"At-large voting schemes and multimember districts tend to minimize the voting strength of minority groups. ... [But] this Court has repeatedly held that they are not unconstitutional per se."—Justice WHITE

"A constitutional standard that gave special protection to political groups identified by racial characteristics would be inconsistent with the basic tenet of the Equal Protection Clause."—Justice STEVENS

Rogers v. Lodge

458 U.S. 613, 102 S.Ct. 3272, 73 L.Ed.2d 1012 (1982).

Eight African Americans living in Burke County, Georgia filed a class action in a federal district court, claiming that the county's electoral system denied their constitutional rights under the First, Thirteenth, Fourteenth, and Fifteenth amendments, as well as their statutory rights under federal civil rights laws. The county chose the five members of its governing board by at-large elections, that is, each candidate had to win a county-wide election. No African American had ever been selected. The district judge found for the plaintiffs and ordered the county divided into five geographic areas, each of which would become the electoral district for a commissioner. The court of appeals affirmed, and the county appealed.

Mr. Justice **WHITE** delivered the opinion of the Court. ...

II

At-large voting schemes and multimember districts tend to minimize the voting strength of minority groups by permitting the political majority to elect *all* representatives of the district. A distinct minority, whether it be a racial, ethnic, economic, or political group, may be unable to elect any representatives in an at-large election, yet may be able to elect several representatives if the political unit is divided into single-member districts. The minority's voting power in a multimember district is particularly diluted when bloc voting occurs and ballots are cast along strict majority-minority lines. While multimember districts have been challenged for "their winner-take-all aspects, their tendency to submerge minorities and to over-represent the winning party," Whitcomb v. Chavis (1971), this Court has repeatedly held that they are not unconstitutional per se. Mobile v. Bolden [1980]; White v. Regester (1973); *Whitcomb*. The Court has recognized, however, that multimember districts violate the Fourteenth Amendment if "conceived or operated as purposeful devices to further racial ... discrimination" by minimizing, cancelling out or diluting the voting strength of racial elements in the voting population. *Whitcomb*. Cases charging that multimember districts unconstitutionally dilute the voting strength of racial minorities are thus subject to the standard of proof generally applicable to Equal Protection Clause cases. Washington v. Davis (1976) and Village of Arlington Heights v. Metropolitan Housing Development Corp. (1977) made it clear that in order for the Equal Protection Clause to be violated, "the invidious quality of a law claimedto be racially discriminatory must ultimately be traced to a racially discriminatory purpose." ...[1]

[1]Purposeful racial discrimination invokes the strictest scrutiny of adverse differential

Arlington Heights and *Davis* both rejected the notion that a law is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than another. However, both cases recognized that discriminatory intent need not be proven by direct evidence. ... Thus determining the existence of a discriminatory purpose "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*.

... First, and fundamentally, we are unconvinced that the District Court in this case applied the wrong legal standard. ... [It] demonstrated its understanding of the controlling standard ... and concluded that the at-large scheme of electing commissioners, "although racially neutral when adopted, is being *maintained* for invidious purposes." ...

III

We are also unconvinced that we should disturb the District Court's finding that the at-large system in Burke County was being maintained for the invidious purpose of diluting the voting strength of the black population. ...

The District Court found that blacks have always made up a substantial majority of the population in Burke County, but that they are a distinct minority of the registered voters. There was also overwhelming evidence of bloc voting along racial lines. Hence, although there had been black candidates, no black had ever been elected to the Burke County commission. These facts bear heavily on the issue of purposeful discrimination. Voting along racial lines allows those elected to ignore black interests without fear of political consequences, and without bloc voting the minority candidates would not lose elections solely because of their race. ...

Under our cases, however, such facts are insufficient in themselves to prove purposeful discrimination absent other evidence such as proof that blacks have less opportunity to participate in the political processes and to elect candidates of their choice. United Jewish Organizations v. Carey (1977); *White; Whitcomb*. See also *Mobile*. Both the District Court and the Court of Appeals thought the supporting proof in this case was sufficient to support an inference of intentional discrimination. ...

The District Court began by determining the impact of past discrimination on the ability of blacks to participate effectively in the political process. Past discrimination was found to contribute to low black voter registration because prior to the Voting Rights Act of 1965, blacks had been denied access to the political process by means such as literacy tests, poll taxes, and white primaries. The result was that "Black suffrage in Burke County was virtually non-existent." Black voter registration in Burke County has increased following the Voting Rights Act to the point that some 38 per cent of blacks eligible to vote are registered to do so. On that basis the District Court inferred that "past discrimination has had an adverse effect on black voter

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treatment. Absent such purpose, differential impact is subject only to the test of rationality. *Davis*. [Footnote by the Court.]

registration which lingers to this date." Past discrimination against blacks in education also had the same effect. Not only did Burke County schools discriminate against blacks as recently as 1969, but some schools still remain essentially segregated and blacks as a group have completed less formal education than whites.

The District Court found further evidence of exclusion from the political process. Past discrimination had prevented blacks from effectively participating in Democratic Party affairs and in primary elections. ... There were also property ownership requirements that made it difficult for blacks to serve as chief registrar in the county. There had been discrimination in the selection of grand jurors, the hiring of county employees, and in the appointments to boards and committees which oversee the county government. The District Court thus concluded that historical discrimination had restricted the present opportunity of blacks effectively to participate in the political process. Evidence of historical discrimination is relevant to drawing an inference of purposeful discrimination. ...

Extensive evidence was cited by the District Court to support its finding that elected officials of Burke County have been unresponsive and insensitive to the needs of the black community, which increases the likelihood that the political process was not equally open to blacks. This evidence ranged from the effects of past discrimination which still haunt the county courthouse to the infrequent appointment of blacks to county boards and committees; the overtly discriminatory pattern of paving county roads; the reluctance of the county to remedy black complaints, which forced blacks to take legal action to obtain school and grand jury desegregation; and the role played by the County Commissioners in the incorporation of an all-white private school to which they donated public funds for the purchase of band uniforms.

The District Court also considered the depressed socio-economic status of Burke County blacks ..., [concluding] that [it] results in part from "the lingering effects of past discrimination." Although finding that the state policy behind the at-large electoral system in Burke County was "neutral in origin," the District Court concluded that the policy "has been subverted to invidious purposes." ...

The trial court considered, in addition, several factors which this Court has indicated enhance the tendency of multimember districts to minimize the voting strength of racial minorities. See *Whitcomb*. It found that the sheer geographic size of the county, which is nearly two-thirds the size of Rhode Island, "has made it more difficult for Blacks to get to polling places or to campaign for office." ... The majority vote requirement was found "to submerge the will of the minority" and thus "deny the minority's access to the system." The court also found the requirement that candidates run for specific seats enhances [appellee's] lack of access because it prevents a cohesive political group from concentrating on a single candidate. Because Burke County has no residency requirement, "[a]ll candidates could reside in Waynesboro, or in 'lilly-white' neighborhoods. To that extent, the denial of access becomes enhanced."

... As in *White*, the District Court's findings were "sufficient to sustain [its] judgment ... and, on this record, we have no reason to disturb them."

[*Affirmed.*]

Justice **POWELL**, with whom Justice **REHNQUIST** joins, dissenting. ...

The Court's decision today relies heavily on the capacity of the federal district courts—essentially free from any standards propounded by this Court—to determine whether at-large voting systems are "being maintained for the invidious purpose of diluting the voting strength of the black population." Federal courts thus are invited to engage in deeply subjective inquiries into the motivations of local officials in structuring local governments. Inquiries of this kind not only can be "unseemly," see [Kenneth] Karst, The Costs of Motive–Centered Inquiry, 15 *San Diego Law Rev.* 1163, 1164 (1978); they intrude the federal courts—with only the vaguest constitutional direction—into an area of intensely local and political concern. ...

... In the absence of compelling reasons of both law and fact, the federal judiciary is unwarranted in undertaking to restructure state political systems. This is inherently a political area, where the identification of a seeming violation does not necessarily suggest an enforceable judicial remedy—or at least none short of a system of quotas or group representation. Any such system, of course, would be antithetical to the principles of our democracy.

... "The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." *Davis*. Because I am unwilling to abandon this central principle in cases of this kind, I cannot join Justice Stevens's opinion. Nonetheless, I do agree with him that what he calls "objective" factors should be the focus of inquiry in vote-dilution cases. ... In the absence of proof of discrimination by reliance on [such factors], I would hold that the factors cited by the Court of Appeals are too attenuated as a matter of law to support an inference of discriminatory intent. ...

Justice **STEVENS**, dissenting.

... The record in this case amply supports the conclusion that the governing officials of Burke County have repeatedly denied black citizens rights guaranteed by the Fourteenth and Fifteenth Amendments to the Federal Constitution. No one could legitimately question the validity of remedial measures, whether legislative or judicial, designed to prohibit discriminatory conduct by public officials and to guarantee that black citizens are effectively afforded the rights to register and to vote. ... Nor, in my opinion, could there be any doubt about the constitutionality of an amendment to the Voting Rights Act that would require Burke County and other covered jurisdictions to abandon specific kinds of at-large voting schemes that perpetuate the effects of past discrimination. ...

The Court's decision today, however, is not based on either its own conception of sound policy or any statutory command. The decision rests entirely on the Court's interpretation of the requirements of the Federal Constitution. Despite my sympathetic appraisal of the Court's laudable goals, I am unable to agree with its approach to the constitutional issue that is presented. In my opinion, this case raises questions that encompass more than the immediate plight of disadvantaged black citizens. I believe the Court errs by holding the structure of the local governmental unit unconstitutional without identifying an acceptable, judicially-manageable standard for adjudicating cases of this kind. ...

III

Ever since I joined the Court, I have been concerned about the Court's emphasis on subjective intent as a criterion for constitutional adjudication. Although that criterion is often regarded as a restraint on the exercise of judicial power, it may in fact provide judges with a tool for exercising power that otherwise would be confined to the legislature. My principal concern with the subjective intent standard, however, is unrelated to the quantum of power it confers upon the judiciary. It is based on the quality of that power. For in the long run constitutional adjudication that is premised on a case-by-case appraisal of the subjective intent of local decisionmakers cannot possibly satisfy the requirement of impartial administration of the law that is embodied in the Equal Protection Clause of the Fourteenth Amendment. ...

In the future, it is not inconceivable that the white officials who are likely to remain in power under the District Court's plan will desire to perpetuate that system and to continue to control a majority of seats on the county commission. Under this Court's standard, if some of those officials harbor such an intent for an "invidious" reason, the District Court's plan will itself become unconstitutional. It is not clear whether the invidious intent would have to be shared by all three white commissioners, by merely a majority of two, or by simply one if he were influential. It is not clear whether the issue would be affected by the intent of the two black commissioners, who might fear that a return to an at-large system would undermine the certainty of two black seats. ... In sum, as long as racial consciousness exists in Burke County, its governmental structure is subject to attack. ...

... [T]he question becomes whether the system was *maintained* for a discriminatory purpose. Whose intentions control? Obviously not the voters, although they may be most responsible for the attitudes and actions of local government. Assuming that it is the intentions of the "state actors" that is critical, how will their mental processes be discovered? Must a specific proposal for change be defeated? What if different motives are held by different legislators or, indeed, by a single official? Is a selfish desire to stay in office sufficient to justify a failure to change a governmental system?

The Court avoids these problems by failing to answer the very question that its standard asks. Presumably, according to the Court's analysis, the Burke County governmental structure is unconstitutional because it was maintained at some point for an invidious purpose. Yet the Court scarcely identifies the manner in which changes to a county governmental structure are made. There is no reference to any unsuccessful attempt to replace the at-large system with single-member districts. It is incongruous that subjective intent is identified as the constitutional standard and yet the persons who allegedly harbored an improper intent are never identified or mentioned. ...

... I am not convinced ... that the Constitution affords a right—and this is the *only* right the Court finds applicable in this case—to have every official decision made without the influence of considerations that are in some way "discriminatory." Is the failure of a state legislature to ratify the Equal Rights Amendment invalid if a federal judge concludes that a majority of the legislators harbored stereotypical views of the proper role of women in society?

Is the establishment of a memorial for Jews slaughtered in World War II unconstitutional if civic leaders believe that their cause is more meritorious than that of victimized Palestinian refugees? Is the failure to adopt a state holiday for Martin Luther King, Jr. invalid if it is proved that state legislators believed that he does not deserve to be commemorated? Is the refusal to provide medicaid funding for abortions unconstitutional if officials intend to discriminate against women who would abort a fetus?

A rule that would invalidate all governmental action motivated by racial, ethnic or political considerations is too broad. Moreover, in my opinion the Court is incorrect in assuming that the intent of elected officials is invidious when they are motivated by a desire to retain control of the local political machinery. For such an intent is surely characteristic of politicians throughout the country. ...

[A] device that serves no purpose other than to exclude minority groups from effective political participation is unlawful under objective standards. But if a political majority's intent to maintain control of a legitimate local government is sufficient to invalidate any electoral device that makes it more difficult for a minority group to elect candidates—regardless of the nature of the interest that gives the minority group cohesion—the Court is not just entering a "political thicket"; it is entering a vast wonderland of judicial review of political activity.

The obvious response to this suggestion is that this case involves a racial group and that governmental decisions that disadvantage such a group must be subject to special scrutiny under the Fourteenth Amendment. I therefore must consider whether the Court's holding can legitimately be confined to political groups that are identified by racial characteristics.

IV ...

Groups of every character may associate together to achieve legitimate common goals. If they voluntarily identify themselves by a common interest in a specific issue, by a common ethnic heritage, by a common religious belief, or by their race, that characteristic assumes significance as the bond that gives the group cohesion and political strength. When referring to different kinds of political groups, this Court has consistently indicated that ... the Equal Protection Clause does not make some groups of citizens more equal than others. See Zobel v. Williams [1982] (Brennan, J., concurring). ... Indeed, in its opinion today the Court recognizes that the practical impact of the electoral system at issue applies equally to any "distinct minority, whether it be a racial, ethnic, economic, or political group."

A constitutional standard that gave special protection to political groups identified by racial characteristics would be inconsistent with the basic tenet of the Equal Protection Clause. Those groups are no more or less able to pursue their interests in the political arena than are groups defined by other characteristics. Nor can it be said that racial alliances are so unrelated to political action that any electoral decision that is influenced by racial consciousness—as opposed to other forms of political consciousness—is inherently irrational. For it is the very political power of a racial or ethnic group that creates a danger that an entrenched majority will take action contrary to the group's political interests. ... It would be unrealistic to distinguish racial groups from other political groups on the ground that race is an irrelevant factor in the political

process.

Racial consciousness and racial association are not desirable features of our political system. We all look forward to the day when race is an irrelevant factor in the political process. In my opinion, however, that goal will best be achieved by eliminating the vestiges of discrimination that motivate disadvantaged racial and ethnic groups to vote as identifiable units. Whenever identifiable groups in our society are disadvantaged, they will share common political interests and tend to vote as a "bloc." In this respect, racial groups are like other political groups. A permanent constitutional rule that treated them differently would, in my opinion, itself tend to perpetuate race as a feature distinct from all others; a trait that makes persons different in the eyes of the law. ...

My conviction that all minority groups are equally entitled to constitutional protection against the misuse of the majority's political power does not mean that I would abandon judicial review of such action. ... [A] gerrymander as grotesque as the boundaries condemned in Gomillion v. Lightfoot [1960] is intolerable whether it fences out black voters, Republican voters, or Irish–Catholic voters. But if the standard the Court applies today extends to all types of minority groups, it is either so broad that virtually every political device is vulnerable or it is so undefined that federal judges can pick and choose almost at will among those that will be upheld and those that will be condemned.

There are valid reasons for concluding that certain minority groups—such as the black voters in Burke County, Georgia—should be given special protection from political oppression by the dominant majority. But those are reasons that justify the application of a legislative policy choice rather than a constitutional principle that cannot be confined to special circumstances or to a temporary period in our history. Any suggestion that political groups in which black leadership predominates are in need of a permanent constitutional shield against the tactics of their political opponents underestimates the resourcefulness, the wisdom, and the demonstrated capacity of such leaders. ...

Editors' Notes

(1) **Query:** What approaches to constitutional interpretation did Justices White, Powell, and Stevens follow? Did differences among the justices stem merely from different interpretations of the Equal Protection Clause or more deeply from different conceptions of our political system?

(2) **Query:** None of the justices utilized an *originalist approach*. Why not? The Reconstruction Congresses created and funded a massive program of welfare and affirmative action for the newly freed slaves administered by the Freedmen's Bureau. Of what interpretive relevance is that fact?

(3) **Query:** White wrote the opinions of the Court in both *Davis* and *Rogers*. Did *Rogers* blur *Davis*'s distinction between purpose and impact? In *Rogers*, did White offer any proof of purposeful discrimination above and beyond proof of impact of past discrimination?

(4) **Query:** Were the African Americans in *Rogers* asserting a constitutional right to group or proportional representation, as Powell implies in dissent? In Mobile v. Bolden (1980), discussed in *Rogers*, Justice Stewart wrote for the plurality that the "Equal Protection Clause [does] not require proportional representation as an imperative of political organization." For a critique, see Note, "The Constitutional Imperative of Proportional Representation," 94 *Yale L.J.* 163 (1984). See also Cass R. Sunstein, "Beyond the Republican Revival," 97 *ibid*. 1539 (1988); Lani Guinier, *The Tyranny of the Majority: Fundamental Fairness in Representative Democracy* (New York: The Free Press, 1994).

(5) **Query:** Dissenting in *Bolden*, Justice Marshall protested that the plurality had failed "to distinguish two distinct lines of equal protection decisions: those involving suspect classifications and those involving fundamental rights." Where the former were involved, "a showing of discriminatory purpose is necessary to impose strict scrutiny of facially neutral classifications having a racially discriminatory impact." On the other hand, "if a classification 'impinges upon a fundamental right explicitly or implicitly protected by the Constitution ... strict judicial scrutiny' is required, regardless of whether the infringement was intentional." And, Marshall closed his logical noose, the Court had often held that the right to a vote, an undiluted vote equal to that of every other citizen, was a fundamental right. Thus the search for discriminatory purpose in voting cases was irrelevant. In *Rogers*, however, Marshall joined the majority in its quest for discriminatory purpose. Why?

(6) **Query:** Is the logic of *Rogers* limited to political groups defined by racial characteristics or does it extend to any political group? In Davis v. Bandemer (1986; p. ___, available at www.princeton.edu/aci), the Court reversed a judgment sustaining an equal protection challenge to Indiana's 1982 state apportionment on the ground that the law unconstitutionally diluted the votes of Indiana Democrats. For a plurality, White wrote that the plaintiffs (Democrats) were required to prove "both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." The plurality concluded that the plaintiffs had easily satisfied the requirement of intent, but had failed to show the requisite effects. (Plaintiffs usually have more difficulty proving intent than effects.) Powell and Stevens dissented, as they had in *Rogers*.

(7) The Constitution does not mention electoral districts for the United States House of Representatives. Federal law, however, requires members of the House to be elected by district. By contrast, all fifty states elect their United States Senators in at-large, statewide elections. What is more, many people unreflectively assume that that is just the way it has to be. For an intriguing argument for United States Senate districting, in part on the ground that it would have benefits for both racial minorities and campaign finance reform, see Terry Smith, "Rediscovering the Sovereignty of the People: The Case for Senate Districts," 75 *North Carolina L. Rev.* 1 (1996). Under Smith's proposal, each state would be permitted, though not required, to create two Senate districts.

(8) In addition to the article by Karst, which Powell cited above, p. ___, see also John Hart Ely, "The Centrality and Limits of Motivation Analysis," 15 *San Diego L.Rev.* 1155 (1978); these articles were part of a symposium on legislative motivation published in that volume. See also earlier works: Paul Brest, "Palmer v. Thompson: An Approach to the Problem of

Unconstitutional Motive," 1971 *Sup.Ct.Rev.* 95; John Hart Ely, "Legislative and Administrative Motivation in Constitutional Law," 79 *Yale L.J.* 1205 (1970), as well as ch. 6 of his later work, *Democracy and Distrust* (Cambridge: Harvard University Press, 1980); and Laurence H. Tribe, *American Constitutional Law* (2d ed.; Mineola, NY: Foundation Press, 1988), pp. 1076–1080.