LESSONS FROM NORTH CAROLINA’S REDISTRICTING LITIGATION

ROBINSON O. EVERETT

I. A BRIEF HISTORY ............................................................................................................. 206
II. UNRESOLVED QUESTIONS ............................................................................................. 214
III. LESSONS TO BE LEARNED ......................................................................................... 217
IV. CONCLUSION ............................................................................................................... 222

* A.B., 1947, J.D., 1950, Harvard University; L.L.M., 1959, Duke University. Robinson Everett is a native of Durham, North Carolina. He served for several years as a legal officer in the Air Force and as a commissioner of the United States Court of Military Appeals. He returned to Durham to enter a general practice, which he continued until 1980 when he rose to the bench of the United States Court of Military Appeals as chief judge. In September 1990 he retired from that position to become a senior judge of the court and resume full-time teaching. From 1961 to 1964, he served as counsel to the Subcommittee on Constitutional Rights of the United States Senate Judiciary Committee. He began teaching at Duke University in 1950. He was elected to regular membership on the faculty in 1967. He is the founder of the Center on Law, Ethics and National Security at Duke University Law School.
I. A Brief History

In January 1992, when I first glimpsed a map of the congressional redistricting plan just enacted by the North Carolina General Assembly, I noted immediately that many of the districts were not compact. This lack of compactness was especially true of the First District, which stretched erratically from the Virginia line almost to South Carolina, and of the Twelfth District, which snaked along the corridor of Interstate 85 from Gastonia to Durham. Moreover, the First District remained contiguous only because it intersected with its remaining portion at a single point.

I asked myself how this could be, given that in 1964 the Supreme Court stated that a district might be so lacking in compactness as to be unconstitutional on that ground alone. Indeed, in 1966 I successfully represented plaintiffs in attacking a newly created North Carolina congressional district for lack of compactness and contiguousness.

As a native North Carolinian, I readily discerned that the districts must have been created along racial lines. For example, Durham County—my home county—was split between the Twelfth District and another district, and I noted that each significant concentration of African Americans in Durham had been placed in the Twelfth District, but relatively few concentrations of whites had been placed there. The newspaper accounts revealed that the General Assembly had believed it necessary to create two majority-black congressional districts due to the position of the Justice Department Civil Rights Division.

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3. Shaw 1, 509 U.S. at 659 (map of North Carolina districts). Thus, one could not walk from the northern part of the First District to the southern part without passing through the Third District, nor could one walk from the eastern part of the Third District to the western part without crossing the First District.
7. The Justice Department Civil Rights Division compelled the state legislatures to create twenty-six new African-American or Hispanic districts across the country following
This was a formidable task in a state where the African-American population is only twenty-two percent and is "relatively dispersed." I also was very familiar with Supreme Court rulings that held race-based peremptory challenges against prospective jurors to be violative of the Equal Protection Clause of the Fourteenth Amendment, and to me it seemed obvious that if race could not be used in peremptory challenges of jurors, it could not be used in drawing the boundaries of congressional and legislative districts or in establishing racial quotas for elected officials.

A few weeks later on March 12, 1992, four other plaintiffs and I instituted an action in the federal district court to challenge the constitutionality of the North Carolina redistricting plan. We contended that this racial gerrymander violated equal protection and other constitutional safeguards. The three-judge district court dismissed our complaint, in part because all five plaintiffs were white and thus not entitled to invoke equal protection in this context. On direct appeal, the Supreme Court, by a five to four vote, reversed the lower court and held that, regardless of our race, we had stated a valid claim under the Equal Protection Clause—a claim "analytically distinct" from vote dilution claims. Accordingly, the court remanded the case for trial to provide us an opportunity to establish that the General Assembly had acted with a predominantly racial motive.

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8. Shaw I, 509 U.S. at 634 (noting that North Carolina population is approximately twenty percent black and that "[t]he black population is relatively dispersed"); John Cochran, Democrats Revel District Plan, GREENSBORO NEWS & RECORD, Feb. 21, 1997, at A1 (noting that "North Carolina's overall population is 22 percent black"); Court to Weigh Black Districts, supra note 7 (noting that the North Carolina redistricting plan was rejected because it created only one majority-black district in a state that is twenty-two percent black).


and, in that event, to allow the State to show that the racial gerrymander survived the test of "strict scrutiny."

Upon review, the district court, although now upholding our standing and finding that a racial motive predominated in the Legislature, nonetheless decided that the State had shown a compelling governmental interest in creating two majority-black districts and that these districts had been drawn in accord with that interest. On appeal to the Supreme Court, we again obtained reversal of the lower court by a five to four majority. The Court, however, following its conclusion a year before in a Louisiana redistricting case, ruled that we lacked standing to challenge the First District because of district residency requirements. As to the Twelfth District, in which two plaintiffs resided, the Court held that even if the defendants had shown a "compelling governmental interest," they had failed to show that the gerrymander of the Twelfth District had been "narrowly tailored" to promote that interest.

The court issued its opinion in June 1996, and we sought to obtain a new redistricting plan for the 1996 election. The General Assembly, however, was unwilling to draw a new plan that quickly, and neither the district court nor the Supreme Court was willing to compel it to do so. Thus, because of judicial deference to the Legislature, the 1996 congressional elections were conducted under a plan that five months earlier had been held unconstitutional.

The General Assembly enacted a new plan late in March 1997, just before the court-established deadline of April 1. Under this plan none of the plaintiffs remained in the Twelfth District; instead, they were all in a compact, contiguous district that included all of Durham County where they resided. Thus, they lacked standing to challenge the plan, which the district

17. Id. at 918.
18. Id. at 899.
court had previously approved as a remedy for the constitutional violation that had occurred.\textsuperscript{22} The court, however, expressly limited its decision so that it would not bar suit by potential future plaintiffs who had standing.\textsuperscript{23}

New plaintiffs emerged quickly to challenge both the First and Twelfth Districts as drawn in the 1997 plan. They contended that these districts were still racially gerrymandered, and they relied particularly on demographic data that showed the extent to which the district boundaries in each instance corresponded to race.\textsuperscript{24} The plaintiffs also complained that these districts were the "fruit of the poisonous tree," namely the two majority-black districts in the 1992 plan, and were designed "with unclean hands" to perpetuate the election of the two African-American members of Congress elected originally from those districts.\textsuperscript{25}

The State defendants responded that the defects of the 1992 districts had been cured.\textsuperscript{26} In the First District, only slightly more than a majority of the population was African-American and the district had been made more compact with a smaller number of counties and a lesser number of split counties.\textsuperscript{27} Even though it still split all of its counties, the new Twelfth District only included parts of six counties, rather than being composed of parts of ten counties.\textsuperscript{28} Moreover, the Twelfth District was no longer majority-black; rather, only forty-seven percent of its total population was African American\textsuperscript{29} and in the view of some, including the chair of the Senate Redistricting Committee,\textsuperscript{30} it was therefore not subject to Shaw v. Reno.\textsuperscript{31}

As to the Twelfth District, the three-judge district court, by a two-to-one vote, granted summary judgment for the plaintiffs—


\textsuperscript{23} Id. ("Our approval thus does not—cannot—run beyond the plan's remedial adequacy with respect to those parties and the equal protection violation found as to former District 12.").

\textsuperscript{24} Plaintiff's Brief on Motion for Summary Judgment, Cromartie v. Hunt, 34 F. Supp. 2d 1029 (E.D.N.C. 1998) (No. 4:96-CV-104-BO(3)).

\textsuperscript{25} Id.

\textsuperscript{26} Defendant's Brief on Motion for Summary Judgment, Cromartie, 34 F. Supp. 2d 1029 (No. 4:96-CV-104-BO(3)).

\textsuperscript{27} Id.

\textsuperscript{28} Id.

\textsuperscript{29} Id.

\textsuperscript{30} Id.

\textsuperscript{31} Id.
all of whom I represented. As to the First District, however, the court ruled that a trial would be necessary. The State appealed and unsuccessfully sought stays from the district court and from the Supreme Court.

By this time it was April 1998, and in a few weeks the General Assembly enacted a plan to be used in the 1998 primaries and elections. The Legislature was under great pressure to provide a plan promptly; otherwise, the court had announced that it would do so. Under the new plan the First District remained as it was drawn in the 1997 plan. The Twelfth District, however, was modified so that, instead of containing parts of ten counties, it contained parts of six counties. The African-American population was reduced from 47% to 33% of the District’s total population.

The law enacting the 1998 plan contained a proviso that if the State succeeded in its appeal from the summary judgment rendered by the district court, the 1998 plan would not be used in later elections. This proviso was probably designed to prevent the State’s appeal from being dismissed as moot; its practical effect, however, was to insure that if the appeal to the Supreme Court succeeded, the 1998 plan would be used in only one election. An alternative to enacting the proviso would have been for the State to abandon its appeal and seek district court approval to use the 1998 plan in the year 2000 election.

The appeal resulted in success for the State in that the Supreme Court ruled that an issue of fact existed as to whether

33. Id. at 1029 (granting summary disposition as to Twelfth District but not as to the First).
36. Cromartie, 133 F. Supp. 2d at 410. (“On April 21, 1998, the Court issued a scheduling order, requiring that the General Assembly either submit a new plan to the Court and the Department of Justice by May 22, 1998 or the Court would assume responsibility for drawing an interim plan.”).
40. 1998 N.C. Sess. Laws 2 § 1.1 (“The plan adopted by this act is effective for the elections for the years 1998 and 2000 unless the United States Supreme Court reverses the decision holding unconstitutional G.S. 163-201(a) as it existed prior to the enactment of this act.”).
41. See Cromartie, 526 U.S. at 545 n.1.
the predominant motive of the General Assembly had been racial, rather than political.\textsuperscript{42} Upon remand, extensive discovery took place, leading to a three-day trial at the end of November 1999.\textsuperscript{43} In mid-March 2000 the three-judge district court held by a two-to-one vote that the drawing of the Twelfth District was predominately motivated by race and could not meet the test of strict scrutiny.\textsuperscript{44} The First District’s realignment was also held to be race-based, but in this instance the court concluded that the test of strict scrutiny had been met.\textsuperscript{45} The court reasoned that the State had a “compelling interest” to satisfy the perceived requirement of the Voting Rights Act that called for creation of a majority-black district in northeastern North Carolina and that, even though it split many counties and other political subdivisions, the First District was “narrowly tailored.”\textsuperscript{46}

The State immediately gave notice of appeal and requested a stay in light of the imminence of the May 2000 primary.\textsuperscript{47} The district court denied a stay, but the Supreme Court granted the motion pending a decision on the appeal.\textsuperscript{48}

At this point the plaintiffs were confronted with a dilemma: should they cross-appeal as to that portion of the district court judgment which upheld the First District’s constitutionality? The plaintiffs doubted that the General Assembly had an adequate basis for a belief that a “compelling state interest” existed for creating a majority-black district, and even if such an interest existed, they questioned whether the First District, as it had been drawn, was “narrowly tailored.” The plaintiffs believed, however, that if they cross-appealed as to the First District, they would have almost no chance of getting the Court to decide before the end of its 1999 term whether to grant the motion for summary affirmance, which they planned to file with respect to the Twelfth District. Thus, in light of the Supreme Court’s grant of a stay of the District Court’s judgment, and absent summary affirmance of that judgment, the year 2000 elections would have taken place under the 1997 plan. In retrospect, it seems safe to

\begin{footnotes}
\item 42. \textit{Id.} at 553 (holding that case was not suitable for summary disposition).
\item 44. \textit{Id.} at 420.
\item 45. \textit{Id.} at 423.
\item 46. \textit{Id.}
\item 47. \textit{Cromartie}, 526 U.S. at 546.
\end{footnotes}
say that if the plaintiffs had foreseen that the Supreme Court would not grant their motion for summary affirmance as to the Twelfth District before the end of the 1999 term, they would have attempted a cross-appeal as to the First District.

When the appeal was argued on November 27, 2000, the State contended that the findings of the majority in the district court were "clearly erroneous," and that plaintiffs had failed to establish a racially predominant motive on the part of the General Assembly. The State maintained that, instead of being racial, the predominant motives for the 1997 plan were political—keeping a six-to-six party balance in North Carolina's twelve member congressional delegation and protecting the Democratic incumbents of the Twelfth and First Districts.

The plaintiff-appellees contended, to the contrary, that under Rule 52(a) of the Federal Rules of Civil Procedure, an appellate court must give great weight to the findings of the trial court, which heard the witnesses and evaluated their credibility. Moreover, the direct and circumstantial evidence combined to provide a sound basis for finding that there was a predominant racial motive to draw the Twelfth District. This motive was to ensure election of an African American, who would most likely be a Democrat.

The opinion of the court, written by Justice Breyer for himself and four other Justices, was filed on April 18, 2001. Relying on the undisputed fact that over ninety-five percent of the African Americans who vote in North Carolina vote Democratic, the court concluded that the plaintiffs had failed to disprove that African-American voters had been concentrated in the Twelfth


50. Ibid., at 1460-61.

52. Cromartie v. Hunt, 133 F. Supp. 2d 407, 420 (E.D.N.C. 2000) ("It is clear that the Twelfth District was drawn to collect precincts with high racial identification rather than political identification. Additionally, the evidence demonstrates that precincts with higher partisan representation (that is, more heavily Democratic precincts) were bypassed in the drawing of District 12 in favor of precincts with a higher African-American population."). rev'd, Hunt v. Cromartie, 121 S. Ct. 1452 (2001); see also Cromartie, 121 S. Ct. at 1466 ("We concede the record contains a modicum of evidence offering support for the District Court's conclusion.").

53. Ibid., at 1460.

54. Id., at 1452, 1455.
District to assure a safe Democratic district, rather than for any racial purpose.\textsuperscript{55}

Justice Thomas, writing for the four dissenting Justices, relied on Rule 52(a)\textsuperscript{56} of the Federal Rules of Civil Procedure.\textsuperscript{57} In his view, the district court had observed the witnesses and considered carefully the substantial evidence that the Legislature’s predominant motive had been racial.\textsuperscript{58} In his analysis, he cited some of the evidence that tended to undercut the defense claim, including an email message to Senator Roy Cooper, Chair of the Senate Redistricting Committee, from Gerry Cohen, the legislative staff member in charge of bill drafting.\textsuperscript{59} In the message the staff member noted that in redrafting an earlier redistricting plan into a final version he had moved the “Greensboro black community” into the Twelfth District.\textsuperscript{60}

The majority opinion criticized the lower court for focusing on voter registration figures rather than past voter performance.\textsuperscript{61} Its rationale was that, in forming a safe Democratic district, the General Assembly had properly relied on voting results in past elections to determine to what extent voters who might have registered as Democrats nonetheless had voted for Republican candidates.\textsuperscript{62} Since in North Carolina over ninety-five percent of African Americans who register and vote do so as Democrats, an effort to create a “safe” Democratic district would yield the same results whether it was based on voter registration or on past performance.\textsuperscript{63} According to this view, the General Assembly should not be precluded from forming a very “safe” Democratic district, even if that district

\textsuperscript{55} Id. at 1466 (“The evidence taken together, however, does not show racial considerations predominating in the drawing of District 12’s boundaries.”).

\textsuperscript{56} FED. R. CIV. P. 52(a) states that a “[f]inding of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.”

\textsuperscript{57} Croomartie, 121 S. Ct. at 1471-72 (Thomas, J., dissenting).

\textsuperscript{58} See id. at 1470-75 (detailing the evidence that the trial court could have relied on in concluding that race was the predominant factor in discussing the boundaries of District 12).

\textsuperscript{59} Id. at 1474-75; see also Croomartie v. Hunt, 133 F. Supp. 2d 407, 411 (E.D.N.C. 2000), rev’d, Croomartie, 121 S. Ct. 1452.

\textsuperscript{60} Croomartie, 121 S. Ct. at 1475.

\textsuperscript{61} Id. at 1460 (“As we said before, the problem with this evidence is that it focuses upon party registration, not upon voting behavior.”).

\textsuperscript{62} Id.

\textsuperscript{63} Id.
turned out to be heavily African-American in its composition. This argument would apply even if the resulting district was not compact. The majority simply was not satisfied from its review of the evidence that the plaintiffs had adequately disproved this proffered political explanation of the General Assembly’s action. 64

II. UNRESOLVED QUESTIONS

Justice Breyer’s opinion provided 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. 65

Unfortunately, this test is not completely clear. Must the General Assembly state “legitimate political objectives” on the record before or during adoption of a redistricting plan or will post hoc explanation of the “objectives” suffice? What “political objectives,” if any, are not “legitimate?” If the redistricting plan fails to comply with “political objectives” stated by the legislature, may this be considered in a proper case as evidence of racial motive? What are the “traditional districting principles” to which Justice Breyer refers? Presumably, compactness and contiguousness are among these principles, as well as the avoidance of splitting counties, cities, or other political subdivisions. To what extent, however, is the “community of interest” to be considered and, if so, what constitutes “community of interest?” 66 Some have argued that race itself

64. Id. at 1466 (“And given the fact that the party attacking the legislature’s decision bears the burden of proving that racial considerations are ‘dominant and controlling,’ given the ‘demanding’ nature of that burden of proof, and given the sensitivity, the ‘extraordinary caution,’ that district courts must show to avoid treading upon legislative prerogatives, the attacking party has not successfully shown that race, rather than politics, predominantly accounts for the result.”) (quoting Miller v. Johnson, 515 U.S. 900, 913, 916, 929 (1995) (minority opinion and O’Connor, J., concurring)).

65. Id.

66. See Hunt v. Cromartie, 526 U.S. 541, 555 (1999) (Stevens, J., concurring) (“In this regard, I note that neither the Court’s opinion nor the District Court’s opinion analyzes the question whether the ‘traditional districting principle’ of joining
creates a "community of interest," and in that event it becomes easy to claim that the legislature has drawn a gerrymandered district following racial lines to promote this "community of interest."

In Justice Breyer's test, what is a "significantly greater racial balance?" Ironically, one can argue that the North Carolina 1998 redistricting plan, which reduced the African-American population of the Twelfth District from 44% to 33% and which was more compact, fully satisfied Justice Breyer's test. His opinion, however, does not focus on this plan, though the plan purported to have the same "political objectives" as its 1997 predecessor and though the 1998 election conducted under that plan resulted in easy victories for the African-American Democratic incumbents in the First and Twelfth Districts."

Still other questions arise in connection with the majority's deference to "legitimate political objectives." If the North Carolina General Assembly had been satisfied, from a political standpoint with the results reached under the unconstitutional 1992 plan, could it simply have announced that those results were excellent in terms of political balance and in light of the high quality of those persons who had been elected, and that therefore the Legislature would simply reenact the 1992 plan in order to achieve the "political objectives" of reelecting those who had been elected under that plan? Moreover, if a majority of legislators in the General Assembly believe that they can only achieve their "political objectives" by appealing to ethnic and racial groups and by forming districts that are programmed to elect members of those racial and ethnic groups, is this permissible on the theory that the political motive is predominant? Likewise, if a political party yields to threats by a racial or ethnic group's leaders that they will withdraw their traditional support for that party unless a redistricting plan is adopted that insures election of a prescribed number of

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67. Mercurio, supra note 39.
68. See Cromartie, 121 S. Ct. at 1462.
69. See Election '98: Results, ATLANTA J. & CONST., Nov. 4, 1998, at D9 (reporting that Eva Clayton won reelection in the first district with 62% of the vote and that Melvin Watt won reelection in the Twelfth District with 57% of the vote).
70. Cromartie, 121 S. Ct. at 1466.
members of that group, is the resulting redistricting plan racially or politically motivated?

One other point deserves attention. North Carolina has a primary system under which only registered members of a party and independents may vote in that party’s primary. 71 A voter’s registration data includes not only the voter’s political party, but also his or her race. 72 Thus, if a legislative purpose exists to nominate a person of a particular race to be a party nominee for a position, it is important to assure that in a proposed district the number of registered voters of that race who are registered as members of that party exceeds 50% of the total registered voters. Indeed, to be perfectly safe that number should exceed 60% of the registered voters because of a North Carolina statute that provides that if in a primary the leading candidate has 40% of the votes, he or she will be the party nominee. 73 Thus, if a predominant racial purpose exists in drawing a congressional or legislative district, the voter registration data will have a significance that Justice Breyer unduly discounts. Accordingly, the district court’s emphasis on voter registration data, which recorded that district boundaries conformed to racial concentrations, was far more justified than Justice Breyer acknowledged. 74

Plaintiff-appellees raised this point in a petition for rehearing, even though they realized that, under the circumstances, their petition was almost foredoomed to fail. In light of the summary denial of the petition, the issue remains as to whether the effect of racial gerrymandering on the choice of party nominee can provide a basis for successful attack.


72. N.C. GEN. STAT. § 163-82.4(a)(7), 82.10(b)(2), 82.10(e)(2) (1999) (requiring voter registration application to include race and requiring provision of race in records of voter registration data provided to third parties).

73. In 1992 Walter Jones Jr., a white candidate who was then a Democrat, ran in the majority-black First District, and of the several candidates running in that primary he led in votes with almost forty percent. Had he reached 40% and become the Democratic nominee, undoubtedly he would have then been elected to Congress. See Van Denten, Clayton Calls Runoff in 1st District Race, THE NEWS & OBSERVER (Raleigh, N.C.), May 7, 1992, at B1.

74. See Hunt v. Cromartie, 121 S. Ct. at 1459 (“First, the primary evidence upon which the District Court relied for its ‘race, not politics,’ conclusion is evidence of voting registration, not voting behavior; and that is precisely the kind of evidence that we said was inadequate the last time this case was before us.”).
III. LESSONS TO BE LEARNED

From this experience with redistricting in North Carolina, what lessons can we learn for the next decade? The first—and perhaps most important—lesson is that for those who sue to end gerrymanders, the effort and expense will be great. The creators of gerrymanders will usually fight to the end to preserve them, and while the long battle continues, the gerrymander remains in place. Moreover, those who attack a racial gerrymander may be labeled "racists," or they may be ridiculed for their concern about the "appearance" of a district and its "aesthetics." Therefore, litigation should not be initiated lightly. For those who decide to go forward, however, the possibility remains that events may take an unforeseen, favorable turn, not even recognized at the time. For example, I now realize that we who initiated the 1992 Shaw litigation were fortunate that the district court dismissed our complaint on motion of the defendants.\(^75\) As a result of the dismissal, we were able to appeal directly to the Supreme Court on the basic legal issue we sought to raise without the cost and delay of discovery and trial.

From these redistricting cases, we also learned, that everything may hinge on the vote of a single judge or justice. At the district court level, almost all of the rulings were made by two to one vote. Of the four North Carolina redistricting appeals, three were decided five to four.\(^76\) In the fourth case, only five of the justices joined in the opinion of the court, although the other four concurred in the result. Apparently the swing vote in the Supreme Court is that of Justice O'Connor who—not only in this context, but in others—has made clear her concern not to interfere with the legislative process.\(^77\) Indeed, in Miller v. Johnson, where she joined the majority in holding Georgia's redistricting unconstitutional, she stated specifically in a separate concurring opinion that the threshold standard is a


\(^{77}\) See, e.g., Davis v. Bandemer, 478 U.S. 109, 144 (1986) (O'Connor, J., dissenting) ("I would hold that the partisan gerrymandering claims of major political parties raise a nonjusticiable political question that the judiciary should leave to the legislative branch as the Framers of the Constitution unquestionably intended."). Perhaps Justice O'Connor's viewpoint reflects her experience as a state legislator in Arizona.
"demanding one," and that race may be "considered" by the
classifiers.78

Third, opponents of racial gerrymanders may have some
additional arguments to advance in the future. In the extreme
case, historical precedent holds that the lack of compactness
violates equal protection.79 Where a newly drawn district seems
to follow closely the lines of a previous district that was clearly a
racial gerrymander—and especially where the same legislator
represents that district—one can argue that the new district is
the "fruit of the poisonous tree" and that the "vestiges" of the
formerly gerrymandered district must be totally eliminated.
Moreover, in light of the inconsistency between the requirement
in redistricting cases that race must be the predominant motive,
and the precedent in other fields that race need not be the
"dominant" or "primary" purpose,80 the possibility still exists that
a majority of the justices can be persuaded to adopt the more
lenient standard. Despite the desire of the Supreme Court not
to interfere unduly with state legislatures,81 it seems
inappropriate to give them more freedom as to redistricting
when their actions are so deeply rooted in self-interest.
Moreover, the trial process would be greatly simplified if it was
unnecessary to decide the predominant motive among several
concurrent motives.

Moreover, someone who wishes to attack a gerrymander
should seek as many allies as possible. Friendly amicus curiae
briefs can be valuable in emphasizing the importance of the case
and in drawing the attention of the judges who will consider
the case. Intervenors who can locate experts and who will help pay
trial and discovery costs are also valuable. After our first victory
in the Supreme Court in 1993, we were fortunate that the

79. See, e.g., Reynolds v. Sims, 377 U.S. 533, 568 (1964) ("[A]n individual’s right to
vote for state legislators is unconstitutionally impaired when its weight is in a substantial
fashion diluted when compared with votes of citizens living on other parts of the State ")
80. See, e.g., Village of Arlington Heights v. Metropolitan Housing Development
Corporation, 429 U.S. 252, 265 (1977) (upholding denial of a request for village
rezoning to build low-to-middle income housing).
81. Cromartie, 121 S. Ct. at 1466 (listing reasons for upholding the legislature’s
redistricting including "the sensitivity, the 'extraordinary caution,' that district courts
must show to avoid treading upon legislative prerogatives") (citing Miller, 515 U.S. at
916).
Republican Party intervened on our behalf. They had experts otherwise unavailable to us, and they helped share the costs of discovery. Incidentally, we discovered, to our joy, that a few experts will assist in a redistricting case, not in order to receive a fee, but to help establish a principle. Therefore, it can be quite helpful if the plaintiffs are perceived as sincerely interested in correcting a wrong, rather than in achieving political gains.

It is also important to have plenty of plaintiffs to prevent lack of or loss of standing. Ironically, on November 27, 2000, minutes before I began to argue the appeal, the Supreme Court handed down a ruling that plaintiffs in an Alabama redistricting case lacked standing because none of them lived in the district they challenged. Moreover, in our case I was concerned because prior to trial one of our plaintiffs moved out of the district, and then during the appeal another of our plaintiffs died, leaving only one remaining plaintiff who clearly had standing to challenge the Twelfth District.

Furthermore, having plaintiffs of any particular race is not legally necessary for standing purposes. The five plaintiffs who commenced the North Carolina litigation were all white, and the Supreme Court concluded that this was permissible. Nonetheless, as a public relations matter, having plaintiffs of different races and from all political parties is desirable and helps prevent criticism that the plaintiffs in a racial gerrymandering case are a bunch of “racists” or seek a partisan advantage.

The logic of Shaw v. Reno is not limited only to majority-minority districts. Although the Chair of the North Carolina Senate Redistricting Committee asserted to his fellow legislators that Shaw v. Reno was limited to majority-black districts and therefore was irrelevant to the 1997 plan’s Twelfth District, which was only forty-four percent African-American, the State never advanced this argument in the Supreme Court. Moreover, such an argument is inconsistent with the language of Miller v. Johnson, which indicates that the Shaw principle applies when a

84. Shaw I, 509 U.S. 630 (1993) (noting that the plaintiffs were white and holding that the plaintiffs stated a claim sufficient to defeat the State's motion to dismiss).
85. Mercurio, supra note 39.
"significant number of voters" are placed within or without a
district because of their race.\textsuperscript{86} The term "significant number"
would seem to include movement of a number of persons that
might be considerably less than a majority or might not result in
a majority. For this reason, we attached great weight to the email
message about moving the "Greensboro black community" into
the Twelfth District.

Additionally, because of Shaw, those who support
gerrymanders created along racial lines will undoubtedly rely
heavily on Hunt v. Cromartie.\textsuperscript{87} Since the high Democratic
registration and voting figures for African Americans in North
Carolina are probably matched in many other states, those who
seek to rebut claims of racial gerrymandering will contend that
any boundary irregularities can be attributed to political
gerrymandering.\textsuperscript{88} They will be better able to make this
argument if the claimed "political objectives" are set out in the
legislative record. Admittedly, however, the "political objectives"
of a gerrymander may not please voters and, therefore, to state
them truthfully carries some element of risk. If the plan is
subject to section 5 preclearance,\textsuperscript{89} the State's submission to the
Civil Rights Division of the Department of Justice may also
contain language relevant to discovering the legislative purpose
and establishing that it is racial.

Still another lesson learned is that those attacking an alleged
racial gerrymander will obviously seek to distinguish Hunt v.
Cromartie and limit it to its facts. Since Justice O'Connor, who
wrote the lead opinion in Shaw v. Reno, has not disavowed the
principles stated there. Still, the possibility exists of persuading

\textsuperscript{86} Miller, 515 U.S. at 916 ("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.").

\textsuperscript{87} The opinion of April 18, 2001 uses the title Hunt v. Cromartie, but almost at the
time the case was decided Governor Easley was substituted as a party for his predecessor
Governor Hunt; and I have heard references to the opinion under the title Easley v
Cromartie.

\textsuperscript{88} As the Supreme Court decided fifteen years ago, long continued political
gerrymandering may violate equal protection, but the burden on plaintiffs attacking this
gerrymandering is very high. See Davis v. Bandemer, 478 U.S. 109, 127 (1986) ("We also
agree with the District Court that in order to succeed the Bandemer plaintiffs were
required to prove both intentional discrimination against an identifiable political group
and an actual discriminatory effect on that group.").

her in a future case that the facts are different from those in
Hunt v. Cromartie, which purports to be fact-specific.

Moreover, those who attack a gerrymander may find, as we
did, that their access to the facts is hindered by claims of
legislative privilege.90 Fortunately, this privilege can be waived by
the legislator,91 and perhaps because of constituent pressure or
otherwise, a legislator can be persuaded to waive that privilege.
A court, however, will probably give far less weight to post hoc
testimony about legislative purpose than to contemporaneous
statements in the record.

Also, those dissatisfied with a redistricting or reapportionment
plan should consider whether the state constitution offers
opportunities for challenging the plan in the state courts. Some
of these courts may now have a majority of judges who disfavor
gerrymanders and are willing to give relief there from, especially
if the majority of judges are of a different political party from
that which drew the plan. Consequently, one must remember
that language in a state constitution may be the same as in the
United States Constitution and yet be applied differently.92 For
example, a state court might hold that under its state
constitution a race-based motive for redistricting need not be
predominant in order to justify relief, and such a ruling would
be beyond the power of the U.S. Supreme Court to reverse.

Finally, independent redistricting commissions may be the
best solution for gerrymanders in the long run, especially if
those commissions are directed to disregard race, party, and
incumbency. For many years, Great Britain's parliamentary
districts have been drawn by non-partisan Boundary
Commissions.93 Approximately one-third of the states have

90. See U.S. Const. art. I, § 6, cl. 1; see also Bruce v. Riddle, 631 F.2d 272, 279 (4th
Cir. 1980); Northfield Development Co. v. City of Burlington, 523 S.E.2d 743, 749 (N.C.

91. See Burnick v. McLean, 76 F.3d 611, 613 (4th Cir. 1996); Northfield Development Co., 523 S.E.2d at 749.

92. For example, some state courts have applied state constitutional protections
more broadly than identical or parallel provisions in the federal Bill of Rights. See, e.g.,
Commonwealth v. Upton, 476 N.E.2d 548 (Mass. 1985) (holding that the Massachusetts
declaration of rights provides more substantive protection in the determination
of probable cause for search warrants than the Fourth Amendment); State v. Opperman,
247 N.W.2d 673 (S.D. 1976) (holding that the language of the South Dakota
Constitution, which was similar to the Fourth Amendment, warranted a higher standard
of protection for the individuals).

redistricting commissions of some type, and these offer some promise.94 Of course, legislators are not anxious to relinquish their power to independent commissions, but the self-interest of legislators in reapportionment and redistricting plans is so obvious that some of them may be shamed into voting for such commissions. Incidentally, groups like the League of Women Voters and Common Cause have favored independent redistricting commissions on some occasions and might be persuaded to back efforts along these lines.95 Furthermore, in states like California, which have the initiative, it may be worthwhile to place the issue of an independent redistricting commission on the ballot for the voters to consider.96

IV. CONCLUSION

Many critics claim that American voters have become increasingly cynical and view voting as a waste of time. Many understandable reasons explain this attitude, and undoubtedly, one reason is that voters are discouraged from voting if they reside in a district that is gerrymandered and where the voters have few interests in common. Moreover, if the redistricting plan seems to incorporate a racial quota system, it will create resentment among many voters.

The new redistricting plans that result from the new census will undoubtedly lead to controversy and to some litigation, which will be tedious and expensive. Hopefully, however, legislators will downplay their self-interest and partisanship in order to draw districts that inspire voter confidence.


96. Cal. CONST. art. 2, § 8 (explaining initiative power and method for proposing an initiative measure). Unfortunately the cost of placing an initiative on the ballot is so great that this route to reform is often unavailable.