

CAN YOU GET TO KINGS COUNTY FROM INTERSTATE 85? A REEVALUATION OF UNITED JEWISH ORGANIZATIONS v. CAREY IN LIGHT OF SHAW v. RENO

INTRODUCTION

Under the watchful and persuasive eye of President Lyndon Johnson, the United States Congress passed the Voting Rights Act of 1965.¹ The statute unequivocally proclaimed that the federal government was able to prevent persons from blocking potential voters from registering and participating in the electoral process.² Accordingly, a pervasive theme of the Voting Rights Act is the political and social empowerment of those individuals who had previously been excluded from the electoral process—nonwhite citizens. In many ways, the Act was conceived as both a sword and a shield: attempting to destroy those obstacles to voting faced primarily by blacks, while implementing means to assure increased minority representation at the voting booth. This note focuses on the latter of these two goals, and specifically concentrates on one of the Supreme Court's most recent interpretations of how federal and state governments can fashion these assurances pursuant to the dictates of the Fifteenth Amendment to the United States Constitution.

To that end, the following discourse focuses on one of the Court's most recent and controversial opinions, *Shaw v. Reno*.³ Written by Justice O'Connor, the *Shaw* opinion defines the outermost limit of the government's ability to establish redistricting schemes that comport with the dictates of the Constitution and the Voting Rights Act. More specifically, the Court held that a state may not enact "legislation that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting" without passing strict scrutiny analysis.⁴ Since its release in June of 1993, *Shaw v.*

1. Voting Rights Act of 1965, 42 U.S.C. § 1973.

2. *Id.*

3. *Shaw v. Reno*, 113 S. Ct. 2816 (1993).

4. *Id.* at 2824.

Reno has met with both praise and criticism for its approach to an often passionate and complex area of the law.⁵

Prior to *Shaw v. Reno*, in the twenty-eight years after the passage of the Voting Rights Act, the Court defined the opposite end of the spectrum, or rather, what is permissible redistricting.⁶ Representative of that analysis was the Supreme Court's 1977 decision in *United Jewish Organizations of Williamsburgh, Inc. v. Hugh L. Carey* ("*UJO*").⁷ *UJO* involved a challenge to a New York state redistricting scheme designed to create a black majority voting district. Writing for the plurality, Justice White determined that a state may use racial criteria in drawing redistricting lines, and that such considerations were not limited to the elimination of past racial discrimination or prior impermissible apportionment.⁸ The Court further held that the Constitution permitted states to draw lines "deliberately in such a way that the percentage of districts with a nonwhite majority roughly approximates the percentage of nonwhites in the county."⁹

This note examines the juncture at which these two cases meet and the standards which they implement.¹⁰ In pursuit of that goal, this note classifies two schools of Voting Rights Act jurisprudence. The first school is labeled the "access" model and is characterized by a conservative interpretation of the Act. The access model restricts the Act solely to curative measures through which commonly excluded minorities are afforded the opportunity to vote. Access jurists' theories reside between notions of color

5. See *infra* parts III-IV and accompanying notes. Moreover, increased use of racial redistricting tactics has had a pragmatic, if not profound, impact on American politics, most notably in the South. "The combination of the Republican realignment of white votes and the creation of many black-majority districts is working to transform the structure of southern politics," by realigning the traditional Democratic powerbase. Thomas B. Edsall, *Racial Redistricting Had Minor Role Nov. 8, Analysts Say*, WASH. POST, Dec. 27, 1994 at A4.

6. See *infra* part II and accompanying notes.

7. *United Jewish Organizations of Williamsburgh v. Hugh L. Carey*, 430 U.S. 144 (1977) [hereinafter "*UJO*"]. I use the term "representative" with some hesitation. By no means was *UJO* a definitive statement of the law. The opinion itself, which is discussed in part II, *infra*, was written without a majority of the Justices in agreement. This note's discussion of *UJO* focuses on those concepts that were agreed upon, and perhaps more importantly, those concepts that were distinguished in subsequent case law.

8. *Id.* at 161.

9. *Id.* at 165.

10. See *infra* part IV and accompanying notes.

blindness and the robust use of remedial classifications.¹¹ The second school is labeled the "representation" model and takes a more liberal approach toward the Act. Jurists who subscribe to the representation school not only feel that the Act protects the right to vote, but also creates an affirmative scheme for increasing minority representation. Representation jurists are less concerned with maintaining or achieving color blindness and more concerned with developing remedial measures. Thus, minorities are not only provided with a ballot to cast, but with cognizable representation as well.

Shaw v. Reno represents the Supreme Court's attempt to define the outer limits of permissible redistricting while still incorporating considerations of increased minority representation. By granting white plaintiffs standing to challenge an "irrational" redistricting plan, the *Shaw* Court explicitly limited the remedial scheme developed in *UJO*.¹² This note contends that the *Shaw* decision should not be read as a broad-based indictment on the consideration of racial composition in redistricting.¹³ Rather, the result of Justice O'Connor's reasoning is an opinion which remains within the confines of representation jurisprudence, but is influenced by the conservative philosophies of the access approach.¹⁴ To afford the reader a more complete understanding of the significance of the *Shaw* decision, the present inquiry begins with a brief discussion of the history and context of the Voting Rights Act of 1965 and its subsequent amendments.¹⁵ This overview also examines the major case law that preceded the *UJO* decision.¹⁶

This section is followed by an in-depth analysis of the *UJO* holding, the facts surrounding that case, and points of agreement and disagreement among the Justices in the plurality.¹⁷ The discussion of *UJO* also includes a brief examination of that case's treatment in subsequent Supreme Court opinions.¹⁸ A survey of

11. See *infra* notes 183-189 and accompanying text.

12. Upon closer review, it will become apparent that *UJO*'s scheme has been criticized since its inception in 1977. See *infra* part III.A and accompanying notes.

13. See *infra* part IV and accompanying notes.

14. See *infra* part IV and accompanying notes.

15. See *infra* part I.A.

16. See *infra* part I.

17. See *infra* part II and accompanying notes.

18. See *infra* part II.A.

these cases demonstrates the early criticisms of the *UJO* decision which were accompanied by prevalent calls for limiting the Court's decision. A majority of the Court heeded these calls in *Shaw v. Reno*, released fifteen years after the *UJO* decision.¹⁹

The heart of this note lies in an analysis of *Shaw v. Reno* itself.²⁰ This portion of the note begins with a complete evaluation of the facts surrounding the North Carolina redistricting plan.²¹ The Court's emphasis on the administration of a particular state's redistricting scheme necessarily implicates the particular circumstances surrounding the drafting and implementation of a given redistricting plan. With the facts of *Shaw v. Reno* in mind, Justice O'Connor's majority opinion is evaluated in light of the dissents of Justices White,²² Souter, Blackmun, and Stevens. The analysis concludes with a discussion of the prospective application of the *Shaw* decision to future redistricting cases and addresses precisely how stable the *Shaw* standard is in light of its subsequent treatment by lower federal courts and the Supreme Court.²³

I. OVERVIEW

The Voting Rights Act of 1965 was the hallmark achievement of the civil rights movement. Prior to its passage, black Americans faced systemic barriers to voting, including literacy tests, poll taxes, moral fitness requirements, and government-sponsored intimidation through violence.²⁴ Through the Act, Congress sought an end to such barriers. As one commentator noted, the Act "represents a strong commitment to the racial nondiscrimination principle in voting and the conviction that aggressive enforcement is a proper function of the federal

19. See *infra* notes 115-118 and accompanying text.

20. See *infra* part III and accompanying text.

21. See *infra* notes 136-151 and accompanying text.

22. Justice White's dissent is of particular interest because he led the plurality in *UJO*.

23. See *infra* part V and accompanying notes.

24. For an excellent discussion of the barriers faced by black Americans in the pursuit of voting and other civil rights, see generally, *THE EYES ON THE PRIZE CIVIL RIGHTS READER: DOCUMENTS, SPEECHES, AND FIRSTHAND ACCOUNTS FROM THE BLACK FREEDOM STRUGGLE, 1954-1990* (Clayborne Carson et al, eds., 1991); *HOWELL RAINES, MY SOUL IS RESTED* (1977); *FRED POWLEDGE, FREE AT LAST?* (1991).

government.²⁵ In many ways, the leaders of the civil rights movement considered voting to be the first step in the battle for true minority inclusion in the nation's system of representative democracy. Frederick Douglass, revered by many as one of the early fathers of the civil rights movement, considered the right to participate in the electoral process as a cornerstone of any meaningful effort to empower black citizens. In his last public speech, Douglass reflected on the intrinsic value of voting as related to the advancement of civil rights for blacks, stating:

[i]n many of the States we have the elective franchise; in some of them we have colored office-holders. . . . [But the Negro] is here to stay, and while here he will partake of the blessings of your education, your progress, your civilization, and your Christian religion. His appeal to you to-day is for an equal chance in the race of life, and, dark and stormy as the present appears, his appeal will not go unanswered.²⁶

Many in the movement perceived the right to vote as a true indication of one's citizenship and the only way to truly enjoy the privileges attached thereto. Never before had the government of the United States denounced racial discrimination in such a pointed and particular fashion.²⁷

Despite the general dictate of the Fifteenth Amendment to the United States Constitution,²⁸ which seemingly banned discrimination on the basis of race, states throughout the country continued to discriminate at the voting booth.²⁹ Members of

25. James F. Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act*, 69 VA. L. REV. 633, 677-78 (1983).

26. FREDERICK DOUGLASS, ADDRESS TO THE AMERICAN MISSIONARY ASSOCIATION (1984), reprinted in THE DEMOCRACY READER, CLASSIC AND MODERN SPEECHES, ESSAYS, POEMS, DECLARATIONS AND DOCUMENTS ON FREEDOM AND HUMAN RIGHTS WORLDWIDE, at 171-72 (Diane Ravitch and Abigail Thernstrom eds., 1992).

27. Blumstein, *supra* note 25, at 677 n.208.

28. "The 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. The Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XV, § 1-2.

29. Justice O'Connor noted in *Shaw*, "[a] number of states . . . refused to take no for an answer and continued to circumvent the fifteenth amendment's prohibition through the use of both subtle and blunt instruments, perpetuating ugly patterns of pervasive racial

Congress referred to the Voting Rights Act as "the most effective tool for protecting the right to vote"³⁰ and the "most important legislation in the Nation's history relating to voting rights."³¹ Civil rights leaders saw the Act as the first step to substantive equality and power.³² The late Justice Thurgood Marshall, who fought for the right to vote in his capacity as legal counsel to the National Association for the Advancement of Colored People ("NAACP"), recognized that "no matter how much education black people got, they would remain semislaves until they got meaningful political power."³³

A. *The Voting Rights Act of 1965*

There are three primary provisions of the Voting Rights Act that provide the authority to eliminate racial discrimination in the electoral process. Section two,³⁴ as originally drafted, prohibited voting practices which resulted in "a denial or abridgement of the right of any citizen of the United States to vote on account of race or color."³⁵ This section confronted the historic barriers faced by blacks and other minorities by prohibiting any practice which may have had a limiting impact on their electoral franchise. Section four³⁶ created mechanisms for

discrimination." 113 S.Ct. at 2822-23 (citing Blumstein, *supra* note 25, at 637).

30. H.R. REP. NO. 227, 97th Cong., 2d Sess. 37 (1982).

31. STAFF OF SUBCOMM. ON THE CONSTITUTION OF THE SENATE COMM. ON THE JUDICIARY, 97TH CONG., 2ND SESS., REPORT OF S. 1992, 115 (Comm. Print 1982).

32. See sources cited in note 24.

33. CARL T. ROWAN, *DREAM MAKERS, DREAM BREAKERS: THE WORLD OF JUSTICE THURGOOD MARSHALL* 80 (1993).

34. 42 U.S.C. § 1973. Section two, as originally drafted, stated "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." *Id.*

35. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965).

36. If liability is established under section four, two important consequences follow. First the jurisdiction is not permitted to use any "test or device" as a qualification for registration or voting. This prohibits literacy tests and requirements that a person demonstrate educational achievement, knowledge, or good moral character on the assumption that these devices are more often than not used for discriminatory purposes. Blumstein, *supra* note 25, at 679 (citations omitted).

Second, the section's preclearance requirement is triggered, requiring an affected state to submit any redistricting plan for approval from the United States Attorney General or the District Court for the District of Columbia. *Id.* Thus, section four's preclearance requirement creates yet another opportunity for both access and representation advocates to refine and/or manipulate the objectives of a state's redistricting

identifying jurisdictions that had a history of racial discrimination in voting.³⁷ Section four best demonstrates the remedial nature of the Act by concentrating on past harms and practices in order to construct future majority-minority districts. Finally, section five³⁸ provided federal oversight through the U.S. Attorney General or the District Court for the District of Columbia for any change in a "standard, practice, or procedure with respect to voting."³⁹ Accordingly, any redistricting proposal by an affected jurisdiction must be submitted to and approved by the Attorney General.⁴⁰ These provisions, in addition to the section enabling criminal and civil sanctions against those that "deprive or attempt to deprive any person" of the right to vote,⁴¹ created a simple yet

efforts. See *supra* notes 10-12 and accompanying text.

37. The process for activating these mechanisms was described as follows:

First, to be covered, a jurisdiction must have used a "test or device" to screen voters as of November 1, 1964, 1968, or 1972. A "test or device" was defined to include literacy tests and other devices historically associated with a pattern and practice of abuse and all too often used as tools for barring blacks from participating in the political process. Second, a jurisdiction must have low voter registration or turnout—fewer than [fifty percent] of age—eligible citizens registered as of November 1, 1964, 1968, or 1972, or fewer than [fifty percent] of such persons actually voting in the 1964, 1968, or 1972 presidential elections.

Blumstein, *supra*, note 25 at 679 n.217 (citations omitted).

38. 42 U.S.C. §1973(c). Section five, in pertinent part, stated:

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.

Id.

39. 42 U.S.C. § 1973(c). Section five of the Act has the capacity to serve both defensively and offensively, as mentioned earlier. The Attorney General may move proactively to assure increased minority representation in prospective redistricting plans. This provision was referenced by Attorney General Reno in rejecting North Carolina's original redistricting plan. See *infra* notes 139-141 and accompanying text.

40. It is important to note that the politicization of the access and representation models can occur at this point. A given Attorney General can, for the most part, choose to either aggressively pursue an increase in the number of elected seats held by minorities, or take a more passive role in relation to the redistricting avenues chosen by state legislators.

41. 42 U.S.C. §1973(j) (1976).

thorough statutory scheme for the elimination of racial discrimination in the electoral process.

B. Early Supreme Court Interpretations of the Voting Rights Act

Beginning with the case *South Carolina v. Katzenbach*,⁴² the Supreme Court recognized and enforced the substantive rights embodied in the Act and held that they were consistent with the intention of the Fifteenth Amendment. In *Katzenbach*, the Court held that "Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting."⁴³ The *Katzenbach* decision recognized that the Voting Rights Act was consistent with the expansive dictate of section two of the Fifteenth Amendment, which permits Congress to further the amendment's goals through the enactment of appropriate legislation.⁴⁴ Thus, the Voting Rights Act met with the Court's general approval in its attempt to achieve the prohibition of racial discrimination in voting.

As expected, courts were initially asked to confront the more overtly discriminatory restrictions on voter registration and balloting procedures such as poll taxes and literacy tests.⁴⁵ These vestiges of discrimination were arguably the most recognizable under section two, and therefore, the easiest to challenge under the Act.

C. The Court's Consideration of Vote Dilution

Subsequently, courts addressed more subtle methods of discrimination in voting rights by confronting vote dilution through gerrymandering. Vote dilution can be described as the practice of reducing or eliminating the effect of a particular group's vote by placing them in a voting district in which they are significantly outnumbered by another group or groups that will vote in a dissimilar fashion. Vote dilution practices can result in

42. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

43. *Id.* at 324.

44. *Id.*; see also *supra* note 28 for text of the 15th Amendment.

45. See generally *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (prohibiting Virginia's use of a poll tax); *Gaston County v. United States*, 395 U.S. 285 (1969) (eliminating the use of literacy tests).

consistently adverse results to minority voters' candidates or issues, even if they vote as a cohesive unit within the given district. "Where members of a racial minority group vote as a cohesive unit, practices such as multimember or at-large electoral systems can reduce or nullify minority voters' ability, as a group, 'to elect the candidate of their choice.'⁴⁶ In response to the effects of vote dilution practices, the Supreme Court has held that "[t]he right to vote can be affected by a *dilution* of voting power as well as by an absolute prohibition on casting a ballot."⁴⁷

Although it occurred prior to the passage of the Voting Rights Act, the most blatant example of traditional vote dilution was confronted in *Gomillion v. Lightfoot*.⁴⁸ In that case, the Supreme Court addressed a dramatic redistricting plan affecting Tuskegee, Alabama and found it discriminatory on its face.⁴⁹ The plan, which created "an uncouth twenty-eight-sided figure,"⁵⁰ disenfranchised "all save only four or five of its 400 Negro voters while not removing a single white voter or resident."⁵¹ The majority held that Section One of the Fifteenth Amendment prohibited such irregular redistricting schemes, as they effectively served to silence racial minorities.⁵² Thirty-three years later Justice O'Connor, in a tone resonating in themes of color blindness echoed consistently by the Rehnquist Court, would remark in *Shaw* that "*Gomillion* . . . supports [the] . . . contention that district lines obviously drawn for the purpose of separating voters by race require careful scrutiny under the Equal Protection Clause regardless of the motivations underlying their adoption."⁵³ In short, state actions which are based exclusively on racial considerations, benign or otherwise, are subject to

46. *Shaw*, 113 S. Ct. at 2823 (quoting *Allen v. State Board of Elections*, 393 U.S. 544, 569 (1969)).

47. *Allen*, 393 U.S. at 569 (emphasis added).

48. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). Perhaps the proper category for the type of redistricting in *Gomillion* is vote exclusion as opposed to dilution. Nonetheless, *Gomillion* reflects the type of mathematical and geographical hoops that many legislatures jump through in typical dilution cases.

49. *Id.* at 341.

50. *Id.* at 340.

51. *Id.* at 341. Essentially, the Alabama legislature "fenced out" the black population from the district in question.

52. *Gomillion*, 364 U.S. at 342.

53. *Shaw*, 113 S. Ct. at 2826. This sentiment is reminiscent of the Supreme Court's decision in *University of California Regents v. Bakke*, 438 U.S. 265 (1978) and will be discussed in section IV.B *infra*.

heightened judicial scrutiny pursuant to the Equal Protection Clause.

Since *Gomillion*, the Supreme Court has extensively assessed multimember redistricting schemes that violate the Fourteenth Amendment when they are adopted with a discriminatory purpose and have the effect of diluting minority voting strength.⁵⁴ The facts surrounding these reapportionment plans are generally less dramatic than the facts of *Gomillion*, but they were originally viewed as no less problematic. During the early and mid-1970's, the Court became more permissive of state reapportionment plans that had a disparate impact on minorities.⁵⁵

In *Whitcomb v. Chavis*,⁵⁶ the Court refused to invalidate an Indiana redistricting scheme that created such an impact, noting:

The mere fact that [blacks, who are] concerned with the outcome of Marion County elections [have] found [themselves] outvoted and without legislative seats of [their] 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.⁵⁷

Justice White's majority opinion recognized that the petitioners had no basis to assert that the districts were intentionally drawn to limit minority voting power.⁵⁸ As such, the Court refused to invalidate the reapportionment plan merely on the basis of its adverse quantitative impact on the district's minority

54. See generally, *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969) (required states to "make a good-faith effort to achieve precise mathematical equality" in Congressional districting); *Swann v. Adams*, 385 U.S. 440 (1967) (rejecting a state redistricting plan that substantially deviated from population equality); *Abate v. Mundt*, 403 U.S. 182, 185 (1971) (permitting deviations from population equality in state districting if "justified by legitimate state considerations"); *Mahan v. Howell*, 410 U.S. 315, 321-23 (1973) (recognizing that "more flexibility was constitutionally permissible with respect to state legislative reapportionment than in congressional redistricting" in the interest of "the normal functioning of state and local governments").

55. See *infra* notes 56-78.

56. *Whitcomb v. Chavis*, 403 U.S. 124 (1971).

57. *Id.* at 154-55.

58. *Id.* at 155.

community.⁵⁹ The resulting decision resides squarely within the strict access approach to the Voting Rights Act.⁶⁰

In *White v. Regester*,⁶¹ and *Gaffney v. Cummings*,⁶² the Court elaborated on the theme raised in *Whitcomb* two years earlier, with one major exception. Justice White's majority opinion in *Gaffney* found "[i]t [was] now time to recognize . . . that minor deviations from mathematical equality among state legislative districts [were] insufficient to make out a prima facie case . . . as to require justification by the State."⁶³ According to Justice White, such minor deviations were permissible especially in light of the Court's sanctioning of earlier schemes which had a comparatively larger impact on minority representation.⁶⁴ Despite its holding, the Court noted that multi-member district plans which cancel out or minimize minority voter strength were in violation of the Equal Protection Clause.⁶⁵ The Court's approach was largely an effect-oriented analysis which incorporated aspects from both the access and representation models by looking at the composition of the district itself and the result of subsequent elections. Justice White did not require the petitioners to show that the Texas legislature intended to discriminate against nonwhites in its redistricting plan, but rather, that it had the effect of nullifying or reducing minority voting strength.⁶⁶

D. *The Incorporation of Principles of Retrogression*

The Court developed its analysis a step further in 1976, when it directly confronted "what criteria a legislative reapportionment must satisfy under [section five] . . . to demonstrate that it does not have the 'effect' of denying or abridging the right to vote on

59. *Id.*

60. *See supra* INTRODUCTION.

61. *White v. Regester*, 412 U.S. 755 (1973).

62. *Gaffney v. Cummings*, 412 U.S. 735 (1973).

63. *Id.* at 745. The Texas reapportionment plan in *White* had a maximum deviation of 9.9% and an average deviation of 2%. *White*, 412 U.S. at 764.

64. *See generally* *Reynolds v. Sims*, 377 U.S. 533 (1964) (involving the malapportionment of the Alabama legislature with a population variance ratio of nearly five-to-one); *Mahan v. Howell*, 410 U.S. 315 (1973) (involving a Virginia state redistricting plan with a maximum variance of 16.4% from population equality).

65. *White*, 412 U.S. at 765-67.

66. *Id.*

account of race."⁶⁷ *Beer v. United States*⁶⁸ involved the city of New Orleans' attempt to obtain approval of a reapportionment scheme, despite its rejection by the Attorney General and the district court because the city had not shown that the plan maximized black political representation.⁶⁹ Despite the presence of a *significant* black voting district, "[n]o Negro was elected to the New Orleans City Council during the decade from 1960 to 1970."⁷⁰ Justice Stewart's position supported the notion that the Voting Rights Act was passed to completely eliminate racial discrimination in the voting process,⁷¹ but he also recognized that the "purpose of [section five] has always been to insure that no voting-procedure changes would be made that would lead to a *retrogression* in the position of racial minorities with respect to their effective exercise of the electoral franchise."⁷² Thus, the Voting Rights Act did not require demonstrable increases in election results favoring minority candidates, but rather, mandated an improvement in voting procedures themselves.⁷³

The Court concluded that the New Orleans' plan did not violate the Voting Rights Act because it improved minority representation at the voting booth relative to its previous practices.⁷⁴ The dissenting Justices suggested that the Voting Rights Act required more than a merely ameliorative approach. Justices White and Marshall contended that when a state or municipality, such as New Orleans, employs majority vote and "anti-single-shot" rules and has a history of racial block voting and segregated residential patterns, "[section five] is not satisfied unless . . . the new electoral districts afford the Negro minority the opportunity to achieve legislative representation roughly proportional to the Negro population"⁷⁵ Despite their position, and the lengthy dissent of Justices Marshall and

67. *UJO*, 430 U.S. at 159.

68. *Beer v. United States*, 425 U.S. 130 (1976).

69. See Blumstein, *supra* note 26, at 684. By couching their rejection of the New Orleans' plan on the basis of political representation, the Attorney General and the district court demonstrated their alliance with the representation model, discussed *supra* at INTRODUCTION.

70. *Beer*, 425 U.S. at 135 (emphasis added).

71. Blumstein, *supra* note 26, at 684-85 (citing *Beer*, 425 U.S. 130 at 140).

72. *Beer*, 425 U.S. at 141 (emphasis added).

73. *Id.*

74. *Id.* at 142; see also Blumstein, *supra* note 26, at 685.

75. *Beer*, 425 U.S. at 143 (White, J. and Marshall, J., dissenting).

Brennan,⁷⁶ the *Beer* decision rests on the general proposition that section five does not require the maximization of minority political representation, but rather, requires allotting access to minority voters.⁷⁷ This seemingly restrictive position was short lived. During the Court's next term, Justice White suggested a much more expansive approach toward the consideration of racial composition of reapportionment plans in *UJO*.

II. UNITED JEWISH ORGANIZATIONS V. CAREY

One year after its decision in *Beer*, the Supreme Court was confronted with the issue of whether the State of New York violated the Voting Rights Act or the Constitution by affirmatively considering race as a criteria to improve the representation of minority voters in *United Jewish Organizations v. Carey*.⁷⁸ In 1972, New York State submitted its reapportionment plan to the Attorney General of the United States for his approval pursuant to sections four and five of the Voting Rights Act.⁷⁹ The Attorney General determined that the statute, in relation to certain portions of Kings County, New York, did not comply with section five's requirement that the plan not abridge the right to vote by reason of race or color.⁸⁰ Those portions of the county contained a sizable Hasidic Jewish community, in addition to significant numbers of nonwhite residents.⁸¹ In accordance with the Attorney General's comments, New York redrafted the statute.⁸²

Two years after its original submission, the State adjusted the plan to include seats in the state senate and assembly from the

76. *Id.* at 145-63.

77. *Id.* at 140-42.

78. *UJO*, 430 U.S. 144, 148 (1977).

79. *Id.* at 148-49.

Kings County, N.Y., together with New York (Manhattan) and Bronx Counties, became subject to [sections four and five] 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.

Id. at 148.

80. *Id.* at 150.

81. *Id.* at 152.

82. *Id.* at 151.

portion of Kings County in which the Hasidic community was located.⁸³ Although the plan did not increase the number of districts with nonwhite majorities, it did set a goal for increasing the size of the majorities to sixty-five percent.⁸⁴ This percentage was calculated by the State to assure increased minority representation in both the senate and assembly.

In order to achieve this goal, the State divided the white communities, including the Hasidic community, and assigned them to an adjoining district.⁸⁵ Members of the Hasidic community brought an action seeking injunctive and declaratory relief, claiming that the revised plan violated the Fourteenth and Fifteenth Amendments by eliminating their ability to elect representatives whom they supported.⁸⁶

In their suit, the Hasidim asserted that the plan, "would dilute the value of [their] franchise by halving its effectiveness," solely for the purpose of achieving a racial quota, and that they were assigned to electoral districts solely on the basis of race.⁸⁷ The District Court dismissed their complaint, holding that the Hasidim did not represent a cognizable community for purposes of reapportionment, that the 1974 plan did not disenfranchise them, and that the racial considerations of the plan were permissible in accordance with the Voting Rights Act as a remedy of past instances of discrimination.⁸⁸ The Court of Appeals affirmed the decision of the District Court, noting that the revamped plan maintained white majorities in seventy percent of the county's state senate districts, despite the fact that only sixty-five percent of the county was white.⁸⁹ Thus, there was no way that the Hasidic community, as white voters, could be "underrepresented" under the plan.⁹⁰

83. *Id.* at 152.

84. *Id.*

85. *Id.*

86. *United Jewish Organizations v. Carey*, 377 F. Supp. 1164, 1165 (E.D.N.Y. 1974).

87. *UJO*, 430 U.S. at 152.

88. *United Jewish Organizations v. Carey*, 377 F. Supp. at 1165-66.

89. *United Jewish Organizations v. Carey*, 510 F.2d 512, 517, 527 (2d Cir. 1975).

90. *Id.* at 522. It is important to note that the *UJO* plurality recognized underrepresentation as the only cognizable harm covered by the Act. This restrictive position is implicitly rejected by the Court in *Shaw v. Reno* through the recognition of political legitimacy as a concern of the Court. Professors Richard H. Pildes and Richard G. Niemi link this type of harm to value reductionism and define it as an expressive harm. Richard H. Pildes and Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 506

Justice White, writing for the plurality, agreed that the New York plan complied with section five of the Voting Rights Act and that neither the Attorney General, nor the State of New York violated the provisions of the Fourteenth or Fifteenth Amendments.⁹¹ Justice White's opinion addressed four propositions advanced by the petitioners: first, that the use of racial criteria in districting and apportionment is never permissible; second, that there were no findings of prior discrimination that would require or justify the reassignment of white voters to increase black representation; third, that the use of a "racial quota" in redistricting is never acceptable; and fourth, that the use of a sixty-five percent nonwhite racial quota was unconstitutional.⁹²

Section two of the *UJO* plurality opinion summarily dismissed the notion, both generally and in relation to the New York scheme, that race cannot be considered in districting and apportionment.⁹³ Relying on the Court's holding in *Katzenbach*, Justice White found that the question of permissibility of the racial criteria in the Voting Rights Act had been established a decade earlier.⁹⁴

Although recognizing that the "stringent new remedies," including [section five], 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."⁹⁵

Recognizing that the State of New York could have sought an exemption from coverage under section five by demonstrating that

(Dec. 1993). Accordingly, "[a]n expressive harm is one that results from the ideas or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about." *Id.* at 506-507; see also *infra* part IV.B.

91. Justice White was joined by Justice Stevens in his opinion, by Justices Brennan and Blackmun in parts I, II, and III of the opinion, and by Justice Rehnquist in parts I and IV of the opinion.

92. *UJO*, 430 U.S. at 147.

93. *Id.*

94. *Id.*

95. *Id.* at 157 (citing *Katzenbach*, 383 U.S. at 334-335).

it had not employed its literacy tests to discriminate against blacks in the ten years prior to the reapportionment plan, Justice White concluded that the lack of such evidence triggered the enforcement provisions of the Act.⁹⁶ Accordingly, once section five has been triggered by the state, it may use racial criteria in redistricting plans.⁹⁷

Additionally, in section two of the opinion, Justice White relied on the Court's holding in *Beer* to legitimate the use of a racial criteria or "quota" in the Voting Rights Act.⁹⁸ Referring to the *Beer* decision's non-retrogression language, the Court extended that proposition to mean that a state may affirmatively use race as a "specific remedy for past unconstitutional apportionments."⁹⁹ Thus, the Voting Rights Act was interpreted to prohibit the use of racial criteria in reapportionment schemes that reduce the size of nonwhite voting blocks, while allowing such criteria to increase minority representation.¹⁰⁰ Because New York's consideration of racial criteria satisfied the latter permissible use, the Supreme Court concluded that the State's action was constitutional.¹⁰¹ This consideration of a voting district's racial make-up is consistent with the Act's underlying theme of minority empowerment; however, the Court's decision moves it away from access jurisprudence and closer to a representation model.

Perhaps the most expansive holding of Justice White's opinion in *UJO* is found in section four.¹⁰² One observer remarked,

96. *Id.*

97. *Id.*

98. *Id.* at 161.

99. *Id.*

100. Justice White stated that "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." *Id.* at 162.

101. R. E. Paul, Note, *An Answer to the "Other Half of Reynolds v. Simms,"* 14 GA. L. REV. 813, 823 (1980) (citing *UJO*, 430 U.S. 144, at 155-56) [hereinafter *The Other Half*].

102. In addition to being expansive, section four is perhaps the most significant provision in considering whether the Supreme Court's decision in *Shaw* is consistent with the holding of *UJO*. Section four establishes a virtually limitless framework under which a state's redistricting plan would be extremely difficult to challenge. Accordingly, if a majority of the Court had adopted Justice White's reasoning, the *Shaw* decision would be a difficult one to reconcile with the earlier ruling in *UJO*. This however, is not the case as described in part III *infra*.

[i]n part IV . . . Justice White went beyond the confines of the Voting Rights Act and stated that “[w]hether or not the plan was authorized by or 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”¹⁰³

Justice White’s extra-constitutional analysis in section four relied on the apparent intent of the New York legislature.¹⁰⁴ Although New York did use race as a factor to increase the percentage of black voters in certain senate and assembly districts, it did not intend for that criteria to be a “racial slur or stigma with respect to whites”¹⁰⁵ Justice White continued to explain that New York did not prevent whites, including the members of the Hasidic community, from taking part in the political process. He concluded that it is “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 considering the racial composition of a given district.¹⁰⁶ The result of Justice White’s proposition in *UJO* would be to allow states to construct districts designed to assure the election of minority representatives proportionate to their percentage of the population.¹⁰⁷ Justice White’s scheme is clearly aligned with a representation-based perception of the Voting Rights Act.

Although he concurred with the bulk of Justice White’s analysis, Justice Brennan specifically rejected part four of the plurality opinion.¹⁰⁸ He concluded that New York’s actions were permissible within the confines of the Voting Rights Act, and that any analysis beyond that point was unnecessary.¹⁰⁹ Chief Justice Burger was more direct in his disapproval of the plurality’s constitutional analysis. Evoking the policy of color-

103. *The Other Half*, *supra* note 101, at 823 (citing *UJO*, 430 U.S. at 165.)

104. *UJO*, 430 U.S. at 165.

105. *Id.*

106. *Id.* at 168 (emphasis added).

107. *See generally*, *The Other Half*, *supra* note 101 (providing an analysis of the implications of Justice White’s proportionality argument).

108. *UJO*, 430 U.S. at 168 (Brennan, J., concurring in part).

109. *Id.* at 171.

blindness that would become a major theme of the Rehnquist Court, the Chief Justice remarked:

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 marshalling 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 [a] 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 . . . [an] American "melting pot"¹¹⁰

The Chief Justice concluded that the use of a racial criteria or quota, even for a remedial purpose as important as the furtherance of voting rights, was violative of the very basis of the Constitution.¹¹¹

Furthermore, the societal harm caused by redistricting on purely race-based considerations would affect minorities and white voters with equal magnitude.¹¹² As another commentator noted, "[a]lthough [it] may lead to shortrange representation, it does nothing to invest minorities with true political power. It will freeze minorities into token representation, bound by certain geographic areas and will not facilitate infusion of minorities into the mainstream of American society" ¹¹³ The alternative advocated by the Chief Justice was the use of a racially neutral, or color-blind, system.¹¹⁴

110. *Id.* at 186-87 (Burger, C.J., dissenting).

111. *Id.*

112. *Id.*, at 185-86.

113. Christopher J. Mehling, Note, *Representative Government-Constitutional Law-Elections-Deliberate Use of Race to Reapportion is Constitutional Provided it Results in No Racial Slur or Stigma, Regardless of Compliance With the Voting Rights Act*, 46 U. CIN. L. REV. 912, 922-23 (1977).

114. *UJO*, 430 U.S. at 186 (Burger, C.J., dissenting).

A. Subsequent Supreme Court Treatment of the UJO Decision

The criticisms of Justice White's Fourteenth and Fifteenth Amendment analysis in *UJO* were not limited to the Chief Justice's dissent. In the Supreme Court's next term, Justice Powell raised doubt as to the validity of the expansive theories supporting remedial racial classifications espoused in section four of the *UJO* opinion in *University of California Regents v. Bakke*.¹¹⁵ In that case, the Supreme Court confronted the use of a racial quota in the admissions process of the University of California at Davis Medical School.¹¹⁶ In *Bakke*,

Justice Powell cited *United Jewish Organizations* for the proposition that the Court has "never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations." Thus, in the absence of an underlying constitutional violation in a gerrymander case . . . *United Jewish Organizations* does not necessarily mandate or justify the use of racial criteria.¹¹⁷

The *Bakke* Court's refusal to embrace the broader holding of *UJO* is, to a large extent, an indication of its reluctance toward sanctioning the consideration of race as a remedial measure absent other considerations. "Methodologically, one can view both *Shaw* and *Bakke* as rejecting a categorical, rule-oriented form of legal decision for a more contextualized, standard-based approach."¹¹⁸

Despite the Court's admonition in *Bakke*, the *UJO* decision did not completely lose its authority. Relying on *UJO*, the Fifth Circuit Court of Appeals returned to the analysis developed in *White v. Regester* to reject the single-member district plan of Hinds County, Mississippi. In *Kirksey v. Board of Supervisors*,¹¹⁹ the court of appeals found that the State's plan

115. *University of California Regents v. Bakke*, 438 U.S. 265 (1978).

116. *Id.* at 269-70.

117. *The Other Half*, *supra* note 101, at 824 (citing *Bakke*, 438 U.S. at 265).

118. Pildes & Niemi, *supra* note 90 at 504.

119. *Kirksey v. Board of Supervisors*, 554 F.2d 139 (5th Cir. 1977).

served to freeze previously existing forms of discrimination, despite the district court's finding that the plan was racially neutral.¹²⁰ Unlike previous cases, the court in *Kirksey* held that the defect in Mississippi's reapportionment plan was its failure to make affirmative efforts to increase minority representation.¹²¹ The court of appeals concluded, "when a jurisdiction which has purposefully or intentionally created a denial of minority access to the political process adopts a plan of apportionment, it is under a duty to make sure that any apportionment plan it proposes ameliorates the [previous] denial of access."¹²² Although it extended the rationale of *White*, the Fifth Circuit's remedial approach applied only to those states or municipalities that could be shown to have intentionally discriminated against racial minorities.¹²³ Thus, "[u]nless such an inference could be made, no constitutional violation existed."¹²⁴

B. Congressional Treatment of the Voting Rights Act

Subsequent to the significant developments in the case law of the Voting Rights Act, Congress repeatedly addressed issues that confronted the states in their attempts to comply with the Act. Congress has amended sections two, four, and five of the Voting Rights Act on a number of occasions. The most recent amendments, in 1982, were an attempt to address vote dilution¹²⁵ and to ease the burdens on those individuals who

120. *Id.*

121. *Id.*

122. *Id.* at 148 n.16.

123. The intent requirement of *Kirksey* is reflective of the Supreme Court's emphasis on discriminatory intent in *Washington v. Davis*, 426 U.S. 229, issued the year before. *Kirksey*, 554 F.2d at 147-48.

124. *The Other Half*, *supra* note 101, at 820.

125. Commentators have discussed the need for continuing the federal presence in this area:

Columnist Carl Rowan cited recent events in Virginia as evidence of the continuing need for federal voting legislation. Referring to the Virginia General Assembly's troubled efforts to redraw congressional and state legislative districts following the 1980 census, Rowan contended "Virginia has a history of trying every trick known to dilute the black vote and to ensure that blacks are not elected to Congress or to statewide office and that very few blacks get elected to the state legislature."

Timothy G. O'Rourke, *Voting Rights Act Amendments of 1982: The New Bailout Provision and Virginia*, 69 VA. L. REV. 765, 765 (1983) (citing Carl Rowan, *Don't Carry Us Back*, WASH. POST, Aug. 18, 1981, at A12.).

challenged a state's redistricting plan.¹²⁶ With respect to section two, the latest round of amendments increased the availability of relief by eliminating the intent requirement for plaintiffs in vote dilution cases.¹²⁷ Rather, the burden has shifted to the state to show that it is in compliance with the requirements of the Voting Rights Act.¹²⁸ The amendments to section two made it easier to file suit, both strengthening the Act and providing a substantial incentive to states to change their questionable practices.¹²⁹

The amendments to section four also reflect the adaptations that were necessary to address the more subtle forms of discrimination faced by minorities in the early 1980's. As originally drafted, one observer noted: "[t]he triggering formula of section [four] . . . rest[ed] on the rationale that the conjunction of low voter registration or turnout and the use of a literacy test or similar procedure as a prerequisite to registration establishe[d] a presumption that discrimination exists in the voting process."¹³⁰ The amended version of section four essentially shifts the burden from requiring a plaintiff to show previous occasions of discrimination, to requiring a state to demonstrate compliance with the Act.¹³¹ Additionally, section five's oversight provisions, which were drafted as temporary components of the Act, were extended for an additional twenty-five years out of fears that section five violations were occurring with impermissible frequency.¹³² In short, the 1982 amendments, as described by one commentator, redefined what "discrimination [is] and how . . . it [is] proven[.]"¹³³

The years following the 1982 amendment process set the stage for what is arguably the Rehnquist Court's most significant decision regarding the Voting Rights Act. Both the Reagan and

126. "The House amendment [to section two] did not merely attempt to ease the difficulties of proving 'intent.' As the House Report stated, discriminatory purpose would now be 'irrelevant' to the question of whether election practices resulted in 'discrimination.'" Blumstein, *supra* note 25, at 691 (citation omitted).

127. O'Rourke, *supra* note 125, at 766-67 n.11.

128. *Id.* at 771, 782.

129. *Id.* at 774-75.

130. *Id.* at 772-73.

131. The new procedure requires that a jurisdiction demonstrate a record of compliance with the Act over the previous ten years, and that it show that it has taken positive steps both to encourage minority political participation and to remove structural barriers to minority electoral influence. *Id.* at 782-783.

132. Blumstein, *supra* note 25, at 689.

133. *Id.* at 633.

Bush administrations were able to make significant additions to the make-up of the Supreme Court with the appointments of five Justices and the elevation of Justice Rehnquist to Chief Justice. These additions were seen by a number of observers as fostering a change in the perspective of the Court toward the Voting Rights Act.¹³⁴ For many of them that change was best realized in the Court's decision in *Shaw v. Reno*.

III. SHAW V. RENO

Hailed as one of the more controversial cases of the 1993 term,¹³⁵ *Shaw v. Reno* forced the examination of the still undefined contention of Justice White's *UJO* decision: the extent to which a state legislature can use race in reapportionment decisions.¹³⁶ The results of the 1990 census afforded North Carolina the opportunity to send a twelfth member to the United States House of Representatives.¹³⁷ Accordingly, the State's general assembly drafted a redistricting plan which created a new majority-black congressional district in the northern portion of the state.¹³⁸ That version of the plan was submitted to the Attorney General of the United States for pre-clearance, pursuant to section five of the Voting Rights Act.¹³⁹

Acting on behalf of the Attorney General, the Assistant Attorney General for the Civil Rights Division of the Department of Justice objected to the provisions of the plan relating to the south-central and southeastern regions of the State. In his view, the General Assembly "could have created a second majority-minority district 'to give effect to black and Native American voting strength in this area' by using boundary lines 'no more irregular than [those] found elsewhere in the proposed plan,' but failed to do so for 'pretextual reasons.'"¹⁴⁰ The plan was

134. See generally, Richard C. Reuben, *Voting Rights in Court - Challenges to Race-Based Districts Could Shatter Minority Electoral Gains*, 13 CAL. LAWYER 39, 40 (Nov. 1993) (viewing challenges to race-based districts as a potential threat to minority electoral gains).

135. W. John Moore, *Court is in Recess*, 25 NAT'L J. 2587, 2589 (Oct. 30, 1993).

136. *Shaw v. Reno*, 113 S. Ct. 2816 (1993).

137. *Shaw*, 113 S. Ct. at 2819.

138. *Id.* "The largest concentrations of black citizens live in the Coastal Plain, primarily in the northern part [of the state]." O. GADE & H. STILLWELL, *NORTH CAROLINA: PEOPLE AND ENVIRONMENTS* 65-68 (1986).

139. *Shaw*, 113 S. Ct. at 2820.

140. *Id.* (citing Appendix to Brief for Federal Appellees 10a-11a).

returned to the General Assembly to either be redrafted to conform with comments of the Assistant Attorney General or to be challenged in the District Court for the District of Columbia.¹⁴¹

North Carolina chose the former option and redrafted the plan to include a second majority-black district in the north-central portion of the State.¹⁴² This resulted in two majority-minority districts, one more unusually shaped than the other. The first of the two districts, District One, has been described as "somewhat hook shaped. Centered in the northeast portion of the State, it moves southward until it tapers to a narrow band; then, with finger-like extensions, it reaches far into the southern-most part of the State near the South Carolina border."¹⁴³ The First District inspired one observer to compare it to a "bug splattered on a windshield."¹⁴⁴ District Twelve, the second majority-black district, has encouraged even more creative descriptions.

In terms of bizarreness, the North Carolina [twelfth] is very close to the *sui generis*. The district runs largely along I-85, sometimes only the width of the eastbound lanes in the highway, sometimes only the width of the westbound lanes on the highway, picking up small pockets of black population[s] hither and yon as it goes and connecting [the] black population in Charlotte at one end of the district with [the] black population in Durham at the other end, 160 miles away.¹⁴⁵

In some instances, the twelfth district was drawn such that, "[i]f you drove down the interstate with both car doors open, you'd kill most of the people in the district."¹⁴⁶ Neither the Attorney

141. *Id.*

142. *Id.* (citing 1991 N.C. Extra Sess. Laws, ch. 7).

143. *Id.*

144. *Id.* (citation omitted).

145. Bernard Grofman, *High Court Ruling Won't Doom Racial Gerrymandering*, CHI. TRIB., July 9, 1993, at 19.

146. *Shaw*, 113 S. Ct. at 2821 (citing Joan Biskupic, *North Carolina Case to Pose Test of Racial Redistricting the Voters Challenge Black—Majority Map*, THE WASH. POST, Apr. 20, 1993, at A4).

General, nor the Assistant Attorney General objected to the revised redistricting plan.¹⁴⁷

Two members of the twelfth district and three others, all of whom were white, sued state and federal officials in the United States District Court for the Eastern District of North Carolina.¹⁴⁸ The parties named the Governor, Lieutenant Governor, Secretary of State, Speaker of the North Carolina House of Representatives, members of the State Board of Elections, and the United States Attorney General and Assistant Attorney General for the Civil Rights Division as defendants.¹⁴⁹ Harking back to Chief Justice Burger's dissent in *UJO*, the plaintiffs contended "[t]he Constitution is supposed to be colorblind. . . . This bizarre [twelfth] District violates every rational principle of redistricting, such as compactness and contiguousness."¹⁵⁰ With respect to the federal officials, plaintiffs argued that the Voting Rights Act had been improperly interpreted when the North Carolina plan was reviewed by the Department of Justice, or in the alternative, that the Act itself was unconstitutional if it permitted the Assistant Attorney General's decision.¹⁵¹

The three-judge district court dismissed the action upon motion of the federal defendants, finding that it lacked subject matter jurisdiction over the case¹⁵² as the Act vests sole jurisdiction to enjoin implementation of a federally approved redistricting plan in the District Court for the District of Columbia.¹⁵³ The court also dismissed the complaint with respect to the state defendants.¹⁵⁴ Two of the three judges concluded that the plaintiffs' constitutional arguments were either without merit or had been precluded by previous cases.¹⁵⁵ Ultimately, the district court concluded that, "[*UJO*] still stands as direct rejection of the contention, at least where, as here, a state legislature's racially conscious purpose is to meet the broad

147. *Id.*

148. Joan Biskupic, *North Carolina Case to Pose Test of Racial Redistricting the Voters Challenge Black-Majority Map*, THE WASH. POST, Apr. 20, 1993, at A4.

149. *Shaw*, 113 S. Ct. at 2821.

150. Biskupic, *supra* note 148, at A4.

151. *Shaw*, 113 S. Ct. at 2821.

152. *Shaw v. Barr*, 808 F. Supp 461, 466-67 (E.D.N.C. 1992).

153. *Id.* at 466-67.

154. *Id.* at 463, 473.

155. *Id.* at 468-73.

remedial requirements of the Voting Rights Act.¹⁵⁶ As was the case in *UJO*, the court honed in on the fact that the plaintiffs that were alleging harm were white, and as such, they could not contend that the North Carolina plan, “ha[d] operated to ‘fenc[e] out the white population of the [state, or either of the two challenged districts] from participation in the political processes of the [state or districts], [nor to] minimize or unfairly cancel out white voting strength.”¹⁵⁷ The Supreme Court subsequently agreed to hear the petitioners’ case.¹⁵⁸

Writing for a majority of the Court, Justice O’Connor rejected the proposition that the petitioners could not assert a cognizable claim because they were white.¹⁵⁹ Rather, the majority asserted that both whites and nonwhites could be harmed by a state’s redistricting efforts.¹⁶⁰ Her opinion began with a brief recitation of the history of discrimination that blacks have faced in the United States and the tools used by states to deprive minorities of their right to vote.¹⁶¹ Justice O’Connor focused on redistricting on the basis of race, or “the racial gerrymander.”¹⁶² The majority referenced *Gomillion v. Lightfoot* as the perennial example of impermissible redistricting practices, noting that “[i]t is unsettling how closely the North Carolina plan resembles the most egregious racial gerrymanders of the past.”¹⁶³ This became the majority’s primary issue:

In their complaint, appellants did not claim that the General Assembly’s reapportionment plan unconstitutionally “diluted” white voting strength. They did not even claim to be white. . . . [A]ppellants appear to concede that race-conscious redistricting is not always unconstitutional. . . . What appellants object to is redistricting legislation that is so extremely irregular on its face that it

156. *Id.* at 470 (referring to the *UJO* petitioners’ contention that the consideration of race by a state is never permissible in reapportionment cases). See *Beer*, 425 U.S. at 142.

157. *Id.* at 473 (citing *UJO*, 430 U.S. at 165).

158. *Shaw v. Reno*, 113 S. Ct. 2816, 2822 (1993).

159. Justice O’Connor’s opinion was joined by Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas. *Id.* at 2829.

160. *Id.* at 2827-28.

161. *Id.* at 2822-23.

162. *Id.* at 2823 (citing *Davis v. Bandemer*, 478 U.S. 109, 164 (1986)).

163. *Id.* at 2824.

rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification.¹⁶⁴

Thus, the majority of the Court restricted its evaluation of the district court's dismissal to the means by which the State drew the new black-majority districts and the potential effect of irregularly drawn districts on white and nonwhite citizens.¹⁶⁵

Citing to *Washington v. Davis*,¹⁶⁶ Justice O'Connor asserted that "[l]aws that explicitly distinguish between individuals on racial grounds fall within the core of" the Equal Protection Clause's role of preventing discrimination on the basis of race.¹⁶⁷ According to the Court, those statutes that not only explicitly distinguish between racial groups, but that do so in an overt fashion, are subject to constant scrutiny.¹⁶⁸ The Court reasoned that state actions that are overtly based on racial considerations for seemingly benign purposes could in fact create further barriers toward minority inclusion.¹⁶⁹ Thus, "[a] racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification."¹⁷⁰

The *Shaw* majority then proceeded to apply this general Equal Protection analysis to the specific area of voter redistricting.¹⁷¹ The Court qualified its position by stating that "redistricting differs from other kinds of state decisionmaking in that the legislature always is aware of race when it draws district lines, just as it is aware of age, economic status, religious and

164. *Id.*

165. *Id.* at 2823-24.

166. *Washington v. Davis*, 426 U.S. 229 (1976).

167. *Shaw*, 113 S. Ct. at 2824.

168. *Id.*

169. *UJO*, 430 U.S. at 172 (Brennan, J., concurring). To underscore the rationale of this principle, the Court focused on Justice Brennan's concurrence in *UJO* where he stated: "a purportedly preferential race assignment may in fact disguise a policy that perpetuates disadvantageous treatment of the plan's supposed beneficiaries." *Id.*

170. *Shaw*, 113 S. Ct. at 2825 (citations omitted). The majority's "presumptively invalid" language is somewhat deceptive in light of its larger holding. Arguably, a reapportionment scheme, formulated pursuant to the Voting Rights Act and conforming with traditional principles of redistricting would satisfy the "extraordinary justifications" alluded to. See *infra* part IV and accompanying notes for further development of this rationale.

171. *Shaw*, 113 S. Ct. at 2825.

political persuasion, and a variety of other demographic factors."¹⁷² Thus, not all redistricting schemes that create majority-minority districts are immediately suspect:

[W]hen members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes. The district lines may be drawn . . . to provide for compact districts of contiguous territory, or to maintain the integrity of political subdivisions.¹⁷³

However, returning to *Gomillion*, Justice O'Connor recognized that the use of race in some egregious instances can fly in the face of the Equal Protection Clause.¹⁷⁴ In these instances, the appearance of the district in question should be an indication of the legislature's suspect motivation.¹⁷⁵

The Court's analogy to *Gomillion* proved to be a pointed and repeated theme throughout the majority's opinion. Describing *Gomillion* as a case which involved a state-drawn district constructed for the express purpose of excluding black citizens of Tuskegee, Justice O'Connor reasoned that the same logic extended to prevent "a case in which a State concentrated a dispersed minority population in a single district by disregarding traditional districting principles such as compactness, contiguity, and respect for political subdivisions."¹⁷⁶

The majority justified its position toward "irrational" redistricting schemes by questioning the very grounds upon which such plans are drawn.¹⁷⁷ Incorporating harsh rhetoric, the majority contended: "[a] reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political

172. *Id.* at 2826 (emphasis omitted).

173. *Id.* (citing *Reynolds v. Sims*, 377 U.S. 533, 578 (1964)).

174. *Id.*

175. *Id.* "In some *exceptional* cases, a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to 'segregat[e] . . . voters' on the basis of race." *Id.* (citing *Gomillion v. Lightfoot*, 364 U.S. 339, 341) (1960) (emphasis added).

176. *Id.* at 2827.

177. *Id.* at 2826-27.

boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid.¹⁷⁸ Moreover, the Court recognized that such practices affect the ways in which elected officials govern:

When a district obviously is created solely to effectuate the perceived common interests of one racial group, elected officials are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole. This is altogether antithetical to our system of representative democracy.¹⁷⁹

Finally, the majority assessed the societal effects of redistricting methods similar to those employed by North Carolina:

They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin. . . . [They] threaten[] to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire.¹⁸⁰

The result of impermissible redistricting practices threatens the very core of American government—our system of representative democracy.

Justice White lead the Court's dissent, harking back to the Court's position in *UJO*.¹⁸¹ He chided the majority for failing to

178. *Id.* at 2827.

179. *Id.*

180. *Id.* at 2832.

181. *Id.* at 2834. Justice White's dissent was joined by Justices Blackmun and Stevens, each of whom filed additional dissents. For a discussion of Justice Souter's dissent, see *infra* notes 198-205 and accompanying text.

square their position with the Court's earlier decision in *UJO*.¹⁸² At the core of the dissent was the failure of the appellants to allege a cognizable injury because the appellants were white.¹⁸³ "[T]he question in gerrymandering cases is 'whether a particular group has been unconstitutionally denied its chance to effectively influence the political process.'"¹⁸⁴ Accordingly, white citizens in a state which had predominantly, if not exclusively, elected other white citizens to public office could not assert that they had been denied the chance to effectively influence that process, because their interests would be protected by the white elected officials. "[I]t strains credulity to suggest that North Carolina's purpose in creating a second majority-minority district was to discriminate against members of the majority group by 'impair[ing] or burden[ing their] opportunity . . . to participate in the political process.'"¹⁸⁵

The second section of Justice White's dissent commented on the majority's interpretation of *UJO*.¹⁸⁶ Specifically, he wrote that the majority's comparison of the North Carolina plan to *Gomillion* was like comparing apples and oranges.¹⁸⁷ Justice White contended that *Gomillion* ultimately avoided a consideration of the legislature's intent, instead relying on the harm caused, "for its focus was on the alleged effect of the city's action, which was to exclude black voters from the municipality of Tuskegee."¹⁸⁸ Regardless of the type of practice that is implicated in a given case, Justice White found that the Voting Rights Act has traditionally required a plaintiff to demonstrate

182. *Id.* The dissent continued, "[b]ecause the holding is limited to such anomalous circumstances, it perhaps will not substantially hamper a State's legitimate efforts to redistrict in favor of racial minorities." *Id.* For a discussion of Justice White's qualification of the majority's holding, see *infra* part IV.

183. *Id.*

184. *Id.* at 2836 (quoting *Davis v. Bandemer*, 478 U.S. at 132-33).

185. *Id.* at 2838 (quoting *UJO*, 430 U.S. at 179) (alterations in original). Interestingly, Justice White's rationale only concentrates on the intent of the North Carolina legislature in drafting the reapportionment plan and fails to examine the effect of the scheme. To compare this position with all four assertions made in the *UJO* plurality, see *supra* part II.

186. *Id.* at 2838.

187. *Id.* ("The essence of the majority's argument is that *UJO* dealt with a claim of vote dilution—which required a specific showing of harm—and that cases such as *Gomillion v. Lightfoot* dealt with claims of racial segregation—which did not.") (citation omitted).

188. *Id.* at 2839 (emphasis omitted).

"that the plan was meant to, and did in fact, exclude an identifiable racial group from participation in the political process."¹⁸⁹

Justice White concluded that the Court's reliance on the district's irregular shape was a false distinction.¹⁹⁰ "Given two districts drawn on similar, race-based grounds, the one does not become more injurious than the other simply by virtue of being snake-like, at least so far as the Constitution is concerned and absent any evidence of differential racial impact."¹⁹¹ Rather, the dissent found that the use of a district's composition was a false distinction that led the Court to make largely irrelevant inquiries.¹⁹² The result of such an approach, according to Justice White, would be an infringement on a state's effort to comply with the requirements and commendable objectives of the Voting Rights Act.¹⁹³

Finally, Justice White commented on the Court's use of strict scrutiny in dealing with the North Carolina plan and other similar redistricting schemes.¹⁹⁴ The dissent observed that the State had a compelling interest in complying with the Attorney General's comments and that the plan was narrowly tailored to achieve that end.¹⁹⁵ Beyond the present case, however, the dissent warned of the difficulties of administering the narrowly tailored requirement.¹⁹⁶

Is it more "narrowly tailored" to create an irregular majority-minority district as opposed to one that is compact but harms other State interests such as incumbency protection or the representation of rural interests? . . . To the extent that no other

189. *Id.* at 2840.

190. *Id.* at 2840-41.

191. *Id.* at 2841.

192. *Id.* "By focusing on looks rather than impact, the majority 'immediately casts attention in the wrong direction—toward superficialities of shape and size, rather than toward the political realities of district composition.'" *Id.* (citing R. DIXON, *DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS* 459 (1968)). Justice White's commentary is informative, particularly in light of the amendments to the Voting Rights Act which focused this inquiry on impact, not intent. However, his argument is premised on a definition of harm that is contrary to the majority's definition. *See infra* part IV.B.

193. *Id.* at 2842.

194. *Id.* at 2842-43.

195. *Id.* at 2842.

196. *Id.*

racial group is injured, remedying a Voting Rights Act violation does not involve preferential treatment. It involves, instead, an attempt to equalize treatment, and to provide minority voters with an effective voice in the political process. The Equal Protection Clause of the Constitution, surely, does not stand in the way.¹⁹⁷

Justice Souter's dissent chastised the majority for their use of traditional equal protection analysis in the area of electoral districting.¹⁹⁸ Unlike other applications of equal protection, Justice Souter argued that redistricting necessarily involves consideration of the racial composition of an area.¹⁹⁹ Additionally, the remedial nature of racial considerations in redistricting does not necessarily harm members of another race.²⁰⁰ "As we have held, one's constitutional rights are not violated merely because the candidate one supports loses the election or because a group . . . to which one belongs winds up with a representative from outside that group."²⁰¹ Therefore, "there is in general a requirement that in order to obtain relief under the Fourteenth Amendment, the purpose and effect of the districting must be to devalue the effectiveness of a voter compared to what, as a group member, he would otherwise be able to enjoy."²⁰²

Recognizing that the majority did not abandon these general principles, Justice Souter's dissent suggested placing the Court's ruling in some perspective:

It may be that the terms for pleading this cause of action will be met so rarely that this case will wind up an aberration. The shape of the district at issue in this case is indeed so bizarre that few other examples are ever likely to carry the unequivocal

197. *Id.* at 2842-43 (emphasis omitted).

198. *Id.* at 2845 ("Until today, the Court has analyzed equal protection claims involving race in electoral districting differently from equal protection claims involving other forms of governmental conduct . . .").

199. *Id.*

200. *Id.* at 2846.

201. *Id.* (citation omitted).

202. *Id.* at 2847 (citations omitted).

implication of impermissible use of race that the Court finds here.²⁰³

Regardless of the peculiar nature of the North Carolina plan, Justice Souter's dissent relied on the potential complications that were implicated by this new category of violation:

[I]n those cases where this cause of action is sufficiently pleaded, the State will have to justify its decision to consider race as being required by a compelling state interest, and its use of race as narrowly tailored to that interest. Meanwhile, in other districting cases, specific consequential harm will still need to be pleaded and proven, in the absence of which the use of race may be invalidated only if it is shown to serve no legitimate state purpose.²⁰⁴

Justice Souter warned that the majority's opinion raised the threat of being read as a general indictment of the use of race in redistricting.²⁰⁵ Accordingly, Justice Souter's dissent can best be viewed as a call for restraint in subsequent review of redistricting cases. Nonetheless, his dissent is considerably more dispassionate with respect to the North Carolina plan.

Writing for the majority, Justice O'Connor directly addressed the criticisms of both Justice White's and Justice Souter's dissents. In response to Justice Souter's belief that racial gerrymandering is harmful only if it dilutes a racial group's voting strength, Justice O'Connor focused on the systemic injuries perpetuated by North Carolina.²⁰⁶ "It reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency

203. *Id.* at 2848.

204. *Id.*

205. *Id.* at 2849. Justice Souter cautioned "not [to] respond to the seeming egregiousness of the redistricting [in North Carolina] . . . by untethering the concept of racial gerrymander in such a case from the concept of harm exemplified by dilution." *Id.*

206. *Id.* at 2828.

as a whole. Justice Souter does not adequately explain why these harms are not cognizable under the Fourteenth Amendment.²⁰⁷

Turning to the criticisms of the majority's distinction between *Shaw* and *UJO*, Justice O'Connor focused on the particular facts of the two cases.²⁰⁸ "The plaintiffs in *UJO*—members of a Hasidic community split between two districts under New York's revised redistricting plan—did not allege that the plan, on its face, was so highly irregular that it rationally could be understood only as an effort to segregate voters by race."²⁰⁹ Despite these factual differences, the two cases did have some principled similarities.²¹⁰ "Three Justices approved the New York statute [in *UJO*], in part, precisely because it adhered to traditional districting principles" such as compactness and population equality.²¹¹ In short, "[n]othing in the decision precludes white voters (or voters of any other race) from bringing the analytically distinct claim that a reapportionment plan rationally cannot be understood as anything other than an effort to segregate citizens into separate voting districts on the basis of race without sufficient justification."²¹²

IV. INDIVIDUAL AND SYSTEMIC HARM—CONSISTENCY BETWEEN *SHAW V. RENO* AND *UNITED JEWISH ORGANIZATIONS*

Despite Justice White's position that the fundamental flaw of the appellants' case was their failure to assert a cognizable injury,²¹³ the very basis of Justice O'Connor's opinion acknowledges that North Carolina's revised plan caused very real harms to both whites and nonwhites individually and systemically. To be sure, the *Shaw* majority did not preclude the consideration of race in redistricting efforts. Instead, the Court limited the extent to which race could be considered by a state. As a result of the *Shaw* decision, states like North Carolina cannot use race to the exclusion of other factors that have traditionally been employed in redistricting. This proposition had

207. *Id.*

208. *Id.* at 2829-30.

209. *Id.* at 2829.

210. For further discussion of the similarities of the two cases, see *infra* part IV.

211. *Shaw*, 113 S. Ct. at 2829.

212. *Id.* at 2830.

213. See *supra* notes 181-97 and accompanying text.

not been established prior to the *Shaw* decision. In essence, the proverbial racial tail cannot wag the redistricting dog.

A. *The Gomillion Comparison*

The Court's distaste for redistricting schemes based exclusively on racial classifications (remedial or otherwise) in the redistricting setting has been apparent for years. *Shaw* simply reiterates the principle that racial considerations in redistricting decisions must be made in conjunction with other, non-race based factors. In arriving at this conclusion, the Court asked what harms result from plans with a merely quantitative approach to racial criteria in redistricting schemes, such as the North Carolina plan.²¹⁴ To that extent, the Court's consideration of *Gomillion* is an effective tool. In *Gomillion*, the Court held that "irrationally" drawn districts that are construed to exclude black citizens and exclusively represent white interests were constitutionally impermissible.²¹⁵ The Court clearly concluded that the Tuskegee plan crossed not only the threshold of color blindness, but actually ventured into invidious racial discrimination.

The North Carolina redistricting plan has more than mere physical resemblance to the one employed in Tuskegee. By gathering the state's black citizens into one mammoth district, regardless of the fact that they are "widely separated by geographical and political boundaries," North Carolina created the same atmosphere of alienation, purportedly for benign reasons.²¹⁶ In *Gomillion*, black citizens of Tuskegee were separated from the white population by being eliminated from a particular voting district. Similarly in *Shaw*, nonwhite electors were segregated from white voters by being channeled into an equally anomalous voting district.

214. See *supra* notes 171-80 and accompanying text.

215. See *supra* notes 48-52 and accompanying text.

216. *Shaw*, 113 S. Ct. at 2827. Moreover one commentator has stated: Given the diversity of the individuals who comprise various racial groups, it is difficult to believe that every member of a racial group votes solely according to "racial" considerations. It may well be that large numbers of blacks and whites have common interests (for example, an interest in environmental issues) which motivate their voting behavior more than their racial affiliation.

The Other Half, *supra* note 101, at 825 n.75.

Thus the question is, in light of the *Gomillion* decision and the subsequent approval of the Voting Rights Act, whether or not the same practice, albeit for benign reasons, is equally untenable. A majority of the Court in *Shaw v. Reno* answered that question with a resounding "no." That decision was not unprecedented, nor was it inconsistent with the Court's holding in *UJO*. Justice White's larger holding in *UJO* was never adopted by a majority of the Court.²¹⁷ Chief Justice Burger noted that Justice White's broader proposition:

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.²¹⁸

Justice White himself referred to the "sound districting principles such as compactness and population equality" in discussing the permissible consideration of race by states who were found to have previously discriminated against minorities in the electoral process.²¹⁹ He continued by stating that redistricting which reflects racial composition should only take place when minority "*residential patterns* afford the opportunity of creating districts in which they will be in the majority."²²⁰

B. *Shaw, Bakke, and "Expressive Harms"*

The majority's opinion requires more of states than mere lip service to the technical requirements of the Voting Rights Act by mandating that states create districts that assure qualitatively

217. Justice White's position "permit[ted] states to create consciously a number of safe districts with substantial non-white majorities in order to insure that minority voters have the potential to elect the number of representatives which is proportional to their share of the population." *The Other Half*, *supra* note 101, at 825.

218. *UJO*, 430 U.S. at 186 (Burger, C.J., dissenting).

219. *Id.* at 168.

220. *Id.* at 168 (emphasis added).

meaningful representation, a goal which is reflective of the overriding purpose of the Voting Rights Act. Accordingly, the majority's position can best be understood as a narrow exception for those rare instances where a state's redistricting plan lacks all but one recognized justification: racial composition.²²¹

Justices Souter's and White's criticisms of the "harm" component of the majority's ruling are correct to the extent that they are distinct from the harms identified in *UJO*. It is here that the similarities between the reasoning employed in *Bakke* and *Shaw* are most apparent. Even during the period in which the *UJO* decision was issued, a majority of the Court has consistently held that the use of remedial racial classifications must be accompanied by non-racial factors. As Professors Pildes and Niemi observed, "[t]his contextual approach to constitutional adjudication that links *Shaw* and *Bakke*—this commitment to viewing the Fourteenth Amendment as standing against value reductionism—can be understood as an effort to seize and defend a legal middle ground between logically coherent alternatives" such as color blindness and curative racial classifications.²²² Thus, the examination required by *Shaw* is necessarily a case-by-case inquiry.²²³

Failure to take a contextual approach to the competing themes of color blindness and remedial classifications also fails to recognize the harms implicated by the *Shaw* decision. Pildes and Niemi have labeled these individual and systemic harms "expressive."²²⁴ These expressive harms are premised on the belief that a state action communicates social values and perspectives by its very performance. Therefore, the action itself, as well as its corollary, has a resultant impact on individuals and society. "Public policies can violate the Constitution not only because they bring about concrete costs, but because the very meaning they convey demonstrates inappropriate respect for

221. See *supra* note 165 and accompanying text.

222. Pildes & Niemi, *supra* note 90, at 504.

223. The *Shaw* majority's distinction between color blindness and benign racial classifications is also reflective of the representation and access dichotomy. Arguably, the access model resides between these two values, while the representation model is more closely aligned with the corrective racial classifications advocated by Justice White in *UJO*.

224. Pildes & Niemi, *supra* note 90, at 506-07. For a discussion of "expressive harms," see *id.* and accompanying text.

relevant public values."²²⁵ This is especially true of policies involving remedial schemes. "A remedy designed to foster a perception of fairness in the administration of justice . . . [may] create, by the public policy statement it would make, perceptions that undermine that very ideal."²²⁶

Redistricting efforts which are designed solely for the purpose of maximizing the racial composition of a district, and which do so by calculating the minority make-up of the district to the exclusion of all other factors, violate the public value of community-based governance. In short, districts designed while considering racial criteria alone would promote representation of factions and insular groups, rather than districts of constituents.²²⁷ The result of such an undesirable system is not the election of "the best [elected] representative but the best racial or religious partisan."²²⁸ The *Shaw* majority recognizes that the Constitution and the Voting Rights Act require a basic communal core, both geographically and politically, in every district created by a state or municipality, whether for remedial purposes or not. This principle, which was not directly confronted in *UJO*, is not inconsistent with that decision, nor would it likely alter the Court's decision in that case. Moreover, despite the fact that Justice O'Connor's majority opinion did not engage in an in-depth statutory analysis of the Voting Rights Act, the legislative history of the Act supports many of her general requirements.²²⁹

The narrower holding of Justice White's opinion in *UJO* focused on the petitioners' specific assertion that "the use of racial criteria in districting and apportionment is never permissible."²³⁰ The Court's rejection of this proposition allows states to consider race as a criteria in redistricting, but it should not be read as an absolute endorsement of such practices. In fact, Justice White's attempt to apply the converse—that the sole use

225. Pildes & Niemi, *supra* note 118, at 507.

226. *Nipper v. Smith*, 39 F.3d 1494, 1546 (11th Cir. 1994) (footnote omitted).

227. *Shaw*, 113 S. Ct. at 2827.

228. *Id.* (quoting *Wright v. Rockefeller*, 376 U.S. 52, 66-67 (1964) (Douglas, J. dissenting)).

229. Members of the Senate Judiciary Committee who favored liberalizing the Act's intent requirement during the amendment of section two specifically avoided embracing extreme remedial approaches such as noncontiguous districting and proportional representation. S. REP. NO. 417, 97th Cong., 2d Sess. 31 n.121, *reprinted in* 1982 U.S.C.C.A.N. 177, 208-209.

230. *UJO*, 340 U.S. at 156.

of racial criteria in districting and apportionment in an effort to increase minimum representation is always permissible—was explicitly rejected by a majority of the Court in *UJO*.²³¹

Moreover, the New York plan complied with the traditional redistricting principles of compactness, contiguity, and respect for political subdivisions. If anything, the *UJO* petitioner's basic complaint was that by dividing the Hasidic community, the State's plan was too compact and too contiguous.²³² But perhaps the most telling indication of the compatibility between the reasoning in *UJO* and *Shaw* is Justice White's own reference to these same principles of redistricting in his *UJO* opinion. By recognizing expressive harms, Justice O'Connor's analysis goes beyond the mere technical requirements of section four of the Voting Rights Act to confront the underlying purpose of the Act: meaningful social and political empowerment.²³³ In so doing, the *Shaw* majority contended that a strictly perfunctory application of section four actually complicates the achievement of those ends.²³⁴ This very proposition was espoused by Justice Brennan in his concurrence in *UJO*.²³⁵ Citing recent cases which addressed the use of racial classifications generally, Justice O'Connor in *Shaw* held that similar practices "reinforce[] the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which the[y] live—think alike, share the same political interests, and will prefer the same candidates at the polls."²³⁶ The divisive nature of this practice was said to "exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract."²³⁷

Taken to its next logical step, the majority's position implies that these same inferences are not implicated when a state

231. See *supra* notes 102-114.

232. The majority distinguishes the claims raised in *UJO* and *Shaw* by categorizing the former as an improper claim of vote dilution (focusing only on specific harms to the petitioners) and the latter as a more generalized attack on the fairness of a particular state's strained effort to create a majority-minority voting district. *Shaw*, 113 S. Ct. at 2829.

233. See *supra* INTRODUCTION.

234. The majority's criticisms of such practices mirrors those of Chief Justice Burger in *UJO*, and are discussed *infra* part IV.C.

235. See *supra* note 108.

236. *Shaw*, 113 S. Ct. at 2827 (citations omitted).

237. *Id.*

employs traditional districting principles such as compactness, contiguity, and respect for political subdivisions when also considering race.²³⁸ Rather, districts which incorporate these principles reflect community interests, as opposed to purely racial interests. That is not to say that minority groups cannot be viewed in a communal light. However, in order to do so, they must be "sufficiently large and geographically compact" enough to do so.²³⁹

The Court's decision in *Shaw v. Reno* should properly be viewed as a narrow exception to the generally permissible use of racial composition in drawing voting district boundaries. Just as Justice White's plurality opinion in *UJO* disposed of the notion that the consideration of race in redistricting was never permissible, Justice O'Connor's majority opinion does the exact opposite: it disposes of the notion that such considerations are always constitutionally tenable. The *Shaw* exception arises only in the rare situation where a state chooses to consider race as the sole motivating factor in its redistricting decision. Even Justice Souter, in his dissenting opinion, recognized the very limited nature of the majority's decision.²⁴⁰ Despite his opposition to the *Shaw* holding, Justice White stated that it would not substantially impede a given state's consideration of racial criteria in redistricting plans. Evidence of the rarity of such situations is the limited number of states that were immediately affected by the Court's decision and the supposedly new standard.

C. *The Expansive Rhetoric of a "Limited" Decision*

Recognizing the precedential power of language, Justice Cardozo wrote: "[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it."²⁴¹ This admonition should be read not only as a warning for those who seek to apply the law, but for those judges who interpret it as well. The majority's decision in *Shaw v. Reno* demonstrates belligerence towards Justice Cardozo's proposition. Despite the seemingly limited application of the *Shaw* decision, perhaps the most objectionable aspect of Justice O'Connor's

238. See *supra* note 173.

239. *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986).

240. See *supra* note 203 and accompanying text.

241. *Berkey v. Third Ave. Ry. Co.*, 244 N.Y. 84, 94, 155 N.E. 58, 61 (1926).

majority opinion is the sweeping nature of the rhetoric which she employs in arriving at her conclusions. Referring to notions of "political apartheid,"²⁴² "racial gerrymander[ing],"²⁴³ "balkaniz[ation],"²⁴⁴ and "segregation,"²⁴⁵ Justice O'Connor's majority opinion provides significant ammunition for potential opponents of the Voting Rights Act and potential confusion for lower court judges. The majority fears that states' overt consideration of race will balkanize America into competing racial factions²⁴⁶ as a result of a state's overt consideration of race above the potential to send messages to lower state and federal courts that such considerations are to be avoided at all costs.

In *Houston v. Lafayette County*, a federal court referred to Justice O'Connor's discussion of political apartheid in rejecting a claim of minority vote dilution.²⁴⁷ That case involved a proposed section two redistricting scheme in Lafayette, Mississippi which attempted to maximize minority voting strength. Rather than employing *Shaw* as an example of the qualifications to the use of racial criteria in redistricting, the court chose to recognize the case as a general repudiation of such criteria. No mention was made of the Supreme Court's endorsement of the consideration of racial criteria. The court of appeals merely used the bravado of Justice O'Connor's opinion. In light of these most recent decisions, further qualification of the *Shaw* decision may be required from the high court.

Misdirected applications of the *Shaw* decision have already pervaded federal courts. Justice O'Connor's rhetoric regarding the insidiousness of some racial classifications has been cited in attacks against mandatory minimum sentencing for distributing cocaine base,²⁴⁸ employment discrimination,²⁴⁹ and child

242. *Shaw*, 113 S. Ct. at 2832; see also *supra* note 178 and accompanying text.

243. *Shaw*, 113 S. Ct. at 2822-23.

244. *Id.* at 2832.

245. *Id.* at 2824.

246. *Id.* at 2832.

247. *Houston v. Lafayette County*, 841 F. Supp. 751, 765 (N.D. Miss. 1993).

248. See *United States v. Thurmond*, 7 F.3d 947, 951 (10th Cir. 1993) (asserting "this case is one of those rare cases, similar to *Shaw v. Reno* . . . wherein statistical evidence alone is enough to prove that Congress had a racially discriminatory purpose in enacting the provisions, as well as in leaving them intact").

249. See *Aiken v. City of Memphis*, 37 F.3d 1155, 1161 (6th Cir. 1994) (regarding reverse discrimination in promoting police officers and fire fighters); *In re Birmingham Reverse Discrimination Employment Litigation*, 20 F.3d 1525, 1545 (11th Cir. 1994) (alleging reverse discrimination in fire department hiring and promotion policies); Hayes

custody disputes.²⁵⁰ This diverse use of the *Shaw* decision is representative of a judiciary seizing on strongly worded dicta, and demonstrative of a need to redirect lower courts through subsequent Supreme Court interpretation.

The expansive character of Justice O'Connor's rhetoric is also reflective of the awkwardness encountered when describing an expressive harm. Because expressive harms have few if any overt manifestations, the words often used to describe them can be vague and illusory. Again, Professors Pildes' and Niemi's observations prove insightful. "Indeed, close attention to the language of Justice O'Connor's opinion reveals a constant struggle to articulate exactly these sorts of expressive harms. . . . [T]he opinion is laden with references to the social perceptions, the messages, and the governmental reinforcement of values that the Court believes North Carolina's districting scheme conveys."²⁵¹ Accordingly, Justice O'Connor's strongly worded opinion should not be read as overt hostility toward racial redistricting or the Voting Rights Act, but as a struggle to delineate a class of harms previously undefined.

These rhetorical aspects of the *Shaw* opinion provide two important lessons for the Justices, lower courts, and potential litigants. First, regarding cases that involve expressive harms generally, care should be taken to avoid language which confuses the intended meaning of the decision in question. Recognizing that expressive harms can result from a given state action, the judiciary must also acknowledge that court opinions often have larger social consequences.²⁵² These consequences can manifest themselves in lower court misinterpretations; encouragement of potentially unfounded litigation; Congressional oversight and reevaluation; and turmoil amongst economic, racial, ethnic, or political factions. Consequently, courts should employ rhetorical devices only after deliberately considering the larger impact of the decision.

v. North State Law Enforcement Officers Ass'n, 10 F.3d 207, 216 (4th Cir. 1993) (alleging reverse discrimination in police department promotion policies); *Shuford v. Alabama State Bd. of Educ.*, 846 F. Supp. 1511, 1520 (M.D. Ala. 1994) (regarding discrimination in the hiring of teachers).

250. *Phelps v. Phelps*, 337 N.C. 344, 446 S.E.2d 17, 20-21 (N.C. 1994) ("[A]n equal protection claim may potentially stand if the law in reality constitutes a device purposefully designed to impose different burdens on different classes of persons.")

251. Pildes and Niemi, *supra* note 90, at 508.

252. See *supra* note 241 and accompanying text.

Second, lower courts and potential Voting Rights Act litigants should recognize that Justice O'Connor's opinion represents a specific exception to voting rights jurisprudence, not an indictment of the Act or racial classifications. Individuals must realize that situations which cause the Court to analogize to "political apartheid" are few and far between and occasionally overblown. Additionally, lower courts should refrain from recognizing the *Shaw* decision as an assault on the integrity of the Voting Rights Act or advocating wholesale color blindness, and should only apply the decision in the few instances for which it was intended: redistricting cases in which states use the consideration of race to the exclusion of all other factors.

V. SUBSEQUENT VOTING RIGHTS CHALLENGES IN THE SHADOW OF *SHAW V. RENO*

A. Lower Court Interpretations

The Court's decision in *Shaw v. Reno* did have major substantive consequences for states that had instituted new voting districts only a short time before the release of the 1993 decision, particularly in the South.²⁵³ For some states, the *Shaw* decision spurred considerations of second rounds of redistricting in an attempt to prevent unwelcome litigation.²⁵⁴ Members of the Georgia state legislature immediately called for a return to the drawing board to redraft their voting districts.²⁵⁵ A panel of federal judges invalidated a South Carolina redistricting plan shortly after the release of the *Shaw* decision, giving the State only a few months to come up with newly drawn districts.²⁵⁶ On the other hand, a federal panel in North Carolina determined that the districting scheme in *Shaw* complied with the Voting Rights Act by satisfying strict scrutiny analysis.²⁵⁷

253. "Southern states have proved fertile ground for *Shaw* claims, as many of their legislatures labor under the long shadow of the Voting Rights Act of 1965 . . ." Johnson v. Miller, 864 F. Supp. 1354, 1359 (S.D. Ga. 1994).

254. *State-by-State Guide to All Senate Contests, Hot House Races From Alabama to Montana*, ROLL CALL, Nov. 1, 1993, at 15.

255. *Id.* at 21.

256. Susan B. Glasser, *Just How "Bizarre" Is Louisiana's 4th?*, ROLL CALL, Aug. 16, 1993, at 2.

257. *Shaw v. Hunt*, 861 F. Supp. 408, 422-23 (E.D.N.C. 1994).

Voting rights litigants have actively pursued claims against states and municipalities in the shadow of the *Shaw* decision. Although some litigants have been successful in their challenges,²⁵⁸ many courts have been restrictive in their review of Voting Rights Act cases. Despite fears to the contrary, many courts thus far have consistently held that the consideration of race in redistricting is permissible.²⁵⁹ For the most part, *Shaw* has been interpreted to narrowly apply, "to redistricting plans that on their face are so dramatically irregular that they can only be explained as attempts to segregate by the races for purposes of voting without regard for traditional redistricting principles."²⁶⁰

B. Subsequent Supreme Court Treatment of *Shaw v. Reno*

The Court's 1993-94 term provided the Justices with two opportunities to revisit the Voting Rights Act and the *Shaw* decision. Amid battle cries of reverse racism and fears of the imminent demise of the Voting Rights Act,²⁶¹ a majority of the

258. See *Johnson v. Miller*, 864 F.Supp. 1354 (S.D.Ga. 1994) (invalidating Georgia congressional districts); *Vera v. Richards*, 861 F.Supp. 1304 (S.D.Tex. 1994) (invalidating a Texas redistricting scheme); and *Hays v. State of La.*, 862 F.Supp. 119 (W.D.La. 1994) (invalidating a Louisiana redistricting scheme).

259. See generally, *Cane v. Worcester County, Md.*, 35 F.3d 921 (4th Cir. 1994) (permitting the consideration of racial composition in Worcester County, Maryland County Board of Commissioner's redistricting plan); *Bridgeport Coalition For Fair Representation v. City of Bridgeport*, 26 F.3d 271 (2nd Cir. 1994) (allowing considerations of race in reformulating Bridgeport City Council reapportionment plan); *Clark v. Calhoun County, Miss.*, 21 F.3d 92 (5th Cir. 1994) (consideration of racial composition permitted, despite finding that redistricting scheme violated traditional principles of compactness, contiguity, etc.); *DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D. Cal. 1994) (permitting special master to consider race in California redistricting plan); *Rojas v. Moriarty*, 1994 WL 114669 (W.D. Mo. 1994) (racial composition of Hispanic community permitted in review of Congressional redistricting plan for Kansas City, Missouri); *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1022 (D. Md. 1994) (permitting the consideration of racial composition in Maryland State Delegate redistricting scheme); *Kimble v. County of Niagara*, 826 F. Supp. 664 (W.D.N.Y. 1993) (inquiry into racial composition allowed in Niagara County legislative elections).

260. *DeWitt*, 856 F. Supp. at 1413.

261. Minority leaders saw *Shaw v. Reno* as a national emergency of historical proportions. Fifth District Representative John Lewis, Chief Deputy Majority Whip of the United States House of Representatives and the highest ranking Black in the Georgia delegation to the House, stated "[t]his ruling is the greatest threat to the Voting Rights Act since it was signed on August 6, 1965 This is a very dangerous decision and we have to fight it." *Supreme Court Decision May Lead to Second Reconstruction*, THE ETHNIC NEWSWATCH, Aug. 4, 1993, at A3. Georgia State Representative Tyrone Brooks viewed the decision as a case of reverse discrimination. "This is a racist political attack on minority voting rights in this country. For years lines have been drawn 'funny' to keep Blacks out

Court did not even refer to *Shaw* in *De Grandy v. Johnson*²⁶² or *Holder v. Hall*.²⁶³ Rather, the Court (including Justice O'Connor who joined Justice Souter's majority opinion in *De Grandy* and Justice Kennedy's majority opinion in *Holder*) continued to recognize claims of vote dilution, albeit in a restrictive fashion. Maintaining an alliance with the access model's perspective of the Voting Rights Act, Justices Souter and Kennedy's opinions take a less activist perspective toward dilution claims. The Court's behavior demonstrates that the larger view of *Shaw* as a decision that signals an end to the Voting Rights Act is misconceived at best.

In *De Grandy*, the Court declined to take a purely representation-oriented approach to section two of the Act by refusing to find that a Florida reapportionment plan for the Dade County area diluted the voting strength of black and Hispanic residents.²⁶⁴ The District Court found that vote dilution occurred pursuant to section two of the Act where a state fails to maximize the number of majority-minority districts when feasible.²⁶⁵ Justice Souter, writing for the majority, concluded that section two of the Act did not require states to fashion minority voting districts unless there was a showing of unequal political and electoral opportunity.²⁶⁶ Rather, the Court considered proportionality as one relevant factor in analyzing vote dilution claims. "[N]o violation of [section two] can be found . . . where, in spite of continuing discrimination and racial bloc voting, minority voters form effective voting majorities in a number of districts roughly proportional to the minority voters' respective

of the legislative process. Now that they are being drawn 'funny' to include Blacks—suddenly it's a problem." *Id.* United States Representative Cynthia McKinney viewed the *Shaw* decision as an opportunity for minority reunification. "We must organize, mobilize, and finance ourselves and say unequivocally we will not accept this assault on our voting rights." *Id.* Ironically, perhaps the greatest threat to the aggressive use of racial redistricting will now come from a former ally of minorities, the Democratic party. The 1994 mid-term congressional election casts some doubt on the utility of this tactic for Democrats in light of other social trends. See Edsall, *supra* note 5 and accompanying text. Moreover, "affirmative action" policies generally are facing increased scrutiny by both key Republicans and Democrats. Viewed in this increasingly heated atmosphere, additional restrictions on remedial racial classifications in the redistricting context are likely to face heightened scrutiny in both the political and judicial realms.

262. *De Grandy v. Johnson*, 114 S. Ct. 2647 (1994).

263. *Holder v. Hall*, 114 S. Ct. 2581 (1994).

264. *De Grandy*, 114 S. Ct. at 2651-52 (1994).

265. *Id.* at 2652.

266. *Id.* at 2663.

shares in the voting-age population."²⁶⁷ Thus, vote dilution claims rarely extend to minority group members whose race is proportionally reflected in other districts of a particular state.

Justice Kennedy's concurrence provided the Court's only reference to *Shaw v. Reno*.²⁶⁸ Referencing Chief Justice Burger's dissent in *UJO* and the *Shaw* decision, his concurrence emphasized the implicit harm resulting from purely remedial redistricting beyond proportionality, a theme central to the Court one term earlier.²⁶⁹ Justice Kennedy concluded by noting in dicta that, "Given our decision in *Shaw*, there is good reason for state and federal officials with responsibilities related to redistricting, as well as reviewing courts, to recognize that explicit race-based districting embarks us on a most dangerous course."²⁷⁰

The Court addressed vote dilution a second time in *Holder*, which involved the composition of Bleckley County, Georgia's county commission. For over eighty years, Bleckley County was governed by a single-commissioner form of government.²⁷¹ In 1985 six black voters and the county chapter of the NAACP challenged the single-commissioner system as being violative of the Fourteenth and Fifteenth Amendments and section two of the Voting Rights Act.²⁷² The Court of Appeals for the Eleventh Circuit did not address the constitutional merits of the case, but found that the single commissioner government violated section two of the Act.²⁷³ The Supreme Court reversed the court of appeals' findings with respect to the statute and remanded for further consideration with respect to the constitutional arguments.²⁷⁴

Justice Kennedy's majority opinion is premised on the notion that a vote dilution claim pursuant to section two cannot be maintained merely on the basis of the size of a government body because of the difficulty of establishing a benchmark, or

267. *Id.* at 2651.

268. *Id.* at 2664 (Kennedy, J., concurring in part and concurring in the judgment).

269. *Id.* at 2666.

270. *Id.* at 2667.

271. *Holder*, 114 S. Ct. at 2584. Although Georgia permitted the county to convert to a five member commission, county voters rejected the shift in a 1986 referendum. *Id.*

272. *Id.*

273. *Id.* at 2585.

274. *Id.* at 2588.

alternative, for comparison.²⁷⁵ According to the majority, the court of appeals misapplied the Act by confusing the standards employed in section two and five challenges. "[A] voting practice that is subject to the preclearance requirements of [section five] is not necessarily subject to a dilution challenge under [section two]."²⁷⁶

Justice Thomas, joined by Justice Scalia, concurred in the judgment, but suggested that the size of a governing body was not a "standard, practice, or procedure" within the meaning of the Act.²⁷⁷ He continued by hinting that the Court should redirect its entire analysis of the Voting Rights Act in order to avoid the further balkanization of the United States.²⁷⁸ Returning to the access and representation dichotomy, Justice Thomas' concurrence recommends pushing the court beyond even the access model in further pursuit of strict color blindness, despite Court precedent which demands at least a modicum of moderation. In short, Justices Thomas and Scalia utilized the Court's decision in *Shaw v. Reno* as a benchmark for a larger reevaluation of the Voting Rights Act. Justice O'Connor's concurrence countered that Justices Thomas and Scalia's arguments flew in the face of established precedent.²⁷⁹

CONCLUSION

Despite the views of most critics, the Supreme Court's decision in *Shaw v. Reno* is both consistent with its previous holding in *UJO*, as well as the foundation of the Voting Rights Act. The *Shaw* decision can best be viewed as an exception to the use of racial criteria in drafting voting districts, not an abandonment of such uses. The decision only applies to those districts that are so irrational in their composition that they can only be seen as an impermissible racial gerrymander. These irrational schemes, as evidenced by North Carolina's Twelfth District, are the product of a state's virtually exclusive consideration of racial composition. In order to avoid such

275. *Id.* at 2586.

276. *Id.* at 2587.

277. *Id.* at 2591 (Thomas, J., concurring).

278. *Id.* at 2591-92.

279. *Id.* at 2588 (O'Connor, J., concurring) (citing *Thornburg v. Gingles*, 478 U.S. 30, 84 (1986)).

conclusions, Justice O'Connor's majority opinion suggests that a plan which conforms to traditional principles of redistricting such as compactness, contiguity, and respect for commonalities of interest among the district's occupants would survive judicial scrutiny and fall within the purview of the Voting Rights Act.

A primary distinction between the positions of the majority and minority opinions in *Shaw* are perceptions of cognizable harm. In limiting the previously unfettered use of race in redistricting, the Supreme Court recognized the fine line between benign racial classifications and those uses of race that conflict with the overarching principles of the Constitution and the Voting Rights Act. Justice O'Connor's majority opinion recognizes that a state's exclusive use of racial criteria, absent other important considerations that have traditionally been invoked in redistricting plans, implicates harms to the individual members of given districts, as well as to our system of representative democracy. The Court's position with respect to the harms faced by individuals has its roots in the plurality's decision in *UJO* and several other cases that discussed the qualifications of remedial schemes. In those cases, as in *Shaw*, the Court recognized that states run the risk of further segregating minorities as opposed to providing them with the voting districts to which they are entitled through the Voting Rights Act.

On a systemic level, the *Shaw* majority recognized that plans such as North Carolina's produce representatives that only reflect the racial composition of a given district. Concurring with the panel's decision in *Hays v. Louisiana*, Judge Walter wrote:

One hundred and thirty years ago this nation endured a bloody civil war to ensure freedom and equality for all. That pledge, so dearly bought, remains elusive, but the concept that people defined only by race should receive separate representation in the legislative bodies of our government mocks the goals for which so many have suffered and died. Indeed, in my opinion, it breathes life into the discredited doctrine announced by the majority in *Plessy*, four years after the Supreme Court

administered what should have been its mortal wound.²⁸⁰

With its decision in *Shaw v. Reno*, the Supreme Court recognized that racial composition is not an end in and of itself; rather, it is one major factor that states must consider along with a number of other traditional redistricting principles. In the vast majority of situations, states have and will continue to consider these factors in concert with one another. However, in those few situations when they do not, a majority of the Court has determined that a state must be held accountable for its redistricting decisions. Legislators must now assure the electorate that their redistricting decisions are qualitatively meaningful pursuant to the United States Constitution and the Voting Rights Act. Both state and federal courts, as well as potential litigants, must go to great lengths to read the *Shaw* decision in the restrictive manner in which it was intended by the Court. Overzealous application of the *Shaw* decision and its supporting bravado could undermine the auspicious goals of the Voting Rights Act, threatening to further disenfranchise minorities three decades after the Act was signed into law.

Bradley David Wine

280. *Hays v. State of La.*, 839 F. Supp. 1188, 1218 (1993).