10-1981

Rogers v. Lodge

Lewis F. Powell Jr.

Reversed to Affirm
(fact specific)

Decision below may not be
consistent with rationale of
Mobile (Commission Plan
of Gov't - neutrally set up)
but findings by DC distinguish
their case.
DC found "invidiously" discriminatory
purpose."

PRELIMINARY MEMORANDUM

Summer List 11, Sheet 1

No. 80-2100-AFX

ROGERS et al. (county commissioners)

v.

LODGE et al. (class of black residents)

Appeal from CA 5 (Jones, Fay; Henderson dissenting)

Federal/Civil

Timely

SUMMARY: Whether a county's system of at-large elections unconstitutionally "dilutes" the voting rights of black residents of the county.

FACTS AND PROCEEDINGS BELOW: Burke County is a large (832 sq. miles), predominantly rural county in Georgia. The population of the county is about 10,000, a slight majority of

declining. (Plaintiffs maintain there is no longer a black majority of voting age residents.) About 38% of the registered voters in the county are black.

The county is governed by a five member Board of Commissioners, and by various committees appointed by the commissioners. As mandated by state statute (Ga. Laws 1911, p.390), all five commissioners are elected at the same time, for four year terms. Candidates for commissioner must run for specific numbered posts (although there are no subdistrict residency requirements for a specific post) and be elected by majority vote. Ga. Code Ann. §§34-1015 & 1413. Run-off elections are held in the event no candidate achieves a majority. No black has ever been elected as a commissioner.

This suit was brought as a class action on behalf of all black residents of Burke County, who allege that the method of selecting commissioners dilutes the relative strength of their votes, in violation of their First, Thirteenth, Fourteenth, and Fifteenth Amendment rights. Plaintiffs sought division of the county into single member districts.

who?

The DC (C.J. Alaimo, S.D.Ga.) held that the election scheme, although racially neutral when adopted in 1911, is being maintained for "invidious purposes". In support of this conclusion, the DC made the following findings:

1) There is a history of discouraging registration of black voters in the county. Prior to passage of the Voting Rights Act, devices such as poll taxes, literacy tests, and white primaries kept registration of black voters at about 6.8% of those eligible. Prior to commencement of this suit, voters could register at only one location in the county, which made

registration difficult for the many black residents without ready access to transportation.

2) In the few instances when blacks have been candidates for commissioner, voting has proceeded largely along racial lines. Bloc voting has also been evident in elections for the city council of Waynesboro, the county seat. nothing unusually abnt Nix-nationwide

3) Blacks are virtually excluded from participation in the powerful Burke County Democratic Committee.

4) The county commissioners have been unresponsive to the needs of black residents. There have been only token appointments of blacks to county committees. Roads in the county have been paved in a racially discriminatory manner, with paving often stopping at the point where a concentration of black residences begins. The commissioners have retained symbols of the county's history of racial discrimination, such as the "coloreds" and "whites" toilet signs and the "Nigger-hook" at the county courthouse.

5) The "socio-economic" status of blacks in the county is depressed, and their level of education lags behind that of whites.

The DC concluded from the above findings that blacks were "denied access to the political process" in the county, and that plaintiffs had made out a case of unconstitutional voting dilution. It ordered that the county be divided into five districts, each of which would elect one commissioner, and adopted a districting plan submitted by plaintiffs. It further ordered a special election of the five commissioners at the same time as the Nov. 1978 general election. Prior to the 1978

election, while the case was pending before CA 5, Justice Powell granted a stay of the DC order.

HOLDING BELOW: The CA 5 affirmed the DC, holding that plaintiffs had established both Fourteenth and Fifteenth Amendment violations. The CA noted that the DC had relied heavily on a "test" for determining unconstitutional voting dilution set out in Zimmer v. McKeithen, 485 F.2d 1297 (CA5 1973), which was subsequently discredited in Mobile v. Bolden, 446 U.S. 55 (1980). (Zimmer held that unlawful voting dilution could be presumed from an "aggregate" of factors such as a minority group's lack of access to political processes, unresponsiveness of elected representatives to minority interests, and the effects of past discrimination on minority participation in the electoral process.) Nevertheless, the CA found that the DC had anticipated Mobile's explicit requirement of a demonstration of "discriminatory purpose" in voting dilution cases, and had made findings sufficient to support its conclusion that the Burke County at-large election system was being maintained for the purpose of minimizing the political impact of black voters in the county. The CA further held that while the presence of Zimmer factors in a voting dilution case is no longer determinative of a Fourteenth or Fifteenth Amendment violation, it is still "indicative" of intentional discrimination in maintenance of an at-large election system.

J. Henderson, dissenting, thought the case should be remanded to the DC for reconsideration in light of Mobile.

CONTENTIONS: Appellants contend 1) the CA erred in concluding that purposeful discrimination had been shown, and in using the Zimmer factors to create an "inference" of such

discrimination; 2) the CA erred in not remanding to the DC for further findings in light of Mobile; 3) the CA erred in holding that voting dilution can be the basis of a Fifteenth Amendment violation; 4) the doctrine of voting dilution is inapplicable to county governing bodies; 5) assuming a constitutional violation, the DC's relief is inappropriate.

Appellees contend that the CA accurately applied the principles established in Mobile, and that remand was unnecessary because the DC findings were sufficient to establish purposeful discrimination in maintenance of the election system. They maintain that appellants did not challenge the DC's factual findings before the CA. They also contend that the relief ordered was limited and reasonable, in that it does not affect the basic composition or responsibilities of the commissioners, and does not alter the structure of county government.

DISCUSSION: Jurisdiction for the appeal is established by 28 U.S.C. §1254 (2), since the CA held that the Georgia statutes governing Burke County election procedures were repugnant to the Fourteenth and Fifteenth Amendments. The case does not appear appropriate for summary disposition.

The only major issue is whether the lower courts correctly applied principles established in Mobile--and particularly the requirement of a showing of intentional discrimination--to the facts of this case. However, no opinion in Mobile commanded a majority of the Court, and this case would provide an opportunity for clarification of the principles applicable to constitutional challenges to at-large election schemes. Moreover, while the disposition of the case below was somewhat fact-specific, the facts found by the DC here seem more highly indicative of

intentional discrimination than those in Mobile. This case may be a good vehicle for further explication of the extent to which "discriminatory purpose" in voting dilution cases may be inferred from a record which lacks a "smoking gun".

An interesting wrinkle is the fact that the CA sustained the voting dilution claim even though blacks constitute a majority of the residents in the county. However, blacks constitute a minority of the registered voters in the county, a circumstance the DC found attributable to official discouragement of black voting registration. Thus, the black population majority may not be a dispositive factor.

I would note probable jurisdiction.

There is a motion to dismiss or affirm.

7/17/81 Rosenblum Opns in petition

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 80-2100

ROGERS

vs.

LODGE

CFV of SG

Mr. Justice Rehnquist

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.				✓									
Brennan, J.							✓						
Stewart, J.													
White, J.							✓						
Marshall, J.							✓						
Blackmun, J.							✓						
Powell, J.				✓									
Rehnquist, J.				✓									
Stevens, J.				✓									
O'Connor, J.				✓									

An useful & helpful memo.
See particularly ¶pp 6-12

rhf 02/19/82

Two general principles with which
9 agree - 7

Dick thinks JPS's Mobile opinion
offers guidance - 8. See JPS's Rossi
objective factors in these "vote dilution" cases:
1. Is the structure (e.g. at-large)
unusual? - 8,9
2. Impact on minority groups - 8,9
3. Presence or absence of neutral
justifications - 9

BENCH MEMORANDUM

TO: Mr. Justice Powell

FROM: Dick Fallon

DATE: February 19, 1982

RE: No. 80-2100, Rogers et al. v. Lodge et al.

Question Presented

The question is whether the plaintiffs carried their burden of proving discriminatory intent in the maintenance of an at-large electoral system in Burke County, Georgia.

ANALYSIS

In this bobtail memo I address only the central problem of this case: the criteria for identifying "discriminatory intent" behind State-structured voting districts. Viewed in isolation, I would be very surprised if this for you were a hard case.

The large principles now are clear. (1) At-large voting districts are not per se unconstitutional. E.g., City of Mobile v. Bolden, 446 U.S. 55 (1980) ("Mobile"); White v. Regester, 412 U.S. 755 (1973); Whitcomb v. Chavis, 403 U.S. 124 (1971). (2) In order to invalidate an at-large scheme under the constitution, a plaintiff must show "discriminatory intent." See Mobile, supra (plurality opinion of Stewart, J., joined by the Chief, LFP, and WHR; dissenting opinion of BRW).

Nor do I think you would find much difficulty in applying these principles to the facts of this case. In finding discriminatory intent in this case, both the district court and the court of appeals relied almost exclusively on the kinds of factors expressly held insufficient in Justice Stewart's plurality opinion in Mobile. The district court in fact decided the case in reliance on the same factors as those used by the lower courts in Mobile--the so-called Zimmer factors. See Zimmer v. McKeithen, 485 F.2d 1297 (CA5 1973), aff'd sub nom East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976). (The district court did, however, make a clear finding, not only that the factors were present, but there was "discriminatory intent.") Under the Zimmer test the "primary" factors include (1) the group's access to political processes, (2) the responsiveness of elected representatives to the

CA5 relied on Zimmer factors that we rejected in Mobile But DC did find "discriminatory intent"

group's interests, (3) the importance of the state policy supporting at-large districting, and (4) the effects of past discrimination upon the group's participation in the political system. See 485 F.2d, at 1305. The test also recognizes "secondary" or "enhancing" factors, which are more specific to a particular set of facts. In this case the court of appeals tried to save the Zimmer test by giving a very narrow reading to Mobile. It construed Mobile to hold only that proof of these factors would not create a necessary or irrebuttable presumption of discriminatory intent. See App., at 38-39. In a particular case, proof of the factors could still suffice. Thus, reasoning that the district court had only used the factors as part of a more situation-sensitive inquiry, the court of appeals found the existence of discriminatory intent on the facts presented. In my view, Justice Stewart's plurality opinion--which you joined--fairly can be read as establishing that more direct and specific proof of intent must be provided. Mere sociological facts will not do. See 446 U.S., at 73-74 (discounting the probative value of each of the four factors on which the district court had relied). Thus, in Mobile, Justice Stewart dismissed reliance on the Zimmer factors in the following way:

(1) No black ever had been elected to the city commission, but "It may be that Negro candidates have been defeated, but that fact alone does not work a constitutional deprivation." 446 U.S., at 73.

(2) The district court found that the commission discriminated against Negroes in employment, but "evidence of discrimination by white officials in Mobile is relevant only as the most tenuous and circumstantial evidence of the constitutional validity of the electoral system under which they attained their offices." Id., at 74.

(3) There was a long local history of segregation, but "past discrimination cannot, in the manner of original sin, condemn government action that is itself unlawful." Id. ?

(4) Other factors of the voting system, apparently disadvantageous to blacks, "tend naturally to disadvantage any voting minority" but were not in themselves evidence of discrimination against a particular group. Id.

Obviously these were fact-specific conclusions, which could be altered on the different facts of a different case. But in this case the same logic would seem to apply with equal validity. If there is any strong basis for distinction, it would be that the district court here found discrimination against blacks in the operation of the Democratic party--few blacks elected to attend political conventions, etc. Again, however, by the logic of Mobile this is only "attenuated" evidence of discriminatory intent in maintaining a system of voting districts in-place since 1911. Moreover, if there is discrimination in this area, the appropriate recourse may be a request for direct challenge to the actual illegalities, rather than a relatively unconnected lawsuit against the natural of the county's electoral districts. As the cited evidence does

good point

not show directly that local officials kept the voting system in order to disadvantage blacks, there is no real difficulty in knocking down this arguable basis for distinction. (In attempting to distinguish this case, appellees rely mainly on two basis: (a) Unlike Mobile, this case does not involve the invalidation of an entire form of municipal government; but this factor, while relevant to the question of the appropriate judicial remedy, is irrelevant to intent; and (b) the the district court here did not indulge the presumption that proof of the factors necessarily would prove discrimination, but saw the factors only as identifying relevant evidence; as the above discussion indicates, however, Justice Stewart's opinion--which you joined--seems to me to go further.)

Thus, to summarize, I think that your Mobile position--applied to this case--would almost surely mandate a vote to reverse. The record of local discrimination arguably is marginally worse. (In addition to the sociological and economic data, both the District Court and the Court of Appeals pointed out that a "Niggerhook" still hangs in the courthouse, and it seems clear that discrimination in the provision of municipal services remains pervasive.) On the other hand, the blacks in this case are an absolute majority of the residents of the county (about 60%), and apparently comprise slightly over 50% of those of voting age. This evidence makes it less clear how--in a "causal" sense-- blacks are disadvantaged by at-large voting.

Blacks will control

We must try to establish principles that will guide courts more effective than Mobile.

Viewing the issues more generally, however, the problem underlying this case of course is that--in a situation involving an historic form of government arguably producing "vote dilution"--there seldom if ever will be a "smoking gun." Does this mean that the Court is destined to fight out--in a long sequence of cases--whether a particular set of facts does or does not evidence deliberate intent to dilute the vote of minority groups? Should it mean that intent to "dilute" minority votes never could be proved?

The background to this case may be illuminating. In Mobile Justice White dissented, mostly on the basis of his Court opinion in White v. Regester, supra. In my view Justice White had a powerful argument from precedent. In Regester v. White the Court upheld a finding of intentional vote dilution in a redistricting case, relying entirely on a district court's inferences from the same sort of factors present both in Mobile and again in this case. In White v. Regester the Court indicated a strong disposition to trust the fact-finding of the District Court, in deference to its proximity to the relevant facts. See 412 U.S., at 769: "Based on the totality of the circumstances, the District Court evolved its ultimate assessment of the multi-member district, overlaid, as it was, on the cultural and economic realities....[It held] from its own special vantage point ... [relying on the district court's] findings, representing as they do a blend of history and an intensely local appraisal of the design and impact of the Bexar County multi-member district."

Merely by granting the present case, the Court has signalled how its view has changed since White v. Regester. No longer does it want "an intensely local appraisal of design and impact," 412 U.S., at 770. If it did, the findings of the District Court and the Court of Appeals would not need to be tested here.

As I understand it, the since White v. Regester the Court has grown wary of local appraisals out of respect for two principles:

(1) It is fundamentally the business of the States to structure their own governments. There is hardly a more intrusive role for federal courts than to tell States how to govern themselves.

(2) Even if the courts did wish to fight against vote-dilution--for it seems indisputable both (a) that the phenomenon occurs and (b) that it is morally wrong--there are no judicially manageable standards to apply in this area. Once setting down this road, it is hard to stop short of quotas and group representation.

At the same time, it still seems clear enough that the Court would need to do something in a case where there really was a "smoking gun"--unambiguous proof of discriminatory intent in a particular case.

Thus, if this case is to serve any useful law-guiding purpose, the Court would need to "articulate principles." It could not, as the plurality did in Mobile, merely say: (a) purpose must be proved specifically, rather then presumed under

some formulaic test; and (b) it is not proved here, because it is hard to prove.

Trying to view the problem from your perspective, I think two alternatives may merit your consideration:

(1) Focus on the question: Whose intent? This is an approach suggested by Justice Stewart's Mobile opinion but not emphasized. See 446 U.S., at 74 n.20: "Among the difficulties with the District Court's view of the evidence was its failure to identify the state officials whose intent it considered relevant ...." This approach would bar repeated review of "attenuated" economic and sociological evidence. And, though best applied to "action" rather than "inaction", it could be applied at least in some situations of failure to act. Cf. your opinion in Arlington Heights v. Metropolitan Housing Dev. Corp. 429 U.S., at 264.

(2) Move in the direction of Justice Stevens's opinion in Mobile. At first blush, Justice Stevens seems to take a position absolutely antithetical to that of the plurality. Like the majority he distinguishes cases of "vote dilution" from cases involving direct barriers to voting--a helpful and important distinction, for--as he emphasizes--the difficulty of proof should be very different as between them. Then, with regard to "vote dilution" cases, he says that subjective discriminatory intent is not relevant. See 446 U.S., at 90. Justice Stevens prefers rather to emphasize three "objective" factors: (1) the "routineness" of a political decision--the more unusual a voting structure, the more suspect; (2) the

impact on minority groups; and (3) the presence or absence of a neutral justification.

In my view the interest of Justice Stevens's approach lies in the objective factors that he chooses. Upon examination, it becomes plain that each is most important as an "index" to "intent." There is no reason to care about the unusual or non-routine shape of a voting district--as Justice Stevens does--unless you think that a very peculiar shape is likely to indicate ulterior purposes. Nonetheless, in an area of this delicacy in the federal system, it may be preferable to talk about "odd shapes" rather than "corrupt" or "bigoted" legislators.

Without agreeing with Justice Stevens that "intent" should be abandoned as the ultimate criterion, I think that his three-factor approach might provide the basis for some positive guidance from this Court to the lower courts. In other words, with appropriate references to the significance of context, it might be helpful to identify and suggest the central relevance of factors directly involving the structure of the voting scheme--factors such as "innocent" or "suspect" appearance, and the presence or absence of a neutral justification. As noted above, in Mobile the plurality criticized the Zimmer test as drawing "attenuated" inferences--inferences from evidence, such as distributions of wealth and other benefits, not on their face related to the question in issue. Emphasis on more direct factors would alleviate this concern. These factors also would provide a presumption in favor of upholding at-large electoral

districts. As emphasized in Mobile in the opinions both of Justices Stewart and Stevens, they are very common. See 446 U.S., at 60 n.7: "According to the 1979 Municipal Yearbook, most municipalities over 25,000 people conducted at-large elections of their city commissions or council members as of 1977."

Finally, I think that this approach is somwhat analogous to that of your opinion in Arlington Heights, supra. See 429 U.S., at 266-268: "The historical background is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes.... Departures from the normal procedural sequence also might afford evidence.... Substantive departures too may be relevant."

To complete the reference to Arlington Heights, your opinion there also suggested another "backstop" safeguard against judicial interference with the decisionmaking of other bodies. "Proof that the decision ... was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered." 429 U.S., at 27--271 n.21.

If the Court were interested, it also would be possible to combine the approaches that I have cited as alternatives. In a combined approach, the Court could (a) emphasize the question whose intent is being challenged as discriminatory and (b)

refer to certain "objective" factors as having a preferred place in the scheme of proof, possibly then (c) allowing proof that a decision motivated in part by discriminatory purpose would have been reached for independent reasons.

An unrelated concluding word: In this case the Court of Appeals embraced the findings of the district court as "not clearly erroneous." As I understand it, the Court opinion in Swint--assigned but not yet circulated--will hold that this is the correct standard. If this Court does wish to reverse here, it therefore must emphasize that there is a legal basis for the decision. This simply could be that the factors relied on were too attenuated, as a matter of law, to support an inference of the fact of discriminatory intent. Cf. Warth v. Seldin (although injury was pleaded as a fact, causal chain was too attenuated as a matter of law to support the alleged conclusion of fact).

80-2100 Rogers v Lodge 2/22/82

1. CA5, contrary to our decision in Mobile, applied the same Zimmer factors we rejected to infer intent: e.g. no blacks elected, history of discouraging registration (~~from 1867 to 5 months~~) prior to Voting Rts Act, virtual exclusion from Democratic Party, the social-economic status,

2. Two general principles are important:
(i) A state, not fed. court, has primary resp. to structure local govt.
(ii) No limiting principle to deciding that type of case (a "vote dilution" rather than a "redistricting" case)
As noted in Mobile, many "groups" can make these claims. Proportional representation of groups is not our system.

3. Other relevant - essentially objective factors - that should be considered:
Adopted in 1911
(i) Is the system facially neutral
(ii) Are elections at ~~large~~ common.
(iii) "Whose intent" is relevant?
(a) The officials who have retained the system; those currently in office; Democratic leaders.??
~~(b)~~

~~Henley v. Finley~~
Hunkler Finley (CA4) - 11/17/81) Columbia S.C.)

89-2100 AGGERS v. LOOKS

Argued 3/21/90

Lovevett (cont)

§2 of Voting Rts Act does not adopt ~~a~~ disparate impact analysis. Congress expressly did this in §3, 4 & 5 of Act.

CA5 in this case rejected this argument now made by Resp., & there was no X-appeal. (See n ?

Other courts also have rejected this reading of §2

(Read transcript of Lovevett's discussion of this issue. He is persuasive)

Walbert (Resp)

Blacks excluded from "political process". This is the key to this type of case.

J P S asked whether the alleged "exclusion from political process" could be remedied? If there had been a denial of voting, why did it count remedy this? (What about §5)

Whitbeck (cont.)

[redacted]

GRANT
Schlueter

Enclosed to Grant — if, as I recall, we usually do this. We will probably decide the case before

February 26, 1982 Conference
List 3, Sheet 4

No. 80-2100

ROGERS, et al.

v.

LODGE, et al.

Motion of Appellants for Leave to File a Delayed Reply Brief

Reply Brief is filed.

SUMMARY: Apps move to file on or before March 5, 1982 a "reply brief" in response to briefs filed earlier by the appees and four civil rights organizations as amici curiae. Oral arguments were heard in this case on Tuesday, February 23, 1982.

CONTENTIONS: Noting that a busy trial schedule precluded filing a reply brief earlier, apps state that appees and amici have filed briefs totaling almost 200 pages and apps have been limited to 50 pages; in addition, the appees' brief contains a statement of facts grossly mistaking certain facts and "distorted extracts quoted out of context." (Motion at 1).

I would be inclined to Deny. A bad precedent. No strong reasons are asserted.

RF

DISCUSSION: Under Rule 35.3 of this Court's Rules, a "reply brief will be received no later than one week before the date of oral argument, and only by leave of court thereafter." Any reply brief was therefore due on February 16, 1982. However, Rule 35.6 allows for filing briefs after arguments are heard. In this case, it seems appropriate to receive the apps' brief which addresses the appees' and amici briefs which according to the apps raise issues in addition to those argued by the parties.

The motion to file a brief on or before March 5, 1982 should be granted.

There is no response.

2/24/82 Schlueter

PJC

Schlueter

G
Rule permits
Ct. to grant

SUPPLEMENTAL MEMORANDUM

February 26, 1982 Conference
List 3, Sheet 4

No. 80-2100

ROGERS, et al.

v.

LODGE, et al.

Motion of Appellants for Leave to File a Delayed Reply Brief

SUMMARY AND CONTENTIONS: Appees have filed a response to the apps' motion to file a reply brief;[1] they argue that: (1) The apps have asserted no grounds for filing the brief. (2) Being in trial for two months is insufficient reason for not filing a reply brief earlier. (3) It is the apps' brief, not the appees', which contains distorted material. (4) Appees were earlier denied permission to file a brief in excess of 50 pages; fairness requires that apps' motion be denied. (5) Apps' motion is not timely.

[1]The motion was addressed in a Legal Office memo on February 24, 1982.

Grant. The reply can only assist the Court.

jw

DISCUSSION: As noted in the original Legal Office memo, the Rules of this Court permit late Reply Briefs (by leave of the Court) and also briefs following oral argument. However demonstrated in this instance, it remains appropriate to permit the appe to file a reply brief on or before March 3, 1982.

2/25/82 Schlueter

EJC

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

Argued ....., *19*... *Assigned* ....., *19*... No. 80-2100

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

ROGERS

vs.

LODGE

Motion of appellants for leave to file a delayed reply brief.

G

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.										✓			
Brennan, J.										✓			
White, J.										✓			
Marshall, J.											✓		
Blackmun, J.										✓			
Powell, J.										✓			
Rehnquist, J.											✓		
Stevens, J.										✓			
O'Connor, J.											✓		

No. 80-2100 Rogers v. Lodge Rev 2 Pass 1 (CJ) Conf. 2/26/82

The Chief Justice Passed

Problem here is whether places of reg. & voting were intentionally located to discourage voting. If so holding could be sustained. Could agree to remand on Issue Q.

Justice Brennan Aff in.

BRW circulation of 5 writ makes clear that dissent is factual, & these two court rule applies.

Justice White Aff'm

Argument is that DC & CA 5 applied erroneous standards. But BRW disagrees. Agree with WJB.

Would not remand on CJ's proposal.

* ~~To state~~.

Afna

Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: 28 APR 1982

Recirculated: _____

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-2100

QUENTIN ROGERS, ET AL., APPELLANTS *v.*
HERMAN LODGE ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[April ——, 1982]

JUSTICE WHITE delivered the opinion of the Court.

The issue in this case is whether the at-large system of elections in Burke County, Georgia violates the Fourteenth Amendment rights of Burke County's black citizens.

I

Burke County is a large, predominately rural county located in eastern Georgia. Eight hundred and thirty-one square miles in area,[1] it is approximately two-thirds the size of the State of Rhode Island. According to the 1980 Census, Burke County had a total population of 19,349, of whom 10,385, or 53.6%, were black.[2] The average age of blacks living there is lower than the average age of whites and therefore whites constitute a slight majority of the voting age population. As of 1978, 6,373 persons were registered to

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[1] United States Department of Commerce, Bureau of the Census, County and City Data Book 1977, p. 90.

[2] United States Dept. of Commerce, Bureau of the Census, 1980 Census of Population and Housing, PHC80-V-12. March 1981, p. 5. In 1930, Burke County had a total population of 29,224, of whom 12,698 or 78 percent were black. United States Dept. of Commerce, Bureau of the Census, II Characteristics of the Population, Pt. 2, p. 229 (1943). The percentage of blacks in the total population of Burke County has steadily diminished over the last 50 years.

vote in Burke County, of whom 38% were black.[1]

The Burke County Board of Commissioners governs the county. It was created in 1911, see Georgia Laws 1911 at 310–311, and consists of 5 members elected at large to concurrent 4-year terms by all qualified voters in the county. The county has never been divided into districts, either for the purpose of imposing a residency requirement on candidates or for the purpose of requiring candidates to be elected by voters residing in a district. In order to be nominated or elected, a candidate must receive a majority of the votes cast in the primary or general election, and a runoff must be held if no candidate receives a majority in the first primary or general election. Ga. Code §34–1513 (1980). Each candidate must run for a specific seat on the Board, Ga. Code §34–1015 (1980), and a voter may vote only once for any candidate. No Negro has ever been elected to the Burke County Board of Commissioners.

Eight black citizens of Burke County filed this suit in 1976 in the United States District Court for the Southern District of Georgia. The suit was brought on behalf of all black citizens in Burke County. The class was certified in 1977. The complaint alleged that the County's system of at-large elections violated appellees' First, Thirteenth, Fourteenth and Fifteenth Amendment rights, as well as their rights under 42 U. S. C. §§ 1971, 1973, and 1983 by diluting the voting power of black citizens. Following a bench trial at which both sides introduced extensive evidence, the court issued an order on September 28, 1978 stating that appellees were entitled to prevail and ordering that Burke County be divided into 5 districts for purposes of electing County Commissioners. App. to Juris. Statement 62a. The court later issued detailed findings of fact and conclusions of law in which it stated that while the present method of electing County Commissioners was "racially neutral when adopted, [it] is being maintained

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[1] App. to Juris. Statement 72a.

for invidious purposes" in violation of appellees' Fourteenth and Fifteenth Amendment rights. *Id.*, at 71a, 96a.

The Court of Appeals affirmed *sub nom. Lodge* v. *Buxton*, 639 F. 2d 1358 (CA5 1981). It stated that while the proceedings in the District Court took place prior to the decision in *Mobile* v. *Bolden*, 446 U. S. 55 (1980), the District Court correctly anticipated *Mobile* and required appellees to prove that the at-large voting system was maintained for a discriminatory purpose. 639 F. 2d, at 1375–1376. The Court of Appeals also held that the District Court's findings not only were not clearly erroneous, but its conclusion that the at-large system was maintained for invidious purposes was "virtually mandated by the overwhelming proof." *Id.*, at 1380. We noted probable jurisdiction, —— U. S. —— (1981), and now affirm.[1]

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 overrepresent the winning party," *Whitcomb* v. *Chavis*, 403 U. S. 124, 158–159 (1971), this Court has repeatedly held that they are not unconstitutional *per se*.

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[1]The District Court's judgment was stayed pending appeal to the Court of Appeals. 439 U. S. 948 (1978). The Court of Appeals stayed its mandate on April 6, 1981, pending disposition of the case here.

Mobile v. *Bolden*, *supra*, at 66; *White* v. *Regester*, 412 U. S. 755, 765 (1973); *Whitcomb* v. *Chavis*, *supra*, at 142. 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* v. *Chavis*, *supra* at 149; *White* v. *Regester*, *supra*, at 765. 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*, 426 U. S. 229 (1976), and *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252 (1977), made it clear that in order for the Equal Protection Clause to be violated, "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." *Washington* v. *Davis*, *supra*, at 240. Neither case involved voting dilution, but the Court observed that the requirement that racially discriminatory purpose or intent be proven applies to voting cases by relying upon, among others, *Wright* v. *Rockefeller*, 376 U. S. 52 (1964), a districting case, to illustrate that a showing of discriminatory intent has long been required in *all* types of cases arising under the Equal Protection Clause. *Arlington Heights*, *supra*, at 265; *Washington* v. *Davis*, *supra*, at 240.

Arlington Heights and *Washington* v. *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. *Arlington Heights*, *supra*, at 265; *Washington* v. *Davis*, *supra*, at 242. However, both cases recognized that discriminatory intent need not be proven by direct evidence. "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." *Ibid.* Thus deter-

mining the existence of a discriminatory purpose "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, *supra*, at 266.

In *Mobile* v. *Bolden*, *supra*, the Court was called upon to apply these principles to the at-large election system in Mobile, Alabama. Mobile is governed by three commissioners who exercise all legislative, executive, and administrative power in the municipality. 446 U. S., at 59. Each candidate for the City Commission runs for one of three numbered posts in an at-large election and can only be elected by a majority vote. *Ibid.* Plaintiffs brought a class action on behalf of all Negro citizens of Mobile alleging that the at-large scheme diluted their voting strength in violation of several statutory and constitutional provisions. The District Court concluded that the at-large system "violates the constitutional rights of the plaintiffs by improperly restricting their access to the political process," 423 F. Supp. 384, 399 (SD Ala. 1976), and ordered that the commission form of government be replaced by a mayor and a nine-member City Council elected from single-member districts. *Id.*, at 404. The Court of Appeals affirmed. 571 F. 2d 238 (CA5 1978). This Court reversed.

Justice Stewart, writing for himself and three other Justices, noted that to prevail in their contention that the at-large voting system violates the Equal Protection Clause of the Fourteenth Amendment, plaintiffs had to prove the system was "conceived or operated as [a] purposeful devic[e] to further racial . . . discrimination." 446 U. S., at 66, *quoting* *Whitcomb* v. *Chavis*, 403 U. S., at 149.[5] Such a require-

[5] With respect to the Fifteenth Amendment, the plurality held that the Amendment prohibits only direct, purposefully discriminatory interference with the freedom of Negroes to vote. "Having found that Negroes in Mobile 'register and vote without hindrance,' the District Court and Court of Appeals were in error in believing that the appellants invaded the protec-

ment "is simply one aspect of the basic principle that only if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment, 446 U. S., at 66, and *White* v. *Regester* is consistent with that principle. *Id.*, at 69. Another Justice agreed with the standard of proof recognized by the plurality. *Id.*, at 101 (WHITE, J., dissenting).

The plurality went on to conclude that the District Court had failed to comply with this standard. The District Court had analyzed plaintiffs' claims in light of the standard which had been set forth in *Zimmer* v. *McKeithen*, 485 F. 2d 1297 (CA5 1973), aff'd on other grounds *sub nom. East Carroll Parrish School Board* v. *Marshall*, 424 U. S. 636 (1975) (*per curiam*).[6] *Zimmer* set out a list of factors[7] gleaned from *Whitcomb* v. *Chavis*, *supra*, and *White* v. *Regester*, *supra*,

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tion of [the Fifteenth] Amendment in the present case." *Mobile* v. *Bolden*, 446 U. S. 55, 65 (1980). Three Justices disagreed with the plurality's basis for putting aside the Fifteenth Amendment. *Id.*, at 84 n. 3 (STEVENS, J., concurring); *Id.*, at 102 (WHITE, J., dissenting); *Id.*, at 125–135 (MARSHALL, J., dissenting). We express no view on the application of the Fifteenth Amendment to this case.

The plurality noted that plaintiffs' claim under § 2 of the Voting Rights Act, 79 Stat. 437, as amended, 42 U. S. C. § 1973, added nothing to their Fifteenth Amendment claim because the "legislative history of § 2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself." *Id.*, at 60–61.

[6]We specifically affirmed the judgment below "without approval of the constitutional views expressed by the Court of Appeals." 424 U. S., at 638.

[7]The primary factors listed in *Zimmer* include a lack of minority access to the candidate selection process, unresponsiveness of elected officials to minority interests, a tenuous state policy underlying the preference for multi-member or at-large districting, and the existence of past discrimination which precludes effective participation in the elector process. 485 F. 2d, at 1305. Factors which enhance the proof of voting dilution are the existence of large districts, anti-single shot voting provisions, and the absence of any provision for at-large candidates to run from geographic subdistricts. *Ibid.*

that a court should consider in assessing the constitutionality of at-large and multimember district voting schemes. Under *Zimmer*, voting dilution is established "upon proof of the existence of an aggregate of these factors." 485 F. 2d, at 1305.

The plurality in *Mobile* was of the view that *Zimmer* was "decided upon the misunderstanding that it is not necessary to show a discriminatory purpose in order to prove a violation of the Equal Protection Clause—that proof of a discriminatory effect is sufficient." 446 U. S., at 71. The plurality observed that while "the presence of the indicia relied on in *Zimmer* may afford some evidence of a discriminatory purpose," the mere existence of those criteria is not a substitute for a finding of discriminatory purpose. *Id.*, at 73. The District Court's standard in *Mobile* was likewise flawed. Finally, the plurality concluded that the evidence upon which the lower courts had relied was "insufficient to prove an unconstitutionally discriminatory purpose in the present case." *Ibid.* JUSTICE STEVENS rejected the intentional discrimination standard but concluded that the proof failed to satisfy the legal standard that in his view was the applicable rule. He therefore concurred in the judgment of reversal. Four other Justices, however, thought the evidence sufficient to satisfy the purposeful discrimination standard. One of them, JUSTICE BLACKMUN, nevertheless concurred in the Court's judgment because he believed an erroneous remedy had been imposed.

Because the District Court in the present case employed the evidentiary factors outlined in *Zimmer*, it is urged that its judgment is infirm for the same reasons that led to the reversal in *Mobile*. We do not agree. First, and fundamentally, we are unconvinced that the District Court in this case applied the wrong legal standard. Not only was the District Court's decision rendered a considerable time after *Washington* v. *Davis* and *Arlington Heights*, but the trial judge also had the benefit of *Nevett* v. *Sides*, 571 F. 2d 209

(CA5 1978), where the Court of Appeals for the Fifth Circuit assessed the impact of *Washington* v. *Davis* and *Arlington Heights* and concluded that "a showing of racially motivated discrimination is a necessary element in an equal protection voting dilution claim . . ." 571 F. 2d, at 219. The court stated that "[t]he ultimate issue in a case alleging unconstitutional dilution of votes of a racial group is whether the districting plan under attack exists because it was intended to diminish or dilute the political efficacy of that group." *Id.*, at 226. The Court of Appeals also explained that although the evidentiary factors outlined in *Zimmer* were important considerations in arriving at the ultimate conclusion of discriminatory intent, the plaintiff is not limited to those factors. "The task before the fact finder is to determine, under all the relevant facts, in whose favor the 'aggregate' of the evidence preponderates. This determination is peculiarly dependent upon the facts of each case." *Id.*, at 224.

The District Court referred to *Nevett* v. *Sides* and demonstrated its understanding of the controlling standard by observing that a determination of discriminatory intent is "a requisite to a finding of unconstitutional vote dilution" under the Fourteenth and Fifteenth Amendments. App. to Juris. Statement 68a. Furthermore, while recognizing that the evidentiary factors identified in *Zimmer* were to be considered, the District Court was aware that it was "not limited in its determination only to the *Zimmer* factors" but could consider other relevant factors as well. *Id.*, at 70a. The District Court then proceeded to deal with what it considered to be the relevant proof and concluded that the at-large scheme of electing commissioners, "although racially neutral when adopted, is being *maintained* for invidious purposes." *Id.*, at 71a. That system "while neutral in origin . . . has been subverted to invidious purposes." *Id.*, at 90a. For the most part, the District Court dealt with the evidence in terms of the factors set out in *Zimmer* and its progeny, but as the Court of Appeals stated:

> "Judge Alaimo employed the constitutionally required standard . . . [and] did not treat the *Zimmer* criteria as absolute, but rather considered them only to the extent they were relevant to the question of discriminatory intent." 639 F. 2d, at 1376.

Although a tenable argument can be made to the contrary, we are not inclined to disagree with the Court of Appeals' conclusion that the District Court applied the proper legal standard.

III

A

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. In *White* v. *Regester*, 412 U. S., at 769–770, we stated that we were not inclined to overturn the District Court's factual findings, "representing as they do a blend of history and an intensely local appraisal of the design and impact of the Bexar County multimember district in the light of past and present reality, political and otherwise." *See also Columbus Board of Education* v. *Penrick*, 443 U. S. 449, 468 (1979) (CHIEF JUSTICE BURGER, concurring). Our recent decision in *Pullman-Standard* v. *Swint*, —— U. S. —— (1982), emphasizes the deference Fed. Rule Civ. Proc. 52 requires reviewing courts to give a trial court's findings of fact. "Rule 52 broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings. . . ." Op. at 13. The Court held that the issue of whether the differential impact of a seniority system resulted from an intent to discriminate on racial grounds "is a pure question of fact, subject to Rule 52's clearly erroneous standard." Op. at 14. The *Swint* Court also noted that issues of intent are commonly treated as fac-

tual matters. *Id.*, at 14–15. We are of the view that the same clearly-erroneous standard applies to the trial court's finding in this case that the at-large system in Burke County is being maintained for discriminatory purposes, as well as to the court's subsidiary findings of fact. The Court of Appeals did not hold any of the District Court's findings of fact to be clearly erroneous, and this Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts. See, *e. g.*, *Berenyi* v. *Information Director*, 385 U. S. 630, 635 (1967); *Blau* v. *Lehman*, 368 U. S. 403, 408–409 (1962); *Graver Mfg. Co.* v. *Linde Co.*, 336 U. S. 271, 275 (1949). We agree with the Court of Appeals that on the record before us, none of the factual findings are clearly erroneous.

B

The District Court found that blacks have always made up a substantial majority of the population in Burke County, App. to Juris. Statement 66a n. 3, but that they are a distinct minority of the registered voters. *Id.*, at 71a–72a. There was also overwhelming evidence of bloc voting along racial lines. *Id.*, at 72a–73a. 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. Because it is sensible to expect that at least some blacks would have been elected in Burke County, the fact that none have ever been elected is important evidence of purposeful exclusion. See *White* v. *Regester*, *supra*, at 766.

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*, 430 U. S. 144, 167 (1977); *White* v. *Regester*, *supra*, at 765–766; *Whitcomb* v. *Chavis*, *supra*, at 149; see also *Mobile* v. *Bolden*, *supra*, at 66 (plurality opinion). 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 supporting evidence was organized primarily around the factors which *Nevett* v. *Sides*, *supra*, had deemed relevant to the issue of intentional discrimination. These factors were primarily those suggested in *Zimmer* v. *McKeithen*, *supra*.

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 by means such as literacy tests, poll taxes, and white primaries. The result was that "Black suffrage in Burke County was virtually non-existent." App. to Juris. Statement 71a. 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. *Id.*, at 72a. On that basis the District Court inferred that "past discrimination has had an adverse effect on black voter registration which lingers to this date." *Ibid.* 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. *Id.*, at 74a.

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. Until this law suit was filed, there had never been a black member of the County Executive Committee of the Democratic Party.

There were also property ownership requirements that made it difficult for blacks to serve as chief registrar in the county. There had also 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. *Id.*, at 74–76a. 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, particularly in cases such as this one where the evidence shows that discriminatory practices were commonly utilized, that they were abandoned when enjoined by courts or made illegal by civil rights legislation, and that they were replaced by laws and practices which, though neutral on their face, serve to maintain the status quo.

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,[8] 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 do-

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[8] The Court of Appeals held that "proof of unresponsiveness by the public body in question to the group claiming injury" is an *essential* element of a claim of voting dilution under the Fourteenth Amendment. 639 F. 2d, at 1375. Under our cases, however, unresponsiveness is an important element but only one of a number of circumstances a court should consider in determining whether discriminatory purpose may be inferred.

nated public funds for the purchase of band uniforms. *Id.*, at 77a–82a.

The District Court also considered the depressed socio-economic status of Burke County blacks. It found that proportionately more blacks than whites have incomes below the poverty level. *Id.*, at 83a. Nearly 53 per cent of all black families living in Burke County had incomes equal to or less than three-fourths of a poverty-level income. *Ibid.* Not only have blacks completed less formal education than whites, but the education they have received "was qualitatively inferior to a marked degree." *Id.*, at 84a. Blacks tend to receive less pay than whites, even for similar work, and they tend to be employed in menial jobs more often than whites. *Id.*, at 85a. Seventy-three per cent of houses occupied by blacks lacked all or some plumbing facilities; only 16 per cent of white-occupied houses suffered the same deficiency. *Ibid.* The District Court concluded that the depressed socio-economic status of blacks results in part from "the lingering effects of past discrimination." *Ibid.*

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 for invidious purposes." *Id.*, at 90a. As a practical matter, maintenance of the state statute providing for at-large elections in Burke County is determined by Burke County's state representatives, for the legislature defers to their wishes on matters of purely local application. The court found that Burke County's state representatives "have retained a system which has minimized the ability of Burke County blacks to participate in the political system." *Ibid.*

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* v. *Chavis*, 403 U. S., at 143–144. 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." *Id.*, at 91a. The court concluded, as a matter of law, that the size of the county tends to impair the access of blacks to the political process. *Id.*, at 92a. The majority vote requirement, Ga. Code §34–1513 (1980), was found "to submerge the will of the minority" and thus "deny the minority's access to the system." *Id.*, at 92a. The court also found the requirement that candidates run for specific seats, Ga. Code §34–1015 (1980), enhances respondent'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." *Id.*, at 93a.

None of the District Court's findings underlying its ultimate finding of intentional discrimination appears to us to be clearly erroneous; and as we have said, we decline to overturn the essential finding of the District Court, agreed to by the Court of Appeals, that the at-large system in Burke County has been maintained for the purpose of denying blacks equal access to the political processes in the county. As in *White* v. *Regester*, 412 U. S., at 767, the District Court's findings were "sufficient to sustain [its] judgment . . . and, on this record, we have no reason to disturb them."

IV

We also find no reason to overturn the relief ordered by the District Court. Neither the District Court nor the Court of Appeals discerned any special circumstances that would militate against utilizing single-member districts. Where "a constitutional violation has been found, the remedy does not 'exceed' the violation if the remedy is tailored to cure the 'condition that offends the Constitution.'" *Milliken* v. *Brad-*

ley, 433 U. S. 267, 282 (1977), *quoting Milliken* v. *Bradley*, 418 U. S. 717, 738 (1974).[3]

The judgment of the Court of Appeals is

Affirmed.

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[3]Appellants contend that the District Court should not have divided Burke County into 5 districts but should have allowed appellants to devise a plan for subdividing the County and to submit their plan for preclearance under § 5 of the Voting Rights Act, 79 Stat. 439, as amended, 42 U. S. C. § 1973c. This contention was not raised in the Court of Appeals and was not addressed by that court. We therefore do not address it. See *Adickes* v. *Kress & Co.*, 398 U. S. 144, 147 n. 2 (1970).

Appellants also contend that the doctrine of unconstitutional dilution of voting rights arising from an at-large election system does not apply to county governing bodies. We find no merit to this contention, having previously affirmed a judgment that at-large elections for the governing body of a parish (county) unconstitutionally diluted black voting strength. *East Carroll Parish School Board* v. *Marshall*, 424 U. S. 636 (1976).

f

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 29, 1982

RE: No. 80-2120 Rogers v. Lodge

Dear Byron:

Please join me.

Sincerely,

Bill

Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE JOHN M. HARLAN

April 23, 1962

Re: 83-2180 - Rogers v. Lodge

Dear Byron:

In due course I will circulate a dissent.

Respectfully,

Justice White

Copies to the Conference

April 29, 1981

81-5185 Rogers v. Lodge

Dear Byron:

I will await John's dissent.

Sincerely,

Justice White

lfp/ss

cc: The Conference

April 29, 1982

Re: 80-2100 - Rogers v. Lodge

Dear Byron:

In due course I will circulate a dissent.

Respectfully,

Justice White

Copies to the Conference

You might "announce" this dissent.

RF

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 3, 1982

Re: No. 81-2135 - Rogers v. Lodge

Dear Byron:

Please join me.

Sincerely,

Lewis

Justice White

cc: The Conference

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 6, 1982

Re: No. 80-2109 - Quentin Rogers v. Herman Lodge

Dear Byron:

Please join me.

Sincerely,

T.M.

Justice White

cc: The Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

June 2, 1982

Re: No. 80-2100 - Rogers v. Lodge

Dear Byron:

I join.

Regards,

WEB

Justice White

Copies to the Conference

and June 19, 1982

No. 80-2100. Rogers v. Lodge

Justice Powell, dissenting.

I

Mobile v. Bolden, 446 U.S. 55 (1980), established that an at-large voting system must be upheld against constitutional attack unless maintained for a discriminatory purpose. In Mobile we reversed a finding of unconstitutional vote dilution because the lower courts had relied on factors insufficient as a matter of law to establish discriminatory intent. See 446 U.S., at 73 (plurality opinion of Stewart, J.). The lower courts in

this case based their finding of unconsitutional discrimination on the same factors held insufficient in Mobile. Yet the Court now finds the conclusion unexceptionable. The Mobile plurality also affirmed that the concept of "intent" was no mere fiction, and held that the District Court had erred in "its failure to identify the state officials whose intent it considered relevant." Although the lower courts did not answer that question in this case, the Court today affirms their decision.

Whatever the wisdom of Mobile, the Court's opinion cannot be reconciled persuasively with that case. ~~Despite~~ There ~~may~~ are some ~~Allowing for~~ variances in the largely sociological evidence presented in the two cases, Mobile held that this kind of evidence was not enough. Such evidence, we found in Mobile, did not merely fall short, but "fell far

short[,] of showing that [an at-large electoral scheme was] 'conceived or operated [as a] purposeful devic[e] to further racial ... discrimination.'" Id., at 70, quoting Whitcomb v. Chavis, 403 U.S., at 149. Because I ~~still~~ believe that Mobile ~~was correctly decided~~, I dissent.

II

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." Ante, at 9. According to the Court, we ~~should~~ should view findings of discriminatory intent as factual conclusions entitled to the most substantial deference, "'representing as they do a blend

of history and ... intensely local appraisal of the design and impact of [a] multimember district in the light of past and present reality, political and otherwise." Ibid., at 9, quoting White v. Regester, 412 U.S., at 769-770.

50

In this case as in Mobile, Justice STEVENS argues that this approach is seriously flawed. Although I agree with much of what he says, I write to note my areas of divergence from his insightful analysis.

A 55

As I understand it, Justice STEVENS's attack on the Court's approach can be seen as resting on three principles with which I am in fundamental agreement.

First, it is appropriate to distinguish between "state action that inhibits an individual's right to vote 60

(STEVENS, J., concurring); see also post, at 6-9.

and state action that affects the political strength of various groups." Mobile v. Bolden, 55, 446 U.S., at 83. Under this distinction, this case is fundamentally different from cases involving direct barriers to voting. There is no claim here that blacks may not register freely and vote for whom they choose. This case also differs from one-man, one-vote cases, in which districting practices make a person's vote less weighty in some districts than in others.

Second, I agree with Justice STEVENS that vote dilution cases of this kind are analytically indistinguishable from other gerrymanders. "By definition gerrymandering involves drawing district boundaries ~~for using multimember districts in at-large elections~~ in order to maximize the voting strength of those loyal to

-- especially in their remedial aspect -- See post, at 28.

actions to redress

Dick - this is not clear to me

Cf. Mobile, supra, at 80-82 (Blackmun, J., concurring).

the dominant political faction and to minimize the strength of those opposed to it." ~~446 U.S.~~ Mobile, Supra, at 87 (STEVENS, J., concurring).

Finally, Justice STEVENS is correct that the standard used to identify unlawful racial discrimination in this area must be defined in terms that are judicially manageable and ~~appropriate~~ renewable. See post, at 16-17. The federal judiciary should not undertake to restructure state political systems in the absence of compelling reasons of both law and fact. It should be especially ~~loathe~~ reluctant to do so in this inherently political area, where the identification of a seeming violation in no way suggests an enforceable judicial remedy--or at least none short of quotas ~~and a system~~ of ~~proportional~~ group representation. Any such system, of course, would be antithetical to the principles of democratic elections.

Justice STEVENS would accommodate these principles by

holding that "intent" is irrelevant to the establishment of a case of racial vote dilution under the Fourteenth Amendment. ~~This suggestion I cannot accept.~~ "The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." Washington v. Davis, ~~, at~~ 242. 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 ~~Justice STEVENS~~ that what he calls "objective" factors should ~~form the core~~ of inquiry in ~~this~~ vote-dilution case. Unlike the ~~factors~~ on which the lowers courts relied in this case and in Mobile, the factors identified by Justice STEVENS are direct, reliable, and ~~unattenuated~~ indices of discriminatory

intent. ~~Moreover,~~ primary reliance on these factors would help to avoid federal inquiries into the subjective thought processes of local officials, at least until objective evidence had been presented ~~from which a~~ presumption of intent ~~might be created~~.

In the absence of proof of discrimination by reliance on the kind of objective factors identified by Justice STEVENS, I would hold that the factors cited by the Court of Appeals were too attenuated as a matter of law to support an inference of discriminatory intent. I would reverse its judgment on that basis.

ROGERS) BAZZ-POW

This determination decides the case. It is a conclusion of law, not a finding of fact. As was true in Mobile, the opinions of the courts below have made few findings of fact based on identifiable objective evidence. In elevating ultimate conclusion of law to the status of controlling factual findings, entitled to the most substantial deference by appellate courts, this Court relies on White v. Regester, 412 U.S., at 765-770. That was a very different case, as was made clear by Mobile.

Note to Dick: Do you think the foregoing is fair? Also, please check to see whether I am correct in thinking that Mobile distinguished White v. Regester.

Certainly it did not follow it. I must say, however, that there is language in Register that is not easy to reconcile.

We had a Title VII case this Term (Nee in Swint) from CA5 in which we rejected that Circuit's distinction between facts and "ultimate facts". Is there anything in that opinion that is relevant to this case? Perhaps not, but take a look.

I like your draft, and suggest that we put it in line with the print shop even though JPS has not circulated. I doubt that we will have to make many changes.

Dick - Subject to my minor editing, lets (1) circulate an Alex draft & (2) go to the Printer. 6/23

Thank you for this appropriately brief but forceful draft of what I think is sound doctrine in the interest of all concerned.

June 23, 1982

First Draft

No. 80-2100, Rogers v. Lodge

Justice Powell, dissenting.

I

Mobile v. Bolden, 446 U.S. 55 (1980), establishes that an at-large voting system must be upheld against constitutional attack unless maintained for a discriminatory purpose. In Mobile we reversed a finding of unconstitutional vote dilution because the lower courts had relied on factors insufficient as a matter of law to establish discriminatory intent. See 446 U.S., at 73 (plurality opinion of Stewart, J.). The ~~lower courts in~~ District Court and the Court of Appeals, in this case, based their finding of unconsitutional discrimination on the same factors held insufficient in Mobile. Yet the Court now finds their conclusion unexceptionable. The Mobile plurality also affirmed that

Dick - are you know DCs & CAs don't like to called "lower"

the concept of "intent" was no mere fiction, and held that the District Court had erred in "its failure to identify the state officials whose intent it considered relevant." Id., at 74 n. 20. Although the ~~lower~~ courts below did not answer that question in this case, the Court today affirms their decision.

Whatever the wisdom of Mobile, the Court's opinion cannot be reconciled persuasively with that case. There are some variances in the largely sociological evidence presented in the two cases. But Mobile held that this kind of evidence was not enough. Such evidence, we found in Mobile, did not merely fall short, but "fell far short[,] of showing that [an at-large electoral scheme was] 'conceived or operated [as a] purposeful devic[e] to further racial ... discrimination.'" Id., at 70 (emphasis added), quoting Whitcomb v. Chavis, 403 U.S. 124, 149 (1971). Because I believe that Mobile controls this case, I dissent.

II

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." Ante, at 9. 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 Karst, The Coats of Motive-Centered Inquiry, 15 San Diego Law Rev. 1161, 1164 (1978); they instruct the federal courts--with only the vaguest constitutional direction--into an area of intensely local and political concern.

Emphasizing these considerations, Justice STEVENS, post, at ___, argues forcefully that the Court's focus of inquiry is seriously mistaken. I agree with much of what he says. As I do not share his views entirely, however, I write separately.

A

As I understand it, Justice STEVENS's critique of the Court's approach rests on three principles with which I am in fundamental agreement.

First, it is appropriate to distinguish between "state action that inhibits an individual's right to vote and state action that affects the political strength of various groups." Mobile v. Bolden, 446 U.S. 55, 83

(STEVENS, J., concurring); see post, at ___. Under this distinction, this case is fundamentally different from cases involving direct barriers to voting. There is no claim here that blacks may not register freely and vote for whom they choose. This case also differs from one-man, one-vote cases, in which districting practices make a person's vote less weighty in some districts than in others.

Second, I agree with Justice STEVENS that vote dilution cases of this kind are difficult if not impossible to distinguish--especially in their remedial aspect--from other actions to redress gerrymanders. See post, at ___.

Finally, ~~I think~~ Justice STEVENS is correct that the standard used to identify unlawful racial discrimination in this area ~~must~~ should be defined in terms that are judicially manageable and reviewable. See post, at ___. In the absence of compelling reasons of both law and fact, the federal judiciary is ~~wholly~~ unwarranted in undertaking to restructure state political systems. This is inherently a political area, where the identification of a seeming violation ~~in no way~~ does not necessarily suggests 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.

B

Justice STEVENS would accommodate these principles by holding that subjective intent is irrelevant to the establishment of a case of racial vote dilution under the Fourteenth Amendment. See post, at ___. Despite sharing the concerns from which his position is developed, I would not accept this view. "The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." Washington v. Davis, 426 U.S. 229, 242 (1976). 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. Unlike the considerations on which the lowers courts relied in this case and in Mobile, the factors identified by Justice STEVENS as "objective" in fact are direct, reliable, and unambiguous indices of discriminatory intent. ~~By holding~~ If we held, as I think we should, that the district courts must place primary reliance on these factors to

establish discriminatory intent, ~~this Court would help to avoid~~ federal inquiries into the subjective thought processes of local officials--at least until enough objective evidence had been presented to warrant discovery into subjective motivations in this complex, politically charged area. By prescribing such a rule we would hold federal courts to a standard that was judicially manageable. And we would remain faithful to the central protective purpose of the Equal Protection Clause.

In the absence of proof of discrimination by reliance on the kind of objective factors identified by Justice STEVENS, 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. I would reverse its judgment on that basis.

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

June 24, 1982

From: Justice Powell

Circulated: JUN 24 1982

Recirculated: _____

First Draft

No. 80-2100, Rogers v. Lodge

Justice Powell, dissenting.

I

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the invidious purpose of diluting the voting strength of the black population." Ante, at 9. 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 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.

Emphasizing these considerations, Justice STEVENS, post, at ___, argues forcefully that the Court's focus of inquiry is seriously mistaken. I agree with much of what he says. As I do not share his views entirely, however, I write separately.

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Second, I agree with Justice STEVENS that vote dilution cases of this kind are difficult if not impossible to distinguish--especially in their remedial aspect--from other actions to redress gerrymanders. See post, at ___.

Finally, Justice STEVENS clearly is correct in arguing that the standard used to identify unlawful racial discrimination in this area should be defined in terms that are judicially manageable and reviewable. See post, at ___. 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.

II

Justice STEVENS would accommodate these principles by holding that subjective intent is irrelevant to the establishment of a case of racial vote dilution under the Fourteenth Amendment. See post, at ____. Despite sharing the concerns from which his position is developed, I would not accept this view. "The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." Washington v. Davis, 426 U.S. 229, 240 (1976). 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. Unlike the considerations on which the lower courts relied in this case and in Mobile, the factors identified by Justice STEVENS as "objective" in fact are direct, reliable, and unambiguous indicia of discriminatory intent. If we held, as I think we should,

that the district courts must place primary reliance on these factors to establish discriminatory intent, we would prevent federal court inquiries into the subjective thought processes of local officials--at least until enough objective evidence had been presented to warrant discovery into subjective motivations in this complex, politically charged area. By prescribing such a rule we would hold federal courts to a standard that was judicially manageable. And we would remain faithful to the central protective purpose of the Equal Protection Clause.

In the absence of proof of discrimination by reliance on the kind of objective factors identified by Justice STEVENS, 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. I would reverse its judgment on that basis.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 24, 1982

No. 80-2100 Rogers v. Lodge

Dear Byron,

Please join me.

Sincerely,

Justice White

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 24, 1982

Re: No. 80-2100 Rogers v. Warren Lodge

Dear Lewis:

Please join me in your dissent.

Sincerely,

WHR/gp

Justice Powell

cc: The Conference

pp. 17, 19, 21-23

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: _____

Recirculated: JUN 25 '82

1st Printed DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-2100

QUENTIN ROGERS, ET AL., APPELLANTS *v.*
HERMAN LODGE ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June —, 1982]

JUSTICE STEVENS, dissenting.

Our legacy of racial discrimination has left its scars on Burke County, Georgia.[1] 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. Public roads may not be paved only in areas in which white citizens live;[2] black citizens may not be denied employment opportunities in county government;[3] segregated schools may not be maintained.[4]

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[1] Certain vestiges of discrimination—although clearly not the most pressing problems facing black citizens today—are a haunting reminder of an all too recent period of our nation's history. The District Court found that a segregated laundromat is operated within a few blocks of the county courthouse; at the courthouse itself, faded paint over restroom doors does not entirely conceal the words "colored" and "white."

[2] *Dowdell* v. *City of Apopka*, 511 F. Supp. 1375 (MD Fla. 1981).

[3] 42 U. S. C. § 2000e-2.

[4] *Brown* v. *Board of Education*, 347 U. S. 483.

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See my separate dissent.

LFP 6/25

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. "As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." *South Carolina* v. *Katzenbach*, 383 U. S. 301, 324. It might indeed be wise policy to accelerate the transition of minority groups to a position of political power commensurate with their voting strength by amending the Act to prohibit the use of multimember districts in all covered jurisdictions.

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.

I

The Court's entry into the business of electoral reapportionment in 1962 was preceded by a lengthy and scholarly debate over the role the judiciary legitimately could play in what Justice Frankfurter described in *Colegrove* v. *Green*, 328 U. S. 549, as a "political thicket."[5] In that case, decided

[5] In his much criticized opinion announcing the judgment of the Court, Justice Frankfurter wrote:

in 1946, the Court declined to entertain a challenge to single-member congressional districts in Illinois that had been created in 1901 and had become grossly unequal by reason of the great growth in urban population.[8] In dissent, Justice Black advocated the use of a state-wide, at-large election of representatives; he argued that an at-large election "has an element of virtue that the more convenient method does not have—namely, it does not discriminate against some groups to favor others, it gives all the people an equally effective voice in electing their representatives as is essential under a free government, and it is constitutional." *Id.*, at 574.

In 1962, the Court changed course. In another challenge

"Nothing is clearer than that this controversy concerns matters that bring courts into immediate and active relations with party contests. From the determination of such issues this Court has traditionally held aloof. It is hostile to a democratic system to involve the judiciary in the politics of the people. And it is not less pernicious if such judicial intervention in an essentially political contest be dressed up in the abstract phrases of the law.

. . . . .

"Courts ought not to enter this political thicket. The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress. The Constitution has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action. Thus, 'on Demand of the executive Authority,' Art. IV, § 2, of a State it is the duty of a sister State to deliver up a fugitive from justice. But the fulfilment of this duty cannot be judicially enforced. *Kentucky* v. *Dennison*, 24 How. 66. The duty to see to it that the laws are faithfully executed cannot be brought under legal compulsion, *Mississippi* v. *Johnson*, 4 Wall. 475. Violation of the great guaranty of a republican form of government in States cannot be challenged in the courts. *Pacific Telephone Co.* v. *Oregon*, 223 U. S. 118. The Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights." 328 U. S., at 553–554, 556.

[8]The districts ranged in population from 112,000 to 900,000 persons. *Id.*, at 557.

to the constitutionality of a 1901 districting statute, it held that the political question doctrine did not foreclose judicial review. *Baker* v. *Carr*, 369 U. S. 186. That decision represents one of the great landmarks in the history of this Court's jurisprudence.

Two aspects of the Court's opinion in *Baker* v. *Carr* are of special relevance to the case the Court decides today. First, the Court's scholarly review of the political question doctrine focused on the dominant importance of satisfactory standards for judicial determination.[7] Second, the Court's articulation of the relevant constitutional standard made no reference to subjective intent.[8] The host of cases that have arisen in the

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[7]The Court stated that the "nonjusticiability of a political question is primarily a function of the separation of powers." 369 U. S., at 210. It emphasized, however, that "the lack of satisfactory criteria for a judicial determination" was a dominant consideration in *Coleman* v. *Miller*, 307 U. S. 433, 454–455; that whether a foreign relations question is justiciable turns, in part, on "its susceptibility to judicial handling"; that in the presence of clearly definable criteria for decision "the political question barrier falls away"; and that "even in private litigation which directly implicates no feature of separation of powers, lack of judicially discoverable standards and the drive for even-handed application may impel reference to the political departments' determination of dates of hostilities' beginning and ending." 369 U. S., at 210, 211, 214. *Luther* v. *Borden*, 7 How. 1, was distinguished, in part, because that case involved "the lack of criteria by which a court could determine which form of government was republican"; the Court stated that "the only significance that *Luther* could have for our immediate purposes is in its holding that the Guaranty Clause is not a repository of judicially manageable standards which a court could utilize independently in order to identify a State's lawful government." 369 U. S., at 222, 223. In concluding that the reapportionment question before it was justiciable, the Court emphasized that it would not be necessary "to enter upon policy determinations for which judicially manageable standards are lacking." *Id.*, at 226.

[8]The Court simply stated:

"Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious

wake of *Baker* v. *Carr* have shared these two characteristics. They have formulated, refined, and applied a judicially manageable standard that has become known as the one-person, one-vote rule; they have attached no significance to the subjective intent of the decisionmakers who adopted or maintained the official rule under attack.

In approaching the novel case it decides today, the Court assumes that the governing standard for decision has been well established by our prior cases. The Court's approach is straightforward; it simply states that "a showing of discriminatory intent has long been required in *all* types of cases arising under the Equal Protection Clause." *Ante*, at 4 (emphasis in original). This blanket assertion is simply incorrect.[9] For the Court has repeatedly identified the criteria for determining whether a law violates the Equal Protection Clause without any reference to subjective motivation.[10]

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action." *Id.*, at 226.

[9] As noted above, the many cases applying the one-person, one-vote rule arose under the Equal Protection Clause and did not involve a showing of discriminatory intent. Unequal districts must be reapportioned whether they are the product of unanticipated shifts in population or an attempt to dilute the voting power of minority citizens.

[10] For example, in his opinion for the Court in *Dunn* v. *Blumstein*, 405 U. S. 330, 335, JUSTICE MARSHALL wrote:

"To decide whether a law violates the Equal Protection Clause, we look, in essence, to three things: the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification."

And in *Williams* v. *Rhodes*, 393 U. S. 23, at the outset of its analysis of the question whether Ohio election laws impairing a new political party's access to the state ballot violated the Equal Protection Clause, the Court stated:

"In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification." *Id.*, at 30.

In sum, the standard by which an equal protection challenge is measured cannot be determined without identifying the substantive right that the

In reviewing the constitutionality of the structure of a local government, two quite different methods of analysis could be employed. The Court might identify the specific features of the government that raise constitutional concerns and decide whether, singly or in combination, they are valid. This is the approach the Court has used in testing the constitutionality of rules conditioning the right to vote on payment of a poll tax,[11] imposing burdens on independent candidates,[12] denying new residents or members of the Armed Forces the right to vote,[13] prohibiting cross-overs in party primaries,[14] requiring political candidates to pay filing fees,[15] and disadvantaging minority parties in presidential elections.[16] In none of these

standard is designed to protect. If the right is merely a right to be free from improper motivations, a subjective standard obviously is appropriate. But if the Equal Protection Clause provides certain rights that are independent of motivation—such as the right to have one's vote count the same as that of any other voter, see n. 9, *supra*—than a subjective standard clearly is *not* appropriate. See n. 24, *infra*.

[11] *Harper* v. *Virginia Board of Elections*, 383 U. S. 663. The Court concluded that "a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax." *Id.*, at 666. "To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor." *Id.*, at 668. In dissent, Justice Black noted: "It should be pointed out at once that the Court's decision is to no extent based on a finding that the Virginia law as written or applied is being used as a device or mechanism to deny Negro citizens of Virginia the right to vote on account of their color." *Id.*, at 672.

[12] *Storer* v. *Brown*, 415 U. S. 724. The Court stated that, in determining the constitutionality of eligibility requirements for independent candidates, the "inevitable question for judgment" is "could a reasonably diligent independent candidate be expected to satisfy the signature requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot?" *Id.*, at 742. See *Mandel* v. *Bradley*, 432 U. S. 173, 177; *id.*, at 181 (STEVENS, J., dissenting). See also *American Party of Texas* v. *White*, 415 U. S. 767, 795.

[13] *Dunn* v. *Blumstein*, 405 U. S. 330; *Carrington* v. *Rash*, 380 U. S. 89.

[14] *Kusper* v. *Pontikes*, 414 U. S. 51.

[15] *Lubin* v. *Panish*, 415 U. S. 709; *Bullock* v. *Carter*, 405 U. S. 134.

[16] *Williams* v. *Rhodes*, 393 U. S. 23.

cases did the validity of the electoral procedure turn on whether the legislators who enacted the rule subjectively intended to discriminate against minority voters. Under the approach employed by the Court in those cases, the objective circumstances that led to a declaration that an election procedure was unconstitutional would invalidate a similar law wherever it might be found.

Alternatively, the Court could employ a subjective approach under which the constitutionality of a challenged procedure depends entirely on federal judges' appraisals of the reasons why particular localities have chosen to govern themselves in a particular way. The Constitution would simply protect a right to have an electoral machinery established and maintained without the influence of impermissible factors. Constitutional challenges to identical procedures in neighboring communities could produce totally different results, for the subjective motivations of the legislators who enacted the procedures—or at least the admissible evidence that might be discovered concerning such motivation—could be quite different.

In deciding the question presented in this case, the Court abruptly rejects the former approach and considers only the latter. It starts from the premise that Burke County's at-large method of electing its five county commissioners is, on its face, unobjectionable. The otherwise valid system is unconstitutional, however, because it makes it more difficult for the minority to elect commissioners and because the majority that is now in power has maintained the system for that very reason. Two factors are apparently of critical importance: (1) the intent of the majority to maintain control; and (2) the racial character of the minority.

I am troubled by each aspect of the Court's analysis. In my opinion, the question whether Burke County's at-large system may survive scrutiny under a purely objective analysis is not nearly as easy to answer as the Court implies. As-

suming, however, that the system is otherwise valid, I do not believe that the subjective intent of the persons who adopted the system in 1911, or the intent of those who have since declined to change it, can determine its constitutionality. Even if the intent of the political majority were the controlling constitutional consideration, I could not agree that the only political groups that are entitled to protection under the Court's rule are those defined by racial characteristics.

II

At-large voting systems generally tend to maximize the political power of the majority. See *ante*, at 3.[11] There are,

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[11] In the words of Chancellor Kent, the requirement of districting "was recommended by the wisdom and justice of giving, as far as possible, to the local subdivisions of the people of each state, a due influence in the choice of representatives, so as not to leave the aggregate minority of the people in a state, though approaching perhaps to a majority, to be wholly overpowered by the combined action of the numerical majority, without any voice whatever in the national councils." 1 Kent, *Commentaries* (12th ed., 1873) *230–231, n. (c). See also *Mobile* v. *Bolden*, 446 U. S. 55, 105, n. 3 (MARSHALL, J., dissenting); *Whitcomb* v. *Chavis*, 403 U. S. 124, 158–160.

The challenge to multimember or at-large districts is, of course, quite different from the challenge to the value of individual votes considered in *Reynolds* v. *Sims*, 377 U. S. 533. An at-large system is entirely consistent with the one-person, one-vote rule developed in that case. As Justice Stewart noted in *Mobile*, in considering the applicability of *Reynolds* and the cases that followed it:

"Those cases established that the Equal Protection Clause guarantees the right of each voter to 'have his vote weighted equally with those of all other citizens.' 377 U. S., at 576. The Court recognized that a voter's right to 'have an equally effective voice' in the election of representatives is impaired where representation is not apportioned substantially on a population basis. In such cases, the votes of persons in more populous districts carry less weight than do those of persons in smaller districts. There can be, of course, no claim that the 'one person, one vote' principle has been violated in this case, because the city of Mobile is a unitary electoral district and the Commission elections are conducted at large. It is therefore obvious that nobody's vote had been 'diluted' in the sense in which that word was used in the *Reynolds* case." 446 U. S., at 77–78 (plurality

however, many types of at-large electoral schemes. Three features of Burke County's electoral system are noteworthy, not in my opinion because they shed special light on the subjective intent of certain unidentified people, but rather because they make it especially difficult for a minority candidate to win an election. First, although the qualifications and the duties of the office are identical for all five commissioners, each runs for a separately designated position.[18] Second, in order to be elected, each commissioner must receive a majority of all votes cast in the primary and in the general election; if the leading candidate receives only a plurality, a run-off election must be held. Third, there are no residency requirements; thus, all candidates could reside in a single, all-white neighborhood.[19]

Even if one assumes that a system of local government in which power is concentrated in the hands of a small group of persons elected from the community at large is an acceptable—or perhaps even a preferred—form of municipal government,[20] it is not immediately apparent that these addi-

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opinion).

See also *id.*, at 83 (STEVENS, J., concurring).

[18] This feature distinguishes Burke County's at-large electoral system from the municipal commission form of government popularized by reformers shortly after the turn of the century and known as the Galveston Plan or the Des Moines Plan. See n. 20, *infra*.

[19] "Other features of certain at-large electoral schemes that make it more difficult for a minority group to elect a favored candidate when bloc voting occurs—prohibitions against cumulative and incomplete voting—are not involved in this case. Prohibitions against cumulative or partial voting are generally inapplicable in electoral schemes involving numbered posts.

[20] "During its evolution as a progressive solution to municipal problems, the commission format was variously known as the Galveston plan, the Texas idea, and the Des Moines plan. Since Galveston invented the basic organization and Des Moines popularized the addition of related reform techniques, the new type of government is probably best described as the Galveston—Des Moines plan. So popular did the new idea become that towns could reap advertising benefits for being in the forefront of munici-

tional features that help to perpetuate the power of an entrenched majority are either desireable or legitimate.[21] If the only purpose these features serve—particularly when viewed in combination—is to assist a dominant party to maintain its political power, they are no more legitimate than the Tennessee districts described in *Baker* v. *Carr* as "*no* policy, but simply arbitrary and capricious action." 369 U. S., at 226 (emphasis in original). Unless these features are inde-

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pal innovation if they used the commission plan. Consequently, some cities boasted that they had the system, knowing full well that their charters had little resemblance to Galveston's. But there were certain essentials necessary before a city could claim commission status. Benjamin DeWitt, an early historian of the progressive movement, explained:

"In every case, however, no matter how much charters may differ as to minor details, they have certain fundamental features in common. These fundamental features of commission charters are four:

"1. Authority and responsibility are centralized.

"2. The number of men in whom this authority and this responsibility are vested is small.

"3. These few men are elected from the city at large and not by wards or districts.

"4. Each man is at the head of a single department.

"The most radical departure the new scheme made was the combination of legislative and executive functions in one body. The plan disregarded the federal model of separation of powers. Sitting together, the commission was a typical policy- and ordinance-making council; but, separately, each commissioner administered a specific department on a day-to-day basis. The original Galveston charter provided for a mayor-president plus commissioners of finance and revenue, waterworks and sewerage, streets and public property, and fire and police. Later commission cities followed a similar division of responsibility." Rice, Progressive Cities: The Commission Government Movement in America, 1901–1920, pp. xiii–xiv (Univ. of Texas Press 1977).

[21] It is noteworthy that these features apparently characterize many governmental units in jurisdictions that have been subjected to the strictures of the Voting Rights Act as the result of prior practices that excluded black citizens from the electoral process. See generally, The Voting Rights Act: Unfulfilled Goals, A Report of the United States Commission on Civil Rights, 38–50 (1981).

pendently justified, they may be invalid simply because there is no legitimate justification for their impact on minority participation in elections.[22]

In this case, appellees have not argued—presumably because they assumed that this Court's many references to the requirement of proving an improper motive in equal protection cases are controlling in this new context—that the special features of Burke County's at-large system have such an adverse impact on the minority's opportunity to participate in the political process that this type of government deprives the minority of equal protection of the law. Nor have the appellants sought to identify legitimate local policies that might justify the use of such rules. As a result, this record does not provide an adequate basis for determining the validity of Burke County's governmental structure on the basis of traditional objective standards.[23]

If the governmental structure were itself found to lack a legitimate justification, inquiry into subjective intent would clearly be unnecessary. As JUSTICE MARSHALL stated in

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[22] No group has a right to proportional representation. See *Mobile* v. *Bolden*, 446 U. S. 55, 75–76 (plurality opinion); *id.*, at 122 (MARSHALL, J., dissenting). But in a representative democracy, meaningful participation by minority groups in the electoral process is essential to ensure that representative bodies are responsive to the entire electorate. For this reason, a challenged electoral procedure may not be justified solely on the ground that it serves to reduce the ability of a minority group to participate effectively in the electoral process.

[23] The record nevertheless does indicate that the validity of the at-large system itself need not be decided in this case. For it is apparent that elimination of the majority run-off requirement and the numbered posts would enable a well-organized minority to elect one or two candidates to the county board. That consequence could be achieved without replacing the at-large system itself with five single-member districts. In other words, minority access to the political process could be effected by invalidating specific rules that impede that access and without changing the basic structure of the local governmental unit. See *Mobile* v. *Bolden*, 446 U. S. 55, 80 (BLACKMUN, J., concurring).

his dissent in *Mobile*: "Whatever may be the merits of applying motivational analysis to the allocation of constitutionally gratuitous benefits, that approach is completely misplaced where, as here, it is applied to the distribution of a constitutionally protected interest." 446 U. S., at 121.[24] Under the Court's analysis, however, the characteristics of the particular form of government under attack are virtually irrelevant; the Court states that a showing of discriminatory intent is required in *all* equal protection cases. *Ante*, at 4. Thus, not only would the Court's approach uphold an arbitrary—but not invidious—system that lacked independent justification, it would invalidate—if a discriminatory intent were proved—a local rule that would be perfectly acceptable absent a showing of invidious intent. The Court's standard applies not

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[24] It is worth repeating the statement of Professor Ely noted by JUSTICE MARSHALL:

"The danger I see is the somewhat different one that the Court, in its newfound enthusiasm for motivation analysis, will seek to export it to fields where it has no business. It therefore cannot be emphasized too strongly that analysis of motivation is appropriate only to claims of improper discrimination in the distribution of goods that are constitutionally gratuitous (that is, benefits to which people are not entitled as a matter of substantive constitutional right). In such cases the covert employment of a principle of selection that could not constitutionally be employed overtly is equally unconstitutional. However, *where what is denied is something to which the complainant has a substantive constitutional right*—either because it is granted by the terms of the Constitution, or because it is essential to the effective functioning of a democratic government—*the reasons it was denied are irrelevant.* It may become important in court what justifications counsel for the state can *articulate* in support of its denial or non-provision, but the reasons that actually inspired the denial never can: To have a right to something is to have a claim on it irrespective of why it is denied. It would be a tragedy of the first order were the Court to expand its burgeoning awareness of the relevance of motivation into the thoroughly mistaken notion that a denial of a constitutional right does not count as such unless it was intentional." Ely, The Centrality and Limits of Motivation Analysis, 15 San Diego L. Rev. 1155, 1160–1161 (1978) (emphasis in original) (footnotes omitted).

only to Burke County and to multimember districts, but to any other form of government as well.

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.[25] 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.[26] 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.

The facts of this case illustrate the ephemeral character of a constitutional standard that focuses on subjective intent. When the suit was filed in 1976, approximately 58 percent of

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[25] In *Washington* v. *Davis*, 426 U. S. 229, I wrote:

"Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decisionmaking, and of mixed motivation. It is unrealistic, on the one hand, to require the victim of alleged discrimination to uncover the actual subjective intent of the decisionmaker or, conversely, to invalidate otherwise legitimate action simply because an improper motive affected the deliberation of a participant in the decisional process. A law conscripting clerics should not be invalidated because an atheist voted for it." *Id.*, at 253 (concurring opinion).

[26] See Miller, If "The Devil Himself Knows Not the Mind of Man," How Possibly Can Judges Know the Motivation of Legislators? 15 San Diego L. Rev. 1167, 1170 (1978).

the population of Burke County was black and approximately 42 percent was white. Because black citizens had been denied access to the political process—through means that have since been outlawed by the Voting Rights Act of 1965—and because there had been insufficient time to enable the registration of black voters to overcome the history of past injustice, the majority of registered voters in the county were white. The at-large electoral system therefore served, as a result of the presence of bloc voting, to maintain white control of the local government. Whether it would have continued to do so would have depended on a mix of at least three different factors—the continuing increase in voter registration among blacks, the continuing exodus of black residents from the county, and the extent to which racial bloc voting continued to dominate local politics.

If those elected officials in control of the political machinery had formed the judgment that these factors created a likelihood that a bloc of black voters was about to achieve sufficient strength to elect an entirely new administration, they might have decided to abandon the at-large system and substitute five single-member districts with the boundary lines drawn to provide a white majority in three districts and a black majority in only two. Under the Court's intent standard, such a change presumably would violate the Fourteenth Amendment. It is ironic that the remedy ordered by the District Court fits that pattern precisely.[27]

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[27] The following table shows a breakdown of the population of the districts in the plan selected by the District Court as to race and voting age:

District	Voting Age Population	Black Voting Age Population (%)	White Voting Age Population (%)
1	2,048	1,482 (72.4)	556 (27.6)
2	2,029	1,407 (69.3)	622 (30.7)
3	2,115	978 (46.2)	1,137 (53.8)
4	2,112	947 (44.6)	1,175 (55.4)
5	2,217	803 (36.2)	1,414 (63.8)

See *Lodge* v. *Buxton*, 639 F. 2d 1358, 1361, n. 4 (CA5 1981).

If votes continue to be cast on a racial basis, the judicial remedy virtually guarantees that whites will continue to control a majority of seats on the county board. It is at least possible that white control of the political machinery has been frozen by judicial decree at a time when increased black voter registration might have led to a complete change of administration. Since the federal judge's intent was unquestionably benign rather than invidious—and, unlike that of state officials, is presumably not subject in any event to the Court's standard—that result has been accomplished without violating the Federal Constitution.

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.[28] Of course, if the subjective intent of these officials were such as to mandate a change to a governmental structure that would permit black voters to elect an all-black commission—and if black voters did so—those black officials could not harbor an intent to

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[28] In *Wright* v. *Rockefeller*, 376 U. S. 52, a group of minority voters in New York City challenged a districting scheme that placed most minority voters in one of four districts. They sought "a more even distribution of minority groups among the four congressional districts." *Id.*, at 58. Congressman Adam Clayton Powell intervened in the lawsuit and argued strenuously "that the kind of districts for which appellants contended would be undesirable and, because based on race or place of origin, would themselves be unconstitutional." *Ibid.*

maintain the system to keep whites from returning to power. In sum, as long as racial consciousness exists in Burke County, its governmental structure is subject to attack. Perhaps those more familiar than I with political maneuvering will be able to identify with greater accuracy and reliability those subjective intentions that are legitimate and those that are not. Because judges may not possess such expertise, however, I am afraid the Court is planting seeds that may produce an unexpected harvest.

The costs and the doubts associated with litigating questions of motive, which are often significant in routine trials, will be especially so in cases involving the "motives" of legislative bodies.[29] Often there will be no evidence that the governmental system was *adopted* for a discriminatory reason.[30]

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[29] Professor Karst has strongly criticized motivational analysis on the ground that it is inadequate to protect black citizens from unconstitutional conduct:

"[E]ven though the proof will center on the effects of what officials have done, the ultimate issue will be posed in terms of the goodness or the evil of the officials' hearts. Courts have long regarded such inquiries as unseemly, as the legislative investigation cases of the 1950's attest. The principal concern here is not that tender judicial sensitivities may be bruised, but that a judge's reluctance to challenge the purity of other officials' motives may cause her to fail to recognize valid claims of racial discrimination even when the motives for governmental action are highly suspect. Because an individual's behavior results from the interaction of a multitude of motives, and because racial attitudes often operate at the margin of consciousness, in any given case there almost certainly will be an opportunity for a governmental official to argue that his action was prompted by racially neutral considerations. When that argument is made, should we not expect the judge to give the officials the benefit of the moral doubt? When the governmental action is the product of a group decision, will not that tendency toward generosity be heightened?" Karst, The Costs of Motive-Centered Inquiry, 15 San Diego L. Rev. 1163, 1164–1165 (1978) (footnote omitted).

To reject an examination into subjective intent is not to rule that the *reasons* for legislative action are irrelevant. "In my opinion, customary indicia of legislative intent provide an adequate basis for ascertaining the purpose that a law is intended to achieve. The formal proceedings of the

The reform movement in municipal government, see n. 20, *supra*, or an attempt to comply with the strictures of *Reynolds* v. *Sims*, 377 U. S. 533, may account for the enactment of countless at-large systems. In such a case the 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.[31] 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, accord-

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legislature and its committees, the effect of the measure as evidenced by its text, the historical setting in which it was enacted, and the public acts and deeds of its sponsors and opponents, provide appropriate evidence of legislative purpose." *Cousins* v. *City Council of Chicago*, 466 F. 2d 830, 856 (CA7 1972) (STEVENS, J., dissenting). If a challenged law disadvantages minority citizens and its justifications—as evidenced by customary indicia of legislative intent—are insufficient to persuade a neutral observer that the law was enacted for legitimate nondiscriminatory reasons, it is, in my opinion, invalid.

[30] As the Court of Appeals noted: "The general election laws in many jurisdictions were originally adopted at a time when Blacks had not received their franchise. No one disputes that such laws were not adopted to achieve an end, the exclusion of Black voting, that was the status quo. Other states' election laws, though adopted shortly after the enactment of the Fifteenth Amendment, are so old that whatever evidence of discriminatory intent may have existed, has long since disappeared. This case falls within that category. The focus then becomes the existence of a discriminatory purpose for the *maintenance* of such a system." 639 F. 2d, at 1363, n. 7.

[31] Apart from the lack of "state action," the very purpose of the secret ballot is to protect the individual's right to cast a vote without explaining to anyone for whom, or for what reason, the vote is cast.

ing 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. Undoubtedly, the evidence relied on by the Court proves that racial prejudice has played an important role in the history of Burke County and has motivated many wrongful acts by various community leaders. But unless that evidence is sufficient to prove that *every* governmental action was motivated by a racial animus—and may be remedied by a federal court—the Court has failed under its own test to demonstrate that the governmental structure of Burke County was maintained for a discriminatory purpose.

Certainly governmental action should not be influenced by irrelevant considerations. I am not convinced, however, 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 Medic-

aid funding for abortions unconstitutional if officials intend to discriminate against women who would abort a fetus?[32]

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. In implementing that sort of purpose, dominant majorities have used a wide variety of techniques to limit the political strength of aggressive minorities. In this case the minority is defined by racial characteristics, but minority groups seeking an effective political voice can, of course, be identified in many other ways. The Hasidic Jews in Kings County, New York,[33] the Puerto Ricans in Chicago,[34] the Spanish-speaking citizens in Dallas,[35] the Bohemians in Cedar Rapids,[36] the Federalists in Massa-

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[32] A stereotypical reaction to particular characteristics of a disfavored group cannot justify discriminatory legislation. See, *e. g.*, *Matthews* v. *Lucas*, 427 U. S. 495, 520–521 (STEVENS, J., dissenting). It is nevertheless important to remember that the First Amendment protects an individual's right to entertain unsound and unpopular beliefs—including stereotypical beliefs about classes of persons—and to expound those beliefs publicly. There is a vast difference between rejecting an irrational belief as a justification for discriminatory legislation and concluding that neutral legislation is invalid because it was motivated by an irrational belief. Fresh air and open discussion are better cures for vicious prejudice than are secrecy and dissembling. No matter how firmly I might disagree with a legislator's motivation in casting a biased vote, I not only must respect his right to form his own opinions, cf. *Young* v. *American Mini Theatres*, 427 U. S. 50, 63 (opinion of STEVENS, J.), but also would prefer a candid explanation of those opinions to a litigation-oriented silence.

[33] See *United Jewish Organization* v. *Carey*, 430 U. S. 144.

[34] See *Cousins* v. *City Council of Chicago*, 466 F. 2d 830 (CA7 1972), *cert. denied*, 409 U. S. 893.

[35] See *White* v. *Regester*, 412 U. S. 755.

[36] See Rice, Progressive Cities: The Commission Government Movement In America, 1901–1920, 78 (Univ. of Texas Press 1977).

chusetts,[37] the Democrats in Indiana,[38] and the Republicans in California[39] have all been disadvantaged by deliberate political maneuvers by the dominant majority. As I have stated, 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

Governmental action that discriminates between individuals on the basis of their race is, at the very least, presumptively irrational.[40] For an individual's race is virtually always irrelevant to his right to enjoy the benefits and to share

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[37] The term "gerrymander" arose from an election district—that took the shape of a salamander—formed in Massachusetts by Governor Elbridge Gerry's Jeffersonian or Democratic-Republican Party. The phrase was coined by Gerry's opponents, the Federalists.

[38] See Congressional Quarterly, May 2, 1981, p. 758.

[39] See Congressional Quarterly, May 30, 1981, p. 941.

[40] Since I do not understand the Court's opinion to rely on an affirmative action rationale, I put that entire subject to one side. If that were the rationale for the Court's holding, however, there would be no need to inquire into subjective intent.

the responsibilities of citizenship in a democratic society. Persons of different races, like persons of different religious faiths and different political beliefs, are equal in the eyes of the law.

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, to borrow JUSTICE BRENNAN's phrasing, the Equal Protection Clause does not make some groups of citizens more equal than others. See *Zobel* v. *Williams*, —— U. S. ——, —— (BRENNAN, J., concurring). Thus, the Court has considered challenges to discrimination based on "differences of color, race, nativity, religious opinions [or] political affiliations," *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89, 92; to redistricting plans that serve "to further racial or economic discrimination, *Whitcomb* v. *Chavis*, 403 U. S. 124, 149; to biases "tending to favor particular political interests or geographic areas." *Abate* v. *Mundt*, 403 U. S. 182, 187. 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." *Ante*, at 3.

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 no 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 ir-

rational. 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. "The mere fact that a number of citizens share a common ethnic, racial, or religious background does not create the need for protection against gerrymandering. It is only when their common interests are strong enough to be manifested in political action that the need arises. Thus the characteristic of the group which creates the need for protection is its political character." *Cousins* v. *City Council of Chicago*, 466 F. 2d 830, 852 (CA7 1972) (STEVENS, J., dissenting). 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 of 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. Such a rule would delay—rather than advance—the goal advocated by Justice Douglas:

> "When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or reli-

gious partisan. Since that system is at war with the democratic ideal, it should find no footing here." *Wright* v. *Rockefeller*, 376 U. S. 52, 67 (dissenting opinion).

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. As I have written before, a gerrymander as grotesque as the boundaries condemned in *Gomillion* v. *Lightfoot*, 264 U. S. 339, is intolerable whether it fences out black voters, Republican voters, or Irish-Catholic voters. *Mobile* v. *Bolden*, 446 U. S. 55, 86 (concurring opinion). 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. I cannot accept the Court's constitutional holding.[41]

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[41] The Court does not address the statutory question whether the at-large system violates § 2 of the Voting Rights Act of 1965. Neither the District Court nor the Court of Appeals considered this issue. Since appellees have been granted full relief by the Court, I express no opinion on their statutory claims.

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: JUN 25 1982

Recirculated: _____

1st Printed DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-2100

QUENTIN ROGERS, ET AL., APPELLANTS *v.*
HERMAN LODGE ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June —, 1982]

JUSTICE POWELL, with whom JUSTICE REHNQUIST joins, dissenting.

I

Mobile v. *Bolden*, 446 U. S. 55 (1980), establishes that an at-large voting system must be upheld against constitutional attack unless maintained for a discriminatory purpose. In *Mobile* we reversed a finding of unconstitutional vote dilution because the lower courts had relied on factors insufficient as a matter of law to establish discriminatory intent. See 446 U. S., at 73 (plurality opinion of Stewart, J.). The District Court and Court of Appeals in this case based their findings of unconsitutional discrimination on the same factors held insufficient in *Mobile*. Yet the Court now finds their conclusion unexceptionable. The *Mobile* plurality also affirmed that the concept of "intent" was no mere fiction, and held that the District Court had erred in "its failure to identify the state officials whose intent it considered relevant." *Id.*, at 74 n. 20. Although the courts below did not answer that question in this case, the Court today affirms their decision.

Whatever the wisdom of *Mobile*, the Court's opinion cannot be reconciled persuasively with that case. There are some variances in the largely sociological evidence presented in the two cases. But *Mobile* held that this *kind* of evidence

was not enough. Such evidence, we found in *Mobile*, did not merely fall short, but "fell *far* short[,] of showing that [an at-large electoral scheme was] 'conceived or operated [as a] purposeful devic[e] to further racial . . . discrimination.'" *Id.*, at 70 (emphasis added), quoting *Whitcomb* v. *Chavis*, 403 U. S. 124, 149 (1971). Because I believe that *Mobile* controls this case, I dissent.

II

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." *Ante*, at 9. 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 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.

Emphasizing these considerations, JUSTICE STEVENS, *post*, at ——, argues forcefully that the Court's focus of inquiry is seriously mistaken. I agree with much of what he says. As I do not share his views entirely, however, I write separately.

A

As I understand it, JUSTICE STEVENS's critique of the Court's approach rests on three principles with which I am in fundamental agreement.

First, it is appropriate to distinguish between "state action that inhibits an individual's right to vote and state action that affects the political strength of various groups." *Mobile* v. *Bolden*, 446 U. S. 55, 83 (STEVENS, J., concurring); see *post*, at ——. Under this distinction, this case is fundamentally

different from cases involving direct barriers to voting. There is no claim here that blacks may not register freely and vote for whom they choose. This case also differs from one-man, one-vote cases, in which districting practices make a person's vote less weighty in some districts than in others.

Second, I agree with JUSTICE STEVENS that vote dilution cases of this kind are difficult if not impossible to distinguish—especially in their remedial aspect—from other actions to redress gerrymanders. See *post*, at ——.

Finally, JUSTICE STEVENS clearly is correct in arguing that the standard used to identify unlawful racial discrimination in this area should be defined in terms that are judicially manageable and reviewable. See *post*, at ——. 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.

B

JUSTICE STEVENS would accommodate these principles by holding that subjective intent is irrelevant to the establishment of a case of racial vote dilution under the Fourteenth Amendment. See *post*, at ——. Despite sharing the concerns from which his position is developed, I would not accept this view. "The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." *Washington* v. *Davis*, 426 U. S. 229, 242 (1976). 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. Unlike the considerations on which the lower courts

relied in this case and in *Mobile*, the factors identified by JUSTICE STEVENS as "objective" in fact are direct, reliable, and unambiguous indices of discriminatory *intent*. If we held, as I think we should, that the district courts must place primary reliance on these factors to establish discriminatory intent, we would prevent federal court inquiries into the *subjective* thought processes of local officials—at least until enough objective evidence had been presented to warrant discovery into subjective motivations in this complex, politically charged area. By prescribing such a rule we would hold federal courts to a standard that was judicially manageable. And we would remain faithful to the central protective purpose of the Equal Protection Clause.

In the absence of proof of discrimination by reliance on the kind of objective factors identified by JUSTICE STEVENS, 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. I would reverse its judgment on that basis.

THE C.J.	W.J.B.	S.H.B.	T.M.	H.A.B.	L.F.P.	W.H.R.	J.P.S.	
		3/8/82						
BEW 6/-/82	Join BEW 3/10/82	2nd Draft 3/31/82	Join BEW 3/4/82	Join BEW 3/30/82	Typed Draft 4/19/82	Join 5/7/82	Typed Draft 4/19/82	Join 4/20
		2nd Draft 4/26/82			Typed Draft 4/26/82		Typed Draft 4/26/82	
					2nd Typed Draft 5/5/82		2nd Typed Draft 5/5/82	
							2nd Draft 6/10/82	