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REDISTRICTING IN NORTH CAROLINA—A PERSONAL PERSPECTIVE

ROBINSON O. EVERETT*

In 1992, when I filed a lawsuit attacking North Carolina's recently enacted congressional redistricting plan, my premise was that drawing a plan for a racially-defined purpose violates equal protection and for this reason and others is unconstitutional.¹ Having now argued four appeals before the Supreme Court concerning North Carolina's redistricting, I still believe in the correctness of my original premise; but, in addition, I am concerned that districts drawn with a predominantly racial purpose tend to polarize our society, discourage the formation of multiracial coalitions, and, in the long run, to harm even those they are intended to protect. I also have observed subterfuges designed to mask the presence of a racial motive by describing it as political. Because concealment of motive occurs frequently and often can be readily undertaken, I—like many others—have become increasingly skeptical that legislators can put aside racial gerrymandering, and I am now persuaded that the best approach is to create independent commissions to draw redistricting plans. This Article seeks to provoke discussion of some of the issues posed by racial gerrymandering and to challenge some views that I believe are too readily accepted.

Gerrymandering refers to dividing a territorial area into electoral districts that would give one political party an electoral majority in a large number of districts while concentrating the voting strength of the opposition in as few districts created as possible. The term was first used in 1812 while Elbridge Gerry was governor of Massachusetts to describe an election district which resembled a salamander. In their time, the British “rotten boroughs” were the British counterpart of American gerrymanders.²

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1. Our complaint cited not only the Equal Protection Clause of the Fourteenth Amendment but also the Fifteenth Amendment and Article I, Section 2 of the U.S. Constitution.

2. See *Reynolds v. Sims*, 377 U.S. 533, 567 n.44 (1964) (discussing briefly the British

Gerrymanders place the target voters where they will do the greatest good or the least harm from the standpoint of those creating the gerrymander. Computer technology has now made it easier to identify the characteristics of voters and to place in the same district voters who share the same characteristics—whether race, ethnicity, income, or otherwise. For example, the 1990 census provided extensive racial and other data for census blocks, which often are no greater than a city block in size. In turn, the census blocks and precincts containing them can be readily rearranged to form new legislative and congressional districts, which can be easily displayed on a computer screen. Moreover, as a district changes on the screen, the person drawing the district is made aware immediately of the percentage of the district's population that will be of any race or be registered in any particular party.³

Some state constitutions and statutes contain requirements intended to limit gerrymandering and the creation of dysfunctional legislative and congressional districts.⁴ However, typically any political or legal remedies are inadequate to enforce such requirements.⁵ Also, it remains unclear who has standing to invoke whatever remedies may exist. Moreover, legislators elected under an existing redistricting plan often see little need to change that plan.⁶ Consequently, despite increased urbanization of many states during

experience eliminating "rotten boroughs").

3. See Brief on the Merits for Appellees at 22, *Shaw v. Hunt*, 517 U.S. 899 (1996) (No. 94-923, No. 94-924).

4. These requirements are more frequently provided for state legislative districts than for congressional districts. Sometimes "contiguousness" is required; this term refers to districts of which there is no part that does not touch another part of the district. However, a question may arise as to whether this requirement is satisfied by "point contiguity," where parts of a district meet at an imaginary point. For example, in North Carolina's 1992 redistricting plan, the northern and southern parts of the First District came together at the same point as the eastern and western parts of the Third District. "Compactness" is generally thought of as "geographical compactness," of which there are at least two measures. However, in the North Carolina redistricting litigation some of the parties also advanced a concept of "functional compactness."

5. For example, in *Reynolds v. Sims*, 377 U.S. 533, 553-54 (1964), the Court noted:

No effective political remedy to obtain relief against the alleged malapportionment of the Alabama Legislature appears to have been available. No initiative procedure exists under Alabama law. Amendment of the State Constitution can be achieved only after a proposal is adopted by three-fifths of the members of both houses of the legislature and is approved by a majority of the people, or as a result of a constitutional convention convened after approval by the people of a convention call initiated by a majority of both houses of the Alabama Legislature.

6. They could rationalize that as elected representatives of the voters they had been entrusted by the voters with the duty of drawing district boundaries as they believed wise—regardless of any personal interest they might have in the outcome.

the first part of the last century, districts differing greatly in population continued to elect the same number of legislators and the practical value of a city dweller's vote diminished in relation to the value of a farmer's vote.

Colegrove v. Green, which concerned congressional districts in Illinois, provides a good example of the difficulty in obtaining change.⁷ The plaintiffs complained that because of changes in population, the districts—drawn by the legislature forty-five years earlier—lacked compactness and approximate equality of population.⁸ In denying relief, Justice Frankfurter wrote that “[c]ourts ought not to enter this political thicket. The remedy for unfairness in districting is to secure state legislatures that will apportion properly or to invoke the ample powers of Congress.”⁹

Despite *Colegrove*, groups that had their core strength in the cities continued to push for changes that could provide urban dwellers greater voting power. In 1961, in *Baker v. Carr*, Tennessee voters challenged the districts that were used in electing members of the general assembly.¹⁰ The plaintiffs alleged that subsequent to the 1901 statute, which created the districts, substantial growth and redistribution of Tennessee's population had occurred but the legislature had arbitrarily and capriciously failed to enact a reapportionment plan to take account of these changes.¹¹ As a result, these voters suffered “debasement of their vote” and were thereby denied equal protection.¹² In dismissing the complaint on the basis of nonjusticiability under Article III of the Constitution, the district court noted that the “matter is considered unsuited to judicial inquiry or adjustment.”¹³ The U.S. Supreme Court disagreed.¹⁴

Justice Brennan, writing for the Court, noted appellants' argument that, despite the “shifted and enlarged voting population” that had occurred since the 1901 reapportionment statute, the composition of the legislature made it difficult or impossible to obtain

7. 328 U.S. 549, 550 (1946).

8. *Id.* at 550–51.

9. *Id.* at 556. However, resort to Congress would not be very helpful if reapportionment of a legislature was involved, rather than congressional districts.

10. 369 U.S. 186, 187–88 (1962).

11. *Id.* at 192–93.

12. *Id.* at 193–94.

13. *Id.* at 196.

14. *Id.* at 237. There, Charles Rhyne, a former president of the American Bar Association, argued the case for the voter appellants and also joined in filing an amicus brief for the National Institute of Municipal Law Officers. Solicitor General Archibald Cox argued as an amicus in support of the appellants.

reapportionment.¹⁵ In rejecting the district court's view as to nonjusticiability, the Court outlined several factors bearing on justiciability, including the "lack of judicially discoverable and manageable standards for resolving" the issue.¹⁶ Justice Brennan then concluded that the Court had jurisdiction over the cause of action.¹⁷ The Court also upheld the standing of the complaining voters. Predictably, Justice Frankfurter dissented, joined by Justice Harlan. In retrospect, the application of equal protection to redistricting had an incredible effect on the political map of the United States and *Baker* was clearly one of the most important decisions of the last century.

Two years later, the Supreme Court relied on *Baker* to invalidate Alabama's apportionment of its state legislature due to Alabama's significant departure from the "one person, one vote" standard and the resulting violation of equal protection. In *Reynolds v. Sims*,¹⁸ the Court made clear that states will be allowed more flexibility in creating legislative districts than in drawing congressional districts.¹⁹ The Court noted, however, that the Alabama legislative apportionment "presented little more than crazy quilts, completely lacking in rationality, and could be found invalid on that basis alone."²⁰ This comment seems to intimate that irrational boundaries of a legislative district may offend equal protection.

Soon after *Reynolds* was decided, Renn Drum, a recent Wake Forest Law School graduate, initiated a federal lawsuit to require that North Carolina redistrict itself in accord with the "one person, one

15. *Id.* at 192-93.

16. *Id.* at 217. Justice Brennan's discussion of justiciability and the political question has often been cited in later cases as controlling authority. See, e.g., *Davis v. Bandemere*, 478 U.S. 109, 121-26 (1986) (discussing the political question doctrine).

17. 328 U.S. at 228-29. In support of its position the Court also cited its recent decision in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), where the Fifteenth Amendment was applied to strike down a redrawing of the municipal boundaries of Tuskegee, Alabama. The state legislature had created a twenty-eight sided district boundary to exclude practically all blacks and thereby deprive them of the right to vote in municipal elections. *Id.* at 341.

18. 377 U.S. 533 (1964).

19. See *id.* at 577-78 (citing *Wesberry v. Sanders*, 376 U.S. 1 (1964) (holding Georgia congressional redistricting unconstitutional because of population variances)). In *Wesberry*, the Supreme Court decided that "construed in its historical context, the command of Article I, § 2 that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." 376 U.S. 1, 7 (1964). In *Reynolds*, which relies on the Equal Protection Clause of the Fourteenth Amendment, the Court stated that "somewhat more flexibility may therefore be constitutionally permissible with respect to state legislative apportionment than in congressional districting." 377 U.S. at 571-81.

20. 377 U.S. at 569.

vote" mandate.²¹ The result was the enactment of a new redistricting plan by the North Carolina General Assembly. At the time, the legislature was controlled by the Democrats, who in this plan apparently had gerrymandered the Fourth Congressional District to protect incumbent Representative Harold Cooley, one of North Carolina's most senior members of Congress and the chair of an important committee. Cooley was facing a likely challenge in the Democratic primary from William A. Creech, who had been Chief Counsel for Senator Sam Ervin's Subcommittee on Constitutional Rights. Creech had always resided in Johnston County, which for many years had been in the same district with Nash County, where Cooley resided. The redistricting plan removed Johnston County from the Fourth District and thereby created an obvious barrier to Creech's candidacy. Because Creech and I were close friends, we talked about challenging the gerrymander—which had produced a district that was barely contiguous.²² Ultimately, along with another attorney, I instituted an action to have the redistricting plan declared unconstitutional.²³

A hearing before a three-judge district court led to the decision that the challenged Fourth Congressional District was so lacking in compactness and contiguousness as to deny equal protection.²⁴ However, because the May 1966 primaries were fast approaching, the district court allowed the General Assembly to delay replacement of the unconstitutional plan until the 1968 elections.²⁵ On appeal, the Supreme Court summarily affirmed.²⁶ This frustrating outcome has been repeated in some other redistricting cases in North Carolina and

21. *Drum v. Seawell*, 249 F. Supp. 877, 879 (M.D.N.C. 1965).

22. There was some question as to whether the Fourth District was contiguous, because it was unclear that Nash and Wake Counties—which were both in the district—had any common boundary.

23. Among the several voters who joined as plaintiffs was Ruth O. Shaw, a public-spirited Durham citizen who unwittingly was preparing herself to participate in precedent-setting litigation a quarter of a century later.

24. *Drum v. Seawell*, 250 F. Supp. 922, 925 (M.D.N.C. 1966); *see also Drum v. Seawell*, 271 F. Supp. 193, 194 (M.D.N.C. 1967) (holding proposed redistricting plan invalid but allowing state to hold election under unconstitutional redistricting plan).

25. *Drum*, 250 F. Supp. at 925.

26. *Drum v. Seawell*, 383 U.S. 831, 831 (1966) (per curiam). Creech changed his voting registration to a county in the new district and immediately thereafter filed as a candidate for Congress. He lost the nomination to Representative Cooley in the Democratic primary and, in turn, Cooley lost in the general election to Republican Jim Gardner, who thereby launched his political career. The net result of our efforts was to invalidate an unconstitutional congressional district but only after significant damage had occurred. Ironically, the Democratic legislature would probably have been more pleased to have Creech elected to Congress than to have a Republican.

elsewhere: A court decides that a legislature has violated the Constitution by designing gerrymandered districts which violate equal protection, but in deference to the legislature, the court allows the unconstitutional plan to remain in effect until the next election cycle.²⁷

In later years, some important developments occurred in election law. In 1986, the Supreme Court decided *Davis v. Bandemer*,²⁸ in which the challenge was to the political gerrymander by which the Republican Party had blocked Democrats from winning elective office in Indiana.²⁹ In *Davis*, a majority recognized the possibility that equal protection would be violated by the establishment of immutable legislative district lines that prevented a party out of power from ever winning seats in the legislature. In denying relief to the plaintiffs, however, the Court made clear that complying with the prerequisites for successfully challenging a political gerrymander would be almost impossible.³⁰

Another important development involved the Supreme Court's recognition of a minority group's right to obtain a judicial remedy if, under certain conditions, a state legislature failed to create a majority-minority district.³¹ Finally, during this period the Department of Justice employed with increasing vigor its preclearance authority to deny approval of changes in voting procedures and qualifications.³² In many instances, the state or

27. Thus, as will be discussed later in more detail, North Carolina's Twelfth Congressional District was held unconstitutional in 1996, but nonetheless the legislature was allowed to use that district in the 1996 elections. See *infra* notes 89-90 and accompanying text.

28. 478 U.S. 109 (1986).

29. *Id.* at 115.

30. Cf. *id.* at 143. The first successful challenge to a political gerrymander occurred when North Carolina Republicans convinced a federal court that the Democratic Party's dominance of the election of North Carolina Superior Court judges would continue until judicial relief was granted. *Republican Party of North Carolina v. Hunt*, 841 F. Supp. 722, 733 (E.D.N.C. 1994), *aff'd as modified*, *Republican Party of North Carolina v. North Carolina Bd. of Elections*, No-94-1057, 1994 WL 263955, at *1 (4th Cir. 1994) (per curiam); see also *Republican Party v. Martin*, 980 F.2d 943, 961 (4th Cir. 1992).

31. The leading case, *Thornburg v. Gingles*, 478 U.S. 30 (1986), arose in North Carolina. The lower court awarded relief under the Voting Rights Act, which had been enacted to prevent disenfranchisement and vote dilution of minority voters. *Id.* at 37-38. Under *Gingles*, if minority groups could demonstrate that certain threshold conditions existed, the creation of a minority-black district could be compelled. The three *Gingles* conditions are: (1) a minority group "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) the minority group is "politically cohesive"; and (3) "the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate." *Id.* at 50-51.

32. 42 U.S.C. §§ 1973, 1973c (1994) provides that certain states or political

political subdivision involved would accede to the demands of the civil rights division in order to avoid delay and litigation expenses.³³

THE NORTH CAROLINA 1992 REDISTRICTING PLAN

Because of the "one person, one vote" requirement and changes in population, the results of the 1990 census required legislatures in North Carolina and many other states to enact new redistricting plans.³⁴ In the summer of 1991, the North Carolina General Assembly enacted a redistricting plan with a single majority-black district.³⁵ In December, 1991, this plan was denied preclearance by the Civil Rights Division, which insisted on the creation of a second majority-black district.³⁶ The denial of preclearance was in accord with the "maximization" policy then being followed by the Department of Justice whereunder if a majority-minority district could be created, the legislature had to do so.³⁷ Whatever its merits, this policy offered a possible advantage to the Republican Party. In view of the overwhelming alignment of African Americans with the Democratic Party,³⁸ the "packing" of African Americans in majority-

subdivisions thereof shall not alter voting qualifications, prerequisites, standards, practices, or procedures without either instituting an action in the United States District Court for the District of Columbia to obtain a declaratory judgment that this alteration "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color" or securing preclearance from the Attorney General. The states or political subdivisions subject to this requirement are those which "maintained on November 1, 1964, any test or device" and with respect to which less than 50% of the persons of voting age residing therein were registered to vote on November 1, 1964 or voted in the 1964 presidential election. *Id.* § 1973b(b). Under this standard, forty North Carolina counties were subject to preclearance.

33. The litigation expenses might include those of minority groups attacking a redistricting plan enacted by the state and later held to violate statutory requirements.

34. North Carolina was allocated an additional congressional seat because of an increase in its population during the 1980s in relation to increases in some other states. Also, much of the population growth in North Carolina was in the urbanized central area rather than the more rural eastern and mountain regions.

35. Act of July 8, 1991, ch. 601, 1991 N.C. Sess. Laws 1318, 1319-28 (codified as amended at N.C. GEN. STAT. § 163-201 (1999)).

36. In connection with the subsequent redistricting litigation, Dennis Winner, who as a state senator had chaired a redistricting committee, testified in a deposition that he had been present at a meeting in December 1991 at which John Dunne, who headed the Civil Rights Division, expressed the view that since twenty-two percent of North Carolina's population was black, at least two of its twelve representatives in Congress should be African American.

37. Some have referred to this policy as "if you can, you must."

38. In North Carolina's redistricting litigation experts estimated, without any disagreement, that over ninety-five percent of the African Americans who registered and voted in the state did so as Democrats. No one has pointed out any group of voters in North Carolina as consistently Democratic as African Americans.

minority districts inevitably resulted in a "bleaching" of other districts—thereby increasing their percentage of Republicans.³⁹

One possibility for a second majority-black district was that it would run through the Piedmont region of the state from Charlotte to Durham.⁴⁰ Another possibility was to create a district running from Charlotte to Wilmington.⁴¹ Ultimately, because of the denial of preclearance for the earlier plan, late in January 1992, the General Assembly enacted a redistricting plan that contained two majority-black districts.⁴² One of these districts—the First District—was in the northeast part of the state but extended from Virginia almost to the South Carolina border.⁴³ The other—the Twelfth District—was in the Piedmont area of the state and ran from Gastonia to Durham.⁴⁴

By February 1992, the Republican Party in North Carolina must have concluded that it had been out-manuevered. The Democrats had cleverly used racial demographic data from the 1990 census to create these two majority-black districts—apparently without endangering white Democratic incumbents in other districts.⁴⁵ Therefore, Arthur Pope and some other Republican plaintiffs filed a

39. From a variety of sources, I have received the impression that the strong encouragement of majority-minority districts by the Civil Rights Division was urged by Benjamin Ginsberg, who was at one time counsel for the National Republican Party, and by C. Allen Foster and Robert Hunter, who were prominent Republican attorneys in Greensboro, N.C. Some have speculated that the 1994 change in control of the House of Representatives may reflect the political cunning of these individuals because that change resulted in part from the defeat of moderate white southern Democrats in Congress whose districts had been changed incident to "maximization."

40. My understanding is that this alternative had apparently first been proposed by David Balmer, a Republican legislator from Charlotte; and subsequently it was pursued by the National Association for the Advancement of Colored People (NAACP).

41. This alternative probably would have been unsatisfactory to the Civil Rights Division because although it would contain only a minority of whites, there would not have been a majority of blacks due to the substantial population of Native Americans in Robeson County.

42. Act of Jan. 24, 1992, ch. 7, 1991 N.C. Extra Sess. Laws 77, 77-128 (codified as amended at N.C. GEN. STAT. § 163-210 (1999)).

43. District One is somewhat hook-shaped and is centered in the northeast portion of North Carolina from which it moves south until it tapers to a narrow band. Then, with finger-like extensions, it reaches far into the southernmost part of the state near the South Carolina border. It has also been compared to a Rorschach ink-blot test and a bug splattered on a windshield.

44. District Twelve is approximately 160 miles long and, for much of its length, no wider than the I-85 corridor. It winds in snake-like fashion through tobacco country, financial centers, and manufacturing areas. The district divides all ten of the counties through which it passes and at one point remains contiguous only because it intersects at a single point with two other districts before crossing over them.

45. Subsequent events revealed that the Democrats may not have been as successful as they may have believed.

case in Federal District Court.⁴⁶ They claimed the 1992 plan was an unconstitutional political gerrymander; however, race was not alleged to be a factor in any constitutional violation.

On the basis of later conversations with informed persons, it is clear to me that the Republican attorneys attacking the North Carolina gerrymander had been directed by the Republican National Committee to stay away from any claim of racial—as distinguished from political—gerrymandering. Had it been otherwise, the plaintiffs would have been challenging indirectly the “maximization” policy being enforced so vigorously by the Civil Rights Division of the then Republican-controlled Department of Justice. In any event, the district court quickly resolved the issues that had been raised by the Republicans and the suit was dismissed.⁴⁷

In January 1992, after seeing a map of the two majority-black districts that had been created, I was incredulous. The districts seemed to defy compactness and contiguousness requirements to which the district court referred in 1966 when it held unconstitutional the gerrymandered district I had contested.⁴⁸ Upon inquiry, I learned that these two districts had been drawn with a majority of African Americans to ensure election of two African Americans to Congress.⁴⁹ This also concerned me because it seemed to fly in the face of cases holding that race could not be the basis for peremptory challenges in court trials.⁵⁰ The rationale for those cases had been

46. *Pope v. Blue*, 809 F. Supp. 392, 394 (W.D.N.C. 1992). Pope, a Raleigh resident and attorney, has served in the General Assembly from time to time and was most recently re-elected in November 2000. He has been active in introducing bills designed to curtail gerrymandering.

47. *Id.* at 396.

48. *Drum v. Seawell*, 250 F. Supp. 922, 925 (M.D.N.C. 1966). Likewise, the two districts seem to be “little more than crazy quilts, completely lacking in rationality, and could be found invalid on that basis alone.” *Reynolds v. Sims*, 377 U.S. 533, 568 (1964). The unnatural shape of the majority-black districts tended to distort adjacent districts.

49. At this time, there was no hesitancy on the part of the State in admitting the purpose for creating these districts.

50. In *Batson v. Kentucky*, the Court noted that the central concern of the Fourteenth Amendment was to put an end to government discrimination based on race. 476 U.S. 79, 85 (1986). Later Supreme Court precedents have reaffirmed and extended *Batson*. See, e.g., *J.E.B. v. Alabama*, 511 U.S. 127, 129 (1994) (holding that the Equal Protection Clause prohibits not only racial discrimination but also gender discrimination in jury selection); *Georgia v. McCollum*, 505 U.S. 42, 59 (1992) (holding that the Equal Protection Clause prohibits criminal defendants from exercising racially discriminatory peremptory challenges during jury selection); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628–29 (1991) (holding that private litigants in civil cases may not use racially based peremptory challenges); *Hernandez v. New York*, 500 U.S. 352, 359 (1991) (holding that, while race neutral jury selection is permissible, the trial court should make sure that an attorney does not have a secret or forbidden intent when making a peremptory challenge);

that equal protection precluded the use of race as the basis for the governmental action involved in a court's allowance of a peremptory challenge. It was hard to understand why this rationale, designed to protect a citizen's right to serve on a jury without regard to race, would not apply equally to a citizen's important right to vote and to hold elective office without regard to race.

Shortly thereafter, I talked separately to several persons in Durham who felt disenfranchised by the legislature's creation of the Twelfth District and the racial gerrymandering of Durham County and who wished to challenge this district.⁵¹ My own motivation for initiating a court action to overturn the gerrymander was my firm belief that use of data about the racial composition of census blocks in the creation of congressional districts appeared to give governmental approval to the use of racial stereotypes and racial quotas. The implicit premise for such racial gerrymanders was that only an African American could properly represent the interests of other African Americans in the Congress or the state legislature and that all African Americans were expected to vote in the same way. In my view, this was racial stereotyping; the assumption that because twenty-two percent of North Carolina's total population was African American, a corresponding percent of its congressional delegation should be black was the endorsement of a racial quota.

Moreover, I was unconvinced that creating majority-black districts was the only means by which African Americans could be elected to office. In Durham, where I reside, multi-racial coalitions had been formed successfully. Thus, at various time during the 1990s, a majority of Durham's County Commission and City Council members were black even though the majority of the population is white. Additionally, the city of Durham—like Raleigh and Charlotte—has elected a black mayor on at least one occasion.⁵² Much earlier, Howard Lee, an African American, became the first black mayor elected in a majority-white town in the South, Chapel Hill, N.C., and now is a state senator from a majority-white district. Furthermore, my longtime association with the Armed Services—in which racial integration to a considerable extent has been

Powers v. Ohio, 499 U.S. 400, 402 (1991) (holding that one may raise an equal protection challenge to jury selection regardless of one's race).

51. One such person was Professor Melvin G. Shimm, a Duke Law School colleague of mine since the 1950s. Another was Ruth O. Shaw, who participated in 1966 in attacking the politically rigged gerrymander in favor of Congressman Cooley.

52. Clarence Lightner was mayor of Raleigh from December 1973 to November 1975. Harvey Gantt was mayor of Charlotte from 1983 to 1987. Chester Jenkins was mayor of Durham from November 1989 to December 1991.

successful—produced optimism on my part as to the feasibility of creating a “color-blind” society in the United States. Indeed, to me, the majority-minority districts created in North Carolina—like those elsewhere—have greater potential for harm than good because they tend to deter the formation of multi-racial coalitions.

Although over the years I have been a loyal Democrat,⁵³ I had no political motivation for initiating litigation. However, had I approached the issue of racial gerrymandering from a partisan standpoint and with the information I acquired later, I would have been equally opposed to the creation of “bizarre” majority-black districts because their ultimate effect was to polarize Congress by making it more difficult for moderate white Democrats to be elected.

On March 12, 1992, four co-plaintiffs and I filed a complaint in federal district court, wherein we named as defendants the Attorney General and Assistant Attorney General for the Civil Rights Division as well as the Governor and Lieutenant Governor of North Carolina, the Speaker of the House of Representatives, the Secretary of State, and the Board of Elections.⁵⁴ Although all five plaintiffs were white, we did not allege this fact in our complaint because we did not consider it to be relevant. In our view, every voter regardless of his or her race, was entitled to participate in an electoral process not based on racial classification or quotas.⁵⁵

All of the defendants filed motions to dismiss, maintaining we had stated no cause of action against federal or state defendants. A prompt hearing led to an order dismissing all our claims. Our lawsuit was probably being derided by many at the time, but it seemed clear to us that some basic issues of equal protection had been raised. Therefore, we went ahead with an appeal, and to our delight, we learned on December 7, 1992, that probable jurisdiction had been noted by the U.S. Supreme Court.

Soon thereafter, a number of amicus curiae briefs were filed. The Republican National Committee filed as an amicus on our side,

53. Some would have referred to me as a “yellow dog” Democrat—someone who would vote for a “yellow dog” rather than a Republican.

54. *See Shaw v. Barr*, No. 92-202-CIV-5-BR (E.D.N.C. filed Mar. 12, 1992). In addition to Melvin Shimm and Ruth Shaw, my co-plaintiffs were my son, Greg Everett, and my secretary, Dorothy Bullock. I was counsel for myself and the other plaintiffs and received important pro bono assistance from a young Raleigh lawyer, Jeffrey Parsons.

55. In this connection our analogy was to *Powers v. Ohio*, which held that on equal protection grounds one may attack race-based peremptory challenges in jury selection regardless of the race of either the challenged juror or the person making the challenge. 499 U.S. 400, 402 (1999).

and the Democratic National Committee filed against us.⁵⁶ The Washington Legal Foundation and American Jewish Congress supported our appeal—probably because of our professed adherence to principles of nondiscrimination. Also, amicus briefs for appellees were filed by the NAACP Legal Defense and Educational Fund, the Lawyers' Committee for Civil Rights under Law, and others. These amicus briefs were important in various ways. They alerted the Court to the importance of the issues we were raising. Sometimes they presented additional or alternative theories for reaching a particular result or information that could ultimately prove helpful to the Court. Certainly the presence of the amicus briefs made us appellants feel a special responsibility to assure that we presented our arguments against racial gerrymandering as persuasively as possible.

After oral argument on April 20, 1993,⁵⁷ the Court affirmed the dismissal as to the federal defendants, but by a five-to-four vote, it reversed the dismissal of our action as to the State defendants.⁵⁸ Our claim had rested on three arguments. The first was that Fourteenth Amendment equal protection barred the intentional use of race to draw majority-black districts that ignored traditional redistricting principles. Specifically, our premise was that the Constitution did not allow an electoral process in which voters—black or white—were segregated explicitly or implicitly on the basis of race. The Court ultimately ruled in our favor on this claim.

A second theory, derived from *Gomillion v. Lightfoot*,⁵⁹ was that voters placed inside or outside artificially constructed race-based districts suffered an abridgement of their right to vote in violation of the Fifteenth Amendment. Finally, we asserted that insofar as congressional elections are concerned, the constitutional requirement that a state's representatives in Congress be elected by the "people" of the state does not permit those "people" to be arbitrarily divided by racial gerrymandering.⁶⁰ The Court found no need to explore any theory other than that of equal protection—which it accepted.

The Court's opinion referred to the "appearances" of the North Carolina redistricting plan and, to make the point clearer, appended a

56. This alignment seemed somewhat incongruous to the plaintiffs, all of whom were Democrats.

57. The most effective part of my oral argument was to call the Court's attention to the bizarre shape of the Twelfth District as shown on a large map which we had lodged with the Court.

58. *Shaw v. Reno*, 509 U.S. 630, 658 (1993).

59. 364 U.S. 339 (1960).

60. U.S. CONST., art. I, § 2. I am unaware of any precedents dealing directly with this theory.

map of the districts.⁶¹ Critics subsequently complained that the Court was preoccupied with “aesthetics.” Such criticism, however, ignores the fact that “appearances” are important in revealing intent. Furthermore, a district drawn in compliance with traditional redistricting principles, such as compactness, contiguousness, and conformity to the boundaries of cities, counties, and other political subdivisions, is more likely to be “functional”—a district in which voters are aware of the district in which they vote, representatives are aware of whom they represent, and coalitions can be more readily formed.

Subsequent events revealed the tactics that would be used later in defending racial gerrymanders. For example, in the oral argument on April 20, 1993, Professor Jefferson Powell,⁶² who represented the State appellees, commented that everyone knew why the 1992 North Carolina redistricting plan had been created;⁶³ and, to me, his remarks obviously implied that the plan was a racial gerrymander and that such gerrymanders were permissible. However, when the Court reversed the dismissal of our action as to the state officials and remanded the case for trial, the State changed its position and argued that the North Carolina gerrymander was not based on race. This denial was hard to reconcile with the circumstance that the distorted Twelfth District with its 55% black population was located in North Carolina, where only 22% of the total population is African Americans and where that 22% is “relatively dispersed.”⁶⁴

Another argument for evading the holding of *Shaw v. Reno* focuses on avoiding interference with the prerogatives of state legislators in performing their difficult task of redistricting. According to this argument, if the federal courts involve themselves with state redistricting, they should only do so when those who

61. *Shaw v. Reno*, 509 U.S. 630, 658 (1996).

62. Professor Powell was a colleague of mine at Duke Law School; this may have been the first time in the Supreme Court's history that two members of the same law faculty had argued before it on opposite sides. On two later occasions in the North Carolina redistricting legislation, my Duke Law colleague, Walter Dellinger, and I argued against each other before the Supreme Court.

63. Powell asserted that the “General Assembly intentionally created two majority-minority congressional districts. . . . [T]he General Assembly did so for the purpose of complying with § 5 of the Voting Rights Act and of securing preclearance of its congressional reapportionment plan from the Attorney General of the United States.” Transcript, 1993 WL 751836, at *26 (U.S.Oral.Arg.), *Shaw v. Reno*, 509 U.S. 630 (1993) (No. 92-357). Subsequently, in responding to a question from the Court, he stated: “There’s no dispute here over what the State’s purpose is. There’s a dispute over how to characterize it legally, but we’re not in disagreement over what the State legislature was trying to do.” *Id.* at 38.

64. *Shaw*, 509 U.S. at 634.

challenge the redistricting bear a very heavy burden of proof and comply with an especially demanding standard. To a considerable extent, the Supreme Court has accepted this argument by requiring that those who attack a redistricting plan as being racially gerrymandered must establish that race was the predominant motive for the plan. This requirement imposes a significantly more rigorous burden than that which usually applies in determining whether unconstitutional racial discrimination has occurred in taking state action. That requirement—stated in *Arlington Heights v. Metropolitan Housing Development Corporation*⁶⁵—demands only that racial discrimination be one purpose underlying the state action, rather than the predominant motive.

Because race must not only be a cause of the challenged redistricting but also must be the predominant motive, some legislators have defended their redistricting plans by claiming that race either was not their chief motive or was not a motive at all. At most, race was only “considered”—a term that those who defend gerrymanders have sought to use as a shield against a factual finding of a predominant race-based motive.⁶⁶

I do not understand why legislators should have more leeway to utilize race in drawing district lines than in making other decisions—especially in light of the legislators’ self-interest in districting. It seems appropriate that courts should not unduly hamper legislatures, but this rationale should not entitle legislatures to trample on constitutional rights. The right to vote is among the most precious rights of citizenship. It deserves no less protection than is provided other rights—such as the right to be a juror or to have equal access to education and employment.

Hopefully, in the interest of consistency and fairness, the Court someday will apply strict scrutiny more readily to racial gerrymandering. Unfortunately, just as with political gerrymandering—where in *Davis v. Bandemer*, the Court recognized a right but made it very difficult to vindicate that right—the Court may choose to denounce racial gerrymandering but at the same time may create unwarranted potential barriers against voters’ obtaining relief from such gerrymanders.

After we had appealed to the Supreme Court in 1992, I learned that plaintiffs in other states had followed in our footsteps with

65. 429 U.S. 252, 265–66 (1977).

66. In her separate concurring opinion in *Miller v. Johnson*, Justice O’Connor stated that race may be “considered” in redistricting. 515 U.S. 900, 929 (1995) (O’Connor, J., concurring).

complaints that tracked our own.⁶⁷ In late June 1993, we received the welcome news of our victory in *Shaw v. Reno*. At that point, we realized that we would be entering a new stage. In the hope that some settlement might be reached, I requested a conference with North Carolina's then Attorney General Mike Easley. When we met, I primarily emphasized that, although we five white plaintiffs were all Democrats, we had no racial or partisan agenda to pursue. Our goal was simply to seek from the legislature the enactment of a race-neutral redistricting plan, and we believed this task could be readily performed by a good-faith effort of everyone involved.

I heard nothing for several weeks thereafter until, while attending a National Legislators Conference in San Diego, I learned from Gerry Cohen, a staff member of the North Carolina General Assembly,⁶⁸ that on the previous day the legislature had adjourned soon after appropriating \$500,000 to defend the 1992 redistricting plan at trial. Obviously, the battle would continue!

At this point I realized for the first time how significant a financial burden we five plaintiffs—all private individuals not backed by political groups—would have to carry in order to present our case adequately to the district court. Large costs would be incurred during discovery. Moreover, the absence of ample resources for hiring experts would make it difficult to establish a racial gerrymander's existence in the face of post hoc denials by legislators. Fortunately, we encountered some highly motivated experts who did not wish to be tarred by any suspicion that they were "hired guns" seeking to receive expert witness fees or to profit in any other way from our litigation.⁶⁹

67. Thus, on a visit to Monroe, Louisiana, where one of my sons was teaching, I met a solo practitioner, Paul Hurd, who had pending at the trial level a racial gerrymandering case, eventually decided as *U.S. v. Hays*, 515 U.S. 737 (1995), that was awaiting the outcome of our appeal. We developed a close relationship and interchanged ideas and information. Such interchanges with Hurd and others proved invaluable for us; subsequently we were able to reciprocate some of the benefits we received. We became increasingly aware that ours was a pivotal case that could have a profound effect on the electoral process in the United States. This awareness enhanced our determination to fight to the finish.

68. Cohen was the staff member who headed up bill drafting for the General Assembly. He drafted the 1991 and 1992 redistricting plans and other redistricting plans in 1997 and 1998.

69. For example, William O. Keech, then a professor of political science at the University of North Carolina, whom I asked to be an expert witness for us, said that he would do so only on one condition. Upon inquiring anxiously as to that condition, I welcomed the news that it was that he not be paid any expert witness fees. His interest was only in obtaining justice! Similarly, Timothy O'Rourke, then a professor of Political Science at Clemson University, decided to waive any witness fees and only obtain from us

We soon discovered that political scientists had developed objective standards to make it easier to establish whether geographical compactness had been ignored in gerrymanders. With the aid of such standards we could emphasize that far more than “appearance” or “ugliness” was involved and that the legislature’s disregard of geographical compactness in drawing the “targeted” districts revealed that the true legislative intent was predominantly race-based.⁷⁰

Fortunately, when the NAACP intervened in the case on the defendants’ side, the Republican Party intervened on our side.⁷¹ This action may have reflected a change in party leadership⁷² or perhaps a conclusion by Republican leaders that whatever political gain might accrue from the flagrant racial gerrymandering in the 1992 redistricting plan, their party in the long run would be subject to complaints about promoting the use of race in the electoral process.

The Court had made clear in *Shaw* that the legislature’s primary motive could be established by direct evidence, circumstantial evidence, or both.⁷³ When the gerrymanders were being enacted shortly before *Shaw* was decided, legislators were unaware of any possibility that the Court would later recognize an “analytically distinct” claim as to racial gerrymandering.⁷⁴ Therefore, in many instances, they had acknowledged without hesitation a racial purpose behind their redistricting. Moreover, those filing submissions to the Department of Justice for preclearance from the Civil Rights Division specifically asserted that the purpose was to elect black candidates by

reimbursement of actual expenses.

70. The two most accepted measures of compactness—“perimeter compactness” and “dispersion compactness”—are explained in Richard H. Pildes & Richard G. Niemi, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 554–56 (1993).

71. The intervenors actually were persons sponsored by the organizations involved. A question exists as to the standing required of organizations wishing to be a party to *Shaw*-type litigation. In each instance the organizations provided access to valuable witnesses. For example, once the Republicans had intervened on our side, Thomas Hofeller, the leading Republican expert on redistricting, became available for consultation and testimony. His experience made it easy for him either to construct a racial gerrymander or to identify such a gerrymander created by others. His testimony was important in establishing that race was the primary motive for the North Carolina redistricting plan and that other explanations were spurious.

72. Benjamin L. Ginsberg, who reportedly had strongly supported a “maximization” policy for majority-minority districts, had been replaced by Michael A. Hess as counsel for the Republican Party.

73. 509 U.S. 630, 646–47; *see also* *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (describing plaintiffs’ burden of showing motive either by direct or circumstantial evidence).

74. *Shaw*, 509 U.S. at 632.

designing majority-black districts. Subsequently, these legislative statements were disavowed to whatever extent possible, but still they were part of the record for use as evidence by plaintiffs.⁷⁵

In North Carolina, the defendants attributed the shape of the districts to a political purpose to concentrate Democrats in safe districts. What easier way was there to concentrate Democrats than to “pack” a district with African Americans—of whom over 95% of those who registered and voted did so as Democrats? To counter such claims of a political—as opposed to racial—motive, it was especially important for us plaintiffs to have available experts to demonstrate from the demographic data and otherwise that different districts would have been drawn had race not been the primary motive.

In terms of compactness—and geographical measures thereof like “perimeter compactness” and “dispersion compactness”—North Carolina’s “bizarre” Twelfth District was in the bottom one percent out of 435 districts nationally; the First District was close behind. The defendants attempted to discount these embarrassing facts by introducing an amorphous concept of “functional compactness”—which focused on asserted similarities among individuals regardless of where they resided. Not surprisingly, race was argued to be the most vital factor in establishing “functional compactness.” If this rationale were accepted, the General Assembly could form a congressional district by grouping African Americans from all over North Carolina and nonetheless that district would be viewed as “compact.” In that event, lack of “compactness” could not be relied on as circumstantial evidence to establish a race-based motive.⁷⁶

The defendants not only disputed the predominant racial motive for North Carolina’s Twelfth and First Districts but also insisted that, even if race-based, the two districts survived the test of “strict scrutiny.” This test requires a showing of a “compelling governmental interest” and of “narrow tailoring” to serve that interest. Here again the availability of expert testimony was

75. In other states such as Georgia and Texas, the legislature in enacting racial gerrymanders made revealing statements about their purpose. See *Miller*, 515 U.S. at 906–08 (describing the give and take between the Georgia General Assembly, the U.S. Department of Justice, and the ACLU); *Bush v. Vera*, 517 U.S. 952, 960–61 (1996) (discussing Texas’s submission to the U.S. Department of Justice).

76. Carried to an extreme, “functional compactness” under this view means that a black person with a white spouse in Durham would be deemed to be less “compact” with that spouse than with another black person in Charlotte. Placing in the same district predominantly black census blocks, wherever located, would also be permissible. This type of “racial profiling” seems at odds with its denunciation in many other contexts.

important because the defendants cited evidence of many years of racial discrimination in North Carolina to justify creating these districts. Moreover, the First District was explained as being in the tradition of a predominantly black congressional district—the “Black Second”—that had existed in eastern North Carolina near the end of the nineteenth century. The Twelfth District was defended as having followed generally the “Piedmont Crescent” across the center of the State and also having followed the path of the North Carolina Railroad—which had been built some 150 years ago. Fortunately, the experts we obtained could point to demographic changes and relocation of population that had occurred in recent years; describe improving race relations, increased voting participation, and greater office holding among African Americans; and show how each of the two majority-black districts in the 1992 plan ignored the boundaries of Standard Metropolitan Areas (SMAs)⁷⁷ and television, radio and newspaper markets.

In connection with “strict scrutiny,” probably the most persuasive claim of compelling government interest was that North Carolina had to obtain preclearance from the Civil Rights Division and that the Civil Rights Division would not preclear a plan without two majority-black districts. Of course, the Justice Department “maximization” policy was later held to be illegal,⁷⁸ but in 1992 this policy had been a major redistricting constraint for North Carolina and many other states. Another claim of compelling state interest was to avoid a possibly successful suit by the NAACP for failure by the General Assembly to create a majority-black district that could feasibly be drawn.⁷⁹

After a week’s trial, the three-judge court ruled against the plaintiffs, one judge dissenting.⁸⁰ The district court had concluded that a predominant race-based motive existed and that all of the plaintiffs—even though white—had standing because all were registered voters in North Carolina. They also decided, however, that

77. The SMA is a concept used in connection with the census. Charlotte is in a different SMA than either Durham or Greensboro and Winston-Salem. Similar differences exist as to television markets—sometimes referred to as Dominant Market Areas (DMAs)—radio markets, and newspaper circulation areas.

78. See *Abrams v. Johnson*, 521 U.S. 74, 79 (1997) (upholding the district court’s redistricting on the remand from *Miller v. Johnson*); *Miller*, 515 U.S. at 921–22.

79. In this connection the three conditions of *Thornburg v. Gingles* came into play because unless they can all be satisfied, liability under section 2 of the Voting Rights Act, 42 U.S.C. § 1973 (1994), cannot be invoked. 478 U.S. 36, 50 (1986).

80. *Shaw v. Hunt*, 861 F. Supp. 408, 417 (E.D.N.C. 1994).

the two districts survived strict scrutiny. Once again we were launched on a direct appeal to the Supreme Court.

The Supreme Court delayed in acting on our appeal while it considered *Shaw*-type cases from Louisiana and Georgia—two states where the redistricting plaintiffs had won at trial. In *U.S. v. Hays*,⁸¹ the Louisiana plaintiffs lost the appeal on standing grounds, because none of the plaintiffs had been registered voters of the challenged congressional district.⁸² In *Miller v. Johnson*,⁸³ the defendants tried in various ways to limit the scope of *Shaw*, but the Court reaffirmed the prohibition against racial gerrymandering and rejected contentions that *Shaw* was unclear and ambiguous.

At the same time that the Court decided *Hays* and *Miller*, it noted probable jurisdiction in our case, as well as in a case in Texas in which the lower court had invalidated the racial gerrymandering of congressional districts in Dallas and Houston. In turn, our appeal was heard immediately after that of the state of Texas and other defendants in *Bush v. Vera*.⁸⁴ That appeal apparently occurred because, after a three-judge district court had held the Texas plan unconstitutional, Governor Bush decided not to remand the plan to the Texas legislature, which was then controlled by Democrats.

Our case, like *Vera*, produced a favorable outcome for the plaintiffs. The Court recognized the predominant racial purpose of the North Carolina plan and concluded that, if the Twelfth District, which slithered from Durham to Gastonia, was designed to fulfill a compelling interest, its boundaries did not match that claimed purpose.⁸⁵ In short, the district would not have been drawn as it was if its real purpose had been to ensure compliance with sections 2 and 5 of the Voting Rights Act.⁸⁶ Chief Justice Rehnquist's opinion for the Court termed "singularly unpersuasive" the State's claim that if the Voting Rights Act required the State to draw two majority-black districts, they could be drawn in any manner and anywhere the legislature might choose.⁸⁷

81. 515 U.S. 737 (1995).

82. The same principle was applied with respect to three of the five plaintiffs in *Shaw v. Hunt*, because they did not live in the Twelfth District. Quite recently—on November 27, 2000—the Supreme Court relied on this principle in dismissing a redistricting suit filed in Alabama. *Sinkfield v. Kelley*, 531 U.S. 28, 28 (2000) (per curiam).

83. 515 U.S. 900 (1995).

84. 517 U.S. 952 (1996).

85. *Shaw v. Hunt*, 517 U.S. 899, 908 (1996).

86. 42 U.S.C. §§ 1973, 1973c (1994).

87. *Shaw*, 861 F. Supp. at 416–17.

During the oral argument, a question arose as to our standing. Unfortunately, none of the plaintiffs resided in the First District, and thus we apparently lacked standing to challenge that district. I contended, however, that the various districts were all so interconnected that voters in all congressional districts in North Carolina were prejudiced by the "ripple effect" from the gerrymandered First District. But we did have two plaintiffs who resided in the portion of Durham County which lay within the Twelfth District, and they provided the necessary standing as to that district.⁸⁸

NORTH CAROLINA'S 1997 REDISTRICTING PLAN

When we received news of a reversal, only a few months remained before the 1996 elections. Therefore, we requested prompt action by the General Assembly and by the governor to put a new plan in place. Our logic was that because a violation of important constitutional rights had continued over the preceding four years, it was time for a change. To continue longer with use of a plan held unconstitutional by the Supreme Court was intolerable! Furthermore, we submitted that a racially neutral plan could be drawn rather easily, and we pointed out several models upon which to draw.

The defendants responded that considerable time would be needed to prepare a new plan and that the General Assembly should be given ample opportunity to do so.⁸⁹ We next sought an extraordinary writ from the district court to require the General Assembly to prepare a plan. Failing in that effort, we then tried unsuccessfully to obtain a writ of mandamus from the Supreme Court to direct the district court to order the legislature to act. The ultimate result was that the unconstitutional plan was used in the 1996 elections.⁹⁰

The events in North Carolina contrast with those in Texas. In Texas, thirteen out of more than thirty congressional districts were

88. *Id.* at 904. The clear lesson from this is to assemble enough plaintiffs at the outset so that changes of residence, deaths, or redrawing of districts do not leave only plaintiffs who lack standing.

89. The Redistricting Committee in the then Republican-controlled House of Representatives did prepare a plan. The Democrat-controlled Senate took the position that preparing a plan could not be accomplished in time for the November 1996 elections, and it did nothing.

90. Lay persons have difficulty understanding how a redistricting plan can continue to be used after being held unconstitutional by the Supreme Court. This lack of understanding increases cynicism about the electoral process.

redrawn in 1996 to eliminate racial gerrymanders. This was accomplished within a time frame comparable to that available to the legislature in North Carolina, which has only twelve congressional districts. Thus, the Texas legislature demonstrated that North Carolina's claim of potential electoral process disruption by redistricting in 1996 was probably exaggerated.⁹¹

When it became clear that a new plan would not be forthcoming in 1996 for the election and that for a third time the unconstitutional plan would be used, we sought to induce legislators to adopt a non-gerrymandered plan for 1998. As far as we could determine, however, the General Assembly wanted to get by with the fewest changes in the 1992 plan that would still be accepted by the courts.

To try to forestall acceptance of a spurious claim about a need to create a majority-black district to comply with the Voting Rights Act, our related non-profit organization, Americans for the Defense of Constitutional Rights,⁹² offered a \$1,000 prize for a design of the most "geographically compact" district containing a majority of blacks. The winning contestant proposed a district in which blacks barely exceeded 50% of total population and which did not conform to either the First or Twelfth Districts, as they had been drawn in the 1992 plan.⁹³ The contest provided additional evidence that majority-black congressional districts in North Carolina had not been—and could not be—"narrowly tailored" to fulfill any claimed compelling state interest.⁹⁴

Just before an April 1, 1997 deadline prescribed by the district court, a new redistricting plan was enacted. In this plan, Durham County was removed from the Twelfth District. As a result, the existing plaintiffs, all of whom resided in Durham, lost their standing.⁹⁵ Just as in the 1992 plan, both the Twelfth and First

91. The Texas remedial plan provided for open primaries to be conducted on the day of the general election in November 1996 and for a runoff between the two top candidates if no one received a majority.

92. The five *Shaw* plaintiffs incorporated this North Carolina non-profit corporation as a means for mobilizing the efforts of persons concerned with violations of equal protection and for informing citizens of North Carolina and elsewhere about evils that result from explicit or implicit use of racial classifications—especially in the electoral process.

93. The winning plan would not have been politically acceptable to the General Assembly because it tied Durham County to northeastern North Carolina and this would apparently not have pleased African Americans in either area.

94. The contest results tended to indicate that a geographically compact majority-black district in North Carolina would have to include black communities in Durham, if it could be created at all.

95. For the five plaintiffs in *Shaw*, the plan provided full relief. Their county—

Districts appeared to lack geographical compactness, although they both were improvements on their predecessors. The First District was majority-black in total population by a very narrow margin; the Twelfth District was almost 47% African American, instead of 55% as compared to the previous plan.

As the legislative record later revealed, the chairman of the Senate Redistricting Committee apparently believed—and so advised his colleagues—that *Shaw* applied only to the creation of majority-black districts and that, accordingly, a district that did not reach 50% black in population was not subject to the “analytically distinct” claim first recognized by *Shaw*. According to this argument, the Twelfth District was immune from attack and a license existed to base its district lines on race.

When the district court which had decided *Shaw* considered the adequacy of the 1997 plan as a remedy, the plaintiffs pointed out that none of them had standing but that they believed the plan was unconstitutional. Their argument was that such a great similarity existed between the Twelfth District in the 1992 plan, and the “new” district in the 1997 plan that the more recent version should be viewed as racially motivated and the “fruit of the poisonous tree.” Moreover, the obvious purpose of the 1997 plan was to assure retention of incumbents who had been elected under the unconstitutional 1992 plan; if this were allowed, persons with “dirty hands” would retain their spoils. The district court ultimately approved the 1997 plan, but only as a remedy for those parties who had been victims of the original unconstitutional gerrymander. The district court left open the constitutionality of the new plan for future challenge by others who might have standing.

Martin Cromartie, a Tarboro lawyer, and several others from the Tarboro area initiated a lawsuit to challenge the First District.⁹⁶ Thereafter, some other persons who resided in the 1997 plan’s Twelfth District joined in Cromartie’s suit in order to challenge that district. The suit was referred to a three-judge panel which already had before it another case concerning North Carolina’s reapportionment and redistricting.⁹⁷ After a hearing in late March

Durham County—was no longer split and they were placed in a district that was compact and not drawn according to racial lines.

96. I represented Cromartie, whom I have known for almost half a century.

97. On July 3, 1996, a group of plaintiffs led by Jack Daly had filed a complaint, challenging not only North Carolina’s congressional redistricting plan, but also its legislative reapportionment plan. *Daly v. High*, No. 97-CV-750-BO (E.D.N.C. filed July 3, 1996). Only one of the judges on the panel to which this case was assigned had been on the panel that decided *Shaw v. Hunt*.

1998, the district court granted the plaintiffs' motion for summary judgment as to the Twelfth District and ruled that a trial should take place as to the constitutionality of the First District.

To a majority of the three judges, it seemed clear from the uncontested facts—such as the racial demographics and their relation to district boundaries—that the “new” version of the Twelfth District was predominantly race-based. Although the percentage of African Americans in the district had been reduced from around 55% to below 47%, that percentage was still much greater than the percentage of African Americans in the state—around 22%—or the percentage of African Americans in the six counties from which the District had been created—below 30%. Moreover, in the 1997 plan, the blacks who were in the 1992 plan's Twelfth District had been retained in that District in a much higher percentage than whites had been.⁹⁸

The district court concluded that to decide the constitutionality of the First District would require a full trial, but that in the meantime the legislature should redraw the Twelfth District. Both the district court and the Supreme Court denied a defense-requested stay. Therefore, in April 1998, the General Assembly enacted a new plan which did not change the First District but modified the Twelfth District and several contiguous districts.

Under this plan, the Twelfth District's black percentage was reduced to around 33%; the number of counties directly affected by that district was reduced from six to five; and, unlike the 1997 version, one entire county was not split by the Twelfth District. Under the 1998 plan, the district was clearly more geographically compact than its 1992 and 1997 predecessors.

The legislation enacting the 1998 plan⁹⁹ included a rather unique proviso. According to that proviso, the 1998 plan would be in effect not only in 1998, but also in later years. However, if the State obtained reversal of the summary judgment entered by the District Court, the 1997 plan would again go into effect.¹⁰⁰ When the State proceeded with its appeal, this proviso meant that in the event of success therein, the Twelfth District would become less compact and more racially gerrymandered in the year 2000 elections. Moreover, if

98. Over 90% of the African Americans who were in the Twelfth District under the 1997 plan had been in that district under the 1992 plan, while less than 50% of whites were similarly retained.

99. Act of May 21, 1998, ch. 2. 1998 N.C. Sess. Laws 2 (codified as amended at N.C. GEN. STAT. § 163-201(a) (1999)).

100. See *Hunt v. Cromartie*, 526 U.S. 541, 545 n.1 (1999).

the summary judgment for plaintiffs were set aside, a trial would be required to determine whether the 1997 plan's Twelfth District could be used in an election. In any event, if the State's appeal from the summary judgment against the 1997 plan's Twelfth District was successful, the 1998 plan's Twelfth District could not be used again without new legislation. The uncertainty and confusion resulting from this proviso inevitably raised the question: Why was it inserted? Was it forthcoming as a suggestion from the Attorney General's office or from the legislators who had spawned the 1997 plan? Were the possible confusing consequences foreseen?

After elections in 1998 under the plan which the legislature had enacted earlier that year, the State continued its appeal. Ultimately it won a Supreme Court ruling that a trial was necessary as to whether a predominant racial motive existed for the 1997 plan's Twelfth District.¹⁰¹ The comprehensive evidence before the three-judge court led to a decision by a majority of the court in March 2000 to the effect that the Twelfth District was predominantly race-based and could not survive strict scrutiny and that the First District was race-based—as its 1992 predecessor also had been—but that this district was adequately justified by the compelling interest of compliance with the Voting Rights Act.

The lower court denied a request for a stay, but the Supreme Court granted the stay pending completion of the State's appeal.¹⁰² Subsequently, the plaintiffs made an unsuccessful motion for summary affirmance before the end of the 1999 term,¹⁰³ and the case was set for argument. A subsequent effort by the plaintiffs to obtain summary affirmance was not granted.

The case had been remanded for trial to determine whether race had been the predominant motive of the North Carolina General Assembly in enacting the 1997 redistricting plan. When the case was argued on November 27, 2000, the plaintiff-appellees relied on Federal Rule of Civil Procedure 52(a), which establishes "clear error" as the standard for reviewing findings of fact by a lower court. This rule also requires an appellate court to accept determinations as to

101. *Id.* at 541.

102. It seems ironic that a stay was denied in April 1997 when a summary judgment was involved but was granted in 1999 when judgment had been entered for plaintiffs after a full trial.

103. In the effort to obtain summary judgment as to the Twelfth District, the plaintiffs did not proceed with an appeal as to the First District. Their thinking was that in view of the Court's schedule prior to the end of the term, it would be impossible to obtain consideration of an appeal by plaintiffs before the end of term, and that the defendants' appeal would be held over for resolution at the same time as plaintiffs' appeal.

credibility made by the factfinder. Our principal contention was that the majority in the district court had considered voluminous documentary evidence, heard extensive testimony, and then made fact-supported findings as to the legislature's predominant motive. Thus, under Rule 52(a), an appellate court—presumably even the Supreme Court—was bound by those findings and could not independently weigh the evidence.

The appellants asserted that the predominant motive of the General Assembly in drawing the Twelfth District had been political—create a Democratic district and to protect incumbent Representative Melvin Watt. This argument was bolstered by the circumstance that in North Carolina at least 95% of the African Americans who register support Democratic candidates. Thus, if 47% of the population of a district is black, almost inevitably a Democrat will be elected to Congress.¹⁰⁴ Consequently, it can be contended that the primary goal was to elect a Democrat by segregating a number of Democrats—who just happen to be African Americans.

A subsidiary argument made by the appellants was that incumbent protection was an important political motive for the General Assembly and that Congressman Watt, who had represented the Twelfth District for many years, should be protected by having as many African Americans as possible in the Twelfth District. One possible flaw in this argument is suggested by the following question: If the Twelfth District from which Congressman Watt was elected in 1992 was itself an unconstitutional racial gerrymander—as held in *Shaw v. Hunt*—is the incumbent elected therefrom entitled to any protection?¹⁰⁵

When this Article was initially drafted, the appeal was pending before the Supreme Court. However, on April 18, 2001, the Supreme Court in a 5 to 4 decision held that the district court had clearly erred in finding that the 1997 boundaries of the Twelfth District were predominantly race-motivated.¹⁰⁶ According to Justice Breyer's

104. North Carolina has party primaries in which only members of that party and independents may vote. N.C. GEN. STAT. § 163-59 (1999). By law, in the party primary there will be a runoff unless the leading candidate has at least 40% of the votes cast. N.C. GEN. STAT. § 163-111 (1999). Under these circumstances, it is almost inevitable that a district in which forty-seven percent of the population is African American will nominate an African American as the Democratic candidate. In turn, the party nominee will receive enough votes from white Democrats to assure his or her election.

105. In a sense such protection could be viewed as providing the incumbent with "the fruit of the poisonous tree."

106. *Easley v. Cromartie*, 121 S. Ct. 1452, 1456 (2001).

opinion for the Court, the issue in the appeal is “evidentiary” and the burden of proof on the plaintiffs attacking the district is “a demanding one.”¹⁰⁷ Justice Breyer noted, “Caution is especially appropriate in this case, where the State has articulated a legitimate political explanation for its districting decision, and the voting population is one in which race and political affiliation are highly correlated.”

The Court also prescribed this test: In a case such as this one where majority-minority districts (or the approximate equivalent) are at issue and where racial identification correlates highly with political affiliation, the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles. That party must also show that those districting alternatives would have brought about significantly greater racial balance.¹⁰⁸

Justice Thomas, writing for the four dissenters and relying on Federal Rule of Civil Procedure 52(a), noted that, “The issue for this Court is simply whether the District Court’s factual finding—that racial considerations did predominate—was clearly erroneous.”¹⁰⁹ In this connection, he called attention to the Twelfth District’s lack of geographic compactness, the testimony of the plaintiffs’ chief expert, and various other items of evidence. One such item was an e-mail from Gerry Cohen, the drafter of the redistricting plans, to Senator Roy Cooper who chaired the Senate Redistricting Committee, which reported, “I have moved Greensboro Black community into the 12th [District], and now need to take . . . 60,000 out of the 12th [District].”

Shaw v. Reno recognized an “analytically distinct” cause of action and sought to prevent the development of American apartheid. The principle of equal protection stated therein has not been repudiated by *Easley v. Cromartie*. However, the Court’s most recent decision has the practical effect of severely curtailing cases brought to enforce the *Shaw* prohibition of predominantly race-based redistricting. Even where a race-based motive exists, *Easley* provides

107. *Miller v. Johnson*, 515 U.S. 900, 928 (1995) (O’Connor, J., concurring). Moreover, the Court cautioned that courts must “exercise extraordinary caution in adjudicating claims that a state has drawn district lines on the basis of race.” *Id.*

108. The Court fails to define what constitutes a “significantly greater racial balance.” For example, in the 1997 plan, the total population of the Twelfth District was 47% African-American, and in the 1998 plan it was only 33%. The plan increases the likelihood an African American will be elected to Congress but concentrates African Americans in one district. Would this be “significantly greater racial balance?”

109. *Easley*, 121 S. Ct. at 1470–71 (Thomas, J., dissenting).

a reward for disguising that motive. Indeed, it seems an affront to *Shaw* and to equal protection that the November 2000 election was conducted in a Twelfth District that was more racially gerrymandered than the 1998 Twelfth District.

The willingness of a majority of Supreme Court justices to tolerate political—as distinguished from racial—gerrymandering suggests some interesting questions. What if, after the Twelfth District in the 1992 plan had been held unconstitutional as a racial gerrymander, the North Carolina General Assembly had voiced the view that it thoroughly approved of the “political” results of the elections under the 1992 plan and, therefore, had reenacted the plan? Would that district then be constitutional because it was motivated by politics rather than race? Indeed, what if the legislature concluded that certain candidates could be elected by reason of their race if they were placed in suitably designed districts and further concluded that for “political” reasons it would be desirable to have these candidates elected? Would districts drawn under those circumstances be constitutional because of their “political” underpinning?

EPILOGUE

I had hoped that the *Hunt v. Cromartie* litigation would provide an incentive for abandoning racial gerrymanders, rather than disguising them. However, I suspect that now the effect of the case will be the opposite. Even so, I would suggest that the gerrymandering problem might be solved if we heeded guidance provided by Chief Justice Warren’s opinion in *Reynolds v. Sims*,¹¹⁰ where he wrote: “The British experience in eradicating ‘rotten boroughs’ is interesting and enlightening. Parliamentary representation is now based on districts of substantially equal proportion, and periodic reapportionment is accomplished through independent Boundary Commissions.” In the United States, some states have proceeded in a similar manner and have created or authorized redistricting commissions for congressional redistricting or legislative reapportionment.¹¹¹ Five states—New Jersey, Hawaii, Idaho, Montana, and Washington—have commissions for congressional redistricting. To ensure some partisan balance, each state provides that the majority leaders of both houses and a representative of the minority party in both houses shall each choose

110. 377 U.S. 533, 567 n.44 (1964).

111. See generally Jeffery C. Kubin, Note, *The Case for Redistricting Commissions*, 75 TEX. L. REV. 837 (1997) (examining the potential uses of redistricting commissions).

at least one member of the commission. In Idaho and New Jersey, the state chairs of the states' two largest political parties also each choose a member.¹¹² Idaho's commission is comprised of an even number of members,¹¹³ while in New Jersey, Hawaii, Idaho, and Washington the appointed members of the commission—who are an even number—choose an additional member to serve as chair of the commission.¹¹⁴ Each of these five states seeks to ensure the commission's political independence by imposing limitations on participation in electoral politics or lobbying before, during, and after service on the commission. Six other states use independent commissions to perform legislative reapportionment.¹¹⁵ Yet at least four states use commissions as a backup method of redistricting if the state legislature fails to adopt redistricting plans.¹¹⁶ In three states—Iowa, Maine, and Vermont—redistricting commissions are used only in a consultative capacity.¹¹⁷

In Hawaii, Idaho, and New Jersey, a redistricting plan approved by the independent commission requires no further approval and is not subject to amendment. The plan becomes law upon filing with the appropriate official. In Montana, a congressional redistricting plan prepared by the commission becomes law upon filing with the Secretary of State; but a legislative reapportionment plan must be submitted to the legislature for comments.¹¹⁸ After a thirty-day period, the legislature returns the plan along with its recommendation to the commission, which then must file a final revision with the Secretary of State within thirty days. A redistricting plan approved by the Washington redistricting commission must be submitted to the state legislature, which by two-thirds vote of each house may make amendments affecting no more than 2% of the population of each district. The plan then becomes law.

In light of North Carolina's unhappy history with redistricting during the 1990s, I have become convinced that creation of some type of redistricting commission would be the best means for the state to

112. IDAHO CONST. art. III, § 2; N.J. CONST. art. III, § 2.

113. IDAHO CONST. art. III, § 2.

114. HAW. CONST. art. IV, § 2; N.J. CONST. art. III, § 2; WASH. CONST. art. II § 43(2).

115. ALASKA CONST. art. VI, § § 8-10; ARK. CONST. art. 8, § § 1, 3-4; COLO. CONST. art. V, § § 44, 48; MO. CONST. art. III, § § 2, 7, 45; OHIO CONST. Art. XI, § 1; PA. CONST. art. II, § 17.

116. ILL. CONST. art. IV, § 3; IND. CODE ANN. § § 3-6-4.1-1 to 4.1-14 (1998); MISS. CONST. art. XIII, § 254; OKLA. CONST. art. V, § 11A.

117. ME. CONST. art. IV, pt. 1, § 3 and pt. 3, §1-A (1986); VT. CONST. ch. II, § 73 (1974).

118. MONT. CONST. art. V, § 12(3) and (4).

deal with redistricting in the wake of the year 2000 census. Legislators will undoubtedly protest that they are the elected representatives of the people and should perform redistricting, rather than have it performed by others. However, they fail to recognize that in redistricting, where legislators have great potential self-interest, it is preferable to have impartial persons make the decisions.

A constitutional amendment would be the best means for establishing an independent commission. In this way, greater permanency would be assured for the commission than if it were established by statute, which could subsequently be amended or repealed.¹¹⁹ However, such an amendment would be time-consuming and the legislature might be hesitant to propose such an amendment. Moreover, unlike some states, North Carolina has no initiative procedure whereby voters can place a constitutional amendment before the voters for their consideration. Nevertheless, there remains the possibility of a deadlock in redistricting and, in desperation, the General Assembly might decide as an alternative to create an independent redistricting commission by statute or else to place on the ballot a constitutional amendment concerning such commission.

If created, such a commission should have some provision for partisan balance, such as the appointment of one member apiece by the leaders of each major party in the House and Senate. Likewise, the members of the commission should be persons who have not been involved recently in the legislative process, either as legislators and lobbyists, and who agree not to run for elective office or to lobby within several years after their service on the commission.

Certain basic requirements would be prescribed for the commission to use in preparing a plan. Those requirements would be derived from the traditional neutral districting principles to which the Supreme Court has referred in recent redistricting cases. Thus, contiguousness, geographical compactness, and respect for the boundaries of cities, counties, and other political subdivisions would be mandated. In light of the State's egregious racial gerrymandering, the commission should be prohibited from considering racial data in drawing district boundaries, except to the extent required by federal law.¹²⁰ Because of the high identification of African Americans with

119. Perhaps if the voice of the people were expressed through a constitutional amendment, this circumstance would be given special weight in the future and legislators would hesitate to abolish the commission.

120. Under the conditions prescribed by *Thornburg v. Gingles*, 478 U.S. 306, 350 (1986), the legislature may be under a statutory obligation to create majority-black districts.

the Democratic Party, the danger exists that racial gerrymandering will be disguised as partisan gerrymandering. To avoid such issues—and for many other reasons—it would be wise to prohibit partisan gerrymanders and to preclude consideration of political data concerning voter registration and voting performance. Similarly, since incumbent protection may be used as a means to allow representatives who previously were the beneficiaries of racial and partisan gerrymandering to retain their spoils, I would propose that the commission not be allowed to consider the residence of incumbents.¹²¹

The redistricting plan prepared by the independent commission could be made final without further approval. A less drastic alternative would provide that once prepared by the commission, a plan could be submitted to the legislature and would take effect if not disapproved within thirty days by a two-thirds vote of both the House and the Senate. Amendments would not be permitted, and if disapproval occurred by the required supermajorities in the legislature, the plan would be returned to the commission to prepare a new plan. The process would continue until a plan was approved.¹²²

On several occasions in the past, legislation to create an independent redistricting commission has been proposed by members of the General Assembly but has received no meaningful consideration. During the current session of the North Carolina General Assembly, which began in January 2001, bills have been offered to create an independent redistricting commission by constitutional amendment or by statute.¹²³

These bills, however, have not even received a hearing and have no hope of passage. The population trends revealed by the 2000 census will apparently result in an additional congressional seat for North Carolina and in a need to make major changes in legislative and congressional districts. The failure of the General Assembly to

121. Under the 1992 plan, there were elections in North Carolina in which persons ran successfully for Congress even though they did not reside in the district involved. Thus, an incumbent would be free to run for Congress even though placed in a district where he or she did not reside. This would not be true as to candidates for the state legislature.

122. Requiring an “up or down” vote on a redistricting plan provides a process that avoids minor tinkering with a plan. This process seems to have worked well in some other situations—such as with congressional approval for closing military installations.

123. H.R. 318, 2001 Leg., 2001-2001 Reg. Sess. (N.C. 2001), *available at* <http://www.ncleg.net/html2001/bills/currentversion/house/hbil0318.full.html>; S. 283, 2001 Leg., 2001-2002 Reg. Session (N.C. 2001), *available at* <http://www.ncleg.net/html2001/bills/currentversion/senate/sbil0283.full.html>; S. 285, 2001 Leg., 2001-2002 Reg. Sess. (N.C. 2001), *available at* <http://www.ncleg.net/html2001/bills/currentversion/senate/sbil0285.full.html>.

even consider an independent redistricting commission probably will lead to some major legislative battles over reapportionment and redistricting plans for future elections. While the litigation as to these plans will not likely have the same high profile that it did during the 1990s, some attacks in federal and state courts are not improbable.

