Supplementary Material

Chapter 9: Liberalism Divided—Democratic Rights/Voting/Majority-Minority Districts

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United Jewish Organizations of Williamsburgh v. Carey, 430 U.S. 144 (1977)

United Jewish Organizations of Williamsburgh was composed of civic associations that represented members of the Hasidic Jewish community in Brooklyn, New York. In 1968, parts of New York City, including Brooklyn, became covered jurisdictions under the Voting Rights Act of 1965 because fewer than half of the eligible population cast ballots in that year's presidential election. One consequence of becoming a covered jurisdiction was that all changes in voting laws and practices had to be precleared by the Attorney General of the United States or the District Court for the District of Columbia. In order to increase minority representation both in Congress and in the New York state legislature, the New York legislature split the Williamsburgh community into two election districts, both of which had substantial nonwhite majorities. Members of the Hasidic community immediately sued the state (Hugh Carey was the governor of New York when the case came before the Supreme Court). They claimed that New York had assigned legislative districts on the basis of race in violation of the Fifteenth Amendment. A federal district court dismissed that complaint and that dismissal was affirmed by the Court of Appeals for the Second Circuit. United Jewish Organizations appealed to the Supreme Court of the United States.

The Supreme Court by a 7–1 vote affirmed the previous decision to dismiss the lawsuit. Justice White's plurality opinion ruled that states could use race criteria when redistricting whenever doing so was necessary to comply with the Voting Rights Act of 1965. Why did Justice White think the use of race was necessary in this case? Was he correct? Under what conditions to the various justices believe that states may make "benign" use of race when redistricting? What uses are race are constitutional?

JUSTICE WHITE announced the judgment of the Court and filed an opinion in which JUSTICE STEVENS joined; JUSTICE BRENNAN, JUSTICE BLACKMUN and JUSTICE REHNQUIST join in part.

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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. In rejecting petitioners' 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 a 65% nonwhite racial quota for certain districts. . . .

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In *Beer v. United States* . . . (1976) . . . 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." 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. . . . 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.

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Implicit in *Beer* . . . 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. . . . 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. . . . The permissible use of racial criteria is not confined to eliminating the effects of past discriminatory districting or apportionment.

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. . . . 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*. . . , 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. . . .

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. . . 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. . . .

. . . 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, nor 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. . . . 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 abridgment of their right to vote on the grounds of race. 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. . . .

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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 representation at the expense of white voters, who previously elected all of the legislators but who, 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.

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

JUSTICE BRENNAN, concurring in part.

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If we were presented here with a classification of voters motivated by racial animus, . . . or with a classification that effectively downgraded minority participation in the franchise, . . . 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. . . . 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. Unlike JUSTICE WHITE's opinion, I 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. . . . 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. . . .

First, a purportedly preferential race assignment may, in fact, disguise a policy that perpetuates disadvantageous treatment of the plan's supposed beneficiaries. . . . Indeed, even the present case is not entirely free of complaints that the remedial redistricting in Brooklyn is not truly benign. 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. . . . 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. . . .

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. . . . 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. . . .

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 affected 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. . . . Perhaps not surprisingly, there are indications that this case affords an example of just such decisionmaking in operation. For example, the respondent intervenors take 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 predominately non-white districts. . . .

. . . 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. . . .

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. . . . 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, . . . and the "specially informed legislative competence" in this area, . . . 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.

. . . [T]he obvious remedial nature of the Act and its enactment by an elected Congress that hardly can be viewed as dominated by nonwhite representatives belie the 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. 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. . . .

JUSTICE STEWART, with whom JUSTICE POWELL joins, concurring in the judgment.

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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. . . . 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. . . .

Under the Fourteenth Amendment, the question is whether the reapportionment plan represents purposeful discrimination against white voters. . . . Disproportionate impact may afford some evidence that an invidious purpose was present. . . But the record here does not support a finding that the redistricting plan undervalued the political power of white voters relative to their numbers in Kings County. . . . 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 white voters.

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. . . .

CHIEF JUSTICE BURGER, dissenting.

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. . . If *Gomillion v. Lightfoot* (1960) teaches anything, I had thought it was that drawing of political boundary lines with the sole, explicit objective of reaching a predetermined racial result cannot ordinarily be squared with the Constitution. . . .

. . . [U]ndisputed testimony shows that the 65% figure was viewed by the legislative reapportionment committee as so firm a criterion that even a fractional deviation was deemed impermissible. I cannot see how this can be characterized otherwise than a strict quota approach, and I must therefore view today's holding as casting doubt on the clear-cut principles established in *Gomillion.*

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The assumption that "whites" and "nonwhites" in the county form homogeneous entities for voting purposes is entirely without foundation. The "whites" category consists of a veritable galaxy of national origins, ethnic backgrounds, and religious denominations. It simply cannot be assumed that the legislative interests of all "whites" are even substantially identical. In similar fashion, those described as "nonwhites" include, in addition to Negroes, a substantial portion of Puerto Ricans. . . . The Puerto Rican population, for whose protection the Voting Rights Act was "triggered" in Kings County, . . . has expressly disavowed any identity of interest with the Negroes, and, in fact, objected to the 1974 redistricting scheme because it did not establish a Puerto Rican controlled district within the county.

Although reference to racial composition of a political unit may, under certain circumstances, serve as "a starting point in the process of shaping a remedy," . . . rigid adherence to quotas, especially in a case like this, deprives citizens such as petitioners of the opportunity to have the legislature make a determination free from unnecessary bias for or against any racial, ethnic, or religious group. I do not quarrel with the proposition that the New York Legislature may choose to take ethnic or community union into consideration in drawing its district lines. Indeed, petitioners are members of an ethnic community which, without deliberate purpose so far as shown on this record, has long been within a single assembly and senate district. While petitioners certainly have no constitutional right to remain unified within a single political district, they do have, in my view, the constitutional right not to be carved up so as to create a voting bloc composed of some other ethnic or racial group through the kind of racial gerrymandering the Court condemned in *Gomillion v. Lightfoot.*

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The result reached by the Court today in the name of the Voting Rights Act is ironic. The use of a mathematical formula tends to sustain the existence of ghettos by promoting the notion that political clout is to be gained or maintained by marshaling particular racial, ethnic, or religious groups in enclaves. It suggests to the voter that only a candidate of the same race, religion, or ethnic origin can properly represent that voter's interests, and that such candidate can be elected only from a district with a sufficient minority concentration. The device employed by the State of New York, and endorsed by the Court today, moves us one step farther away from a truly homogeneous society. This retreat from the ideal of the American "melting pot" is curiously out of step with recent political history—and, indeed, with what the Court has said and done for more than a decade. The notion that Americans vote in firm blocs has been repudiated in the election of minority members as mayors and legislators in numerous

American cities and districts overwhelmingly white. Since I cannot square the mechanical racial gerrymandering in this case with the mandate of the Constitution, I respectfully dissent from the affirmance of the judgment of the Court of Appeals.