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## Confounded by *Cromartie*: Are Racial Stereotypes Now Acceptable Across the Board or Only When Used in Support of Partisan Gerrymanders?

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## ARTICLES

### **Confounded by *Cromartie*: Are Racial Stereotypes Now Acceptable Across the Board or Only When Used in Support of Partisan Gerrymanders?**

JOHN HART ELY\*

In *Easley v. Cromartie*,<sup>1</sup> decided April 18, 2001, the Supreme Court, Justice Breyer speaking for a majority of five, upheld North Carolina's long-litigated Twelfth Congressional District against a charge of racial gerrymander. This was the Twelfth District's fourth appearance before the Court (quite considerably for those who would write about it, each time under a different name). In *Shaw v. Reno*, decided in 1993,<sup>2</sup> the Court reversed and remanded the ruling of the three-judge district court below that appellants had failed to state a claim of unconstitutional pro-minority gerrymander. On remand, the three-judge court rejected the claim on the merits, and in 1996, in *Shaw v. Hunt*,<sup>3</sup> the Court reversed outright, invalidating District 12. In 1997 the state redrew the district's boundaries, rendering it somewhat less bizarre, though still intentionally including an unusually high percentage of African-Ameri-

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\* Richard A. Hausler Professor of Law, University of Miami. With no more irony than is compelled by the situation, I dedicate this Comment to Mel Watt, whose congressional district was upheld in *Easley v. Cromartie*. Mel took a couple of courses from me my second year in teaching and was, even then, a conspicuously honorable and intelligent person. Given the opportunity I would vote for him without a moment's hesitation. I'd add my confident speculation that he would be elected in an ungerrymandered election, had he not proved that in 1998.

1. 121 S.Ct. 1452 (2001). The case was *Hunt v. Cromartie* at the time of its argument and decision, but has since been retitled, *Easley* having recently replaced Hunt as governor.

2. 509 U.S. 630 (1993).

3. 517 U.S. 899 (1996).

can voters. In April 1998, apparently getting with the program, the three-judge court granted summary judgment invalidating the 1997 version of the District. This time the state legislature responded in better faith, drawing a considerably less irregular version of District 12,<sup>4</sup> which was only 35 percent African-American, in time for the 1998 election, which was won by African-American incumbent Mel Watt. This proved too perfect a fairy-tale ending for the Supreme Court, however, which in *Hunt v. Cromartie* (1999)<sup>5</sup> reversed the three-judge court's 1998 decision, holding that there was a triable issue of fact whether the 1997 gerrymander was engineered for racial or, rather, political reasons, and that summary judgment had therefore been inappropriate. The 1998 remap no longer seen as necessary, the 1997 version was reinstated for the next election.<sup>6</sup> After a hearing, the three-judge court invalidated the resurrected 1997 District on the merits. Then in 2001, in *Easley v. Cromartie*, the Supreme Court reversed the three-judge court for the fourth straight time, holding that it had committed "clear error" in concluding that the gerrymander's "predominant purpose" had been racial (that is, to create a strongly African-American district) rather than political (to create a safely Democratic district). It turned out, or so at least it must have seemed to the judges below, that the Supreme Court's theme was not "invalidate the Twelfth District" but rather "reverse the three-judge court": some days a guy must wonder why he didn't stay in practice.

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In section I of this Comment I shall argue that the Supreme Court's conclusion that the three-judge court committed clear error in finding race to have been the predominant purpose of the gerrymander of District 12 was, if not itself "clear error" in the sense of being instantly obvious fallacy, demonstrable error nonetheless. Were this the most important problem with the Court's opinion, however, I would not have authored this comment.<sup>7</sup> The opinion has more dangerous features, though, and they are those suggested by my title, its essentially offhand approval — both integral parts of its line of reasoning — of partisan gerrymanders and racial stereotypes.

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4. No longer reaching east to Greensboro and Durham or west to Gastonia, the [1998] district was only 85 (rather than 160) miles between extreme points. It was also noticeably wider, the result of closer conformity to county boundaries. And rather than encompassing minor parts of ten counties, District 12 now consisted of one complete county and parts of four others.

MARK MONMONIER, *BUSHMANDERS & BULLWINKLES: HOW POLITICIANS MANIPULATE ELECTRONIC MAPS AND CENSUS DATA TO WIN ELECTIONS* 52 (2001).

5. 526 U.S. 541 (1999).

6. Maps of the 1997 and 1998 versions of District 12 appear on page \_\_\_\_.

7. See text at notes 58-59 *infra* — though I grant you 2001: *A Race Travesty* is a tempting title.

## I. OF ERROR CLEAR AND PURPOSE PREDOMINANT

With the exception of the short-lived 1998 map, District 12's history has obviously been one of attempting — largely as a means of insuring (federal) Justice Department pre-clearance<sup>8</sup> — to include as high a percentage of African-Americans as possible. As noted, and for obvious reasons, the current (1997) version is less flagrant than the 1992 version that the Supreme Court invalidated in 1996, coming in at 46.67% black (as opposed to 22% in the entire state). True, 46.67% is less than half, though not by much, and neither of those facts is coincidental. The legislative history makes clear what would have been obvious anyway, that the state districters were trying to walk a fine line between the Justice Department's demand for a district where an African-American would have a good chance of winning and the threat of another Supreme Court invalidation, from which at least some of the districters felt they could immunize themselves if they stayed under 50%.<sup>9</sup> Obviously this makes no sense in theory:<sup>10</sup> an intention to include as many blacks as possible is, well, an intention to include as many blacks as possible, or as the three-judge court put it, "using a computer to achieve a district that is just under 50% minority is not less a predominant use of race than using it to achieve a district that is just over 50% minority."<sup>11</sup>

District 12 is depicted in the top map on page \_\_\_\_\_. While it is not as bizarre as its predecessor — faint praise, to put it mildly — it is "barely contiguous in parts"<sup>12</sup> and remains by a considerable margin the most geographically contorted district in the state<sup>13</sup> in terms of both of the now-standard Pildes-Niemi indicators,<sup>14</sup> dispersion compactness and perimeter compactness.<sup>15</sup>

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8. The Department has construed section 5 of the Voting Rights Act, 42 U.S.C. § 1973c (1994), to require such preclearance. See John Hart Ely, *Gerrymanders: The Good, the Bad, and the Ugly*, 50 STAN. L. REV. 607, 612 (1998).

9. *Cromartie v. Hunt*, 133 F. Supp. 2d 407, 420 (E.D. Va. 2000).

10. Happily, it was not the stated theory of Justice Breyer's Opinion of the Court, though his gratuitous observation that if you're looking for an unconstitutional district you probably should focus on District 1, the barely majority-minority district upheld below (it was considerably more compact), see text at note 28 *infra*, does raise the spectre that 50% may become the working constitutional standard. I'll grant that it's administrable, and that's good, but it isn't enough.

11. 133 F. Supp. 2d at 420.

12. *Id.* at 414.

13. 121 S.Ct. at 1459.

14. 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 (1993). See *Bush v. Vera*, 517 U.S. 952, 959-60 (1996); MONMONIER, *supra* note 4, at 65.

15. To calculate dispersion compactness a circle is circumscribed around the district. The reported coefficient is the proportion of the area of the circumscribed circle that is also included within the district. District 12's dispersion coefficient is 0.109 on scale of 0 to 1, the average for

In *Shaw I* the Supreme Court described the 1992 plan's District 12 as "unusually shaped . . . approximately 160 miles long and, for much of its length, no wider than the [Interstate]-85 corridor. It winds in snake-like fashion through tobacco country, financial centers, and manufacturing areas until it gobbles in enough enclaves of black neighborhoods." . . . The 1997 Plan's District 12 is similar: it is "unusually shaped," it is "snake-like," and "gobbles in" African-American population centers. The evidence establishes that although its length has been shortened by approximately 65 miles, it still winds from Charlotte to Greensboro along the Interstate-85 corridor, detouring to envelop heavily African-American portions of cities such as Statesville, Salisbury, and Winston-Salem. It also connects communities not joined in a congressional district, other than the unconstitutional 1992 Plan, since the whole of Western North Carolina was one district, nearly two hundred years ago.<sup>16</sup>

Political subdivisions were routinely dissected, nay scrimshawed, so as to gather their black neighborhoods into District 12.

72.9 percent of the total population of Forsyth County allocated to District 12 is African-American, while only 11.1 percent of its total population assigned to neighboring District 5 is African-American. . . . Similarly, Mecklenburg County is split so 51.9 of its total population allocated to District 12 is African American, while only 7.2 percent of the total population assigned to adjoining District 9 is African American. . . . [T]he four largest cities assigned [in part] to District 12 are split along racial lines. . . . For example, where the City of Charlotte is split between District 12 and adjacent District 9, 59.47 percent of the population assigned to District 12 is African-American, while only 8.12 percent of the Charlotte population assigned to District 9 is African-American. . . . And where the city of Greensboro is split, 55.58 percent of the population assigned to District 12 is African-American, while only 10.70 percent of the population assigned to District 6 is African-American.<sup>17</sup>

Enough to challenge a Houdini, it would appear: whatever can Justice Breyer do to escape? Two things, apparently — one so flimsy that we probably should assume that he didn't really mean it, the other enough to make this a close call under a preponderance of the evidence

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the state being 0.354, the next lowest 0.206. The perimeter compactness coefficient is the proportion of the area in the district relative to that of a circle with the same perimeter. District 12's perimeter compactness coefficient is 0.041, the state's average 0.192 and next lowest 0.107. Intrastate comparisons do not begin to tell the story, however, as North Carolina's districting scheme is relatively contorted statewide: in terms of both coefficients District 12 ranks among the least compact in the country. See 133 F. Supp. 2d at 413-15; cf. MONMONIER, *supra* note 4, at 65-68 (focusing on predecessor district).

16. 133 F. Supp. 2d at 418-19.

17. *Id.* at 413. There's more, mainly *id.* at 415, but I'm not a complete sadist.

standard. The first is that the facts I have related so far respecting “the district’s shape, its splitting of towns and counties, and its high African-American voting population [are things] we previously found insufficient to support summary judgment.”<sup>18</sup> Now I’ve known Steve Breyer a long time — we clerked the same Term and were on the same faculty for ten years — and can certainly testify to what you presumably already know, that he is as intelligent (indeed, all-round good) a justice as we’ve seen in a long time. It would therefore perhaps be best to construe this observation as simply pointless,<sup>19</sup> for as an argument it is a flaming non sequitur: the fact that factors *A*, *B* and *C* were found insufficient to justify finessing the trial does not mean they thereby lost their probative value, which in this case is massive.

Breyer’s weightier point is that as contorted as the shape may be, it is essentially as consistent with an intent to create a safe Democratic district as it is with an intent to create a district that is heavily African-American: “political affiliation explains splitting cities and counties as well as does race”.<sup>20</sup> Obviously this possibility had occurred to the court below, which rejected it:

As the uncontroverted evidence demonstrates, however, the legislators excluded many heavily-Democratic precincts from District 12, even when those precincts immediately border the Twelfth and would have established a far more compact district. The only clear thread woven throughout the districting process is that the border of the Twelfth district meanders to include nearly all of the precincts with African-American populations of over forty percent which lie between Charlotte and Greensboro, inclusive. . . . [W]ithout fail, Democratic districts adjacent to District 12 yielded their minority areas to that district, retaining white Democratic districts.<sup>21</sup>

Justice Houdini again to the rescue: the primary evidence upon which the District Court relied here was “evidence of voter registration, not

18. 121 S.Ct. at 1459.

19. At one point he seems to leave open the possibility that these factors are still relevant, *id.* at 1456, but at yet another point suggests (again) that because they weren’t enough before, they have somehow dropped out of the equation:

The [lower] court based its . . . conclusion in part upon the district’s snakelike shape, the way in which it split cities and towns, and its heavily African-American (47%) voting population . . . — all matters this Court had considered when it found summary judgment inappropriate . . . .

*Id.* at 1457. Nor am I the only one to suppose that the Court’s opinion can be read this way: Justice Thomas’s four-justice dissent countered that “[a]lthough this evidence was appropriate when we held that summary judgment was inappropriate [Thomas had written the Court’s earlier opinion], we certainly did not hold that it was irrelevant in determining whether racial gerrymandering occurred.” *Id.* at 1473.

20. *Id.* at 1463.

21. 133 F. Supp. 2d at 419. This discussion too goes on at some further length. *Id.*; see also *id.* at 414.

voting behavior.”<sup>22</sup> Since, however, everyone know that blacks are reliable Democratic voters, a focus on voting behavior would naturally be expected to yield a high number of black neighborhoods.<sup>23</sup>

However, numerical correlation is not all the lower court relied on. Senator Cooper admitted that he had been unsure whether he could get the plan pre-cleared by the Justice Department without creating a majority-minority district.<sup>24</sup>

Senator Cooper’s testimony also brought to light a February 10, 1997 email message . . . sent to him by Director of Bill Drafting Gerry Cohen . . . stat[ing] that “By shifting areas in Beaufort, Pitt, Craven and Jones Counties, I was able to boost the minority percentage in the first district from 48.1% to 49.25%. The district was only plurality white, as the white percentage was 49.67%.” . . . The email continues, “This was all the district could be improved by switching between the 1st and 3rd unless I went into Pasquotank, Perquimans, or Camden. I was able to make the district plurality black by switching between the 1st and 4th . . .” The Cohen-Cooper email also states that “I have moved the Greensboro Black community into the 12th and now need to take bout [sic] 60,000 out of the 12th.”<sup>25</sup>

Senator Cooper was also questioned about a statement he had made on March 25, 1997, to the (federal) House of Representatives’ congressional redistricting committee, to the effect that the 1997 plan “provides for a fair geographical, racial, and partisan balance throughout the state of North Carolina.” He testified that although “partisan balance” had indeed referred to maintaining the six-six Democrat/Republican balance in North Carolina’s congressional delegation, “racial balance” had not been intended to refer to maintaining the ten-two white/black balance<sup>26</sup> (although, of course, that is what it did). The trial court understandably dismissed this testimony as “simply not credible”.<sup>27</sup>

In response Justice Breyer notes that the e-mail discusses both District 1 and District 12, and adds that if anything “it suggests that the legislature appears to have paid less attention to race in respect to the 12th District than in respect to the 1st District . . .”<sup>28</sup> However, this wasn’t a contest for Worst in Show, and as Justice Thomas noted in

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22. 121 S.Ct. at 1459.

23. The Court cited defendants’ expert for the proposition that “registration data were the least reliable information upon which to predict voter behavior”. 121 S.Ct. at 1460. Less reliable, we can thus assume, than, say, hat size? Surprising.

24. 133 F. Supp. 2d at 411. District 1 did end up majority-minority (and was upheld below); District 12, of course, fell just short.

25. *Id.*

26. *Id.* at 412.

27. *Id.* at 419.

28. 121 S.Ct. at 1464.

dissent, “a decision can be racially motivated even if another decision was also racially motivated.”<sup>29</sup> In fact Breyer’s point is even weaker than that: the two districts were drawn and enacted by precisely the same cast of characters, and as the Court noted in 1973, in *Keyes v. School District No. 1*,<sup>30</sup> the fact that they were racially motivated as to one district makes it *more* likely that they were racially motivated<sup>31</sup> as to the other. Beyond that, what Breyer doesn’t note is that (in the same opinion) the three-judge court *upheld* the First District, despite the fact that it was majority-minority, suggesting that that court was other than hell-bent on finding racial gerrymandering on the part of the North Carolina legislature, and capable of recognizing distinctions.<sup>32</sup>

Breyer also argues that though the e-mail may show that the plan’s architects made choices based on race, it “does not discuss the point of the reference. It does not discuss *why* Greensboro’s African-American voters were placed in the 12th District . . . .”<sup>33</sup> They might, once again, have been placed there on the theory that blacks are reliable Democratic voters. Of this more later, but one might initially wonder why, if that indeed had been the point of the selections in question, they were described by those who made them in racial terms. (Given the Court’s ordering of the constitutional priorities<sup>34</sup> it is difficult to imagine what could have been thought the gain in dressing political motives in the language of race.)

Justice Breyer states that “[t]he basic question is whether the legislature drew District 12’s boundaries because of race *rather than* because

29. *Id.* at 1475.

30. 413 U.S. 189 (1973).

31. With respect to *Cromartie*, “racially motivated” obviously means “motivated by a desire to facilitate the election of a black congressman,” which seems morally different from an attempt to preclude any such possibility and, at least when a majority of those responsible for the shape of the district are white, arguably different constitutionally as well. Ely, *supra* note 8, at 629-32. Nobody suggests antimorality animus was operative here, though the overall increase in Republican districts typically effected by the creation of a heavily black district, see note 43 *infra*, is likely to have some negative policy repercussions for poor people generally and consequently many blacks, a realization to which a number of black opinion leaders reportedly are awakening, which may attenuate the drive for majority-minority districts, *Color Lines*, NEW REPUBLIC, June 23, 2001, at 10-11, though there are also reasons for doubting that it will. Ely, *supra* note 8, at 618-19 n. 253.

32. See 133 F. Supp. 2d at 415-16, 421-23. Unsurprisingly, there are facts cutting both ways about both districts, to the point where at least in my opinion none of the four possible combinations (both constitutional, both unconstitutional, only First unconstitutional, only Twelfth unconstitutional) would have constituted “clear error”. What Breyer hoped to gain by suggesting that the First may have been unconstitutional is not evident: surely the suggestion lends no support to his apparent inference that the Twelfth is constitutional.

33. 121 S.Ct. at 1464 (emphasis added).

34. *But see* text at note 76 *infra*.



of political behavior".<sup>35</sup> The emphasis is in the original, but the dichotomy is false: the fact that politics undoubtedly numbered among the motivations doesn't mean that race didn't as well. And clearly they both did. The Court's response to this presumably would be that although it is true that race and politics can both influence a decision, there can be only one "predominant purpose," and that is, or at least it ought to be, the constitutional standard. There are several problems with this. First, the logic that makes motivation constitutionally relevant implies that where constitutional and unconstitutional motives are both involved,<sup>36</sup> the resulting decision should be invalidated unless it can be said with some degree of confidence (as it plainly cannot here) that absent the unconstitutional motive the selfsame action would have been taken nonetheless.<sup>37</sup> "Predominant purpose," at least as the Court employs the term, is obviously a far cry from such a "but for" test.

Beyond that, the entire concept is indeterminate to the point of incoherence.<sup>38</sup> Is my predominant purpose as I sit here "processing words" to straighten out the Supreme Court (fat chance), to show how smart I am, to justify my salary, to fill the hours I spend above the surface of the water, to help enhance the standing of Miami Law School, to give my life some semblance of structure, to prove to at least one of us that despite the fact that I recently moved to Florida I am still functional? Even I don't know: all of these factors play a role. Moreover, unlike the North Carolina legislature, I am but one person:<sup>39</sup> attempting to determine the "predominant purpose" of the North Carolina legislature (as it attempts to gain federal preclearance)<sup>40</sup> compounds the impossibility.

35. 121 S.Ct. at 1466.

36. I don't believe partisan motives are any more constitutional than (at least affirmative action) racial motives, see text at note 76 *infra*, but for the moment we are assuming arguendo that they are.

37. See generally Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95 (1971); John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 78 YALE L.J. 1205 (1970). In the past, the Court has understood and explicated this clearly. *E.g.*, *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-66, 270-71 n.21 (1977).

38. *E.g.*, *id.* at 265; *McGinnis v. Royster*, 410 U.S. 263, 276-77 (1973):

The search for legislative purpose is often elusive enough . . . without a requirement that primacy be ascertained. Legislation is frequently multipurposed: the removal of even a "subordinate" purpose may shift altogether the consensus of legislative judgment supporting the statute.

See generally Ely, *supra* note 8, at 611-14.

39. Another one-person one-decision example appears *id.* at 611-12. (If you were looking for authority for the proposition in the text I'm afraid I have to disappoint you).

40. That racial considerations are paramount, and partisan considerations irrelevant, to federal preclearance is another strong reason to question the Court's finding of clear error in *Cromartie*.

Perhaps at this point Justice Breyer would respond that that's all well and good, but when a decision to include an African-American neighborhood is made — as it is theoretically possible that this one was — *on the theory that* most blacks vote Democratic, politics is the “pre-dominant purpose.” Whatever other constitutional problems this line of analysis may have,<sup>41</sup> several observations are now in order. First:

Drawing a voting district involves an infinity of choices, each of which is similarly likely to be influenced by a number of considerations. The boundaries zig and zag, shuck and jive, sidle like side-winders. And each spasm has at least one story of its own: How in the name of heaven could one suppose the whole monstrosity to have a “dominant purpose,” unless it's to accommodate as many little purposes as possible?<sup>42</sup>

Second, even if it were appropriate to focus on one or another of the micro-decisions that make up the shaping of a district it seems impossible to say that an overtly racial choice was “actually” made for political reasons: for years the Democratic party has been catering to its black constituents by crafting majority-black districts, often at the known cost of creating about two dominantly Republican districts each time it does so.<sup>43</sup> Obviously the purpose here was compound, to create a heavily black district *and* to create a heavily Democratic district. Third, even if Justice Breyer had a magic x-ray machine that could tell him<sup>44</sup> that here the desire to create a substantially African-American district was almost entirely parasitic on a desire to create a safely Democratic district, it would still be hard to understand why that makes the latter purpose “pre-dominant” for constitutional purposes. Throughout our history race-based decisions have been made on the theory, however benighted, that they will generate one or more nonracial effects that in other contexts would be unexceptionable (keeping the peace, weeding out the less qualified, and so on). That hasn't meant they aren't still racial decisions, and it correctly has not shielded them from invalidation. As Justice Thomas observed in dissent, “the District Court was assigned the task of deter-

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41. See text as note 79-85 *infra*.

42. Ely, *supra* note 8, at 612. See also Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505, 2545 (1997) (“The problem is that this dominant motive question cannot be answered meaningfully in a redistricting context.”).

43. MONMONIER, *supra* note 4, at 8, 12, 13; Jason Zengerle, *Color Line*, THE NEW REPUBLIC, Aug. 6, 2001; *Color Lines*, THE NEW REPUBLIC, June 23, 2001, at 10-11; sources cited Ely, *supra* note 8, at 618; David E. Rosenbaum, *As Redistricting Unfolds, Power is Used to get More of it*, N.Y. TIMES, Aug. 13, 2001, at 14 (“In 1992, for example, only one Republican was in the Georgia delegation in the House, Newt Gingrich. Now there are eight white Republicans and three black Democrats”).

44. Pretty clearly contrary to fact, given the need for federal preclearance. See notes 40 *supra*, 54 *infra*.

mining *whether*, not *why*, race predominated.”<sup>45</sup>

The indeterminacy of the predominant purpose test has another implication as well, that where two or more purposes are in play, especially where they are as inextricably intertwined as they were here, there is no principled ground on which an appellate court can hold that a lower court committed “clear error” in settling on one of them. Indeed the very fact that the Court’s decision was five-four suggests that the error, if any, was something short of clear, as does the fact that it took Justice Breyer eleven closely-reasoned and fact-intensive pages<sup>46</sup> to defend the Court’s conclusion. He promises us “an extensive review of the District Court’s findings, for clear error,”<sup>47</sup> and boy does he deliver, but “extensive review for clear error” would seem to be something of an oxymoron.<sup>48</sup>

By now it seems obvious, however, that Justice Breyer doesn’t really think “clear error” is the appropriate standard of review in a case like this. On the surface, though, it is: patently questions of motivation are factual questions, albeit unusually elusive ones (an observation that underscores rather than undercuts the conclusion that the trial court is in a better position to answer them). In defense of the aggressiveness of his review Breyer mentions that there was no intervening court of appeals decision,<sup>49</sup> an observation of questionable relevance given that the law quite sensibly provides that courts of appeals are also, in the absence of clear error, to defer to the factual findings of trial courts.<sup>50</sup> Moreover, the case was tried before a *three-judge* district court (one member of which had been sitting on various versions of it since 1992). Thus, even limiting ourselves to this particular iteration of the case, three judges had ruled on it before it got to the Supreme Court, as opposed to the four who would have been involved had there been a single district judge and a panel of the court of appeals. It is true that three is one less than four, but all three of them heard the evidence, and were thereby in a position to assess its tone and credibility (as opposed to the single judge involved in the trial of a case that proceeds via the

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45. 121 S.Ct. at 1475 (emphasis in original).

46. In the Supreme Court Reporter; it obviously will be considerably more in the United States Reports.

47. *Id.* at 1459.

48. I suppose it is theoretically possible that it might take eleven or more pages to strip a lower court’s argument to its fulcrum and find it to be defective in a way that is, at the same time, (a) beyond doubt and (b) too subtle for 44% of the Court to grasp — though I’m bound to say that’s quite a slalom. At all events it doesn’t describe this opinion, which comprises a simple if articulate marshalling of the arguments on the side other than the one on which the three-judge court came down.

49. *Id.* at 1458-59.

50. FED. RULE CIV. PROC. 52(a); *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985).

court of appeals). Breyer's point here thus seems upside down: three factfinders are, if anything, entitled to more deference than one.<sup>51</sup>

In many respects, the factual inferences to be drawn boiled down to a choice between warring experts. Justice Breyer centrally relied upon, and thought the lower court should have given more heed to, the state's expert, Dr. David W. Peterson. However, the trial court had found Peterson's testimony to be "'unreliable' and not relevant,"<sup>52</sup> and consequently relied more on the testimony of the challengers' expert Dr. Ronald Weber, of whom Breyer obviously has a comparably low opinion. Anyone who has tried cases involving expert witnesses knows that such disparate reactions are not unusual, which is hardly surprising in light of the fact that each side calls its own. The finder of fact has to size them up and decide whom it trusts more. Of course an appellate court is capable of reviewing *de novo* the lower court's opinion of what is and is not relevant, but which of two witnesses is the more reliable is a determination the trial court, having heard the testimony, is in a considerably better position to make.<sup>53</sup> Moreover, the core question here was the motivation of a group of southern politicians,<sup>54</sup> and unlike Justice Breyer or any of the four other justices who joined his opinion,<sup>55</sup> the three trial judges were (as the system sensibly provides) southerners, indeed all from North Carolina.<sup>56</sup> The clear error rule seems entirely appropriate in this case, and should have been followed.

A thorough review of the argument over whether this was or was not a racially motivated gerrymander would require considerably more analysis than this, which as I indicated may be one reason for supposing that neither finding would have constituted clear error. (As one would expect of good lawyers, the majority below capably marshalled the facts in support of the conclusion that the legislature's purpose was predominantly racial, Justice Breyer capably argued that they could be interpreted otherwise, and Justice Thomas did a capable job of nitpicking Breyer's nitpicks.) As I said earlier, however, if the central problem

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51. Admittedly my point would be stronger had the lower court not split 2-1. (To his credit, this split is not something on which Breyer relies; indeed at no point does he quote or even cite the dissent below). Thus (including the Supreme Court) the judges who heard this iteration of the case split 6-6, which on the surface suggests (though of course it does not establish) a lack of "clear error," especially because the vote was 2-1 by those who heard the evidence.

52. 121 S.Ct. at 1463.

53. *See, e.g.*, text at note 27 *supra* (district court finding Senator Cooper's spin on his earlier remarks about racial balance "simply not credible").

54. Of course, if one focuses on the motives of the Justice Department, the placation of which was the North Carolina legislature's most immediate motive, Justice Breyer clearly gets it wrong. *See* note 40 *supra*.

55. The only southerner on the Court authored the dissent.

56. The judge not mentioned in the report of the case — which is to say the judge other than Boyle and Thornburgh — was Judge Richard L. Voorhees.

with the Court's opinion were its rejection of the lower court's finding of a racial gerrymander, I would not have written this comment. For one thing that inquiry is entirely fact-bound, and like the justices I wasn't present at the trial and like eight of them<sup>57</sup> I am not (really) a southerner. Moreover, although I have argued that on balance the Court has been right in supposing pro-minority racial gerrymanders to be unconstitutional, that question is by no means an easy one.<sup>58</sup> Thus had the Court said that that was what this was and proceeded to uphold it as such, you might have heard from others but you would not have heard from me. However, the way *Cromartie* in fact was rationalized generates considerably more fundamental concerns.

\* \* \* \* \*

Reconsider the holding: The court below committed clear error in finding the creation of a heavily African-American district to have been the predominant purpose underlying the creation of District 12, in that it did not convincingly negate the possibility that the legislature may have gone out of its way to include an unusually high percentage of black neighborhoods on the theory that an unusually high percentage of blacks are likely to vote Democratic.

You will be relieved to know that I am through carping about the questionable application of the clear error standard or the conclusion that the fact that the intentional inclusion of blacks could possibly have been effected on the theory that blacks are likely to vote Democratic would mean that politics, not race, had been the "predominant purpose". There are bigger fish to fry, namely (1) the assumption that an intention to craft a safely Democratic district is constitutionally innocent, and (2) the assumption that using race as a surrogate for probable political preference is as well.

## II. THE ASSUMED LEGITIMACY OF PARTISAN GERRYMANDERS

The Court is clear that its holding rests upon the conclusion that "the creation of a safe Democratic seat" is a "constitutional political objective".<sup>59</sup> The only problem is it isn't.<sup>60</sup> In its landmark decision in

57. See note 55 *supra*.

58. Ely, *supra* note 8.

59. 121 S.Ct. at 1456-57.

60. The error here unfortunately has roots in Justice Thomas's Opinion of the Court in *Hunt v. Cromartie*, the 1999 decision reversing the lower court's grant of summary judgment for the challengers, and in the process conceding the constitutionality of partisan gerrymandering (one of several aspects of his *Hunt* opinion that in writing his *Cromartie* dissent Thomas must have wished had self-destructed). His [unanimous] Opinion of the Court in *Hunt*, though reaching the correct result, overargued at virtually every turn, with embarrassing — and, more importantly, misleading — rhetorical repercussions for the correct position in *Cromartie*. In *Hunt*, Thomas

*Reynolds v. Sims* (1964), the Court justified its observation that districts should be compact and contiguous on the ground that to allow otherwise would be “an open invitation to partisan gerrymandering,”<sup>61</sup> and nine years later, in *Gaffney v. Cummings*, it again adverted to the constitutional invidiousness of drawing districts so as “to minimize or cancel out the voting strength of racial *or political* elements of the voting population.”<sup>62</sup> The principal precedent here, however, is *Davis v. Bandemer*,<sup>63</sup> decided in 1986, in which the three-judge district court below had struck down Indiana’s districting plan for its state legislature as a partisan (Republican) gerrymander. There was no Opinion of the Court,<sup>64</sup> its members splitting four-three-two. In the most straightforward opinion, Justice Powell, writing for himself and Justice Stevens,<sup>65</sup> strongly (and in my opinion convincingly) supported the lower court’s reasoning and voted to affirm.

The positions of the other two opinions, each of which supported reversal, are considerably more contorted, but neither supports the view that partisan gerrymandering is constitutionally innocent. In an opinion blending rhetoric that even by 1986 was deservedly obsolete with a perceptive analysis sounding in political safeguards, Justice O’Connor — for herself and Chief Justice Burger and Justice Rehnquist — took the position that the case presented a “nonjusticiable political question”<sup>66</sup> that the Court should stay away from. On the one hand, she reprised the warnings of the 1960s, from the likes of Felix Frankfurter and Alexander Bickel, that electoral disputes were a treacherous thicket the Court should stay out of.<sup>67</sup> By 1986, however, such alarms had generally been consigned to the dustbin of history: to take only the most relevant comparison, the combination of *Baker v. Carr* and *Reynolds v. Sims* was

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cited five opinions purportedly supporting the constitutionality of partisan gerrymandering, 526 U.S. at 551, only one of which, Justice O’Connor’s three-person opinion in *Bush v. Vera*, 517 U.S. 952, 968 (1996), actually did.

61. 377 U.S. 533, 578-79 (1964). *See also id.* at 580-81 (adherence to political subdivision boundaries calculated to “deter the possibilities of gerrymandering”). As of the decision in *Reynolds*, one person/one vote could indeed go some distance toward preventing partisan gerrymanders, but not any more, given the development of computers. Note 86 *infra*.

62. 412 U.S. 735, 751 (1973) (emphasis added).

63. 478 U.S. 109 (1986).

64. A majority of the justices concurred only in that section of Justice White’s opinion concluding that the case was justiciable. *See id.* at 113.

65. In light of furor over *Bush v. Gore*, which furor is certainly justified on a number of grounds, it seems worth noting that Justices Powell and Stevens were Republicans, the author of the plurality opinion, Justice White, a Democrat. (And while the entire majority in *Bush* were indeed Republicans, two of the four dissenters, Stevens and Souter, were as well. To counter that their votes prove they are “really Democrats” is transparently circular).

66. 478 U.S. at 144.

67. Chief Justice Burger’s concurrence, less than a page in length — he also joined Justice O’Connor’s opinion — is entirely to this effect.

conventionally counted among the Court's greatest successes, strengthening rather than weakening its institutional position.<sup>68</sup> (I would add that such non-interventionist rhetoric renders the votes of O'Connor and Rehnquist in *Bush v. Gore* incomprehensible, if it did not seem to render them all too comprehensible).

Justice O'Connor's other ground for saying the Court should have stayed out of *Bandemer* made considerably more sense. Focusing here on the only genuinely intelligible branch of the political question doctrine,<sup>69</sup> that the Court need not police those constitutional violations that the political process can be counted on to control, Justice O'Connor, drawing on her experience as a state legislator, observed that if the political party that is dominant in the legislature tries to grab as many districts as it can, it will have to make its projected margins of victory so thin that it risks losing them all: partisan self-interest will therefore counsel settling for a limited number of truly safe districts, which necessarily will increase the number of districts that are either competitive or safe for the other party.<sup>70</sup> But whatever the relative strength of O'Connor's two grounds, neither of them carries any implication that partisan gerrymandering is constitutionally innocent: the former argues simply that the courts should not get into the business of policing such violations, the latter that they need not (and thus, it seems fair to infer, they should not).

Justice White's opinion, for himself and Justices Brennan, Marshall, and Blackmun, reached a conclusion with identical implications for the question involved in *Cromartie*, albeit by a different route. First, it said unequivocally that allegations of unconstitutional partisan gerrymandering are justiciable — indeed this was the only proposition that garnered a majority in *Bandemer*<sup>71</sup> — and obviously there is no point in holding a claim justiciable if what it alleges is legally innocent. However, it went on to say that the courts should not invalidate partisan gerrymanders unless there has been a showing of “consistent [long-term] degradation” of the political process. As a holding on the merits this would have been incomprehensible: violations are violations whether

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68. See sources cited JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 120-21 (1980). In an earlier discussion of Justice O'Connor's *Bandemer* opinion I went overboard in the silk purse department, essentially pretending that this aspect of it wasn't there. Ely, *supra* note 8, at 617-18. (My suggestion that she may have meant to leave open the possibility that third parties could bring such claims, *id.*, also seems, on rereading, the result of wishful thinking).

69. See JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 55-56 (1993).

70. See, e.g., BRUCE E. CAIN, *THE REAPPORTIONMENT PUZZLE* 147-54 (1984); Ely, *supra* note 8, at 617-18.

71. See *supra* note 64.

their effects are long- or short-term.<sup>72</sup> It too can thus intelligibly be rationalized only as rooted in considerations of prudent judicial intervention, something along the lines of “True, partisan gerrymandering is a constitutional violation, but without proof of serious long-term effect, it is one that courts should refrain from policing, because given only transient facts it will resist confident judicial evaluation and thus risk unnecessary friction with state legislatures, and deprive those legislatures of the opportunity — which given the balance of our two-party system is not unlikely to be realized — to rectify (or at least even out) the situation over time.” How much sense this makes is not relevant to our evaluation of *Cromartie*’s obliviousness to precedent: what *is* relevant is that there is nothing in Justice White’s opinion (or the others) that suggests that partisan gerrymandering is constitutional. Indeed, Justice White indicated that his test would withhold judicial relief only in *de minimus* cases.<sup>73</sup> This was a poor and possibly disingenuous prediction, but it certainly negates any possible inference that he meant to be declaring partisan gerrymandering constitutionally innocent.<sup>74</sup>

More important than precedent is the sense of the matter. A central theme of our Constitution is the preclusion of self-dealing maneuvers on the part of incumbents (other than by the pursuit of constituent preferences) to perpetuate their incumbency or otherwise promote the fortunes of their political party.<sup>75</sup> As I have argued at length elsewhere,<sup>76</sup> partisan gerrymandering is more clearly unconstitutional than pro-minority racial gerrymandering: whether or not the former should form the basis of a cause of action, it certainly should not be invocable as a defense to, or “innocent” explanation of, what appears to be the latter.

### III. THE ASSUMED LEGITIMACY OF RACIAL STEREOTYPES

When I was a lad I drafted an opinion for Chief Justice Warren striking down a congressional statute as a bill of attainder.<sup>77</sup> While it was circulating, Justice Tom Clark (who predictably ended up dissenting) stopped me in the hall to inquire, “A bill of attainder! What on earth is a bill of attainder?” I responded that he ought to know what a

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72. As Justice Powell’s dissent demonstrates, Justice White’s halting suggestion, that his test is somehow derived from the Court’s decisions respecting racial discrimination, is simply incorrect. 478 U.S. at 171-72 n.10.

73. *Id.* at 134.

74. Of course the *Cromartie* Court could have overruled these prior cases, but it didn’t, and there is not in its opinion a phrase devoted to undercutting the argument that partisan gerrymanders are unconstitutional, simply an assertion that they aren’t.

75. See, e.g., Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491 (1997); ELY, *supra* note 68.

76. Ely, *supra* note 8.

77. *United States v. Brown*, 381 U.S. 437 (1965).



bill of attainder was, as he had probably written more opinions than anyone else rejecting bill of attainder claims. He responded, "True, but remember what my opinions said: 'It is also argued that this is a bill of attainder. It is not.'" Something like that happened in *Cromartie*. Justice Thomas, dissenting, observed that "[i]t is not a defense that the legislature merely may have drawn the district based on the stereotype that blacks are reliable Democratic voters."<sup>78</sup> He did not elaborate further, conceivably chastened by Justice Breyer's peremptory dismissal (also without elaboration) of the point: the question "is not, as the dissent contends . . . whether a legislature may defend its districting decisions based on a 'stereotype' about African-American voting behavior."<sup>79</sup> Except that *is* the question: Breyer's only hope of rescuing the racial choices involved in this case must, and does, rely on the possibility that the districters were relying on the stereotype that blacks vote Democratic.<sup>80</sup>

Of course the law ordinarily proceeds by stereotypes — "optometrists are better qualified than opticians to replace eyeglass lenses"<sup>81</sup> and so forth. However, and this is central to the past half century's constitutional development, some stereotypes are impermissible, at least where a reasonably accurate alternative classification is available. The paradigm example, of course, has been race. Once in a very long while the government can select on the basis of race, when no alternative classification can come nearly as close to serving the state interest in question. (The only examples that spring readily to mind are the selection of blacks to appear in a police lineup with a black suspect, and the sending of black undercover officers to a black neighborhood).<sup>82</sup> Where, however, an alternative principle or method of selection will do a decent job, it must be used:<sup>83</sup> racial shorthand is forbidden. If you're thinking, "Yeah, yeah, but *here* the stereotype is accurate: most blacks *do* vote Democratic," think again. A substantial majority of brain surgeons are white, world class sprinters black, yet we would not countenance for a nanosecond a racial principle of selection for V.A. hospital operating

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78. 121 S.Ct. at 1475.

79. *Id.* at 1466.

80. See text at notes 33-34, 58-59 *supra*.

81. *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). See generally JOHN HART ELY, ON CONSTITUTIONAL GROUND 269-72 (1996); ELY, *supra* note 68, at 155-56.

82. Or, of course, whites (or whatever) where the suspect or neighborhood in question is white (or whatever). No, it won't necessarily even out: in many cities minority neighborhoods are more dangerous. (I am also advised that the separate but equal doctrine is in disfavor).

83. Concerning racially specific affirmative action, it is true that an alternative selection system could do a much better job of approximating "disadvantage," but obviously not in achieving racial diversity, which (at least in certain contexts) has many benefits, including the reduction of race prejudice.

rooms or the U.S. Olympic team, and instead would require a more individualized selection system.<sup>84</sup>

You will recall that one ground on which Justice Breyer criticized the testimony of the expert on whom the court below had relied was that he had noted that the districters often selected for inclusion predominantly black neighborhoods in preference to neighborhoods of predominantly Democratic registration: everyone knows, Breyer observed, that registered Democrats do not always vote Democratic. In other words, don't use a nonracial stereotype when a racial stereotype will do the job. This is the exact opposite of what *Brown v. Board of Education* and its progeny meant to teach us.

### CONCLUSION

I'm optimistic enough to suppose that the Court is unlikely to export its approval of racial stereotyping outside the voting area.<sup>85</sup> However, I don't see how in light of *Cromartie* it can again, at least for quite a long time, entertain a complaint of political gerrymandering, a practice it made a virtual sacrament. And that is serious: given the capabilities of computers, a green light for partisan gerrymandering can easily undo the good that the Warren Court thought (correctly in a those pre-computer days)<sup>86</sup> its reapportionment decisions would accomplish. Give a latter-day Elbridge Gerry or Boss Tweed a modern computer, and one person/one vote will seem a minor annoyance.<sup>87</sup> If the Court was bent on approving District 12, it would have done considerably less damage to our constitutional system had it straightforwardly approved pro-minority racial gerrymandering.

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84. Of course we do, and for that matter must, rely on stereotypes all the time, even as we recognize their imperfection — doctors with certain advanced training, or years of experience, are likely to be more skillful brain surgeons than others; those who have bettered a certain time in an NCAA-sanctioned competition within the past year are more likely than others to prevail in the Olympics next summer — but not racial stereotypes.

85. Of course such a limitation makes no imaginable sense: “to the extent that race is used as a proxy for political characteristics, a racial stereotype requiring strict scrutiny is in operation.” *Bush v. Vera*, 517 U.S. 952, 968 (1996) (O'Connor, J.). I suppose we should hope it is imposed nonetheless.

86. Okay, early computer days. To the extent anyone was thinking about the connection, computers were somewhat naively regarded as instruments to eliminate, rather than facilitate, gerrymanders. Curtis C. Harris, Jr., *A Scientific Method of Districting*, 9 BEHAV. SCI. 219 (1964); James B. Weaver & Sidney W. Hess, *A Procedure for Nonpartisan Districting: Development of Computer Techniques*, 73 YALE L.J. 288 (1963); William Vickrey, *On the Prevention of Gerrymandering*, 76 POL. SCI. Q. 105 (1961). See generally MONMONIER, *supra* note 4, ch. 8.

87. E.g., *id.* at 30; Samuel Issacharoff, *Supreme Court Destabilization of Single-Member Districts*, 26 U. CHI. LEGAL F. 205, 214 (1995).

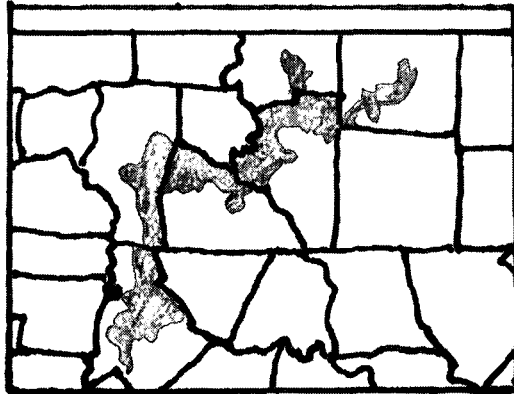


FIGURE 1  
12TH DISTRICT IN 1997 PLAN

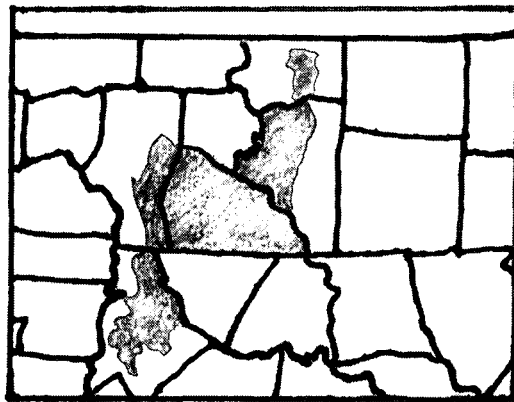


FIGURE 2  
12TH DISTRICT IN 1998 PLAN