NEW MEXICO LAW REVIEW

Volume 32
Issue 3 *Summer 2002*

Summer 2002

Redistricting: Easley v. Cromartie, 532 U.S. 234 (2001): Race-Based Redistricting and Unequal Protection

Wade L. Jackson

REDISTRICTING: Easley v. Cromartie, 532 U.S. 234 (2001): Race-Based Redistricting and Unequal Protection

WADE L. JACKSON*

INTRODUCTION

In *Easley v. Cromartie*,[1] the United States Supreme Court put an end to a nearly decade-long battle over North Carolina's Twelfth Congressional District.[2] This bitter litigation began shortly after the district was redrawn following the 1990 decennial census.[3] In that decade of litigation, the Supreme Court reversed lower court decisions four times,[4] three by a five-to-four vote.[5]

In the final suit, analyzed herein, the Court held that the U.S. District Court's finding that race, rather than politics, had been the predominant factor in drawing the district was clearly erroneous, and therefore reversed.[6] In doing so, the decision created a new test for plaintiffs who challenge redistricting plans[7] and signaled a shift in the direction the substantive law of redistricting had been traveling in the previous decade.

This Casenote will describe the background and procedural history of the *Easley* decision, analyze its reasoning, and explain its implications generally and for New Mexico in particular following the resolution of this state's redistricting process, some of which took place in court. It will describe how the Court ignored its role as an appellate court to undertake its own fact finding; how the Court, upon doing so, either mistook or ignored the bulk of the evidence; how the Court went about

---

* Class of 2003, University of New Mexico School of Law. The author would like to acknowledge with sincere gratitude and heartfelt thanks several people without whom this Note would not have been possible: Pat Rogers, Esq.; Duncan Scott, Esq.; Mickey Barnett, Esq.; Sen. Rod Adair; Rep. Joe Thompson, Esq.; Jay McCleskey; and Steve Plante. Their assistance, advice, and example were indispensable, but nothing when compared to their friendship.

1. 532 U.S. 234 (2001). Pursuant to Supreme Court Rule 35.3, Governor Michael F. Easley was substituted as a party defendant for former Governor James B. Hunt, Jr., upon the former's inauguration in January 2001. The case name was therefore changed from Hunt v. Cromartie to Easley v. Cromartie.

2. *See infra* Statement of the Case.

3. Shaw v. Barr, 808 F. Supp. 461 (E.D. N.C. 1992), was filed less than two months after the first challenged redistricting plan, the second plan enacted by the legislature, was enacted by the North Carolina General Assembly on January 24, 1992. The first plan enacted by the legislature failed to receive necessary pre-clearance of the Assistant Attorney General for the Civil Rights Division. *Id.* at 463. *See also* Letter from John R. Dunne, Assistant Attorney General, Civil Rights Division, to Tiare B. Smiley, Special Deputy Attorney General, State of North Carolina (Dec. 18, 1991).

Jurisdictions are placed under Department of Justice supervision for violations of the Voting Rights Act's prohibition on racial discrimination in voting practices. 42 U.S.C. § 1973(c) (1982). The redistricting process is deemed a voting practice for the purposes of the Act. *Id.* Such jurisdictions must submit redistricting plans to the Civil Rights Division of the Department of Justice before they are enacted into law. *Id.*

The Assistant Attorney General for the Civil Rights Division and his staff will then examine the plan for legal defects such as racial discrimination and either grant pre-clearance, in which case the plan may be enacted into law, or interpose official objection, in which case the legislature must remedy the defects before the plan can become law. *Id.* The grant of Department of Justice pre-clearance does not, however, serve to insulate a redistricting plan from legal challenges. *Id. See also infra* note 49.

4. Easley v. Cromartie, 532 U.S. 234 (2001); Hunt v. Cromartie, 526 U.S. 541 (1999); Shaw v. Hunt, 517 U.S. 899 (1996); Shaw v. Reno, 509 U.S. 630 (1993).

5. *Easley*, 532 U.S. at 234; *Shaw v. Hunt*, 517 U.S. at 899; *Shaw v. Reno*, 509 U.S. at 630.

6. *Easley*, 532 U.S. at 237.

7. *Id.* at 258.

making new law in derogation of its Equal Protections jurisprudence; and how Justice O'Connor changed positions on this issue and thereby determined the outcome of this case. Finally, it will describe how the Court shirked its duty to act as the legal system's moral compass and set this nation's race relations back a generation.

HISTORICAL BACKGROUND

The Census and Redistricting

Article I, Section 2 of the United States Constitution mandates that the House of Representatives be apportioned according to population and that each state have at least one representative.[8] The Census Bureau of the Department of Commerce conducts a nationwide census every ten years, and the 385 popularly apportioned congressional seats must be reapportioned among the states according to population shifts that have occurred in the previous decade.[9] Reapportionment refers to the division of these seats among the states according to population and is often used in place of the term "redistricting."[10]

Both congressional and state legislative districts must be redrawn to account for population shifts.[11] With rare exceptions, the number of seats in a state legislature does not change, and those seats are therefore not reapportioned, but merely redrawn.[12] Redistricting refers to the process of drawing the geographic boundaries of the new districts following the census, be they congressional, legislative, or those of some other body.[13] Only after congressional seats have been reapportioned among the states do the states begin the process of redistricting.[14] But, by the same token, until the districts are redrawn, the process of reapportionment is not completed.[15]

Numerous considerations, including many political factors, go into redistricting decisions. These decisions, whether made by legislatures or redistricting commissions,[16] often determine the fate of legislators' political futures, and can, and indeed have, ended political careers altogether.[17] Redistricting is arguably the single

---

8. U.S. CONST. art. I, § 2.

9. There are 435 seats in the U.S. House of Representatives. 2 U.S.C. § 2c. Each of the fifty states is given one seat and the remaining 385 are apportioned according to population. U.S. CONST. art. I, § 2.

10. *See* 2 U.S.C. § 2a (differentiating between "reapportionment" and "redistricting").

11. Wesberry v. Sanders, 376 U.S. 1 (1964); Reynolds v. Sims, 377 U.S. 533 (1964).

12. New Mexico, like most states, has constitutional provisions defining the number of seats in each house of its legislature. N.M. CONST. art. IV, § 3. Those numbers may therefore be changed only by constitutional amendment. *Id.*

13. *See* 2 U.S.C. § 2a (differentiating between "reapportionment" and "redistricting").

14. 2 U.S.C. § 2c.

15. *See id.*

16. At present, the task of redistricting still falls to the legislature in the majority of states, including New Mexico. N.M. CONST. art. IV, § 3. However, several states have created redistricting commissions, with far fewer members, to undertake the redrawing of districts. *See, e.g.*, ARIZ. CONST. art. IV, Part 2, § 3; CONN. CONST. art. 3, § 6; N.J. CONST. art. II, § 2.

17. Republican Sen. Steve Stoddard, a resident of Los Alamos, represented that entire county prior to the 1990 redistricting. N.M. STAT. ANN. §§ 2-8B-1 to 2-8B-51 (repealed 1992). The Democrat-controlled legislature redrew the Senate districts so that Los Alamos, previously represented by a single, majority-Republican district, was divided among three majority-Democrat districts, in none of which could a Republican be elected. 1991 Senate Redistricting Act, N.M. STAT. ANN. §§ 2-8C-1 to 2-8C-49.

most politically heated and contentious issue that state legislatures face; however, it is a power that legislatures guard closely. Following the ratification of the Seventeenth Amendment,[18] which stripped state legislatures of the power to elect U.S. Senators and mandated their popular election statewide, redistricting remains a check against federal power by giving state legislatures a voice in the election of members of Congress.

Redistricting is governed by a long and complex history of case law,[19] as well as several general requirements for legislative districts.[20] First, districts must be of equal population.[21] The purpose of redrawing districts is, after all, to account for population shifts in the previous decade and to ensure that each district represents an equal number of people according to the census.

The first principle a newly-drawn district must meet, equal population,[22] has different definitions in different contexts.[23] The Supreme Court has held that the requirement that congressional districts must be of equal population "as nearly as

---

18. The Seventeenth Amendment was ratified in 1913 as a plank of the Progressive Movement. *See, e.g.*, Todd J. Zywicki, *Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment*, 73 OR. L. REV. 1007, 1015 (1994).

19. *See, e.g.*, Lawyer v. Dept. of Justice, 521 U.S. 567 (1997); Abrams v. Johnson, 521 U.S. 74 (1997); Reno v. Bossier Parish Sch. Bd., 520 U.S. 471 (1997); Bush v. Vera, 517 U.S. 952 (1996) (plurality opinion); Shaw v. Hunt, 517 U.S. 899 (1996); Miller v. Johnson, 515 U.S. 900 (1995); Johnson v. De Grandy, 512 U.S. 997 (1994); Shaw v. Reno, 509 U.S. 630 (1993); Growe v. Emison, 507 U.S. 25 (1993); Thornburg v. Gingles, 478 U.S. 30 (1986); Beer v. United States, 425 U.S. 130 (1976); Wesberry v. Sanders, 376 U.S. 1 (1964).

20. Federal courts have long considered redistricting criteria to be state, not federal, policy choices and have refused to establish any constitutional standards regarding contiguity, compactness, communities of interest, jurisdictional integrity, cores of existing districts, or incumbent protection. *See* Carstens v. Lamm, 543 F. Supp. 68 (D. Colo. 1982). The requirement that districts be of equal population is the exception. *Wesberry*, 376 U.S. at 18.

21. *Wesberry*, 376 U.S. at 7-8 ("We hold that, construed in its historical context, the command of Art. 1, § 2 [of the United States Constitution], that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's.").

The population of districts in different states may differ, due to differences in total population among the states; however, each district in a single state must be of equal population. *Id.* at 8. Following the 2000 Census, the ideal population of New Mexico's congressional districts was 606,349. Census 2000. *See also infra* note 29.

22. *Wesberry*, 376 U.S. at 7-8.

23. This first, seemingly simple, requirement raises one of the more complex and controversial issues in political demography. The equal population requirement to which districts are held is measured by the total population of the district. *Id.* at 18.

Other measures are used, however, in other contexts. For example, with regard to the requirement of not diluting the voting strength of a racial or ethnic minority, many minority groups will argue that they will not be able to elect the minority candidate of their choice unless a majority of its voting-age population, or sixty-five percent of its total population, is minority. *See infra* note 280; United Jewish Org., Inc. v. Carey, 430 U.S. 144, 152 (1977); *see generally* Dr. Henry Flores, Ph.D., *Between a Rock and a Hard Place: Texas Latinos and Redistricting in 2001*, 6 TEX. HISP. J.L. & POL'Y 137, 144 (2001).

This difference between the two measures highlights the difference between representational equality and electoral equality. Districts must be of equal population to ensure electoral equality, that every person's vote is of the same weight as every other's. *Wesberry*, 376 U.S. at 18. Drawing districts with an equal voting-age population would ensure electoral equality.

Even those constituents who do not vote must still be represented, however, and must be given a voice in the representative branch of government through their elected legislator. For example, no one would argue that children should not be represented by their congressperson or state legislator, but no one younger than eighteen is allowed to vote. *See* Jane Rutherford, *One Child, One Vote: Proxies for Parents*, 82 MINN. L. REV. 1463 (1998). For this reason, districts must be of equal population, as measured by the district's total population, to ensure representational equality, that every person, regardless of age or whether or not they vote, is represented equally in the state or national legislative body. Garza v. County of Los Angeles, 918 F.2d 763, 774-75 (1990), *cert. denied*, 498 U.S. 1028 (1991); *Reynolds*, 377 U.S. at 560-61.

practicable"[24] means that if *any* population deviance could have been avoided through a good-faith effort to do so, it is unjustifiable.[25] In other words, equal means equal, and most congressional districts vary by less than the population of a single precinct, usually not more than a few hundred people.[26]

State legislative districts are held to a different standard,[27] usually defined by the state itself.[28] New Mexico's relatively sparse population is spread across one of the nation's largest states, making equal population a nearly impossible goal without districts of unmanageable size and unwieldy shape. As such, New Mexico's legislative districts must be within five percent of the ideal population of a district.[29] This also keeps communities of interest intact rather than being split to achieve popular equality.[30]

Second, districts must be contiguous.[31] A district cannot be made up of more than one separate piece. One must be able to trace the outline of a district without lifting the pencil from the paper.

Third, districts must be compact.[32] Ideally, a district should be a circle, rectangle, or similarly simple geometric shape. It should not contain arms that stretch across many miles, as did the infamous Gerrymander itself.[33] Many rural districts, however,

---

24. *Wesberry*, 376 U.S. at 7-8. *See also Reynolds*, 377 U.S. at 577 ("[T]he Equal Protection Clause requires that a state make an honest and good faith effort to construct districts in both houses of its legislature, as nearly of equal population as practicable.").

25. Karcher v. Daggett, 462 U.S. 725 (1983).

26. *See* Jepsen v. Vigil-Giron, No. D-101-CV-200102177 (2001). The district varying most from the ideal population in the court-ordered plan for New Mexico's congressional districts is the Third, which is 109 people smaller than the ideal population. *Id.* The First District is fifty-one people larger than the ideal population. *Id.* The Second District is fifty-seven people larger than the ideal population. *Id.*

27. Mahan v. Howell, 410 U.S. 316 (1973) ("Thus, whereas population alone has been the sole criterion of constitutionality in congressional redistricting under Art. I, § 2 [of the United States Constitution], broader latitude has been afforded the States under the Equal Protection Clause in state legislative redistricting because of the considerations enumerated in Reynolds v. Sims.").

28. White v. Regester, 412 U.S. 755 (1973); Gaffney v. Cummings, 412 U.S. 735 (1973); and Mahan v. Howell, 410 U.S. 316 (1973), have established a three-tier analysis for the deviation of legislative districts. Generally, districts that deviate from the ideal population of a district by less that ten percent do not establish a prima facie case without evidence that such deviation has caused invidious discrimination. *White*, 412 U.S. at 763. Deviations under 16.4 percent present a prima facie case that must be justified by the state but have been upheld when supported by a rational state policy. *Gaffney*, 412 U.S. at 742; *Mahan* 410 U.S. at 328. Only two such policies have been recognized by the Court: the preservation of political subdivision lines, *Mahan*, 410 U.S. at 325, and the "political fairness" doctrine articulated in *Gaffney*, 412 U.S. at 743. Deviations of more than 16.4 percent have not been upheld by the Court.

29. 2001 N.M. Laws ch. 220. The ideal population of a district is calculated by dividing the total population of a state by the number of districts into which it is to be divided. The maximum deviation of a redistricting plan refers to the absolute sum of the deviations from the population of the ideal district of the largest and smallest districts in that plan.

30. *See infra* pages 507-08.

31. No federal authority, either statutory or case law, exists for the contiguity requirement. *See* Carstens v. Lamm, 543 F.Supp. 68 (D. Colo. 1982); *see also supra* note 20. It is, however, almost universally imposed by the state undertaking the redistricting task. *See, e.g., Miller,* 515 U.S. at 906. It is also considered one of the traditional, race-neutral districting principles against which Equal Protection violations are measured. Easley v. Cromartie, 532 U.S. 234, 258 (2001).

32. No federal authority, either statutory or case law, exists for the compactness requirement. *See* Carstens v. Lamm, 543 F. Supp. 68 (D. Colo. 1982); *see also supra* note 20. It is, however, considered one of the traditional, race-neutral districting principles against which Equal Protection violations are measured. Easley v. Cromartie, 532 U.S. 234, 258 (2001); Bush v. Vera, 517 U.S. 952, 954 (1996).

33. After representing Massachusetts in the first two congresses, statesman Elbridge Gerry (1744-1814) was elected governor of that state. *See generally* 12 ENCYCLOPEDIA AMERICANA, 701-02 (2001). In 1812, during his

must reach into urban areas to pick up population in order to meet the equal population requirement, causing districts to take on non-compact shapes. Districts also take on strange shapes because voting precincts have strange shapes. Precincts, however, are drawn by county officials, not state legislatures.[34] While there are measures of compactness, generally complex mathematical formulae, there is no bright line legal test of whether a district is compact.

Finally, districts should respect communities of interest.[35] Districts, whether congressional or legislative, should keep together communities that share racial, ethnic, cultural, economic, social or other characteristics.[36] This often includes respecting other political boundaries, such as county lines and local school board boundaries, which is sometimes recognized as a separate criteria in and of itself.[37] While generally recognized as a redistricting requirement,[38] nearly anything can be defined as a community of interest. This concept can include two contradictory "communities," such as rural voters, which would include both the arch-conservative oil and gas and cattle ranching groups on New Mexico's east side as well as the reliably Democratic Native American areas in the northwestern "checkerboard" part of the state. Racial and ethnic groups can also be said to belong to a single community of interest deserving of a legislative district, even when drawing a legislative district for those communities might constitute a racial gerrymander in violation of the Equal Protection clause[39] or create a district that does not comply with equal population requirements.[40]

Several of these criteria will at times be contradictory. For example, states have protected incumbent legislators and maintained political balance, relying on respect for communities and jurisdictional lines in an attempt to explain their failure to draw compact or contiguous districts.[41]

---

second term, his party, the Democratic-Republicans, re-drew the state's congressional districts to maintain control of the state's delegation, employing tactics known today as gerrymandering. *Id.*

The most unusual of these districts resembled, at least to the political cartoonist of the *Boston Weekly Messenger*, a salamander. *Id.* The cartoonist added hands, feet and a head to a drawing of the district, and combined its creator's name, Gerry, with the animal it represented, a salamander, to create the caption "The Gerry-mander." *Id.* Gerry lost his next re-election bid but was elected Vice President of the United States in James Madison's second administration. *Id.*

34. Interview with Hon. Rod Adair, New Mexico State Senator (R-33) and President, New Mexico Demographic Research, in Albuquerque, N.M. (Feb. 16, 2002) [hereinafter Adair Interview].

35. Respect for communities of interest is considered one of the traditional, race-neutral districting principles against which Equal Protection violations are measured. Easley v. Cromartie, 532 U.S. 234, 258 (2001); *Miller*, 515 U.S. at 916.

36. *See, e.g., Miller*, 515 U.S. at 916.

37. *Id.*

38. *See, e.g.*, Hunt v. Cromartie, 526 U.S. 541, 547 (1999); Abrams v. Johnson, 521 U.S. 74, 100 (1997); Bush v. Vera, 517 U.S. 972, 977 (1996); Shaw v. Hunt, 517 U.S. 899, 938 (1996); *Miller*, 515 U.S. at 919 (1995).

39. *See Miller*, 515 U.S. at 900.

40. *See* Shaw v. Reno, 509 U.S. 630 (1993).

41. Hunt v. Cromartie, 526 U.S. 541 (1999); Abrams v. Johnson, 521 U.S. 74 (1997); Bush v. Vera, 517 U.S. 952 (1996).

In addition to these requirements, prior to its Special Session on redistricting,[42] the New Mexico State Legislature imposed additional requirements on the districts it would draw.[43] All legislative districts were to be single-member districts,[44] and no district was to split a precinct.[45]

This is to say nothing of the political measures that are considered at every step of the process. Each district is analyzed for both voter registration and voter performance, and the better part of the debate over redistricting plans inevitably focuses on a district's voter performance.[46] As the Supreme Court noted in the *Easley* decision, voter registration is a poor indicator of voter performance, of which there are several measures.[47]

Redistricting requirements with regard to race are even more complex. For example, Section 2 of the Voting Rights Act of 1965[48] states that new districts cannot dilute the voting strength of racial, ethnic, or language minorities.[49] That

---

42. The New Mexico Legislature, a part-time "citizen legislature," meets in regular session for thirty days in even-numbered years and for sixty days in odd-numbered years. N.M. CONST. art. IV, § 5 A. The thirty-day sessions are dedicated solely to the budget and those additional matters that the governor approves in advance. N.M. CONST. art. IV, § 5 B. When necessary, the Legislature will convene special sessions to address extraordinary topics, including redistricting. N.M. CONST. art. IV, § 6.

43. 2001 N.M. Laws ch. 220.

44. *Id.* As its name implies, a single-member district is one represented by only one legislator. Conversely, multi-member districts are represented by more than one member. For example, Arizona's lower house has twice as many members as its upper house, and two house districts are "nested" in each senate district. *See* ARIZ. CONST. art. IV, part 2, § 1. In other words, two house districts are drawn within a single senate district, dividing its population equally, and together have the same outer boundary as the senate district. *Id.* The two house members together represent the entire senate district, making the senate district a multi-member house district. *Id.*

45. 2001 N.M. Laws ch. 220.

46. Voter performance analyzes past election returns in order to predict future elections. Adair Interview, *supra* note 34. Different pollsters and demographers will use different formulae, which weight certain elections in greater or lesser proportion based upon a number of factors, including voter interest and the quantity of information voters receive on candidates. *Id.* Voter performance and voter behavior, the term used in the Supreme Court's opinion, will be used interchangeably in this Casenote.

47. Easley v. Cromartie, 532 U.S. 234, 244 (2001).

48. 42 U.S.C. § 1973.

49. Section 5 of the Voting Rights Act only applies to covered jurisdictions. *See supra* note 3. It requires that such jurisdictions be granted permission from either the Civil Rights Division of the Department of Justice, in the form of pre-clearance from the Assistant Attorney General for the Division, or the U.S. District Court for the District of Columbia, in the form of a declaratory judgment, to enact the proposed redistricting plan. 42 U.S.C. § 1973(c). In either case, the supervising authority must declare that, in its judgment, the submitted redistricting plan "does not have the purpose and will not have the effect of denying or abridging the right of any citizen of the United States to vote on account of race or color" or language minority. *Id.*

Because seeking pre-clearance from the Department of Justice is not a substitute for seeking a de novo proceeding in the district court and because it is generally faster and less expensive than doing so, most covered jurisdictions choose to seek pre-clearance. Following the 1982 amendments to the Voting Rights Act, 42 U.S.C. § 1973, the burden of proof in both the district court and before the Department of Justice is that the jurisdiction must show that redistricting plans do not retrogress the voting strength of racial, ethnic, or language minorities. Reno v. Bossier Parish Sch. Bd., 520 U.S. 471 (1997).

Section 2, on the other hand, applies to the entire country. 42 U.S.C. § 1973. The 1982 amendments to the Voting Rights Act were "designed to restore the legal standard that governed voting discrimination cases prior to the Supreme Court's decision in [City of Mobile v.] Bolden [, 446 U.S. 55 (1980)]." S. Rep. No. 97-417 at 15 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177. In *Bolden*, the Court decided that plaintiffs in constitutional vote dilution cases had to prove discriminatory intent. 466 U.S. at 66-67. This burden was often impossible to meet and severely limited the number of Section 2 challenges to redistricting plans following the 1980 census.

In 1982, Congress amended the Voting Rights Act to prohibit any "voting qualification or prerequisite to voting standard, practice, or procedure...which *results* in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color...." 42 U.S.C. § 1973(a) (emphasis added).

requirement must now be balanced with the requirement that race not be the predominant factor in drawing the district.[50] Put another way, race may, and sometimes must, be considered when drawing a district but may not subordinate traditional race-neutral districting principles, including those discussed above.

New Mexico History

The history of redistricting in New Mexico is short and uninvolved compared to other states, particularly those in the South. A single congressman represented New Mexico until 1942.[51] After the state received its second district, as a result of the 1940 Census, the two congressmen served at large.[52]

It was not until 1968, when the state finally began enforcing the Supreme Court's decision in *Baker v. Carr*,[53] that the state's members of Congress were elected from single-member districts.[54] New Mexico was granted its third congressional district following the 1980 Census.[55] In each of the three redistricting efforts prior to the current battle, Democrats controlled both houses of the state legislature and there was not only a Democratic governor, but the same Democratic governor: Bruce King.[56]

Following the 1980 Census, a group of Hispanic plaintiffs successfully challenged the legislative redistricting, alleging racial discrimination and the dilution of their voting strength.[57] The United States District Court for the District of New Mexico redrew portions of the redistricting plan itself to remedy the defects.[58] As a result, New Mexico was placed under Department of Justice supervision for the 1990 redistricting, meaning any plan passed by the legislature and signed by the governor must also be granted pre-clearance by the Department of Justice pursuant to Section 5 of the Voting Rights Act[59] before it was enacted.[60]

In 1991, the Department of Justice granted pre-clearance to the state house's redistricting plan but interposed an official objection to the state senate plan.[61] The legislature then met twice more in special session before agreeing to a plan that cured the Department of Justice's objections and was granted pre-clearance.[62]

---

50. Bush v. Vera, 517 U.S. 952 (1996) (plurality opinion); Miller v. Johnson, 515 U.S. 900 (1995). *See also Bush v. Vera*, 517 U.S. at 1002-1003 (Thomas, J., concurring in the judgment).

51. Congressional Quarterly, CONGRESSIONAL QUARTERLY'S GUIDE TO U.S. ELECTIONS, 930 (3d ed. 1994).

52. *Id.* at 1201-56.

53. 369 U.S. 186 (1962) (holding that a complaint alleging a violation of Equal Protection based upon malapportionment did not present a nonjusticiable political question).

54. CONGRESSIONAL QUARTERLY, *supra* note 51, at 1261.

55. *Id.* at 930.

56. While New Mexico prohibits the same governor from serving more than two consecutive terms, there is no limit to the total number of terms one may serve. N.M. CONST. art. 5, § 1, cl. 2.

57. Sanchez v. King, 550 F. Supp. 13 (D. N.M. 1982).

58. *Id.*

59. 42 U.S.C. § 1973(c).

60. *See supra* notes 3, 49, and accompanying text.

61. Letter from John R. Dunne, Assistant Attorney General, Civil Rights Division, to Sen. Manny Aragon, President Pro Tem, and Rep. Raymond Sanchez, Speaker, State of New Mexico (Dec. 10, 1991).

62. 1991 Senate Redistricting Act, N.M. Stat. Ann. §§ 2-8C-1 to -49.

STATEMENT OF THE CASE

In 1990, the Census Bureau of the United States Department of Commerce conducted its decennial census. North Carolina was awarded a twelfth congressional district as a result of its increased population throughout the previous decade, which was reflected in the Census.[63] After the reapportionment, the North Carolina General Assembly met to redistrict the state's congressional and legislative districts, as each state must do following each decennial census.[64]

North Carolina's legislature passed a redistricting plan that included one district with a voting-age population that was majority-African-American.[65] Due to its history of voting qualifications and prerequisites, North Carolina was required to obtain Department of Justice pre-clearance before enacting any redistricting legislation.[66]

The Assistant Attorney General for the Civil Rights Division interposed an objection to the plan,[67] pursuant to Section 5 of the Voting Rights Act,[68] however, because the plan "appear[ed] to minimize minority voting strength" in the southeastern part of the state and "chose not to give effect to black and Native-American voting strength" in that area.[69] The Assistant Attorney General's objection letter implied that a second majority-minority district should have been created.[70]

In response to its failure to obtain the requisite pre-clearance from the Department of Justice, the General Assembly enacted a second redistricting plan. The new plan created a majority-African-American Twelfth Congressional District, but the district was not in the southeastern part of the state, as suggested. It was instead drawn as "a thin band, sometimes no wider that Interstate Highway 85, some 160 miles long, snaking diagonally across piedmont North Carolina from Durham to Gastonia."[71] The new plan divided precincts, counties, and towns among two and three different districts.[72]

Anglo citizens and registered voters of Durham County filed suit for deprivation of their civil rights[73] against the U.S. Attorney General, the Assistant Attorney General for the Civil Rights Division, and various state officials and agencies.[74] The suit challenged the congressional redistricting plan adopted by the State on constitutional and statutory grounds and sought a preliminary injunction and a temporary restraining order enjoining the state from "taking any action in

---

63. *Shaw v. Barr*, 808 F. Supp. at 463.

64. *Id.*

65. *Id.*

66. 42 U.S.C. 1973(c). *See also supra* notes 3, 49, and accompanying text.

67. As an expression of his refusal to grant a plan pre-clearance, *see supra* notes 3 and 49, the Assistant Attorney General for the Civil Rights Division interposes an official objection to the plan to the appropriate state legislative officials. 42 U.S.C. § 1973(c).

68. 42 U.S.C. § 1973(c).

69. Letter from John R. Dunne, Assistant Attorney General, Civil Rights Division, to Tiare B. Smiley, Special Deputy Attorney General, State of North Carolina (Dec. 18, 1991).

70. *Id.*

71. *Shaw v. Barr*, 808 F. Supp. at 464.

72. *Id.*

73. 42 U.S.C. § 1983.

74. *Shaw v. Barr*, 808 F. Supp at 461-62.

preparation for primary or general elections for the U.S. House of Representatives."[75] It also sought a permanent injunction against implementation of the plan on the ground that it was unconstitutional.[76]

The federal defendants moved to dismiss the claim,[77] alleging lack of subject matter jurisdiction[78] and failure to state a claim upon which relief could be granted.[79] The State defendants moved to dismiss the claim,[80] alleging failure to state a claim upon which relief could be granted.[81] The United States District Court for the Eastern District of North Carolina met as a three-judge panel to hear the case.[82] The court, over a dissent, dismissed the suit against the federal defendants for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be granted.[83]

The court held that Section 14(b) of the Voting Rights Act[84] grants exclusive jurisdiction over a claim such as this one to the United States District Court for the District of Columbia.[85] The court further held that a challenge to Section 5 of the Voting Rights Act[86] involves a challenge to the Attorney General's discretionary power, and as such the suit failed to state a cognizable federal claim.[87]

The trial court, again over a dissent, further dismissed the suit against the state defendants for failure to state a claim upon which relief could be granted.[88] The court held that the plaintiff's claim, as the trial court construed it, was "a novel claim in voting rights jurisprudence...and we decline to recognize the individual right asserted under it."[89]

The suit was appealed directly to the U.S. Supreme Court.[90] The Supreme Court, by a five-to-four vote, affirmed the dismissal of the suit against the federal defendants[91] but reversed the dismissal of the suit against the state defendants.[92] The Court held that North Carolina's congressional redistricting legislation, particularly the shape of the Twelfth Congressional District, was so extremely irregular on its face that it could rationally be viewed only as an effort to segregate the races for voting purposes.[93] Having drawn such a district without regard to traditional districting principles and without sufficiently compelling justification was sufficient

---

75. *Id.*
76. *Id.* at 463.
77. *Id.*
78. FED. R. CIV. P. 12(b)(1).
79. FED. R. CIV. P. 12(b)(6).
80. *Shaw v. Barr*, 808 F. Supp. at 463.
81. FED. R. CIV. P. 12(b)(6).
82. 28 U.S.C. § 2284 requires a three-judge district court to be convened for any suit challenging the constitutionality of a redistricting plan. 28 U.S.C. § 1253 allows for direct appeal to the Supreme Court of any suit required to be heard by a three-judge district court.
83. *Shaw v. Barr*, 808 F. Supp. at 467.
84. 42 U.S.C. § 1973.
85. *Shaw v. Barr*, 808 F. Supp. at 466.
86. 42 U.S.C. § 1973c.
87. *Shaw v. Barr*, 808 F. Supp. at 467.
88. *Id.* at 468.
89. *Id.*
90. *See supra* note 82.
91. Shaw v. Reno, 509 U.S. 630, 641 (1993).
92. *Id.* at 642.
93. *Id.* at 649.

to state a claim upon which relief could be granted under the Equal Protection Clause of the Fourteenth Amendment.[94]

On remand, the three-judge district court found for the defendants.[95] The court, with one judge concurring in part and dissenting in part, held that the plaintiffs had standing to maintain their Equal Protection claim.[96] It further held that the plan deliberately included one or more districts of a certain racial composition, making it a racial gerrymander, which, under the Court's ruling in *Shaw v. Reno*,[97] is subject to strict scrutiny.[98]

Nonetheless, the court found that the defendant state of North Carolina had a compelling interest in enacting a plan that brought its congressional redistricting scheme into compliance with the Voting Rights Act[99] and would therefore be given pre-clearance by the Department of Justice and passed into law.[100] The court also found that the challenged redistricting plan was narrowly tailored to serve its compelling interest. To wit, the plan did not create more majority-minority districts than were required to bring the plan into compliance with the Voting Rights Act,[101] allowing it to be granted pre-clearance,[102] and the African-American voting majorities in those districts were no greater than reasonably necessary to give the African-American communities an opportunity to elect the representatives of their choice.[103] The plan therefore survived strict scrutiny.[104]

The plaintiffs again appealed directly to the U.S. Supreme Court,[105] and the Court again reversed by a five-to-four vote.[106] The Court held that while voters who lived in an allegedly gerrymandered district did have standing to challenge the part of the redistricting scheme that defined the district in which they lived, voters who did not live in the challenged district and could not demonstrate that they had been assigned to the district in which they lived on the basis of race did not have standing.[107]

More significantly, the Court held that the challenged redistricting plan violated the Equal Protection clause of the Fourteenth Amendment.[108] The Court did not reach the issue of whether complying with the Voting Rights Act was indeed a compelling state interest. The Court found, however, that "creating an additional majority-black district was not required under a correct reading of [Section] 5 and that District 12, as drawn, is not a remedy narrowly tailored to the State's professed

---

94. *Id.*
95. Shaw v. Hunt, 861 F. Supp 408, 417 (E.D. N.C. 1994).
96. *Id.* at 425.
97. 509 U.S. 630 (1993) (holding a suit alleging that North Carolina's redistricting plan was so extremely irregular on its face that it could rationally be viewed only as an effort to segregate the races for the purposes of voting was sufficient to state a claim upon which relief could be granted under the Equal Protection clause of the Fourteenth Amendment).
98. *Shaw v. Hunt*, 861 F. Supp. at 429.
99. 42 U.S.C. § 1973.
100. *Shaw v. Hunt*, 861 F. Supp. at 437.
101. 42 U.S.C. § 1973.
102. *See Shaw v. Hunt*, 861 F. Supp. at 475.
103. *Id.*
104. *Id.*
105. *See supra* note 82.
106. Shaw v. Hunt, 517 U.S. 899 (1996).
107. *Id.* at 904.
108. *Id.* at 902.

interest in avoiding [Section] 2 liability."[109] The plan therefore failed the strict scrutiny test and violated the Equal Protection clause.[110]

Following the Supreme Court's ruling, the North Carolina General Assembly enacted a new redistricting plan. The three-judge District Court approved of the plan as a remedy for the previous constitutional violation.[111] The new Twelfth Congressional District was again challenged as an unconstitutional racial gerrymander by two of the original three plaintiffs along with four other residents of the new Twelfth Congressional District.[112]

The three-judge District Court granted the plaintiffs' motion for summary judgment at a hearing on the plaintiffs' motion for a preliminary injunction.[113] The court therefore granted the plaintiffs' request for a preliminary injunction and a permanent injunction, enjoining the defendants from conducting any elections under the new redistricting plan.[114]

Based presumably on the expertise it had gained in the previous litigation, the court quickly found "uncontroverted material facts" that the legislature had drawn the Twelfth District by collecting voting precincts with high racial, rather than political, identification by bypassing more heavily Democratic precincts to include more heavily African-American ones.[115] In doing so, the court found that the legislature had disregarded traditional districting criteria.[116] The court then denied the defendant's motion to stay its order.[117]

The District Court issued a scheduling order requiring the General Assembly to either submit a new congressional redistricting plan to the court and to the Department of Justice for Section 5 pre-clearance within one month or the court would assume responsibility for drawing an interim plan.[118] The legislature submitted a new redistricting plan, under which North Carolina conducted its 1998 congressional elections with the district court's approval.[119] The plan included a clause to the effect that, in the event the challenged plan was upheld on appeal to the Supreme Court, it would become law and the new plan would be null and void.[120]

Upon direct appeal of the district court's grant of summary judgment, the Supreme Court reversed.[121] The Court held that genuine issues of material fact existed, making summary judgment improper, and remanded for trial.[122] On remand, the three-judge district court, with one judge concurring in part and dissenting in

109. *Id.* at 911.
110. *Id.*
111. Shaw v. Hunt, No. 92-202-Civ-5-BR (E.D. N.C. June 9, 1997).
112. Cromartie v. Hunt, 34 F. Supp. 2d 1029, 1029 (E.D. N.C. 1998).
113. *Id.*
114. *Id.*
115. Cromartie v. Hunt, 4:96-CV-104-BO(3) (E.D. N.C. 1998).
116. *Id.*
117. *Cromartie v. Hunt*, 34 F. Supp. 2d at 1030.
118. Cromartie v. Hunt, 133 F. Supp. 2d 407, 410 (E.D. N.C. 2000).
119. 1998 N.C. Sess. Laws, ch. 2 (codified at N.C. Gen. Stat. § 163-201(a) (Supp. 1998)).
120. *Cromartie v. Hunt*, 133 F. Supp. 2d at 410.
121. Hunt v. Cromartie, 526 U.S. 541 (1999).
122. *Id.* at 552.

part, held that the First Congressional District was acceptable despite being adjusted to ensure that African-Americans were a slight majority.[123]

The court found that the Twelfth Congressional District, however, had been racially gerrymandered in violation of the Equal Protection clause of the Fourteenth Amendment.[124] The court held that race had been the predominant reason for the creation of the Twelfth District,[125] requiring strict scrutiny to be applied.[126] The district was not narrowly tailored to a compelling state interest, however, and was therefore an unconstitutional violation of Equal Protection.[127]

RATIONALE

The Supreme Court, in a five-to-four decision, reversed. It held that the district court's finding that race, rather than politics, was the predominant criterion in creating the Twelfth Congressional District was clearly erroneous.[128] Accordingly, due to a clause inserted in the 1998 redistricting plan that the North Carolina General Assembly submitted to the three-judge District Court as a remedy to the constitutional violations found in the 1992 redistricting plan, the 1998 plan, put in place for the 1998 congressional elections, was null and void, and the 1997 plan was reinstated.[129]

The Court held that it "cannot accept the District Court's findings as adequate,"[130] and that the findings were therefore clearly erroneous. The Court listed four instances of error[131] and then analyzed each in detail.[132]

First, the Court found the district court had used voter registration rather than voting behavior as its primary evidence for its conclusion that race was the predominant factor in drawing the district.[133] That evidence, the Court held, was inadequate to support the district court's findings.[134] The district court had found that in drawing the district the legislature had included the heavily African-American precincts but excluded many heavily Democratic precincts that had a higher Anglo population.[135] Many of these heavily Democratic precincts bordered the district and if included would have created a much more compact district.[136] The Supreme Court found, however, that the district court had used voter registration, as opposed to voting behavior, to determine that these precincts were "heavily

123. *Cromartie v. Hunt*, 133 F. Supp. 2d at 423.
124. *Id.* at 420.
125. *Id.*
126. Shaw v. Reno, 509 U.S. 630, 658 (1993).
127. *Cromartie v. Hunt*, 133 F. Supp. 2d at 420.
128. Easley v. Cromartie, 532 U.S. 234, 237 (2001).
129. *Cromartie v. Hunt*, 133 F. Supp. 2d at 410.
130. *Easley v. Cromartie*, 532 U.S. at 244.
131. *Id.*
132. *Id.* at 244-57.
133. *Id.* at 244.
134. *Id.*
135. *Cromartie v. Hunt*, 133 F. Supp. 2d at 420.
136. *Id.*

Democratic."[137] The Court held, "we previously found the same evidence inadequate because registration figures do not accurately predict preference at the polls."[138]

Second, the district court had relied on the testimony of the plaintiff-appellee's expert, Dr. Ronald Weber of the University of Wisconsin, Milwaukee, whose statements "simply do not provide significant additional support for the District Court's conclusion."[139] The Court then analyzed the testimony of Dr. Weber and determined that it provided, at best, only "minimal support for the District Court's conclusion that race predominantly underlay the legislature's districting decision."[140] Dr. Weber testified that the legislature made the Twelfth District more safely Democratic than it intended or needed by including heavily African-American precincts.[141] The Court rejected that argument, stating that the performance numbers Dr. Weber spoke of were "inherently uncertain"[142] and the voting performance greater than that necessary to constitute a safe district was therefore "too small to carry significant evidentiary weight."[143]

The Court then took issue with Dr. Weber's testimony that District Twelve included only some precincts with a high Democratic performance but nearly all precincts with an equally high percentage of African-Americans.[144] The Court wrote that the same precincts with a large African-American population, the precincts included in the district, were the most reliably Democratic precincts.[145] The Court reasoned that including those precincts could have been done for political, not racial, reasons.[146] The Court also questioned the district court's reliance on Dr. Weber's contention that a particular precinct in Mecklenburg County was split between districts for racial reasons.[147]

Finally, the Court accepted Dr. Weber's assertion, on which the district court relied, that the legislature could have created a safe Democratic district without including so many majority-African-American precincts.[148] However, the Court questioned whether these alternatives would have "satisfied the legislature's other nonracial political goals" while adhering to traditional districting principles.[149] Without such proof, the Court reasoned, alternative plans were not evidence of improper, race-based motive.[150]

The Court then went beyond the district court's opinion to examine the trial transcript of Dr. Weber's testimony in depth. It found that, as a whole, his testimony "further undercut Dr. Weber's conclusions."[151] For example, Dr. Weber was

137. *Easley v. Cromartie*, 532 U.S. at 244-45.
138. *Id.* at 245.
139. *Id.* at 244.
140. *Id.* at 250.
141. *Id.* at 246.
142. *Id.* at 247.
143. *Id.*
144. *Id.* at 247-48.
145. *Id.*
146. *Id.*
147. *Id.* at 248.
148. *Id.* at 249.
149. *Id.*
150. *Id.*
151. *Id.*

working under the incorrect impression that the legislature's map-drawing computers provided racial but not political data.[152] He also expressed a "disdain" for the process by which legislatures redistrict congressional seats.[153]

Third, the Court found that the district court summarily rejected the conclusions of the defendant-appellant's expert, Dr. David Peterson of the University of North Carolina at Chapel Hill, without rejecting the factual information he provided in support of his conclusions.[154] Those conclusions were contrary to those of Dr. Weber, upon which the district court had relied in making its decision.[155] Dr. Peterson first testified that African-American Democrats were more reliably Democratic voters than other voters registered as Democrats.[156] He then examined the precincts on both sides of the district's border and determined that the boundary was drawn based on politics, not race.[157] The Court clearly gave more weight to Dr. Peterson's testimony than did the district court.[158]

Fourth, the Court found that the district court had relied on two pieces of direct evidence that supported its conclusion.[159] The Supreme Court, however, discredited one, the testimony of a state senator before a legislative committee that the challenged plan satisfied a "need for 'racial and partisan' balance."[160] The Court found that the statement showed only that the legislature considered race along with other factors.[161] The second piece, an e-mail from the legislative staff member responsible for drafting districting plans to two state senators referencing moving the "Greensboro Black community into the 12th" District, was found to offer "some support for the District Court's conclusion."[162]

The Court then detailed several maps appended to the plaintiff-appellee's brief, which it argued showed support for the district court's conclusion.[163] The Court then, one-by-one, discredited the precinct changes suggested by the plaintiff-appellee to draw a more compact, less African-American district without harming the political goals of the legislature.[164] The Court found these maps refuted the conclusion that race, rather than politics, had been the predominant factor in creating the district.[165]

Finally, the Court established a new test for cases "such as this one where majority-minority districts (or the approximate equivalent) are at issue and where racial identification correlates highly with political affiliation."[166] In such cases, the Court held that the "party attacking the legislatively drawn boundaries must show

152. *Id.* at 249-50.
153. *Id.* at 250.
154. *Id.* at 244.
155. *Id.* at 251.
156. *Id.* at 252.
157. *Id.*
158. *See id.* at 251-53.
159. *Id.* at 253.
160. *Id.* at 253-54.
161. *Id.* at 253.
162. *Id.* at 254.
163. *Id.* at 254-57.
164. *Id.*
165. *Id.* at 244.
166. *Id.* at 258.

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."[167]

ANALYSIS

The Supreme Court committed four errors in deciding *Easley*. The first was procedural. The Court failed to properly apply the clearly erroneous standard of review and undertook its own fact-finding. The second was substantive. The Court ignored indisputable evidence of a predominantly racial motive. The third was jurisprudential. The Court overruled controlling precedent, reversed the trend of redistricting case law, and carved out an exception to Equal Protection standards without basis in the Constitution or Fourteenth Amendment jurisprudence. The fourth was political. The *Easley* majority included Justice O'Connor, who had voted for all of the decisions overruled here and had written several of the opinions. Each error will be examined in detail.

I.

The Court's first error was procedural. The proper standard of review was clearly erroneous.[168] The Court failed to correctly apply that standard. Instead of reviewing the district court's decision for clear error, the Court performed its own fact-finding. It overturned factual determinations to which it should have deferred and reversed a decision it should have affirmed.

A.

The Court stated at the outset of its analysis that "[t]he issue in this case is evidentiary. We must determine whether there is adequate support for the district court's key findings, particularly the ultimate finding that the legislature's motive was predominantly racial, not political."[169] The Court cites no authority for this proposition, likely because it is an inaccurate statement of the Court's role.

One of the first descriptions a law student hears of an appellate court's function is that it is a court of review, not redo. That description, while superficial, is largely accurate. Appellate courts do not retry cases because they do not have the authority to do so. That is particularly true when an appellate court reviews a trial court's findings of fact. Rule 52 of the Federal Rules of Civil Procedure states:

> In all actions tried upon the facts without a jury...[f]indings 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.[170]

---

167. *Id.*
168. FED. R. CIV. P. 52(a).
169. *Easley v. Cromartie*, 532 U.S. at 241 (2001).
170. FED. R. CIV. P. 52(a).

That rule has been held, and is now commonly understood, to mean that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."[171] However,

> [t]his standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court.[172]

That overstepping is precisely what the Supreme Court did in this case. The clearly erroneous standard was the one to be applied here, and the trial court's decision could only be overturned if its findings of fact were found to be clearly erroneous. The Court cites the two cases thought to be definitive of that standard, *United States v. United States Gypsum Co.*[173] and *Anderson v. City of Bessemer City*,[174] but disregards the latter's discussion of the issue.

Two of the four bases for the district court's finding were its reliance on the plaintiff-appellee's expert, Dr. Weber, and its rejection of the conclusions of the defendant-appellant's expert, Dr. Peterson. Weighing the testimony and determining the credibility of witnesses is, however, the role of the trial court. As the *Anderson* Court wrote,

> when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error.[175]

The Court not only chose to reverse largely because it would have decided the case differently but ignored the direction of the one case decided nearly forty years after the second. In *Anderson*, the Court determined that "[w]here there are two permissible views of the evidence, the factfinder's choice between them *cannot* be clearly erroneous."[176]

The Court emphasized that this case was heard on direct appeal to the Supreme Court,[177] without the benefit of intermediate review.[178] As apparent justification for failing to properly apply the clearly erroneous standard, the Court elaborated that the trial of the case was "not lengthy," that the evidence was "primarily of documents and expert testimony," and that "credibility evaluations played a minor role."[179]

That argument is without authority and without merit. Courts of appeals regularly apply the clearly erroneous standard to cases they review on appeal. There is no reason that the first appellate court to hear a case cannot properly apply the

171. United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948).
172. Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 573 (1985).
173. 333 U.S. 364 (1948).
174. 470 U.S. 564 (1985).
175. *Id.* at 575.
176. *Id.* at 574 (emphasis added).
177. *See supra* note 82.
178. *Easley v. Cromartie*, 532 U.S. at 242-43.
179. *Id.* at 243.

appropriate legal standard. And, as Justice Thomas pointed out in dissent, the lack of an intermediate appellate court would certainly have been mentioned in prior redistricting cases if it were truly a factor in the standard of review.[180]

The relevance of the trial being "not lengthy"[181] is unclear, but there is no legal support for the argument that a shorter trial entitles the appellate court to undertake its own fact-finding enterprise. The same is true of trials in which the evidence is "primarily of documents and expert testimony,"[182] and Rule 52(a) itself states, "findings of fact, *whether based on oral or documentary evidence*, shall not be set aside unless clearly erroneous."[183]

Finally, the Court disregarded the magnitude of the role credibility evaluations played. The basis of the Court's opinion is the choice of one expert witness over another. The Court spent ten pages of its opinion sifting through the trial court's record in great detail.[184] Had the Court believed the same expert witness the district court had, the case would have been decided the other way. Credibility evaluations were central to the Court's decision, and its failure to recognize this is inexplicable.

Moreover, *Bose v. Consumers Union of the United States, Inc.*,[185] the very case the Court cites as support for "an extensive review of the District Court's findings,"[186] held that "the likelihood that the appellate court will rely on the presumptions [of the correctness of factual findings] tends to increase when trial judges have lived with the controversy for weeks or months instead of just a few hours."[187] The Court's reliance on *Bose* is therefore clearly misplaced. Such a holding should weigh in favor of affirmance, as the trial court not only "lived with the controversy"[188] through the three-day trial during which hundreds of pages of expert and statistical analysis were presented, but one member of the three-judge panel had presided over suits challenging this congressional district for the past ten years.[189]

B.

In the district court, defendant-appellant's expert Dr. Peterson testified that African-American Democrats were more reliably Democrat voters than were other voters registered as Democrats.[190] The district court found that testimony unreliable and not relevant.[191] The Supreme Court listed this finding as error.[192]

---

180. *Id.* at 260 (Thomas, J., dissenting).
181. *Id.* at 243.
182. *Id.*
183. FED. R. CIV. P. 52(a) (emphasis added).
184. *Easley v. Cromartie*, 532 U.S. at 244-54.
185. 466 U.S. 485 (1984).
186. *Easley v. Cromartie*, 532 U.S. at 243.
187. *Bose*, 466 U.S. at 500.
188. *Id.*
189. *See Cromartie v. Hunt*, 133 F. Supp. 2d at 410; *Cromartie v. Hunt*, 34 F. Supp. 2d at 1030; *Cromartie v. Hunt*, 4:96-CV-104-BO(3); *Cromartie v. Hunt*, 34 F. Supp. 2d at 1029; *Shaw v. Hunt*, 861 F. Supp at 417; *Shaw v. Barr*, 808 F. Supp. at 464.
190. *Cromartie v. Hunt*, 133 F. Supp. 2d at 420.
191. *Id.*
192. *Easley v. Cromartie*, 532 U.S. at 251-53.

In making its finding, the district court relied on the testimony of the plaintiff-appellee's expert, Dr. Weber, that Dr. Peterson's analysis was unreliable because it "ignored the core"[193] of the district as it previously existed and that it failed "to take account of the fact that different precincts have different populations."[194] Dr. Weber, one of the nation's foremost redistricting experts,[195] was found by the trial court to be credible, and it relied upon his testimony.[196] Dr. Peterson, who had never before testified in a redistricting case and used a methodology never before employed in the redistricting context, was deemed to be unreliable.[197]

The Supreme Court examined Dr. Peterson's testimony, as well as Dr. Weber's criticism thereof, and determined that the district court's reliance on the latter and rejection of the former was in error.[198] In doing so, the Court ignored its role as a reviewing court and engaged in the sort of credibility determination that is reserved for the trial court. The Court found that "differences in the racial and political makeup of the precincts just inside and outside the boundaries of District 12 show that politics is as good an explanation as is race for the district's boundaries."[199]

Dr. Weber testified, however, that politics was not as good an explanation as race for the district's boundaries,[200] and the district court relied on that testimony.[201] That is its role. The trial court is charged with making factual determinations that cannot be overturned unless clearly erroneous, and, as the dissent pointed out, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."[202]

C.

The argument has been made that the Court applied the clear error standard in an unusual fashion because this was an unusual case.[203] In reversing the trial court, the argument goes, the Supreme Court loosened the ordinarily strict clearly erroneous standard not to apply constitutional standards, whether new or existing, to the redistricting plan but to protect the power of the state legislature to redraw its state's congressional districts.

---

193. *Id.* at 251.

194. *Id.*

195. Dr. Ronald Weber is the Wilder Crane Professor of Political Science at the University of Wisconsin, Milwaukee. *See* University of Wisconsin, Milwaukee, faculty directory *at* http://www.uwm.edu/Dept/Polsci/faculty/weber.html. Dr. Weber holds a bachelor's degree from Macalester College in St. Paul, Minn., and a Ph.D. from Syracuse University. He specializes in American politics and public policy and empirical theory and methodology. *Id.* He has authored a book and several scholarly articles on state politics and has testified as an expert in redistricting cases in Louisiana, Texas, Georgia, Virginia, Florida, and North Carolina. *Id.*

196. *Cromartie v. Hunt*, 133 F. Supp. 2d at 420.

197. *Id.*

198. *Easley v. Cromartie*, 532 U.S. at 246-53.

199. *Id.* at 252.

200. *Id.* at 246.

201. *Cromartie v. Hunt*, 133 F. Supp. 2d at 419.

202. *Easley v. Cromartie*, 532 U.S. at 259 (Thomas, J., dissenting) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985)).

203. Interview with Ted Occhialino, civil procedure professor, University of New Mexico School of Law, in Albuquerque, N.M. (Oct. 26, 2001).

In previous cases, the Court has stated in no uncertain terms that redistricting is the province of state government.[204] The Court made no mention of this in its *Easley* opinion, however, and certainly does not offer it as a rationale for eviscerating the clearly erroneous standard. There is no statement to the effect that this is the sort of extraordinary case in which the standard of review should be less deferential, or that the case was decided as it was to protect the state legislature's authority to redraw its congressional districts.

Moreover, Justices Scalia and Thomas, the Justices who most often take an absolutist position with regard to separation of powers and federalism, dissented in this case.[205] Had the Court truly decided as it did to protect the state legislature's authority, Federalist Society[206] member Justice Scalia would have taken the opportunity to put to use his "anachronistically formal view of the separation of powers."[207]

II.

The Court's second error was substantive. The Court either misunderstood or ignored much of the plaintiff-appellees' evidence of the predominantly racial motive in drawing the Twelfth Congressional District, which was clearly sufficient to support the trial court's judgment.

A.

The Court found that, having been based primarily on voter registration data instead of voter performance data, the district court's findings were inadequate to support its decision.[208] The Court, however, misconstrued both the plaintiff-appellee's and the lower court's use of those figures, despite the plaintiff-appellees explaining the importance of voter registration figures in this case clearly and in detail.[209]

North Carolina's party primary elections are open only to registered voters of that party and to voters registered as Independents.[210] Candidates can win a primary election with a plurality of forty percent of the vote.[211] Plaintiff-appellee's expert witness, Dr. Weber, whose testimony was so lightly regarded by the Court,[212] testified that the inclusion of majority-African-American precincts had made the

---

204. Growe v. Emison, 507 U.S. 25, 34 (1993) ("Absent evidence that these state branches will fail timely to perform that duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it."). *See also* Chapman v. Meier, 420 U.S. 1 (1975); Scott v. Germano, 381 U.S. 407 (1965).

205. *Easley v. Cromartie*, 532 U.S. at 259.

206. The Federalist Society for Law and Public Policy is a non-partisan organization interested in the current state of legal order. It is founded on the principles that the state exists to preserve freedom, that the separation of governmental powers is central to the Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be. The Federalist Society for Law and Public Policy, *available at* http://www.fed-soc.org/.

207. Lujan v. Defenders of Wildlife, 504 U.S. 555, 602 (1992) (Blackmun, J., dissenting).

208. *Easley v. Cromartie*, 532 U.S. at 244.

209. *See* Plaintiff-Appellee's Brief at 26, Easley v. Cromartie, 532 U.S. 234 (2001) (Nos. 99-1864, 99-1865).

210. N.C. Gen. Stat. § 163-59 (1999).

211. N.C. Gen. Stat. § 163-111 (1999).

212. *See supra* Rationale.

Twelfth District more Democratic than necessary to ensure the election of a Democratic congressperson.[213]

The gravamen of that testimony was that the district had been gerrymandered so that African-Americans made up more than sixty percent of the registered Democrats in the district.[214] If the African-American community made up less than sixty percent, a candidate with unified Anglo support could win in an election against two African-American candidates who split the vote of the African-American community.[215] When the African-American community made up more than sixty percent of the registered Democrats in the district, it could elect the candidate of its choice, so long as it voted as a bloc.[216] The African-American community would therefore control the Democratic primary election, and, because the district is so highly Democratic, the general election as well.

The trial court understood and relied upon this testimony in making its decision.[217] Dr. Weber uncovered the legislature's motive when Dr. Peterson, a redistricting novice, could not. The Court, upon reviewing a cold record, apparently got as far as the words "voter registration" and skipped to the next section, because it missed the point entirely. Nowhere in its opinion does the Court mention why voter registration figures were used or that these figures indicated a racial motive for drawing the district. The opinion stated only that voter registration was inadequate to predict voter performance,[218] which is true but not at all relevant.

The second piece of direct evidence considered by the district court was likewise all but ignored by the Supreme Court, but together with the plaintiff-appellee's presentation of voter registration data carried all the drama of a smoking gun. That evidence was an e-mail message from Gerry Cohen, the draftsman of redistricting plans during the legislative session, to two Democratic senators.[219] One of the recipients was the chairman of the Senate Redistricting Committee. The other recipient was a private voting rights attorney who in 1992, when the Twelfth District was originally drawn, was practicing in the same Charlotte firm as Mel Watt, the Congressman who has represented the Twelfth District since its creation. The e-mail read, "I have moved the Greensboro Black community into the 12th...."[220] Upon considering that evidence, the Court concluded, "It does not discuss why Greensboro's African-American voters were placed in the 12th District; it does not discuss the political consequences of failing to do so...."[221]

The e-mail itself did not discuss the consequences, but Dr. Weber did. Had the Court's majority attended the trial or read the entire transcript, it might have noticed that by moving the "Greensboro Black community" into the Twelfth District the percentage of registered Democrats who were African American rose from 52.5

213. *Easley v. Cromartie*, 532 U.S. at 246.
214. *Id.*
215. *See infra* note 222 and accompanying text.
216. There were only 773 voters registered as Independents in the district. Plaintiff-Appellee's Brief at 28.
217. *Cromartie v. Hunt*, 133 F. Supp. 2d at 419-20.
218. *Easley v. Cromartie*, 532 U.S. at 244.
219. *Id.* at 254.
220. *Id.*
221. *Id.*

percent to 60.5 percent, enough to control the primary election.[222] This also explains why majority-Anglo precincts with a high Democratic registration were excluded from the district. Their inclusion would have diluted the percentage of registered Democrats who were African-American, thereby destroying the African-American community's control of the district's election.

The voter registration figures, considered "inadequate"[223] by the Court, along with the e-mail message, which was found "less persuasive than the kinds of direct evidence we have found significant in other redistricting cases,"[224] provide indisputable evidence of a racial motive in creating the district as it was drawn. Any evidence of a racial motive is sufficient in this case to find that race was the predominant factor in drawing the district when one considers that there was no political reason for drawing it at all.[225] It had been decided early in the legislative session that the only possible means of reaching a compromise on a redistricting plan for the state's congressional districts was to maintain the existing partisan split among the delegation of six Democrats and six Republicans.[226] In other words, the Twelfth District needed to be a Democrat district that included incumbent Mel Watt's residence, and nothing more.

B.

In rejecting Dr. Weber's criticism of Dr. Peterson's testimony, and ignoring its role as a reviewing court by making a credibility determination itself,[227] the Court stated that Dr. Weber's testimony that Dr. Peterson's analysis ignored the core of the existing district "apparently reflects Dr. Weber's view that in context the fact that District 12's heart or 'core' is heavily African-American by itself shows that the legislature's motive was predominantly racial, not political."[228] Dr. Weber's testimony reflects no such thing and in making that assertion the Court revealed its own motive in finding error in the analysis. The Court was so caught up in discrediting Dr. Weber's testimony that it wrongly defined the term "core."

Preserving the core of existing districts is one of the race-neutral districting criterion to which redistricting plans must adhere, and political demographers charged with creating redistricting plans produce "core retention studies" to

---

222. North Carolina maintains a database of voter registration records by both party and race. N.C. Gen. Stat. § 163-82.4 (2001). The percentage is determined by an equation in which the number of African-American registered voters in the Twelfth District is multiplied by the rate at which African-Americans register as Democrats, in this case ninety-five percent. Plaintiff-Appellee's Brief at 27 n.24 (citing Defendant-Appellant State of North Carolina's J.A. at 589). That number is divided by the number of voters permitted to vote in the primary election, namely all voters registered as either Democrats or Independents. *Id.* (citing Defendant-Appellant State of North Carolina's J.A. at 17).

Using election data from the first election following the enactment of the 1997 redistricting plan, the number of registered African-American voters in the district (126,488) was multiplied by the rate at which African-Americans register as Democrats in North Carolina, (ninety-five percent). *Id.* (citing Defendant-Appellant State of North Carolina's J.S. App. 79a). That number, 120,164, is divided by the sum of the number of voters in the district registered either as Democrats, 197,783, or Independents, 773, or 198,556. *Id.* The quotient is 60.5 percent.

223. *Easley v. Cromartie*, 532 U.S. at 245.

224. *Id.* at 254.

225. *See also infra* Analysis, part II C.

226. *Easley v. Cromartie*, 532 U.S. at 239-40, 246-47.

227. *See supra* Rationale.

228. *Easley v. Cromartie*, 532 U.S. at 251.

accompany new maps and determine how much of an existing district is retained in a new one.[229] The core of a district refers to the geographic and population centers and would therefore include demographic factors such as race, but the Court's assumption that by "core" Dr. Weber meant racial core is incorrect.

The appellants themselves argued that politics, namely incumbent protection, had been the predominant factor in drawing the Twelfth District, and "[t]his was done in part by preserving the constituent and partisan core of each district."[230] The district court, having litigation over this district before it for the better part of a decade, was well versed in the substantive law of redistricting and correctly determined that any new redistricting plan must respect the core of existing districts.[231]

When Dr. Weber, one of the nation's foremost experts on redistricting,[232] testified that the analysis done by Dr. Peterson, who had never before testified in a redistricting case and used a methodology never before employed in a redistricting context, ignored the core of existing districts, the district court understood that analysis, the terms used therein, and the reason why they were significant.[233] The district court knew that districting plans must respect the core of existing districts and understood the justification for that race-neutral districting requirement.[234] The Court held that "[t]he District Court did not argue that the racial makeup of a district's 'core' is critical."[235] But it is the Supreme Court that has crafted the law of redistricting, and the Supreme Court that has held that respecting the core of an existing district is one of the traditional race-neutral districting principles.[236]

C.

For all it did say, the Court's opinion is as remarkable for what it did not say. Neither the district court nor the Supreme Court addressed the most obvious point in support of upholding the lower court's decision, and it was not argued by either party. Had politics, as opposed to race, truly been the predominant factor in drawing the Twelfth District, race need never have been considered at all. While it is true, as the Court stated, that voting behavior figures are, to a certain extent, "inherently uncertain,"[237] that is only true because most demographers do not extend their analyses to sufficient lengths to ensure greater certainty as doing so would take inordinate amounts of time and effort. Determining voter performance does not involve complex mathematical formulae; it requires simple arithmetic. Predicting future voter performance is nothing more than analyzing past voter performance.[238]

---

229. Adair Interview, *supra* note 34.

230. Defendant-Appellant State of North Carolina's Brief on the Merits at 2, 22, Easley v. Cromartie, 532 U.S. 234 (2001) (Nos. 99-1864, 99-1865).

231. *See Cromartie v. Hunt*, 133 F. Supp. 2d at 419-420.

232. *See supra* note 195.

233. *Cromartie v. Hunt*, 133 F. Supp. 2d at 419-20.

234. *Id.* at 420.

235. *Easley v. Cromartie*, 532 U.S. at 251.

236. *See, e.g.*, Abrams v. Johnson, 521 U.S. 74, 84 (1997); Bush v. Vera, 517 U.S. 952 (1996); Miller v. Johnson, 515 U.S. 900 (1995).

237. *Easley v. Cromartie*, 532 U.S. at 247.

238. *See supra* note 46.

Demographers, regardless of what the Court may believe, are perfectly able to analyze election returns and predict how each and every precinct in a particular state is going to vote for a particular candidate for a particular office. To do so, one must only add together the votes cast in past elections, giving more or less weight to certain contests based upon their desirability in predicting the race in question, and then divide by the number of elections added.[239] However a particular demographer might decide to average the votes of a particular precinct, and there is any number of ways to do so, race is not a consideration.

What's more, North Carolina only received its twelfth district after the 1990 Census. Prior to that time, it did not exist. Therefore, there was no minority population in the district, so that minority population could not have been diluted. In other words, compliance with non-retrogression principles required by the Voting Rights Act,[240] essentially the only reason to consider race at all, was not a factor. That being the case, there is no justification for using race as a factor in any way in creating the Twelfth District.

The Court also made no mention of North Carolina's party primary system or the argument, which was briefed extensively[241] and argued orally before the Court,[242] that race was clearly the predominant factor in creating the Twelfth District because the district was drawn in such a manner as to guarantee an African-American would win the Democratic primary election, and, due to the partisan composition of the district, the general election as well.[243]

The Court never addressed the fact that the Twelfth District was drawn to be just less than majority-minority so that it would not present a prima facie racial gerrymander, despite the trial court pointing out that "using a computer to achieve a district that is just under fifty-percent minority is no less a predominant use of race than using it to achieve a district that is just over fifty-percent minority."[244] It also failed to acknowledge that the plan at issue in this case included 90.2 percent of the African-American population of the 1992 plan, struck down as an unconstitutional racial gerrymander,[245] but only 48.8 percent of the Anglo population.[246]

---

239. For example, a high-energy, charismatic candidate with good name recognition running for a high-profile office, such as the U.S. House or Senate, might reflect how a similar candidate would perform in a similar race. Adair Interview, *supra* note 34. However, that race would not be an accurate reflection of how an unknown, low-profile candidate would perform in what is known as a "low-information race," one about which the voters receive little information, have little knowledge, and express little interest, such as state court of appeals judge. *Id.* A mix of low- and high-information races at the national, statewide, and local levels can easily be averaged, adding a certain race more or fewer times depending on the candidate for whom one wants to predict performance, to provide any number of predictions about a certain precinct's performance. *Id.* The low-information race returns, for example, could be added twice to each high-information race, lessening the performance expectations of the candidate and providing a more realistic prediction of performance. Demographers generally include only those races decided by a certain number of percentage points, thereby rejecting any landslide elections that would contaminate the sample. *Id.* Using only low-information races is a good indication of how an "average" candidate will perform, as it more closely reflects the purely partisan preferences of a precinct or district, and the more elections that are added to the average, the more accurate that prediction will be. *Id.*

240. 42 U.S.C. § 1973.

241. Plaintiff-Appellee's Brief at 27.

242. Transcript of Oral Argument at 33-35.

243. *See supra* Analysis, part II A.

244. *Cromartie v. Hunt*, 133 F. Supp. 2d at 420.

245. *Shaw v. Hunt*, 517 U.S. at 902.

246. Plaintiff-Appellee's Petition for Rehearing at 4.

The Court also did not discuss the 1998 plan,[247] passed after the district court granted these plaintiffs summary judgment[248] and under which that year's congressional elections were held.[249] The "legitimate political objectives"[250] of that plan were the same as those of the 1997 plan.[251] The Twelfth District in the 1998 plan, however, divided fewer counties than the 1997 plan's Twelfth District, included a far more compact Twelfth District than the 1997 plan, and its African-American population was only thirty-six percent, compared to the forty-seven percent of the 1997 plan.[252] In other words, the 1998 plan, which was in place at the time of the *Easley* decision, met all the requirements of the new *Easley* test: it "achieved [the legislature's] legitimate political objectives,"[253] adhered to "traditional redistricting principles,"[254] and "brought about significantly greater racial balance."[255] However, the 1998 plan was replaced with the 1997 plan.

D.

The Court found that "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 doing so was in error.[256] Yet, a mere two pages later the Court wrote, "[i]n a field such as voting behavior, where figures are inherently uncertain...."[257] The voter registration figures were not used as a substitute for voter performance but as direct evidence of the racial motive in drawing the Twelfth District, as discussed above.

In any case, there is no question that voter registration numbers are poor indicators of voting performance or that there are more accurate methods of measuring voting performance itself without regard for party registration.[258] However, there are as many different formulas for calculating voting behavior as there are demographers and pollsters, and, as the Court readily admitted, their accuracy leaves something to be desired. But was it clearly erroneous for the district court not to rely on figures that are inherently uncertain as its primary evidence?

Furthermore, after declaring that voter registration is inadequate to predict preference at the polls, the Court stated, "In part this is because white voters registered as Democrats cross-over [sic] to vote for a Republican candidate more often than do African-Americans, who register and vote Democratic between ninety-five [percent] and ninety-seven [percent] of the time."[259] After stating that voter registration is "inadequate" to "predict preference at the polls"[260] and that voting

247. *See supra* notes 119, 120 and accompanying text.
248. *Cromartie v. Hunt*, 34 F. Supp. 2d. at 1029.
249. 1998 N.C. Sess. Laws, ch. 2 (codified at N.C. Gen. Stat. § 163-201(a) (Supp. 1998)).
250. *Easley v. Cromartie*, 532 U.S. at 258.
251. *See* Appellants Exhibit 146 (1998 § 5 submission to the Department of Justice).
252. *Id. See also* Plaintiff-Appellees' Petition for Rehearing at 5.
253. *Easley v. Cromartie*, 532 U.S. at 258.
254. *Id. See also supra* Historical Background.
255. *Easley v. Cromartie*, 532 U.S. at 258.
256. *Id.* at 244.
257. *Id.* at 247.
258. *See supra* notes 46, 239 and accompanying text.
259. *Easley v. Cromartie*, 532 U.S. at 245.
260. *Id.* at 244.

behavior statistics are "inherently uncertain,"[261] the Court saw fit to cite actual figures of both registration and performance as evidence that the district court was clearly erroneous.[262]

As backward as that logic may be, it goes unnoticed for several readings due to the gist of the sentence in which it is found. The Court, in declaring a lower court to be in error, stated that Anglo voters "cross-over [sic] to vote for a Republican candidate more often than do African-Americans."[263] That sentence is based on one of three assumptions: Anglo voters registered as Democrats will sooner vote for an Anglo Republican than an African-American Democrat, implying the very racism the district court sought to prevent with this decision; African-American voters are too stupid to evaluate candidates for political office based upon their merits and will vote for any candidate with a "D" beside his or her name, practicing the very racism it implies with the first assumption; or African-American voters will vote only for African-American candidates and that there are not any African-American Republicans, implying a point "too absurd to be contemplated, and I shall contemplate it no further."[264]

In his dissent, Justice Thomas made the point clearly:

> However, the District Court was assigned the task of determining *whether*, not *why*, race predominated. As I see it, this inquiry is sufficient to answer the constitutional question because racial gerrymandering offends the Constitution whether the motivation is malicious or benign. It is not a defense that the legislature merely may have drawn the district based on the stereotype that blacks are reliable Democratic voters.[265]

The question of which of the Court's assumptions is more insulting, a question that will be left to the reader, is overshadowed by the implications of the Court's argument. It is undisputed that the North Carolina legislature could not have drawn districts that included or excluded African-American citizens because they were African-American. The Court, however, had no problem with the legislature drawing districts that include or exclude African-Americans because they "are reliable Democratic voters."[266]

Never mind that that reasoning is precisely the use of race as a proxy that is prohibited by redistricting case law.[267] By that logic, employers could refuse to hire African-Americans if they did so not because the applicants were African-American but because they were more likely to steal from the employer.[268]

---

261. *Id.* at 247.
262. *Id.* at 245-47.
263. *Id.* at 245.
264. Immigration and Naturalization Service v. St. Cyr, 533 U.S. 289, 342 (2001) (Scalia, J., dissenting).
265. *Easley v. Cromartie*, 532 U.S. at 266-67 (Thomas, J., dissenting).
266. *Id.*
267. *Bush v. Vera*, 517 U.S. at 968. *Cf.* Powers v. Ohio, 499 U.S. 400, 410 (1991) ("Race cannot be a proxy for determining juror bias or competence.").
268. In 2000, African-Americans made up 12.3 percent of the nation's total population. Census 2000. However, in 2000, African-Americans made up 28.4 percent of those arrested for burglary, 30.4 percent of those arrested for larceny, and 53.9 percent of those arrested for robbery. 2000 Uniform Crime Statistics, Federal Bureau of Investigation, Department of Justice (Washington, D.C., U.S. Department of Justice Statistics, 2000). In 1996, African-Americans made up thirty-nine percent of those convicted in state courts for all property offenses, thirty-six

In his dissenting opinion in *Bush v. Vera*,[269] Justice Stevens, who joined the Court's opinion in the present case, wrote, "I note that in most contexts racial classifications are invidious because they are irrational....It is neither irrational, nor invidious, however, to assume that a black resident of a particular community is a Democrat if reliable statistical evidence discloses that 97 [percent] of the blacks in that community vote in Democratic primary elections."[270]

Never mind that the Democratic primary elections in the community in question in this case are not limited to voters registered as Democrats.[271] Assuming that the Federal Bureau of Investigation's own crime statistics are "reliable statistical evidence,"[272] Justice Stevens would apparently agree, as the Court's argument shows, that it would be "neither irrational, nor invidious"[273] to assume that an African-American is more likely to steal than other people. Such an assumption would support an employer's decision not to hire an African-American, as it is "reliable statistical evidence."[274] Can it be that the Fourteenth Amendment, following this decision, reads, "No state shall deny to any person within its jurisdiction the equal protection of the laws unless 'reliable statistical evidence' leads it to believe that the denial of such equal protection would be neither irrational nor invidious"?

The substantive law of redistricting is well established and very involved. That of Equal Protection is even more so. It is difficult to imagine that the Court did not realize its decision here would have an impact beyond this case but harder still to imagine that they intended the consequences of its opinion. The Court clearly did not contemplate the implications of its rationale in reaching its decision, evidence that it determined the outcome of this appeal before applying its rationale to reach a conclusion.

III.

The Court's third error was jurisprudential. It overruled controlling precedent, reversed the trend of redistricting cases, and carved out an exception to Equal Protection standards without basis in the Constitution or Fourteenth Amendment jurisprudence.

---

percent of those convicted of burglary, thirty-eight percent of those convicted of fraud, forgery, or embezzlement, and forty-one percent of those convicted of auto theft. U.S. Department of Justice, Bureau of Justice Statistics, Felony Sentences in State Courts, 1996 (Washington, D.C., U.S. Department of Justice, 1999) at 5, tbl.5. In 1997, African-Americans made up 14.8 percent of those sentenced in federal district courts for burglary or breaking and entering, 17.8 percent of those sentenced for auto theft, 28.7 percent of those sentenced for fraud, and 35.7 percent of those sentenced for larceny. U.S. Sentencing Commission, 1997 Sourcebook of Federal Sentencing Statistics (Washington, D.C., U.S. Sentencing Commission, 1998) at 14-15.

269. 517 U.S. 952 (1996).

270. *Bush v. Vera*, 517 U.S. at 1031 (Stevens, J., dissenting).

271. *See supra* note 210 and accompanying text.

272. *Bush v. Vera*, 517 U.S. at 1031 (Stevens, J., dissenting).

273. *Id.*

274. *Id.*

A.

Beyond deciding the fate of North Carolina's Twelfth Congressional District, the Court established a new test for "case[s] such as this one where majority-minority districts (or the approximate equivalent) are at issue and where racial identification correlates highly with political affiliation...."[275] The new test the Court announced creates serious practical difficulties. First, to which plans does it apply? While the term majority-minority seems self-explanatory, there is great debate over its precise definition.[276]

Moreover, Anglos are often numerical minorities in their states or political subdivisions, and racial and ethnic diversity will only become greater in the future.[277] It is already the case in New Mexico that no single racial or ethnic group makes up a majority of the state's population.[278] As previously discussed, different groups in different contexts will use total population, voting-age population, registered voters, or other measures to calculate whether a particular minority makes up a majority in a particular district.[279] Some groups, including advocates for Hispanic and Native Americans in New Mexico, argue that, for many reasons, a district must be sixty-five percent minority to give that minority group the opportunity to elect the representative of its choice.[280]

Even if one is able to determine the definition of a majority-minority district, what is its "approximate equivalent"? If the term majority-minority may be stretched to include nearly any district with a high percentage of minority population, does "approximate" mean that the percentage must not actually be greater than fifty? The answer is obviously yes because the district challenged in this case was not majority-African-American, yet the Court applied its newly created test nonetheless. In the next decade, the number of districts that could be argued to be the "approximate equivalent"[281] of a majority-minority district will likely outnumber those that could not.

More important are the actual requirements of the new test. The Court held that the party challenging the redistricting plan must show 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

---

275. *Easley v. Cromartie*, 532 U.S. at 258.

276. *See supra* note 23 and accompanying text. There has, at least, come to be an accepted definition of "minority." As used in the Voting Rights Act, 42 U.S.C. § 1973, and in this Note, the term refers to any non-Anglo racial, ethnic, or language group. The analogous term for "Anglo" used by demographers and in racial redistricting figures is "non-Hispanic white."

277. *See infra* Implications.

278. *Id.*

279. *See supra* note 23 and accompanying text.

280. Only a portion of that sixty-five percent of the population are citizens who are eligible to vote, reducing the minority community's ability to elect the candidate of its choice. Adair Interview, *supra* note 34. Of those who are, only a portion will be of voting age, further undercutting the minority community's political power. *Id.* Only a portion of that population will actually be registered to vote. *Id.* The ability to elect the candidate of choice is further reduced by any number of sociological factors, including an absence of minority candidates, a perceived inattention to minority issues, and simple apathy toward the political process. *Id.*

281. *Easley v. Cromartie*, 532 U.S. at 258.

show that those districting alternatives would have brought about significantly greater racial balance."[282]

While those requirements seem straightforward, the Court established them in a case in which one of the parties challenging North Carolina's congressional redistricting plans did exactly that. The plaintiffs in *Easley* employed one of the most authoritative and well respected redistricting experts in the nation.[283] He testified that the North Carolina General Assembly had subordinated traditional, race-neutral districting principles to race itself, and that race, rather than politics, had been the predominant factor in drawing the districts.[284] He showed that the Twelfth Congressional District included precincts with higher percentages of African-American population while bypassing precincts with equal or greater percentages of population that were registered and voted Democratic and were closer to the district.[285]

As Dr. Weber testified, the legislature, therefore, could have achieved its legitimate political objective, namely maintaining the existing partisan balance in the congressional delegation, by including precincts with lower percentages of African-American population that were closer to the district, thereby adhering to the traditional districting principle of compactness and bringing about "significantly greater racial balance."[286] The district also would have adhered to the principles of equal population, contiguity, and respect for true communities of interest.[287]

The Court itself recognized that these requirements were met. It wrote,

> The District Court's final citation is to Dr. Weber's assertion that there are other ways in which the legislature could have created a safely Democratic district without placing so many primarily African-American districts within District 12. And we recognize that *some* such other ways might exist. But, unless the evidence also shows that these hypothetical alternative districts would have better satisfied the legislature's other nonracial political goals as well as traditional nonracial districting principles, this fact alone cannot show an improper legislative motive.[288]

Creating a safe Democrat district that protected the incumbent *was* the legislature's "nonracial political goal."[289] Plans that, for example, paired incumbent members of Congress in the same district would have been rejected out of hand. Dr. Weber's "hypothetical alternative districts"[290] did no such thing. What they did do, as the Court itself admits, was make the Twelfth District safely Democrat, meeting "the legislature's other nonracial political goals."[291] They did so "without placing so many primarily African-American districts within District 12,"[292] meaning they

---

282. *Id.*
283. *See supra* note 195.
284. *Cromartie v. Hunt*, 133 F. Supp. 2d at 419.
285. *Id.*
286. *Easley v. Cromartie*, 532 U.S. at 258.
287. *Cromartie v. Hunt*, 133 F. Supp. 2d at 419.
288. *Id.* at 249 (internal citations omitted).
289. *Id.* at 249. *See also* Appellant's Exhibit 146 (1998 § 5 submission to the Department of Justice).
290. *Easley v. Cromartie*, 532 U.S. at 249.
291. *Id.*
292. *Id.*

"would have brought about significantly greater racial balance."[293] And they met, as any district drawn by a redistricting expert with Dr. Weber's expertise and experience would, "traditional nonracial districting principles."[294] In fact, Dr. Weber's districts were not only "comparably consistent"[295] with those principles but were *more* compact than the Twelfth District, which "connects communities not joined in a congressional district, other than in the unconstitutional 1992 Plan, since the whole of Western North Carolina was one district, nearly two hundred years ago."[296]

In other words, Dr. Weber's "hypothetical alternative districts"[297] met each and every requirement of the test the Court announced in *Easley*.[298] The Court found, however, that they did not "provide evidence of a politically practical alternative plan that the legislature failed to adopt predominantly for racial reasons."[299] If one of the nation's pre-eminent redistricting experts supplying exactly the alternative methods the new tests demands was not sufficient evidence to meet the burden now applied, what would be? And the Court was surprised that Dr. Weber testified, "sometimes expressing disdain for" the legislative redistricting process.[300]

The Court, in creating its new test, failed to define "legitimate political objectives."[301] For example, is electing an African-American representative a legitimate objective? Is re-electing the incumbent, who was originally elected from an unconstitutionally racially gerrymandered district, legitimate?[302] If either of the above is legitimate, then no alterative proposed by any plaintiff challenging such a district that adheres to traditional, race-neutral districting principles could possibly achieve those objectives.[303] The Court also failed to state when those "legitimate political objectives"[304] must have been established. Any redistricting plan could be defended legally and justified politically if the legislature that passed it is able to define its objectives post hoc. They will simply be tailored to the plan or district in question, selecting some legitimate, race-neutral objective that applies to the completed plan, no matter how irrelevant it may have been in the actual drawing of the districts.

---

293. *Id.* at 258.
294. *Id.* at 249.
295. *Id.* at 258.
296. *Cromartie v. Hunt*, 133 F. Supp. 2d at 419.
297. *Easley v. Cromartie*, 532 U.S. at 249.
298. *Id.* at 258. The same is true of the North Carolina General Assembly's 1998 plan. *See supra* notes 119, 120 and accompanying text.
299. *Easley v. Cromartie*, 532 U.S. at 249.
300. *Id.* at 250.
301. *Id.* at 258.
302. *See id.* at 263 n.3 (Thomas, J., dissenting) (answering this question in the negative).
303. By adhering to the traditional, race-neutral districting principles, the district would obviously not meet these "legitimate" political objectives because the objectives are race-based. Similarly, it would be impossible for any plan offered by a party challenging a districting scheme with "legitimate" political objectives such as these to bring about significantly greater racial balance, again because the objectives are race-based and by definition are seeking to bring about the very opposite of racial balance.
304. *Easley v. Cromartie*, 532 U.S. at 258.

B.

Far more importantly, though, is the fact that the test is a break from controlling precedent. The Court attempted to distinguish *Easley* by finding that politics, as opposed to race, was the predominant factor and that the case was therefore not subject to the rules established in *Miller v. Johnson*[305] and *Bush v. Vera*.[306] The Court, however, was only able to distinguish the present case because it found that large African-American populations were placed into the Twelfth District only because they were reliably Democrat voters.[307] That amounts to using race "as a proxy for political characteristics."[308] That language indicates that "a racial stereotype requiring strict scrutiny is in operation."[309]

That being the case, *Easley* overrules *Bush*, despite the Court making no mention of the fact that it is doing so. Beyond that, using race as a proxy for political characteristics is no less a racial classification than using race for its own sake, calling for strict scrutiny to be applied.[310] In that regard, *Easley* at the very least carves out an exception to both *Miller v. Johnson*[311] and *Shaw v. Reno*[312] for cases to which the newly created test applies.

But, beyond the question of to which cases the new test applies is the fact that it is a complete break with anything remotely associated with Equal Protection jurisprudence. It shifts to the party challenging the constitutionality of a redistricting scheme the burden of showing "at 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."[313]

The Court first assumes that the party challenging as unconstitutional the drawing of its legislative districts will have access to the map-drawing software and printers necessary to produce alternative districting methods, which generally cost tens of thousands of dollars, to say nothing of the expertise and experience to do so. More importantly, though, the Court makes an exception, indeed the only exception, to the application of strict scrutiny to racial classifications by governmental actors.[314] It not only holds that strict scrutiny does not apply, but actually shifts the burden from the government, usually required to defend its classification, to the party challenging the redistricting plan.[315]

---

305. 515 U.S. 900 (1995).

306. 517 U.S. 972 (1996) (plurality opinion); 517 U.S. at 999 (Thomas, J., concurring in the judgment).

307. *Easley v. Cromartie*, 532 U.S. at 243.

308. *Bush v. Vera*, 517 U.S. at 968.

309. *Id.* at 1000 (Thomas, J., concurring in the judgment). *Cf.* Powers v. Ohio, 499 U.S. 400, 410 (1991) (stating, "Race cannot be a proxy for determining juror bias or competence").

310. Shaw v. Reno, 509 U.S. 630, 630 (1993).

311. 515 U.S. 900, 900 (1995) (creating "predominant factor" test as application of strict scrutiny to redistricting cases).

312. 509 U.S. at 630 (applying strict scrutiny to redistricting cases as any other racial classification by a governmental actor).

313. *Easley v. Cromartie*, 532 U.S. at 258.

314. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

315. *Easley v. Cromartie*, 532 U.S. at 258.

In that regard, *Easley* overruled, without acknowledging that it was doing so, a long line of cases applying the Equal Protection clause to redistricting cases. First, it overruled *Shaw v. Reno*, which held a racial gerrymander was a violation of Equal Protection and therefore subject to strict scrutiny.[316] It overruled *Adarand Constructors, Inc. v. Pena*,[317] which held that all racial classifications by governmental actors were subject to strict scrutiny.[318] It overruled *Miller v. Johnson*, which applied the *Adarand/Shaw* standard to redistricting cases and articulated the "predominant factor" test.[319]

IV.

The Court's fourth error was political. The *Easley* majority included Justice O'Connor, who had voted for all of the decisions overruled by *Easley* and had written several of the opinions herself.[320]

That the *Easley* decision overruled the precedents discussed in the previous section is surprising enough. It is all the more surprising when one considers that the Court was only able to do so because Justice O'Connor voted with the majority, which included the four Justices commonly thought of as the Court's liberal members.[321] That, of course, was not itself surprising. Justice O'Connor's position on the issue, however, was.

Justice O'Connor seemed to recognize that the Court was overstepping its Rule 52 bounds and undertaking its own fact-finding. At oral argument, she went so far as to ask Walter Dellinger, attorney for the defendant-appellants, "the court below appears to have believed one expert over another and made findings that may have been within its power to make, and how are we to upset that?"[322]

Justice O'Connor is the only member of the current Court who participated in the redistricting process as a state legislator[323] and represents the deciding fifth vote on nearly all recent voting rights cases.[324] She wrote the Court's opinions in both *Shaw v. Reno*,[325] a 1993 five-to-four decision, and, less than two years later, in *Adarand*

---

316. *Shaw v. Reno*, 509 U.S. at 642. *Cf.* Batson v. Kentucky, 476 U.S. 79, 104 (1986) ("The Equal Protection Clause prohibits a State from taking any action based on crude, inaccurate racial stereotypes.").

317. 515 U.S. 200 (1995).

318. *Id.* at 227.

319. *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. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations.").

320. Justice O'Connor wrote the Court's opinions in Bush v. Vera, 517 U.S. 952 (1996) (plurality opinion); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); and Shaw v. Reno, 509 U.S. 630 (1993).

321. Justices Stevens, Souter, and Ginsberg also joined Justice Breyer's opinion.

322. Transcript of Oral Argument at 6.

323. Justice O'Connor was a Republican state senator in 1971 when Arizona, a jurisdiction covered by Section 5 and thus requiring pre-clearance, went through reapportionment. NANCY MAVEETY, JUSTICE SANDRA DAY O'CONNOR 15 (1996); 42 U.S.C. § 1973(c).

324. *See, e.g.*, Abrams v. Johnson, 521 U.S. 74 (1997); Reno v. Bossier Parish Sch. Bd., 520 U.S. 471 (1997); Bush v. Vera, 517 U.S. 952 (1996); Shaw v. Hunt, 517 U.S. 899 (1996); Miller v. Johnson, 515 U.S. 900 (1995); Shaw v. Reno, 509 U.S. 630 (1993).

325. 509 U.S. 630 (1993).

Constructors, Inc. v. Pena.[326] Just two weeks later, Justice O'Connor joined the Court's opinion in *Miller v. Johnson*.[327]

In her concurring opinion, Justice O'Connor wrote, "To invoke strict scrutiny, a plaintiff must show that the State has relied on race in substantial disregard of customary and traditional districting practices."[328] The majority opinion quoted Justice O'Connor's own opinion in *Shaw v. Reno*: "But where the State assumes from a group of voters' race that they 'think alike, share the same political interests, and will prefer the same candidates at the polls,' it engages in racial stereotyping at odds with equal protection mandates."[329]

Less than a year after *Miller* was decided, Justice O'Connor wrote the Court's plurality opinion in *Bush v. Vera*.[330] There she wrote, "But to the extent that race is used as a proxy for political characteristics, a racial stereotype requiring strict scrutiny is in operation."[331]

Justice O'Connor clearly believed that politics, and not race, was the predominant factor in drawing the challenged district in *Easley*. However, the appellant's argument and the basis of the Court's opinion is that African-American voters were placed in the Twelfth Congressional District because they were reliable Democrat voters.[332] In other words, race was used as a proxy for political characteristics. In Justice O'Connor's own words, "a racial stereotype requiring strict scrutiny is in operation."[333]

Beyond that, the test that *Easley* established is a break with Equal Protection precedent that overrules several cases altogether. In effect, Justice O'Connor voted to overrule precedent that she had not only voted for but had herself written in the past eight years.[334] This reversal occurred even after writing in *Bush*, "[The Court's] legitimacy requires, above all, that we adhere to *stare decisis*, especially in such sensitive political contexts as the present, where partisan controversy abounds.... Our Fourteenth Amendment jurisprudence evinces a commitment to eliminate unnecessary and excessive governmental use and reinforcement of racial stereotypes."[335]

The test established in *Easley* only applies to cases in which "racial identification correlates highly with political affiliation,"[336] or, put another way, to cases in which "race is used as a proxy for political characteristics."[337] How can a single Justice write an opinion calling for strict scrutiny to be applied in all cases in which race is used as a proxy for political characteristics, and five years later sign onto an opinion

---

326. 515 U.S. 200 (1995).
327. 515 U.S. 900 (1995).
328. 515 U.S. at 928 (O'Connor, J., concurring).
329. *Miller*, 515 U.S. at 920 (quoting *Shaw v. Reno*, 509 U.S. at 647). *Cf. Powers*, 499 U.S. at 410 ("We may not accept as a defense to racial discrimination the very stereotype the law condemns.").
330. 517 U.S. 952 (1996) (plurality opinion).
331. 517 U.S. at 968. *Cf. Powers*, 499 U.S. at 410 ("Race cannot be a proxy for determining juror bias or competence.").
332. *Easley v. Cromartie*, 532 U.S. at 243.
333. *Bush v. Vera*, 517 U.S. at 968.
334. *See supra* Analysis, part III B.
335. *Bush v. Vera*, 517 U.S. at 985.
336. *Easley v. Cromartie*, 532 U.S. at 258.
337. *Bush v. Vera*, 517 U.S. at 968.

that destroys that precedent and others she has written and allows the use of race as a proxy?

IMPLICATIONS

I.

The Court's decision in *Easley* signaled a significant shift in the direction the substantive law of redistricting had been traveling. In 1993, in the first suit over the congressional district at issue here, the Court held that the plaintiffs had stated a claim under the Equal Protection clause by alleging that North Carolina's redistricting plan was "so irrational on its face that it could be understood only as an effort to segregate voters on the basis of race."[338] In doing so, the Court reversed the trial court, which had held that the plaintiffs' theory was "a novel claim in voting rights jurisprudence...and we decline to recognize the individual right asserted under it."[339]

This was the Supreme Court's first recognition of so-called reverse-discrimination claims in the redistricting context.[340] Less than three years later the Court went further, holding that race could not be the primary factor in any redistricting plan for any reason,[341] including obtaining requisite Department of Justice pre-clearance or achieving non-retrogression to bring a plan into compliance with the Voting Rights Act.[342]

The Court, and thus the law of redistricting in general, was clearly moving toward requiring "color blind" plans and minimizing the use of race as a factor[343] until the decision in *Easley*. Such a trend would have had significant impact in New Mexico and nationwide, as minority populations comprise an ever-increasing percentage of the population of this state and nearly every other.

According to Census 2000, Anglos made up just 44.7 percent of New Mexico's population, the lowest total of any state other than Hawaii.[344] New Mexico's Hispanic population made up 42.1 percent of its total population, the highest

---

338. *Shaw v. Reno*, 509 U.S. at 642.

339. *Shaw v. Barr*, 808 F. Supp. at 468.

340. Justice O'Connor expressly denied this claim in the Court's opinion, writing that the "appellants did not claim that the General Assembly's reapportionment plan unconstitutionally 'diluted' white voting strength. They did not even claim to be white." *Shaw v. Reno*, 509 U.S. at 641. However, as the Court's citations to Richmond v. J.A. Croson, 488 U.S. 469 (1989), and Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995), show, the "reverse discrimination" line of cases clearly informed the Court's decision and supporting rationale in *Shaw*.

341. *Bush v. Vera*, 517 U.S. at 959 (plurality opinion); 517 U.S. at 999 (Thomas, J., concurring in the judgment).

342. The Court expressly refused to decide whether bringing a redistricting plan into non-retrogression and receiving Department of Justice pre-clearance was a compelling state interest for the purposes of strict scrutiny under the Equal Protection clause in *Shaw v. Hunt*, 517 U.S. at 902.

343. This trend Justice O'Connor readily admitted. Following the passage cited in note 340, *supra*, she wrote, "Rather, appellants' complaint alleged that the deliberate segregation of voters into separate districts on the basis of race violated their constitutional right to participate in a 'color-blind' electoral process." *Shaw v. Reno*, 509 U.S. at 641-42.

344. Native Americans made up 8.9 percent of the state's population, African-Americans 1.7 percent, and Asian-Americans 1.2 percent. Census 2000. Anglos composed 22.9 percent of Hawaii's population. *Id.* The District of Columbia (27.8 percent) and Puerto Rico (.9 percent) also had a lesser percentage of Anglo population. *Id.*

Hispanic population percentage in the country[345] and the largest minority percentage of any state in the country.[346] Presently, California is the only other state with a majority-minority population,[347] but in many states, including New Mexico, minority groups are the fastest growing portions of the population.[348]

Nine of New Mexico's thirty-three counties are majority-Hispanic, but the combined population of those nine is only 382,937.[349] That is twenty-one percent of the state's population and an average of 42,549 per county. Moreover, those counties, like the state's Hispanic population as a whole, are dispersed throughout the state.[350] Of course, this means that the state's Anglo population is likewise dispersed throughout the state. Thus, the only way to draw a majority-Hispanic or majority-minority district is by using race as a districting factor and for its own sake.

The Supreme Court reversed direction with the *Easley* decision, establishing a new test for cases "such as this one where majority-minority districts (or the approximate equivalent) are at issue and where racial identification correlates highly with political affiliation...."[351] The Court held that in such cases, 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."[352]

That test indicates that legislatures may use race as a factor, indeed as the predominant factor, in drawing majority-minority districts "or the approximate equivalent"[353] if there is no alternative way to achieve its legitimate political objectives that are comparably consistent with traditional districting principles. That test was applied in *Easley* to a district that was not majority-minority and will certainly be applied to others in the future.

To that extent it is a break with the decisions in *Miller v. Johnson*[354] and *Bush v. Vera*,[355] which should have controlled the outcome in this case.[356] Further, the Court reversed the trend of recent redistricting cases, which had been moving toward requiring race-neutral redistricting, as well as creating an exception to the rule that

345. Excluding Puerto Rico's 98.8 percent. *Id.*

346. Excluding Puerto Rico's 98.8 percent Hispanic population and the District of Columbia's sixty-percent African-American population. *Id.*

347. "Majority-minority," as used herein, is defined as any state, district, etc., in which minorities make up more than fifty percent of the total population or, conversely, Anglos comprise less than fifty percent of the total population. "Minority," as used in this Casenote, refers to any racial, ethnic, or language minority, or generally any non-Anglo group.

348. *Id.*

349. *Id.*

350. The state's nine majority-Hispanic counties include Mora, Guadalupe, and San Miguel on the eastern plains; Rio Arriba in the northwest mountains; Dona Ana in the south-central Rio Grande valley; Taos in the north-central mountains; Luna and Hidalgo in the southwest corner; and Valencia in the central Rio Grande Valley, which includes much of the rapidly growing Albuquerque suburbs. *Id.*

351. *Easley v. Cromartie*, 532 U.S. at 258.

352. *Id.*

353. *Id.*

354. 515 U.S. 900 (1995).

355. 517 U.S. 952 (1996).

356. *See infra* note 396 and accompanying text.

racial classifications are subject to strict scrutiny.[357] That exception has no basis in the Constitution or in Equal Protection jurisprudence.[358]

II.

The effect of the *Easley* decision on New Mexico's redistricting efforts was felt immediately. The New Mexico legislature met in special session to address redistricting,[359] but only the proposal for the Public Regulation Commission was signed by the governor.[360] The redistricting plans passed for the congressional, state house and senate, and the state Board of Education districts were all vetoed by the governor.[361] The legislature later passed a bill redistricting the state senate,[362] but the congressional, state house, and state Board of Education districts were taken to court.[363]

At the trial on the congressional districts, it was widely believed that the presiding judge would select a moderate plan that included the least-changed districts and that each party would offer a map that closely resembled the then-existing districts, as well as each other.[364] One group of Democrat plaintiffs, however, instead offered a radical plan that would have created, for the first time, a majority-Hispanic district that ran from Albuquerque's North Valley down the Rio Grande corridor to the Mexican border and included most of the southwestern quadrant of the state.[365]

In the end, Judge Frank Allen indeed selected a plan that closely resembled the previous districts and whose voter performance numbers indicate that the two Republican–one Democrat split will likely remain intact for the time being.[366] Those same Democrat plaintiffs, in theory, could have offered a more moderate, less changed plan whose districts would have hurt Rep. Heather Wilson's (R-Albuquerque) chances of re-election, meaning the delegation's partisan make-up might have shifted from two Republicans and one Democrat to two Democrats and one Republican in the near future and had far greater chances of success at trial.[367] Instead they chose to support the radical plan that would have created a majority-Hispanic district.[368]

Those plaintiffs did not argue that *Easley* supported their plan and allowed the creation of a majority-Hispanic district despite its use of race as a districting factor and its disregard of traditional, race-neutral factors.[369] However, prior to *Easley* such

---

357. *See supra* Analysis, part III B.
358. *Id.*
359. *See supra* note 42.
360. Barry Massey, *PRC Redistricting Goof May Help Republicans*, ALBUQUERQUE J., Oct. 4, 2001, at D3.
361. David Miles, *Governor Vetoes Plans For Districts*, ALBUQUERQUE J., Oct. 4, 2001, at D3.
362. Loie Fecteau, *Senate OKs 'Status Quo' Redistricting*, ALBUQUERQUE J., Feb. 2, 2002, at A8.
363. Jepsen v. Vigil-Giron, No. D-0101-CV-2001-02177 (2001) (deciding both U.S. House and state house districts); Sanchez v. Vigil-Giron, No. D-0101-CV-2001-02250 (2001).
364. *See, e.g.*, Loie Fecteau, *Skeen Re-Election Plans Remain a Political Mystery*, ALBUQUERQUE J., Jan. 6, 2002, at B2; David Miles, *Gov. Wants 'Fair Shake' for GOP*, ALBUQUERQUE J., Sept. 26, 2001, at B3; Loie Fecteau, *Johnson Backs Off Map Veto Threat*, ALBUQUERQUE J., Sept. 12, 2001.
365. Jepsen v. Vigil-Giron, No. D-101-CV-200102177 (2001).
366. *Id. See also* Loie Fecteau, *Duke City Keeps District 1*, ALBUQUERQUE J., Jan. 3, 2002, at A1.
367. *See* Deborah Baker, *Hispanics Key to Dem Map*, ALBUQUERQUE J., Dec. 13, 2001, at D3.
368. *See* Loie Fecteau, *Dems' Remap Plan Supported*, ALBUQUERQUE J., Dec. 12, 2001, at B3.
369. *See* Jepsen v. Vigil-Giron, No. D-101-CV-200102177 (2001).

a plan would have had no basis in law and no argument to support its adoption.[370] It is likely that *Easley* was behind the plaintiffs supporting the plan they created.

III.

Had *Easley* been decided the other way, the redistricting process would still run roughshod over the principles of republican democracy. There can hardly be an argument that racial classifications are not despicable and have a divisive effect on politics, not to mention on life in general. However, removing the racial gerrymander from the redistricting scenery leaves in place the partisan gerrymander and the political and legal battles, fought at taxpayer expense, that come with it. Most congressional elections are decided, and will continue to be decided, in state legislatures once every ten years, often based on nothing more than which party happens to be in control at that moment in time.

The Court has held that partisan gerrymanders can give rise to Equal Protection claims,[371] though they seldom do. Even when a legal challenge or the political process dictates partisan impartiality, partisan gerrymanders are replaced with bipartisan gerrymanders whose only purpose is to protect incumbents. As was the case in *Easley*,[372] a sufficiently detailed demographic analysis can reveal the manner in which a district must be drawn in order to elect nearly any candidate.

Sophisticated policy debates have disappeared from our campaigns and elections. It takes time to prepare and deliver an answer to a difficult question and those silent seconds do not play well on television, which we, as a nation, seem to be unable to do without. Instead of finding another way to engage our candidates for political office, we, as a society and a political culture, have instead ceased asking difficult questions.

There was a time when debates among candidates for public office took place on the courthouse steps and lasted all of Sunday afternoon. Now we, as a society and a political culture, settle for a thirty-second sound bite and choose the most attractive smile because we can't be bothered to devote any more time or effort to participating in our government.

The very basis of any system of democracy, whether direct or representative, is that the people participate and have a voice in their government. In our republican system, the people do this by choosing their representatives. The redistricting system that has evolved has turned these precepts on their head, and our system of government has become the polar opposite of what it was intended to be. "The final result seems not one in which the people select their representatives, but in which the representatives have selected the people."[373]

Citizens who understand the redistricting process should be outraged by the way it operates. Legislators who understand how voters operate have every reason to hide behind that process. And the cycle continues.

---

370. *See* Bush v. Vera, 515 U.S. 952 (1996); Miller v. Johnson, 515 U.S. 900 (1995); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); Shaw v. Reno, 509 U.S. 630 (1993).

371. Davis v. Bandemer, 478 U.S. 109 (1986).

372. *See supra* Analysis, part II A.

373. Vera v. Richards, 861 F. Supp. 1304, 1334 (S.D. Tex. 1994), *aff'd sub nom.* Bush v. Vera, 517 U.S. 952 (1996).

CONCLUSION

The Supreme Court committed four errors in deciding *Easley*. The first was procedural. The Court misapplied the clear error standard required by Rule 52(a) of the Federal Rules of Civil Procedure. It abused its role as a reviewing court and overstepped its bounds in undertaking its own fact-finding. The Court apparently did not like the trial court's decision, so it did what it had to do to reverse it, including ignoring precedent and rules of procedure.

The second error was substantive. The Court, because it sought to determine the facts of the case as described above, either misunderstood or ignored much of the plaintiffs' evidence. As the district court found at trial, ample evidence existed to support the finding that race was the predominant factor in drawing the district. North Carolina's Twelfth Congressional District was racially gerrymandered and should have been struck down as a violation of Equal Protection.

The third error was jurisprudential. Without announcing it was doing so, the Court overruled *Miller v. Johnson*[374] and *Bush v. Vera*,[375] as well as the accompanying decade-long trend toward color-blind redistricting. The new test the Court announced has no basis in either the Constitution or the Court's own Equal Protection jurisprudence. It carves out an exception to the racial discrimination rule that will be exploited for the foreseeable future.

The fourth error was political. The Court's majority somehow convinced Justice O'Connor to vote for a decision that flew in the face of, and in fact overruled, not only controlling decisions, but controlling decisions that she had written. Her positions on redistricting issues are a complete mystery, and her voting record on recent cases is inexplicable.

Easley represents judicial activism at its worst. The Court never should have reached the merits of the appeal. Its inquiry should have ended once it established that the trial court's decision was not clearly erroneous. Once the Court did reach the merits of the appeal, it never should have reversed the lower court's opinion. The evidence supporting the trial court's decision was abundant. Once the Court reversed the trial court, it never should have created a new test for future cases. *Easley* created new law in derogation of decades of Equal Protection jurisprudence.

Finally, the Court had before it the sort of case that would have allowed it to make a moral statement and set an example for the nation. It had before it a clear-cut case of voters being placed into a particular congressional district because of their race. The Court could have said that racial classifications have no place in this legal system, in this country, in a civilized society. Instead, it turned a blind eye and allowed them to continue, so long as five Justices who do not want to believe they exist can be convinced that they are not really there.

The *Easley* decision gives the sanction of the Supreme Court to the use of race as a factor, indeed the predominant factor, in drawing new districts so long as it is cloaked as party affiliation. In other words, the Supreme Court has allowed people to be segregated according to their race for the purposes of redistricting. What then

374. 515 U.S. 900 (1995).
375. 515 U.S. 952 (1996).

is the difference between drawing a congressional or legislative district for people of a certain race only because of their race and giving those same people their own schools, or restrooms, or water fountains only because of their race? Only the fact that the minority group will ostensibly benefit from being segregated into its own district.

Since its creation, the Supreme Court has held a unique position in our legal and political system. It has had, throughout its history, opportunities to create law, lead society, and set examples. Since 1954, it has set an example in the area of race relations[376] and accepted the responsibility of acting as the moral compass for our nation and its legal system. Because it has the opportunity and ability to do so, the Court has the duty to act in that capacity when possible. *Easley* presented just such an opportunity. The case provided the Court with an occasion to make a social, political, and moral statement.

What neither the district court nor the Supreme Court addressed is the fact that the North Carolina General Assembly enacted racial discrimination. Whether African-Americans were targeted and placed into the Twelfth District because they were African-American or because they were Democrats, whether they were placed in the district for their benefit or for their detriment, is positively irrelevant. All that matters is that they were placed in the district. They were subject to a racial classification. Such a classification, regardless of its intent or result, is per se constitutionally suspect.[377]

Racial classifications "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."[378] "This rule obtains with equal force regardless of 'the race of those burdened or benefited by a particular classification.'"[379] Racial classifications by governmental actors are alone sufficient to trigger strict scrutiny.[380] "A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification."[381] "Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law."[382]

There is no exception for redistricting decisions, and the same principles apply despite the difficulty of the task of determining whether voters were placed into districts based upon their race.[383] This is true not only for explicit racial

376. *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

377. *Id. See also* Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989) (opinion of O'Connor, J., joined by Rehnquist, C.J., and White and Kennedy, J.J.) ("We thus reaffirm the view expressed by the plurality in Wygant [v. Jackson Bd. of Educ., 476 U.S. at 279-80] that the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification."); *Croson*, 488 U.S. at 520 (Scalia, J., concurring in the judgment) ("I agree...with Justice O'Connor's conclusion that strict scrutiny must be applied to all governmental classifications by race, whether or not its asserted purpose or design is 'remedial' or 'benign.'").

378. Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

379. *Miller*, 515 U.S. at 904 (quoting *Croson*, 488 U.S. at 494).

380. Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986); Korematsu v. United States, 323 U.S. 214 (1944).

381. *Brown*, 347 U.S. at 483.

382. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

383. Shaw v. Reno, 509 U.S. 630 (1993).

classifications but also for facially neutral laws that are "unexplainable on grounds other than race,"[384] including "redistricting legislation that is so bizarre on its face that it is 'unexplainable on grounds other than race,'"[385] which "demand[s] the same close scrutiny that we give other state laws that classify citizens by race."[386]

Shaw v. Reno made clear that a state may not racially segregate its citizens into voting districts any more than it may segregate them in its public parks,[387] buses,[388] golf courses,[389] beaches,[390] or schools.[391] Having done so, *Miller v. Johnson* then articulated the now-famous (or notorious, depending on one's point of view) "predominant factor test."[392] While this test has been argued to require some higher standard of challenges to redistricting legislation,[393] it was merely the Court's expression of the strict scrutiny standard as applied to redistricting cases.[394]

How the Court, or anyone else, could possibly presume that a racial classification such as the one that occurred in North Carolina should remain undisturbed because it was undertaken on behalf of the African-American community of the Piedmont area is inexplicable. That the Court, or anyone else, could possibly believe that a racial classification that allegedly protects the interests of African-Americans is less "odious"[395] than any other is preposterous.

In deciding *Easley*, the Court could have held that racial classifications simply will not be tolerated under any circumstances. It could have held that regardless of who attempts to undertake them, regardless of why they do so, regardless of what groups they apply to, racial classifications by governmental actors are subject to strict scrutiny. As that was the law when the case was decided,[396] the Court needed only to apply controlling precedent in order to eradicate the use of race in redistricting.

There is no justification for the use of race that the Court sees fit to allow to continue after *Easley*. Instead of accepting, even embracing, its law-making role, the Court hid behind and improperly applied its error-correcting role, and in doing so was derelict in its duty to the legal system and to American society. Instead of

---

384. Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977).

385. *Shaw v. Reno*, 509 U.S. at 644 (quoting *Arlington Heights*, 429 U.S. at 266).

386. *Id.*

387. New Orleans City Park Improv. Ass'n v. Detiege, 358 U.S. 54 (1958) (per curiam).

388. Gayle v. Browder, 352 U.S. 903 (1956) (per curiam).

389. Holmes v. City of Atlanta, 350 U.S. 879 (1955) (per curiam).

390. Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (per curiam).

391. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

392. *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. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations.").

393. *See, e.g.*, Brief of the United States as Amicus Curiae at 12, Easley v. Cromartie, 532 U.S. 234 (2001) (Nos. 99-1864, 99-1865).

394. *Miller*, 515 U.S. at 915 ("To the extent any of the opinions in [United Jewish Org. of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977)] can be interpreted as suggesting that a State's assignment of voters on the basis of race would be subject to anything but our strictest scrutiny, those views ought not to be deemed controlling.").

395. Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

396. Bush v. Vera, 517 U.S. 952 (1996); Miller v. Johnson, 515 U.S. 900 (1995); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); Shaw v. Reno, 509 U.S. 630 (1993).

making a moral statement, the Court averted its collective eyes. Instead of reaffirming the principle, previously believed self-evident, that all people are created equal,[397] it consented to treating them unequally, based only upon their race.

The *Easley* decision is no less divisive or discriminatory than any poll tax or literacy test that forty years of voting rights jurisprudence and civil rights struggle have sought to eradicate. It does nothing more than enact hate into law. It holds that because a group of people looks different and comes from a different place it should be treated differently. It ignores the fact that separating people into different congressional districts on the basis of their race is only one step removed from separating them with fire hoses and police dogs on the streets of Montgomery. It not only defies logic; it destroys faith, flouts hope, extinguishes love.[398] It not only has no basis in the Constitution or Equal Protection jurisprudence; it has no basis in American tradition, history, or the Judeo-Christian experience.

The division of people based upon nothing more than the color of their skin is the sort of repugnant hatred that people in this country have fought against for centuries. The use of race as a proxy for political, or any other, characteristics is the very definition of racism.[399] More remarkable than the fact that racism still exists is that it need be discussed in a publication such as this one because it is practiced in government at the dawn of the twenty-first century. Just as remarkable is that any person of any race would, under any circumstance, argue that dividing people by their race would benefit their group.

In an enlightened society, no party should be heard to argue for racial or ethnic segregation because it suits its purposes. In a civilized society, no party should be heard to argue for racial or ethnic segregation under any circumstances. Yet, one hundred thirty-six years after the end of the Civil War, one hundred thirty-three years after slavery was prohibited forever, and forty-seven years after the Supreme Court bravely held that "separate but equal" was inherently unequal,[400] a majority of the Court voted to re-legalize segregation. The only winner in this case was hate.

The first sentence of this Casenote's Historical Background section stated that Article I, Section 2 of the Constitution requires that representatives be apportioned according to population and that each state have one representative. Of course, that Section originally read, "Representatives...shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons...three fifths of all other Persons."[401] Our Founding Fathers, despite the racial ignorance common to that period, had the foresight to include in the Constitution a provision allowing for its amendment. Unfortunately, Supreme Court precedents have no such provision. Alas, constitutional law has come full circle.

---

397. The Declaration of Independence para. 2 (U.S. 1776).

398. *See* I Corinthians 13:1-13.

399. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 962 (10th ed. 1995) ("Racism: A belief that race is the primary determinant of human traits and capacities.").

400. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

401. U.S. CONST. art. I, § 2.