10-1976

United Jewish Organizations of Williamsburgh, Inc. v. Carey

Lewis F. Powell Jr.

Phil - Thanks for your helpful words. Not an easy case but the "quota" road is one that could lead to immense complexities & divisions.

Discuss with view to Joining 3

CA 2 upheld a N.Y. redistricting plan that gerrymandered districts (for State legislature) to give minority groups a representation equal to population percentage — to correct unspecified past discrimination.

DISCUSS

Cir J. Frankel notes in his dissent, this plan legislates a "quota system" for benefit of a single segment of a widely diversified (heterogeneous) population that is "alien" to our ~~so~~ society

Preliminary Memo

Conf. of Oct. 17, 1975
List 1, Sheet 2

See my attached memo.
Phil

No. 75-104

UNITED JEWISH ORGANIZATIONS OF WILLIAMSBURGH, ET AL.	Cert. to CA 2 (Oakes, Kellher; Frankel dissents)	Timely */
V.	See Frankel's dissent; see, for other view, Resp's Br. pp 3-10	
HUGH L. CAREY, ET AL.	Federal/Civil	

I. SUMMARY: The question is whether a New York state redistricting plan (undertaken after the Department of Justice had disapproved the previous plan as possibly discriminatory) which was specifically

*/Pursuant to extensions granted by Marshall, J. and Blackmun, J.

drawn to create districts with at least a 65% black majority, is unconstitutional in the face of a challenge by the Hasidic community asserting that the plan discriminates against them, as an ethnic voting bloc and as whites.

II. FACTS: Kings County New York has a 65% white and 35% non-white (black & Puerto Rican) population. Most of the non-whites live in Bedford-Stuyvesant. However, by dividing up this area and pairing the divisions with larger, surrounding white areas, it has been possible to fix it so that the non-whites were in the minority in 88% of the Senate and 77% of the Assembly districts, (the exceptions being right in the heart of the ghetto).

New York sought to redistrict in 1972 but, for reasons not challenged here, the USDC (D. D.C.) determined that the reapportionment plan must be approved by the U.S. Attorney General pursuant to § 5 of the Voting Rights Act. That approval was withheld, apparently because the New York plan perpetuated the status quo outlined above,[1] and New York had to come up with a new plan before they could hold another election.

A.G. withheld approval 1972 Plan

Although the A.G. made no formal recommendations as to the new plan, the New York officials "got the feeling" through informal contacts that they should carve out some districts with

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1/The stated reason for disapproval, a model of non-information, was that "we cannot conclude . . . that (this plan) will not have the effect of abridging the right to vote on account of race or color. . .

at least 65% non-white majorities. This they did, giving Kings County 3 of 10 Senate districts and 7 of 22 Assembly districts with non-white majorities.[2/] This plan was approved by the A.G.

In the process they cut in half the Hasidic community which, under the old plan and the pre-1972 setup, had been contained in a single district. Prior even to the A.G.'s approval of the plan the Hasidim (petrs here) sought a temporary restraining order in U.S.D.C. (ED N.Y. -- Bruchhausen, J) which was denied. Subsequently the DC denied a preliminary injunction holding that petrs' suit was "untenable" because only political subdivisions could bring actions under the Voting Rights Act. [See 42 U.S.C. § 1973(c)]

CA 2 rejected this reasoning by the USDC, holding, in effect, that the remedy afforded to states and political subdivisions by § 1973(c) is not exclusive and private parties may seek traditional injunctive relief (but may not sue pursuant to § 5 of the Voting Rights Act) citing Allen v. Bd. of Education, 393 U.S. 544, 549-50 (1969). However, they did hold that § 5 bars a suit against the A.G., a holding which petrs do not protest.

Next CA 2 turned to the standing question. They held that petrs lacked standing as members of an ethnic bloc noting that

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2/The SG points out that the percentage of non-white dominated districts is now approximately equal to the percentage of non-white population in the county, i.e. 30 - 40%.

there were so many ethnic blocs in Kings County that to suffer them all the right to protest would create havoc. Petrs do not specifically protest this holding here, though they still seem to complain about it.

However, CA 2 found standing for petrs as representatives of the white community especially where, as here, the white voters are members of a racial-political minority in the districts in question.

On the merits CA 2 noted that there was no showing that the voting strength of white voters had been unduly diluted (see the percentages quoted above). Thus the question became whether districting on racial lines is per se unconstitutional. CA 2 agreed with petrs that the redistricting had in fact been performed solely along racial lines. However, they concluded that the Voting Rights Act contemplated such color-oriented action as the only effective way to correct past discrimination. They thus concluded that redistricting done solely on the basis of race is not per se unconstitutional.

Judge Frankel dissented pointing out that it was unclear what the "wrong" was which was being corrected or whether the 65% quotas would in fact right that "wrong." No hearings were held or findings made as to whether the non-whites were in fact injured by the old system or benefitted by the new.

He then stated that such a race-oriented quota system is "odius" in our society and argues that non-whites, a minority of

35%, have no constitutional right to a majority in 35% of the districts (with the presumed consequence of having 35% of the legislators from the county being non-white).

III. CONTENTIONS: Petr cites City of Richmond v. U.S., No. 74-201 (dec. 6-24-75) in which a majority held that "voting changes taken with the purpose of denying the vote on the grounds of race or color" are invalid no matter what their actual effect might be. Petr also contends that Beer v. U.S. (No. 73-1869 set for reargument this Term) presents similar issues. Finally petrs argue, as did Frankel, J., below, that there has been no finding of any past discrimination which required correction and no rational relationship between the form of the remedy and the nature of the discrimination it allegedly corrects.

The SG essentially tracks the arguments of the majority below.

IV. DISCUSSION: Contrary to petrs' contentions the plan challenged here seems to have the same result as the plan approved in City of Richmond, supra. That is, non-whites have majorities in a percentage of districts which is roughly equal to their percentage of the total population. City of Richmond, Slip Op. p. 12.

Query, however, if the rule is that minorities are entitled to representation in the legislature according to their percentage representation in the community (which is the basic thrust of this case & City of Richmond) does it not follow that, if 45% of the population are Republicans, they are entitled to 45% representation in Congress?

The point is that the ruling of this case is that minorities are now entitled to more than minorities have ever gotten in the past. Here they apparently were actually gerrymandered into a more favorable position than the natural order of things would have ordained.[3/] CA 2 approved it as a correction of past wrongs, but as petr points out, nobody has proved that such "wrongs" will be corrected by this action. A difficult case but probably settled by the dictum in City of Richmond.

There is a response.

10/6/75 Bradley Op in Pets App

3/Nobody specifically admits that this is the case, but it seems to be the tacit basis of CA 2's decision.

Discuss, join 3.

I have read the CA 2 opinion and the papers. There are excellent ~~lawyers~~ lawyers on both sides, and they have succeeded in presenting a difficult case in all its complexity!

I would suggest ~~that~~ that you read Judge Frankel's dissent, Petition 32a-50a, and then read the Brief for Respondents in Opposition 3-10. That is about 25 pages of reading, but I believe it is necessary for you to get a real feel for the issues. Judge Frankel gives the best argument for striking down the districting plan, while the ~~Respondents~~ Respondents present a clear and cogent argument that the plan is just fine.

There seem to be two real issues. First, do these plaintiffs have standing? They are whites, and members of an ethnic group. As ethnics, they have been split into several voting districts where previously they had been in one. But ~~it~~ this doesn't harm them socially in any way, ~~it~~ since the division is purely on paper and they still have a community. So the only harm has to be in voting power. But ~~even~~ even before the split they were all in a district that had a 61.5 % nonwhite majority. After the split (which really results in four districts, two for Senate and two for Assembly elections), ~~they~~ they are in three districts with nonwhite majorities ranging from 65% to 88.1%, and in one district with a white majority of 65.3%. So it's kind of difficult to say that they have been hurt as voters, whether looked at as ethnic voters or as white voters--either way,

they were in the minority before and remain in the minority now (except in the one district with a white majority).

Assuming standing, the question becomes whether there was anything impermissible about what the State did. What they did, basically, was sit down and (1) assume block voting along racial lines (which had apparently been the case in the past), (2) look at the percentages of whites and nonwhites in the whole Kings County, and (3) draw district lines so that nonwhites of voting age would be in a majority in a percentage of the total number of districts approximately equal to their percentage of the total population in the County. (At the latter stage, apparently, they allowed for census figures that showed a lower percentage of nonwhites above voting age than the percentage of whites above voting age. Because of this, they drew the lines to insure supermajorities (i.e., above 65%) of nonwhites in certain districts, in order to insure at least a majority of nonwhite voters in those districts. The plaintiffs, of course, contend that the 65% figure was just pulled out of the air because the State officials "got the feeling" that was the figure the Justice Department would accept. That appears ludicrous to me, but we may find from the full record that it's true.)

The aim of the line drawing was apparently to attempt to insure election of nonwhite candidates from some of the districts. The question is whether this "quota" system is permissible in the context of this case.

City of Richmond does not control. In Part II of that

opinion the Court said that the change from at-large election to ward elections, in conjunction with Richmond's annexation, saved the annexation under § 5 because it kept it from having the effect of denying or abridging the ~~right~~ blacks' right to vote. It is true that the wards there were drawn so that a percentage of them would have substantial black majorities, and that that percentage corresponded very ~~rough~~ roughly to the percentage of blacks in the city after annexation. Thus, the Court did ~~n~~ condone drawing lines with racial purposes in mind. The difference ~~w~~ between Richmond and this ~~case~~ case, however, is the question presented to the Court by the line-drawing. In ~~Richmond~~ Richmond, the question was whether, given the wards as drawn, the Court could [redacted] say that the annexation plan as a whole [redacted] the effect of denying or abridging ~~black~~ black voting ~~rights~~ rights. Here, the question is whether the line-drawing was necessary to correct past wrongs, and if so whether that necessity justified it. Given that difference, I do not believe Richmond makes consideration of this case redundant.

As to the answer to the question presented by the line-drawing in this case, I remain quite confused. Plaintiffs claim that it was unjustified because there has been no finding of prior discrimination that the line-drawing was to remedy. Respondents try to get around this argument by pointing to the 1972 redistricting that failed to pass the AG, claiming that that redistricting was discriminatory against blacks, and arguing that there was no way to "remedy" that discrimination

without considering racial composition of the districts to be created by the 1974 plan. The problem with Respondents' argument is that the 1972 lines never went into effect, so one can't point to their discriminatory effect at all. Thus, the 1974 lines challenged here were not drawn to remedy any discriminatory effect of the previously proposed plan, and we must look somewhere else for the previous discrimination. It is true that district lines in Kings County appear to have been drawn from time immemorial with the purpose of keeping blacks from having majorities in any districts, or many districts. But I am not so sure that this "common knowledge" has been reduced to a finding anywhere in this litigation, and even if it had I'm not sure it would be relevant. This challenged redistricting came about simply because the AG refused to approve the previous one. The ground for that disapproval, under the Act and as given, was that the AG could not say that the plan did not have a discriminatory effect. The AG did not say that it did have one, either. And he certainly made no judgment as to previous districtings in Kings County. So, all his disapproval required the County to do was come up with a new plan that did not discriminate against nonwhites. His disapproval can hardly be pointed to as justification for quotas of any sort. But on the other hand, one doesn't want to tie the AG's and a State's hands in working out a plan that will not have a discriminatory effect against nonwhites, and it may be easiest for them at times to sit down with figures and drawing paper and play the percentages as they did here. It is

~~xxxxxxxxx~~ certainly difficult for me, at least, to think of some way they could avoid a discriminatory ~~xxxxx~~ effect against nonwhites without paying attention to the percentage figures for various districts.)

Phil

Conference 10-17-75

Court CA - 2 .... Voted on ...., 19...

Argued ...., 19... Assigned ...., 19... No. 75-104

Submitted ...., 19... Announced ...., 19...

UNITED JEWISH ORGANIZATIONS OF WILLIAMSBURGH, INC., ET AL.,
Petitioners

vs.

HUGH L. CAREY, ET AL.

DISCUSS

7/17/75 Cert. filed

White thinks this is a statutory rather than a const. matter (?). No one claims whites are underrepresented. Chavez seems relevant. Rehnquist disagrees with White. This is a "quota" system case.

Relisted at request of C.J.

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	POST	DIS	AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING	
Rehnquist, J.		✓												
Powell, J.					Join 3									
Blackmun, J.		✓												
Marshall, J.			✓											
White, J.			✓	?										
Stewart, J.			✓											
Brennan, J.			✓											
Douglas, J.							absent							
Burger, Ch. J.			✓											

Conference 10 31-75

Court ..... Voted on....., 19...

Argued ....., 19... Assigned ....., 19... No. 75-104

Submitted ....., 19... Announced ....., 19...

United Jewish Organizations of Williamsburg

vs.

Carey

Relist

Relisted for C & to reconsider

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING	
Rehnquist, J.		✓												
Powell, J.					Join 3.									
Blackmun, J.		✓												
Marshall, J.			✓	?										
White, J.			✓											
Stewart, J.			✓											
Brennan, J.														
Douglas, J.						Pend								
Burger, Ch. J.														

Conference 11-7-75

Court ..... Voted on ....., 19...

Argued ....., 19.. Assigned ....., 19... No. 75-104

Submitted ....., 19... Announced ....., 19...

United Jewish Organizations of Williamsburg

VS.

Carey

Relist

granted

End of Book I

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION G	MOTION D	ABSENT	NOT VOTING	
Rehnquist, J.		✓												
Powell, J.					join 3									
Blackmun, J.		✓												
Marshall, J.			✓		(doubtful)									
White, J.			✓											
Stewart, J.			✓											
Brennan, J.			✓											
Douglas, J.														
Burger, Ch. J.		✓												

LFP/vsl
July 26, 1976

No. 75-104, United Jewish Organizations of Williamsburgh vs. Carey (Governor of New York), NAACP, et al.

This memorandum, dictated after a preliminary look at the briefs, is intended only as an "aid to memory" that will refresh my recollection when I return to a more careful study of the case prior to argument and decision. When an opinion is expressed or intimated, it is wholly tentative.

* * * *

This is a rather complex "redistricting" case, from New York that has been in the courts for some time. It is here on certiorari to CA2 where the 1974 legislative redistricting of Kings County, following disapproval by the Attorney General under the Civil Rights Act of 1965 of a 1972 plan, was sustained by a majority of CA2 (Oakes), with a dissent by Frankel.

The two opinions, majority and dissenting, of the Circuit Court, and the briefs filed by petitioners (the Miller, Cassidy firm) and by the respondents-intervenors (NAACP) provide a comprehensive -- if at times confusing -- account of this case and its

issues. The other briefs, including that filed on behalf of Governor Carey, are not helpful. In view of the thorough opinions and briefing, however, I will not attempt in this memorandum to record for myself a coherent account of the history of the case, its relevant facts, or the various arguments. In brief sum-mary, the case is as follows:

The Situation and the Suit

Portions of New York, unlike most states outside of the South, are subject to Section V of the Voting Rights Act. Commencing in 1970, the State of New York and the Attorney General (Department of Justice) have been "sparring" -- and litigating -- over the effect of the Act on certain redistricting, including Kings County. The 1972 New York plan was disapproved by the Attorney General. Responding to this disapproval, a special emergency session of the New York legislature in May 1974 adopted a new plan, which was approved by the Attorney General. This case presents an attack on the constitutionality of that plan.

The district lines at issue here were largely influenced, if not in effect dictated, by the Justice Department. Judge Oakes, for CA2, noted:

> These lines were drawn, Richard S. Scolaro, the executive director of the Joint Committee on Reapportionment testified below, to comply with Justice Department criteria, informally discussed over the telephone and in person, that there be three senate and two assembly

districts with "substantial nonwhite majorities." Because the assembly district in which the entire Hasidic community was located under the 1972 apportionment had a nonwhite population of 61.5 per cent and the Justice Department indicated this was insufficient, Mr. Scolaro "got the feeling," although the number was not specifically referred to, that a 65 per cent nonwhite majority would be approved. Under the 1974 reapportionment plan devised and approved the Hasidic community was divided almost in half, placed in Assembly Districts 56 and 57 and Senate Districts 23 and 25. Assembly District 56 as redrawn contains 88.1 per cent nonwhite population, Assembly District 57 contains 65.0 per cent nonwhite population, Senate District 23 contains 71.1 per cent nonwhite population, Senate District 25 contains 34.7 per cent nonwhite population.

This suit was instituted by petitioner as representative of the Hasidic community of Kings County, described as a closely knit community of Jewish citizens most of whom escaped Nazi persecution, and have lived in what is called the Williamsburgh area since they immigrated to this country. The complaint avers that it was unconstitutional to dilute the vote of the Hasidic community by dividing it in half. The Court of Appeals correctly resolved this issue by holding that no specific ethnic or racial group is entitled to preserve community political integrity. This aspect of the case was resolved by CA2, and is not pressed on this appeal.

The Questions Presented

The best statement of the question presented is found in

petitioners' brief, as follows:

> 1. Whether the Fourteenth and Fifteenth Amendments were violated by a deliberate racial gerrymander under which election lines were drawn on a racial basis to secure ten districts with white voting populations at 35 percent or less.
>
> 2. Whether such a gerrymander was rendered constitutional by the fact that it was carried out under the instructions of the United States Department of Justice, purporting to implement the Voting Rights Act of 1965.
>
> 3. Whether a racial gerrymander can be viewed as "corrective action" to remedy past discrimination if there has been no affirmative finding by any court or government agency that there was past voting discrimination which required correction and if there is no rational relationship between the form of the remedy and the nature of the discrimination it assertedly "corrects."

Petitioners' brief argues, as a separate issue, each of these questions. The NAACP respondent's brief presents the opposing arguments. The issues are important and far-reaching, and not without considerable difficulty. At this time, I will merely comment on them quite briefly.

It is asserted by petitioners, and not denied, that this is "the first case in which there is absolutely no factual dispute as to the legislature's dominant purpose or motive." As CA2 stated the central issue is whether an apportionment "specifically drawn to ensure nonwhite voters a 'viable majority'" is permissible under the Fourteenth and Fifteenth Amendments. It is thus conceded, in effect, that although the plan was not directed in any way against

the Hasidic community as such, that community was divided -- and placed in separate state senate and assembly districts -- solely because they were white. Absent such a division, these new districts would not have had at least 65 percent nonwhite voting population prescribed as the goal for the redistricting.

As petitioners put it rather starkly

> If the petitioners' skin were black, brown, red or yellow, the apportionment challenged here would never have reached this Court. Any federal judge mindful of his oath to enforce the Constitution would instantly strike down a districting scheme which was flagrantly designed to keep blacks, Chicanos, Indians or orientals at not more than 35 percent of an election district.

Petitioners then present "three alternative grounds" for the alleged invalidity of the legislation:

1. As the broadest ground, it is argued that "there is never any justification for race-consciousness in the electoral process." Petitioners concede that the court has sustained race-oriented legislation with respect to public education and employment "to undo the effects of past discrimination" or to prevent its perpetuation. But "no seniority builds up in voting" and "no established attendance or assignment patterns develop over the years of racial discrimination as they do with regard to public school students and teachers." Hence, it is argued that once racial gerrymandering has been shown, the cure "is fair non-racial apportionment -- not districting designed to maximize the voting power of

blacks, Puerto Ricans, or any other minority."

2. Petitioners' second argument assumes, arguendo, that there may be some situations where racial redistricting is supportable to correct "past discrimination." It is argued, however, that there has been "no finding by any judicial or administrative body [in this case] that there was racial discrimination in the drawing" of past district lines in Kings County. As noted, the record shows that in one of the districts at issue in this case, nonwhites numbered 61.4 percent of the total population under the 1972 reapportionment, suggesting no discrimination in voting against this large nonwhite majority.

3. The third alternative argument (the most narrow of the three) is related to the particular quota system urged by the Department of Justice and adopted by the New York Legislature. Even if one accepts that (i) race-oriented legislation may be justified in some electoral districting and (ii) there was in fact past racial discrimination in Kings County that warranted some compensatory racial remedy, petitioners argue that "the record -- as well as human experience -- is devoid . . . of any justification for the remarkable 'quota' remedy undertaken by the New York Legislature." This is the focus of Judge Frankel's dissent. There had been no finding -- by the legislature or a court -- that the 65 percent quota was a necessary or an appropriate remedy for the objections raised by the Attorney General. Judge Frankel concluded that "there

is no semblance of justification" for the 65 percent quota.

Petitioners here rely on Milliken v. Bradley for the proposition that the remedy in a racial discrimination case designed to correct past segregated conduct may not substantially exceed in scope the constitutional violation found to have been committed. This concept goes back to Swann.

Respondent's Answers

The brief on behalf of the NAACP undertakes to answer the foregoing contentions, relying heavily on the purpose of the Voting Rights Act and on the perceived rationale of several of our reapportionment cases including, particularly, White v. Regester, 412 U.S. 755.

The NAACP argues that the 1974 lines, adopted to conform to the Attorney General's views, were not unfair to whites. Although the lines drawn resulted in five new districts with nonwhite majorities, "white candidates were elected in four of these districts." It was emphasized that the racial mix of the population necessarily had to be considered, under the Civil Rights Act and the Attorney General's view in drawing the new lines.

Respondent NAACP noted, correctly I think, that there was certainly no showing of past discrimination against whites, and no past exclusion of them from access to the political processes, such as were noted in White v. Regester with respect to the black population.

The respondent-intervenors defend the appropriateness of the 65 percent quota remedy by reference, not so much to specific discrimination or intentional exclusion of blacks as by reference to general black-white ratios in various districts in New York prior to 1974. These ratios indicate that the non-white community had been fragmented in many instances, and paired with larger white areas, in a way that substantially diluted the black vote.

Comment

The briefs in this case, as well as the opinion of CA2, are rather "long" on arguments and "short" on the citation of relevant authorities and legal analysis based thereon.

Subject to rereading the major decisions of this Court that may be relevant (e.g., Regester, City of Richmond, Whitcomb), and to advice from my clerk, I am inclined to think that the Voting Rights Act -- if not our prior decisions -- dispose of petitioners' first, sweeping assertion that "there is never any justification for race consciousness in the electoral process."

Petitioners' second and third arguments present more difficult issues, as is made clear -- at least to me -- by Judge Frankel's dissenting opinion. If indeed there is no finding by any judicial or administrative body that there was racial discrimination in drawing former district lines in Brooklyn (Kings County),

is there justification for the lines being drawn deliberately to place the white voters at a serious percentage disadvantage? In answering this question, to what extent is the view of the Attorney General on the Voting Rights Act relevant? Is it, as argued by respondents, determinative? I would have thought that it is certainly relevant, as the Act applies to Kings County, but this would not necessarily answer a Fourteenth Amendment attack on the ground that -- as applied -- the Act was violative of the equal protection rights of the whites.

The third argument, that won Judge Frankel's vigorous endorsement, is still more narrowly focused. Is there anything in the record that supports the necessity for, or rationality of, the 65 percent quota system in relation to the legislative purpose? Indeed, if the legislative purpose is a "legitimate one," is there a reasonable relationship between the purpose and the "classification" (the 65-35 minimum ratio) adopted?

I add, for the benefit of my clerk or clerks, that my own "bias" is against "quota systems" as either a constitutionally required, or a socially justifiable, resolution of most race discrimination cases. In the voting area particularly, the underlying assumption that blacks and whites votes as separate blocs is -- in my opinion -- fallacious and unsupported by the most relevant empiric data. See, e.g., petitioners' brief, p. 29-33. Moreover, I agree with petitioners that blacks also can be -- and in many

instances have been -- effectively represented by whites and by vice versa. These generalizations are supported by my own experience and participation in campaigns in Richmond. There is evidence (some of which I have personally seen) that black citizens tend to vote more as a "bloc" than do white citizens, but this does not mean that if a white is elected to office -- despite the bloc voting against him -- he will ignore or fail to represent the black constituents. One usually may safely count on a politician to make conscious appeals to -- certainly not to ignore -- any major, identifiable group of voters among his constituency. A well organized minority often is far more influential in the political process than is the unorganized, disparate, and often relatively disinterested white majority.

More fundamentally, in the long view our democratic processes will be strengthened by bringing the races together, not by creating and perpetuating a consciousness of continuing apartheid.

Despite these generalized (and perhaps irrelevant) observations, I would like for the clerk assigned to this case to identify more precisely than I have the most relevant Supreme Court authorities, and indicate to me the directions in which these authorities point. There is, I believe, no controlling decision but perhaps the guiding principles can be distilled from these precedents.

BENCH MEMO

October 2, 1976

To: Mr. Justice Powell

From: Dave Martin

No. 75-104, United Jewish Organizations of Williamsburgh, Inc., et al. v. Carey, et al.

I began my consideration of this case in much the same frame of mind that I detect in your "aid to memory" memorandum. I think quotas are generally wrong, even if they are ostensibly benign. Moreover, to talk about any reapportionment plan (I am thinking in particular here of the 1972 plan) as diluting a racial group's voting strength or effectiveness comes very close to assuming, and perhaps implicitly encouraging, racial bloc voting. Naturally there is some reality to bloc voting, but it is wrong to build public policy on the assumption that it will continue and even become more entrenched. See Wright v. Rockefeller, 376 U.S. 52, 66 (Douglas, J., dissenting); cf. Anderson v. Martin, 375 U.S. 399, 402 (invalidating Louisiana's requirement that a candidate's race be printed on the ballot next to his or her name).

I have concluded, however, that reversal here would be a mistake. New York was clearly conscious of race in drawing the 1974 lines, but it is unrealistic to think that such consciousness could have been completely purged. Moreover, although the legislature was conscious of race, there is really no claim that it exercised its consciousness in an invidious attempt to disadvantage whites. The purpose was not to harm whites. Nor was the effect to harm whites, if we focus--as we should--on the reapportionment plan as a whole and not just on the districts where New York admittedly labored to create a 35% white population.

In addition, I do not think the issues have come to us framed in the most relevant form. The parties and CA2 assumed that a Swann/Milliken analysis governs. I tend to think that the more traditional reapportionment cases, particularly Whitcomb v. Chavis, provide the relevant standards.

I conclude that the CA2 should be affirmed, or perhaps that the writ should be dismissed as improvidently granted. I do not think this is the kind of quota case the Court thought it was when it granted review.

Before I focus specifically on the three claims petitioner has presented, it is appropriate to review the broader background.

New York was acting in response to the AG's objection to its 1972 apportionment. Assuming for the moment that that objection amounted to a finding of improper racial gerrymandering, one might well argue that the way to correct the problem is simply to draw the lines with an eye that is color-blind. In fact, petitioners suggest exactly this, that the cure "is fair non-racial reapportionment--not districting designed to maximize the voting power of blacks, Puerto Ricans, or any other minority."

If I thought color-blind districting were realistically possible, then I might well join petitioners in striking down the 1974 plan on the broadest ground they urge. But I do not think that color-blindness is a realistic expectation in the reapportionment context--this context being decidedly different in this regard from, say, employment or jury selection. One cannot expect such blissfully ignorant neutrality unless perhaps all line-drawing is taken over by judges--or even then, unless the judge appoints a special master from a distant city who knows nothing of the local community and is denied all access to information except a map showing gross population figures.

Reapportionment is undeniably a political process. There are an infinite number of ways to draw up districts with equal population. Each variation will have different political, racial, and ethnic implications. Legislators are bound to know something about the communities affected--that is their job--and they are bound to have at least a rough awareness of those political, racial, and ethnic implications before any plan is enacted.

In Gaffney v. Cummings, 412 U.S. 735, the Court had to face a contention that districts should

be drawn with an eye that is "party-blind." The context is a bit different from the one we have here, but I think the Court's recognition of the realities applies equally when consciousness of race is at issue.

~~in the present context~~

> We are quite unconvinced that the reapportionment plan offered by the three-member Board violated the Fourteenth Amendment because it attempted to reflect the relative strength of the parties in locating and defining election districts. It would be idle, we think, to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it. Our cases indicate quite the contrary.
>
> See *White* v. *Regester, supra; Burns* v. *Richardson, supra; Whitcomb* v. *Chavis, supra; Abate* v. *Mundt, supra.* The very essence of districting is to produce a different—a more "politically fair"—result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats. Politics and political considerations are inseparable from districting and apportionment. The political profile of a State, its party registration, and voting records are available precinct by precinct, ward by ward. These subdivisions may not be identical with census tracts, but, when overlaid on a census map, it requires no special genius to recognize the political consequences of drawing a district line along one street rather than another. It is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area. District lines are rarely neutral phenomena. They can well determine what district will be predominantly Democratic or predominantly Republican, or make a close race likely. Redistricting may pit incumbents against one another or make very difficult the election of the most experienced legislator. The reality is that districting inevitably has and is intended to have substantial political consequences.
>
> It may be suggested that those who redistrict and reapportion should work with census, not political, data and achieve population equality without regard for political impact. But this politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results; and, in any event, it is most unlikely that the political impact of such a plan would remain undiscovered by the time it was proposed or adopted, in which event the results would be both known and, if not changed, intended.

Id. at 752-53.

If it is unrealistic to expect reapportionment to proceed without awareness of racial consequences, then it is surely wrong to strike down a plan that resulted from a process marked by such awareness--even though, admittedly, that awareness here was probably far more explicit than is common. Obviously this does not mean that courts should abandon all review of reapportionment plans, but it counsels caution and restraint in reviewing equal-population plans when they are challenged as unconstitutional under the Fourteenth or Fifteenth Amendment.

Racial awareness more explicit here than usual

The cases support this view. It requires quite a strong showing to have a plan invalidated (assuming reasonably equal population among districts) by a court on constitutional grounds. (Cases under §5 of the Voting Rights Act are a different matter.) I set out the most important cases below. The best general discussion I have found is Justice Stevens' dissent in Cousins v. City Council, 466 F.2d 830, 847 (CA7 1972). It is 14 pages long, but it is well worth reading.

The first significant case involved an outrageous redrawing of municipal boundaries. Gomillion v. Lightfoot, 364 U.S. 339. →

The case arose on the pleadings, and the court held that the plaintiff had alleged enough to get to trial. There has been ongoing debate about whether Gomillion announced a standard looking to (1) legislative purpose or to (2) necessary effect--but the results there were so extreme (all but four blacks were districted out of Tuskegee's city limits; all whites remained inside) that it did not make much difference. The standard announced was that action of this sort is invalid if it "fences out" particular groups.

That standard, however, is not very helpful for the usual legislative districting case. First, Gomillion was an extreme case. The result was so blatantly segregative that it fairly cried out for invalidation. More importantly, Gomillion involved a city's boundaries, not legislative districting. Those outside the boundaries had no vote whatever on city affairs. For state legislative apportionment, however by contrast, a group fenced out of one district is simply fenced into another.

~~For state legislative apportionment, [illegible] out of one district simply [illegible] fended into another.~~

Wright v. Rockefeller, 376 U.S. 52, presented a like question in the legislative setting. ~~Plaintiffs~~ The challenge was to ~~counsel namely~~ the Congressional districts on Manhattan. Plaintiff's counsel argued that all the Court had to determine was whether the lines were drawn with racial considerations in mind and whether the effect was to create racially segregated districts. If so, he argued, the lines were unconstitutional. The facts ~~afforded~~ tended to show that the lines were thus drawn. But the ~~court~~ ~~result~~ ~~of~~ ~~divi~~ three-judge DC divided confusingly. This Court read the three opinions as meaning that the DC did not find that the New York legislature "was either motivated by racial considerations or in fact drew the districts on racial lines." Id. at 56. And it accepted the finding. Later it phrased the test a bit more narrowly: did the lines amount to a "contrivance to segregate"? Id. at 57. Justices Douglas and Goldberg dissented, saying the lines could only be explained in racial terms. Justice Douglas eloquently marshaled the arguments against racial line-drawing. Id. at 66. Wright predated Reynolds v. Sims, 377 U.S. 533.

Once "one person, one vote" was established, the Court might conceivably have stopped there. As long as each vote carried numerically equal force, and as long as the situation is not as outrageous as Gomillion, one could make a strong claim that the legislature court's role is at an end. The most any could do would be to fiddle with district lines with arguable negative impact on this group or that--but the negative impacts would be so arguable that there would be no cause for court intervention. Cf. Wright v. Rockefeller, 376 U.S. at 58 (noting that the black plaintiffs wanted more even dispersal of minority votes among districts, whereas intervenors--Adam Clayton Powell and others--supported concentration).

Whatever the merit of that position, it did not catch on. The Court continued to hold out the prospect of invalidation where a plan had the effect of "diluting" the voting power of given groups. The question usually arose in cases attacking multi-member districts. Fortson v. Dorsey, 379 U.S. 433, and Burns v. Richardson, 384 U.S. 73, approved multi-member districts in the Georgia and Hawaii plans, but they indicated that such

districts would be invalidated if they were employed "to minimize or cancel out the voting strength of racial or political elements of the voting population." Fortson, 379 U.S., at 439; Burns, 384 U.S., at 88.

There were a lot of analytical problems and buried in that deceptively simple formulation. They all came home to roost in Whitcomb v. Chavis, 403 U.S. 124. There a DC had carefully analyzed voting patterns and housing patterns and concluded that the multimember districts in Marion County, Indiana did have the proscribed effect. [This case hits close to home. I grew up in Indianapolis and my father was a legislator from Marion County until 1962.] This Court reversed. It became clear that the Fortson/Burns doctrine, without more, bordered on saying that a group's voting power was cancelled or minimized if its candidate lost.

The Court elaborated on the test and narrowed it substantially. First it put to one side cases where it was shown that multimember districts "were conceived or operated as purposeful devices to further racial or economic discrimination." Id. at 149. Absent such a showing, plaintiffs would have to prove a good deal more about past deprivations in the voting

area. This is the crucial passage: in Whitcomb:

> Nor does the fact that the number of ghetto residents who were legislators was not in proportion to ghetto population satisfactorily prove invidious discrimination absent evidence and findings that ghetto residents had less opportunity than did other Marion County residents to participate in the political processes and to elect legislators of their choice. We have discovered nothing in the record or in the court's findings indicating that poor Negroes were not allowed to register or vote, to choose the political party they desired to support, to participate in its affairs or to be equally represented on those occasions when legislative candidates were chosen. Nor did the evidence purport to show or the court find that inhabitants of the ghetto were regularly excluded from the slates of both major parties, thus denying them the chance of occupying legislative seats.[2]

Id. at 149-50 (footnote omitted).

The Court continued, disowning some of the possible implications of the earlier cases:

> If this is the proper view of this case, the failure of the ghetto to have legislative seats in proportion to its population emerges more as a function of losing elections than of built-in bias against poor Negroes. The voting power of ghetto residents may have been "cancelled out" as the District Court held, but this seems a mere euphemism for political defeat at the polls.
>
> On the record before us plaintiffs' position comes to this: that although they have equal opportunity to participate in and influence the selection of candidates and legislators, and although the ghetto votes predominantly Democratic and that party slates candidates satisfactory to the ghetto, invidious discrimination nevertheless results when the ghetto, along with all other Democrats, suffers the disaster of losing too many elections. But typical American legislative elections are district-oriented, head-on races between candidates of two or more parties. As our system has it, one candidate wins, the others lose. Arguably the losing candidates' supporters are without representation since the men they voted for have been defeated; arguably they have been denied equal protection of the laws since they have no legislative voice of their own. This is true of both single-member *and* multi-member districts. But we have not yet deemed it a denial of equal protection to deny legislative seats to losing candidates, even in those so-called "safe" districts where the same party wins year after year.

Id. at 153. And again:

> . The mere fact that one interest group or another concerned with the outcome of Marion County elections has found itself outvoted and without legislative seats of its own provides no basis for invoking constitutional remedies where, as here, there is no indication that this segment of the population is being denied access to the political system.

Id., at 154-155 (emphasis added). See also id. at 156-157.

Similar issues arose in White v. Regester, 412 U.S. 755, but the Court held that plaintiffs had put on sufficient proof to meet the Chavis test. At issue were multimember districts in Texas allegedly disadvantaging black and Mexican-American voters. The Court noted that multimember districts are not per se invalid, but that the Court has entertained claims that such districts were used invidiously to cancel out or minimize the voting strength of racial groups. It restated the tests:

> To sustain such claims, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.

Id. at 765-66.

The test derives from Whitcomb and Chavis

For constitutional cases, these remain the tests. Indeed, where the claim is that single-member districts are invalid, the tests must be, if anything, more stringent, for in such cases the reviewing court has no alternative plan to offer that is as easily managed as one simply substituting single-member districts for multimember

districts.

In the case before us, I do not see any possibility that petitioners can prevail under such a test. It is not conceivable that it could be proved that white voters have had less opportunity than others to participate in the political processes and to elect legislators of their choice. (I am assuming here that petitioners' only relevant claim is as white voters, not as Hasidim. ~~Ex~~ They seem to have abandoned the claim based on standing as Hasidim, and indeed they would have had a hard time sustaining it since what they want is color-blind and "ethnic-blind" districting.)* ~~(f~~ ~~quote from Gaffney re proportional rep--this helps resps, but I would not rely on it. Proportional rep of parites is OK, of races, highly problematic.)~~

Petitioners' only hope under Chavis ~~x~~ is to bring the case under the first branch of the Chavis ~~x~~ test. ~~the test put to one side in that case.~~ That is, they would have to show that the districts here "were conceived or operated as purposeful devices to further racial or economic discrimination." 403 U.S., at 149. They have succeeded, I think, in proving that the districts were drawn purposefully with respect to the racial element,

but they have not shown that the districts were meant "to further racial or economic discrimination." There was no showing that the legislators wanted to harm whites, if that is part of what is meant by the test. But more importantly, the Kings County redistricting, viewed as a whole, cannot be said to (have an effect unfair to white voters.) Even if one assumes for the moment racial bloc voting (an assumption which I hesitate to embrace), whites have majorities in 68-70% of the districts even though they comprise only about 65% of the Kings County population.[2] See CA2's opinion at n. 21, Petn. at 27a.

If viewed as a whole, no unfair effect on white voters

Moreover, one should not ignore the statistic isolated by the NAACP although in their brief at 24, although I would want to think about approving it a good deal more before adopting it as a relevant factor for broad application. The 1972 lines placed a large number of nonwhites in majority white districts, but only a relatively small number of whites in nonwhite majority districts. This suggests the pattern of "concentration" plus "diffusion" which formed the basis for the AG's objection to the 1972 plan.) The 1974 plan, by contrast, evens out the figures

The only way to think that there has been a harmful effect on white voters is to focus attention only on those whites who now find themselves in the districts deliberately engineered to have 65% nonwhites. That is too narrow a focus. The whole county should be considered. In that light, I do not think one can say that the districting amounted to a "purposeful device to further racial . . . discrimination" against whites.

With this background in mind, let me turn to the three specific questions raised by petitioners. If I am right that Chavis sets the standards here, then the questions (as well as the lower court opinion) are a bit off the mark. The parties and the lower court act as though Swann/ Milliken questions are the crucial ones--as though race is a permissible consideration only when used in a carefully circumscribed way to remedy a past wrong clearly established. That test may be perfectly sound for most contexts, but, for the reasons outlined above--especially the impossibility of eradicating race consciousness from the districitng process--it will not work in the reapportionment area. The Court should stick with Chavis.

~~Assuming, however, that the Court will take~~ decide the case in the terms in which it presents itself, I still would hold for respondents. I ~~take the questions~~ treat petitioner's arguments seriatim, as they are set forth at ~~page~~ pp. 5-7 of your aid-to-memo.

1. We ~~do not have here a "deliberate~~ racial gerrymander," in that the districts as drawn in 1974 do not distort the relative voting power of the racial groups involved. Certainly they do not diminish the power of white voters, and this is the only claim petitioners have standing to present. And I have argued above that a mere showing of race consciousness by the redistricters ought not invoke this Court's wrath.

2. Question 2 is irrelevant if there is no gerrymander.

1. Petitioners argue that there is never any justification for race-consciousness in the electoral process. I have argued above that it is largely unavoidable, ~~saying racial lines are drawn~~ unless the lines are drawn by ~~political~~ judges or special masters. The more important question is whether such consciousness is invidious, and I think it is the ~~Chavis Committee~~ more stringent Chavis test (or some variant adjusted to apply to a plan

that already provides for single-member districts) which forms the standard for judging invidiousness. There was no invidious race-consciousness here.

Moreover, I think the Court should scrutinize very carefully the basic premise upon which petitioners build their entire case, even though it has never been squarely challenged by any of the other parties. The petitioners argue that this case is different from all others ever to come before the Court in that this is "the first case in which there is absolutely no factual dispute as to the legislature's dominant purpose or motive." I simply cannot agree.

~~Nearly all the petitioners have this same~~ ~~almost any~~ It is clear that the New York legislature was not ~~[illegible]~~ acting of its own free will in drawing the 1974 lines. It was ~~They were~~ acting to overcome the AG's objections to the 1972 lines. Moreover, the legislative reports indicate that the

Brief at 7. The individual is Richard Scolaro, executive director of the legislative committee on reapportionment. He is apparently not a legislator. He did testify that the "sole reason" why he ran a district line through the Hasidic community was his understanding that the AG wanted a given number of 65% nonwhite districts.

This Court, however, should not let one staff member's testimony determine conclusively the intent of the entire legislature of the sovereign state of New York.

> Inquiries into congressional motives or purposes are a hazardous matter. . . . What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork.

United States v. O'Brien, 391 U.S. 367, 383-384. See also Palmer v. Thompson, 403 U.S. 217, 224-225.

The unique setting of this case, where New York is basically sympathetic to petitioners' position, has meant that New York has not so far raised any substantial objection to the Court's presuming intent from isolated remarks by staff members. But this does not make a presumed finding of legislative intent any the less a monumental undertaking for this Court. Even though Scolaro may have been motivated solely by the AG's ostensible 65% requirement, I cannot believe that all the legislators who voted for the plan likewise abandoned all other considerations when they cast their votes. Surely they reviewed the lines to make sure that they did not trench too deeply

on other interests the legislature wanted to serve. And since the 1974 lines ~~really~~ are not too terribly different generally from the 1972 lines, I should think that whatever motives prompted adoption of the 1972 lines also went into approval of the 1974 lines. In other words, it is ~~axgxax~~ an oversimplification, even in the unusual circumstances of this case, to say that a 65% quota was the legislature's only motive in adopting the 1974 plan.

that already provides for single-member districts) which governs permits forms the standard for judging invidiousness). There was no invidious race-consciousness here.

2. Petitioners argue that even if race consciousness is sometimes permissible, it must be done only upon a solid administrative or judicial finding of a past wrong. They claim that the AG's objection cannot serve as such a finding, because ~~it was such a mild statement.~~ the letter containing his objection was so mildly phrased. In it the AG pointed out that the state bears the burden of proof on the question whether the plan has the purpose or effect of abridging the right to vote because of race or color. Then he stated: "we have concluded that the proscribed effect may exist in parts of the plans in Kings and New York counties." (emphasis added).

That is not a very ringing declaration of a past wrong. But in context I think it has to be taken as an administrative finding that calls for remedial action. I would not tax the AG too heavily for his namby-pamby wording. After Georgia v. United States, 411 U.S. 526, this is all he has to say in order to explain his objection. ~~He is in a delicate position, and if I were in his position, I too would~~

There is no need to call New York officials, in effect, a bunch of racists, even if he truly concluded that the 1972 plan was horribly discriminatory in purpose and effect. He has to deal with the officials in other contexts, so he has every incentive to use the mildest language possible.

Moreover, his determination is final and, (for present purposes,) unreviewable. The Voting Rights Act provides for "review" (really a de novo action concerning the same questions) only in the district court for the District of Columbia. Only the state can invoke that review, and it chose not to do so. That its decision was ostensibly prompted more by time pressures than by acquiescence in the AG's finding (although here too there is room for skepticism as to the real motivation) does not make the AG's objection any the less final. Even if the odds are low that the AG's action would have been sustained upon a proper challenge--and I do not concede that[31]--the fact remains that it was not challenged. We must, I think, treat it as a fully valid finding of racial discrimination.

Petitioners have largely forsworn their claim that the present suit is an appropriate forum for reviewing the AG's decision, but their reply brief at 5 n.1 demonstrates that they are not quite giving up. To the extent that this remains a live issue, the Court should affirm the DC's and CA's judgment dismissing the suit against the AG, and make clear that this case is not appropriate for reviewing the AG's objection or the standards he employed. The sole question here, unless this Court's Voting Rights Act cases are to be drastically reconsidered, is whether the 1974 lines violate the constitutional rights of white voters. If point 2 remains

relevant (and my Chavis analysis suggests it really is not), then we do have a solid, final, currently nonreviewable administrative finding of a constitutional wrong to be corrected.

3. Petitioners' narrowest argument, tracking Judge Frankel, is that even if there was a finding of a wrong, nothing in the finding justifies the extraordinary remedy of a rigid 65% nonwhite quota. (We must look at the entire county.) Again I think the focus is too narrow. The quota, if such there was, applied only to two Senate districts and two assembly districts. Other districts varied in percentages. This is not a school case, and again ~~I do not think~~ Swann/Milliken treatment is not called for -- ~~as to every aspect of the plan is appropriate.~~ particularly not as to every detail of every district line. In the reapportionment context, the kind of numbers game played here, given the AG's unchallenged objection, was not unacceptable.

footnotes

2

to one side cases where the district were "conceived or operated as purposeful devices to further racial or economic discrimination." 403 U.S, at 149. A close reading of the language suggests that the case before us is not such a case--so the general Chavis test should govern.[1]

1. Justice Harlan wrote a separate opinion in Chapt. He noted the "'evident malaise among the members of the Court' with prior decisions in the field of voter qualifications and reapportionment." 403 U.S., at 165. He went on:

> The reapportionment opinions of this court provide little help. They speak in conclusory terms of 'debasement' or 'dilution' of the 'voting power' or 'representation' of citizens without explanation of what these concepts are. . . . A coherent and realistic notion of what is meant by 'voting power' might have restrained some of the extreme lengths to which this Court has gone in pursuit of the will-o'-the-wisp of 'one man, one vote.'

He hit the heart of the problem. But unfortunately he did not go on to suggest what a coherent concept of voting power would be. We are still

[footnote 1, cont'd.]

I think the Court made a mistake years ago in applying the "dilution" concept to the voting power of groups within districts of equal population. Dilution is a fairly clear concept when applied to individuals in districts of markedly different population, for there is a clear base-line referent available: one person, one vote. When it is applied to groups, however, the concept becomes hopelessly fuzzy. There is no clear baseline. Any number of configurations of district lines could be drawn, with different implications for group "effectiveness." Does concentration enhance effectiveness? Or are certain kinds of diffusion, whereby the group becomes the swing vote, the best? Moreover, although nobody wants any group to be totally without effectiveness, it is not clear just what level of effectiveness constitutes anyone's due.

In an attempt to give the dilution concept some clear content (i.e., diluted in comparison to what?), some courts have come close to saying either that black voting power must be maximized, or that some kind of proportional representation must be guaranteed: blacks are to have a clear majority in a percentage of districts equivalent to their population percentage. If one enters the "dilution" quagmire, then perhaps such standards afford the only solid ground--the only baseline--available. But they require one to assume that race (or race-related issues) will always be the determinative factor when individuals decide for whom to vote--a grotesque assumption. Perhaps some day this Court should reconsider →

the application of the dilution concept to groups affected by reapportionment. Abandoning such application would confine constitutional policing to cases as extreme as Gomillion, perhaps retaining review of multimember districts (a narrowly circumscribed phenomenon) under the Chavis standards. And of course, reasonable population equivalency should also be required. But I doubt that this case is an appropriate one for such reconsideration.

The Voting Rights Act presents related problems. See note 3 infra.

See generally Cousins v. City Council, 466 F. 2d 830, 847 (CA7) (Stevens, J., dissenting).

2. In this respect, the plan could conceivably be sustained under the following language from Gaffney:

> But neither we nor the district courts have a constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State.

However, I would not, however, rely on this notion in our present context. Fair, proportional representation of parties is a mild proposition; of races, much more problematic.

3. The 1972 district lines did at least raise some substantial question about the legislative motivation. See the map in the NAACP brief, p. 23. When the AG is working with a concept as amorphous as "dilution of group voting power," it seems quite possible that burden of proof will make a big difference. That is, in constitutional cases where the burden is on the plaintiffs, "fishy" configurations like the 1972 lines will usually be sustained. Under the Voting Rights Act, with the burden on the state, it is conceivable that "fishy" configurations will often fail, even if the substantive standard remains the same.

I think, parenthetically, that it would have been better if reapportionment had never been held to be one of the practices or procedures required to be submitted for review under §5 of the Voting Rights Act. This Court (started us down that road) ~~construed the Act~~ in Allen v. Board of Elections, 393 U.S. 544, 569. (It construed the Act to apply to a shift from district to at-large voting.) on the basis of a highly arguable ~~interpretation~~ reading of the legislative history. At the cited page, the Court pulled in the Reynolds v. Sims "dilution" language and applied it to group voting power, without any recognition of the analytical difficulties involved. Mr. Justice Harlan, dissenting,

~~to my mind,~~ in my view, had the better of the argument in showing that Congress did not intend the 1965 Act to apply to reapportionment or changes from ~~a~~ district to at-large voting. But he went unheeded.

~~If this interpretation is the~~ It is probably too late to turn around that act of ~~interpretation~~ statutory construction. For one thing, Congress has reenacted the Act twice since Allen, fully embracing the implications of Allen. Moreover, subsequent cases in this Court ~~accepted~~ entrenched the interpretation even more deeply. Perkins v. Matthews, 400 U.S. 379 (annexations); Georgia v. United States, 411 U.S. 526 (reapportionment). And even the cases from the last two terms are still/decidedly speaking the language of "dilution" and "effectiveness" of a group's voting power. City of Richmond v. United States, 422 U.S. 358; Beer v. United States, No. 73-1869 (March 30, 1976).

75-104 UNITED JEWISH v. CAREY Cert to CA2 Argued 10/6/76

Inclined to affirm - subject to conference discussion

N.Y. reapportionment plan that established Districts deliberately to give non-whites a 65-35% advantage. (Involves Kings County - which is all of Brooklyn)

Two Senate Districts & 2 Assembly Districts are involved (i.e. the 65-35% ratio). 1972 plan disapproved by AG

Under 1974 Plan: Viewing County of Kings as a whole, whites are elected from:

17 of 22 assembly Districts (68.6%)

8 of 10 Senatorial Districts (70%)

(Total population ration 65-35)

Case is troublesome, but I think the action of N.Y. Legislature - esp. in view of §5 - is well within the rationale of Gaffney v Cummings (partisan political districting in Conn).

Not a good case to address sticky issue of "racial quotas" in districting.

Lewis (Petros)

Petros did not know in advance that Leg. [redacted] was considering dividing the Jewish district into new districts.

Racial quotas invalid [redacted] in a reapportionment – except in most extreme case.

Sec 5 of Act of 1965 goes beyond what 14th amend. requires (Beare). (J. White said that in Beare it would probably be necessary to apply racial quotas).

But even if §5 allows quotas, Lewis says there must be a showing for need – a clear justification. No such [redacted] showing here.

Relies on Washington v Davis – no racially discriminatory purpose.

Lewis (cont.)

There is a "racial minority" — Jewish — purposely discriminated against in this case.

D/Justice takes position that Sec 5 protects only Negroes & Puerto Ricans — not Jews, Irish, Poles, etc. A 293

Relies on McDonald v Santa Fe Trail Co, 96 S. Ct. 2574 (1976) [We held in that case that Title VII protects whites also. I believe — Conference vote was that 14th Amend. also protects whites - but I ~~do~~ don't think we reached this point in our op.]

If Leg. purpose is non-racial (i.e. is genuinely political), districts may be devised this way.

Pfz

Lou Pollack (for NAACP)

~~Anomalous~~ nature of Petrs Court claim:

The Petrs argue for a preference (i.e. an ethnic district permanently) to Hasidic Jews.

~~But if whites~~

But if Petr. argue not for Jews (but for whites) it is frivolous to suggest that whites are disadvantaged; ~~whole~~ White legislators ~~[illegible]~~ (in Brooklyn):

68.6% = 17 of 22 districts in Brooklyn

~~8 of~~ and

70% = 8 of 10 senatorial districts

5 of 6 Congressmen

J Stevens asked if case would be different if there were ~~not~~ no Sec 5 of 1965 & no ruling by AG, could NY Leg have adopted these districts? Pollack answered "yes" * — but said N.Y. was virtually compelled to do this by Sec 5 & AG

---

* Citing Gaffney

Pollock (cont.)

Not a de Funis problem - no preference given to some at expense of others.

Pollock is wrong on this: Case was on dismissal of Petrs' complaint.

(Case is here on Prelim. Injunction, & record is inadequate as to Leg. purpose or intention. ? If we think CA 2 erred, we must remand for full trial.)

Bork (SG) argues for affirmance
Limits argument to "merits".

~~White here~~
If Petrs win, Sec. 5 will become meaningless.

→ Can't do redistricting w/out having racial impact in mind. Sec 5, as construed in Allen, etc., requires no less.

Petrs are really saying any redistricting of N.Y. would be invalid because legislature - even apart from § 5 - do & must* consider racial results. Otherwise, could use computers.

AG did not compel 1974 Plan.

* Gaffney v Cummings

The Chief Justice Passed
~~Aff'd~~ Affirm

Douglas, J. Affirm

Not impermissible for leg. to take race into account.

Even on these facts, no justification is required.

Moreover, whites not hurt – they have proportionate representation in Assembly & Senate.

Brennan, J. Remand for further hearing

If there had never been a §5 + no opinions of A.G., we would not look into motives of legislature.

But case is troublesome because it is ~~not~~ clear that race was a central motivation. Race alone is not enough. There must be some other justification.

State ~~has~~ of N.Y. justifies the action solely on racial grounds.

This case may be relevant to the employment quota cases.

Stewart, J. ~~D/G or~~ Affirm

Courts should not get into leg. reapportionments – whether motives are viewed as benign or otherwise.

Const. issue is frivolous

Affirm (tentative)
This is first case where racial motivation is admitted. N.Y. consider this - under AG's pressure.

~~But we~~
~~I~~ We should tie ~~the~~ our opinion to Title 5 to limit its application. This is a Katzenbach v Morgan case (I don't see this).

Out

Blackmun, J. Affirm

Agree with Potter & Byron (but this confuses me as they do not seem to agree)

Powell, J. Affirm

See my notes
Write narrowly to limit to leg. reapportionment - a political decision.
I agree generally with Potter.
This is different from Title VII or other quota cases.
I don't need to rely on Title V - where legislative reapp. is involved

Rehnquist, J. DIG or Affirm on grounds stated by Potter & me

Pg 6 - missing

10

I discussed this with Brennan on 12/2. He is reversing it, and may abandon the § 5 approach. I will await her new draft.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: 11-22-76

Recirculated: _____

1st DRAFT

Reviewed although I will concur in the judgment, I disapprove thoroughly of some of the cases cited and the sweeping language herein of approval.

SUPREME COURT OF THE UNITED STATES

No. 75-104

United Jewish Organizations of Williamsburgh, Inc., et al., Petitioners, v. Hugh L. Carey et al.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[November —, 1976]

MR. JUSTICE WHITE delivered the opinion of the Court.

Section 5 of the Voting Rights Act prohibits a state or political subdivision subject to § 4 of the Act from implementing a legislative reapportionment unless it has obtained a declaratory judgment from the District Court for the District of Columbia, or a ruling from the Attorney General of the United States, that the reapportionment "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. . . ."[1]

[1] Section 5 of the Voting Rights Act, 42 U. S. C. § 1973c, provides in pertinent part:

"Whenever . . . a State or political subdivision with respect to which the prohibitions set forth in section 1973b (a) of this title based upon determinations made under the second sentence of section 1973b (b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, . . . such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, stand-

The question presented is whether, in the circumstances of this case, the use of racial criteria by the State of New York in its attempt to comply with § 5 of the Voting Rights Act and to secure the approval of the Attorney General violated the Fourteenth or Fifteenth Amendments.

I

Kings County, N. Y., together with New York (Manhattan) and Bronx Counties, became subject to §§ 4 and 5 of the Act, by virtue of a determination by the Attorney General that a literacy test was used in these three counties as of November 1, 1968, and a determination by the Director of the Census that fewer than 50% of the voting-age residents of these three counties voted in the presidential election of 1968.[2] Litigation to secure exemption from the Act was unsuccessful,[3] and it became necessary for New York to

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ard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court."

A legislative reapportionment is a "standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968," within the meaning of § 5. *Beer* v. *United States*, 44 U. S. L. W. 4435, 4436 (1976); *Georgia* v. *United States*, 411 U. S. 526 (1973); *Allen* v. *State Board of Elections*, 393 U. S. 544, 569 (1969).

[2] See 42 U. S. C. § 1973b (b).

[3] The State of New York brought an action to obtain a statutory exemption for the three counties under § 4 (a) of the Act, seeking a declaratory judgment that its literacy test had not been used within the

secure the approval of the Attorney General or of the United States District Court for the District of Columbia for its 1972 reapportionment statute insofar as that statute concerned Kings, New York, and Bronx Counties. On January 31, 1974, the provisions of the statute districting these counties for congressional, state senate, and state assembly seats were submitted to the Attorney General. In accordance with the regulations governing his § 5 review, the Attorney General considered submissions from interested parties criticizing and defending the plan.[4] Those submissions included assertions that voting in these counties was racially

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10 years preceding the filing of the suit "for the purpose or with the effect of denying or abridging the right to vote on account of race or color." 42 U. S. C. § 1973b (a). After several years of litigation, the District Court for the District of Columbia denied the exemption and ordered the State to comply with the filing requirements of § 5. This Court summarily affirmed. *New York on Behalf of New York County* v. *United States*, 419 U. S. 888 (1974). See 510 F. 2d, at 516.

[4] Section 51.19, 28 C. F. R. provides:

"Section 5, in providing for submission to the Attorney General as an alternative to seeking a declaratory judgment from the U. S. District Court for the District of Columbia, imposes on the Attorney General what is essentially a judicial function. Therefore, the burden of proof on the submitting authority is the same in submitting changes to the Attorney General as it would be in submitting changes to the District Court for the District of Columbia. The Attorney General shall base his decision on a review of material presented by the submitting authority, relevant information provided by individuals or groups, and the results of any investigation conducted by the Department of Justice. If the Attorney General is satisfied that the submitted change does not have a racially discriminatory purpose or effect, he will not object to the change and will so notify the submitting authority. If the Attorney General determines that the submitted change has a racially discriminatory purpose or effect, he will enter an objection and will so notify the submitting authority. If the evidence as to the purpose or effect of the change is conflicting, and the Attorney General is unable to resolve the conflict within the 60-day period, he shall, consistent with the above-described burden of proof applicable in the District Court, enter an objection and so notify the submitting authority."

polarized and that the district lines had been created with the purpose or effect of diluting the voting strength of nonwhites (blacks and Puerto Ricans).[5] On April 1, 1974, the Attorney General concluded that, as to certain districts in Kings County covering the Bedford-Stuyvesant area of Brooklyn, the State had not met the burden placed on it by § 5 and the regulations thereunder to demonstrate that the redistricting had neither the purpose nor the effect of abridging the right to vote by reason of race or color.[6]

Under § 5, the State could have challenged the Attorney General's objections to the redistricting plan by filing a

[5] The record in this Court contains only part of the materials submitted to and considered by the Attorney General in his review of the 1972 plan. Included in the present record are a memorandum submitted on behalf of the NAACP and letters from several prominent black and Puerto Rican elected officials, all opposing the plan. Not included in the record are materials defending the plan submitted by the reapportionment committee of the New York legislature, the state attorney general, and several state legislators. Brief for the United States, at 8, and n. 9.

The NAACP, the Attorney General, and the court below classified Puerto Ricans in New York together with blacks as a minority group entitled to the protections of the Voting Rights Act. Hereinafter we use the term "nonwhite" to refer to blacks and Puerto Ricans, although small numbers of other nonwhite groups (such as orientals) are also included in the nonwhite population statistics.

[6] The basis for the Attorney General's conclusion that "the proscribed effect may exist" as to certain state assembly and senate districts in Kings County was explained in his letter to the New York state authorities as follows:

"Senate district 18 appears to have an abnormally high minority concentration while adjoining minority neighborhoods are significantly diffused into surrounding districts. In the less populous proposed assembly districts, the minority population appears to be concentrated into districts 53, 54, 55 and 56, while minority neighborhoods adjoining those districts are diffused into a number of other districts. . . . [W]e know of no necessity for such configuration and believe other rational alternatives exist."

The Attorney General also objected to the congressional districting in Kings County and to the state legislative districting in New York County. The districting for these seats is not at issue in this litigation.

declaratory judgment action in a three-judge court in the District of Columbia. Instead, the State sought to meet what it understood to be the Attorney General's objections and to secure his approval in order that the 1974 primary and general elections could go forward under the 1972 statute.[7] A revised plan, submitted to the Attorney General on May 31, 1974, in its essentials did not change the number of districts with nonwhite majorities but did increase the size of the nonwhite majorities in those districts. Under the 1972 plan, Kings County had three state senate districts with nonwhite majorities of approximately 91%, 61%, and 53%; under the revised 1974 plan, but there were again three districts with nonwhite majorities, but now all three were between 70% and 75% nonwhite.[8] As for state assembly districts, both the 1972 and the 1974 plans provided for seven districts with nonwhite majorities. However, under the 1972 plan, there were four between 85% and 95% nonwhite, and three were approximately 76%, 61%, and 52%, respectively; under the 1974 plan, the two smallest nonwhite majorities were increased to 65% and 67.5%, and the two

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[7] The State was also under pressure from a private suit to compel enactment of new district lines consistent with the views of the Attorney General. *NAACP* v. *New York City Board of Elections*, SDNY 72 Civ. 1460. See 510 F. 2d, at 517 n. 6.

[8] The 1972 percentages are taken from Table 3, accompanying the memorandum in support of the motions to dismiss of the applicants for intervention, record at 265, except for the 61% figure, which is for a district only partially in Kings County. That figure is taken from the Brief for the United States, App., at 53, and represents the black and Puerto Rican population rather than all nonwhites. The 1974 percentages are taken from the Interim Report of the Joint Committee on Reapportionment, record at 179–180. (The "record" is the printed appendix submitted by the parties.)

The 1974 plan created nonwhite majorities in two state senate districts that were majority white under the 1972 plan (the 17th and the 23d), but created white majorities in two districts that were majority nonwhite under the 1972 plan (the 16th and the 25th). See Brief for the United States, App., at 53.

in violation of the Fourteenth Amendment. Petitioners also alleged that they were assigned to electoral districts solely on the basis of race, and that this racial assignment diluted their voting power in violation of the Fifteenth Amendment. Petitioners sought an injunction restraining New York officials from enforcing the new redistricting plan and a declaratory judgment that the Attorney General of the United States had used unconstitutional and improper standards in objecting to the 1972 plan.

On June 20, 1974, the District Court held a hearing on petitioners' motion for a preliminary injunction. On July 1, 1974, the Attorney General informed the State of New York that he did not object to the implementation of the revised plan. The Attorney General moved to be dismissed as a party on the ground that the relief sought against him could be obtained only in the District Court for the District of Columbia and only by a State or political subdivision subject to the Voting Rights Act; the State and the intervenor NAACP moved to dismiss the complaint on the ground that it failed to state a claim upon which relief could be granted. The District Court granted the motions to dismiss the complaint, reasoning that petitioners enjoyed no constitutional right in reapportionment to separate community recogntion as Hasidic Jews, that the redistricting did not disenfranchise petitioners, and that racial considerations were permissible to correct past discrimination.[12] 377 F. Supp., at 1165–1166.

A divided Court of Appeals affirmed. The majority first held that the Attorney General must be dismissed as a party because the court had no jurisdiction to review his objection to the 1972 plan.[13] After agreeing with the District Court

[12] Petitioners' motions for a preliminary injunction and summary judgment were denied.

[13] Although petitioners did not present this question for review, they argue that the Attorney General is properly a party to this suit because he allegedly caused the state officials to deprive petitioners of their constitutional rights. Brief for Petitioners, at 53–54, n. 22; Petitioners' Reply

that petitioners had no constitutional right to separate community recognition in reapportionment—a holding not challenged by petitioners here[14]—the Court of Appeals went on to address petitioners' claims as white voters that the 1974 plan denied them equal protection of the laws and abridged their right to vote on the basis of race. The court noted that the 1974 plan left approximately 70% of the senate and assembly districts in Kings County with white majorities; given that only 65% of the population of the county was white, the 1974 plan would not underrepresent the white population, assuming that voting followed racial lines. 510 F. 2d., at 523, and n. 21. Petitioners thus could not claim that the plan canceled out the voting strength of whites as a racial group, under this Court's decisions in *White* v. *Regester*, 412 U. S. 755 (1973), and *Whitcomb* v. *Chavis*, 403 U. S. 124 (1971). The court then observed that the case did not present the question whether a legislature, "starting afresh," could draw lines on a racial basis so as to bolster nonwhite voting strength, but rather the "narrower" question whether a State could use racial considerations in drawing lines in an effort to secure the Attorney General's approval under the Voting Rights Act. 510 F. 2d, at 524. The court thought this question answered by this Court's decision in *Allen* v. *State Board of Elections*, 393 U. S. 544, 569 (1969), where a change from district to at-large voting for county supervisors was held to be covered by § 5 of the Act. The court below reasoned that the Act contemplated that the Attorney General and the state legislature would have "to

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Brief, at 5 n. 1. In view of our disposition of the case, we do not reach this issue.

[14] In their brief in this Court, petitioners state: "[We do not] contend that there is any right—constitutional or statutory—for permanent recognition of a community in legislative apportionment. Our argument is, rather, that the history of the area demonstrates that there could be—and in fact was—*no reason other than race* to divide the community at this time." Brief for Petitioners, at 6 n. 6. (Emphasis in original.)

think in racial terms"; because the Act "*necessarily deals with race or color, corrective action under it must do the same.*" (Emphasis in original; footnote omitted.) The court held that

> "so long as a districting, even though based on racial considerations, is in conformity with the unchallenged directive of and has the approval of the Attorney General of the United States under the Act, at least absent a clear showing that the resultant legislative reapportionment is unfairly prejudicial to white or nonwhite, that districting is not subject to challenge." 510 F. 2d, at 525.[13]

We granted certiorari, 423 U. S. 945 (1975). We affirm.

II

Petitioners argue that the New York Legislature, under the compulsion of the Attorney General, has violated the Fourteenth and Fifteenth Amendments by deliberately revising its reapportionment plan along racial lines. They argue that whatever might be true in other contexts, the use of racial criteria in apportionment and districting is never permissible and that, in any event, there is no finding of past discrimination the residual effects of which require or justify as a remedy that white voters be reassigend in order to increase the size of black majorities in certain districts. Our difficulty with this argument is that it fails to appreciate

[13] The dissent would have found a constitutional violation in "the drawing of district lines with a central and governing premise that a set number of districts must have a predetermined nonwhite majority of 65% or more in order to ensure nonwhite control in those districts." The dissent pointed out that neither the Attorney General nor the State of New York would take responsibility for the 65% "quota," and argued that there was no showing of a pre-existing wrong which could justify the use of a "presumptively odious" racial classification. 510 F. 2d, at 525, 526 (Frankel, J.).

the role of the Voting Rights Act in this case.[16] This is not a case, as petitioners would have it, of "affirmative action" or "benign discrimination"; nor is it even a case of "remedial" discrimination designed to eliminate the effects of past discrimination. It is rather a case involving the application of the screening procedures of the Voting Rights Act to ensure that a change in voting procedures—here a new reapportionment statute—does not discriminate against racial minorities. The Attorney General's objection to the 1972 plan and New York's consequent changes in that plan were aimed at ensuring that discriminatory voting laws would not be implemented in the first place, not at curing the effects of past discrimination.

In upholding the Voting Rights Act as a valid exercise of congressional authority under § 2 of the Fifteenth Amendment, we recognized the ineffectiveness of case-by-case litigation in combating "widespread and persistent" voting discrimination and the need for "sterner and more elaborate measures" to counteract the "unremitting and ingenious defiance of the Constitution." *South Carolina v. Katzenbach*, 383 U. S. 301, 309, 328 (1966). One of the "stringent new remedies" we upheld was the screening by federal authorities required by § 5 before States subject to the Act were permitted to implement new voting regulations. Recognizing § 5 as "an uncommon exercise of congressional power" which might not be appropriate in less exceptional circumstances, we sustained it nonetheless, as a "permissibly decisive" response to "the extraordinary stratagem of con-

[16] The United States and the State of New York have urged us to hold that wholly aside from the Voting Rights Act it is constitutionally permissible for a legislature to draw district lines deliberately in such a way as to achieve a proportion of majority white and of majority nonwhite districts roughly approximating the proportion of each racial group in the countywide population. This argument may have considerable merit, cf. *Gaffney v. Cummings*, 412 U. S. 735, 751–754 (1973), but we do not need to reach it because we dispose of this case on a narrower ground.

applied only to few states. We know from school cases that this can be said of every State with significant black population

triving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees." *Id.*, at 334–335. (Footnote omitted.)

In *Allen* v. *State Board of Elections*, *supra*, on which the Court of Appeals relied below, we held that a change from district to at-large voting for county supervisors had to be submitted for federal approval under § 5, because of the potential for a "dilution" of minority voting power which could "nullify their ability to elect the candidate of their choice. . . ." *Id.*, at 569. When it renewed the Voting Rights Act in 1970 and again in 1975, Congress was well aware of the application of § 5 to redistricting. In its 1970 extension, Congress relied on findings by the United States Commission on Civil Rights that the newly gained voting strength of minorities was in danger of being diluted by redistricting plans that divided minority communities among predominantly white districts.[17] In 1975, Congress was un-

[17] The findings of the Commission's 18-month study, contained in its 1968 report, Political Participation, at 21–39, were endorsed in a statement submitted in the course of the Senate debates by ten out of seventeen Senate Judiciary Committee members, who proposed and successfully supported the critical amendment that extended § 5. The findings were repeatedly referred to during the Senate and House hearings held in 1969 and 1970 in connection with the extension. *E. g.*, Hearings on H. R. 4249, H. R. 5538, and Similar Proposals (Voting Rights Act Extension) before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 1st Sess., 3–4 (1969) (statement of Rep. McCulloch); *id.*, at 17 (testimony of Howard Glickstein, Acting Staff Director, United States Commission on Civil Rights); *id.*, at 150 (testimony of Thomas E. Harris, Associate General Counsel, AFL–CIO); Hearings on S. 818, S. 2456, etc. (Amendments to the Voting Rights Act of 1965) before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 91st Cong., 1st and 2d Sess., 47 (1969) (testimony of Frankie Freeman, Member, United States Commission on Civil Rights); *id.*, at 132 (testimony of Joseph L. Rauh, Jr., General Counsel, Leadership Conference on Civil Rights); *id.*, at 427 (statement of Howard Glickstein); *id.*, at 516–518 (testimony of David Norman, Deputy Assistant Attorney General, Civil Rights Division, U. S. Dept. of Justice.

mistakenly cognizant of this new phase in the effort to eliminate voting discrimination. Former Attorney General Katzenbach testified that § 5 "has had its broadest impact . . . in the areas of redistricting and reapportionment," and the Senate and House reports recommending the extension of the Act referred specifically to the Attorney General's role in screening redistricting plans to protect the opportunities for nonwhites to be elected to public office.[18]

In *Beer* v. *United States*, 44 U. S. L. W. 4435 (1976), the Court considered the question of what criteria a legislative reapportionment must satisfy under § 5 of the Voting Rights Act to demonstrate that it does not have the "effect" of denying or abridging the right to vote on account of race. *Beer* established that the Voting Rights Act does not permit the implementation of a reapportionment that "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Id.*, at 4438. This test requires that, in jurisdictions with a history of voting by racial blocs, the reapportionment must not decrease the percentage of districts where members of racial minorities protected by the Act are in the majority. See *id.* Where this requirement is not met, clearance by the Attorney General or the District Court for the District of Columbia cannot be given, and the reapportionment cannot be implemented.

The reapportionment at issue in *Beer* was approved by this Court, because New Orleans had created one councilmanic district with a majority of black voters where none existed before. But had there been districts with black majorities under the previous law and had New Orleans in fact decreased the number of majority black districts, it would have

[18] Hearings before a Subcommittee of the Senate Judiciary Committee, 94th Cong., 1st Sess., 124 (1975) (testimony of Nicholas Katzenbach); S. Rep. No. 94-295, 94th Cong., 1st Sess., 15-19 (1975); H. R. Rep. No. 94-196, 94th Cong., 1st Sess., 8-11 (1975).

had to modify its plan in order to implement its reapportionment by carving out a large enough black majority in however many additional districts would be necessary to satisfy the *Beer* test. There was division on the Court as to what a State must show to satisfy § 5; but all eight Justices who participated in the decision implicitly accepted the proposition that a State may revise its reapportionment plan to comply with § 5 by increasing the percentage of black voters in a particular district until it has produced a clear majority. See 44 U. S. L. W., at 4438; *id.*, at 4439 (WHITE, J., dissenting), 4443–4444 (MARSHALL, J., dissenting). Indeed, the plan eventually approved by this Court in *Beer* was drawn with the purpose of avoiding dilution of the black vote by attaining at least a 54% majority of black voters in one district while preventing a 90% concentration. See *Beer* v. *United States*, record, at 341–342.

The Court has taken a similar approach in applying § 5 to the extension of city boundaries through annexation. Where the annexation has the effect of reducing the percentage of blacks in the city, the proscribed "effect" on voting rights can be avoided by a post-annexation districting plan which "fairly reflects the strength of the Negro community as it exists after the annexation" and which "would afford them representation reasonably equivalent to their political strength in the enlarged community." *City of Richmond* v. *United States*, 422 U. S. 358, 370–371 (1975). Accord, *City of Petersburg* v. *United States*, 354 F. Supp. 1021 (DC 1972), aff'd, 410 U. S. 962 (1973). In *City of Richmond*, the Court approved an annexation which reduced the proportion of blacks in the city from 52% to 42%, because the post-annexation ward system created four out of nine wards with substantial black majorities of 64%. Had the redistricting failed to "fairly reflect the strength of the Negro community," however, it would follow from the Court's decision that the Constitution would permit the city to modify its

plan by deliberately creating black majorities in a sufficient number of wards to satisfy statutory requirements.

Implicit in *Beer* and *City of Richmond*, then, is the proposition that a State subject to the Voting Rights Act may redistrict along racial lines to purge its reapportionment plan of a discriminatory effect. That proposition must be rejected if we are to accept petitioners' view that racial criteria may be used, if at all, only to eliminate the effects of a past discrimination in apportionment. However, we decline to hold that the Voting Rights Act, as construed by this Court in *Beer*, is an unconstitutional exercise of congressional authority to implement the Fourteenth and Fifteenth Amendments. Cf. *Katzenbach* v. *Morgan*, 384 U. S. 641 (1966); *South Carolina* v. *Katzenbach*, *supra*. Rather, we hold that this use of racial criteria to shore up the voting potential of nonwhite voters in a reasonable attempt to comply with § 5 does not violate the Constitution.

Based on the evidence and submissions before him,[19] the Attorney General refused to approve the 1972 plan for Kings County until the nonwhite majority in certain districts had been sufficiently increased. It was evidently his judgment that only in this way could a dilution of nonwhite representation be prevented. Petitioners insist that, because the Attorney General concluded not that the 1972 plan would have a discriminatory effect but only that the State had failed to demonstrate that the plan would not have such an effect, there was insufficient justification for racial redistricting. This argument overlooks the central role of the shift in burden of proof in the congressional effort to combat discriminatory voting laws. As we said in *South Carolina* v. *Katzenbach*, *supra*, "After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia

[19] See nn. 4 and 6, *supra*.

from the perpetrators of the evils to the victims." 383 U. S. at 328. And in affirming the issuance of an injunction against enforcement of a state reapportionment plan for which the State had not demonstrated the absence of a discriminatory effect, the Court stated:

> "It is well established that in a declaratory judgment action under § 5, the plaintiff State has the burden of proof. What the Attorney General's regulations do is to place the same burden on the submitting party in a § 5 objection procedure. . . . Any less stringent measure might well have rendered the formal declaratory judgment procedure a dead letter by making available to covered States a far smoother path to clearance." *Georgia* v. *United States*, 411 U. S. 526, 538 (1973). (Footnote omitted.)

Petitioners also overlook the allocation of burden of proof under § 5 when they suggest that the Attorney General should have compared the voting power of nonwhites under the 1972 plan with nonwhite voting power under the previous reapportionment in 1966. The burden was on the State to convince the Attorney General that its plan would not have the proscribed effect. There is no evidence in the present record, and no offer of proof by petitioners, to show whether the 1972 plan increased or decreased the number of nonwhite majority districts in comparison with the 1966 reapportionment.[20]

Finally, petitioners object to what they describe as an "irrational" 65% "quota" imposed by the Attorney General. The Attorney General's letter of objection provided reasons for his inability to approve the 1972 plan, but did not an-

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[20] Petitioners take the position that there are no disputed issues of fact and that their motion for summary judgment should be granted on the basis of the present record. Petitioners' Reply Brief, at 17; Tr. of Oral Arg., at 70–71.

nounce the criteria an acceptable plan would have to meet. It would have been no more appropriate for the Attorney General to suggest an alternative plan than it would have been for the three-judge court in *Beer* to issue a dictum describing precisely what plan would have enabled New Orleans to satisfy the court's view of the requirements of the Voting Rights Act. However, the nature of the modification required was clear from the reasons given for the objection: lines had to be redrawn to assign some nonwhites in abnormally concentrated nonwhite districts to adjoining districts. Because several of those adjoining districts already contained nonwhite majorities, the task confronting the legislative reapportionment committee was essentially to create more substantial nonwhite majorities in districts adjoining those with high concentrations of nonwhites. The committee had to revise the plan for resubmission in less than two months in order to conduct the 1974 elections on schedule, and it therefore sought through informal contacts with Justice Department officials to ascertain exactly what percentages would guarantee approval for the revised plan. On the basis of these discussions, the committee concluded that the Attorney General would view 65% as a substantial majority, and the committee proceeded to modify petitioners' assembly district to achieve this figure. The overall effect of the revisions was to smooth out the distribution of nonall whites in Kings County but only about 55% of all nonwhites in nonwhite majority districts. The number of nonwhite majority districts was not increased; but in the 1974 plan there were no nonwhite majorities above 90% and none below 65%.[21]

The Attorney General's insistence on increasing the size of the nonwhite majority in two senate districts and two assembly districts was within the scope of his empowered duties and was not inconsistent with the statute. As the

[21] See text at nn. 8 and 9, *supra*.

Court indicated in *Beer*, 44 U. S. L. W., at 4436 n. 4, there is often a substantial difference between the nonwhite percentage of total population in a district and the nonwhite percentage of the voting age population. In the redistricting plan approved in *Beer*, for example, only one of the two districts with a black population majority also had a black majority of registered voters. *Id.*, at 4438. Where the question of the existence of a discriminatory effect focuses on the opportunity for the election of nonwhite candidates, the percentage of eligible or registered voters by district is of great importance.[22] No such statistics were furnished to the Attorney General by the State. The NAACP, intervenor in this action, submitted census data showing that roughly 75% of all whites in Kings County but only about 55% of all nonwhites were eligible to vote.[23] The NAACP urged that districts without significant nonwhite population majorities would not have nonwhite majorities among eligible voters.[24]

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[22] The regulation governing submissions to the Attorney General for review of redistricting plans under § 5 "strongly urges" the submitting authority to include "[v]oting-age population and the number of registered voters before and after the change, by race, for the area to be affected by the change." 28 CFR § 51.10 (b)(6)(ii) (1976).

[23] Table 2, accompanying memorandum in support of motions to dismiss of applicants for intervention, record, at 264.

[24] In its memorandum urging the Attorney General to object to the 1972 plan, the NAACP argued that petitioners' assembly district, which in the initial figures submitted to the Attorney General was reported as having a nonwhite majority of 50.1% (subsequently revised to 61%), should be counted as a white majority district because of the difference in the percentages of whites and nonwhites eligible to vote. Record, at 219.

The statistical problems in estimating the nonwhite population of the districts in the 1972 plan provided an additional reason for the Attorney General to ask for an increase in the size of the nonwhite majorities in certain districts. The legislature used the higher of the two sets of estimates, and the actual nonwhite population may have been somewhat lower. See Table 3, *supra*, n. 8.

We think it was reasonable for the Attorney General to conclude that a *substantial* nonwhite population majority—in the vicinity of 65%—would be required to achieve a nonwhite majority of eligible voters.

The judgment of the Court of Appeals is

Affirmed.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 22, 1976

Re: No. 75-104, United Jewish Organizations of Williamsburgh, Inc. v. Carey

Dear Byron:

Please show me as not participating in this one.

Sincerely,

T. M.

Mr. Justice White

cc: The Conference

Nov. 23, 1976

MEMORANDUM

To: Mr. Justice Powell

From: Dave Martin

No. 75-104 United Jewish Organizations v. Carey

As we have discussed, Justice White's circulated opinion seems to go off on an unfortunate tangent. It impliedly reviews the merits of the AG's decision to object ~~to the~~ under the Voting Rights Act to New York's 1972 reapportionment. Finding his objection reasonable, the opinion essentially concludes that therefore petitioners' Fourteenth and Fifteenth Amendment rights were not violated.

I would approach the case quite differently. Since it involves the Fourteenth and Fifteenth Amendments, I would rest the decision on this Court's precedents under those Amendments, ~~and the AG's decision comes in only tangentially~~ bringing the AG's decision in only tangentially, for what it may tell us about the legislature's purpose in enacting the 1974 plan.

The key Fourteenth Amendment case should be Washington v. Davis. The question here is whether the 1974 reapportionment represents purposeful discrimination against white voters. Two other Fourteenth Amendment cases, ~~in the voting area~~ specifically involving voting rights, also provide guidance: Whitcomb v. Chavis, 403 U..S. 124; White v. Regester, 412 U.S. 755. The question in those cases was whether multi-member legislative districts were employed "to minimize or cancel out the voting strength of racial or political elements of the voting population." ~~The Court held that it would not find~~

A plaintiff alleging that the districts were so employed must show more than that minority-supported candidates are losing elections. He must show that "this segment of the population is being denied access to the political system," 403 U.S., at 155, or that "the political processes leading to nomination and election were not equally open to participation by the group in question," 412 U.S., at 766.

The Fifteenth Amendment cases, Wright v. Rockefeller, 376 U.S. 52, and Gomillion v. Lightfoot, 364 U.S. 339, add little. They do indicate that, if the lines amount to a "contrivance to segregate," 376 U.S., at 57, they are invalid.

Applying these principles to the facts here yields a holding that there has been no constitutional violation. Taking "effect" as our starting point (Arlington Heights), there is no disproportionate impact disfavoring whites. If we look to Kings County as a whole, whites have majorities in a percentage of districts slightly higher than their percentage of total population--assuming arguendo that this type of statistic is relevant. Looking to other possible evidence of discriminatory intent, we find that the legislature was indeed quite conscious of race when it drew the 1974 lines. But consciousness of race is not the same as discriminatory purpose, although it may that discrimination is present. prompt concern. Discriminatory purpose implies either a desire to harm the target group or at least a "contrivance to segregate." Nothing in the record supports a finding of intent to harm or segregate. And the sequence of events bolsters a finding that the legislature's race-consciousness was not discriminatory. The legislature was acting in response to

the AG's objection. Though it disagreed with his disapproval of the 1972 plan, it felt it did not have time to challenge the AG in court. Its race-consciousness stemmed from its desire to pass a plan that would survive the AG's scrutiny, not its desire to harm whites.

The Chavis and Regester standards support this conclusion. Nothing in the record suggests that the political processes in Kings County have not been equally open to the participation of whites.

Somewhere I would make clear that we do not have before us for review the merits of the AG's decision to object, and we express no views on its validity. ~~[illegible] is "reviewable" only in the District Court for the District of Columbia. Perkins v. Matthews, 400 U.S. 379, 384-385.~~

D.M.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

L78

I'll await Byron's recirculation

From: Mr. Justice Stewart

Circulated: NOV 30 1976

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-104

United Jewish Organizations of Williamsburgh, Inc., et al., Petitioners, v. Hugh L. Carey et al.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[December —, 1976]

MR. JUSTICE STEWART, concurring.

In capsule form, this opinion makes nearly every point we plan to include in our opinion.

-Dave

The question presented for decision in this case is whether New York's use of racial criteria in redistricting Kings County violated the Fourteenth or Fifteenth Amendments. The petitioners' contention is essentially that racial awareness in legislative reapportionment is unconstitutional *per se*. Acceptance of their position would mark an egregious departure from the way this Court has in the past analyzed the constitutionality of claimed discrimination in dealing with the elective franchise on the basis of race.

The petitioners have made no showing that a racial criterion was used as a basis for denying them their right to vote, in contravention of the Fifteenth Amendment. See *Gomillion* v. *Lightfoot*, 364 U. S. 339. They have made no showing that the redistricting scheme was employed as part of a "contrivance to segregate"; to minimize or cancel out the voting strength of a minority class or interest; or otherwise to impair or burden the opportunity of affected persons to participate in the political process. See *Wright* v. *Rockefeller*, 376 U. S. 52, 58; *White* v. *Regester*, 412 U. S. 755; *Louisiana* v. *United States*, 380 U. S. 145; *Fortson* v. *Dorsey*, 379 U. S. 433.

See change I would want in Note next pg

Under the Fourteenth Amendment, the question is whether the reapportionment plan represents purposeful discrimination against white voters. Washington v. Davis, 426 U.S. —. Disproportionate impact may afford evidence that an invidious purpose was present. Arlington Heights. But the

Quotes

The record here cannot support a finding that the redistricting plan undervalued the political power of white voters relative to their numbers in Kings County. Cf. *City of*

Richmond v. *United States*, 422 U. S. 358. And the clear purpose with which the New York Legislature acted—in response to the position of the United States Department of Justice under the Voting Rights Act—forecloses any finding that the Legislature acted with the invidious purpose of discriminating against the participation of white voters in the political process.*

Having failed to show that the legislative reapportionment plan had either the purpose or the effect of discriminating against them on the basis of their race, the petitioners have offered no basis for affording them the constitutional relief they seek. Accordingly, I join the judgment of the Court.

*It is unnecessary to consider whether the position of the Department of Justice in this case was required or even authorized by the Voting Rights Act. It is enough to note that the Voting Rights Act and the procedures used to implement it are constitutionally valid, see, e. g., *South Carolina* v. *Katzenbach*, 383 U. S. 301; *Allen* v. *State Board of Elections*, 393 U. S. 544; *Georgia* v. *United States*, 411 U. S. 526, and that the procedures followed in this case were consistent with the Act. Congress has established an exclusive forum—the District Court for the District of Columbia—and provided exclusive standing in the state or political subdivision to raise the issue of substantive compliance with the Act. 42 U. S. C. § 1973*l* (b). That procedure was not invoked by New York here, and the issue of statutory compliance is consequently not properly before us.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: Mr. Justice Stevens

SUPREME COURT OF THE UNITED STATES

Circulated: 11/30/76

No. 75–104

Recirculated: _____

United Jewish Organizations of Williamsburgh, Inc., et al., Petitioners, *v.* Hugh L. Carey et al.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

I'll not join

[December —, 1976]

MR. JUSTICE STEVENS, concurring.

In my opinion this case raises a basic issue which cannot be avoided by placing decision on the Voting Rights Act.

New York has relied on racial factors in drawing voting district boundaries in three counties. This action is taken on the assumption that voters in these counties will tend to vote for candidates who are members of their own race. On that assumption, viewing the area as a whole, the plan minimizes the likelihood that black citizens will be underrepresented in the legislature; in this sense, it is designed to avoid a discriminatory effect on this class of citizens.

On the other hand, again making the assumption that votes will be cast along racial lines, viewing the problem from the point of view of particular white voters in the district in which these petitioners reside, the plan minimizes the likelihood that they will be represented by a member of their own race. Therefore, the plan is designed to have a discriminatory effect on particular citizens in these districts. The basic question raised by this case is whether that deliberate discrimination on account of race is constitutional.

Because race is merely one of several political characteristics that responsible legislators will inevitably consider when drawing political boundaries, I am satisfied that a plan is not automatically invalidated by showing that racial factors were

used to determine particular boundaries. More narrowly, I am satisfied that the plan adopted by New York for these three counties is one which the State Legislature could have adopted independently without violating the Equal Protection Clause of the Fourteenth Amendment. See *Cousins* v. *City Council of City of Chicago*, 466 F. 2d 830, 848–853, 854–856 (CA7 1972) (STEVENS, J., dissenting). If that were not my view, however, I could not uphold the plan on the strength of the federal statute on which the Court relies.

The Court's holding that the plan is acceptable rests squarely on the fact that New York is a State subject to the Voting Rights Act of 1965.[1] In so limiting its holding, the Court implicitly assumes that the federal statute—which was enacted to implement the Fourteenth Amendment—may authorize conduct which would violate that amendment if it were not so authorized.[2] I regard that assumption, and

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[1] Opinion, at 9–10, *supra*.

[2] I believe this to be a fair reading of the Court's opinion. The following quotation is from p. 14, *supra*:

"Implicit in *Beer* and *City of Richmond*, then, is the proposition that a State subject to the Voting Rights Act may redistrict along racial lines to purge its reapportionment plan of a discriminatory effect. That proposition must be rejected if we are to accept petitioners' view that racial criteria may be used, if at all, only to eliminate the effects of a past discrimination in appointment. However, we decline to hold that the Voting Rights Act, as construed by this Court in *Beer*, is an unconstitutional exercise of congressional authority to implement the Fourteenth and Fifteenth Amendments. Cf. *Katzenbach* v. *Morgan*, 384 U. S. 641 (1966); *South Carolina* v. *Katzenbach*, *supra*. Rather, we hold that this use of racial criteria to shore up the voting potential of nonwhite voters in a reasonable attempt to comply with § 5 does not violate the Constitution."

This paragraph provides a retrospective endorsement of the application of racial criteria in those cases, but does not, of course, endorse any possible use which might be made of racial criteria in the future. The remainder of the Court's opinion is an examination of the action of the New York Legislature in light of the dictates of the Voting Rights Act. But nowhere does the Court purport to address or decide whether the

therefore the Court's attempt to decide this case on a "narrow" rationale as untenable.

If the Fourteenth Amendment would prevent the New York Legislature from drawing these lines independently, I do not believe that either the Congress or the Attorney General of the United States could remedy the constitutional defect. Or, to put the same thought in a slightly different way, if the Attorney General's benign purpose protects these boundaries from constitutional attack, there is no reason why the State Legislature could not act on the basis of precisely the same motivation and be equally protected from constitutional attack.

It is, of course, perfectly clear that New York did rely, in part, on racial factors in drawing these district boundaries and that such reliance has operated to the disadvantage of certain members of the white race. I believe the Court has implicitly and correctly held that such reliance does not necessarily invalidate the State's action. I therefore concur in the judgment.

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employment of racial criteria in designing the scheme enacted here comports with the Fourteenth or Fifteenth Amendments. In fact the Court specifically declines to address or decide that question in n. 16, at 10, *supra*.

Gaffney
17 of 22
8 & 10

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 2, 1976

MEMORANDUM TO THE CONFERENCE

Re: No. 75-104 - United Jewish Organizations v. Carey

The risk of circulating a draft in this case with a rationale for which there was little enthusiasm at conference has perhaps been verified. Although shortly there will be another circulation taking essentially the same course, but with modifications, it is doubtful that it will garner the necessary votes. In that event, I shall redo the opinion and reflect what I understand to be the majority view--which I share--that a State may, without relying on the Voting Rights Act, use racial considerations in districting at least to the extent necessary to validate New York's actions in this case.

B.R.W.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 3, 1976

RE: No. 75-104 United Jewish Organizations, etc. v. Carey

Dear Byron:

I agree with the basic approach of your present circulation because I think we ought to avoid if possible reaching the broader question of the constitutionalty of "quotaizing" districts in the reapportionment process. I am preparing a concurrence elaborating my views but also hope I may be able to join your circulation.

Sincerely,

Bill

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 8, 1976

Re: No. 75-104 - United Jewish Organizations v. Carey

Dear Byron:

Please join me in your circulation of December 7.

Sincerely,

Harry

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 8, 1976

Re: No. 75-104 - United Jewish Organizations v. Carey

Dear Byron:

Please join me in your circulation of December 7.

Sincerely,

Harry

Mr. Justice White

cc: The Conference

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: 12/9/76

Recirculated: _____

Renewed - I'll not join

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-104

United Jewish Organizations of Williamsburgh, Inc., et al., Petitioners, v. Hugh L. Carey et al. | On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[December —, 1976]

MR. JUSTICE BRENNAN, concurring.

The Court effectively demonstrates that prior cases unquestionably establish the Attorney General's expansive authority to oversee legislative redistricting under § 5 of the Voting Rights Act. See, *e. g., Georgia* v. *United States*, 411 U. S. 526, 532 (1973); *Allen* v. *State Board of Elections*, 393 U. S. 544, 566, 569 (1969). Yet this is only the first step to analysis, for, however expansive, the breadth of that authority is not without limits with respect to its effect on white voters. Therefore, although I can subscribe to the Court's opinion, I add these words to indicate that I find the roadblocks to its reseult somewhat more difficult to overcome.

The one starkly clear fact of this case is that an overt racial number was employed to effect petitioners' assignment to voting districts. In brief, following the Attorney General's refusal to certify the 1972 reapportionment under his § 5 powers, unnamed Justice Department officials made known that satisfaction of the Voting Rights Act in Brooklyn would necessitate creation by the state legislature of 10 state Assembly and Senate districts with threshold nonwhite populations of 65%. Prompted by the necessity of preventing interference with the upcoming 1974 election, state officials complied. Thus, even though the Court correctly notes that

There are some thoughtful comments on pp. 4-7 concerning the general problems with "benign" quotas. But much of the rest overrelies on the Voting Rights Act.

— Dave

(and apparently likens the Act solves all problems even tho it applies only to a few states.

§ 5 is set in operation through prospective "screening procedures," *ante*, at 10, the Justice Department's unofficial instruction to state officials effectively resulted in an explicit process of assignment to voting districts pursuant to race. The result of this process was a county-wide pattern of districting closely approximating proportional representation. While it is true that this demographic outcome did not "underrepresent the white population" throughout the county, *ante*, at 8,—indeed, the very definition of proportional representation precludes either under- or over-representation—these particular petitioners filed suit to complain that *they* have been subjected to a process of classification on the basis of race that adversely altered their status.

If we were presented here with a classification of voters motivated by racial animus, *City of Richmond v. United States*, 422 U. S. 358, 378 (1975); *Wright* v. *Rockefeller*, 376 U. S. 52, 58 (1964); *Gomillion* v. *Lightfoot*, 364 U. S. 339, 347 (1960), or with a classification that effectively downgraded minority participation in the franchise, *Georgia* v. *United States*, *supra*, 411 U. S., at 534; *Whitcomb* v. *Chavis*, 403 U. S. 124, 144 (1971), we promptly would characterize the resort to race as "suspect" and prohibit its use. Under such circumstances, the tainted apportionment process would not necessarily be saved by its proportional outcome, for the segregation of voters into "separate but equal" blocs still might well have the intent or effect of diluting the voting power of minority voters. See, *e. g.*, *City of Richmond* v. *United States*, *supra*, 422 U. S., at 378; *Wright* v. *Rockefeller*, *supra*, 376 U. S., at 53–54. It follows, therefore, that if the racial redistricting involved here, imposed with the avowed intention of clustering together 10 viable nonwhite majorities at the expense of pre-existing white groupings, is not similarly to be prohibited, the distinctiveness that avoids this prohibition must arise from either or both of two considerations: the permissibility of

affording preferential treatment to disadvantaged nonwhites generally, or the particularized application of the Voting Rights Act in this instance.

The first and broader of the two plausible distinctions rests upon the general propriety of so-called benign discrimination: the challenged race assignment may be permissible because it is cast in a remedial context with respect to a disadvantaged class rather than in a setting that aims to demean or insult any racial group. Even in the absence of the Voting Rights Act, this preferential policy plausibly could find expression in a state decision to overcome nonwhite disadvantages in voter registration or turnout through redefinition of electoral districts—perhaps, as here, through the application of a numerical rule—in order to achieve a proportional distribution of voting power. Neither the propriety, nor indeed the full significance, of such a preferential policy, however, has ever been addressed by this Court. I, like the Court, *ante*, at 15, and unlike my Brother STEVENS, *post*, am wholly content to leave this thorny question until another day, for I am convinced that the existence of the Voting Rights Act makes such a decision unnecessary and alone suffices to support an affirmance of the judgment before us.

I begin with the settled principle that not every remedial use of race is forbidden. For example, we have authorized and even required race-conscious remedies in a variety of corrective settings. See, *e. g.*, *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 25 (1971); *United States* v. *Montgomery Board of Education*, 395 U. S. 225 (1969); *Franks* v. *Bowman Transp. Co.*, 44 U. S. L. W. 4356, 4363 (1976). Once it is established that circumstances exist where race may be taken into account in fashioning affirmative policies,[1] we must identify those circumstances,

[1] Of course, it could be argued that the remedial rules upheld in these earlier cases acquired added legitimacy because they arose in the form of

and, further, determine how substantial a reliance may be placed upon race. If resort to the 65% rule involved here is not to be sanctioned, that must be because the benign use of such a binding numerical criterion (under the Voting Rights Act) generates problems of constitutional dimension that are not relevant to other, previously tolerated race-conscious remedies. As a focus for consideration of what these problems might or might not be, it is instructive to consider some of the objections frequently raised to the use of overt preferential race assignment practices.

First, a purportedly preferential race assignment may in fact disguise a policy that perpetuates disadvantageous treatment of the plan's supposed beneficiaries. Accordingly, courts might face considerable difficulty in ascertaining whether a given race classification truly furthers benign rather than illicit objectives. An effort to achieve proportional representation, for example, might be aimed at aiding a group's participation in the political processes by guaranteeing safe political offices, or, on the other hand, might be a "contrivance to segregate" the group, *Wright* v. *Rockefeller*, *supra*, 376 U. S., at 58, thereby frustrating its potentially successful efforts at coalition building across racial lines. Compare, *e. g.*, the positions of the black plaintiffs in *Wright*, at 53–54, with the black inter-

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judicial decrees rather than affirmative legislative or executive action. I agree that a court-imposed remedy to correct a ripe finding of discrimination should be accorded particular respect. Yet, the role of the judiciary is not decisive. First, as is the case here, even a legislative policy of remedial action can be closely tied to prior discriminatory practices or patterns. See *infra*, at 9. Second, many of the criticisms discussed below that commonly are leveled against the benign use of racial remedies—*e. g.*, the potential for arousing race consciousness and the likelihood of imposing disproportionate burdens of compliance upon relatively "innocent" whites—remain relevant regardless of the decisionmaker who imposes the remedial regime. I believe, therefore, that the history of equitable decrees utilizing racial criteria fairly establishes the broad principle that race may play a legitimate role in remedial policies.

venors, *id.*, at 62 (Douglas, J., dissenting). Indeed, even the present case is not entirely free of complaints that benignity is not the true characteristic of the remedial redistricting. Puerto Rican groups, for example, who have been joined with black groups to establish the "nonwhite" category, protested to the Attorney General that their political strength under the 1974 reapportionment actually is weaker than under the invalidated 1972 districting. Appendix, at 295. A black group similarly complained of the loss of a "safe" seat because of the inadequacy of the 65% minimum figure. *Id.*, at 296–297. These particular objections, as the Attorney General argued in his memorandum endorsing the 1974 reapportionment, may be ill advised and unpersuasive. Nevertheless, they illustrate the risk that what is presented as an instance of benign race assignment in fact may prove to be otherwise. This concern, of course, does not undercut the theoretical legitimacy or usefulness of preferential policies. At the minimum, however, it does suggest the need for careful consideration of the operation of any racial device, even one cloaked in preferential garb. And if judicial detection of truly benign policies proves impossible or excessively crude, that alone might warrant invalidating any race-drawn line.

Second, even in the pursuit of remedial objectives, an explicit policy of assignment by race may serve to stimulate our society's latent race consciousness, suggesting the utility and propriety of basing decisions on a factor that ideally bears no relationship to an individual's worth or needs. See, *e. g.*, Kaplan, Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment, 61 Nw. U. L. Rev. 363, 379–380 (1966). Furthermore, even preferential treatment may act to stigmatize its recipient groups, for although intended to correct systemic or institutional inequities, such a policy may imply to some the recipients' inferiority and especial need for

protection.[2] Again, these matters would not necessarily speak against the wisdom or permissibility of selective, benign racial classifications. But they demonstrate that the considerations that historically led us to treat race as a constitutionally "suspect" method of classifying individuals are not entirely vitiated in a preferential context.

Third, especially when interpreting the broad principles embraced by the Equal Protection Clause, we cannot well ignore the social reality that even a benign policy of assignment by race is viewed as unjust by many in our society, especially by those individuals who are adversely effected by a given classification. This impression of injustice may be heightened by the natural consequence of our governing processes that the most "discrete and insular" of whites often will be called upon to bear the immediate, direct costs of benign discrimination. See *e. g.*, Kaplan, *supra*, at 373–374; cf. Ely, The Constitutionality of Reverse Racial Discrimination, 41 U. Chi. L. Rev. 723, 737–738 (1974). Perhaps not surprisingly, there are indications that this case affords an example of just such decisionmaking in operation. For example, the intervenor NAACP takes pains to emphasize that the mandated 65% rule could have been attained through redistricting strategies that did not slice the Hasidic community in half. State authorities, however, chose to localize the burdens of race reassignment upon the petitioners rather than to redistribute a more varied and diffused range of whites into predominantly nonwhite districts. NAACP

[2] This phenomenon seems to have arisen with respect to policies affording preferential treatment to women: thus groups dedicated to advancing the legal position of women have appeared before this Court to challenge statutes that facially offer advantages to women and not men. See, *e. g.*, *Kahn* v. *Shevin*, 416 U. S. 351 (1974). This strategy, one surmises, can be explained on the basis that even good-faith policies favoring women may serve to highlight stereotypes concerning their supposed dependency and helplessness.

Brief, at 29–31. I am in no position to determine the accuracy of this appraisal, but the impression of unfairness is magnified when a coherent group like the Hasidim disproportionately bears the adverse consequences of a race assignment policy.

In my view, when a decisionmaker embarks on a policy of benign racial sorting, he must weigh the concerns that I have discussed against the need for effective social policies promoting racial justice in a society beset by deep-rooted racial inequities. But I believe that Congress here adequately struck that balance in enacting the carefully conceived remedial scheme embodied in the Voting Rights Act. However the Court ultimately decides the constitutional legitimacy of "reverse discrimination" pure and simple, I am convinced that the application of the Voting Rights Act substantially minimizes the objections to preferential treatment, and legitimates the use of even overt, numerical racial devices in electoral redistricting.

The participation of the Attorney General, for example, largely relieves the judiciary of the need to grapple with the difficulties of distinguishing benign from malign discrimination. Under § 5 of the Act, the Attorney General in effect is constituted champion of the interests of minority voters, and accompanying implementing regulations ensure the availability of materials and submissions necessary to discern the true effect of a proposed reapportionment plan. See 28 CFR § 51.19. This initial right of review, coupled with the fact-finding competence of the Justice Department, substantially reduces the likelihood that a complicated reapportionment plan that silently furthers malign racial policies would escape detection by appropriate officials. As a practical matter, therefore, I am prepared to accord considerable deference to the judgment of the Attorney General that a particular districting scheme complies with the remedial objectives furthered by the Voting Rights Act.

Similarly, the history of the Voting Rights Act provides reassurance that, in the face of the potential for reinvigorating racial partisanship, the congressional decision to authorize the use of race-oriented remedies in this context was the product of substantial and careful deliberations. Enacted following "voluminous legislative" consideration, *South Carolina* v. *Katzenbach*, 383 U. S. 301, 309 (1966), the Voting Rights Act represents an unequivocal and well-defined congressional consensus on the national need for "sterner and more elaborate measures," *ibid.*, to secure the promise of the Fourteenth and Fifteenth Amendments with respect to exercise of the franchise. Insofar as the drawing of district lines is a process that intrinsically involves numerical calculations, and insofar as state officials charged with the task of defining electoral constituencies are unlikely simply to close their eyes to considerations such as race and national origin,[8] the resort to a numerical racial criterion as a method of securing compliance with the aims of the Voting Rights Act is, in my view, consistent with that consensus. Whatever may be the indirect and undesirable counter-educational costs of employing such far-reaching racial devices, Congress had to confront these considerations before opting for an activist race-conscious remedial role supervised by federal officials. The "insidious and pervasive" evil

[8] It would be naive to suppose that racial considerations do not enter into apportionment decisions. A variety of motivations could produce such a reliance upon race: *e. g.*, the desire to injure a race, a conscious decision to distribute voting power among a variety of well-defined racial and ethnic groups or neighborhoods, or an attempt to employ race as a proxy for political affiliation. Cf. *Gaffney* v. *Cummings*, 412 U. S. 735, 753–754 (1973). The relative difficulty of isolating these motivations in this closeted decisionmaking context, and the further difficulty of deciding which of these motives should be permissible given the realities of the apportionment process, undoubtedly explains § 5's prohibition of practices that either "have the purpose . . . [or] effect of denying or abridging the right to vote on account of race or color . . . ."

of voting rights violations, *id.*, at 309, and the "specially informed legislative competence" in this area, *Katzenbach* v. *Morgan*, 384 U. S. 641, 656 (1966); cf. *Morton* v. *Mancari*, 417 U. S. 535, 555 (1974), argue in support of the legitimacy of the federal decision to permit a broad range of race-conscious remedial techniques, including, as here, outright assignment by race.

I must, of course, address the objection expressed by a variety of participants in this litigation: that this reapportionment worked the injustice of localizing the direct burdens of racial assignment upon a morally undifferentiated group of whites,[4] and, indeed, a group that arguably is peculiarly vulnerable to such injustice. This argument has both normative and emotional appeal, but for a variety of reasons I am convinced that the Voting Rights Act drains it of vitality.

First, it is important to recall that the Attorney General's oversight focuses upon jurisdictions whose prior practices exhibited the purpose or effect of infringing the right to vote on account of race, thereby triggering § 4 of the Act, 42 U. S. C. § 1973 (b). This direct nexus to localities with a history of discriminatory practices or effects enhances the legitimacy of the Attorney General's remedial authority over individuals within those communities who benefited (as whites) from those earlier discriminatory voting patterns. Moreover, the obvious remedial nature of the Act and its enactment by an elected Congress that hardly can be viewed as dominated by nonwhite representatives belies any possibility that the decisionmaker intended a racial insult or

[4] I find nothing in the record to suggest—and such a proposition seems implausible—that the Hasidim bear any unique responsibility for the decisions that led to discriminatory voting practices or effects in Brooklyn. Nor is there any contention that petitioners derived special benefits from the prior discriminatory policies, other than to the extent that the overall white voice countywide was strengthened.

injury to those whites who are adversely affected by the operation of the Act's provisions. Finally, petitioners have not been deprived of their right to vote, a consideration that minimizes the detrimental impact of the remedial racial policies governing the § 5 reapportionment. True, petitioners are denied the opportunity to vote as a group in accordance with the earlier districting configuration, but they do not press any legal claim to a group voice as Hasidim. Petitioners Brief, at 6 n. 6. In terms of their voting interests, then, the burden that they claim to suffer must be attributable solely to their relegation to increased nonwhite-dominated districts. Yet, to the extent that white and nonwhite interests and sentiments are polarized in Brooklyn, the petitioners still are indirectly "protected" by the remaining white Assembly and Senate districts within the county, carefully preserved in accordance with the white proportion of the total county population. While these considerations obviously do not satisfy petitioners, I am persuaded that they reinforce the legitimacy of this remedy.

Since I find nothing in the Court's opinion that is inconsistent with the views expressed herein, I join that opinion.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 3, 1977

Re: 75-104 - United Jewish Organizations of Williamsburg, Inc. v. Carey

Dear Byron:

I have experienced difficulty - which is not surprising - in this very difficult case. I hope to circulate a memo articulating my problems with any fixed "numbers" which seem to give tacit approval to a "quote" concept. We unanimously rejected racial balance in school desegregation in Swann and I fear the proposed disposition seems counter to that in spirit.

I will have my thoughts ready this week.

Regards,

WEB

Mr. Justice White

Copies to the Conference

dm/ss 1/5/77

75-104
United Jewish

These proposed addition to Potter's concurrence was not used. 1/5/77

Under the Fourteenth Amendment the question is whether the reapportionment plan represents purposeful discrimination against white voters. Washington v. Davis, 426 U.S. ___. Disproportionate impact may afford evidence that an invidious purpose was present. Arlington Heights. But the record here ~~cannot~~ does not support a finding of such purpose that the redistricting plan undervalued the political power of white voters relative to their numbers in Kings County. Cf. City of Richmond v. United States, 422 U.S. 358. Nor does anything in the record suggest that the political processes in Kings County historically have been closed to equal participation by white citizens. See White v. Regester, 412 U.S., at 766; Whitcomb v. Chavis, 403 U.S. 124, 155 (19). ~~Finally~~, A showing that the decisionmakers were conscious of race in making a governmental decision might also support a finding of discriminatory intent. But consciousness of race is not the ~~same thing as~~ equivalent of discriminatory purpose. Discriminatory purpose implies a desire to ~~harm~~ disadvantage the target group or at least a desire to segregate. Here, despite the legislature's ~~harm~~ awareness

the fact that it acted

of race as it fashioned district lines, ~~the clear purpose with which it acted~~ in response to the position of the United States Department of Justice under the Voting Rights Act forecloses any finding ~~that the legislature acted with the~~ invidious purpose ~~of~~ discriminating against ~~the participation of~~ white voters ~~in the political process.~~*

January 5, 1976

No. 75-104 United Jewish Organization
v. Carey

Dear Potter:

Subject to a possible major restructuring of Byron's opinion, I will join your concurrence.

What would you think of including a reference to Washington v. Davis, and possibly Arlington Heights, which stands for the proposition that under the Fourteenth Amendment the alleged discrimination must be purposeful?

I enclose a revised draft of the third paragraph of your opinion that is one way this thought could be included.

Sincerely,

Mr. Justice Stewart

lfp/ss

Under the Fourteenth Amendment the question is whether the reapportionment plan represents purposeful discrimination against white voters. Washington v. Davis, 426 U.S. ___. Disproportionate impact may afford evidence that an invidious purpose was present. Arlington Heights. But the record here does not support a finding of such purpose or that the redistricting plan undervalued the political power of white voters relative to their numbers in Kings County. Cf. City of Richmond v. United States, 422 U.S. 358. The legislature was conscious of race when it drew the district lines, but such consciousness is not the equivalent of discriminatory intent. The clear purpose with which the New York legislature acted - in response to the position of the United States Department of Justice under the Voting Rights Act - forecloses any finding that it acted with the invidious purpose of discriminating against the participation of white voters in the political process.*

January 6, 1977

No. 75-104 United Jewish Organizations v. Carey

Dear Byron:

I have continued to be in considerable doubt as to the rationale in the above case.

On the basis of what has been circulated to date, I have decided to join Potter's brief concurring opinion. I do this subject to possible reconsideration in the event you circulate a revised draft.

Sincerely,

Mr. Justice White

Copies to the Conference

LFP/lab

Parts II & III substantially revised; Part IV added.

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: _____

Recirculated: 1-26-77

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SUPREME COURT OF THE UNITED STATES

No. 75-104

United Jewish Organizations of Williamsburgh, Inc., et al., Petitioners, v. Hugh L. Carey et al.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[November —, 1976]

MR. JUSTICE WHITE delivered the opinion of the Court.

Section 5 of the Voting Rights Act prohibits a state or political subdivision subject to § 4 of the Act from implementing a legislative reapportionment unless it has obtained a declaratory judgment from the District Court for the District of Columbia, or a ruling from the Attorney General of the United States, that the reapportionment "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. . . ."[1]

[1] Section 5 of the Voting Rights Act, 42 U. S. C. § 1973c, provides in pertinent part:

"Whenever . . . a State or political subdivision with respect to which the prohibitions set forth in section 1973b (a) of this title based upon determinations made under the second sentence of section 1973b (b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, . . . such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, stand-

(cont'd) part IV goes on ~~Hoffman~~ and fails, even to mention Wash. v. Davis.

I recommend you hold fast to Justice Stewart's concurrence. Perhaps we may want to write more in order to challenge more of what Justice White says, but on balance I think it wise to stay with a short statement. I think the facts of this case are a bit freakish.

– Dave

This does not solve any of our problems. The emphasis on the Voting Rights Act is, if anything, stronger in Parts I-III here than in the previous draft. The opinion misreads Beer, treating it as a holding that the Act mandates quotas. The theme remains that the point of the Act is to assure the election of nonwhite legislators. This is wrong. The point is to assure that black voters are adequately represented. Adequate representation does not correlate with the legislator's skin color. Finally,

The question presented is whether, in the circumstances of this case, the use of racial criteria by the State of New York in its attempt to comply with § 5 of the Voting Rights Act and to secure the approval of the Attorney General violated the Fourteenth or Fifteenth Amendment.

I

Kings County, N. Y., together with New York (Manhattan) and Bronx Counties, became subject to §§ 4 and 5 of the Act, by virtue of a determination by the Attorney General that a literacy test was used in these three counties as of November 1, 1968, and a determination by the Director of the Census that fewer than 50% of the voting-age residents of these three counties voted in the presidential election of 1968.[2] Litigation to secure exemption from the Act was unsuccessful,[3] and it became necessary for New York to

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ard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court."

A legislative reapportionment is a "standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968," within the meaning of § 5. See pp. 11–12, *infra*.

[2] See 42 U. S. C. § 1973b (b).

[3] The State of New York brought an action to obtain a statutory exemption for the three counties under § 4 (a) of the Act, seeking a declaratory judgment that its literacy test had not been used within the 10 years preceding the filing of the suit "for the purpose or with the effect of denying or abridging the right to vote on account of race or

secure the approval of the Attorney General or of the United States District Court for the District of Columbia for its 1972 reapportionment statute insofar as that statute concerned Kings, New York, and Bronx Counties. On January 31, 1974, the provisions of the statute districting these counties for congressional, state senate, and state assembly seats were submitted to the Attorney General. In accordance with the regulations governing his § 5 review, the Attorney General considered submissions from interested parties criticizing and defending the plan.[4] Those submissions included assertions that voting in these counties was racially polarized and that the district lines had been created with the purpose or effect of diluting the voting strength of

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color." 42 U. S. C. § 1973b (a). After several years of litigation, the District Court for the District of Columbia denied the exemption and ordered the State to comply with the filing requirements of § 5. This Court summarily affirmed. *New York on Behalf of New York County* v. *United States*, 419 U. S. 888 (1974). See 510 F. 2d, at 516.

[4] Section 51.19, 28 C. F. R. provides:

"Section 5, in providing for submission to the Attorney General as an alternative to seeking a declaratory judgment from the U. S. District Court for the District of Columbia, imposes on the Attorney General what is essentially a judicial function. Therefore, the burden of proof on the submitting authority is the same in submitting changes to the Attorney General as it would be in submitting changes to the District Court for the District of Columbia. The Attorney General shall base his decision on a review of material presented by the submitting authority, relevant information provided by individuals or groups, and the results of any investigation conducted by the Department of Justice. If the Attorney General is satisfied that the submitted change does not have a racially discriminatory purpose or effect, he will not object to the change and will so notify the submitting authority. If the Attorney General determines that the submitted change has a racially discriminatory purpose or effect, he will enter an objection and will so notify the submitting authority. If the evidence as to the purpose or effect of the change is conflicting, and the Attorney General is unable to resolve the conflict within the 60-day period, he shall, consistent with the above-described burden of proof applicable in the District Court, enter an objection and so notify the submitting authority."

nonwhites (blacks and Puerto Ricans).[5] On April 1, 1974, the Attorney General concluded that, as to certain districts in Kings County covering the Bedford-Stuyvesant area of Brooklyn, the State had not met the burden placed on it by § 5 and the regulations thereunder to demonstrate that the redistricting had neither the purpose nor the effect of abridging the right to vote by reason of race or color.[6]

Under § 5, the State could have challenged the Attorney General's objections to the redistricting plan by filing a declaratory judgment action in a three-judge court in the

[5] The record in this Court contains only part of the materials submitted to and considered by the Attorney General in his review of the 1972 plan. Included in the present record are a memorandum submitted on behalf of the NAACP and letters from several prominent black and Puerto Rican elected officials, all opposing the plan. Not included in the record are materials defending the plan submitted by the reapportionment committee of the New York legislature, the state attorney general, and several state legislators. Brief for the United States, at 8, and n. 9.

The NAACP, the Attorney General, and the court below classified Puerto Ricans in New York together with blacks as a minority group entitled to the protections of the Voting Rights Act. Hereinafter we use the term "nonwhite" to refer to blacks and Puerto Ricans, although small numbers of other nonwhite groups (such as orientals) are also included in the nonwhite population statistics.

[6] The basis for the Attorney General's conclusion that "the proscribed effect may exist" as to certain state assembly and senate districts in Kings County was explained in his letter to the New York state authorities as follows:

"Senate district 18 appears to have an abnormally high minority concentration while adjoining minority neighborhoods are significantly diffused into surrounding districts. In the less populous proposed assembly districts, the minority population appears to be concentrated into districts 53, 54, 55 and 56, while minority neighborhoods adjoining those districts are diffused into a number of other districts. . . . [W]e know of no necessity for such configuration and believe other rational alternatives exist."

The Attorney General also objected to the congressional districting in Kings County and to the state legislative districting in New York County. The districting for these seats is not at issue in this litigation.

District of Columbia. Instead, the State sought to meet what it understood to be the Attorney General's objections and to secure his approval in order that the 1974 primary and general elections could go forward under the 1972 statute.[7] A revised plan, submitted to the Attorney General on May 31, 1974, in its essentials did not change the number of districts with nonwhite majorities, but did change the size of the nonwhite majorities in almost all of those districts. Under the 1972 plan, Kings County had three state senate districts with nonwhite majorities of approximately 91%, 61%, and 53%; under the revised 1974 plan, there were again three districts with nonwhite majorities, but now all three were between 70% and 75% nonwhite.[8] As for state assembly districts, both the 1972 and the 1974 plans provided for seven districts with nonwhite majorities. However, under the 1972 plan, there were four between 85% and 95% nonwhite, and three were approximately 76%, 61%, and 52%, respectively; under the 1974 plan, the two smallest nonwhite majorities were increased to 65% and 67.5%, and the two largest nonwhite majorities were decreased from greater than

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[7] The State was also under pressure from a private suit to compel enactment of new district lines consistent with the views of the Attorney General. *NAACP* v. *New York City Board of Elections*, SDNY 72 Civ. 1460. See 510 F. 2d, at 517 n. 6.

[8] The 1972 percentages are taken from Table 3, accompanying the memorandum in support of the motions to dismiss of the applicants for intervention, record at 265, except for the 61% figure, which is for a district only partially in Kings County. That figure is taken from the Brief for the United States, at 53, and represents the black and Puerto Rican population rather than all nonwhites. The 1974 percentages are taken from the Interim Report of the Joint Committee on Reapportionment, app., at 179–180.

The 1974 plan created nonwhite majorities in two state senate districts that were majority white under the 1972 plan (the 17th and the 23d), but created white majorities in two districts that were majority nonwhite under the 1972 plan (the 16th and the 25th). See Brief for the United States, at 53.

90% to between 80% and 90%.[9] The report of the legislative committee on reapportionment stated that these changes were made "to overcome Justice Department objections" by creating more "substantial nonwhite majorities" in two assembly districts and two senate districts.[10]

One of the communities affected by these revisions in the Kings County reapportionment plan was the Williamsburgh area, where about 30,000 Hasidic Jews live. Under the 1972 plan, the Hasidic community was located entirely in one assembly district (61% nonwhite) and one senate district (37% nonwhite); in order to create substantial nonwhite majorities in these districts, the 1974 revisions split the Hasidic community between two senate and two assembly districts. A staff member of the legislative reapportionment committee testified that in the course of meetings and telephone conversations with Justice Department officials, he "got the feeling . . . that 65 percent would be probably an approved figure" for the nonwhite population in the assembly district in which the Hasidic community was located, a district approximately 61% nonwhite under the 1972 plan.[11] To attain the 65% figure, a portion of the white population, including part of the Hasidic community, was reassigned to an adjoining district.

Shortly after the State submitted this revised redistricting plan for Kings County to the Attorney General, petitioners sued on behalf of the Hasidic Jewish community of Williamsburgh, alleging that the 1974 plan "would dilute the value of each plaintiff's franchise by halving its effectiveness," solely for the purpose of achieving a racial quota and therefore

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[9] Table 3, *supra*, n. 8, app., 266; Interim Report, *supra*, n. 8, app., 195; Brief for the United States, app., at 54. See 510 F. 2d, at 523 n. 21.

[10] Interim Report, *supra*, n. 8, app., 179; see *id.*, app., 181–182.

[11] Testimony of Richard S. Scolaro, executive director of the Joint Committee on Reapportionment, at hearing on plaintiff's motion for preliminary injunction, app., 106; see 510 F. 2d, at 517.

in violation of the Fourteenth Amendment. Petitioners also alleged that they were assigned to electoral districts solely on the basis of race, and that this racial assignment diluted their voting power in violation of the Fifteenth Amendment. Petitioners sought an injunction restraining New York officials from enforcing the new redistricting plan and a declaratory judgment that the Attorney General of the United States had used unconstitutional and improper standards in objecting to the 1972 plan.

On June 20, 1974, the District Court held a hearing on petitioners' motion for a preliminary injunction. On July 1, 1974, the Attorney General informed the State of New York that he did not object to the implementation of the revised plan. The Attorney General moved to be dismissed as a party on the ground that the relief sought against him could be obtained only in the District Court for the District of Columbia and only by a State or political subdivision subject to the Voting Rights Act; the State and the intervenor NAACP moved to dismiss the complaint on the ground that it failed to state a claim upon which relief could be granted. The District Court granted the motions to dismiss the complaint, reasoning that petitioners enjoyed no constitutional right in reapportionment to separate community recogntion as Hasidic Jews, that the redistricting did not disenfranchise petitioners, and that racial considerations were permissible to correct past discrimination.[12] 377 F. Supp., at 1165–1166.

A divided Court of Appeals affirmed. The majority first held that the Attorney General must be dismissed as a party because the court had no jurisdiction to review his objection to the 1972 plan.[13] After agreeing with the District Court

[12] Petitioners' motions for a preliminary injunction and summary judgment were denied.

[13] Although petitioners did not present this question for review, they argue that the Attorney General is properly a party to this suit because he allegedly caused the state officials to deprive petitioners of their constitutional rights. Brief for Petitioners, at 53–54, n. 22; Petitioners' Reply

think in racial terms"; because the Act "*necessarily deals with race or color, corrective action under it must do the same.*" (Emphasis in original; footnote omitted.) The court held that

> "so long as a districting, even though based on racial considerations, is in conformity with the unchallenged directive of and has the approval of the Attorney General of the United States under the Act, at least absent a clear showing that the resultant legislative reapportionment is unfairly prejudicial to white or nonwhite, that districting is not subject to challenge." 510 F. 2d, at 525.[15]

We granted certiorari, 423 U. S. 945 (1975). We affirm.

II

Petitioners argue that the New York Legislature, although seeking to comply with the Voting Rights Act as construed by the Attorney General, has violated the Fourteenth and Fifteenth Amendments by deliberately revising its reapportionment plan along racial lines.[16] In rejecting petitioners' claims, we address four propositions: first, that whatever

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[15] The dissent would have found a constitutional violation in "the drawing of district lines with a central and governing premise that a set number of districts must have a predetermined nonwhite majority of 65% or more in order to ensure nonwhite control in those districts." The dissent pointed out that neither the Attorney General nor the State of New York would take responsibility for the 65% "quota," and argued that there was no showing of a pre-existing wrong which could justify the use of a "presumptively odious" racial classification. 510 F. 2d, at 525, 526 (Frankel, J.).

[16] The Equal Protection Clause, contained in § 1 of the Fourteenth Amendment, forbids any State to "deny to any person within its jurisdiction the equal protection of the laws." Section 1 of the Fifteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

might be true in other contexts, the use of racial criteria in districting and apportionment is never permissible; second, that even if racial considerations may be used to redraw district lines in order to remedy the residual effects of past unconstitutional reapportionments, there are no findings here of prior discriminations that would require or justify as a remedy that white voters be reassigned in order to increase the size of black majorities in certain districts; third, that the use of a "racial quota" in redistricting is never acceptable; and fourth, that even if the foregoing general propositions are infirm, what New York actually did in this case was unconstitutional, particularly its use of 65% nonwhite racial quota for certain districts. The first three arguments, as we now explain, are foreclosed by our cases construing and sustaining the constitutionality of the Voting Rights Act; the fourth we address in Parts III and IV.

It is apparent from the face of the Act, from its legislative history, and from our cases that the Act was itself broadly remedial in the sense that it was "designed by Congress to banish the blight of racial discrimination in voting. . . ." *South Carolina* v. *Katzenbach*, 383 U. S. 301, 308 (1966). It is also plain, however, that after "repeatedly try[ing] to cope with the problem by facilitating case-by-case litigation against voting discrimination," *id.*, at 313, Congress became dissatisfied with this approach, which required judicial findings of unconstitutional discrimination in specific situations and judicially approved remedies to cure that discrimination. Instead, Congress devised more stringent measures, one of which, § 5, required the covered States to seek the approval of either the Attorney General or of a three-judge court in the District of Columbia whenever they sought to implement new voting procedures. Under § 4, a State became subject to § 5 whenever it was administratively determined that certain conditions which experience had proved were indicative of racial discrimination in voting had existed

in the area—in the case of New York, as already indicated, p. 2, *supra*, that a literacy test was in use in certain counties in 1968 and that fewer than 50% of the voting age residents in these counties voted in the Presidential election that year. At that point, New York could have escaped coverage by undertaking to demonstrate to the appropriate court that the test had not been used to discriminate within the past 10 years, an effort New York unsuccessfully made. See n. 3, *supra*.

Given this coverage of the counties involved, it is evident that the Act's prohibition against instituting new voting procedures without the approval of the Attorney General or the three-judge District Court is not dependent upon proving past unconstitutional apportionments and that in operation the Act is aimed at preventing the use of new procedures until their capacity for discrimination has been examined by the Attorney General or by a court. Although recognizing that the "stringent new remedies," including § 5, were "an uncommon exercise of congressional power," we nevertheless sustained the Act as a "permissibly decisive" response to "the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetrating voting discrimination in the face of adverse federal court decrees." *South Carolina* v. *Katzenbach*, *supra*, 383 U. S., at 334–335 (footnote omitted).

It is also clear that under § 5, new or revised reapportionment plans are among those voting procedures, standards or practices that may not be adopted by a covered State without the Attorney General or a three-judge court ruling that the plan "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." In *Allen* v. *State Board of Elections*, *supra*, on which the Court of Appeals relied below, we held that a change from district to at-large voting for county supervisors had to be submitted for federal approval under § 5, because of the potential for a "dilution" of minority

voting power which could "nullify [its] ability to elect the candidate of [its] choice. . . ." 393 U. S., at 569. When it renewed the Voting Rights Act in 1970 and again in 1975, Congress was well aware of the application of § 5 to redistricting. In its 1970 extension, Congress relied on findings by the United States Commission on Civil Rights that the newly gained voting strength of minorities was in danger of being diluted by redistricting plans that divided minority communities among predominantly white districts.[17] In 1975, Congress was unmistakenly cognizant of this new phase in the effort to eliminate voting discrimination. Former Attorney General Katzenbach testified that § 5 "has had its broadest impact . . . in the areas of redistricting and reapportionment," and the Senate and House reports recommending the extension of the Act referred specifically to the Attor-

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[17] The findings of the Commission's 18-month study, contained in its 1968 report, Political Participation, at 21–39, were endorsed in a statement submitted in the course of the Senate debates by ten out of seventeen Senate Judiciary Committee members, who proposed and successfully supported the critical amendment that extended § 5. The findings were repeatedly referred to during the Senate and House hearings held in 1969 and 1970 in connection with the extension. *E. g.*, Hearings on H. R. 4249, H. R. 5538, and Similar Proposals (Voting Rights Act Extension) before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 1st Sess., 3–4 (1969) (statement of Rep. McCulloch); *id.*, at 17 (testimony of Howard Glickstein, Acting Staff Director, United States Commission on Civil Rights); *id.*, at 150 (testimony of Thomas E. Harris, Associate General Counsel, AFL–CIO); Hearings on S. 818, S. 2456, etc. (Amendments to the Voting Rights Act of 1965) before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 91st Cong., 1st and 2d Sess., 47 (1969) (testimony of Frankie Freeman, Member, United States Commission on Civil Rights); *id.*, at 132 (testimony of Joseph L. Rauh, Jr., General Counsel, Leadership Conference on Civil Rights); *id.*, at 427 (statement of Howard Glickstein); *id.*, at 516–518 (testimony of David Norman, Deputy Assistant Attorney General, Civil Rights Division, U. S. Dept. of Justice).

ney General's role in screening redistricting plans to protect the opportunities for nonwhites to be elected to public office.[18]

As the Court of Appeals understood the Act and our decision in *Allen*, compliance with the Act in reapportionment cases would often necessitate the use of racial considerations in drawing district lines. That the Court of Appeals correctly read the Act has become clearer from later cases.

In *Beer* v. *United States*, 425 U. S. 130 (1976), the Court considered the question of what criteria a legislature reapportionment must satisfy under § 5 of the Voting Rights Act to demonstrate that it does not have the "effect" of denying or abridging the right to vote on account of race. *Beer* established that the Voting Rights Act does not permit the implementation of a reapportionment that "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Id.*, at 141. This test was satisfied where the reapportionment increased the percentage of districts where members of racial minorities protected by the Act were in the majority. See *ibid.* But if this test were not met, clearance by the Attorney General or the District Court for the District of Columbia could not be given, and the reapportionment could not be implemented.

The reapportionment at issue in *Beer* was approved by this Court, because New Orleans had created one councilmanic district with a majority of black voters where none existed before. But had there been districts with black majorities under the previous law and had New Orleans in fact decreased the number of majority black districts, it would have had to modify its plan in order to implement its reapportion-

[18] Hearings before a Subcommittee of the Senate Judiciary Committee, 94th Cong., 1st Sess., 124 (1975) (testimony of Nicholas Katzenbach); S. Rep. No. 94-295, 94th Cong., 1st Sess., 15-19 (1975); H. R. Rep. No. 94-196, 94th Cong., 1st Sess., 8-11 (1975).

ment by carving out a large enough black majority in however many additional districts would be necessary to satisfy the *Beer* test. There was division on the Court as to what a State must show to satisfy § 5; but all eight Justices who participated in the decision implicitly accepted the proposition that a State may revise its reapportionment plan to comply with § 5 by increasing the percentage of black voters in a particular district until it has produced a clear majority. See 425 U. S., at 141–142; *id.*, at 144 (WHITE, J., dissenting), 158–161 (MARSHALL, J., dissenting). Indeed, the plan eventually approved by this Court in *Beer* was drawn with the purpose of avoiding dilution of the black vote by attaining at least a 54% majority of black voters in one district while preventing a 90% concentration. See *Beer* v. *United States*, app. 341–342.

The Court has taken a similar approach in applying § 5 to the extension of city boundaries through annexation. Where the annexation has the effect of reducing the percentage of blacks in the city, the proscribed "effect" on voting rights can be avoided by a post-annexation districting plan which "fairly reflects the strength of the Negro community as it exists after the annexation" and which "would afford [it] representation reasonably equivalent to [its] political strength in the enlarged community." *City of Richmond* v. *United States*, 422 U. S. 358, 370–371 (1975). Accord, *City of Petersburg* v. *United States*, 354 F. Supp. 1021 (DC 1972), aff'd, 410 U. S. 962 (1973). In *City of Richmond*, the Court approved an annexation which reduced the proportion of blacks in the city from 52% to 42%, because the post-annexation ward system created four out of nine wards with substantial black majorities of 64%. Had the redistricting failed to "fairly reflect the strength of the Negro community," however, it would follow from the Court's decision that the Constitution would permit the city to modify its plan by deliberately creating black majorities in a sufficient number of wards to satisfy statutory requirements.

Implicit in *Beer* and *City of Richmond*, then, is the proposition that the Constitution does not prevent a State subject to the Voting Rights Act from deliberately creating or preserving black majorities in particular districts in order to ensure that its reapportionment plan complies with § 5. That proposition must be rejected and § 5 held unconstitutional to that extent if we are to accept petitioners' view that racial criteria may never be used in redistricting or that they may be used, if at all, only as a specific remedy for past unconstitutional apportionments. We are unwilling to overturn our prior cases, however. Section 5, and its authorization for racial redistricting where appropriate to avoid abridging the right to vote on account of race or color, are constitutional. Contrary to petitioners' first argument, neither the Fourteenth nor the Fifteenth Amendment mandates any *per se* rule against using racial factors in districting and apportionment. Nor is petitioners' second argument valid. The permissible use of racial criteria is not confined to eliminating the effects of past discriminatory districting or apportionment.[19]

this certainly needs supporting reasoning

[19] Petitioners also insist that, because the Attorney General concluded not that the 1972 plan would have a discriminatory effect but only that the State had failed to demonstrate that the plan would not have such an effect, there was insufficient justification for racial redistricting. This argument overlooks the central role of the shift in burden of proof in the congressional effort to combat discriminatory voting laws. Our cases have upheld this shift. As we said in *South Carolina* v. *Katzenbach*, *supra*, "After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evils to the victims." 383 U. S., at 328. And in affirming the issuance of an injunction against enforcement of a state reapportionment plan for which the State had not demonstrated the absence of a discriminatory effect, the Court stated:

"It is well established that in a declaratory judgment action under § 5, the plaintiff State has the burden of proof. What the Attorney General's regulations do is to place the same burden on the submitting party in a § 5 objection procedure. . . . Any less stringent measure might well have rendered the formal declaratory judgment procedure a

Moreover, in the process of drawing black majority districts in order to comply with § 5, the State must decide how substantial those majorities must be in order to satisfy the Voting Rights Act. The figure used in drawing the *Beer* plan, for example, was 54% of registered voters.[20] At a minimum and by definition, a "black majority district" must be more than 50% black. But whatever the specific percentage, the State will inevitably arrive at it as a necessary means to ensure the opportunity for the election of a black representative and to obtain approval of its reapportionment plan. Unless we adopted an unconstitutional construction of § 5 in *Beer* and *City of Richmond*, a reapportionment cannot violate the Fourteenth or Fifteenth Amendment merely because a State uses specific numerical quotas in establishing a certain number of black majority districts. Our cases under § 5 stand for at least this much.

?!

NO - overreads these cases

III

Having rejected these three broad objections to the use of racial criteria in redistricting under the Voting Rights Act, we turn to the fourth question, which is whether the racial criteria New York used in this case—the revision of the 1972 plan to create 65% nonwhite majorities in two additional senate and two additional assembly districts—were constitutionally infirm. We hold they are not, on two separate grounds. The first is addressed in this Part III, the second in Part IV.

The first ground is that petitioners have not shown, or offered to prove, that New York did more than the Attorney General was authorized to require it to do under the nonretrogression principle of *Beer*, a principle that as we have

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dead letter by making available to covered States a far smoother path to clearance." *Georgia* v. *United States*, 411 U. S. 526, 538 (1973). (Footnote omitted.)

[20] See p. 14, *supra*.

already indicated this Court has accepted as constitutionally valid. Under *Beer*, the acceptability of New York's 1972 reapportionment for purposes of § 5 depends on the change in nonwhite voting strength in comparison with the previous apportionment, which occurred in 1966. Yet there is no evidence in the record to show whether the 1972 plan increased or decreased the number of senate or assembly districts with substantial nonwhite majorities of 65%. For all that petitioners have alleged or proved, the 1974 revisions may have accomplished nothing more than the restoration of nonwhite voting strength to 1966 levels.[21] To be successful in their constitutional challenge to the racial criteria used in New York's revised plan, petitions must show that minority voting strength was increased in comparison with the 1966 apportionment; otherwise the challenge amounts to a constitutional attack on compliance with the statutory rule of nonretrogression.

In the absence of any evidence regarding nonwhite voting strength under the 1966 apportionment, the creation of substantial nonwhite majorities in approximately 30% of the senate and assembly districts in Kings County was reasonably related to the constitutionally valid statutory mandate of maintaining nonwhite voting strength. The percentage of districts with nonwhite majorities was less than the percentage of nonwhites in the county as a whole (35%). The size of the nonwhite majorities in those districts reflected the need to take account of the substantial difference between the nonwhite percentage of the total population in a district and the non-

[21] It is true, of course, that *Beer* was decided after petitioners moved for summary judgment in the District Court and after the Court of Appeals affirmed the District Court's denial of that motion and dismissal of the action. But while relying on *Beer* in this Court, petitioners take the position that there are no disputed issues of the fact and that their motion for summary judgment should be granted on the basis of the present record. Petitioners' Reply Brief, at 17; Tr. of Oral Arg., at 70–71.

white percentage of the voting age population.[22] Because, as the Court said in *Beer*, the inquiry under § 5 focuses ultimately on "the position of racial minorities with respect to their effective exercise of the electoral franchise, 425 U. S., at 141, the percentage of eligible voters by district is of great importance to that inquiry.[23] In the redistricting plan approved in *Beer*, for example, only one of the two districts with a black population majority also had a black majority of registered voters. *Id.*, at 142. We think it was reasonable for the Attorney General to conclude in this case that a *substantial* nonwhite population majority—in the vicinity of 65%—would be required to achieve a nonwhite majority of eligible voters.

Petitioners have not shown that New York did more than accede to a position taken by the Attorney General that was authorized by our constitutionally permissible construction of § 5. New York adopted the 1974 plan because it sought to comply with the Voting Rights Act. This has been its primary defense of the plan, which was sustained on that basis by the Court of Appeals. Because the Court of Ap-

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[22] The NAACP, intervenor in this action, submitted census data to the Attorney General showing that roughly 75% of all whites in Kings County but only about 55% of all nonwhites were eligible to vote. App. 264. The NAACP urged that districts without significant nonwhite population majorities would not have nonwhite majorities among eligible voters. See, *e. g.*, app. 219.

The statistical problems in estimating the nonwhite population of the districts in the 1972 plan provided an additional reason for the Attorney General to ask for an increase in the size of the nonwhite majorities in certain districts. The legislature used the higher of the two sets of estimates, and the actual nonwhite population may have been somewhat lower. See app. 265.

[23] The regulation governing submissions to the Attorney General for review of redistricting plans under § 5 "strongly urges" the submitting authority to include "[v]oting-age population and the number of registered voters before and after the change, by race, for the area to be affected by the change." 28 CFR § 51.10 (b)(6)(ii) (1976).

peals was essentially correct, its judgment may be affirmed without addressing the additional argument by New York and by the United States that, wholly aside from New York's obligation under the Voting Rights Act to preserve minority voting strength in Kings County, the Constitution permits it to draw district lines deliberately in such a way that the percentage of districts with a nonwhite majority roughly approximates the percentage of nonwhites in the county.

IV

This additional argument, however, affords a second, and independent, ground for sustaining the particulars of the 1974 plan for Kings County. Whether or not the plan was authorized by or was in compliance with § 5 of the Voting Rights Act, New York was free to do what it did as long as it did not violate the Constitution, particularly the Fourteenth and Fifteenth Amendments; and we are convinced that neither Amendment was infringed.

There is no doubt that in preparing the 1974 legislation, the State deliberately used race in a purposeful manner. But New York was seeking to comply with a federal statute prohibiting racial discrimination in voting; its plan represented no racial slur or stigma with respect to whites or any other race; and we discern no purposeful discrimination violative of the Fourteenth Amendment or any abridgment of the right to vote on account of race within the meaning of the Fifteenth Amendment.

It is true that New York deliberately increased the nonwhite majorities in certain districts in order to enhance the opportunity for election of nonwhite representatives from those districts. Nevertheless, there was no fencing out of the white population from participation in the political processes of the county, and the plan did not minimize or unfairly cancel out white voting strength. Compare *White* v. *Regester*, 412 U. S. 755, 765–767 (1973), and *Gomillion* v.

Lightfoot, 364 U. S. 339 (1960), with *Gaffney* v. *Cummings*, 412 U. S. 735, 751–754 (1973). Petitioners have not objected to the impact of the 1974 plan on the representation of white voters in the county or in the State as a whole. As the Court of Appeals observed, the plan left white majorities in approximately 70% of the assembly and senate districts in Kings County, which had a countywide population that was 65% white. Thus, even if voting in the county occurred strictly according to race, whites would not be underrepresented relative to their share of the population.

In individual districts where nonwhite majorities were increased to approximately 65%, it became more likely, given racial bloc voting, that black candidates would be elected instead of their white opponents, and it became less likely that white voters would be represented by a member of their own race; but as long as whites in Kings County, as a group, were provided with fair representation, we cannot conclude that there was a cognizable discrimination against whites or an abridgement of their right to vote on the grounds of race.[24] Furthermore, the individual voter in the district with a nonwhite majority has no constitutional complaint merely because his candidate has lost out at the polls and his district is represented by a person for whom he did not vote. Some candidate, along with his supporters, always loses. See *Whitcomb* v. *Chavis*, 403 U. S. 124, 153–160 (1971).

Where it occurs, voting for or against a candidate because

[24] We also note that the white voter who as a result of the 1974 plan is in a district more likely to return a nonwhite representative will be represented, to the extent that voting continues to follow racial lines, by legislators elected from majority white districts. The effect of the reapportionment on whites in districts where nonwhite majorities have been increased is thus mitigated by the preservation of white majority districts in the rest of the county. See Note, 25 Stan. L. Rev. 84, 87 (1972). Of course, if voting does not follow racial lines, the white voter has little reason to complain that the percentage of nonwhites in his district has been increased.

of his race is an unfortunate practice. But it is not rare; and in any district where it regularly happens, it is unlikely that any candidate will be elected who is a member of the race that is in the minority in that district. However disagreeable this result may be, there is no authority for the proposition that the candidates who are found racially unacceptable by the majority, and the minority voters supporting those candidates, have had their Fourteenth or Fifteenth Amendment rights infringed by this process. Their position is similar to that of the Democratic or Republican minority that is submerged year after year by the adherents to the majority party who tend to vote a straight party line.

It does not follow, however, that the State is powerless to minimize the consequences of racial discrimination by voters when it is regularly practiced at the polls. In *Gaffney* v. *Cummings, supra,* the Court upheld a districting plan "drawn with the conscious intent to . . . achieve a rough approximation of the statewide political strengths of the Democratic and Republican Parties." 412 U. S., at 752. We there recognized that districting plans would be vulnerable under our cases if "*racial or political groups* have been fenced out of the political process and their voting strength invidiously minimized." *Id.,* at 754 (emphasis added); but that was not the case there, and no such purpose or effect may be ascribed to New York's 1974 plan. Rather, that plan can be viewed as seeking to alleviate the consequences of racial voting at the polls and to achieve a fair allocation of political power between white and nonwhite voters in Kings County.

In this respect New York's revision of certain district lines is little different in kind from the decision by a State in which a racial minority is unable to elect representatives from multimember districts to change to single-member districting for the purpose of increasing minority representation. This change might substantially increase minority repre-

sentation at the expense of white voters, who previously elected all of the legislators but with single-member districts could elect no more than their proportional share. If this intentional reduction of white voting power would be constitutionally permissible, as we think it would be, we think it also permissible for a State, employing sound districting principles such as compactness and population equality, to attempt to prevent racial minorities from being repeatedly outvoted by creating districts that will afford fair representation to the members of those racial groups who are sufficiently numerous and whose residential patterns afford the opportunity of creating districts in which they will be in the majority.

As the Court said in *Gaffney*,

> "[C]ourts have [no] constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State." *Ibid.*

New York was well within this rule when, under the circumstances present in Kings County, it amended its 1972 plan in an effort to comply with the Voting Rights Act prohibition against "denying or abridging the right to vote on account of race or color." [25]

The judgment is

Affirmed.

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[25] Petitioners seek to distinguish *Gaffney* on the ground that New York's use of racial criteria was not the product of "reasoned choice" by the state legislature but rather was coerced by federal officials. But we do not think that this otherwise constitutionally permissible plan was rendered unconstitutional merely because New York adopted it to comply with a federal statute.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 28, 1977

Re: No. 75-104 - United Jewish Organizations v. Carey

Dear Byron:

As one moves from Part I through Part IV of your third draft of this opinion, the Voting Rights Act undergoes much the same metamorphosis as did the Cheshire cat. This suits me fine, and if you could see your way clear to adopt the following suggestions, or their substance, so as to do away with even the grin in Part IV, I will join Parts I and IV.

In the second full paragraph on page 19 omit the reference to the fact that "New York was seeking to comply with the federal statute prohibiting racial discrimination in voting."

On page 22, omit the reference in the last full sentence "to comply with the Voting Rights Act prohibition against 'denying or abridging the right to vote on account of race or color.', and replace it with some sort of language such as "accomplish such a result".

Sincerely,

WHR

Mr. Justice White

Blind copy to: Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 31, 1977

Re: 75-104 - United Jewish Organizations, etc.
v. Cary et al.

Dear Byron:

Your third draft takes care of my problems. I am pleased to join it and will withdraw my separate opinion.

Respectfully,

John

Mr. Justice White

Copies to the Conference

1, 2-4, 10

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

Circulated: _____

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4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-104

United Jewish Organizations of Williamsburgh, Inc., et al., Petitioners, *v.* Hugh L. Carey et al.	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[December —, 1976]

MR. JUSTICE BRENNAN, concurring.

I join Parts I, II, and III of Mr. JUSTICE WHITE's opinion. Part II effectively demonstrates that prior cases firmly establish the Attorney General's expansive authority to oversee legislative redistricting under § 5 of the Voting Rights Act. See, *e. g.*, *Georgia* v. *United States*, 411 U. S. 526, 532 (1973); *Allen* v. *State Board of Elections*, 393 U. S. 544, 566, 569 (1969). Part III establishes to my satisfaction that as a method of securing compliance with the Voting Rights Act, the 65% rule applied to Brooklyn in this instance was not arbitrarily or casually selected. Yet, because this case carries us further down the road of race-centered remedial devices than we have heretofore traveled—with the serious questions of fairness that attend such matters—I offer this further explanation of my position.

The one starkly clear fact of this case is that an overt racial number was employed to effect petitioners' assignment to voting districts. In brief, following the Attorney General's refusal to certify the 1972 reapportionment under his § 5 powers, unnamed Justice Department officials made known that satisfaction of the Voting Rights Act in Brooklyn would necessitate creation by the state legislature of 10 state Assembly and Senate districts with threshold nonwhite populations of 65%. Prompted by the necessity of preventing

No significant changes. (Brennan does not join Part II of White's opinion, the ~~Hoffman~~ analysis.)

-Dave

interference with the upcoming 1974 election, state officials complied. Thus, the Justice Department's unofficial instruction to state officials effectively resulted in an explicit process of assignment to voting districts pursuant to race. The result of this process was a county-wide pattern of districting closely approximating proportional representation. While it is true that this demographic outcome did not "underrepresent the white population" throughout the county, *ante*, at 8,—indeed, the very definition of proportional representation precludes either under- or over-representation—these particular petitioners filed suit to complain that *they* have been subjected to a process of classification on the basis of race that adversely altered *their* status.

If we were presented here with a classification of voters motivated by racial animus, *City of Richmond v. United States*, 422 U. S. 358, 378 (1975); *Wright* v. *Rockefeller*, 376 U. S. 52, 58 (1964); *Gomillion* v. *Lightfoot*, 364 U. S. 339, 347 (1960), or with a classification that effectively downgraded minority participation in the franchise, *Georgia* v. *United States*, *supra*, 411 U. S., at 534; *Whitcomb* v. *Chavis*, 403 U. S. 124, 144 (1971), we promptly would characterize the resort to race as "suspect" and prohibit its use. Under such circumstances, the tainted apportionment process would not necessarily be saved by its proportional outcome, for the segregation of voters into "separate but equal" blocs still might well have the intent or effect of diluting the voting power of minority voters. See, *e. g.*, *City of Richmond* v. *United States*, *supra*, 422 U. S., at 378; *Wright* v. *Rockefeller*, *supra*, 376 U. S., at 53–54; *infra*, at 5. It follows, therefore, that if the racial redistricting involved here, imposed with the avowed intention of clustering together 10 viable nonwhite majorities at the expense of preexisting white groupings, is not similarly to be prohibited, the distinctiveness that avoids this prohibition must arise from either or both of two considerations: the permissibility of

affording preferential treatment to disadvantaged nonwhites generally, or the particularized application of the Voting Rights Act in this instance.

The first and broader of the two plausible distinctions rests upon the general propriety of so-called benign discrimination: the challenged race assignment may be permissible because it is cast in a remedial context with respect to a disadvantaged class rather than in a setting that aims to demean or insult any racial group. Even in the absence of the Voting Rights Act, this preferential policy plausibly could find expression in a state decision to overcome nonwhite disadvantages in voter registration or turnout through redefinition of electoral districts—perhaps, as here, through the application of a numerical rule—in order to achieve a proportional distribution of voting power. Such a decision, in my view, raises particularly sensitive issues of doctrine and policy.[1] Unlike Part IV of MR. JUSTICE WHITE's opinion, I

[1] Part IV limits its endorsement of proportional distribution of voting power to instances where the voters are polarized along racial lines and where the State intends "no racial slur or stigma with respect to" any race. *Ante*, at 19. I agree that without such qualifications, the position taken in Part IV plainly would be intolerable. Yet, even as so limited, problems remain that, in my view, merit further consideration. For example, questions concerning the polarization of voters and the motives of the state policymakers may place formidable factfinding responsibilities on the courts. Such responsibilities, I believe, are greatly lessened when the Voting Rights Act is involved. See *infra*, at 8. Furthermore, I am not at rest with the notion that a "cognizable discrimination" cannot be found so long as whites "as a group [are] provided with fair representation . . . ." *Ante*, at 20. While voting may differ from other activities or entitlements in that one group of voters often derives benefits indirectly from a legislator serving a different constituency—and to that extent I agree that the adverse effects of a racial division are "mitigated," compare *ante*, at 20 n. 24 with *infra*, at 11—I am not satisfied that this vicarious benefit fully answers the Hasidim's complaint of injustice. Finally, I have serious doubts that the Court's acceptance of political-party apportionment in *Gaffney* v. *Cummings*, 412 U. S. 735, 751–754

am wholly content to leave this thorny question until another day, for I am convinced that the existence of the Voting Rights Act makes such a decision unnecessary and alone suffices to support an affirmance of the judgment before us.

I begin with the settled principle that not every remedial use of race is forbidden. For example, we have authorized and even required race-conscious remedies in a variety of corrective settings. See, *e. g.*, *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1, 25 (1971); *United States* v. *Montgomery Board of Education*, 395 U. S. 225 (1969); *Franks* v. *Bowman Transp. Co.*, 44 U. S. L. W. 4356, 4363 (1976); *ante*, at 14. Once it is established that circumstances exist where race may be taken into account in fashioning affirmative policies,[2] we must identify those circumstances, and, further, determine how substantial a reliance may be placed upon race. If resort to the 65% rule involved here is not to be sanctioned, that must be because the benign use of such a binding numerical criterion (under the Voting Rights Act) generates problems of constitutional dimension that are not relevant to other, previously tolerated

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(1973), necessarily applies to apportionment by race. Political affiliation is the keystone of the political trade. Race, ideally, is not.

[2] Of course, it could be suggested that the remedial rules upheld in these earlier cases acquired added legitimacy because they arose in the form of judicial decrees rather than affirmative legislative or executive action. Arguably, a court-imposed remedy to correct a ripe finding of discrimination should be accorded particular respect. Yet, the role of the judiciary is not decisive. First, as is the case here, even a legislative policy of remedial action can be closely tied to prior discriminatory practices or patterns. See *infra*, at 10. Second, many of the criticisms discussed below that commonly are leveled against the benign use of racial remedies—*e. g.*, the potential for arousing race consciousness and the likelihood of imposing disproportionate burdens of compliance upon relatively "innocent" whites—remain relevant regardless of the decisionmaker who imposes the remedial regime. I believe, therefore, that the history of equitable decrees utilizing racial criteria fairly establishes the broad principle that race may play a legitimate role in remedial policies.

race-conscious remedies. As a focus for consideration of what these problems might or might not be, it is instructive to consider some of the objections frequently raised to the use of overt preferential race assignment practices.

First, a purportedly preferential race assignment may in fact disguise a policy that perpetuates disadvantageous treatment of the plan's supposed beneficiaries. Accordingly, courts might face considerable difficulty in ascertaining whether a given race classification truly furthers benign rather than illicit objectives. An effort to achieve proportional representation, for example, might be aimed at aiding a group's participation in the political processes by guaranteeing safe political offices, or, on the other hand, might be a "contrivance to segregate" the group, *Wright* v. *Rockefeller*, *supra*, 376 U. S., at 58, thereby frustrating its potentially successful efforts at coalition building across racial lines. Compare, *e. g.*, the positions of the black plaintiffs in *Wright*, at 53–54, with the black intervenors, *id.*, at 62 (Douglas, J., dissenting). Indeed, even the present case is not entirely free of complaints that benignity is not the true characteristic of the remedial redistricting. Puerto Rican groups, for example, who have been joined with black groups to establish the "nonwhite" category, protested to the Attorney General that their political strength under the 1974 reapportionment actually is weaker than under the invalidated 1972 districting. Appendix, at 295. A black group similarly complained of the loss of a "safe" seat because of the inadequacy of the 65% minimum figure. *Id.*, at 296–297. These particular objections, as the Attorney General argued in his memorandum endorsing the 1974 reapportionment, may be ill advised and unpersuasive. Nevertheless, they illustrate the risk that what is presented as an instance of benign race assignment in fact may prove to be otherwise. This concern, of course, does not undercut the theoretical legitimacy or usefulness of preferential policies. At the minimum, however, it

does suggest the need for careful consideration of the operation of any racial device, even one cloaked in preferential garb. And if judicial detection of truly benign policies proves impossible or excessively crude, that alone might warrant invalidating any race-drawn line.

Second, even in the pursuit of remedial objectives, an explicit policy of assignment by race may serve to stimulate our society's latent race consciousness, suggesting the utility and propriety of basing decisions on a factor that ideally bears no relationship to an individual's worth or needs. See, *e. g.*, Kaplan, Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment, 61 Nw. U. L. Rev. 363, 379–380 (1966). Furthermore, even preferential treatment may act to stigmatize its recipient groups, for although intended to correct systemic or institutional inequities, such a policy may imply to some the recipients' inferiority and especial need for protection.[3] Again, these matters would not necessarily speak against the wisdom or permissibility of selective, benign racial classifications. But they demonstrate that the considerations that historically led us to treat race as a constitutionally "suspect" method of classifying individuals are not entirely vitiated in a preferential context.

Third, especially when interpreting the broad principles embraced by the Equal Protection Clause, we cannot well ignore the social reality that even a benign policy of assignment by race is viewed as unjust by many in our society, especially by those individuals who are adversely effected

[3] This phenomenon seems to have arisen with respect to policies affording preferential treatment to women: thus groups dedicated to advancing the legal position of women have appeared before this Court to challenge statutes that facially offer advantages to women and not men. See, *e. g.*, *Kahn* v. *Shevin*, 416 U. S. 351 (1974). This strategy, one surmises, can be explained on the basis that even good-faith policies favoring women may serve to highlight stereotypes concerning their supposed dependency and helplessness.

by a given classification. This impression of injustice may be heightened by the natural consequence of our governing processes that the most "discrete and insular" of whites often will be called upon to bear the immediate, direct costs of benign discrimination. See *e. g.*, Kaplan, *supra*, at 373–374; cf. Ely, The Constitutionality of Reverse Racial Discrimination, 41 U. Chi. L. Rev. 723, 737–738 (1974). Perhaps not surprisingly, there are indications that this case affords an example of just such decisionmaking in operation. For example, the intervenor NAACP takes pains to emphasize that the mandated 65% rule could have been attained through redistricting strategies that did not slice the Hasidic community in half. State authorities, however, chose to localize the burdens of race reassignment upon the petitioners rather than to redistribute a more varied and diffused range of whites into predominantly nonwhite districts. NAACP Brief, at 29–31. I am in no position to determine the accuracy of this appraisal, but the impression of unfairness is magnified when a coherent group like the Hasidim disproportionately bears the adverse consequences of a race assignment policy.

In my view, when a decisionmaker embarks on a policy of benign racial sorting, he must weigh the concerns that I have discussed against the need for effective social policies promoting racial justice in a society beset by deep-rooted racial inequities. But I believe that Congress here adequately struck that balance in enacting the carefully conceived remedial scheme embodied in the Voting Rights Act. However the Court ultimately decides the constitutional legitimacy of "reverse discrimination" pure and simple, I am convinced that the application of the Voting Rights Act substantially minimizes the objections to preferential treatment, and legitimates the use of even overt, numerical racial devices in electoral redistricting.

The participation of the Attorney General, for example,

largely relieves the judiciary of the need to grapple with the difficulties of distinguishing benign from malign discrimination. Under § 5 of the Act, the Attorney General in effect is constituted champion of the interests of minority voters, and accompanying implementing regulations ensure the availability of materials and submissions necessary to discern the true effect of a proposed reapportionment plan. See 28 CFR § 51.19. This initial right of review, coupled with the fact-finding competence of the Justice Department, substantially reduces the likelihood that a complicated reapportionment plan that silently furthers malign racial policies would escape detection by appropriate officials. As a practical matter, therefore, I am prepared to accord considerable deference to the judgment of the Attorney General that a particular districting scheme complies with the remedial objectives furthered by the Voting Rights Act.

Similarly, the history of the Voting Rights Act provides reassurance that, in the face of the potential for reinvigorating racial partisanship, the congressional decision to authorize the use of race-oriented remedies in this context was the product of substantial and careful deliberations. Enacted following "voluminous legislative" consideration, *South Carolina* v. *Katzenbach*, 383 U. S. 301, 309 (1966), the Voting Rights Act represents an unequivocal and well-defined congressional consensus on the national need for "sterner and more elaborate measures," *ibid.*, to secure the promise of the Fourteenth and Fifteenth Amendments with respect to exercise of the franchise. Insofar as the drawing of district lines is a process that intrinsically involves numerical calculations, and insofar as state officials charged with the task of defining electoral constituencies are unlikely simply to close their eyes to considerations such as race and national origin,[4] the resort to a numerical racial criterion as

[4] It would be naive to suppose that racial considerations do not enter into apportionment decisions. A variety of motivations could produce

a method of securing compliance with the aims of the Voting Rights Act is, in my view, consistent with that consensus. Whatever may be the indirect and undesirable counter-educational costs of employing such far-reaching racial devices, Congress had to confront these considerations before opting for an activist race-conscious remedial role supervised by federal officials. The "insidious and pervasive" evil of voting rights violations, *id.*, at 309, and the "specially informed legislative competence" in this area, *Katzenbach* v. *Morgan*, 384 U. S. 641, 656 (1966); cf. *Morton* v. *Mancari*, 417 U. S. 535, 555 (1974), argue in support of the legitimacy of the federal decision to permit a broad range of race-conscious remedial techniques, including, as here, outright assignment by race.

This leaves, of course, the objection expressed by a variety of participants in this litigation: that this reapportionment worked the injustice of localizing the direct burdens of racial assignment upon a morally undifferentiated group of whites,[8] and, indeed, a group that plausibly is peculiarly vulnerable to such injustice. This argument has both normative and emotional appeal, but for a variety of

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such a reliance upon race: *e. g.*, the desire to injure a race, a conscious decision to distribute voting power among a variety of well-defined racial and ethnic groups or neighborhoods, or an attempt to employ race as a proxy for political affiliation. Cf. *Gaffney* v. *Cummings*, 412 U. S. 735, 753–754 (1973). The relative difficulty of isolating these motivations in this closeted decisionmaking context, and the further difficulty of deciding which of these motives should be permissible given the realities of the apportionment process, undoubtedly explains § 5's prohibition of practices that either "have the purpose . . . [or] effect of denying or abridging the right to vote on account of race or color . . . ."

[8] I find nothing in the record to suggest—and such a proposition seems implausible—that the Hasidim bear any unique responsibility for the decisions that led to discriminatory voting practices or effects in Brooklyn. Nor is there any contention that petitioners derived special benefits from the prior discriminatory policies, other than to the extent that the overall white voice county-wide was strengthened.

reasons I am convinced that the Voting Rights Act drains it of vitality.

First, it is important to recall that the Attorney General's oversight focuses upon jurisdictions whose prior practices exhibited the purpose or effect of infringing the right to vote on account of race, thereby triggering § 4 of the Act, 42 U. S. C. § 1973 (b). This direct nexus to localities with a history of discriminatory practices or effects enhances the legitimacy of the Attorney General's remedial authority [6] over individuals within those communities who benefited (as whites) from those earlier discriminatory voting patterns. Moreover, the obvious remedial nature of the Act and its enactment by an elected Congress that hardly can be viewed as dominated by nonwhite representatives belies any possibility that the decisionmaker intended a racial insult or injury to those whites who are adversely affected by the operation of the Act's provisions.[7] Finally, petitioners have not been deprived of their right to vote, a consideration that minimizes the detrimental impact of the remedial racial policies governing the § 5 reapportionment. True, petitioners

[6] It is true that invoking jurisdiction under the Voting Rights Act does not require an actual finding of purposeful discrimination [redacted]. Nonetheless, as Mr. JUSTICE WHITE's opinion notes, Congress enacted the Act with "broadly remedial" objectives in mind, *ante*, at 10, and the conditions that activate § 4 are those "which experience had proved were indicative of racial discrimination in voting," *id.*, at 10-11. Indeed, these discriminatory effects often would afford probative evidence of purposeful discrimination. See *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, —— U. S. ——, —— (1976).

[7] In this regard, it is important that, notwithstanding the worrisome suggestions of the intervenor, *supra*, at 7, petitioners themselves do not protest that their treatment under the 1974 plan was motivated by anti-semitism. See, *e. g.*, Brest, Foreword: In Defense of the Antidiscrimination Principle, 90 Harv. L. Rev. 1, 17 (1976). Indeed, it is undeniable that the Hasidic community is contiguous to several nonwhite neighborhoods, and, therefore, understandably is a candidate for redistricting given the goal of creating 10 viable nonwhite voting majorities.

are denied the opportunity to vote as a group in accordance with the earlier districting configuration, but they do not press any legal claim to a group voice as Hasidim. Petitioners Brief, at 6 n. 6. In terms of their voting interests, then, the burden that they claim to suffer must be attributable solely to their relegation to increased nonwhite-dominated districts. Yet, to the extent that white and nonwhite interests and sentiments are polarized in Brooklyn, the petitioners still are indirectly "protected" by the remaining white Assembly and Senate districts within the county, carefully preserved in accordance with the white proportion of the total county population. While these considerations obviously do not satisfy petitioners, I am persuaded that they reinforce the legitimacy of this remedy.

Since I find nothing in the first three parts of Mr. JUSTICE WHITE's opinion that is inconsistent with the views expressed herein, I join those parts.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 14, 1977

Re: No. 75-104 - United Jewish Organizations v. Carey

Dear Byron:

Please join me in Parts I and IV of your current circulating opinion.

Sincerely,

WHR

Mr. Justice White

Copies to the Conference

pp 1, 17, 19, 22

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: ____________

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4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-104

United Jewish Organizations of Williamsburgh, Inc., et al., Petitioners, v. Hugh L. Carey et al.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[February —, 1977]

give Jowil Stewart LFP

MR. JUSTICE WHITE announced the judgment of the Court and filed an opinion, all of which is joined by MR. JUSTICE STEVENS, Parts I, II, and III of which are joined by MR. JUSTICE BRENNAN and MR. JUSTICE BLACKMUN, and Parts I and IV of which is joined by MR. JUSTICE REHNQUIST.

Section 5 of the Voting Rights Act prohibits a state or political subdivision subject to § 4 of the Act from implementing a legislative reapportionment unless it has obtained a declaratory judgment from the District Court for the District of Columbia, or a ruling from the Attorney General of the United States, that the reapportionment "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. . . ."[1]

[1] Section 5 of the Voting Rights Act, 42 U. S. C. § 1973c, provides in pertinent part:

"Whenever . . . a State or political subdivision with respect to which the prohibitions set forth in section 1973b (a) of this title based upon determinations made under the second sentence of section 1973b (b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, . . . such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or pro-

The question presented is whether, in the circumstances of this case, the use of racial criteria by the State of New York in its attempt to comply with § 5 of the Voting Rights Act and to secure the approval of the Attorney General violated the Fourteenth or Fifteenth Amendment.

I

Kings County, N. Y., together with New York (Manhattan) and Bronx Counties, became subject to §§ 4 and 5 of the Act, by virtue of a determination by the Attorney General that a literacy test was used in these three counties as of November 1, 1968, and a determination by the Director of the Census that fewer than 50% of the voting-age residents of these three counties voted in the presidential election of 1968.[2] Litigation to secure exemption from the Act was unsuccessful,[3] and it became necessary for New York to

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cedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court."

A legislative reapportionment is a "standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968," within the meaning of § 5. See pp. 11–12, *infra*.

[2] See 42 U. S. C. § 1973b (b).

[3] The State of New York brought an action to obtain a statutory

secure the approval of the Attorney General or of the United States District Court for the District of Columbia for its 1972 reapportionment statute insofar as that statute concerned Kings, New York, and Bronx Counties. On January 31, 1974, the provisions of the statute districting these counties for congressional, state senate, and state assembly seats were submitted to the Attorney General. In accordance with the regulations governing his § 5 review, the Attorney General considered submissions from interested parties criticizing and defending the plan.[4] Those submissions in-

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exemption for the three counties under § 4 (a) of the Act, seeking a declaratory judgment that its literacy test had not been used within the 10 years preceding the filing of the suit "for the purpose or with the effect of denying or abridging the right to vote on account of race or color." 42 U. S. C. § 1973b (a). After several years of litigation, the District Court for the District of Columbia denied the exemption and ordered the State to comply with the filing requirements of § 5. This Court summarily affirmed. *New York on Behalf of New York County* v. *United States*, 419 U. S. 888 (1974). See 510 F. 2d, at 516.

[4] Section 51.19, 28 C. F. R. provides:

"Section 5, in providing for submission to the Attorney General as an alternative to seeking a declaratory judgment from the U. S. District Court for the District of Columbia, imposes on the Attorney General what is essentially a judicial function. Therefore, the burden of proof on the submitting authority is the same in submitting changes to the Attorney General as it would be in submitting changes to the District Court for the District of Columbia. The Attorney General shall base his decision on a review of material presented by the submitting authority, relevant information provided by individuals or groups, and the results of any investigation conducted by the Department of Justice. If the Attorney General is satisfied that the submitted change does not have a racially discriminatory purpose or effect, he will not object to the change and will so notify the submitting authority. If the Attorney General determines that the submitted change has a racially discriminatory purpose or effect, he will enter an objection and will so notify the submitting authority. If the evidence as to the purpose or effect of the change is conflicting, and the Attorney General is unable to resolve the conflict within the 60-day period, he shall, consistent with the above-described burden of proof applicable in the District Court, enter an objection and so notify the submitting authority."

cluded assertions that voting in these counties was racially polarized and that the district lines had been created with the purpose or effect of diluting the voting strength of nonwhites (blacks and Puerto Ricans).[5] On April 1, 1974, the Attorney General concluded that, as to certain districts in Kings County covering the Bedford-Stuyvesant area of Brooklyn, the State had not met the burden placed on it by § 5 and the regulations thereunder to demonstrate that the redistricting had neither the purpose nor the effect of abridging the right to vote by reason of race or color.[6]

[5] The record in this Court contains only part of the materials submitted to and considered by the Attorney General in his review of the 1972 plan. Included in the present record are a memorandum submitted on behalf of the NAACP and letters from several prominent black and Puerto Rican elected officials, all opposing the plan. Not included in the record are materials defending the plan submitted by the reapportionment committee of the New York legislature, the state attorney general, and several state legislators. Brief for the United States, at 8, and n. 9.

The NAACP, the Attorney General, and the court below classified Puerto Ricans in New York together with blacks as a minority group entitled to the protections of the Voting Rights Act. Hereinafter we use the term "nonwhite" to refer to blacks and Puerto Ricans, although small numbers of other nonwhite groups (such as orientals) are also included in the nonwhite population statistics.

[6] The basis for the Attorney General's conclusion that "the proscribed effect may exist" as to certain state assembly and senate districts in Kings County was explained in his letter to the New York state authorities as follows:

"Senate district 18 appears to have an abnormally high minority concentration while adjoining minority neighborhoods are significantly diffused into surrounding districts. In the less populous proposed assembly districts, the minority population appears to be concentrated into districts 53, 54, 55 and 56, while minority neighborhoods adjoining those districts are diffused into a number of other districts. . . . [W]e know of no necessity for such configuration and believe other rational alternatives exist."

The Attorney General also objected to the congressional districting in Kings County and to the state legislative districting in New York County. The districting for these seats is not at issue in this litigation.

Under § 5, the State could have challenged the Attorney General's objections to the redistricting plan by filing a declaratory judgment action in a three-judge court in the District of Columbia. Instead, the State sought to meet what it understood to be the Attorney General's objections and to secure his approval in order that the 1974 primary and general elections could go forward under the 1972 statute.[7] A revised plan, submitted to the Attorney General on May 31, 1974, in its essentials did not change the number of districts with nonwhite majorities, but did change the size of the nonwhite majorities in almost all of those districts. Under the 1972 plan, Kings County had three state senate districts with nonwhite majorities of approximately 91%, 61%, and 53%; under the revised 1974 plan, there were again three districts with nonwhite majorities, but now all three were between 70% and 75% nonwhite.[8] As for state assembly districts, both the 1972 and the 1974 plans provided for seven districts with nonwhite majorities. However, under the 1972 plan, there were four between 85% and 95% nonwhite, and three were approximately 76%, 61%, and 52%,

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[7] The State was also under pressure from a private suit to compel enactment of new district lines consistent with the views of the Attorney General. *NAACP* v. *New York City Board of Elections*, SDNY 72 Civ. 1460. See 510 F. 2d, at 517 n. 6.

[8] The 1972 percentages are taken from Table 3, accompanying the memorandum in support of the motions to dismiss of the applicants for intervention, record at 265, except for the 61% figure, which is for a district only partially in Kings County. That figure is taken from the Brief for the United States, at 53, and represents the black and Puerto Rican population rather than all nonwhites. The 1974 percentages are taken from the Interim Report of the Joint Committee on Reapportionment, app., at 179–180.

The 1974 plan created nonwhite majorities in two state senate districts that were majority white under the 1972 plan (the 17th and the 23d), but created white majorities in two districts that were majority nonwhite under the 1972 plan (the 16th and the 25th). See Brief for the United States, at 53.

respectively; under the 1974 plan, the two smallest nonwhite majorities were increased to 65% and 67.5%, and the two largest nonwhite majorities were decreased from greater than 90% to between 80% and 90%.[9] The report of the legislative committee on reapportionment stated that these changes were made "to overcome Justice Department objections" by creating more "substantial nonwhite majorities" in two assembly districts and two senate districts.[10]

One of the communities affected by these revisions in the Kings County reapportionment plan was the Williamsburgh area, where about 30,000 Hasidic Jews live. Under the 1972 plan, the Hasidic community was located entirely in one assembly district (61% nonwhite) and one senate district (37% nonwhite); in order to create substantial nonwhite majorities in these districts, the 1974 revisions split the Hasidic community between two senate and two assembly districts. A staff member of the legislative reapportionment committee testified that in the course of meetings and telephone conversations with Justice Department officials, he "got the feeling . . . that 65 percent would be probably an approved figure" for the nonwhite population in the assembly district in which the Hasidic community was located, a district approximately 61% nonwhite under the 1972 plan.[11] To attain the 65% figure, a portion of the white population, including part of the Hasidic community, was reassigned to an adjoining district.

Shortly after the State submitted this revised redistricting plan for Kings County to the Attorney General, petitioners sued on behalf of the Hasidic Jewish community of Williams-

[9] Table 3, *supra*, n. 8, app., 266; Interim Report, *supra*, n. 8, app., 195; Brief for the United States, app., at 54. See 510 F. 2d, at 523 n. 21.

[10] Interim Report, *supra*, n. 8, app., 179; see *id.*, app., 181–182.

[11] Testimony of Richard S. Scolaro, executive director of the Joint Committee on Reapportionment, at hearing on plaintiff's motion for preliminary injunction, app., 106; see 510 F. 2d, at 517.

burgh, alleging that the 1974 plan "would dilute the value of each plaintiff's franchise by halving its effectiveness," solely for the purpose of achieving a racial quota and therefore in violation of the Fourteenth Amendment. Petitioners also alleged that they were assigned to electoral districts solely on the basis of race, and that this racial assignment diluted their voting power in violation of the Fifteenth Amendment. Petitioners sought an injunction restraining New York officials from enforcing the new redistricting plan and a declaratory judgment that the Attorney General of the United States had used unconstitutional and improper standards in objecting to the 1972 plan.

On June 20, 1974, the District Court held a hearing on petitioners' motion for a preliminary injunction. On July 1, 1974, the Attorney General informed the State of New York that he did not object to the implementation of the revised plan. The Attorney General moved to be dismissed as a party on the ground that the relief sought against him could be obtained only in the District Court for the District of Columbia and only by a State or political subdivision subject to the Voting Rights Act; the State and the intervenor NAACP moved to dismiss the complaint on the ground that it failed to state a claim upon which relief could be granted. The District Court granted the motions to dismiss the complaint, reasoning that petitioners enjoyed no constitutional right in reapportionment to separate community recogntion as Hasidic Jews, that the redistricting did not disenfranchise petitioners, and that racial considerations were permissible to correct past discrimination.[12] 377 F. Supp., at 1165–1166.

A divided Court of Appeals affirmed. The majority first held that the Attorney General must be dismissed as a party because the court had no jurisdiction to review his objection

[12] Petitioners' motions for a preliminary injunction and summary judgment were denied.

to the 1972 plan.[13] After agreeing with the District Court that petitioners had no constitutional right to separate community recognition in reapportionment—a holding not challenged by petitioners here[14]—the Court of Appeals went on to address petitioners' claims as white voters that the 1974 plan denied them equal protection of the laws and abridged their right to vote on the basis of race. The court noted that the 1974 plan left approximately 70% of the senate and assembly districts in Kings County with white majorities; given that only 65% of the population of the county was white, the 1974 plan would not underrepresent the white population, assuming that voting followed racial lines. 510 F. 2d., at 523, and n. 21. Petitioners thus could not claim that the plan canceled out the voting strength of whites as a racial group, under this Court's decisions in *White* v. *Regester*, 412 U. S. 755 (1973), and *Whitcomb* v. *Chavis*, 403 U. S. 124 (1971). The court then observed that the case did not present the question whether a legislature, "starting afresh," could draw lines on a racial basis so as to bolster nonwhite voting strength, but rather the "narrower" question whether a State could use racial considerations in drawing lines in an effort to secure the Attorney General's approval under the Voting Rights Act. 510 F. 2d, at 524. The court thought this question answered by this Court's decision in *Allen* v. *State Board of Elections*, 393 U. S. 544, 569 (1969),

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[13] Although petitioners did not present this question for review, they argue that the Attorney General is properly a party to this suit because he allegedly caused the state officials to deprive petitioners of their constitutional rights. Brief for Petitioners, at 53–54, n. 22; Petitioners' Reply Brief, at 5 n. 1. In view of our disposition of the case, we do not reach this issue.

[14] In their brief in this Court, petitioners state: "[We do not] contend that there is any right—constitutional or statutory—for permanent recognition of a community in legislative apportionment. Our argument is, rather, that the history of the area demonstrates that there could be—and in fact was—*no reason other than race* to divide the community at this time." Brief for Petitioners, at 6 n. 6. (Emphasis in original.)

where a change from district to at-large voting for county supervisors was held to be covered by § 5 of the Act. The court below reasoned that the Act contemplated that the Attorney General and the state legislature would have "to think in racial terms"; because the Act "*necessarily deals with race or color, corrective action under it must do the same.*" (Emphasis in original; footnote omitted.) The court held that

> "so long as a districting, even though based on racial considerations, is in conformity with the unchallenged directive of and has the approval of the Attorney General of the United States under the Act, at least absent a clear showing that the resultant legislative reapportionment is unfairly prejudicial to white or nonwhite, that districting is not subject to challenge." 510 F. 2d, at 525.[15]

We granted certiorari, 423 U. S. 945 (1975). We affirm.

II

Petitioners argue that the New York Legislature, although seeking to comply with the Voting Rights Act as construed by the Attorney General, has violated the Fourteenth and Fifteenth Amendments by deliberately revising its reapportionment plan along racial lines.[16] In rejecting petitioners'

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[15] The dissent would have found a constitutional violation in "the drawing of district lines with a central and governing premise that a set number of districts must have a predetermined nonwhite majority of 65% or more in order to ensure nonwhite control in those districts." The dissent pointed out that neither the Attorney General nor the State of New York would take responsibility for the 65% "quota," and argued that there was no showing of a pre-existing wrong which could justify the use of a "presumptively odious" racial classification. 510 F. 2d, at 525, 526 (Frankel, J.).

[16] The Equal Protection Clause, contained in § 1 of the Fourteenth Amendment, forbids any State to "deny to any person within its jurisdiction the equal protection of the laws." Section 1 of the Fifteenth

claims, we address four propositions: first, that whatever might be true in other contexts, the use of racial criteria in districting and apportionment is never permissible; second, that even if racial considerations may be used to redraw district lines in order to remedy the residual effects of past unconstitutional reapportionments, there are no findings here of prior discriminations that would require or justify as a remedy that white voters be reassigned in order to increase the size of black majorities in certain districts; third, that the use of a "racial quota" in redistricting is never acceptable; and fourth, that even if the foregoing general propositions are infirm, what New York actually did in this case was unconstitutional, particularly its use of 65% nonwhite racial quota for certain districts. The first three arguments, as we now explain, are foreclosed by our cases construing and sustaining the constitutionality of the Voting Rights Act; the fourth we address in Parts III and IV.

It is apparent from the face of the Act, from its legislative history, and from our cases that the Act was itself broadly remedial in the sense that it was "designed by Congress to banish the blight of racial discrimination in voting. . . ." *South Carolina* v. *Katzenbach*, 383 U. S. 301, 308 (1966). It is also plain, however, that after "repeatedly try[ing] to cope with the problem by facilitating case-by-case litigation against voting discrimination," *id.*, at 313, Congress became dissatisfied with this approach, which required judicial findings of unconstitutional discrimination in specific situations and judicially approved remedies to cure that discrimination. Instead, Congress devised more stringent measures, one of which, § 5, required the covered States to seek the approval of either the Attorney General or of a three-judge court in the District of Columbia whenever they sought

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Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

to implement new voting procedures. Under § 4, a State became subject to § 5 whenever it was administratively determined that certain conditions which experience had proved were indicative of racial discrimination in voting had existed in the area—in the case of New York, as already indicated, p. 2, *supra*, that a literacy test was in use in certain counties in 1968 and that fewer than 50% of the voting age residents in these counties voted in the presidential election that year. At that point, New York could have escaped coverage by undertaking to demonstrate to the appropriate court that the test had not been used to discriminate within the past 10 years, an effort New York unsuccessfully made. See n. 3, *supra*.

Given this coverage of the counties involved, it is evident that the Act's prohibition against instituting new voting procedures without the approval of the Attorney General or the three-judge District Court is not dependent upon proving past unconstitutional apportionments and that in operation the Act is aimed at preventing the use of new procedures until their capacity for discrimination has been examined by the Attorney General or by a court. Although recognizing that the "stringent new remedies," including § 5, were "an uncommon exercise of congressional power," we nevertheless sustained the Act as a "permissibly decisive" response to "the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetrating voting discrimination in the face of adverse federal court decrees." *South Carolina* v. *Katzenbach*, *supra*, 383 U. S., at 334–335 (footnote omitted).

It is also clear that under § 5, new or revised reapportionment plans are among those voting procedures, standards or practices that may not be adopted by a covered State without the Attorney General or a three-judge court ruling that the plan "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." In *Allen* v. *State Board of Elections*,

supra, on which the Court of Appeals relied below, we held that a change from district to at-large voting for county supervisors had to be submitted for federal approval under § 5, because of the potential for a "dilution" of minority voting power which could "nullify [its] ability to elect the candidate of [its] choice. . . ." 393 U. S., at 569. When it renewed the Voting Rights Act in 1970 and again in 1975, Congress was well aware of the application of § 5 to redistricting. In its 1970 extension, Congress relied on findings by the United States Commission on Civil Rights that the newly gained voting strength of minorities was in danger of being diluted by redistricting plans that divided minority communities among predominantly white districts.[17] In 1975, Congress was unmistakenly cognizant of this new phase in the effort to eliminate voting discrimination. Former Attorney General Katzenbach testified that § 5 "has had its broadest impact . . . in the areas of redistricting and reap-

[17] The findings of the Commission's 18-month study, contained in its 1968 report, Political Participation, at 21–39, were endorsed in a statement submitted in the course of the Senate debates by ten out of seventeen Senate Judiciary Committee members, who proposed and successfully supported the critical amendment that extended § 5. The findings were repeatedly referred to during the Senate and House hearings held in 1969 and 1970 in connection with the extension. *E. g.*, Hearings on H. R. 4249, H. R. 5538, and Similar Proposals (Voting Rights Act Extension) before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 1st Sess., 3–4 (1969) (statement of Rep. McCulloch); *id.*, at 17 (testimony of Howard Glickstein, Acting Staff Director, United States Commission on Civil Rights); *id.*, at 150 (testimony of Thomas E. Harris, Associate General Counsel, AFL–CIO); Hearings on S. 818, S. 2456, etc. (Amendments to the Voting Rights Act of 1965) before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 91st Cong., 1st and 2d Sess., 47 (1969) (testimony of Frankie Freeman, Member, United States Commission on Civil Rights); *id.*, at 132 (testimony of Joseph L. Rauh, Jr., General Counsel, Leadership Conference on Civil Rights); *id.*, at 427 (statement of Howard Glickstein); *id.*, at 516–518 (testimony of David Norman, Deputy Assistant Attorney General, Civil Rights Division, U. S. Dept. of Justice).

portionment," and the Senate and House reports recommending the extension of the Act referred specifically to the Attorney General's role in screening redistricting plans to protect the opportunities for nonwhites to be elected to public office.[18]

As the Court of Appeals understood the Act and our decision in *Allen*, compliance with the Act in reapportionment cases would often necessitate the use of racial considerations in drawing district lines. That the Court of Appeals correctly read the Act has become clearer from later cases.

In *Beer* v. *United States*, 425 U. S. 130 (1976), the Court considered the question of what criteria a legislature reapportionment must satisfy under § 5 of the Voting Rights Act to demonstrate that it does not have the "effect" of denying or abridging the right to vote on account of race. *Beer* established that the Voting Rights Act does not permit the implementation of a reapportionment that "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Id.*, at 141. This test was satisfied where the reapportionment increased the percentage of districts where members of racial minorities protected by the Act were in the majority. See *ibid.* But if this test were not met, clearance by the Attorney General or the District Court for the District of Columbia could not be given, and the reapportionment could not be implemented.

The reapportionment at issue in *Beer* was approved by this Court, because New Orleans had created one councilmanic district with a majority of black voters where none existed before. But had there been districts with black majorities under the previous law and had New Orleans in fact decreased the number of majority black districts, it would have

[18] Hearings before a Subcommittee of the Senate Judiciary Committee, 94th Cong., 1st Sess., 124 (1975) (testimony of Nicholas Katzenbach); S. Rep. No. 94-295, 94th Cong., 1st Sess., 15-19 (1975); H. R. Rep. No. 94-196, 94th Cong., 1st Sess., 8-11 (1975).

had to modify its plan in order to implement its reapportionment by carving out a large enough black majority in however many additional districts would be necessary to satisfy the *Beer* test. There was division on the Court as to what a State must show to satisfy § 5; but all eight Justices who participated in the decision implicitly accepted the proposition that a State may revise its reapportionment plan to comply with § 5 by increasing the percentage of black voters in a particular district until it has produced a clear majority. See 425 U. S., at 141–142; *id.*, at 144 (WHITE, J., dissenting), 158–161 (MARSHALL, J., dissenting). Indeed, the plan eventually approved by this Court in *Beer* was drawn with the purpose of avoiding dilution of the black vote by attaining at least a 54% majority of black voters in one district while preventing a 90% concentration. See *Beer* v. *United States*, app. 341–342.

The Court has taken a similar approach in applying § 5 to the extension of city boundaries through annexation. Where the annexation has the effect of reducing the percentage of blacks in the city, the proscribed "effect" on voting rights can be avoided by a post-annexation districting plan which "fairly reflects the strength of the Negro community as it exists after the annexation" and which "would afford [it] representation reasonably equivalent to [its] political strength in the enlarged community." *City of Richmond* v. *United States*, 422 U. S. 358, 370–371 (1975). Accord, *City of Petersburg* v. *United States*, 354 F. Supp. 1021 (DC 1972), aff'd, 410 U. S. 962 (1973). In *City of Richmond*, the Court approved an annexation which reduced the proportion of blacks in the city from 52% to 42%, because the post-annexation ward system created four out of nine wards with substantial black majorities of 64%. Had the redistricting failed to "fairly reflect the strength of the Negro community," however, it would follow from the Court's decision that the Constitution would permit the city to modify its

plan by deliberately creating black majorities in a sufficient number of wards to satisfy statutory requirements.

Implicit in *Beer* and *City of Richmond*, then, is the proposition that the Constitution does not prevent a State subject to the Voting Rights Act from deliberately creating or preserving black majorities in particular districts in order to ensure that its reapportionment plan complies with § 5. That proposition must be rejected and § 5 held unconstitutional to that extent if we are to accept petitioners' view that racial criteria may never be used in redistricting or that they may be used, if at all, only as a specific remedy for past unconstitutional apportionments. We are unwilling to overturn our prior cases, however. Section 5, and its authorization for racial redistricting where appropriate to avoid abridging the right to vote on account of race or color, are constitutional. Contrary to petitioners' first argument, neither the Fourteenth nor the Fifteenth Amendment mandates any *per se* rule against using racial factors in districting and apportionment. Nor is petitioners' second argument valid. The permissible use of racial criteria is not confined to eliminating the effects of past discriminatory districting or apportionment.[19]

[19] Petitioners also insist that, because the Attorney General concluded not that the 1972 plan would have a discriminatory effect but only that the State had failed to demonstrate that the plan would not have such an effect, there was insufficient justification for racial redistricting. This argument overlooks the central role of the shift in burden of proof in the congressional effort to combat discriminatory voting laws. Our cases have upheld this shift. As we said in *South Carolina* v. *Katzenbach*, *supra*, "After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evils to the victims." 383 U. S., at 328. And in affirming the issuance of an injunction against enforcement of a state reapportionment plan for which the State had not demonstrated the absence of a discriminatory effect, the Court stated:

"It is well established that in a declaratory judgment action under § 5, the plaintiff State has the burden of proof. What the Attorney

Moreover, in the process of drawing black majority districts in order to comply with § 5, the State must decide how substantial those majorities must be in order to satisfy the Voting Rights Act. The figure used in drawing the *Beer* plan, for example, was 54% of registered voters.[20] At a minimum and by definition, a "black majority district" must be more than 50% black. But whatever the specific percentage, the State will inevitably arrive at it as a necessary means to ensure the opportunity for the election of a black representative and to obtain approval of its reapportionment plan. Unless we adopted an unconstitutional construction of § 5 in *Beer* and *City of Richmond*, a reapportionment cannot violate the Fourteenth or Fifteenth Amendment merely because a State uses specific numerical quotas in establishing a certain number of black majority districts. Our cases under § 5 stand for at least this much.

III

Having rejected these three broad objections to the use of racial criteria in redistricting under the Voting Rights Act, we turn to the fourth question, which is whether the racial criteria New York used in this case—the revision of the 1972 plan to create 65% nonwhite majorities in two additional senate and two additional assembly districts—were constitutionally infirm. We hold they are not, on two separate grounds. The first is addressed in this Part III, the second in Part IV.

The first ground is that petitioners have not shown, or offered to prove, that New York did more than the Attorney

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General's regulations do is to place the same burden on the submitting party in a § 5 objection procedure. . . . Any less stringent measure might well have rendered the formal declaratory judgment procedure a dead letter by making available to covered States a far smoother path to clearance." *Georgia* v. *United States*, 411 U. S. 526, 538 (1973). (Footnote omitted.)

[20] See p. 14, *supra*.

General was authorized to require it to do under the nonretrogression principle of *Beer*, a principle that as we have already indicated this Court has accepted as constitutionally valid. Under *Beer*, the acceptability of New York's 1972 reapportionment for purposes of § 5 depends on the change in nonwhite voting strength in comparison with the previous apportionment, which occurred in 1966. Yet there is no evidence in the record to show whether the 1972 plan increased or decreased the number of senate or assembly districts with substantial nonwhite majorities of 65%. For all that petitioners have alleged or proved, the 1974 revisions may have accomplished nothing more than the restoration of nonwhite voting strength to 1966 levels.[21] To be successful in their constitutional challenge to the racial criteria used in New York's revised plan, petitioners must show at a minimum that minority voting strength was increased under the 1974 plan in comparison with the 1966 apportionment; otherwise the challenge amounts to a constitutional attack on compliance with the statutory rule of nonretrogression.

In the absence of any evidence regarding nonwhite voting strength under the 1966 apportionment, the creation of substantial nonwhite majorities in approximately 30% of the senate and assembly districts in Kings County was reasonably related to the constitutionally valid statutory mandate of maintaining nonwhite voting strength. The percentage of districts with nonwhite majorities was less than the percentage of nonwhites in the county as a whole (35%). The size of the nonwhite majorities in those districts reflected the need to take

[21] It is true, of course, that *Beer* was decided after petitioners moved for summary judgment in the District Court and after the Court of Appeals affirmed the District Court's denial of that motion and dismissal of the action. But while relying on *Beer* in this Court, petitioners take the position that there are no disputed issues of the fact and that their motion for summary judgment should be granted on the basis of the present record. Petitioners' Reply Brief, at 13–14, 17; Tr. of Oral Arg., at 70–71.

account of the substantial difference between the nonwhite percentage of the total population in a district and the nonwhite percentage of the voting age population.[22] Because, as the Court said in *Beer*, the inquiry under § 5 focuses ultimately on "the position of racial minorities with respect to their effective exercise of the electoral franchise, 425 U. S., at 141, the percentage of eligible voters by district is of great importance to that inquiry.[23] In the redistricting plan approved in *Beer*, for example, only one of the two districts with a black population majority also had a black majority of registered voters. *Id.*, at 142. We think it was reasonable for the Attorney General to conclude in this case that a *substantial* nonwhite population majority—in the vicinity of 65%—would be required to achieve a nonwhite majority of eligible voters.

Petitioners have not shown that New York did more than accede to a position taken by the Attorney General that was authorized by our constitutionally permissible construction of § 5. New York adopted the 1974 plan because it sought to comply with the Voting Rights Act. This has been its

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[22] The NAACP, intervenor in this action, submitted census data to the Attorney General showing that roughly 75% of all whites in Kings County but only about 55% of all nonwhites were eligible to vote. App. 264. The NAACP urged that districts without significant nonwhite population majorities would not have nonwhite majorities among eligible voters. See, *e. g.*, app. 219.

The statistical problems in estimating the nonwhite population of the districts in the 1972 plan provided an additional reason for the Attorney General to ask for an increase in the size of the nonwhite majorities in certain districts. The legislature used the higher of the two sets of estimates, and the actual nonwhite population may have been somewhat lower. See app. 265.

[23] The regulation governing submissions to the Attorney General for review of redistricting plans under § 5 "strongly urges" the submitting authority to include "[v]oting-age population and the number of registered voters before and after the change, by race, for the area to be affected by the change." 28 CFR § 51.10 (b)(6)(ii) (1976).

primary defense of the plan, which was sustained on that basis by the Court of Appeals. Because the Court of Appeals was essentially correct, its judgment may be affirmed without addressing the additional argument by New York and by the United States that, wholly aside from New York's obligation under the Voting Rights Act to preserve minority voting strength in Kings County, the Constitution permits it to draw district lines deliberately in such a way that the percentage of districts with a nonwhite majority roughly approximates the percentage of nonwhites in the county.

IV

This additional argument, however, affords a second, and independent, ground for sustaining the particulars of the 1974 plan for Kings County. Whether or not the plan was authorized by or was in compliance with § 5 of the Voting Rights Act, New York was free to do what it did as long as it did not violate the Constitution, particularly the Fourteenth and Fifteenth Amendments; and we are convinced that neither Amendment was infringed.

There is no doubt that in preparing the 1974 legislation, the State deliberately used race in a purposeful manner. But its plan represented no racial slur or stigma with respect to whites or any other race, and we discern no discrimination violative of the Fourteenth Amendment or any abridgment of the right to vote on account of race within the meaning of the Fifteenth Amendment.

It is true that New York deliberately increased the nonwhite majorities in certain districts in order to enhance the opportunity for election of nonwhite representatives from those districts. Nevertheless, there was no fencing out of the white population from participation in the political processes of the county, and the plan did not minimize or unfairly cancel out white voting strength. Compare *White* v. *Regester,* 412 U. S. 755, 765–767 (1973), and *Gomillion* v.

Lightfoot, 364 U. S. 339 (1960), with *Gaffney* v. *Cummings*, 412 U. S. 735, 751–754 (1973). Petitioners have not objected to the impact of the 1974 plan on the representation of white voters in the county or in the State as a whole. As the Court of Appeals observed, the plan left white majorities in approximately 70% of the assembly and senate districts in Kings County, which had a countywide population that was 65% white. Thus, even if voting in the county occurred strictly according to race, whites would not be underrepresented relative to their share of the population.

In individual districts where nonwhite majorities were increased to approximately 65%, it became more likely, given racial bloc voting, that black candidates would be elected instead of their white opponents, and it became less likely that white voters would be represented by a member of their own race; but as long as whites in Kings County, as a group, were provided with fair representation, we cannot conclude that there was a cognizable discrimination against whites or an abridgement of their right to vote on the grounds of race.[24] Furthermore, the individual voter in the district with a nonwhite majority has no constitutional complaint merely because his candidate has lost out at the polls and his district is represented by a person for whom he did not vote. Some candidate, along with his supporters, always loses. See *Whitcomb* v. *Chavis*, 403 U. S. 124, 153–160 (1971).

Where it occurs, voting for or against a candidate because

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[24] We also note that the white voter who as a result of the 1974 plan is in a district more likely to return a nonwhite representative will be represented, to the extent that voting continues to follow racial lines, by legislators elected from majority white districts. The effect of the reapportionment on whites in districts where nonwhite majorities have been increased is thus mitigated by the preservation of white majority districts in the rest of the county. See Note, 25 Stan. L. Rev. 84, 87 (1972). Of course, if voting does not follow racial lines, the white voter has little reason to complain that the percentage of nonwhites in his district has been increased.

of his race is an unfortunate practice. But it is not rare; and in any district where it regularly happens, it is unlikely that any candidate will be elected who is a member of the race that is in the minority in that district. However disagreeable this result may be, there is no authority for the proposition that the candidates who are found racially unacceptable by the majority, and the minority voters supporting those candidates, have had their Fourteenth or Fifteenth Amendment rights infringed by this process. Their position is similar to that of the Democratic or Republican minority that is submerged year after year by the adherents to the majority party who tend to vote a straight party line.

It does not follow, however, that the State is powerless to minimize the consequences of racial discrimination by voters when it is regularly practiced at the polls. In *Gaffney* v. *Cummings, supra,* the Court upheld a districting plan "drawn with the conscious intent to . . . achieve a rough approximation of the statewide political strengths of the Democratic and Republican Parties." 412 U. S., at 752. We there recognized that districting plans would be vulnerable under our cases if "*racial or political groups* have been fenced out of the political process and their voting strength invidiously minimized." *Id.,* at 754 (emphasis added); but that was not the case there, and no such purpose or effect may be ascribed to New York's 1974 plan. Rather, that plan can be viewed as seeking to alleviate the consequences of racial voting at the polls and to achieve a fair allocation of political power between white and nonwhite voters in Kings County.

In this respect New York's revision of certain district lines is little different in kind from the decision by a State in which a racial minority is unable to elect representatives from multimember districts to change to single-member districting for the purpose of increasing minority representation. This change might substantially increase minority repre-

sentation at the expense of white voters, who previously elected all of the legislators but with single-member districts could elect no more than their proportional share. If this intentional reduction of white voting power would be constitutionally permissible, as we think it would be, we think it also permissible for a State, employing sound districting principles such as compactness and population equality, to attempt to prevent racial minorities from being repeatedly outvoted by creating districts that will afford fair representation to the members of those racial groups who are sufficiently numerous and whose residential patterns afford the opportunity of creating districts in which they will be in the majority.

As the Court said in *Gaffney*,

> "[C]ourts have [no] constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State." *Ibid.*

New York was well within this rule when, under the circumstances present in Kings County, it amended its 1972 plan.[25]

The judgment is

Affirmed.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

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[25] Petitioners seek to distinguish *Gaffney* on the ground that New York's use of racial criteria was not the product of "reasoned choice" by the state legislature but rather was coerced by federal officials. But we do not think that this otherwise constitutionally permissible plan was rendered unconstitutional merely because New York adopted it to comply with a federal statute.

February 16, 1977

No. 75-104 United Jewish Organization
v. Carey

Dear Potter:

Please join me in your concurring opinion.

Sincerely,

Mr. Justice Stewart

lfp/ss

cc: The Conference

February 16, 1977

No. 75-104 United Jewish Organization
v. Carey

Dear Byron:

I have concluded that Potter's concurring opinion best reflects my thinking about this troublesome case. It also leaves me more options for the future.

Accordingly, I am asking Potter to join me in his concurrence.

I am not unaware of your substantial efforts to accommodate our divergent views. It will not afford you much comfort, but I do thank you.

Sincerely,

Mr. Justice White

lfp/ss

cc: The Conference

THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.
			10/18/76	~~10/18/76~~				
Circulation 1/4/77	Concurring opinion 2nd draft 12/9/76	Concurring opinion 1st draft 11/30/76	1st draft 11/22/76 2nd draft	out	Join BLW ~~12/9/76~~ Join Parts I, II, III & Judgment 2/9/77	Join PS 2/16/77	~~Join~~ Join Part I + IV JBLW 2/14/77	Concurring opinion 1st draft 11/30/76 2nd draft 1/6/77 Join BRW 1/31/77 withdraw opinion
dissent 1st draft 2/17/77	3rd draft 12/17/76 4th draft 2/2/77	3rd draft 2/17/77	12/7/76 3rd draft 1/28/77 4th draft 2/10/77					
					75-104 United Jewish Org v. Carey			