10-1979

City of Mobile, Alabama v. Bolden

Lewis F. Powell Jr.

September 25, 1978

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

Argued ....., *19*... *Assigned* ....., *19*... No. 77-1844

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

CITY OF MOBILE, ALABAMA

vs.

BOLDEN

Also motion to affirm.

PS referred to our opinion in Wise & Terry last Term as relevant

Noted

	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.				Passed; then Noted									
Marshall, J.							✓						
Blackmun, J.				✓									
Powell, J.				✓									
Rehnquist, J.				✓									
Stevens, J.				✓									

LFP/lab 2/26/79

To: Clerk Date: February 26, 1979

From: L.F.P., Jr.

No. 77-1844 Mobile v. Bolden
No. 78-357 Williams v. Brown

These are companion cases, the first involving the city government of Mobile, and the second the composition of the school board (Board of School Commissioners) for Mobile County.

Although the Solicitor General has filed a single amicus brief dealing with the two cases (99 pages long!), the cases involve separate "grants" and a number of different considerations.

These cases will be argued in March, and therefore are three weeks "off". But in view of their complexity and importance, I write this memorandum at this time to say that I will need a bench memo on each of them or a consolidated memo. I have not yet done more than take a most preliminary look at the briefs, although I recall fairly clearly the central issues. I will not get into these now beyond some preliminary observations.

In the City of Mobile case (77-1844), the federal courts not only invalidated the Commission form of

government, but the district court - in an unprecedented action so far as I know - devised and ordered effective an entirely new form of government for the city. The new city charter, judicially imposed, appears in the appendix to the jurisdictional statement (7d) and is roughly 50 pages long, constituting a detailed new form of government for the city. Although the three commissioners, under the old form of government, were afforded the "opportunity" to recommend a new form of government, they declined to do so. Thus, unless the judgments below are reversed, the second largest city in Alabama will have had imposed upon it a form of government never considered by any elected representatives of the people, and only by federal judges. Moreover, the new form of government is totally different from the commission form that Mobile had adopted in 1911, and with amendments immaterial to this controversy, had remained in effect over the intervening 60-odd years.

Under the commission form of government, there were three commissioners elected at large, by majority, nonpartisan vote. Each, however, was elected to a "slot" with responsibility for particular governmental functions. The population of Mobile is roughly two-thirds white and one-third Negro. No Negro has ever been elected a commissioner, and the district court - with obvious enthusiasm - made just about every finding of discrimination against the Negro

minority that could be imagined. As the court of appeals apparently accepted these findings without question (and probably without any serious review), we are bound by those that are findings of fact as distinguished from conclusions.

We took the case, as I understand it, to determine whether maintaining the commission form of government constituted purposeful discrimination within the meaning of Davis and Arlington Heights. Both the district court and the court of appeals had no difficulty in finding purposeful or intentional discrimination. But they did so on a theory that as articulated by CA 5, is novel - so far as I can recall. That court said:

> "Under our holding today in Nevett II, these findings also compel the inference that the system [i.e. the commission form of government] has been maintained with the purpose of diluting the black vote, thus supplying the element of intent necessary to establish a violation of the Fourteenth Amendment."
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> [We] conclude that 'there is a current condition of dilution of the black vote resulting from the intentional state legislative inaction which is as effective as . . . intentional state action." (Emphasis supplied by CA 5).

The last sentence is particularly notable. It states that there may be "state action" when in fact there is no state action, a contradiction in terms that is more than curious in a judicial opinion.

I do suppose that if there were proof that the commission form of government was purposefully retained primarily to discriminate against negroes, this would present a arguable but difficult question. The commission form of government per se has never been viewed, so far as I know, as a more effective means of depriving negroes of equal voting opportunities than any other form of government. Although discrimination certainly was a way of life in every southern community until 1954, and continued with respect to voting until well into the 1960s, I doubt that anyone thought of the commission form of government - or any other particular form of government - as a means of effectuating discriminatory intent. The government obviously had been satisfactory to the people of Mobile for more than half a century, in all probability quite without

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The only discriminatory effect found by the courts below was that the election at large, plus polarized voting, precluded the election of a black member to the Board of Commissioners, and this resulted in minimizing black participation in all governmental activities. Thus, in view of the at large election feature of the commission plan, our decision in White v. Regester, 412 U.S. 755, is relevant. In view the "parade of horrors" marshaled in the opinion of the district court (appearing consciously to "track" the White v. Regester situation), a decision invalidating at large elections may have been justified. The DC was not content with any such limited remedy. It concluded that dividing the city into three districts, one of which would have assured a negro commissioner, was not desirable, and - without affording the state legislature or the existing city government the opportunity to go through the legislative process of considering other alternatives, decided that the appropriate remedy was a judicially devised new form of government.

If the foregoing preliminary reaction to the case is generally correct, I suppose we could hold that the remedy exceeded the violation of constitutional rights. However, we come out on this case, it will be difficult for

me to approve the creation by a federal judge of an entirely new form of government.

I should have mentioned above my concern over the emphasis by the courts below on what they refer to as the "devaluation [or dilution] of the votes of blacks". This reflects the ancient, and often rejected political science notion of proportional representation: since one-third of the population of Mobile is negro, it should have one-third participation in its government. By the same logic, every county, city and state should be governed legislatively (and perhaps in all administrative agencies and bodies) by a racial and ethnic mix in direct proportion to the population. Since our national population is - as I understand it - about 12% to 15% negro, the Congress of the United States should have this percentage of negro representation. But this simplistic thinking (apart from its other falacies, historical and practical) does not take into account the diversity and hetrogeneous nature of the peoples of this country. The "whites" are not - and never have been since the early colonial years - a homogeneous American population. One of the unique things about our country is that it has been a haven for almost every religious, ethnic and divergent cultural component of the earth's population. If we start down the road of proportional representation for each identifiable segment of

the population, there would be chaos. This was a problem I addressed in Bakke, but without perceptible impact on the thinking of my Brothers.

Apart from the foregoing, I think we have said in Whitcomb (and elsewhere) that no segment of the population - racial or otherwise - is entitled to any particular representation in a legislative body. The assuring of equal voting rights for all should be the remedy. This already is becoming increasingly evident, as the negro vote exercises the balance of power in a number of the most populous states and cities - exercising political influence substantially in excess of its numerical strength.

Despite the generalized reactions expressed above, I want my clerk's independent judgment. As usual, I also want recommendations based on principles that can be applied consistently and that will stand the test of time.

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I have not mentioned, in the foregoing rather rambling discussion, the school board case (78-357). It is a companion case with both similarities and dissimilarities. I will, of course, want advice on it also.

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As so often happens in these cases, the city and school board are completely "outgunned" on the briefing. The city's brief is particularly amateurish, even though the lawyers - whom I know - are experienced and I would have thought capable of much higher quality work. This means we cannot rely (as we rarely can) on the briefs alone.

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L.F.P., Jr.

Questions are substantial - see p 7 (CA5 majority, J Wisdom in concurring o/s., & SG

Note (see note if not noted)

CA5 affirmed a DC decision that invalidated the Ala. state system for the governance of cities. take different views as to law - the agreement in result.

Mobile, under this system, was governed by three Commissioners elected at large. This resulted in the 35% black population never electing a black Commissioner.

After invalidating the state law, the DC created by order a Council-Mayor form of govt. with Council members to be elected from single-member districts. Although the state law was adopted in 1911 and was neutral on its face, CA held that the inaction + the failure to change the 1911 law - constituted discrimination, & that the intent required by Davis + Arlington Heights could be inferred - even if those cases apply to a 15th Amend. case.

9/13/78 - a supplemental memo by Spaeth has been received - adds nothing. E.G.

PRELIMINARY MEMORANDUM

Summer List 17, Sheet 1

No. 77-1844

CITY OF MOBILE, ALABAMA (Appeal from CA 5th (Simpson & Tjoflat: Wisdom, specially concurring)

v.

BOLDEN (voting rights plaintiff) Federal/Civil Timely

SUMMARY: This suit was brought as a class action under the Civil Rights Act of 1871, 42 U.S.C. §1983, the Voting Rights Act of 1965, 42 U.S.C. § 1973, and the First, Thirteenth, Fourteenth, and Fifteenth Amendments, as an anti-dilution voting rights case. Principally relying on White v. Register, 412 U.S. 755 (1973), and Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973)(en banc), aff'd sub nom. East Carroll Parish School Bd v. Marshall, 424 U.S. 636 (1976), the district court held that the system of electing City

See p 7 for Eric's note

Commissioners of Mobile, Alabama at large unconstitutionally impairs and dilutes the voting rights of black citizens of Mobile. As a remedy, the court disestablished Mobile's commission form of government elected at large and ordered that a strong mayor-council form of local government be created with the council members to be elected from single-member districts. The district court set November 21, 1978 as the date for the election of members of the new city government, but the order provides that the election shall be stayed if this Court grants review before that date. Petitioner seeks review of the court of appeals's affirmance of the district court's findings and remedy.

FACTS: Mobile, the second largest city in Alabama, has a population of 190,026, 35.4% of which is black. Pursuant to a state statute [hence, this is an appeal], the city is governed by three commissioners, each assigned specific functions by statute and elected at-large. The elections are non-partisan, and there is no requirement that commissioners reside in specific subdistricts of the city or be elected therefrom.

After applying Zimmer's multifactor circumstantial evidence test, Chief Judge Pittman (S.D. Ala.) found that the at-large election system worked an unconstitutional dilution of black voting strength. Of the Zimmer "primary" factors, the district court found (1) that blacks were effectively denied access to the political process because of racially polarized voting patterns that eliminated any reasonable expectation of a black candidate succeeding in a citywide election; (2) that the at-large elected commissioners have not been responsive to the needs of black citizens; (3) that state policy was neutral with respect to the at-large election of commissioners; and (4) that

longstanding past discrimination against black voters helped to preclude the effective participation of blacks in present at-large elections of commissioners. The following factors served to enhance the dilution of black voting strength deduced from consideration of the above "primary" factors: (1) Mobile was a large city of 142 square miles with a population of 190,026; (2) the election of commissioners at large requires a majority vote; (3) there is no anti-single-shot provision but the candidates run for positions by number; (4) commissioners did not run from geographical subdistricts and no subdistrict residency requirements were imposed. These Zimmer-criteria conclusions were found not to be clearly erroneous by the court of appeals. The district court further found that, although the at-large elected commissioner form of government was racially neutral in its inception in 1911, the present dilution of black voting strength was a "natural and forseeable consequence" of the at-large election system imposed in 1911. Moreover, the current condition of dilution resulted from "intentional state legislative inaction" which is as effective as the intentional state action referred to in Keyes." (emphasis in original). This was sufficient, in the district court's view, to support a finding of unconstitutionality under Washington v. Davis, 426 U.S. 229 (1976).

HOLDING BELOW: On appeal, the Fifth Circuit panel adopted the district court's findings of fact as not clearly erroneous and held that the lower court had sensitively and correctly applied the "primary" and "enhancing" factors of Zimmer to the facts as found in reaching the conclusion that the voting rights of black citizens of Mobile were in fact diluted as a consequence of the at-large election system employed pursuant to statute.

The court then turned its attention to the question of whether there was sufficient evidence of discriminatory purpose or intent to make out a constitutional violation under Washington and Arlington Heights. As the district court had, the court of appeals rejected virtually out of hand the contention that the at-large election system was immune from constitutional attack under Washington because it was not enacted initially with a racially discriminatory purpose in mind. The court found that the at-large scheme at issue is "archetypal of the intentionally maintained plan we contemplated in Nevett II," a contemporaneous decision in which the same panel held (1) that a plan neutral in its inception may become unconstitutional when it is maintained for the purpose of devaluing the votes of blacks, and (2) that an inference that the plan is being maintained for such a purpose may be drawn when the aggregate of the evidence under the Zimmer criteria indicates dilution. See 571 F.2d 209, 217-25. The court held that the district court's finding that the current condition of dilution of black votes resulted from intentional state legislative inaction was sufficient to support a finding of unconstitutionally discriminatory purpose, especially when conjoined with the inference of purpose arising out of the diluting effect found by application of the Zimmer criteria.

Judge Wisdom, adopting his comments in Nevett II, 571 F.2d 209, 231-38 (5th Cir. 1978), specially concurred. He found the majority's approach to the discriminatory-purpose issue inconsistent with Washington v. Davis and Arlington Heights. Though agreeing that inferring a racially discriminatory purpose from the invidious effects of at-large voting schemes was acceptable in some cases, he did not believe that such an inference would be sufficient to support a finding of discriminatory

purpose in cases where, as in Bolton, the voting scheme was racially neutral or even benign when initiated. Nor, in such cases, could discriminatory purpose be found in maintaining the voting plan, that is, in taking no affirmative action to cure the discriminatory effects of the plan. This view of inaction, he said, was inconsistent with Washington v. Davis.

Nevertheless, Judge Wisdom concurred in the result reached by the majority by adopting the view of the United States as amicus curiae that proof of racially discriminatory intent or purpose was not required in voting dilution cases. After all, reasoned Judge Wisdom, neither Washington v. Davis nor Arlington Heights were voting dilution cases, and the Supreme Court had not required proof of a legislative intent to discriminate in White v. Register, 412 U.S. 755 (1973), and Witcomb v. Chavis, 403 U.S. 124 (1971), the leading voting dilution cases involving multi-member districts. With respect to the need to prove racially discriminatory purpose, he would distinguish voting dilution cases from all other types of equal protection cases because the right to vote is preservative of all other rights. Moreover, voting dilution cases involved the Fifteenth Amendment, as well as the Fourteenth, and there was nothing in prior precedent or the language and history of the Fifteenth Amendment requiring proof of discriminatory purpose or intent in voting cases to which that amendment was limited by its own terms. Finally, Judge Wisdom observed that, even if an intent requirement were read into the Fifteenth Amendment, the Bolton plaintiffs could still make out a case under the Voting Rights Act of 1965, 42 U.S.C. § 1973, solely on the basis of proof of discriminatory effects.

CONTENTIONS: Although taking issue with the finding that the proof of discriminatory effects had been sufficient to make out a case

of voting dilution under the Zimmer criteria, appellants' principal contention is that the court of appeals erred in holding that discriminatory purpose could be found through a "tort" standard of intent and legislative inaction. Appellants argue that the "natural and probable consequences" test of intent approved by the majority is inconsistent with Washington v. Davis, and that discriminatory purpose cannot be inferred merely from maintenance of the status quo. In this respect, appellants adopt the reasoning of Judge Wisdom's concurring opinion. Finally, appellants claim the remedy ordered by the district court was unauthorized by the constitution, though they offer no clear legal argument in support of this claim.

Appellees contend that the district court's finding that the Mobile at-large voting scheme had the effect of disenfranchising black voters is supported by the overwhelming weight of the evidence, and that the "two court" rule immunizes the district court's findings from review here. E.g., Graver Mfg. Co. v. Linde Co., 336 U.S. 271, 275 (1961). Appellees also deny that the lower courts adopted any "tort" standard of intent, for the decisions below rested on a finding that the at-large voting scheme had been deliberately maintained for racially discriminatory purposes. Pointing to the testimony of Alabama legislators that the legislature would not pass any redistricting plan that would benefit black voters in Mobile, the appellees contend the courts below were well justified in concluding that the maintenance of at-large voting in this case was racially motivated in fact. Moreover, appellees claim, no proof of racially discriminatory intent was required in this voting dilution case for the reasons noted by Judge Wisdom. Finally, appellees argue that appellants are estopped from challenging the remedy ordered by the district court because they

stubbornly refused to offer the court any alternative plan.

ANALYSIS: I believe this appeal raises substantial questions of federal constitutional law warranting review by this Court. The Court should make clear (1) whether proof of discriminatory intent is required in voting dilution cases based on the Fifteenth, as well as the Fourteenth Amendment. Moreover, it is questionable (2) whether the majority view of legislative inaction as sufficient to support a finding of discriminatory purpose is consistent with Washington v. Davis and Arlington Heights, though those cases might be distinguishable because there is some direct testimony concerning racially discriminatory motivation here that was not present in those cases. Finally, (3) the remedy ordered by the district court is, indeed, a sweeping one that not only altered the manner of electing local governmental officials, but also the entire structure of the local government itself. Arguably, a colorable, though not necessarily persuasive, Tenth Amendment attack on the distric court's remedy might be maintainable in light of Usery.

The Court may wish to call for the views of the Solicitor General before making any decision as to whether or not to note probable jurisdiction.

There is a response.

9/5/78 Walsh opns in petn
aml

I think you should consider voting to ~~grant~~ note in this case. The question whether discriminatory intent is necessary in 15th Amendment cases is significant; The Court will be reviewing ~~the~~ analogous question whether such intent need be proved under 42 U.S.C. § 1981 in Davis v. County of L.A., No. 77-1553. In addition, further guidance on what facts

cc: Bell for S.G.'s views.

Renewed 9/30 - An exceptionally well organized and written memorandum. Altho I may not agree with all of it, the memo is the best over view of this murky area I have seen.

DOS

No restriction on registration & voting by blacks - 4. 10

Blacks ran for Commissioner only once - 1973 - & were young & inexperienced - 5 Even blacks gave them limited support - 5

Since '72 6 legislators have been elected in single member districts in Mobile - 5

Mobile voters in referenda in '63 & '73 rejected mayor-council form of Govt - 3; yet this was ordered by DC in this case - 6

DC inferred intent from "disproportionate impact" + "intentional legislative inaction" - 11, 12

BENCH MEMORANDUM

TO: Mr. Justice Powell

FROM: David

DATE: Sept. 11, 1979

RE: No. 77-1844, City of Mobile v. Bolden; No. 78-357, Williams v. Brown

QUESTIONS PRESENTED: (Good summary)

1) Does the intent requirement of Arlington Heights and Washington v. Davis apply to cases involving vote-dilution under the Fourteenth Amendment?

2) Should vote-dilution cases be decided under the Fifteenth Amendment? Would the legal standard under that provision vary from that under the Fourteenth, especially with regard to the intent requirement?

3) Is invidious intent demonstrated by maintenance of an electoral structure that is neutral on its face, but that in practice results in white dominance of all elected offices?

4) Did the DC overstep its remedial powers in No. 77-1844 when it imposed a new form of government and a new city charter on Mobile?

I. BACKGROUND

These cases involve challenges by black voters to the at-large election of the Mobile City Commission and the Mobile County Board of School Commissioners. The complaints alleged that although blacks make up 35 per cent of the 190,000 city residents, and 32 per cent of the 337,000 county residents, a black has never been elected to either body because votes are cast strictly on racial lines in Mobile, and the white majority invariably swamps any black candidates. In the context of the long history of discrimination in Mobile and the unresponsiveness to black needs of the City Commission and the School Board, the plaintiffs argued that the at-large system violates their constitutional right to participate in the political process. The District Court ruled in favor of plaintiffs in both cases. Under a new City Charter that he promulgated, the judge replaced the commission form of government in Mobile with a mayor-council system. He established nine single-member districts for the council, but elections were stayed pending this appeal. In the school board case, the court ordered election of the five board members from single-member districts on a staggered basis from 1978 through 1982. Two new members, both black, were elected in 1978.

A. The City Commission: Mobile adopted the commission form of government in 1911, in the midst of a national wave of municipal reform. By electing the three commissioners at-large in a non-partisan manner, the reformers hoped to end the corruption and "ward-heeling" that had characterized the mayor-alderman governments in Alabama. The State Constitution of 1901 had disenfranchised blacks, so the city (appellee in this case) argues that in 1911 there

Three Commissioners - numbered posts - majority vote required.

was no intent to exclude blacks from the city commission. As amended in 1945, the "system" provides for election by majority vote of three commissioners to numbered posts. If no candidate received a majority for a particular post, a runoff would be held between the two top vote-getters. There was no residency requirement for the commissioners. After election, the commissioners would designate one of their number as mayor, but they jointly exercised all legislative and administrative power in the city without formal distribution of specific duties. A proposal to replace the Commission with a mayor-council system was defeated in a referendum in 1963.

In 1965, the state legislature approved Act 823, which authorized the holding of another referendum on the mayor-council form of government. If approved by the voters, the Act provided for seven at-large councilmen. According to testimony by a former state legislator, the Act did not propose single-member districts because such a provision would have been considered an attempt to get blacks elected to state office. Brief for amicus United States, at 22. A referendum under this statute was defeated in 1973.

Act 823 also designated that one commissioner should be responsible for each of three administrative areas: (1) public safety, (2) finance and (3) public works and services. After this lawsuit was filed, the City submitted Act 823 to the Attorney General for clearance under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (1976). On March 2, 1976, the Attorney General objected to the statute. He contended that so long as each commissioner had a particular substantive responsibility, single-member districts would be unconstitutional, since they would permit one section of the city

to control policy in one area but have little voice on other matters. The city has not appealed the Attorney General's ruling to the District Court of the District of Columbia, so commission seats are no longer identified with functional duties.

Also in 1975, a bill was introduced in the state legislature to permit Mobile to adopt a strong-mayor/council government by referendum. The bill, which would have provided for seven single-member council districts and two council members elected at-large, was vetoed by one senator in the Mobile delegation (the county delegation operates on a sort of liberum veto on all local legislation). Two black legislators testified at trial that the referendum bill was defeated because it "would allow the possibility for blacks to hold public office in the City Government." Appellees' brief, at 24. Referring to the history of redistricting attempts in Mobile, the District Court observed, "The evidence is clear that whenever a redistricting bill of any type is proposed by a county delegation member, a major concern has centered around how many, if any, blacks would be elected." Juris. St. at 30b.

The DC found extreme racial polarization in voting in Mobile. Due to traditional methods of discrimination, blacks never voted in substantial numbers until after the Voting Rights Act went into effect. Now, according the the District Court, blacks are unrestricted in their registration and voting. But when a candidate is identified with the black community, "a white backlash occurs which usually results in the defeat of the black candidate or the white candidate identified with the blacks." Juris. St. at 8b. No black has ever been elected to the City Commission. Only three

No restrictions on voting

Blacks have run only once

blacks have run for the City Commission, and all unsuccessfully competed for the post in 1973. The only time blacks have run for the Commission was 1973, when three "young, inexperienced" blacks "mounted extremely limited campaigns." Id. They received little support even in the black community. In 1969,a white incumbent commissioner who had been identified with the black community was defeated for reelection by white votes, and lost a bid for the commission in 1972. The DC also cited a 1969 race for the state legislature when the county made up one multimember district. Two black candidates were well-supported in their own community, but were defeated. Similarly, black candidates for the School Commission lost at-large run-offs in 1962, 1966, and 1974, and a white "moderate" lost such a run-off in 1970.

There is some dispute about these election statistics. The 1969 defeat of Joseph Langan, the white incumbent commissioner who was identified with blacks, was attributed by some to a partial boycott of the elections by black militants and to a low turnout caused by Hurricane Camille. And plaintiffs' expert stated that 1969 was the high point of polarization in Mobile and predicted that racism would ebb as a force in political contests. Part of the basis for this prediction, however, was the observation that many black voters supported white candidates over the three young blacks running for City Commissioner. Plaintiffs, and the SG, argue that the supporting data is unreliable, since the black candidates were not very impressive. Indeed, there is no recent data on at-large voting patterns because since 1972 state legislators have been elected in single-member districts in Mobile, after 1976 the only school board

races have been in single-member districts, and there was no City Commission election in 1977 due to this lawsuit.

In October, 1976, the District Court found the at-large election of commissioners to be invidiously discriminatory. Following the failure of a legislative effort to establish single-member districts by authorizing a referendum on the subject, the judge asked the parties to submit remedial plans. The city refused to propose a plan that did not include at-large election of commissioners, but agreed to recommend two people to serve on a special committee to advise the court on redistricting. The third member of the committee was nominated by plaintiffs. The committee modelled its mayor-council plan on the municipal government in Montgomery, which is about the same size as Mobile. The court modified the plan in response to solicited comments from various segments of the community, and then ordered that it be followed in the 1977 elections. The DC stayed its injunction pending appeal, and offered to dissolve the injunction if the legislature adopted a constitutional reapportionment scheme.

CA 5 affirmed the DC, and this Court granted cert. The case was argued last March, and was then held for reargument.

B. The School Board: The Mobile County Board of School Commissioners was established in 1826. In all its permutations since then, it has always been elected on an at-large basis. After 1919, there were five commissioners elected by the whole county. Candidates ran for numbered seats on a partisan basis. No black was ever elected to the at-large board. Unlike contests for the City Commission, school board elections are relatively inexpensive, so the

black community has produced higher-quality candidates for the board. From 1962 until 1974, three blacks and one white civil-rights activist ran for the board in the Democratic primary. All four made it into the runoff, only to lose. Lost in run-offs

Before this suit was filed, Sen. Cain Kennedy, a black from Mobile, introduced legislation to establish single-member districts for the Mobile Board. Alabama has two kinds of statutes: local laws like Kennedy's bill and "general" laws. The "local" law was advertised in the Mobile newspapers, as required, at which point the incumbent school board members asked that the implementation dates be slightly altered. Sen. Kennedy agreed, and in October, 1975, the legislation was signed into law. Consequently, the DC disimissed this suit without prejudice on November 21, 1975. In February 1976, however, the Board of School Commissioners won a state decision declaring the Kennedy bill unconstitutional because the language of the bill as enacted was different from the language as advertised in the Mobile newspapers. Of course, the only change in that language had come at the request of the board itself. The nominal defendants in the suit -- the sheriff, circuit clerk and probate judge -- scarcely contested it, and the final judgment came twelve days after the suit was initiated. No appeal was taken. Although appellees then revived this action, they point out that the delay due to the Kennedy bill ensured that the 1976 board elections would occur before the DC could issue a decision in this case.

School Bd. - in litigation - invalidated a statute providing for single-member districts

In 1976 the board prepared a second legislative proposal, cast as a "general law of local application. A black legislator from Mobile refused to sponsor the bill, but Rep. Sonnier, a white, agreed

to present it. Counsel for the school board immediately requested that this litigation be continued pending legislative action on the Sonnier bill. The school board assured the District Court that the legislation would meet "all constitutional requirements." The District Court denied the continuance. During a subsequent exchange over a 1939 "general" law dealing with the school board, the board's counsel insisted that "general laws of local application" were unconstitutional. Judge Pittman asked counsel if the same principle applied to the Sonnier Bill. Counsel replied in the affirmative, and then conceded that the legislation was unconstitutional as drafted. Appellees' brief at 28-29.

The District Court ruled in favor of the plaintiffs, and ordered that the School Commissioners be elected in single-member districts on a staggered basis. Two districts, which both had black majorities, were to hold elections in 1978, one in 1980, and the last two in 1982. Due to the residence patterns of the incumbents, the plan resulted in a six-member board between 1978 and 1982. The court ordered that one of the incumbents should be designated non-voting chairman for each year during that period. After two blacks won the primaries for the seats that were available in 1978, the incumbents adopted a rule requiring the assent of at least four commissioners to every major substantive or procedural action. The district court held three of the Board members in contempt for promulgating the rule, but on Oct. 27, 1978, Mr. Justice POWELL stayed the contempt proceedings and the November elections. On Halloween, however, Mr. Justice POWELL vacated his stay of the elections, which took place in the first week of November. The District Court then enjoined the

Board from adopting its new rules and from voting to dismiss the instant litigation.

CA 5 affirmed the District Court's actions in a two-paragraph per curiam opinion that cited only its opinion in the City Commission case.

II. OPINIONS BELOW

The District Court opinion in No. 77-1844 served as the framework for its effort in No. 78-357, with only the facts changed. At the court of appeals, No. 77-1844 received a full airing, while No. 78-357 was affirmed in two paragraphs. Accordingly, I will concentrate in this section on the City Commission case.

A. District Court: The DC applied the standards for vote-dilution cases under the Fourteenth amendment that were articulated by the Fifth Circuit en banc in Zimmer v. McKeithen, 485 F.2d 1297 (1973), which was affirmed by this Court "without approval of the constitutional views expressed by the Court of Appeals." East Carroll Parish School Board v. Marshall, 424 U.S. 636, 638 (1976). The DC found that three of the primary factors identified by Zimmer were satisfied here, and that the fourth was neutral, while several "enhancing factors" were also present. Although the DC divided its opinion between Findings of Fact and Conclusions of Law, the City argues that many allegedly factual statements are based on inferences and should be carefully scrutinized by this court.

1) "Lack of Openness in the Political Process to Blacks" -- The DC cited "massive official and private discrimination" before the 1965 Voting Rights Act, although it also observed that now "blacks

register and vote without hindrance." Juris. St. at 7b. Despite this superficial equality of the franchise between black and white, the DC felt that racially polarized voting patterns barred blacks from meaningful participation in the political process. Judge Pittman compared black failure at the polls in at-large districts to the election of blacks from single-member legislative districts established by court order in 1972. He concluded:

> Black candidates at this time can only have a reasonable chance of being elected where they have a majority or a near majority. There is no reasonable expectation that a black candidate could be elected in a citywide election race because of race polarization. The court concludes that an at-large system is an effective barrier to blacks seeking public life.

2) "Unresponsiveness of the Elected City Officials to the Black Minority" -- Judge Pittman pointed to numerous examples of official discrimination, including the paucity of black public servants at higher levels (e.g., 15 of the 435 city fireman are black, while the police department is under a court order to desegregate). Public facilities like the municipal golf course, the airport, and public transportation were integrated by court order in the 1960s, and city advisory boards are more than 90 per cent white. The DC also found that the City Commission has provided quicker, more effective assistance to white neighborhoods faced with Mobile's drainage problems than to black areas, and the U.S. Department of the Treasury found discrimination in the use of revenue-sharing funds for resurfacing roads. He also criticized "sluggish" response by public officials to twenty or thirty cross-burnings in 1976 and a mock-lynching by police officers of a black robbery suspect who was later released without charge.

3) "Past Racial Discrimination" -- Starting from the disenfranchisement of blacks in the 1901 Constitution, the Court found that the "existence of past discrimination has helped preclude the effective participation of blacks in the election system today . . . ." Juris. St. at 20b.

4) "State Policy in Favor of At-Large Districts" -- Judge Pittman concluded that, in view of the diversity of forms of municipal government in Alabama, there is no "state policy" in favor of the Commission system as established in Mobile. State policy not to allow localities to choose

5) "Enhancing Factors" -- The DC said the discriminatory effect of the at-large system was buttressed by the large size of the district (which means that many people are disenfranchised, I guess), by the requirement that commissioners be elected by majority vote rather than simple plurality, by the "place" system of running candidates for particular seats on the Commission, and by the absense of a requirement that each commissioner reside in a different geographicdistrict. ?

Armed with these findings, Judge Pittman faced the question of whether to apply to this vote-dilution case the requirement of Washington v. Davis, 426 U.S. 229 (1976), that invidious intent be demonstrated in an equal protection claim under the Fourteenth Amendment. His discussion of the issue is somewhat elliptical, but he squarely concluded that the plaintiffs did have to demonstrate discriminatory intent. The City Commission, however, was established in 1911 when blacks did not have the vote. Confronted with this facially neutral statute, the DC decided that discriminatory intent could be inferred from the law's current "disproportionate impact" on

DC

discriminatory intent inferred from disproportionate impact

blacks. The Court stated that "It is not a long step from the systematic exclusion of blacks from juries . . . to a present purpose to dilute the black vote as evidenced in this case." Juris. St. at 31b (emphasis in original). Judge Pittman then reached his controversial conclusion:

> There is a "current" condition of dilution of the black vote resulting from intentional state legislative "inaction" which is as effective as the intentional state action referred to in [Keyes v. School District No. 1, 413 U.S. 189 (1973)].

Id. (emphasis in original). This conclusion relies on Judge Pittman's earlier assertion that because the legislature in 1911 "should have reasonably expected that the blacks would not stay disenfranchised," "the present dilution of black Mobilians is a natural and foreseeable consequence of the at-large system imposed in 1911." Id.

B. Court of Appeals: Judge Tjoflat, writing for himself and Judge Simpson, affirmed on the basis of the DC's application of the Zimmer factors. The panel incorporated by reference its conclusion in a companion case, Nevett v. Sides (Nevett II), 571 F.2d 209 (5th Cir. 1978), that a vote dilution case was subject to the same intent requirement as all other equal protection cases after Washington v. Davis and Arlington Heights. The findings of the DC on the Zimmer factors, according to the panel, "compel the inference that the system has been maintained with the purpose of diluting the black vote, thus supplying the element of intent necessary to establish a violation of the fourteenth amendment. . ." Juris. St. at 12a. Thus the CA accepted Judge Pittman's equation between legislative inaction and intent. Id. at 13a. Judge Tjoflat pointed

to Act 823 in 1965, which linked each commission seat to a substantive administrative responsibility, as "probative of an intent to maintain the plan by injecting additional policy grounds that would justify, and perhaps insulate, the at-large feature of all of the commission seats." Id. at 14a. He also cited the DC's finding that all redistricting efforts are evaluated in the legislature according to their racial impact.

The panel also upheld the remedial order of the DC, emphasizing the temporary nature of the the remedy "until the state or the city adopts a constitutional replacement." Id. at 17a. Judge Tjoflat also noted that the city had refused to submit a reapportionment plan, and argued that "[a] concomitant to the ability of a court to hear a case is that it be able to decide the case and remedy a wrong, if found." Oddly, the opinion then cites language in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15-16 (1971), that "the nature of the violation determines the scope of the remedy." As I will argue later, that very principle undermines the DC's remedial order.

It is odd!

*(15th Amend)

In Nevett II and in this case, Judge Wisdom filed a special concurrence that deserves mention. He argued that the Zimmer factors cannot provide the basis for the inference of discriminatory intent:

> Then, if invidious effects preponderate, the court by inference declares that the legislative body which initiated the plan had a racially discriminatory intent. If for historical or other reasons the voting scheme could not initially have been motivated by a racially discriminatory intent, . . . then failure of the legislative body to take affirmative curative action demonstrates, . . . an illegal intent to maintain diluted voting rights.

There is reasoning of CA5 majority that Wisdom rejected

571 F.2d at 231. Judge Wisdom found this reasoning inconsistent with

* SG does not agree with J. Wisdom as to

See also

majority of CA5 that infers 14th Amend intent from failure to take affirmative action

Washington v. Davis and Arlington Heights, and argued that when "a court must consider a laundry list, an 'aggregate' of factors, some pointing one way and others pointing another way, the case turns on the attitude of the trial judge and the appellate judges toward the American brand of federalism." Id. at 233.

Yes

Wisdom reaches same result by treating voting cases under 15th

The better approach, for Judge Wisdom, would be to distinguish voting rights cases from all other equal protection litigation, in view of the "fundamental importance of the right to vote," which "argues for expansive protection of that right." Id. at 234-35. In order to avoid further confusion of equal protection theory, he proposed considering this and similar cases under the Fifteenth Amendment.

> When a government adopts a system of voting that . . . places black citizens at a disadvantage, the government's reasons are irrelevant. The right to vote has been abridged.

what about other "disadvantaged citizens" — e.g. whites in Washington

Id. at 236. Where the equal protection clause is a "broad statement, without self-evident limits," the Fifteenth Amendment "by its terms is less expansive." By acting under that amendment, courts would not question the validity of other government programs, and the provision itself is "limited to racial groups." Id. Consequently, Judge Wisdom would look only to the impact of government policies on the right to vote of racial minorities. Because he found that the impact of the at-large system in Mobile was to dilute the votes of blacks, Judge Wisdom concurred in the judgment of the panel.

Poles in Pittsburg

III. VOTE-DILUTION IN MULTI-MEMBER DISTRICTS

According to the 1972 Municipal Year Book, about 12,000 municipalities and over 1,000 counties use at-large elections, though

At-large elections widely used

many may combine at-large seats with single-member districts. Although most of this court's decisions on multi-member districts have involved state legislatures, some have involved the at-large election of local officials. Wise v. Lipscomb, 437 U.S. 535 (1978) (city council); Dallas County v. Reese, 421 U.S. 477 (1975) (county commission); Avery v. Midland County, 390 U.S. 475 (1968); Sailors v. Board of Education of County of Kent, 387 U.S. 105 (county school board). As early as Reynolds v. Sims, 377 U.S. 533, 579 (1964), the Court referred to the use of multi-member districts to "achieve some flexibility" in local government. And the Court has repeatedly stated that such districts are not per se unconstitutional. After reviewing the Court's treatment of multi-member districts, I will examine some issues raised by at-large election of local officials that the Court has not yet explored.

A. The Precedents: The verbal standard that has been applied to challenges to multimember districts comes from Fortson v. Dorsey, 379 U.S. 433 (1965), involving the Georgia legislature.

> It might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case would operate to minimize or cancel out the voting strength of "racial or political elements" of the voting population.

Id. at 439 (emphasis supplied). The underlined language in that statement is the source of part of the argument that intent is not relevant to vote-dilution cases. Regardless, the Court found that the vote-dilution argument had not really been made below and certainly was not proved on the record of the case. Similarly, in Burns v. Richardson, 384 U.S. 73 (1966), concerning the use of multimember districts in the Hawaii legislature, the Court did not

White v Regester (Dallas) - re-districting required because of vote dilution.

find that the districting scheme "effects an invidious result." Id. at 88. Again, the Court's phrase suggested that intent was not an element of a vote-dilution case.

The most thorough consideration of multimember districts came in Whitcomb v. Chavis, 403 U.S. 124 (1971), where the Court upheld multimember districts for the Indiana legislature, and White v. Regester, 412 U.S. 755 (1973), a Texas case and the only instance where the Court has found sufficient vote-dilution to order redistricting. In Whitcomb, blacks and poor people claimed that the use of a county-wide district in Indianapolis, which almost invariably voted Republican, denied them effective participation in the political process. A three-judge court ruled in their favor, but this Court reversed. Mr. Justice WHITE's opinion for the Court reflected great unease with the idea that the courts should intervene in an apparently open political system to assist the election of members a particular group in society.

Only case

Byron's op. in Whitcomb

> [The District Court's holding] is not easily contained. It is expressive of the more general proposition that any group with distinctive interests must be represented in legislative halls if it is numerous enough to command at least one seat and represents a majority living in an area sufficiently compact to constitute a single-member district.

Id. at 156. Mr. Justice WHITE acknowledged that multimember districts have the potential to "submerge" minorities, but argued that petrs had not demonstrated such a state of events in Indianapolis. Because the Democratic party nominated black candidates and was responsive to the black community, the Court found that the political system was not discriminatory:

> [T]he failure of the ghetto to have legislative seats in proportion to its population emerges more as a function of

> losing elections than of built-in bias against poor Negroes. . . . We have not yet deemed it a denial of equal protection to deny legislative seats to losing candidates, even in those so-called 'safe' seats where the same party wins year after year.

Id. at 153.

The majority opinion in Whitcomb muddied the waters a bit on the need to show discriminatory intent in vote-dilution cases. At one point, the Court seemed not to care about intent, stating that a plaintiff must "carry the burden of proving that multimember districts unconstitutionally operate to dilute or cancel the voting strength of racial or political elements." Id. at 144 (emphasis supplied). Later on, however, Mr. Justice WHITE framed the issue in the case as whether the at-large districting was "conceived or operated as purposeful devices to further . . . racial discrimination." Id. at 149. This statement suggests that a districting scheme not conceived as a discriminatory device may nevertheless be "purposefully" operated to deny legislative representation to certain groups. This idea might be especially relevant to the Mobile cases.

White v. Regester focussed on multimember legislative districts in Dallas County, where blacks claimed they suffered vote-dilution, and Bexar County (San Antonio), where the plaintiffs were Mexican-Americans. The portion of Mr. Justice WHITE's opinion on multimember districts, which was joined by the whole Court, affirmed the three-judge court's conclusion that the votes of the minorities had been unconstitutionally diluted. The opinion, however, is unsatisfactory. Its basic statement highlights the importance of "participation in the political process" by a minority.

> [I]t is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiff's burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question -- that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.

412 U.S. at 766.

But when Mr. Justice WHITE turned to the facts in each county, his discussion was unilluminating. For Dallas County, the opinion enumerates several factors supporting the lower court's ruling: 1) the history of official racial discrimination in the county; 2) the requirement of a majority vote in primaries and the enumeration of specific seats for which candidates competed directly; 3) only two blacks had ever been elected to the legislature from Dallas County since Reconstruction; 4) the role of the Dallas Committee for Responsible Government, a white-dominated organization, that "slated" candidates for the Democratic primary. These elements supported the DC's conclusion that blacks were "generally not permitted to enter into the political process in a reliable and meaningful manner." On Bexar County, Mr. Justice WHITE was even less helpful. He noted the history of discrimination against Mexican-Americans in the community, and the "cultural and language barrier" they face in this country. The result, he said, was that only five Mexicam-Americans since 1880 had served in the Texas Legislature from Bexar County, even though in 1971 Mexican-Americans made up a majority of the population (but only a minority of the voting population). At this point, Mr. Justice WHITE argued that the findings of the District Court deserved deference, "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." Id. at 769-770.

I find no strong rule in the White opinion. Past discrimination is clearly important to any showing of vote dilution. It might be considered significant as support for an inference that the dilution is intentional. For the White Court, however, a history of discrimination was important because it established that the minorities had been excluded from the general political process. "Access to the political process" was certainly the Court's concern over the slating organization in Dallas County which provided the "something extra" which distinguished Dallas County from Indianapolis in Whitcomb. But for Bexar County, the Court pointed to nothing more than the language and cultural barriers faced by Mexican-Americans. I would not belittle those barriers, but I am hard pressed to find them substantially greater than the cultural barriers -- including skin color and a history of slavery -- between black and white. See generally, Casper, Apportionment and the Right to Vote: Standards of Judicial Scrutiny, 1973 Sup. Ct. Rev. 1, 27-28.

Access to the political process was also discussed in Chapman v. Meier, 420 U.S. 1 (1975), where the Court reversed a DC redistricting of the North Dakota legislature because the DC had retained multimember districts. In dictum, Mr. Justice BLACKMUN stated that in order to win a vote-dilution suit, "There must be evidence that the group has been denied access to the political process equal to the access of other groups." But in Chapman the

Court applied its rule that redistricting by courts is subject to closer scrutiny for constitutional violations than redistricting by legislation. See Connor v. Finch, 431 U.S. 407 (1977) (you dissented).

Two cases have up-held at-large local elections - but not strong precedents here.

In two cases, the Court has upheld the use of at-large voting for local governments. In Dusch v. Davis, 387 U.S. 112 (1967), the Court did not disturb the creation of a city council for Virginia Beach with four members elected at-large without residency requirement an and seven others, also elected at-large, who each had to live in one of seven residential districts. Mr. Justice DOUGLAS wrote for the Court: "The Seven-Four plan seems to reflect a detente between urban and rural communities that may be important in resolving the complex problems of the modern megalopolis in relation to the city, the suburbia, and the rural countryside." Id. at 117. Dallas County (Ala.) v. Reese, 421 U.S. 477 (1975), involved at-large election of county commissioners. Each of the four commissioners had to live in one of four districts. The city of Selma constituted one district, and thus was entitled to only one commissioner, although it held half the population of the county. The Court ruled that "each commissioner represents the citizens of the entire county and not merely those of the district in which he resides." Id. at 477.* In neither case, it should be stressed, was a convincing argument presented to the Court that the votes of a racial group had been diluted,

But

*In Abate v. Mundt, 403 U.S. 182 (1971), the Court did not disturb a County Commission made up of one representative from each of the five towns in the county. Even though the towns varied widely in population, the Court deemed the scheme adequate because it served "the peculiar needs of the community" by enhancing coordination between the county and town governments.

diluted.

B. General Considerations: Several features of at-large elections f local government bodies deserve some mention. A citywide or countywide perspective would seem more valuable to someone with administrative responsibility for that district than for a legislator. See Comment, 87 Harv. L. Rev. 1851, 1857 (1974). Like a mayor, a city commissioner might need that breadth of view in order to discharge his duties conscientiously, without being subject to parochial pressures. At oral argument last March, the bench indicated some interest in this line of reasoning. This argument was rejected in Avery v. Midland County, 390 U.S. 475, 485 (1968), because the County Commission had "general governmental powers over the entire geographic area served by the body." That holding may have been prompted by the facts of that case: the County Commission was elected at large with one commissioner from a district containing 67,000 people, and three from districts with less than 1,000 people each. In Sailors v. Board of Education of County of Kent, 387 U.S. 105 (1967), the Court ruled that a county board of education "performs essentially administrative functions; and while they are important, they are not legislative in the classical sense." Id. at 110. Among the administrative duties were the selection of a superintendant, preparation of the budget, and oversight of instruction. Because of the county board's predominantly administrative function, the Court approved the appointment of the county Board from popularly elected local school boards of varying sizes. These two rulings might yield the tentative rule that a local body that is primarily administrative must meet a lower standard in

response to a vote-dilution challenge, but that a body with mixed legislative and administrative responsibilities will be treated like a legislature.

A 1968 scholarly article points out two significant distinctions between multimember districts for state legislatures and at-large local elections. Jewell, Local Systems of Representation: Political Consequences and Judicial Choices, 36 Geo. Wash. L. Rev. 790 (1968). The use of at-large elections for a local body does not create any difference in representation between individual voters, while such differences arise when some state legislators are elected from single-member districts and some from multimember ones. Id. at 800. On the other hand, in legislative elections the majority-sweep feature of multimember districts may be offset by the possibility that minorities will win in other multimember or in single-member districts.

> In any single city or county, however, the discriminatory effect of at-large elections is absolute; there is no way of balancing out discriminations against various groups, and it is possible that voters who constitute some kind of minority (partisan or other) will be unable to elect a representative of their own over a period of many years.

Id. In that passage, Jewell rather accurately described the situation in Mobile.

IV. INTENT

All vote dilution opinions of this Court have focused on the equal protection clause of the Fourteenth Amendment. Although the Court is now committed to a requirement that discriminatory intent be demonstrated in cases claiming a denial of equal protection, resps argue that such intent should not be required for voting cases, since

voting is such a fundamental right. They also argue, following Judge Wisdom's concurrence in Nevett II, that the Fifteenth Amendment should be the basis for the Court's decision here because that provision mandates that voting rights shall not be abridged on the basis of race, regardless of questions of intent. I shall deal with each Amendment in order.

A. Fourteenth Amendment -- As noted above, the basic argument here derives from language in the earliest cases, Fortson and Burns, that dilution occurring "designedly or otherwise" could be unconstitutional. Neither Whitcomb nor White really considered intent, but rather concentrated on the effects on minority voting of the political structure and historical practices of the community. This neglect of intent could be seen as part of the Court's uncertainty over the role of intent in equal protection analysis at that time. For example, in Palmer v. Thompson, 403 U.S. 217 (1971), Mr. Justice BLACK wrote for the Court that intent was irrelevant so long as a legitimate nondiscriminatory reason existed for a governmental action. See Brest, Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive, 1971 Sup. Ct. Rev. 95. Since Washington v. Davis and Arlington Heights, however, there has been no such confusion. The alternative view, pressed here by appellees, is that voting is such a fundamental interest for all citizens that the Court has consciously refrained from injecting issues of intent into voting rights cases under the Fourteenth Amendment. (Significantly, amicus United States does not argue this position, but concedes that discriminatory intent must be demonstrated in a vote-dilution case.)

SG does not adopt the view that "intent" is not relevant to vote-dilution cases. He concedes need for disc. intent

holding that Davis & Arlington Heights "intent" analysis applies to vote-dilution cases.

The treatment of this question in the courts below and in the briefs has focussed on Wright v. Rockefeller, 376 U.S. 52 (1964), a gerrymander case concerning congressional districts in Manhattan. The claim was an odd one from our current perspective: minority citizens argued that they had been unconstitutionally lumped into one district, leaving four districts in the county with white majorities. In other words, they urged that the Fourteenth and Fifteenth Amendments required dilution of their votes. The seven-man majority of the Court affirmed the DC's finding that appellants had not proved "that the New York Legislature was either motivated by racial considerations or in fact drew the districts on racial lines." Id. at 56. The Court accepted the DC's conclusion "that appellants have not shown that the challenged [redistricting] was the product of a state contrivance to segregate on the basis of race or place of origin." Id. at 58 (emphasis added).

The language of intent in Wright was cited in both Washington v. Davis, 426 U.S. at 240, and Arlington Heights, 429 U.S. at 265. Because of that, the Fifth Circuit in Nevett II concluded that this Court meant to extend the intent requirement to voting cases under the Fourteenth Amendment. Appellees dispute that reading on the basis of language in Wright discussing discriminatory impact as well. Moreover, they add, Washington and Arlington Heights did not cite any other voting cases.

(i.e. that "intent" is relevant)

I think the Fifth Circuit's position is more accurate. Although Washington and Arlington Heights only decided the case before the Court at the time, the discussion in both cases -- in particular the survey of various areas of equal protection law --

indicated a desire to provide a comprehensive framework for handling such cases. The citation of Wright, a case that has had little impact in any other respect, betrays a conviction that voting cases should also be subject to the intent requirement. Equally, the failure of the Washington and Arlington Heights opinions to discuss White v. Regester or Whitcomb does not seem inadvertent. Rather, because the vote-dilution cases had not dealt with intent, they were not relevant to the Court's new approach. This view is buttressed by Justice Stewart's statement in United Jewish Organization of Williamsburg v. Carey, 430 U.S. 144 (1977), in which you concurred:

> Under the Fourteenth Amendment the question is whether the reapportionment plan represents purposeful discrimination against white voters. Washington v. Davis, 426 U.S. at 229. Disproportionate impact may afford some evidence that an invidious purpose was present. [Arlington Heights, 429 U.S. at 266.] But the record here does not support a finding that the redistricting plan undervalued the political power of white voters relative to their numbers.

Id. at 179-180.

The case against this approach, as Greg Morgan argued in his law review note, Racial Vote Dilution in Multimember Districts: The Constitutional Standard After Washington v. Davis, 76 Mich. L. Rev. 694 (1978), is straightforward. The right to vote is so fundamental that the question of legislative or administrative intent is irrelevant so long as discriminatory impact is demonstrated. And voting rights are a sufficiently discrete set of personal entitlements that the Court could exclude intent as a consideration in voting cases without undermining Washington and Arlington Heights with respect to other equal protection areas. I think this argument may be naive. By recognizing such a "fundamental interest" exception

to the intent requirement, the Court would be inviting future litigants to pose their arguments in that language. Once the Court begins defining interests as fundamental and not-fundamental, irrational linedrawing becomes inevitable.

B. Fifteenth Amendment -- In Nevett II, Judge Wisdom proposed using the Fifteenth Amendment to establish special protection for voting cases by looking only to discriminatory impact, not intent. That constitutional provision applies specifically to the voting rights of racial minorities, so there would be little danger that the Court's ruling would "seep" into other equal protection cases; and by proscribing any abridgment of voting rights, the Amendment is broad enough to reach the devaluation of the vote presented by dilution cases.

Judge Wisdom's proposal is attractive. The major problem with it, however, is the desuetude into which the Fifteenth Amendment has fallen. No major case has been decided on the basis of that provision since Gomillion v. Lightfoot, 364 U.S. 339 (1960), and even then its use was primarily designed to permit Justice Frankfurter to evade his "political thicket" pronouncement in Colegrove v. Green, 328 U.S. 549 (1946). Indeed, there is very little precedent from this Court on the Fifteenth Amendment. Several of the cases upholding the Voting Rights Act of 1965 discuss congressional power under the Amendment, e.g., South Carolina v. Katzenbach, 383 U.S. 301 (1966), but I could only find three cases in the last fifty years discussing its direct applicaton.

The plaintiffs in Gomillion challenged the redrawing of the town boundaries of Tuskegee, Alabama so as to exclude every black

family and no whites. Justice Frankfurter's opinion for the Court distinguished Colegrove as involving the retention of unequal apportionment (or legislative inaction), while the redefinition of Tuskegee had just taken place (legislative action).

More direct guidance for the Mobile cases comes from Terry v. Adams, 345 U.S. 461 (1953), involving the role of a private political group, the "Jaybird Party," that staged white primaries before the Democratic primary, and whose candidates always won the Democratic primary and general election. Writing for himself and two other judges, Mr. Justice BLACK found that the Jaybird Party "holds exactly the kind of election that the Fifteenth Amendment tries to prevent." He added:

> It violates the Fifteenth Amendment for a state. . . to permit within its borders the use of any device that produces the equivalent of the prohibited election. . .
> The effect of the whole procedure. . . is to do precisely that which the Fifteenth Amendment forbids -- strip Negroes of every vestige of [political] influence . .

Id. at 469-470.

While Mr. Justice BLACK was willing to impose a duty on the state to prevent the use of any device that would abridge voting rights of blacks, regardless of intent, Mr. Justice FRANKFURTER,needless to say, would not go so far. He concluded that the exlusion of blacks from a meaningful voice in local government was "not an accidental, unsought consequence of the exercise of civil rights by voters to make their common viewpoint count. . . . It was the design, the very purpose of this arrangment . . . ." Id. at 475-76. Mr. Justice FRANKFURTER rather desperately searched for state action in the Jaybird primary, finally concluding obscurely that,

"The evil here is that the State, through the action and abdication of those whom it has clothed with authority, has permitted white voters to go through a procedure which predetermines the legally devised primary." Id. at 477 (emphasis supplied). Mr. Justice CLARK's opinion for three other justices simply argued that the Jaybird Party was a political party "whose activities fall within the Fifteenth Amendment's self-executing ban," id. at 482, adding, "Quite evidently, the Jaybird Democratic Association operates as an auxiliary of the local Democratic Party. . . ." Id. at 483. Justice Clark concluded:

> [W]hen a state structures its electoral apparatus in a form which devolves upon a political organization the uncontested choice of public officials, that organization itself, in whatever disguise, takes on those attributes of government which draw the Constitution's safeguards into play.

Id. at 484.

In Lane v. Wilson, 307 U.S. 268 (1939), this Court struck down an Oklahoma requirement that all people who had not previously voted (which included all blacks in the state) register in one twelve-day period. Noting that the Fifteenth Amendment "nullifies sophisticated as well as simple-minded" methods of denying the vote to minorities, the Court rejected the statute because its "practical effect" was to abridge the right to vote.

Both Lane and Terry seem to provide Judge Wisdom with what he wants -- an impact-oriented standard for evaluating restrictions on voting rights. In particular, the discussion in Terry of state action offers several bases for arguing that the Fifteenth Amendment is violated by state acquiescence in the abridgment of black voting

rights. The Wisdom approach would represent a "major departure" from the current jurisprudence of voting rights, and I would not want to embrace it without a full consideration of the legislative history behind the Fifteenth Amendment. (Some discussion of that history appears in Brief for Appellees in No. 77-1844, at 87-90, and Brief for Amicus, at 86-89.) Nevertheless, his approach has much to commend it. Where the equal protection clause is obscure and applies broadly, the Fifteenth Amendment is clear and specific to voting rights of racial minorities. And the right to vote is arguably the most basic right we have, protected by the provision in Articles I and II for the election of Congress and the President, by the First Amendment's attention to free speech, assembly and petition of the government, and perhaps even inherent in some notion of societal due process.

Dispensing with the intent requirement by following Judge Wisdom's lead would simplify voting rights litigation and ease the burden on plaintiffs. The result could be greater intervention by federal courts into local districting matters. That result might not be so unattractive under a more clear notion of the remedial powers of the DCs, as I will discuss below, but should be acknowledged as a possible drawback. Realistically, I would not expect the whole Court, or a very sizable minority, to embrace Judge Wisdom's view. But I would commend it to your careful attention.

IV. WAS THERE INTENT IN THESE CASES?

The "most troubling feature" of the opinions below is their equation of legislative inaction with intent to discriminate. Some

support for the DC's approach comes from this Court's decision in Norwood v. Harrison, 413 U.S. 455 (1973), a case which presented a strikingly similar sequence of events. In 1940, Mississippi had adopted a program of giving textbooks to students in private schools. After the state's public schools were desegregated in 1962, however, hundreds of "white academies" sprang up that benefitted from this policy. The Supreme Court found a violation of equal protection even assuming that the textbood aid program was not "motivated by other than a sincere interest in the educational welfare of all Mississippi children." Id. at 466. The program, according to the Court, "has a significant tendency to facilitate, reinforce, and support private discrimination," and could not "be shielded altogether from constitutional scrutiny because its ultimate end was not discrimination but some higher goal." Id. at 466, 467. In addition, this Court's discussion in White v. Regester of the position of Mexican-Americans in Bexar County and of blacks in Dallas County made no mention of discriminatory intent. I think it is reasonable to view both Norwood and White as pre-Washington v. Davis decisions that could not now be reached without a showing of intent. Nevertheless, I think the decision of the courts below can be supported without resort to the artless and wide-ranging language they used.

Whose intent?

The threshhold question is: Whose intent? The most useful treatment of this issue, for me, was in Note, Segregative Intent and the De Facto/De Jure Distinction: Reading the Mind of the School Board, 86 Yale L.J. 317 (1976), arguing that the Court has looked to "institutional intent." Rather than focus exclusively on the statements of particular actors, the Court will infer segregative

intent from the pattern of actions taken by an institution, compared to alternative actions that were open to it. Id. at 337-338. Of course, the at-large systems in this case were established by the state legislature. The DC found, however, that the local delegation controls all legislation that effects only Mobile. And, as was demonstrated by the whirl of legislation responding to this litigation, the delegation is responsive to the requests of local governmental bodies. Consequently, I think this case would focus on the intent behind the actions of the Mobile legislative delegation, the City Commission, and the Board of School Commissioners.

Relevant Intent

Second, discrimination need not be the dominant or primary purpose of an action in order to trigger strict scrutiny by the courts. So long as it is "a" motivating factor, "judicial deference is no longer justified." Arlington Heights, 429 U.S. at 266.

The problem of divining discriminatory intent behind facially neutral classifications is chronic, and acute. As you noted in Arlington Heights:

> Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available . . . . Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action . . . . But such cases are rase. Absent a pattern as stark as that in Gomillion or Yick Wo, impact alone is not determinative, and the Court must look to other evidence.

429 U.S. at 266. You listed five sources of "other evidence": 1) an historical background of discrimination; 2) the "specific sequence of events leading up to the challenged decisions"; 3) whether there were departures from normal procedures; 4) whether there were changes in substantive policy; and 5) the evidence of participants in the

decisionmaking process. Id. at 267.

Although it might be argued that the complete failure of black candidates to win an at-large election demonstrates the needed discriminatory intent, I would look to the totality of factors. The facts of these cases provide some basis for finding discriminatory intent, particularly with respect to the school board. First, there is a long history of discrimination against blacks in Mobile, and viable black candidates have repeatedly lost runoffs for the school board. In addition, the board sabotaged the 1975 Kennedy Bill to set up single-member districts, and then sponsored another unconstitutional reapportionment measure, the Sonnier Bill. Following the victories by two blacks in the 1978 primary, the board enacted its rule requiring four votes for major actions in a transparent attempt to ensure that no school policy could be set without the support of a majority of the white board members. Concededly, this is not legislative intent in the sense that a majority of the Alabama Legislature agreed to keep blacks off the Mobile Board of School Commissioners. Yet the actions taken by the board reflect both discriminatory intent and bad faith.

The City Commission presents a closer case, in my view. The election results are less compelling because no viable black candidate has run for that office. Appellees insist that this has been due to the expense of mounting a serious campaign combined with the certainty of defeat for blacks. Moreover, there has been no demonstration that the Commission has fought single-member districts tooth-and-nail the way the school board has. Nevertheless, the District Court found that race was a major factor in all

redistricting proposals, and that racial considerations were instrumental in defeating 1965 and 1975 legislation to authorize a referendum on single-member districts. The DC drew this conclusion on the basis of testimony of legislators which, although perhaps subject to question on the grounds of personal interest, is certainly more direct evidence that ordinarily arises in equal protection cases. And there is much in the record -- the mock lynching, cross-burnings, and still almost lily-white upper levels of the city bureaucracy -- that suggests that discriminatory motivations underlie many of the Commission's policies.

VI. VOTING RIGHTS ACT Not applicable - no change § 2 not applicable

Appellees repeat somewhat desultorily their claim that the at-large elections in Mobile violate Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (1976), and point out that this Court's practice is to decide a case on statutory grounds if possible, before reaching constitutional issues. E.g., Wood v. Strickland, 420 U.S. 308, 314 (1975). CA 5 decided the case on the constitutional claim because that point had been fully developed by the DC and because "to remand this case [for decision on the statutory question] would be a purposeless waste of judicial resources." Juris. St. at 5a. CA 5 also pointed out that no vote-dilution claim has been sustained under the Voting Rights Act. This Court has noted that in some circumstances the constitutional-decision-avoidance rule may be abused, particularly when there is little basis for the statutory claim and the case has been litigated exclusively on the constitutional issue. Mayor of Philadelphia v.

Educational Equality League, 415 U.S. 605, 629 (1974). I would follow that theory here.

VII. THE REMEDY

The DC's order in the City Commission case is questionable. This Court has stated repeatedly that in court-ordered reapportionments, single-member districts are preferred unless unique circumstances are present. E.g., Mahan v. Howell, supra; Connor v. Johnson, 402 U.S. 690, 692 (1971). But this Court has also insisted that the "scope of the remedy is determined by the nature and extent of the constitutional violation." Milliken v. Bradley, 418 U.S. 717 (1974). Or as you stated in your concurrence to the vacation and remand of Austin Independent School Dist. v. United States, 429 U.S. 990, 991 (1976): "A remedy simply is not equitable if it is disproportionate to the wrong." This approach has been applied beyond the confines of school desegregation cases. Hills v. Gatreaux, 425 U.S. 284 (1976). The "controlling case" for this litigation, in my view, is Sixty-Seventh Minnesota State Senate v. Beens, 406 U.S. 187 (1972). The DC in that case had reapportioned the state senate, and in the process had reduced the number of senators from 67 to 35. The Court's per curiam opinion stated that "a federal reapportionment court should accomodate the relief ordered to the appropriate provisions of state statutes relating to the legislature's size insofar as is possible," Id. at 197, and added:

> We know of no federal constitutional principle or requirement that authorizes a federal reapportioning court to go as far as the District Court did and, thus, to bypass the State's formal judgment as to the proper size of its legislative bodies.

on "remedy" issue, but would affirm re Bd. School

In the instant case, the DC's order drafting a new city charter and imposing a new form of government represents a massive intrusion on local prerogatives. It is particularly unacceptable in view of the availability of intermediate remedial measures that could have responded to the vote-dilution problem. The DC could have banned the "place" requirement that establishes head-to-head elections for each seat on the Commission, and required true at-large voting. Or the DC could have divided the city into three districts and imposed a requirement that a commissioner reside in each district. Indeed, the Attorney General had paved the way for this approach in his 1976 rejection of Act 823's linkage of specific administrative duties to particular commission seats. I see no way to affirm the DC's order in this regard.

Yes! Less intrusive remedies were available.

The remedy in the school board case was a simple conversion from multimember districts to single-member districts, and was far less intrusive. Such action is clearly within the powers of a federal court in a vote-dilution case.

But affirm re School Bd.

VIII. RECOMMENDATION:

I would give serious consideration to Judge Wisdom's Fifteenth Amendment approach. Under traditional equal protection analysis, I think that Washington v. Davis and Arlington Heights require a showing of discriminatory intent. This means revising the "participation in the political process" standard of White and Whitcomb. In view of the obscurity of that standard, though, such a change would be for the best.

I would find on these facts the requisite intent to support

the vote-dilution claim. As I noted above, the question seems closer with respect to the City Commission, especially in view of the stronger local interest in having the executive branch chosen on a citywide basis in order to lessen parochialism. Some relief could be granted without imposing a new type of municipal government, however. More important, this Court has emphasized the need to defer to DC findings in cases like this. E.g., White v. Regester, supra, 412 U.S. at 769-770 (need for "intensely local appraisal" of the facts "in the light of past and present reality"); Mayor of Philadelphia v. Educational Equality League, supra, 415 U.S. at 621 n.20.

I would overturn the remedy ordered in the City Commission case.

David

78-1044 CITY OF MOBILE v. BOLDEN
78-1357 WILLIAMS v. BROWN

Argued 10/29/79

Allen (Mobile School Bd) (Covington + Burling)

Jeenes 78-233

Riker on Veterans Preference case last Term where there had been a failure for years to change a discriminatory statute.

One cannot escape the "intent" requirement of 14th

§2 of Voting Rts Act has been dormant in this case, but not until before this Court have Appellees argued that ~~it~~ §2 requires a different standard. In any event, there is no basis for implying a private cause of action.

Nor does §2 (as distinguished from §5) do more than reappear 15th Amend - & the intent required by 14th must also apply to 15th.

Schnapper (for Appellees)

DC did not rely at all on §2*

CA5 relegated this to a footnote.

Relies primarily on White v Reg.

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§2 (like 15th Amend) covers all 50 states

Turner (Civil Rts Div)

Concedes concern re to effect of this case on thousands of cities & ~~co~~ local govt with at-large elections. Turner says Mobile's situation is unique.

JPS pressed each counsel re to whose intent is at issue, Turner conceded this is difficult quest. Here we are talking about refusal to make a change.

Turner says if we are relying on 14th, it is legislature's intent. May be different under 15th

J.P.S. asked re to situation if ~~ad~~ City Comm. of Mobile and all Mobile legislators desired single member districts, & State Leg. refused to make change? (No good answer)

Bloodshed (pre-Suffragettes)

Disagreement [illegible] reading [illegible]
of Voting Rts Act House of [illegible]
Cabinet of ministers - voting on Commons
Lords talking instead in heart of
legislature

W M K push very Q : How many
other groups ?

Could exclude a Politburo
Group many women Women's suffrage
- but Women only the difference

Reform not Voting Rts Act C
15th Amendment more Negro Rights
19th - Civil rights Act all Blacks

White + Rep majority unlikely
Democrat Party - Have not been
traditional Rep + opposition parties
- Like City Mayor [illegible]

Political
Events
Legislature

Char Rhyne (for Mobile)

In 1973, black vote was decisive.

Referenda in '63 & '73 rejected mayor-council form of Gov't.

DC's reliance on what State Leg. did is irrelevant. State is not a party to this case.

Relevant intent is that of City Commission — not of State Legislature.

No qualified black has ever run.

Black mayors in Atlanta, Los Angeles (17% black), Detroit, Newark Birmingham (?).

Ask Librian for other examples.

The court order in '72 that required single member districts for legislature did not change form of Gov't. (Nor do single member leg. districts ~~re~~ result in the adverse impact on city gov't & city services).

Other remedies for Zimmer factors — e.g. Title VII

Voting Rights Act is irrelevant. It was relied on Complaint.

Decisions of DC & CA 5 were grounded solely on 14th Amend.

77-1664 CITY OF MOBILE v. BOLDEN
78-337 WILLIAMS v. BROWN Conf. 10/31/79

Mr. Justice White

Mr. Justice Marshall

Mr. Justice Blackmun

Mr. Justice Rehnquist *Reverse*

Mr. Justice Stevens *Reverse* (concurring)

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

From: Mr. Justice Stewart

Circulated: 4 JAN 1980

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1844

City of Mobile, Alabama, et al., Appellants, v. Wiley L. Bolden et al. | On Appeal from the United States Court of Appeals for the Fifth Circuit.

[January —, 1980]

MR. JUSTICE STEWART delivered the opinion of the Court.

The City of Mobile, Ala., has since 1911 been governed by a City Commission consisting of three members elected by the voters of the city at-large. The question in this case is whether this at-large system of municipal elections violates the rights of Mobile's Negro voters in contravention of federal statutory or constitutional law.

The appellees brought this suit in the Federal District Court for the Southern District of Alabama as a class action on behalf of all Negro citizens of Mobile.[1] Named as defendants were the city and its three incumbent Commissioners, who are the appellants before this Court. The complaint alleged that the practice of electing the City Commissioners at-large unfairly diluted the voting strength of Negroes in violation of § 2 of the Voting Rights Act of 1965,[2] of the Fourteenth Amendment and of the Fifteenth Amendment. Following a bench trial, the District Court found that the constitutional rights of the appellees had been violated, entered a judgment in their favor, and ordered that the

[1] Approximately 35.4% of the residents of Mobile are Negro.

[2] 79 Stat. 437, 42 U. S. C. 1973. The complaint also contained claims based on the First and Thirteenth Amendments and on 42 U. S. C. § 1983 and 42 U. S. C. § 1985 (3). Those claims have not been pressed in this Court.

Received
L.F.P.
1/4+5/80

If this becomes a Court opinion, it will reverse a trend towards guaranteeing that certain categories of citizens will be elected to office — regardless of all else. I must study details more carefully, but on a first reading I am unpersuaded

City Commission be disestablished and replaced by a municipal government consisting of a Mayor and a City Council with members elected from single-member districts. 423 F. Supp. 384.[3] The Court of Appeals affirmed the judgment in its entirety, *Bolden* v. *City of Mobile*, 571 F. 2d 238, agreeing that Mobile's at-large elections operated to discriminate against Negroes in violation of the Fourteenth and Fifteenth Amendments, *id.*, at 245, and finding that the remedy formulated by the District Court was appropriate. An appeal was taken to this Court, and we noted probable jurisdiction, — U. S. —. The case was originally argued in the 1978 Term, and was reargued in the present Term.

I

In Alabama, the form of municipal government a city may adopt is governed by state law. Until 1911 cities not covered by specific legislation were limited to governing themselves through a mayor and city council.[4] In that year, the Alabama Legislature authorized every large municipality to adopt a commission form of government.[5] Mobile established its City Commission in the same year, and has maintained that basic system of municipal government ever since.

The three Commissioners jointly exercise all legislative, executive, and administrative power in the municipality. They are required after election to designate one of their number as Mayor, a largely ceremonial office, but no formal provision is made for allocating specific executive or administrative duties among the three.[6] As required by the state

[3] The District Court has stayed its orders pending disposition of the present appeal.

[4] Alabama Code, Chapter 11–43 (1975).

[5] Act 281, 1911 Alabama Acts, at 330.

[6] In 1965 the Alabama Legislature enacted Act 823, 1965 Alabama Acts, at 1539, § 2 of which designated specific administrative tasks to be performed by each Commissioner and provided that the title of Mayor be rotated among the three. After the present lawsuit was commenced, the

law enacted in 1911, each candidate for the Mobile City Commission runs for election in the city at-large for a term of four years in one of three numbered posts, and may be elected only by a majority of the total vote. This is the same basic electoral system that is followed by literally thousands of municipalities and other local governmental units throughout the Nation.[7]

II

Although required by general principles of judicial administration to do so, *Ashwander* v. *TVA*, 297 U. S. 288, 347 (Brandeis, J., concurring), neither the District Court nor the Court of Appeals addressed the complaint's statutory claim—that the Mobile electoral system violates § 2 of the Voting Rights Act of 1965. Even a cursory examination of that claim, however, clearly discloses that it adds nothing to the appellees' complaint.

Section 2 of the Voting Rights Act provides:

> "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States on account of race or color."

Even assuming, for present purposes, that there exists a private right of action to enforce this statutory provision, a most

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city of Mobile belatedly submitted Act 823 to the Attorney General of the United States under § 5 of the Voting Rights Act of 1965. 42 U. S. C. 1973c. The Attorney General objected to the legislation on the ground that the city had not shown that § 2 of the Act would not have the effect of abridging the right of Negroes to vote. No suit has been brought in the District Court for the District of Columbia to seek clearance under § 5 of the Voting Rights Act and, accordingly, § 2 of Act 823 is in abeyance.

[7] According to the 1979 Municipal Year Book, in addition to the cities that have a commission system of government, 63.4% of the cities with a population of 25,000 or more persons that have city councils, elect all council members through at-large elections.

dubious assumption in light of our recent cases,[8] it is apparent that the language of § 2 no more than elaborates upon that of the Fifteenth Amendment,[9] and the sparse legislative history of § 2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself.

Section 2 was an uncontroversial provision in proposed legislation whose other provisions engendered protracted dispute. The House Report on the Bill simply recited that § 2 "grants . . . a right to be free from enactment or enforcement of voting qualifications . . . or practices which deny or abridge the right to vote on account of race or color." H. R. Rep. No. 439, 89th Cong., 1st Sess., 23 (1965). See also S. Rep. No. 162, pt. 3, 89th Cong., 1st Sess., 19–20 (1965). The view that this section simply restated the prohibitions already contained in the Fifteenth Amendment was expressed without contradiction during the Senate hearings. Senator Dirksen indicated at one point that all States, whether or not covered by the preclearance provisions of § 5 of the proposed legislation, were prohibited from discriminating against Negro voters by § 2, which he termed "almost a rephrasing of the 15th [A]mendment." Attorney General Katzenbach agreed. See Voting Rights: Hearings on S. 1564 before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., 208 (1965).

In view of the section's language and its sparse but clear legislative history, it is evident that this statutory provision adds nothing to the appellees' Fifteenth Amendment claim. We turn, therefore, to a consideration of the validity of the judgment of the Court of Appeals with respect to the Fifteenth Amendment.

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[8] See *Transamerica Mortgage Advisers, Inc.* v. *Lewis*, — U. S. —, —; *Touche-Ross & Co.* v. *Redington*, — U. S. —, —.

[9] Section 1 of the Fifteenth Amendment provides:

"The right of the citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

III

The Court's early decisions under the Fifteenth Amendment established that it imposes but one limitation on the powers of the States. It forbids them to discriminate against Negroes in matters having to do with voting. See *Ex parte Yarbrough*, 110 U. S. 651, 665; *Neal* v. *Delaware*, 103 U. S. 370, 389–390; *United States* v. *Cruikshank*, 92 U. S. 542, 555–556; *United States* v. *Reese*, 92 U. S. 217. The Amendment's command and effect are wholly negative. "The Fifteenth Amendment does not confer the right of suffrage upon any one," but has "invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous conditions of servitude." *Id.*, at 217–218.

Our decisions, moreover, have made clear that action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose. In *Guinn* v. *United States*, 238 U. S. 347, this Court struck down a "grandfather" clause in a state constitution exempting from the requirement that voters be literate any person or the descendants of any person who had been entitled to vote before January 1, 1866. It was asserted by way of defense that the provision was immune from review, since a law could not be found unconstitutional either "by attributing to the legislative authority an occult motive," or "because of conclusions concerning its operation in practical execution and resulting discrimination arising . . . from inequalities naturally inhering in those who must come within the standard in order to enjoy the right to vote." *Id.*, at 359. Despite this argument, the Court did not hesitate to hold the grandfather clause unconstitutional, because it was not "possible to discover any basis in reason for the standard thus fixed than the purpose" to circumvent the Fifteenth Amendment. *Id.*, at 365.

The Court's more recent decisions confirm the principle that racially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation. In *Gomillion* v. *Lightfoot*, 364 U. S. 339, the Court held that allegations of a racially motivated gerrymander of municipal boundaries stated a claim under the Fifteenth Amendment. The constitutional infirmity of the state law in that case, according to the allegations of the complaint, was that in drawing the municipal boundaries the legislature was "solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote." *Id.*, at 341. The Court made clear that in the absence of such an invidious purpose, a State is constitutionally free to redraw political boundaries in any manner it chooses. *Id.*, at 347.

In *Wright* v. *Rockefeller*, 376 U. S. 52, the Court upheld by like reasoning a state congressional reapportionment statute against claims that district lines had been racially gerrymandered, because the plaintiffs failed to prove that the legislature "was either motivated by racial considerations or in fact drew the districts on racial lines"; or that the statute "was the product of a state contrivance to segregate on the basis of race or place or origin." *Id.*, at 56, 58. See also *Lassiter* v. *Northampton County Bd. of Elections*, 360 U. S. 45; *Lane* v. *Wilson*, 307 U. S. 368, 275–277.

While other of the Court's Fifteenth Amendment decisions have dealt with different issues, none has questioned the necessity of showing purposeful discrimination in order to show a Fifteenth Amendment violation. The cases of *Smith* v. *Allwright*, 321 U. S. 649, and *Terry* v. *Adams*, 345 U. S. 461, for example, dealt with the question whether a State was so involved with racially discriminatory voting practices as to invoke the Amendment's protection. Although their facts differed somewhat, the question in both cases was whether the State was sufficiently implicated in the conduct of racially exclusionary primary elections to make that discrimination an

abridgement of the right to vote *by a State*. Since the Texas Democratic Party primary in *Smith* v. *Allwright* was regulated by statute, and only party nominees chosen in a primary were placed on the ballot for the general election, the Court concluded that the state Democratic Party had become the agency of the State, and that the State thereby had "endorse[d], adopt[ed], and enforce[d] the discrimination against Negroes practiced by a party." 321 U. S., at 664.

Terry v. *Adams*, *supra*, posed a more difficult question of state involvement. The primary election challenged in that case was conducted by a county political organization, the Jaybird Association, that was neither authorized nor regulated under state law. The candidates chosen in the Jaybird primary, however, invariably won in the subsequent Democratic primary and in the general election, and the Court found that the Fifteenth Amendment had been violated. Although the several supporting opinions differed in their formulation of this conclusion, there was agreement that the State was involved in the purposeful exclusion of Negroes from participation in the election process.

The appellees have argued in this Court that *Smith* v. *Allwright* and *Terry* v. *Adams* support the conclusion that the at-large system of elections in Mobile is unconstitutional, reasoning that the effect of racially polarized voting in Mobile is the same as that of a racially exclusionary primary. The only effect, however, of the exclusionary primaries that offended the Fifteenth Amendment was that Negroes were not permitted to vote in them. The difficult question was whether the "State ha[d] had a hand in" in the patent discrimination practiced by a nominally private organization. *Terry* v. *Adams*, 345 U. S., at 473 (Frankfurter, J., concurring).

The simple answer to the Fifteenth Amendment reasoning of the appellees is that, as the District Court expressly found, the appellees were not denied the right to vote by anyone. The Fifteenth Amendment does not entail the right to have

Negro candidates elected, and neither *Smith* v. *Allwright* nor *Terry* v. *Adams* contains any implication to the contrary. That Amendment prohibits only purposefully discriminatory denial or abridgment by government of the freedom to vote "on account of race, color, or previous condition of servitude." Having found that Negroes in Mobile "register and vote without hindrance," the District Court and the Court of Appeals were in error in believing that the appellants invaded the protection of that Amendment in the present case.

IV

The Court of Appeals also agreed with the District Court that Mobile's at-large electoral system violates the Equal Protection Clause of the Fourteenth Amendment. There remains for consideration, therefore, the validity of its judgment on that score.

The claim that at-large electoral schemes unconstitutionally deny to some persons the Equal Protection of the Laws has been advanced in numerous cases before this Court. That contention has been raised most often with regard to multimember constituencies within a state legislative apportionment system. The constitutional objection to multimember districts is not and cannot be that, as such, they depart from apportionment on a population basis in violation of *Reynolds* v. *Simms*, 377 U. S. 533, and its progeny. Rather the focus in such cases has been on the lack of representation multimember districts afford various elements of the voting population in a system of representative legislative democracy. "Criticism [of multimember districts] is rooted in their winner-take-all aspects, their tendency to submerge minorities . . . , a general preference for legislatures reflecting community interests as closely as possible and disenchantment with political parties and elections as devices to settle policy differences between contending interests." *Whitcomb* v. *Chavis*, 403 U. S. 124, 158–159.

Despite repeated constitutional attacks upon multimember

legislative districts, the Court has consistently held that they are not unconstitutional *per se*, *e. g.*, *White* v. *Regester*, 412 U. S. 755; *Whitcomb* v. *Chavis*, 403 U. S. 124; *Kilgarin* v. *Hill*, 386 U. S. 120; *Burns* v. *Richardson*, 384 U. S. 73; *Fortson* v. *Dorsey*, 379 U. S. 433.[10] We have recognized, however, that such legislative apportionments could violate the Fourteenth Amendment if their purpose were invidiously to minimize or cancel out the voting potential of racial or ethnic minorities. See *White* v. *Regester*, *supra*; *Whitcomb* v. *Chavis*, *supra*; *Burns* v. *Richardson*, *supra*; *Fortson* v. *Dorsey*, *supra*. To prove such a purpose it is not enough to show that the group allegedly discriminated against has not elected representatives in proportion to its numbers. *White* v. *Regester*, *supra*, at —; *Whitcomb* v. *Chavis*, *supra*, at —. A plaintiff must prove that the disputed plan was "conceived or operated as [a] purposeful device[] to further racial discrimination," *Whitcomb* v. *Chavis*, *supra*, at 149. This burden of proof 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. See *Washington* v. *Davis*, 426 U. S. 229; *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252; *Personnel Adm'r of Massachusetts* v. *Feeney*, — U. S. —.

In only one case has the Court sustained a claim that multimember legislative districts unconstitutionally diluted the voting strength of a discrete group. That case was *White* v. *Regester*, *supra*. There the Court upheld a constitutional challenge by Negroes and Mexican-Americans to parts of a

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[10] We have made clear, however, that a court in formulating an apportionment plan as an exercise of its equity powers should, as a general rule, not permit multimember legislative districts. "[S]ingle-member districts are to be preferred in court-ordered legislative apportionment plans unless the court can articulate a 'singular combination of unique factors' that justifies a different result. *Mahan* v. *Howell*, 410 U. S. 315, 333." *Connor* v. *Finch*, 431 U. S. 407, 415.

legislative reapportionment plan adopted by the State of Texas. The plaintiffs alleged that the multimember districts for the counties in which they resided minimized the effect of their votes in violation of the Fourteenth Amendment, and the Court held that the plaintiffs had been able to "produce evidence to support the finding that the political processes leading to nomination and election were not equally open to participation by the group[s] in question." 412 U. S., at 766–767. In so holding, the Court relied upon evidence in the record that included a long history of official discrimination against the groups, indifference to their needs and interests on the part of white elected officials, and, in one county, the effective exclusion of Negroes from the process of slating candidates for the Democratic Party.

We may assume, for present purposes, that an at-large election of city officials with all the legislative, executive and administrative power of the municipal government is constitutionally indistinguishable from the election of a few members of a state legislative body in multimember districts—although this may be a rash assumption.[11] But even making this assumption, it is clear that the evidence in the present case fell far short of showing that the appellants "conceived or operated [a] purposeful device[] to further racial discrimination." *Whitcomb* v. *Chavis*, 403 U. S., at 149.

The District Court assessed the appellees' claims in light of the standard that had been articulated by the Court of Appeals for the Fifth Circuit in *Zimmer* v. *McKeithen*, 485 F. 2d 1297. That case, coming before *Washington* v. *Davis*, 426 U. S. 229, was quite evidently decided upon the misunder-

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[11] See *Wise* v. *Lipscomb*, 435 U. S. 535, 549, and 550 (concurring opinion). It is noteworthy that a system of at-large city elections in place of elections of city officials by the voters of small geographic wards was universally heralded not many years ago as a praiseworthy and progressive reform of corrupt municipal government. See, *e. g.*, E. Banfield and J. Wilson, City Politics 151 (1963); see also L. Steffens, The Shame of the Cities (1904).

standing 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. See 485 F. 2d, at 1304–1305, and n. 16.[12]

In light of the criteria identified in *Zimmer*, the District Court based its conclusion of unconstitutionality primarily on the fact that no Negro had ever been elected to the City Commission, apparently because of the pervasiveness of racially polarized voting in Mobile. The trial court also found that city officials had not been as responsive to the interests of Negroes as to those of white persons. On the basis of these findings, the court concluded that the political processes in Mobile were not equally open to Negroes, despite its seemingly inconsistent findings that there were no inhibitions against Negroes becoming candidates, and that in fact Negroes had registered and voted without hindrance. 423 F. Supp., at 387. Finally, with little additional discussion, the District Court held that Mobile's at-large electoral system was invidiously discriminating against Negroes in violation of the Equal Protection Clause.[13]

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[12] This Court affirmed the judgment of the Court of Appeals in *Zimmer* v. *McKeithen* on grounds other than those relied on by that court and explicitly "without approval of the constitutional views expressed by the Court of Appeals." *East Carroll Parish School Bd.* v. *Marshall*, 424 U. S. 636, 638 (*per curiam*).

[13] The only indication given by the District Court of an inference that there existed an invidious purpose was the following statement: "[i]t is not a long step from the systematic exclusion of blacks from juries which is itself such an 'unequal application of the law . . . as to show intentional discrimination,' *Akins* v. *Texas*, 325 U. S. 398, 404, . . . to [the] present purpose to dilute the black vote as evidenced in this case. There is a 'current' condition of dilution of the black vote resulting from intentional state legislative *inaction* which is as effective as the intentional state action referred to in *Keyes* [v. *School District No. 1, Denver Colo.*, 413 U. S. 189]." 423 F. Supp., at 398.

What the District Court may have meant by this statement is uncertain. In any event the analogy to the racially exclusionary jury cases appears mistaken. Those cases typically have involved a consistent pattern of

In affirming the District Court, the Court of Appeals acknowledged that the Equal Protection Clause of the Fourteenth Amendment reaches only purposeful discrimination,[14] but held that one way a plaintiff may establish this illicit purpose is by adducing evidence that satisfies the criteria of its decision in *Zimmer* v. *McKeithen*, *supra*. Thus, because the appellees had proved an "aggregate" of the *Zimmer* factors, the Court of Appeals concluded that a discriminatory purpose had been proved. That approach, however, is inconsistent with our decisions in *Washington* v. *Davis*, *supra*, and *Arlington Heights*, *supra*. Although the presence of the indicia relied on in *Zimmer* may afford some evidence of a discriminatory purpose, satisfaction of those criteria is not of itself sufficient proof of such a purpose. The so-called *Zimmer* criteria upon which the District Court and the Court of Appeals

discrete official actions that demonstrated almost to a mathematical certainty that Negroes were being excluded from juries because of their race. See *Castaneda* v. *Partida*, 430 U. S. 482, 495–497, and n. 17; *Patton* v. *Mississippi*, 332 U. S. 463, 464; *Pierre* v. *Louisiana*, 306 U. S. 354, 359; *Norris* v. *Alabama*, 294 U. S. 587, 591.

If the District Court meant by its statement that the existence of the at-large electoral system was, like the systematic exclusion of Negroes from juries, unexplainable on grounds other than race, its inference is contradicted by the history of the adoption of that system in Mobile. Alternatively, if the District Court meant that the state legislature may be presumed to have "intended" that there would be no Negro Commissioners, simply because that was a foreseeable consequence of at-large voting, it applied an incorrect legal standard. "'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Adm'r of Mass.* v. *Feeney*, — U. S. —, — (footnotes omitted).

[14] The Court of Appeals expressed the view that the District Court's finding of discrimination in light of the *Zimmer* criteria was "buttressed" by the fact that the Attorney General had interposed an objection under § 5 of the Voting Rights Act of 1965 to the state statute designating the functions of each Commissioner. 571 F. 2d, at 246. See n. 6, *supra*.

relied were most assuredly insufficient to prove an unconstitutionally discriminatory purpose in the present case.

First, the two courts found it highly significant that no Negro had been elected to the Mobile City Commission. From this fact they concluded that the processes leading to nomination and election were not open equally to Negroes. But the District Court's findings of fact, unquestioned on appeal, make clear that Negroes register and vote in Mobile "without hindrance," and that there are no obstacles in the way of Negroes who wish to become candidates for election to the Commission. Indeed, it was undisputed that the only active "slating" organization in the city is comprised of Negroes. It may be that Negro candidates have been defeated, but that fact alone does not work a constitutional deprivation. *Whitcomb* v. *Chavis*, *supra*, at 160; see *Arlington Heights*, *supra*, at 266, and n. 15.[15]

Second, the District Court relied in part on its finding that the persons who were elected to the Commission discriminated against Negroes in municipal employment and in dispensing public services. If that is the case, those discriminated against may be entitled to relief under the Constitution, albeit of a sort quite different from that sought in the present case. The Equal Protection Clause proscribes purposeful discrimination because of race by any unit of state government, whatever the method of its election. But evidence of discrimination by white officials in Mobile is relevant only as the most tenuous and circumstantial evidence of the constitutional invalidity of the electoral system under which they attained their offices.

Third, the District Court and the Court of Appeals supported their conclusion by drawing upon the substantial his-

[15] There have been only three Negro candidates for the City Commission, all in 1973. According to the District Court, the Negro candidates "were young, inexperienced, and mounted extremely limited campaigns" and received only "modest support from the black community. . . ." 423 F. Supp., at 388.

tory of official racial discrimination in Alabama. But past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful. The ultimate question remains whether a discriminatory intent has been proved in a given case. More distant instances of official discrimination in other cases are of limited help in resolving that question.

Finally, the District Court and the Court of Appeals pointed to the mechanics of the at-large electoral system itself as proof that the votes of Negroes were being invidiously canceled out. But those features of that electoral system, such as the majority vote requirement, tend naturally to disadvantage any voting minority, as we noted in *White* v. *Regester, supra.* They are far from proof of a racially discriminatory purpose or intent upon the part of the appellants in this case.[18]

For the reasons stated, the judgment is reversed and the case is remanded to the Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

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[18] According to the District Court, voters in the city of Mobile are represented in the state legislature by three state senators, any one of whom can veto proposed local legislation under the existing courtesy rule. Likewise, a majority of Mobile's 11-member House delegation can prevent a bill from reaching the floor for debate. Unanimous approval of a local measure by the city delegation, on the other hand, virtually assures passage. 423 F. Supp., at 397.

There was evidence in this case that several proposals that would have altered the form of Mobile's municipal government have been defeated in the state legislature, including at least one that would have permitted Mobile to govern itself through a mayor and city council with members elected from individual districts within the city. Whether in this litigation, or in future litigation against other defendants, the appellees may be able to prove that Mobile's present governmental and electoral system has been retained for a racially discriminatory purpose, we are in no position now to say.

January 7, 1980

No. 77-1844 Mobile v. Bolden

Dear Potter:

As I indicated in our telephone talk Saturday, I like your opinion in this case and expect to join it. It may serve the purpose of moving the Court back to the Whitcomb view that no group is entitled, as a matter of right, to representation in an elected body. Since Whitcomb, the Court has moved - though not in a straight line - away from that sound doctrine, primarily in cases under §5 of the Voting Rights Act.

I do have a few suggestions for your opinion that are attached to this letter. I will state briefly my reasons for thinking that these may blunt some of the criticism from dissenters.

The first suggestion is based on the presence in the Fifteenth Amendment of the word "abridge". My proposed modification would give appropriate recognition to that word without, I believe, diluting the force of your opinion.

The second suggestion is prompted by the difficulty of distinguishing White v. Register. That decision - which is the highwater mark of the Court's movement away from Whitcomb - is not easy to distinguish from the present case. It seems to me that the language I suggest would be less vulnerable to criticism by the dissent than the sentence I would omit. This, of course, is a judgment call. I do think it is helpful to emphasize the Mexican-American presence.

The third suggestion concerns the language in the second paragraph of footnote 16, p. 14. I am not sure what you have in mind, but guess that you may be thinking of the school board case. I agree that there was evidence of the board's participation in efforts to defeat legislation that would have changed the system of electing board members. Whether this evidence, considered in light of other relevant evidence, is enough to bring about a different answer in the school board case is an open question with me - although that case is much closer than this one.

Also, I am puzzled by the last sentence in note 16, as it can be read as an open invitation for a further attack on "Mobile's present government" (although presumably against some future members of the Board of Commissioners). I would prefer not to extend such an invitation. This litigation should come to an end. If the Commissioners ignore the message of your opinion, a new suit can be instituted.

If I understand what you have in mind, I have suggested the language changes in the last sentence of Note 16, as set forth in the enclosed memorandum.

I am not sending copies of this letter to the other Chambers.

Sincerely,

Mr. Justice Stewart

LFP/lab

1/7/80

No. 77-1844, City of Mobile v. Bolden

Possible language changes in the draft opinion circulated January 4, 1980:

1/ In place of the first sentence of the last paragraph that begins on page 7:

"The answer to the appellees' argument is that they have not been denied the right to vote by anyone and there has been no finding that the city commission elections in Mobile have been designed intentionally to abridge the voting rights of Negroes."

2/ At the end of the carryover paragraph from page 9 to page 10, I would drop the last sentence and insert language substantially as follows:

"In so holding, the Court relied upon evidence in the record that included a long history of official discrimination against minorities as well as indifference to their needs and interests on the part of white elected officials. The Court also found in each county additional factors that restricted the access of minority groups to the political process. In one county, Negroes effectively were excluded from the

process of slating candidates for the Democratic Party, while the plaintiffs in the other county were Mexican-Americans who "suffer[ed] a cultural and language barrier" that made "participation in community processes extremely difficult, particularly . . . with respect to the political life" of the county. Id., at 768 (footnote omitted)."

3/ Substitute for the last two sentences of footnote 16 language along the following lines:
"There has been no finding, however, that any legislative action involving Mobile's electoral processes was motivated by discriminatory purposes. See 423 F. Supp., at 397. We therefore attach no significance to the proposals for change that were defeated. Of course, evidence of racially motivated opposition to legislative change by a local governmental entity would be highly relevant in voting rights litigation."

4/ Minor language modifications appear on pages 10 and 13.

whether it may be possible ultimately to prove that Mobile's present governmental structure has been retained for a racially discriminatory purpose, we are in no position now to say.

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 9, 1980

No. 77-1844 - City of Mobile v. Bolden

Dear Potter:

Please join me.

Sincerely,

Mr. Justice Stewart

Copies to the Conference

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 9, 1980

No. 77-1844 - City of Mobile v. Bolden

Dear Potter,

Please join me.

Sincerely,

Mr. Justice Stewart

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 10, 1980

77-1844 - City of Mobile Alabama v. Bolden

Dear Potter:

As I hope I indicated at Conference, my reasons for voting to reverse the judgment of the Court of Appeals are somewhat different from those set forth in your opinion for the Court. Even though I will therefore probably write separately, it may be useful to you to have me indicate in brief form the points of difference between us.

First, in view of the fact that the Court found an implied cause of action under § 5 of the Voting Rights Act in Allen v. State Board of Education, 393 U.S. 544, and in view of the further fact that none of our recent cases casts any doubt on the viability of Allen, I do not agree that the assumption that there is a private right of action to enforce § 2 is "dubious."

Second, I also disagree with the portion of the opinion that holds that the Fifteenth Amendment cannot be violated unless the State action is motivated by discriminatory purpose. I do not think the prior cases compel this result; nor do I think it is necessary to so decide in this case in order to reverse, even on the ground that you select in Part III.

Third, I believe the Fifteenth Amendment does place limitations on a State's ability to draw district boundaries, and therefore that the simple answer to the Fifteenth Amendment contention which you give at the

bottom of page 7 and the top of page 8 is insufficient. I realize that Gomillion can be interpreted as a case involving a denial of the right to vote, but I think it more correct to analyze the case as one striking down an impermissible gerrymander.

Fourth, although I agree with most of what you say in Part IV, I believe the so-called "discriminatory purpose" standard is somewhat confusing and may have different meanings in a districting case than in various other contexts such as the employment discrimination involved in Washington v. Davis. If "purpose" is the standard, it may be important to identify the governmental entity whose purpose is controlling. Is it the City of Mobile, or is it the Alabama Legislature? If the latter, then almost all of the evidence of discriminatory purpose on which the Fifth Circuit relied is quite irrelevant.

Finally, in my own thinking I have been assuming that we are deciding the question that you leave open in the last sentence of footnote 16. In short, there is no question about the legitimacy of the Mobile council form of government at its inception; the question is whether the retention of that system today can only be explained as having been based on racial factors or other "grounds wholly irrelevant to the achievement of a valid State objective." Turner v. Foust, 396 U.S. 346, 362.

Because this is such an important case, I hope you will bear with me if it takes me longer than usual to put an opinion together.

Respectfully,

Mr. Justice Stewart

Copies to the Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

noted
1-11-80

January 11, 1980

Re: No. 77-1844, City of Mobile v. Bolden

Dear John,

Thank you very much for your letter of January 10. You did make clear at our Conference discussion that your reasons for voting to reverse the judgment in this case are somewhat different from those of the rest of us who would reach the same result, and I appreciate the written summary of your views as contained in your letter. It seems to me that there should be no difficultly in effecting an accommodation of our differences on one of the points you raise, but I am quite doubtful as to the possibility of an accommodation on at least some of the others.

The first point of difference you mention -- relating to whether there is a private cause of action under § 2 of the Voting Rights Act can, I think, be settled very easily. Indeed, I have already toned down my original statement in revisions sent to the printer today, and you will see a modified version in a recirculation early next week.

Our other areas of difference are not so easily reconcilable. As to the Fifteenth Amendment, I firmly believe, after again reviewing this Court's decisions in the process of preparing the present opinion, that a violation of it can be shown only if purposeful state racial discrimination is shown. See, e.g., Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 53-54. Perhaps more importantly, I am convinced that the Fifteenth Amendment prohibits only what it purports to prohibit -- the denial or abridgment of Negroes' freedom to vote. This denial or abridgment could be effectuated through a purposeful racial gerrymander, as the Gomillion case held and Wright v. Rockefeller conceded, but whatever the apparatus utilized, the state must be shown purposefully to have denied or abridged the freedom of Negroes, as such, to vote, if a Fifteenth Amendment violation is to be shown.

Whether the Fifteenth Amendment means what I think it means, or has the somewhat broader meaning that you attribute to it, seems to me, however, ultimately to be of no great importance. I say this because I think you will agree that in the light of the contemporary development of constitutional law under the Equal Protection Clause of the Fourteenth Amendment, the provisions of the Fifteenth Amendment (and the Seventeenth as well), have been embraced by our present understanding of the constitutional demands of equal protection under the law. It is perhaps for this reason that I gather we both think that the present case is really a Fourteenth Amendment case.

As to the impact of the Fourteenth Amendment, my impression is that there is an area of agreement between us, but that we disagree in certain fundamental respects. My own view is that purposeful discrimination, which is required to show a violation of the Equal Protection Clause, has basically the same meaning in any context, whether in employment, voting, zoning, or whatever. This is a view that I would not lightly abandon or qualify. On the other hand, I agree with you that failure to change a system may be purposefully racially discriminatory, although that system in its inception may have been entirely legitimate. I had thought that my proposed opinion recognizes this, and simply holds that there was a failure of proof of any such purposeful racially discriminatory retention of the at-large voting system on the part of the defendants in the present case.

I fully agree with you that this is an important case -- involving as it does a constitutional attack on the at-large system of voting in American cities, a system employed by thousands of cities and local governments and one that has been hailed as a progressive reform of corrupt municipal government. It certainly took us "longer than usual to put an opinion together," and I shall not only gladly bear with you, but fully understand, if it takes you longer than usual also.

Sincerely yours,

P.S.

Mr. Justice Stevens

Copies to the Conference

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

From: Mr. Justice Stewart

Circulated: _____

Recirculated: 14 JAN 1980

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1844

City of Mobile, Alabama, et al., Appellants, v. Wiley L. Bolden et al. } On Appeal from the United States Court of Appeals for the Fifth Circuit.

[January —, 1980]

MR. JUSTICE STEWART delivered the opinion of the Court.

The City of Mobile, Ala., has since 1911 been governed by a City Commission consisting of three members elected by the voters of the city at-large. The question in this case is whether this at-large system of municipal elections violates the rights of Mobile's Negro voters in contravention of federal statutory or constitutional law.

The appellees brought this suit in the Federal District Court for the Southern District of Alabama as a class action on behalf of all Negro citizens of Mobile.[1] Named as defendants were the city and its three incumbent Commissioners, who are the appellants before this Court. The complaint alleged that the practice of electing the City Commissioners at-large unfairly diluted the voting strength of Negroes in violation of § 2 of the Voting Rights Act of 1965,[2] of the Fourteenth Amendment and of the Fifteenth Amendment. Following a bench trial, the District Court found that the constitutional rights of the appellees had been violated, entered a judgment in their favor, and ordered that the

[1] Approximately 35.4% of the residents of Mobile are Negro.

[2] 79 Stat. 437, 42 U. S. C. § 1973. The complaint also contained claims based on the First and Thirteenth Amendments and on 42 U. S. C. § 1983 and 42 U. S. C. § 1985 (3). Those claims have not been pressed in this Court.

The changes on pp. 7-8, 10, 13 and n. 16 are in response to our suggestions. The treatment of § 2 is in response to JPS. The opinion would seem to meet your concerns, though I still think the 15th Amendment passage is too narrow —

David

City Commission be disestablished and replaced by a municipal government consisting of a Mayor and a City Council with members elected from single-member districts. 423 F. Supp. 384.[3] The Court of Appeals affirmed the judgment in its entirety, *Bolden* v. *City of Mobile*, 571 F. 2d 238, agreeing that Mobile's at-large elections operated to discriminate against Negroes in violation of the Fourteenth and Fifteenth Amendments, *id.*, at 245, and finding that the remedy formulated by the District Court was appropriate. An appeal was taken to this Court, and we noted probable jurisdiction, — U. S. —. The case was originally argued in the 1978 Term, and was reargued in the present Term.

I

In Alabama, the form of municipal government a city may adopt is governed by state law. Until 1911 cities not covered by specific legislation were limited to governing themselves through a mayor and city council.[4] In that year, the Alabama Legislature authorized every large municipality to adopt a commission form of government.[5] Mobile established its City Commission in the same year, and has maintained that basic system of municipal government ever since.

The three Commissioners jointly exercise all legislative, executive, and administrative power in the municipality. They are required after election to designate one of their number as Mayor, a largely ceremonial office, but no formal provision is made for allocating specific executive or administrative duties among the three.[6] As required by the state

[3] The District Court has stayed its orders pending disposition of the present appeal.

[4] Alabama Code, Chapter 11–43 (1975).

[5] Act 281, 1911 Alabama Acts, at 330.

[6] In 1965 the Alabama Legislature enacted Act 823, 1965 Alabama Acts, at 1539, § 2 of which designated specific administrative tasks to be performed by each Commissioner and provided that the title of Mayor be rotated among the three. After the present lawsuit was commenced, the

law enacted in 1911, each candidate for the Mobile City Commission runs for election in the city at-large for a term of four years in one of three numbered posts, and may be elected only by a majority of the total vote. This is the same basic electoral system that is followed by literally thousands of municipalities and other local governmental units throughout the Nation.[7]

II

Although required by general principles of judicial administration to do so, *Ashwander* v. *TVA*, 297 U. S. 288, 347 (Brandeis, J., concurring), neither the District Court nor the Court of Appeals addressed the complaint's statutory claim—that the Mobile electoral system violates § 2 of the Voting Rights Act of 1965. Even a cursory examination of that claim, however, clearly discloses that it adds nothing to the appellees' complaint.

Section 2 of the Voting Rights Act provides:

> "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States on account of race or color."

Assuming, for present purposes, that there exists a private

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city of Mobile belatedly submitted Act 823 to the Attorney General of the United States under § 5 of the Voting Rights Act of 1965. 42 U. S. C. § 1973c. The Attorney General objected to the legislation on the ground that the city had not shown that § 2 of the Act would not have the effect of abridging the right of Negroes to vote. No suit has been brought in the District Court for the District of Columbia to seek clearance under § 5 of the Voting Rights Act and, accordingly, § 2 of Act 823 is in abeyance.

[7] According to the 1979 Municipal Year Book, most municipalities of over 25,000 people conducted at-large elections of their city commissioners or council members as of 1977. *Id.*, at 98–99. It is reasonable to suppose than an even larger majority of other municipalities did so.

right of action to enforce this statutory provision,[8] it is apparent that the language of § 2 no more than elaborates upon that of the Fifteenth Amendment,[9] and the sparse legislative history of § 2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself.

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In view of the section's language and its sparse but clear legislative history, it is evident that this statutory provision adds nothing to the appellees' Fifteenth Amendment claim. We turn, therefore, to a consideration of the validity of the

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The Court's early decisions under the Fifteenth Amendment established that it imposes but one limitation on the powers of the States. It forbids them to discriminate against Negroes in matters having to do with voting. See *Ex parte Yarbrough*, 110 U. S. 651, 665; *Neal* v. *Delaware*, 103 U. S. 370, 389–390; *United States* v. *Cruikshank*, 92 U. S. 542, 555–556; *United States* v. *Reese*, 92 U. S. 217. The Amendment's command and effect are wholly negative. "The Fifteenth Amendment does not confer the right of suffrage upon any one," but has "invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous conditions of servitude." *Id.*, at 217–218.

Our decisions, moreover, have made clear that action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose. In *Guinn* v. *United States*, 238 U. S. 347, this Court struck down a "grandfather" clause in a state constitution exempting from the requirement that voters be literate any person or the descendants of any person who had been entitled to vote before January 1, 1866. It was asserted by way of defense that the provision was immune from successful challenge, since a law could not be found unconstitutional either "by attributing to the legislative authority an occult motive," or "because of conclusions concerning its operation in practical execution and resulting discrimination arising . . . from inequalities naturally inhering in those who must come within the standard in order to enjoy the right to vote." *Id.*, at 359. Despite this argument, the Court did not hesitate to hold the grandfather clause unconstitutional, because it was not "possible to

discover any basis in reason for the standard thus fixed than the purpose" to circumvent the Fifteenth Amendment. *Id.*, at 365.

The Court's more recent decisions confirm the principle that racially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation. In *Gomillion* v. *Lightfoot*, 364 U. S. 339, the Court held that allegations of a racially motivated gerrymander of municipal boundaries stated a claim under the Fifteenth Amendment. The constitutional infirmity of the state law in that case, according to the allegations of the complaint, was that in drawing the municipal boundaries the legislature was "solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote." *Id.*, at 341. The Court made clear that in the absence of such an invidious purpose, a State is constitutionally free to redraw political boundaries in any manner it chooses. *Id.*, at 347.

In *Wright* v. *Rockefeller*, 376 U. S. 52, the Court upheld by like reasoning a state congressional reapportionment statute against claims that district lines had been racially gerrymandered, because the plaintiffs failed to prove that the legislature "was either motivated by racial considerations or in fact drew the districts on racial lines"; or that the statute "was the product of a state contrivance to segregate on the basis of race or place or origin." *Id.*, at 56, 58. See also *Lassiter* v. *Northampton County Bd. of Elections*, 360 U. S. 45; *Lane* v. *Wilson*, 307 U. S. 368, 275–277.

While other of the Court's Fifteenth Amendment decisions have dealt with different issues, none has questioned the necessity of showing purposeful discrimination in order to show a Fifteenth Amendment violation. The cases of *Smith* v. *Allwright*, 321 U. S. 649, and *Terry* v. *Adams*, 345 U. S. 461, for example, dealt with the question whether a State was so involved with racially discriminatory voting practices as to invoke the Amendment's protection. Although their facts

differed somewhat, the question in both cases was whether the State was sufficiently implicated in the conduct of racially exclusionary primary elections to make that discrimination an abridgement of the right to vote *by a State*. Since the Texas Democratic Party primary in *Smith* v. *Allwright* was regulated by statute, and only party nominees chosen in a primary were placed on the ballot for the general election, the Court concluded that the state Democratic Party had become the agency of the State, and that the State thereby had "endorse[d], adopt[ed], and enforce[d] the discrimination against Negroes practiced by a party." 321 U. S., at 664.

Terry v. *Adams*, *supra*, posed a more difficult question of state involvement. The primary election challenged in that case was conducted by a county political organization, the Jaybird Association, that was neither authorized nor regulated under state law. The candidates chosen in the Jaybird primary, however, invariably won in the subsequent Democratic primary and in the general election, and the Court found that the Fifteenth Amendment had been violated. Although the several supporting opinions differed in their formulation of this conclusion, there was agreement that the State was involved in the purposeful exclusion of Negroes from participation in the election process.

The appellees have argued in this Court that *Smith* v. *Allwright* and *Terry* v. *Adams* support the conclusion that the at-large system of elections in Mobile is unconstitutional, reasoning that the effect of racially polarized voting in Mobile is the same as that of a racially exclusionary primary. The only effect, however, of the exclusionary primaries that offended the Fifteenth Amendment was that Negroes were not permitted to vote in them. The difficult question was whether the "State ha[d] had a hand in" in the patent discrimination practiced by a nominally private organization. *Terry* v. *Adams*, 345 U. S., at 473 (Frankfurter, J., concurring).

The answer to the appellees' argument is that, as the Dis-

trict Court expressly found, their freedom to vote has not been denied or abridged by anyone. The Fifteenth Amendment does not entail the right to have Negro candidates elected, and neither *Smith* v. *Allwright* nor *Terry* v. *Adams* contains any implication to the contrary. That Amendment prohibits only purposefully discriminatory denial or abridgment by government of the freedom to vote "on account of race, color, or previous condition of servitude." 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 protection of that Amendment in the present case.

IV

The Court of Appeals also agreed with the District Court that Mobile's at-large electoral system violates the Equal Protection Clause of the Fourteenth Amendment. There remains for consideration, therefore, the validity of its judgment on that score.

The claim that at-large electoral schemes unconstitutionally deny to some persons the Equal Protection of the Laws has been advanced in numerous cases before this Court. That contention has been raised most often with regard to multimember constituencies within a state legislative apportionment system. The constitutional objection to multimember districts is not and cannot be that, as such, they depart from apportionment on a population basis in violation of *Reynolds* v. *Simms*, 377 U. S. 533, and its progeny. Rather the focus in such cases has been on the lack of representation multimember districts afford various elements of the voting population in a system of representative legislative democracy. "Criticism [of multimember districts] is rooted in their winner-take-all aspects, their tendency to submerge minorities . . . , a general preference for legislatures reflecting community interests as closely as possible and disenchantment with political parties and elections as devices to settle policy differences

between contending interests." *Whitcomb* v. *Chavis*, 403 U. S. 124, 158–159.

Despite repeated constitutional attacks upon multimember legislative districts, the Court has consistently held that they are not unconstitutional *per se*, *e. g.*, *White* v. *Regester*, 412 U. S. 755; *Whitcomb* v. *Chavis*, 403 U. S. 124; *Kilgarin* v. *Hill*, 386 U. S. 120; *Burns* v. *Richardson*, 384 U. S. 73; *Fortson* v. *Dorsey*, 379 U. S. 433.[10] We have recognized, however, that such legislative apportionments could violate the Fourteenth Amendment if their purpose were invidiously to minimize or cancel out the voting potential of racial or ethnic minorities. See *White* v. *Regester*, *supra*; *Whitcomb* v. *Chavis*, *supra*; *Burns* v. *Richardson*, *supra*; *Fortson* v. *Dorsey*, *supra*. To prove such a purpose it is not enough to show that the group allegedly discriminated against has not elected representatives in proportion to its numbers. *White* v. *Regester*, *supra*, at ——; *Whitcomb* v. *Chavis*, *supra*, at ——. A plaintiff must prove that the disputed plan was "conceived or operated as [a] purposeful device[] to further racial discrimination," *Whitcomb* v. *Chavis*, *supra*, at 149. This burden of proof 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. See *Washington* v. *Davis*, 426 U. S. 229; *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252; *Personnel Adm'r of Massachusetts* v. *Feeney*, —— U. S. ——.

In only one case has the Court sustained a claim that multimember legislative districts unconstitutionally diluted the

[10] We have made clear, however, that a court in formulating an apportionment plan as an exercise of its equity powers should, as a general rule, not permit multimember legislative districts. "[S]ingle-member districts are to be preferred in court-ordered legislative apportionment plans unless the court can articulate a 'singular combination of unique factors' that justifies a different result. *Mahan* v. *Howell*, 410 U. S. 315, 333." *Connor* v. *Finch*, 431 U. S. 407, 415.

voting strength of a discrete group. That case was *White* v. *Regester*, *supra*. There the Court upheld a constitutional challenge by Negroes and Mexican-Americans to parts of a legislative reapportionment plan adopted by the State of Texas. The plaintiffs alleged that the multimember districts for the two counties in which they resided minimized the effect of their votes in violation of the Fourteenth Amendment, and the Court held that the plaintiffs had been able to "produce evidence to support the finding that the political processes leading to nomination and election were not equally open to participation by the group[s] in question." 412 U. S., at 766–767. In so holding, the Court relied upon evidence in the record that included a long history of official discrimination against minorities as well as indifference to their needs and interests on the part of white elected officials. The Court also found in each county additional factors that restricted the access of minority groups to the political process. In one county, Negroes effectively were excluded from the process of slating candidates for the Democratic Party, while the plaintiffs in the other county were Mexican-Americans who "suffer[ed] a cultural and language barrier" that made "participation in community processes extremely difficult, particularly . . . with respect to the political life" of the county. *Id.*, at 768 (footnote omitted).

We may assume, for present purposes, that an at-large election of city officials with all the legislative, executive and administrative power of the municipal government is constitutionally indistinguishable from the election of a few members of a state legislative body in multimember districts—although this may be a rash assumption.[11] But even making this as-

[11] See *Wise* v. *Lipscomb*, 435 U. S. 535, 549, and 550 (concurring opinion). It is noteworthy that a system of at-large city elections in place of elections of city officials by the voters of small geographic wards was universally heralded not many years ago as a praiseworthy and progres-

sumption, it is clear that the evidence in the present case fell far short of showing that the appellants "conceived or operated [a] purposeful device[] to further racial discrimination." *Whitcomb* v. *Chavis*, 403 U. S., at 149.

The District Court assessed the appellees' claims in light of the standard that had been articulated by the Court of Appeals for the Fifth Circuit in *Zimmer* v. *McKeithen*, 485 F. 2d 1297. That case, coming before *Washington* v. *Davis*, 426 U. S. 229, was quite evidently 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. See 485 F. 2d, at 1304–1305, and n. 16.[12]

In light of the criteria identified in *Zimmer*, the District Court based its conclusion of unconstitutionality primarily on the fact that no Negro had ever been elected to the City Commission, apparently because of the pervasiveness of racially polarized voting in Mobile. The trial court also found that city officials had not been as responsive to the interests of Negroes as to those of white persons. On the basis of these findings, the court concluded that the political processes in Mobile were not equally open to Negroes, despite its seemingly inconsistent findings that there were no inhibitions against Negroes becoming candidates, and that in fact Negroes had registered and voted without hindrance. 423 F. Supp., at 387. Finally, with little additional discussion, the District Court held that Mobile's at-large electoral system

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sive reform of corrupt municipal government. See, *e. g.*, E. Banfield and J. Wilson, City Politics 151 (1963). Compare, M. Seasongood, Local Government (1933); L. Steffens, The Shame of the Cities (1904).

[12] This Court affirmed the judgment of the Court of Appeals in *Zimmer* v. *McKeithen* on grounds other than those relied on by that court and explicitly "without approval of the constitutional views expressed by the Court of Appeals." *East Carroll Parish School Bd.* v. *Marshall*, 424 U. S. 636, 638 (*per curiam*).

was invidiously discriminating against Negroes in violation of the Equal Protection Clause.[13]

In affirming the District Court, the Court of Appeals acknowledged that the Equal Protection Clause of the Fourteenth Amendment reaches only purposeful discrimination,[14]

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[13] The only indication given by the District Court of an inference that there existed an invidious purpose was the following statement: "[i]t is not a long step from the systematic exclusion of blacks from juries which is itself such an 'unequal application of the law . . . as to show intentional discrimination,' *Akins* v. *Texas*, 325 U. S. 398, 404, . . . to [the] present purpose to dilute the black vote as evidenced in this case. There is a 'current' condition of dilution of the black vote resulting from intentional state legislative *inaction* which is as effective as the intentional state action referred to in *Keyes* [v. *School District No. 1, Denver Colo.*, 413 U. S. 189]." 423 F. Supp., at 398.

What the District Court may have meant by this statement is uncertain. In any event the analogy to the racially exclusionary jury cases appears mistaken. Those cases typically have involved a consistent pattern of discrete official actions that demonstrated almost to a mathematical certainty that Negroes were being excluded from juries because of their race. See *Castaneda* v. *Partida*, 430 U. S. 482, 495–497, and n. 17; *Patton* v. *Mississippi*, 332 U. S. 463, 464; *Pierre* v. *Louisiana*, 306 U. S. 354, 359; *Norris* v. *Alabama*, 294 U. S. 587, 591.

If the District Court meant by its statement that the existence of the at-large electoral system was, like the systematic exclusion of Negroes from juries, unexplainable on grounds other than race, its inference is contradicted by the history of the adoption of that system in Mobile. Alternatively, if the District Court meant that the state legislature may be presumed to have "intended" that there would be no Negro Commissioners, simply because that was a foreseeable consequence of at-large voting, it applied an incorrect legal standard. "'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Adm'r of Mass.* v. *Feeney*, — U. S. —, — (footnotes omitted).

[14] The Court of Appeals expressed the view that the District Court's finding of discrimination in light of the *Zimmer* criteria was "buttressed" by the fact that the Attorney General had interposed an objection under

but held that one way a plaintiff may establish this illicit purpose is by adducing evidence that satisfies the criteria of its decision in *Zimmer* v. *McKeithen, supra.* Thus, because the appellees had proved an "aggregate" of the *Zimmer* factors, the Court of Appeals concluded that a discriminatory purpose had been proved. That approach, however, is inconsistent with our decisions in *Washington* v. *Davis, supra,* and *Arlington Heights, supra.* Although the presence of the indicia relied on in *Zimmer* may afford some evidence of a discriminatory purpose, satisfaction of those criteria is not of itself sufficient proof of such a purpose. The so-called *Zimmer* criteria upon which the District Court and the Court of Appeals relied were most assuredly insufficient to prove an unconstitutionally discriminatory purpose in the present case.

First, the two courts found it highly significant that no Negro had been elected to the Mobile City Commission. From this fact they concluded that the processes leading to nomination and election were not open equally to Negroes. But the District Court's findings of fact, unquestioned on appeal, make clear that Negroes register and vote in Mobile "without hindrance," and that there are no official obstacles in the way of Negroes who wish to become candidates for election to the Commission. Indeed, it was undisputed that the only active "slating" organization in the city is comprised of Negroes. It may be that Negro candidates have been defeated, but that fact alone does not work a constitutional deprivation. *Whitcomb* v. *Chavis, supra,* at 160; see *Arlington Heights, supra,* at 266, and n. 15.[15]

Second, the District Court relied in part on its finding that

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§ 5 of the Voting Rights Act of 1965 to the state statute designating the functions of each Commissioner. 571 F. 2d, at 246. See n. 6, *supra.*

[15] There have been only three Negro candidates for the City Commission, all in 1973. According to the District Court, the Negro candidates "were young, inexperienced, and mounted extremely limited campaigns" and received only "modest support from the black community. . . ." 423 F. Supp., at 388.

the persons who were elected to the Commission discriminated against Negroes in municipal employment and in dispensing public services. If that is the case, those discriminated against may be entitled to relief under the Constitution, albeit of a sort quite different from that sought in the present case. The Equal Protection Clause proscribes purposeful discrimination because of race by any unit of state government, whatever the method of its election. But evidence of discrimination by white officials in Mobile is relevant only as the most tenuous and circumstantial evidence of the constitutional invalidity of the electoral system under which they attained their offices.

Third, the District Court and the Court of Appeals supported their conclusion by drawing upon the substantial history of official racial discrimination in Alabama. But past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful. The ultimate question remains whether a discriminatory intent has been proved in a given case. More distant instances of official discrimination in other cases are of limited help in resolving that question.

Finally, the District Court and the Court of Appeals pointed to the mechanics of the at-large electoral system itself as proof that the votes of Negroes were being invidiously canceled out. But those features of that electoral system, such as the majority vote requirement, tend naturally to disadvantage any voting minority, as we noted in *White* v. *Regester*, *supra*. They are far from proof of a racially discriminatory purpose or intent upon the part of the appellants in this case.[18]

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[18] According to the District Court, voters in the city of Mobile are represented in the state legislature by three state senators, any one of whom can veto proposed local legislation under the existing courtesy rule. Likewise, a majority of Mobile's 11-member House delegation can prevent a local bill from reaching the floor for debate. Unanimous

For the reasons stated, the judgment is reversed and the case is remanded to the Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

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approval of a local measure by the city delegation, on the other hand, virtually assures passage. 423 F. Supp., at 397.

There was evidence in this case that several proposals that would have altered the form of Mobile's municipal government have been defeated in the state legislature, including at least one that would have permitted Mobile to govern itself through a mayor and city council with members elected from individual districts within the city. Whether it may be possible ultimately to prove that Mobile's present governmental and electoral system has been retained for a racially discriminatory purpose, we are in no position now to say.

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

From: Mr. Justice Stewart

Circulated: _____

Recirculated: 14 JAN 1980

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1844

City of Mobile, Alabama, et al., Appellants, v. Wiley L. Bolden et al. | On Appeal from the United States Court of Appeals for the Fifth Circuit.

[January —, 1980]

MR. JUSTICE STEWART delivered the opinion of the Court.

The City of Mobile, Ala., has since 1911 been governed by a City Commission consisting of three members elected by the voters of the city at-large. The question in this case is whether this at-large system of municipal elections violates the rights of Mobile's Negro voters in contravention of federal statutory or constitutional law.

The appellees brought this suit in the Federal District Court for the Southern District of Alabama as a class action on behalf of all Negro citizens of Mobile.[1] Named as defendants were the city and its three incumbent Commissioners, who are the appellants before this Court. The complaint alleged that the practice of electing the City Commissioners at-large unfairly diluted the voting strength of Negroes in violation of § 2 of the Voting Rights Act of 1965,[2] of the Fourteenth Amendment and of the Fifteenth Amendment. Following a bench trial, the District Court found that the constitutional rights of the appellees had been violated, entered a judgment in their favor, and ordered that the

Join P.S. but largely met my objections to first draft

LFP 1/15

[1] Approximately 35.4% of the residents of Mobile are Negro.

[2] 79 Stat. 437, 42 U. S. C. § 1973. The complaint also contained claims based on the First and Thirteenth Amendments and on 42 U. S. C. § 1983 and 42 U. S. C. § 1985 (3). Those claims have not been pressed in this Court.

City Commission be disestablished and replaced by a municipal government consisting of a Mayor and a City Council with members elected from single-member districts. 423 F. Supp. 384.[3] The Court of Appeals affirmed the judgment in its entirety, *Bolden* v. *City of Mobile*, 571 F. 2d 238, agreeing that Mobile's at-large elections operated to discriminate against Negroes in violation of the Fourteenth and Fifteenth Amendments, *id.*, at 245, and finding that the remedy formulated by the District Court was appropriate. An appeal was taken to this Court, and we noted probable jurisdiction, — U. S. —. The case was originally argued in the 1978 Term, and was reargued in the present Term.

I

In Alabama, the form of municipal government a city may adopt is governed by state law. Until 1911 cities not covered by specific legislation were limited to governing themselves through a mayor and city council.[4] In that year, the Alabama Legislature authorized every large municipality to adopt a commission form of government.[5] Mobile established its City Commission in the same year, and has maintained that basic system of municipal government ever since.

The three Commissioners jointly exercise all legislative, executive, and administrative power in the municipality. They are required after election to designate one of their number as Mayor, a largely ceremonial office, but no formal provision is made for allocating specific executive or administrative duties among the three.[6] As required by the state

[3] The District Court has stayed its orders pending disposition of the present appeal.

[4] Alabama Code, Chapter 11-43 (1975).

[5] Act 281, 1911 Alabama Acts, at 330.

[6] In 1965 the Alabama Legislature enacted Act 823, 1965 Alabama Acts, at 1539, § 2 of which designated specific administrative tasks to be performed by each Commissioner and provided that the title of Mayor be rotated among the three. After the present lawsuit was commenced, the

law enacted in 1911, each candidate for the Mobile City Commission runs for election in the city at-large for a term of four years in one of three numbered posts, and may be elected only by a majority of the total vote. This is the same basic electoral system that is followed by literally thousands of municipalities and other local governmental units throughout the Nation.[7]

II

Although required by general principles of judicial administration to do so, *Ashwander* v. *TVA*, 297 U. S. 288, 347 (Brandeis, J., concurring), neither the District Court nor the Court of Appeals addressed the complaint's statutory claim—that the Mobile electoral system violates § 2 of the Voting Rights Act of 1965. Even a cursory examination of that claim, however, clearly discloses that it adds nothing to the appellees' complaint.

Section 2 of the Voting Rights Act provides:

> "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States on account of race or color."

Assuming, for present purposes, that there exists a private

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city of Mobile belatedly submitted Act 823 to the Attorney General of the United States under § 5 of the Voting Rights Act of 1965. 42 U. S. C. § 1973c. The Attorney General objected to the legislation on the ground that the city had not shown that § 2 of the Act would not have the effect of abridging the right of Negroes to vote. No suit has been brought in the District Court for the District of Columbia to seek clearance under § 5 of the Voting Rights Act and, accordingly, § 2 of Act 823 is in abeyance.

[7] According to the 1979 Municipal Year Book, most municipalities of over 25,000 people conducted at-large elections of their city commissioners or council members as of 1977. *Id.*, at 98–99. It is reasonable to suppose than an even larger majority of other municipalities did so.

right of action to enforce this statutory provision,[8] it is apparent that the language of § 2 no more than elaborates upon that of the Fifteenth Amendment,[9] and the sparse legislative history of § 2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself.

Section 2 was an uncontroversial provision in proposed legislation whose other provisions engendered protracted dispute. The House Report on the Bill simply recited that § 2 "grants . . . a right to be free from enactment or enforcement of voting qualifications . . . or practices which deny or abridge the right to vote on account of race or color." H. R. Rep. No. 439, 89th Cong., 1st Sess., 23 (1965). See also S. Rep. No. 162, pt. 3, 89th Cong., 1st Sess., 19–20 (1965). The view that this section simply restated the prohibitions already contained in the Fifteenth Amendment was expressed without contradiction during the Senate hearings. Senator Dirksen indicated at one point that all States, whether or not covered by the preclearance provisions of § 5 of the proposed legislation, were prohibited from discriminating against Negro voters by § 2, which he termed "almost a rephrasing of the 15th [A]mendment." Attorney General Katzenbach agreed. See Voting Rights: Hearings on S. 1564 before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., 208 (1965).

In view of the section's language and its sparse but clear legislative history, it is evident that this statutory provision adds nothing to the appellees' Fifteenth Amendment claim. We turn, therefore, to a consideration of the validity of the

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judgment of the Court of Appeals with respect to the Fifteenth Amendment.

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The Court's early decisions under the Fifteenth Amendment established that it imposes but one limitation on the powers of the States. It forbids them to discriminate against Negroes in matters having to do with voting. See *Ex parte Yarbrough*, 110 U. S. 651, 665; *Neal* v. *Delaware*, 103 U. S. 370, 389–390; *United States* v. *Cruikshank*, 92 U. S. 542, 555–556; *United States* v. *Reese*, 92 U. S. 217. The Amendment's command and effect are wholly negative. "The Fifteenth Amendment does not confer the right of suffrage upon any one," but has "invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous conditions of servitude." *Id.*, at 217–218.

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The Court's more recent decisions confirm the principle that racially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation. In *Gomillion* v. *Lightfoot*, 364 U. S. 339, the Court held that allegations of a racially motivated gerrymander of municipal boundaries stated a claim under the Fifteenth Amendment. The constitutional infirmity of the state law in that case, according to the allegations of the complaint, was that in drawing the municipal boundaries the legislature was "solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote." *Id.*, at 341. The Court made clear that in the absence of such an invidious purpose, a State is constitutionally free to redraw political boundaries in any manner it chooses. *Id.*, at 347.

In *Wright* v. *Rockefeller*, 376 U. S. 52, the Court upheld by like reasoning a state congressional reapportionment statute against claims that district lines had been racially gerrymandered, because the plaintiffs failed to prove that the legislature "was either motivated by racial considerations or in fact drew the districts on racial lines"; or that the statute "was the product of a state contrivance to segregate on the basis of race or place or origin." *Id.*, at 56, 58. See also *Lassiter* v. *Northampton County Bd. of Elections*, 360 U. S. 45; *Lane* v. *Wilson*, 307 U. S. 368, 275–277.

While other of the Court's Fifteenth Amendment decisions have dealt with different issues, none has questioned the necessity of showing purposeful discrimination in order to show a Fifteenth Amendment violation. The cases of *Smith* v. *Allwright*, 321 U. S. 649, and *Terry* v. *Adams*, 345 U. S. 461, for example, dealt with the question whether a State was so involved with racially discriminatory voting practices as to invoke the Amendment's protection. Although their facts

differed somewhat, the question in both cases was whether the State was sufficiently implicated in the conduct of racially exclusionary primary elections to make that discrimination an abridgement of the right to vote *by a State*. Since the Texas Democratic Party primary in *Smith* v. *Allwright* was regulated by statute, and only party nominees chosen in a primary were placed on the ballot for the general election, the Court concluded that the state Democratic Party had become the agency of the State, and that the State thereby had "endorse[d], adopt[ed], and enforce[d] the discrimination against Negroes practiced by a party." 321 U. S., at 664.

Terry v. *Adams*, *supra*, posed a more difficult question of state involvement. The primary election challenged in that case was conducted by a county political organization, the Jaybird Association, that was neither authorized nor regulated under state law. The candidates chosen in the Jaybird primary, however, invariably won in the subsequent Democratic primary and in the general election, and the Court found that the Fifteenth Amendment had been violated. Although the several supporting opinions differed in their formulation of this conclusion, there was agreement that the State was involved in the purposeful exclusion of Negroes from participation in the election process.

The appellees have argued in this Court that *Smith* v. *Allwright* and *Terry* v. *Adams* support the conclusion that the at-large system of elections in Mobile is unconstitutional, reasoning that the effect of racially polarized voting in Mobile is the same as that of a racially exclusionary primary. The only effect, however, of the exclusionary primaries that offended the Fifteenth Amendment was that Negroes were not permitted to vote in them. The difficult question was whether the "State ha[d] had a hand in" in the patent discrimination practiced by a nominally private organization. *Terry* v. *Adams*, 345 U. S., at 473 (Frankfurter, J., concurring).

The answer to the appellees' argument is that, as the Dis-

trict Court expressly found, their freedom to vote has not been denied or abridged by anyone. The Fifteenth Amendment does not entail the right to have Negro candidates elected, and neither *Smith* v. *Allwright* nor *Terry* v. *Adams* contains any implication to the contrary. That Amendment prohibits only purposefully discriminatory denial or abridgment by government of the freedom to vote "on account of race, color, or previous condition of servitude." 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 protection of that Amendment in the present case.

IV

The Court of Appeals also agreed with the District Court that Mobile's at-large electoral system violates the Equal Protection Clause of the Fourteenth Amendment. There remains for consideration, therefore, the validity of its judgment on that score.

The claim that at-large electoral schemes unconstitutionally deny to some persons the Equal Protection of the Laws has been advanced in numerous cases before this Court. That contention has been raised most often with regard to multimember constituencies within a state legislative apportionment system. The constitutional objection to multimember districts is not and cannot be that, as such, they depart from apportionment on a population basis in violation of *Reynolds* v. *Simms*, 377 U. S. 533, and its progeny. Rather the focus in such cases has been on the lack of representation multimember districts afford various elements of the voting population in a system of representative legislative democracy. "Criticism [of multimember districts] is rooted in their winner-take-all aspects, their tendency to submerge minorities . . . , a general preference for legislatures reflecting community interests as closely as possible and disenchantment with political parties and elections as devices to settle policy differences

between contending interests." *Whitcomb* v. *Chavis*, 403 U. S. 124, 158–159.

Despite repeated constitutional attacks upon multimember legislative districts, the Court has consistently held that they are not unconstitutional *per se*, *e. g.*, *White* v. *Regester*, 412 U. S. 755; *Whitcomb* v. *Chavis*, 403 U. S. 124; *Kilgarin* v. *Hill*, 386 U. S. 120; *Burns* v. *Richardson*, 384 U. S. 73; *Fortson* v. *Dorsey*, 379 U. S. 433.[10] We have recognized, however, that such legislative apportionments could violate the Fourteenth Amendment if their purpose were invidiously to minimize or cancel out the voting potential of racial or ethnic minorities. See *White* v. *Regester*, *supra*; *Whitcomb* v. *Chavis*, *supra*; *Burns* v. *Richardson*, *supra*; *Fortson* v. *Dorsey*, *supra*. To prove such a purpose it is not enough to show that the group allegedly discriminated against has not elected representatives in proportion to its numbers. *White* v. *Regester*, *supra*, at —; *Whitcomb* v. *Chavis*, *supra*, at —. A plaintiff must prove that the disputed plan was "conceived or operated as [a] purposeful device[] to further racial discrimination," *Whitcomb* v. *Chavis*, *supra*, at 149. This burden of proof 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. See *Washington* v. *Davis*, 426 U. S. 229; *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252; *Personnel Adm'r of Massachusetts* v. *Feeney*, — U. S. —.

In only one case has the Court sustained a claim that multimember legislative districts unconstitutionally diluted the

[10] We have made clear, however, that a court in formulating an apportionment plan as an exercise of its equity powers should, as a general rule, not permit multimember legislative districts. "[S]ingle-member districts are to be preferred in court-ordered legislative apportionment plans unless the court can articulate a 'singular combination of unique factors' that justifies a different result. *Mahan* v. *Howell*, 410 U. S. 315, 333." *Connor* v. *Finch*, 431 U. S. 407, 415.

voting strength of a discrete group. That case was *White* v. *Regester, supra.* There the Court upheld a constitutional challenge by Negroes and Mexican-Americans to parts of a legislative reapportionment plan adopted by the State of Texas. The plaintiffs alleged that the multimember districts for the two counties in which they resided minimized the effect of their votes in violation of the Fourteenth Amendment, and the Court held that the plaintiffs had been able to "produce evidence to support the finding that the political processes leading to nomination and election were not equally open to participation by the group[s] in question." 412 U. S., at 766–767. In so holding, the Court relied upon evidence in the record that included a long history of official discrimination against minorities as well as indifference to their needs and interests on the part of white elected officials. The Court also found in each county additional factors that restricted the access of minority groups to the political process. In one county, Negroes effectively were excluded from the process of slating candidates for the Democratic Party, while the plaintiffs in the other county were Mexican-Americans who "suffer[ed] a cultural and language barrier" that made "participation in community processes extremely difficult, particularly . . . with respect to the political life" of the county. *Id.*, at 768 (footnote omitted).

We may assume, for present purposes, that an at-large election of city officials with all the legislative, executive and administrative power of the municipal government is constitutionally indistinguishable from the election of a few members of a state legislative body in multimember districts—although this may be a rash assumption.[11] But even making this as-

[11] See *Wise* v. *Lipscomb*, 435 U. S. 535, 549, and 550 (concurring opinion). It is noteworthy that a system of at-large city elections in place of elections of city officials by the voters of small geographic wards was universally heralded not many years ago as a praiseworthy and progres-

sumption, it is clear that the evidence in the present case fell far short of showing that the appellants "conceived or operated [a] purposeful device[] to further racial discrimination." *Whitcomb* v. *Chavis*, 403 U. S., at 149.

The District Court assessed the appellees' claims in light of the standard that had been articulated by the Court of Appeals for the Fifth Circuit in *Zimmer* v. *McKeithen*, 485 F. 2d 1297. That case, coming before *Washington* v. *Davis*, 426 U. S. 229, was quite evidently 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. See 485 F. 2d, at 1304–1305, and n. 16.[12]

In light of the criteria identified in *Zimmer*, the District Court based its conclusion of unconstitutionality primarily on the fact that no Negro had ever been elected to the City Commission, apparently because of the pervasiveness of racially polarized voting in Mobile. The trial court also found that city officials had not been as responsive to the interests of Negroes as to those of white persons. On the basis of these findings, the court concluded that the political processes in Mobile were not equally open to Negroes, despite its seemingly inconsistent findings that there were no inhibitions against Negroes becoming candidates, and that in fact Negroes had registered and voted without hindrance. 423 F. Supp., at 387. Finally, with little additional discussion, the District Court held that Mobile's at-large electoral system

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sive reform of corrupt municipal government. See, *e. g.*, E. Banfield and J. Wilson, City Politics 151 (1963). Compare, M. Seasongood, Local Government (1933); L. Steffens, The Shame of the Cities (1904).

[12] This Court affirmed the judgment of the Court of Appeals in *Zimmer* v. *McKeithen* on grounds other than those relied on by that court and explicitly "without approval of the constitutional views expressed by the Court of Appeals." *East Carroll Parish School Bd.* v. *Marshall*, 424 U. S. 636, 638 (*per curiam*).

was invidiously discriminating against Negroes in violation of the Equal Protection Clause.[4]

In affirming the District Court, the Court of Appeals acknowledged that the Equal Protection Clause of the Fourteenth Amendment requires only purposeful discrimination.[5]

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[4] The only indication given by the District Court of an inference that there existed an invidious purpose was the following statement: "It is not a long step from the systematic exclusion of blacks from juries within a half mile as a logical application of the pre[illegible] as to allow intentional discrimination." *Akins v. Texas*, 325 U. S. 398, 404. . . to [illegible] present purpose to show the black area as evidenced in this case. There is a 'current' condition of district of the local vote resulting from intentional state legislative manipulation which is as effective as the intentional state action referred to in *Gomillion* [illegible] *Lightfoot* [illegible] *Tuskegee*, 364 U. S. 339[illegible] 422 F. Supp., at 846.

What the District Court may have meant by this statement is uncertain. In any event the analogy to the racially motivated boundary gerrymander appears inapposite. There were certainly facts involved in *Gomillion* [illegible] which demonstrated almost to a mathematical certainty that Negroes were being excluded from future elections by State law. *See Guinn v. United States*, 238 U. S. 347, 366-367; and c. 17, *Patton v. Mississippi*, 332 U. S. 463, 464; *Pierre v. Louisiana*, 306 U. S. 354, 358; *Norris v. Alabama*, 294 U. S. 587, 590.

If the District Court meant by its statement that the existence of its at-large electoral system was, like the systematic exclusion of Negroes from juries, unexplainable on grounds other than race, its inference is contradicted by the history of the adoption of that system in Alabama. Alternatively, if the District Court means that the state legislature may be presumed to have "intended" that there would be no Negro Commissioners simply because that was a foreseeable consequence of at-large voting, it applied an incorrect legal standard. "Discriminatory purpose" . . . implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Adm'r of Mass. v. Feeney*, — U. S. —, — (footnote omitted).

[5] The Court of Appeals agreed the view that the District Court's finding of discrimination in light of the Senate criteria was "buttressed" by the fact that the Attorney General had interposed an objection under

but held that one way a plaintiff may establish this illicit purpose is by adducing evidence that satisfies the criteria of its decision in *Zimmer* v. *McKeithen, supra.* Thus, because the appellees had proved an "aggregate" of the *Zimmer* factors, the Court of Appeals concluded that a discriminatory purpose had been proved. That approach, however, is inconsistent with our decisions in *Washington* v. *Davis, supra,* and *Arlington Heights, supra.* Although the presence of the indicia relied on in *Zimmer* may afford some evidence of a discriminatory purpose, satisfaction of those criteria is not of itself sufficient proof of such a purpose. The so-called *Zimmer* criteria upon which the District Court and the Court of Appeals relied were most assuredly insufficient to prove an unconstitutionally discriminatory purpose in the present case.

First, the two courts found it highly significant that no Negro had been elected to the Mobile City Commission. From this fact they concluded that the processes leading to nomination and election were not open equally to Negroes. But the District Court's findings of fact, unquestioned on appeal, make clear that Negroes register and vote in Mobile "without hindrance," and that there are no official obstacles in the way of Negroes who wish to become candidates for election to the Commission. Indeed, it was undisputed that the only active "slating" organization in the city is comprised of Negroes. It may be that Negro candidates have been defeated, but that fact alone does not work a constitutional deprivation. *Whitcomb* v. *Chavis, supra,* at 160; see *Arlington Heights, supra,* at 266, and n. 15.[15]

Second, the District Court relied in part on its finding that

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§ 5 of the Voting Rights Act of 1965 to the state statute designating the functions of each Commissioner. 571 F. 2d, at 246. See n. 6, *supra.*

[15] There have been only three Negro candidates for the City Commission, all in 1973. According to the District Court, the Negro candidates "were young, inexperienced, and mounted extremely limited campaigns" and received only "modest support from the black community. . . ." 423 F. Supp., at 388.

the persons who were elected to the Commission discriminated against Negroes in municipal employment and in dispensing public services. If that is the case, those discriminated against may be entitled to relief under the Constitution, albeit of a sort quite different from that sought in the present case. The Equal Protection Clause proscribes purposeful discrimination because of race by any unit of state government, whatever the method of its election. But evidence of discrimination by white officials in Mobile is relevant only as the most tenuous and circumstantial evidence of the constitutional invalidity of the electoral system under which they attained their offices.

Third, the District Court and the Court of Appeals supported their conclusion by drawing upon the substantial history of official racial discrimination in Alabama. But past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful. The ultimate question remains whether a discriminatory intent has been proved in a given case. More distant instances of official discrimination in other cases are of limited help in resolving that question.

Finally, the District Court and the Court of Appeals pointed to the mechanics of the at-large electoral system itself as proof that the votes of Negroes were being invidiously canceled out. But those features of that electoral system, such as the majority vote requirement, tend naturally to disadvantage any voting minority, as we noted in *White* v. *Regester, supra*. They are far from proof of a racially discriminatory purpose or intent upon the part of the appellants in this case.[16]

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[16] According to the District Court, voters in the city of Mobile are represented in the state legislature by three state senators, any one of whom can veto proposed local legislation under the existing courtesy rule. Likewise, a majority of Mobile's 11-member House delegation can prevent a local bill from reaching the floor for debate. Unanimous

For the reasons stated, the judgment is reversed and the case is remanded to the Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

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approval of a local measure by the city delegation, on the other hand, virtually assures passage. 423 F. Supp., at 397.

There was evidence in this case that several proposals that would have altered the form of Mobile's municipal government have been defeated in the state legislature, including at least one that would have permitted Mobile to govern itself through a mayor and city council with members elected from individual districts within the city. Whether it may be possible ultimately to prove that Mobile's present governmental and electoral system has been retained for a racially discriminatory purpose, we are in no position now to say.

January 15, 1980

PP-1864 City of Mobile v. Bolden

Dear Potter:

Please join me.

Sincerely,

Mr. Justice Stewart

lfp/ss

cc: The Conference

[P. JAN. 16, 1980] Fill

City of Mobile

Supreme Court of the United States
Memorandum

....., 19.....

Harry told me that he
wants to circ. the dissent,
which he may then decide
to join.

But your "join" in the
meantime, is very helpful.

P.S.

Supreme Court of the United States
Memorandum

Jan, 19 80

Sandra -

Many thanks for your
note joining the Mobile opinion.
I gather there may be trouble
getting a majority for this
opinion. You have undoubtedly
seen the copy of John's
letter about it, and yesterday

Note sent me
by Potter while
we were on Bench.
Refers to my

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 17, 1980

Re: No. 77-1864 - City of Mobile v. Bolden
No. 78-357 - Williams v. Brown

Dear Potter:

In due course I will circulate a dissent in these cases.

Sincerely,

TM

Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 6, 1980

✓

Re: No. 77-1656 - City of Mobile v. Bolden

Dear Potter:

I hope you do not mind it, for now, I await the dissent in this case.

Sincerely,

Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 27, 1980

RE: Nos. 77-1844 and 78-357 - City of Mobile, Alabama
v. Bolden and Williams v. Brown, et al.

Dear Thurgood:

I join your dissent except the second paragraph of Part IV.

Sincerely,

Bill

Mr. Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

February 21, 1980

MEMORANDUM TO THE CONFERENCE

Re: No. 77-1414, Mobile v. Bolden

I contemplate adding to this opinion, in footnote or text and probably in considerably expanded form, something along the lines of the enclosed.

P.S.

February 28, 1980

77-1847 City of Mobile v. Bolden

Dear Potter:

Following our recent telephone talk, I have discussed Thurgood's dissent more carefully with my clerk, David Stewart.

At my request he has reduced to a memorandum an elaboration of the ideas suggested in your draft footnotes, together with some additional thoughts. Thurgood's dissent is vulnerable when our decisions are properly applied, but it is facially impressive. I think it warrants a full response.

Apart from my interest in having "my side" prevail in a case, I view this case as critical to the successful governance of our cities. I know from experience that wholly without regard to minorities, a ward system is detrimental to good municipal government. If a decision by this Court required wards, and that they be shaped to assure proportional representation of identifiable "political groups", our cities could become jungles.

Sincerely,

Mr. Justice Stewart

lfp/ss

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

CHAMBERS OF
THE CHIEF JUSTICE

March 12, 1980

RE: 77-1844 - City of Mobile, Ala. v. Bolden

Dear Potter:

I join.

Regards,

Mr. Justice Stewart

Copies to the Conference

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

From: Mr. Justice White

Circulated: 3-12-80

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1844

City of Mobile, Alabama, et al., Appellants, v. Wiley L. Bolden et al. | On Appeal from the United States Court of Appeals for the Fifth Circuit.

[March —, 1980]

Reviewed L F P.

9' ee stay with Stewart

3/12

MR. JUSTICE WHITE, dissenting.

In *White* v. *Regester*, 412 U. S. 755 (1973), this Court unanimously held the use of multimember districts for the election of state legislators in two counties in Texas violated the Equal Protection Clause of the Fourteenth Amendment because, based on a careful assessment of the totality of the circumstances, they were found to exclude Negroes and Mexican-Americans from effective participation in the political processes in the counties. Without questioning the vitality of *White* v. *Regester* and our other decisions dealing with challenges to multimember districts by racial or ethnic groups, the Court today inexplicably rejects a similar holding based on meticulous factual findings and scrupulous application of the principles of these cases by both the District Court and the Court of Appeals. The Court's decision is flatly inconsistent with *White* v. *Regester* and it cannot be understood to flow from our recognition in *Washington* v. *Davis*, 426 U. S. 229 (1976), that the Equal Protection Clause forbids only purposeful discrimination. Both the District Court and the Court of Appeals properly found that an invidious discriminatory purpose could be inferred from the totality of facts in this case. The Court's cryptic rejection of their conclusions ignores the principles that an invidious discriminatory purpose can be inferred from objective factors of the kind relied on in *White* v. *Regester* and that the trial courts are in a special position to make such intensely local appraisals.

Not a bad effort; it presents a more mainstream dissent, but presents nothing ... surprising -

David

I agree with David that Regester fairly can be read this way as applying to facts of this case. But I view Regester as [illegible]

I

Prior to our decision in *White* v. *Regester*, we upheld a number of multimember districting schemes against constitutional challenges, but we consistently recognized that such apportionment schemes could constitute invidious discrimination "where the circumstances of a particular case may 'operate to minimize or cancel out the voting strength of racial or political elements of the voting population.'" *Whitcomb* v. *Chavis*, 403 U. S. 124, 143 (1971), quoting from *Fortson* v. *Dorsey*, 379 U. S. 433, 439 (1965); *Burns* v. *Richardson*, 384 U. S. 73, 88 (1966). In *Whitcomb* v. *Chavis*, *supra*, we noted that the fact that the number of members of a particular group who were legislators was not in proportion to the population of the group did not prove invidious discrimination absent evidence and findings that the members of the group had less opportunity than did other persons "to participate in the political processes and to elect legislators of their choice." *Whitcomb* v. *Chavis*, *supra*, at 149.

Relying on this principle, in *White* v. *Regester* we unanimously upheld a district court's conclusion that the use of multimember districts in Dallas and Bexar Counties in Texas violated the Equal Protection Clause in the face of findings that they excluded Negroes and Mexican-Americans from effective participation in the political processes. With respect to the exclusion of Negroes in Dallas County, "the District Court first referred to the history of official racial discrimination in Texas, which at times touched the right of Negroes to register and vote and to participate in the democratic processes." *White* v. *Regester*, 412 U. S., at 766. The District Court also referred to Texas' majority vote requirement and "place" rule, "neither in themselves improper nor invidious," but which "enhanced the opportunity for racial discrimination" by reducing legislative elections from the multimember district to "a head-to-head contest for each position." *Ibid.* We deemed more fundamental the District Court's

findings that only two Negro state representatives had been elected from Dallas County since Reconstruction and that these were the only two Negroes ever slated by an organization that effectively controlled Democratic Party candidate slating. *Id.*, at 766–767. We also noted the District Court's findings that the Democratic Party slating organization was insensitive to the needs and aspirations of the Negro community and that at times it had employed racial campaign tactics to defeat candidates supported by the black community. Based on this evidence, the District Court concluded that the black community generally was "not permitted to enter into the political process in a reliable and meaningful manner." *Id.*, at 767. We held that "[t]hese findings and conclusions are sufficient to sustain the District Court's judgment with respect to the Dallas multimember district and, on this record, we have no reason to disturb them." *Ibid.*

With respect to the exclusion of Mexican-Americans from the political process in Bexar County, the District Court referred to the continuing effects of a long history of invidious discrimination against Mexican-Americans in education, employment, economics, health, politics, and other fields. *Id.*, at 768. The impact of this discrimination, coupled with a cultural and language barrier, made Mexican-American participation in the political life of Bexar County extremely difficult. Only five Mexican-Americans had represented Bexar County in the Texas Legislature since 1880 and the county's legislative delegation "was insufficiently responsive to Mexican-American interests." *Id.*, at 769. "Based on the totality of the circumstances, the District Court evolved its ultimate assessment of the multimember district, overlaid, as it was, on the cultural and economic realities of the Mexican-American community in Bexar County and its relationship with the rest of the county." *Ibid.* "[F]rom its own special vantage point" the District Court concluded that the multimember district invidiously excluded Mexican-

Americans from effective participation in the election of state representatives. We affirmed, noting that we were "not inclined to overturn these 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." *Id.*, at 769–770.

II

In the instant case the District Court and the Court of Appeals faithfully applied the principles of *White* v. *Regester* in assessing whether the maintenance of a system of at-large elections for the selection of Mobile City Commissioners denied Mobile Negroes their Fourteenth and Fifteenth Amendment rights. Scrupulously adhering to our admonition that "[t]he plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question," *id.*, at 766, the District Court conducted a detailed factual inquiry into the openness of the candidate selection process to blacks. The court noted that "Mobile blacks were subjected to massive official and private racial discrimination until the Voting Rights Act of 1965" and that "[t]he pervasive effects of past discrimination still substantially affects black political participation." 423 F. Supp. 384, 387 (SD Ala. 1976). Although the District Court noted that "[s]ince the Voting Rights Act of 1965, blacks register and vote without hindrance," the court found that "local political processes are not equally open" to blacks. Despite the fact that Negroes constitute more than 35% of the population of Mobile, no Negro has ever been elected to the Mobile City Commission. The plaintiffs introduced extensive evidence of severe racial polarization in voting patterns during the 1960's and 1970's with "white voting for white and black for black if a white is opposed to a black" resulting in the defeat of the black candidate or, if two whites are running,

the defeat of the white candidate most identified with blacks. *Id.*, at 388. Regression analyses covering every city commission race in 1965, 1969, and 1973, both the primary and general election of the county commission in 1968 and 1972, selected school board races in 1962, 1966, 1970, 1972, and 1974, city referendums in 1963 and 1973, and a countywide legislative race in 1969 confirmed the existence of severe bloc voting. *Id.*, at 388–389. Nearly every active candidate for public office testified that because of racial polarization "it is highly unlikely that anytime in the foreseeable future, under the at-large system, that a black can be elected against a while." *Id.*, at 388. After single-member districts were created in Mobile County for state legislative elections, "three blacks of the present fourteen member Mobile County delegation have been elected." *Id.*, at 389. Based on the foregoing evidence, the District Court found "that the structure of the at-large election of city commissioners combined with strong racial polarization of Mobile's electorate continues to effectively discourage qualified black citizens from seeking office or being elected thereby denying blacks equal access to the slating or candidate selection process." *Ibid.*

The District Court also reviewed extensive evidence that the city commissioners elected under the at-large system have not been responsive to the needs of the Negro community. The court found that city officials have been unresponsive to the interests of Mobile Negroes in municipal employment, appointments to boards and committees, and the provision of municipal services in part because of "the political fear of a white backlash vote when black citizens' needs are at stake." *Id.*, at 392. The court also found that there is no clear-cut state policy preference for at-large elections and that past discrimination affecting the ability of Negroes to register and to vote "has helped preclude the effective participation of blacks in the election system today." *Id.*, at 393. The adverse impact of the at-large election system on minorities was found

that under *Washington* v. *Davis, supra,* and *Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U. S. 252 (1977), "a showing of racially motivated discrimination is a necessary element" for a successful claim of unconstitutional voting dilution under either the Fourteenth or Fifteenth Amendment. *Nevett* v. *Sides,* 571 F. 2d, at 219, 220. The court concluded that the standards for proving unconstitutional voting dilution outlined in *White* v. *Regester* were consistent with the requirement that purposeful discrimination be shown because they focus on factors that go beyond a simple showing that minorities are not represented in proportion to their numbers in the general population. *Id.,* at 219–220, n. 13, 222–224.

In its decision in the instant case the Court of Appeals reviewed the District Court's findings of fact, found them not to be clearly erroneous and held that they "compel the inference that [Mobile's at-large] system has been maintained with the purpose of diluting the black vote, thus supplying the element of intent necessary to establish a violation of the fourteenth amendment, *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U. S. 252 (1977); *Washington* v. *Davis,* 426 U. S. 229 (1976), and the fifteenth amendment, *Wright* v. *Rockefeller,* 376 U. S. 52 (1964)." 571 F. 2d, at 245. The court observed that the District Court's "finding that the legislature was acutely conscious of the racial consequences of its districting policies," coupled with the attempt to assign different functions to each of the three city commissioners "to lock in the at-large feature of the scheme" constituted "direct evidence of the intent behind the maintenance of the at-large plan." *Id.,* at 246. The Court of Appeals concluded that "the district court has properly conducted the 'sensitive inquiry into such circumstantial and direct evidence of intent as may be available' that a court must undertake in '[d]etermining whether invidious discriminatory purpose was a motivating factor' in the main-

of a discriminatory purpose," it holds that the evidence relied upon by the courts below was "most assuredly insufficient to prove an unconstitutional discriminatory purpose in the present case." The Court apparently bases this holding on the fact that there are no official obstacles barring Negroes from registering, voting, and running for office coupled with its conclusion that none of the factors relied upon by the courts below would alone be sufficient to support an inference of purposeful discrimination. The absence of official obstacles to registration, voting, and running for office heretofore has never been deemed to insulate an electoral system from attack under the Fourteenth and Fifteenth Amendments. In *White* v. *Regester*, 412 U. S. 755, there was no evidence that Negroes faced official obstacles to registration, voting, and running for office, yet we upheld a finding that they had been excluded from effective participation in the political process in violation of the Equal Protection Clause because a multimember districting scheme, in the context of racial voting at the polls, was being used invidiously to prevent Negroes from being elected to public office. In *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1969), and *Terry* v. *Adams*, 345 U. S. 461 (1953), we invalidated electoral systems under the Fifteenth Amendment not because they erected official obstacles in the path of Negroes registering, voting or running for office, but because they were used effectively to deprive the Negro vote of any value. Thus, even though Mobile's Negro community may register and vote without hindrance, the system of at-large election of city commissioners may violate the Fourteenth and Fifteenth Amendments if it is used purposefully to exclude Negroes from the political process.

In conducting "an intensely local appraisal of the design and impact" of the at-large election scheme, *White* v. *Regester*, 412 U. S., at 769, the District Court's decision was fully consistent with our recognition in *Washington* v. *Davis*, 426 U. S., at 242, that "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." Although the totality of the facts relied upon by the District Court to support its inference of purposeful discrimination is even more compelling than that present in *White* v. *Regester*, the Court today rejects the inference of purposeful discrimination apparently because each of the factors relied upon by the courts below is alone insufficient to support the inference. The Court states that the "fact [that Negro candidates have been defeated] alone does not work a constitutional deprivation," that evidence of the unresponsiveness of elected officials "is relevant only as the most tenuous and circumstantial evidence," that "the substantial history of official racial discrimination . . . [is] of limited help," and that the features of the electoral system that enhance the disadvantages faced by a voting minority "are far from proof of a racially discriminatory purpose." By viewing each of the factors relied upon below in isolation, and ignoring the fact that racial bloc voting at the polls makes it impossible to elect a black commissioner under the at-large system, the Court rejects the "totality of the circumstances" approach we endorsed in *White* v. *Regester*, 412 U. S., at 766–770, *Washington* v. *Davis*, 426 U. S., at 241–242, and *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S., at 266, and leaves the courts below adrift on uncharted seas with respect to how to proceed on remand.

Because I believe that the findings of the District Court amply support an inference of purposeful discrimination in violation of the Fourteenth and Fifteenth Amendments, I respectfully dissent.

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 13, 1980

RE: No. 77-1844 City of Mobile, Alabama v. Bolden

Dear Byron:

Please join me.

Sincerely,

Bill

Mr. Justice White

cc: The Conference

6-6, 10-13, 17-23

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

From: Mr. Justice Stewart

Circulated: _____

Recirculated: 13 MAR 1980

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1844

City of Mobile, Alabama, et al., Appellants, v. Wiley L. Bolden et al. | On Appeal from the United States Court of Appeals for the Fifth Circuit.

This is much stronger, I would prefer a stronger distinction of Reynolds v. Sims, pp. 20-21, but we have probably shot our wad - David

[January —, 1980]

MR. JUSTICE STEWART delivered the opinion of the Court.

The City of Mobile, Ala., has since 1911 been governed by a City Commission consisting of three members elected by the voters of the city at-large. The question in this case is whether this at-large system of municipal elections violates the rights of Mobile's Negro voters in contravention of federal statutory or constitutional law.

The appellees brought this suit in the Federal District Court for the Southern District of Alabama as a class action on behalf of all Negro citizens of Mobile.[1] Named as defendants were the city and its three incumbent Commissioners, who are the appellants before this Court. The complaint alleged that the practice of electing the City Commissioners at-large unfairly diluted the voting strength of Negroes in violation of § 2 of the Voting Rights Act of 1965,[2] of the Fourteenth Amendment and of the Fifteenth Amendment. Following a bench trial, the District Court found that the constitutional rights of the appellees had been violated, entered a judgment in their favor, and ordered that the

I agree with David. Thin incorporates most of the changes we suggested. LFP 3/11

[1] Approximately 35.4% of the residents of Mobile are Negro.

[2] 79 Stat. 437, 42 U. S. C. § 1973. The complaint also contained claims based on the First and Thirteenth Amendments and on 42 U. S. C. § 1983 and 42 U. S. C. § 1985 (3). Those claims have not been pressed in this Court.

City Commission be disestablished and replaced by a municipal government consisting of a Mayor and a City Council with members elected from single-member districts. 423 F. Supp. 384.[3] The Court of Appeals affirmed the judgment in its entirety, *Bolden* v. *City of Mobile*, 571 F. 2d 238, agreeing that Mobile's at-large elections operated to discriminate against Negroes in violation of the Fourteenth and Fifteenth Amendments, *id.*, at 245, and finding that the remedy formulated by the District Court was appropriate. An appeal was taken to this Court, and we noted probable jurisdiction, — U. S. —. The case was originally argued in the 1978 Term, and was reargued in the present Term.

I

In Alabama, the form of municipal government a city may adopt is governed by state law. Until 1911 cities not covered by specific legislation were limited to governing themselves through a mayor and city council.[4] In that year, the Alabama Legislature authorized every large municipality to adopt a commission form of government.[5] Mobile established its City Commission in the same year, and has maintained that basic system of municipal government ever since.

The three Commissioners jointly exercise all legislative, executive, and administrative power in the municipality. They are required after election to designate one of their number as Mayor, a largely ceremonial office, but no formal provision is made for allocating specific executive or administrative duties among the three.[6] As required by the state

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[3] The District Court has stayed its orders pending disposition of the present appeal.

[4] Alabama Code, Chapter 11–43 (1975).

[5] Act 281, 1911 Alabama Acts, at 330.

[6] In 1965 the Alabama Legislature enacted Act 823, 1965 Alabama Acts, at 1539, § 2 of which designated specific administrative tasks to be performed by each Commissioner and provided that the title of Mayor be rotated among the three. After the present lawsuit was commenced, the

law enacted in 1911, each candidate for the Mobile City Commission runs for election in the city at-large for a term of four years in one of three numbered posts, and may be elected only by a majority of the total vote. This is the same basic electoral system that is followed by literally thousands of municipalities and other local governmental units throughout the Nation.[7]

II

Although required by general principles of judicial administration to do so, *Spector Motor Co.* v. *McLaughlin*, 323 U. S. 101, 105; *Ashwander* v. *TVA*, 297 U. S. 288, 347 (Brandeis, J., concurring), neither the District Court nor the Court of Appeals addressed the complaint's statutory claim—that the Mobile electoral system violates § 2 of the Voting Rights Act of 1965. Even a cursory examination of that claim, however, clearly discloses that it adds nothing to the appellees' complaint.

Section 2 of the Voting Rights Act provides:

> "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States on account of race or color."

Assuming, for present purposes, that there exists a private

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city of Mobile belatedly submitted Act 823 to the Attorney General of the United States under § 5 of the Voting Rights Act of 1965. 42 U. S. C. § 1973c. The Attorney General objected to the legislation on the ground that the city had not shown that § 2 of the Act would not have the effect of abridging the right of Negroes to vote. No suit has been brought in the District Court for the District of Columbia to seek clearance under § 5 of the Voting Rights Act and, accordingly, § 2 of Act 823 is in abeyance.

[7] According to the 1979 Municipal Year Book, most municipalities of over 25,000 people conducted at-large elections of their city commissioners or council members as of 1977. *Id.*, at 98–99. It is reasonable to suppose than an even larger majority of other municipalities did so.

right of action to enforce this statutory provision,[8] it is apparent that the language of § 2 no more than elaborates upon that of the Fifteenth Amendment,[9] and the sparse legislative history of § 2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself.

Section 2 was an uncontroversial provision in proposed legislation whose other provisions engendered protracted dispute. The House Report on the Bill simply recited that § 2 "grants . . . a right to be free from enactment or enforcement of voting qualifications . . . or practices which deny or abridge the right to vote on account of race or color." H. R. Rep. No. 439, 89th Cong., 1st Sess., 23 (1965). See also S. Rep. No. 162, pt. 3, 89th Cong., 1st Sess., 19–20 (1965). The view that this section simply restated the prohibitions already contained in the Fifteenth Amendment was expressed without contradiction during the Senate hearings. Senator Dirksen indicated at one point that all States, whether or not covered by the preclearance provisions of § 5 of the proposed legislation, were prohibited from discriminating against Negro voters by § 2, which he termed "almost a rephrasing of the 15th [A]mendment." Attorney General Katzenbach agreed. See Voting Rights: Hearings on S. 1564 before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., 208 (1965).

In view of the section's language and its sparse but clear legislative history, it is evident that this statutory provision adds nothing to the appellees' Fifteenth Amendment claim. We turn, therefore, to a consideration of the validity of the

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[8] Cf. *Allen* v. *State Board of Elections*, 393 U. S. 544. But see *Transamerica Mortgage Advisers, Inc.* v. *Lewis*, — U. S. —, —; *Touche-Ross & Co.* v. *Redington*, — U. S. —, —.

[9] Section 1 of the Fifteenth Amendment provides:

"The right of the citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

judgment of the Court of Appeals with respect to the Fifteenth Amendment.

III

The Court's early decisions under the Fifteenth Amendment established that it imposes but one limitation on the powers of the States. It forbids them to discriminate against Negroes in matters having to do with voting. See *Ex parte Yarbrough*, 110 U. S. 651, 665; *Neal* v. *Delaware*, 103 U. S. 370, 389–390; *United States* v. *Cruikshank*, 92 U. S. 542, 555–556; *United States* v. *Reese*, 92 U. S. 214. The Amendment's command and effect are wholly negative. "The Fifteenth Amendment does not confer the right of suffrage upon any one," but has "invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude." *Id.*, at 217–218.

Our decisions, moreover, have made clear that action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose. In *Guinn* v. *United States*, 238 U. S. 347, this Court struck down a "grandfather" clause in a state constitution exempting from the requirement that voters be literate any person or the descendants of any person who had been entitled to vote before January 1, 1866. It was asserted by way of defense that the provision was immune from successful challenge, since a law could not be found unconstitutional either "by attributing to the legislative authority an occult motive," or "because of conclusions concerning its operation in practical execution and resulting discrimination arising . . . from inequalities naturally inhering in those who must come within the standard in order to enjoy the right to vote." *Id.*, at 359. Despite this argument, the Court did not hesitate to hold the grandfather clause unconstitutional, because it was not "possible to

discover any basis in reason for the standard thus fixed than the purpose" to circumvent the Fifteenth Amendment. *Id.*, at 365.

The Court's more recent decisions confirm the principle that racially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation. In *Gomillion* v. *Lightfoot*, 364 U. S. 339, the Court held that allegations of a racially motivated gerrymander of municipal boundaries stated a claim under the Fifteenth Amendment. The constitutional infirmity of the state law in that case, according to the allegations of the complaint, was that in drawing the municipal boundaries the legislature was "solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote." *Id.*, at 341. The Court made clear that in the absence of such an invidious purpose, a State is constitutionally free to redraw political boundaries in any manner it chooses. *Id.*, at 347.[10]

In *Wright* v. *Rockefeller*, 376 U. S. 52, the Court upheld by like reasoning a state congressional reapportionment statute against claims that district lines had been racially gerrymandered, because the plaintiffs failed to prove that the legislature "was either motivated by racial considerations or in fact drew the districts on racial lines"; or that the statute "was the product of a state contrivance to segregate on the basis of race or place or origin." *Id.*, at 56, 58.[11] See also

[10] The Court has repeatedly cited *Gomillion* v. *Lightfoot*, 364 U. S. 148, for the principle that an invidious *purpose* must be adduced to support a claim of unconstitutionality. See *Personnel Admin'r of Massachusetts* v. *Feeney*, 442 U. S. 256, 272; *Arlington Heights* v. *Metropolitan Housing Corp.*, 429 U. S. 252, 265, 266; *Washington* v. *Davis*, 426 U. S. 229, 240.

[11] MR. JUSTICE MARSHALL has elsewhere described the fair import of the *Gomillion* and *Wright* cases: "In the two Fifteenth Amendment redistricting cases, *Wright* v. *Rockefeller*, 376 U. S. 52 (1964), and *Gomillion* v. *Lightfoot*, 363 U. S. 145 (1960), the Court suggested that legislative purposes alone is determinative, although language in both cases may be isolated that seems to approve some inquiry into effect insofar as it eluci-

Lassiter v. *Northampton County Bd. of Elections*, 360 U. S. 45; *Lane* v. *Wilson*, 307 U. S. 368, 275–277.

While other of the Court's Fifteenth Amendment decisions have dealt with different issues, none has questioned the necessity of showing purposeful discrimination in order to show a Fifteenth Amendment violation. The cases of *Smith* v. *Allwright*, 321 U. S. 649, and *Terry* v. *Adams*, 345 U. S. 461, for example, dealt with the question whether a State was so involved with racially discriminatory voting practices as to invoke the Amendment's protection. Although their facts differed somewhat, the question in both cases was whether the State was sufficiently implicated in the conduct of racially exclusionary primary elections to make that discrimination an abridgement of the right to vote *by a State*. Since the Texas Democratic Party primary in *Smith* v. *Allwright* was regulated by statute, and only party nominees chosen in a primary were placed on the ballot for the general election, the Court concluded that the state Democratic Party had become the agency of the State, and that the State thereby had "endorse[d], adopt[ed], and enforce[d] the discrimination against Negroes practiced by a party." 321 U. S., at 664. *Terry* v. *Adams*, *supra*, posed a more difficult question of state involvement. The primary election challenged in that case was conducted by a county political organization, the Jaybird Association, that was neither authorized nor regulated under state law. The candidates chosen in the Jaybird primary, however, invariably won in the subsequent Democratic primary and in the general election, and the Court found that the Fifteenth Amendment had been violated. Although the several supporting opinions differed in their formulation of this conclusion, there was agreement that the State was

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dates purpose." *Beer* v. *United States*, 425 U. S. 130, 148 (MARSHALL, J., dissenting.)

The Court in the *Wright* case also rejected claims made under the Equal Protection Clause of the Fourteenth Amendment. See p. —, *infra*.

involved in the purposeful exclusion of Negroes from participation in the election process.

The appellees have argued in this Court that *Smith* v. *Allwright* and *Terry* v. *Adams* support the conclusion that the at-large system of elections in Mobile is unconstitutional, reasoning that the effect of racially polarized voting in Mobile is the same as that of a racially exclusionary primary. The only characteristic, however, of the exclusionary primaries that offended the Fifteenth Amendment was that Negroes were not permitted to vote in them. The difficult question was whether the "State ha[d] had a hand in" in the patent discrimination practiced by a nominally private organization. *Terry* v. *Adams*, 345 U. S., at 473 (Frankfurter, J., concurring).

The answer to the appellees' argument is that, as the District Court expressly found, their freedom to vote has not been denied or abridged by anyone. The Fifteenth Amendment does not entail the right to have Negro candidates elected, and neither *Smith* v. *Allwright* nor *Terry* v. *Adams* contains any implication to the contrary. That Amendment prohibits only purposefully discriminatory denial or abridgment by government of the freedom to vote "on account of race, color, or previous condition of servitude." 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 protection of that Amendment in the present case.

IV

The Court of Appeals also agreed with the District Court that Mobile's at-large electoral system violates the Equal Protection Clause of the Fourteenth Amendment. There remains for consideration, therefore, the validity of its judgment on that score.

A

The claim that at-large electoral schemes unconstitutionally

deny to some persons the Equal Protection of the Laws has been advanced in numerous cases before this Court. That contention has been raised most often with regard to multimember constituencies within a state legislative apportionment system. The constitutional objection to multimember districts is not and cannot be that, as such, they depart from apportionment on a population basis in violation of *Reynolds* v. *Sims*, 377 U. S. 533, and its progeny. Rather the focus in such cases has been on the lack of representation multimember districts afford various elements of the voting population in a system of representative legislative democracy. "Criticism [of multimember districts] is rooted in their winner-take-all aspects, their tendency to submerge minorities . . . , a general preference for legislatures reflecting community interests as closely as possible and disenchantment with political parties and elections as devices to settle policy differences between contending interests." *Whitcomb* v. *Chavis*, 403 U. S. 124, 158–159.

Despite repeated constitutional attacks upon multimember legislative districts, the Court has consistently held that they are not unconstitutional *per se*, *e. g.*, *White* v. *Regester*, 412 U. S. 755; *Whitcomb* v. *Chavis*, 403 U. S. 124; *Kilgarin* v. *Hill*, 386 U. S. 120; *Burns* v. *Richardson*, 384 U. S. 73; *Fortson* v. *Dorsey*, 379 U. S. 433.[12] We have recognized, however, that such legislative apportionments could violate the Fourteenth Amendment if their purpose were invidiously to minimize or cancel out the voting potential of racial or ethnic minorities. See *White* v. *Regester*, *supra*; *Whitcomb* v. *Chavis*, *supra*; *Burns* v. *Richardson*, *supra*; *Fortson* v. *Dorsey*,

[12] We have made clear, however, that a court in formulating an apportionment plan as an exercise of its equity powers should, as a general rule, not permit multimember legislative districts. "[S]ingle-member districts are to be preferred in court-ordered legislative apportionment plans unless the court can articulate a 'singular combination of unique factors' that justifies a different result. *Mahan* v. *Howell*, 410 U. S. 315, 333." *Connor* v. *Finch*, 431 U. S. 407, 415.

supra. To prove such a purpose it is not enough to show that the group allegedly discriminated against has not elected representatives in proportion to its numbers. *White* v. *Regester, supra,* at —; *Whitcomb* v. *Chavis, supra,* at —. A plaintiff must prove that the disputed plan was "conceived or operated as [a] purposeful device[] to further racial discrimination," *Whitcomb* v. *Chavis, supra,* at 149.

This burden of proof 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. See *Washington* v. *Davis,* 426 U. S. 229; *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U. S. 252; *Personnel Adm'r of Massachusetts* v. *Feeney,* 442 U. S. 256. The Court explicitly indicated in *Washington* v. *Davis* that this principle applies to claims of racial discrimination affecting voting just as it does to other claims of racial discrimination. Indeed, the Court's opinion in that case viewed *Wright* v. *Rockefeller, supra,* as an apt illustration of the principle that an illicit purpose must be proved before a constitutional violation can be found. The Court said:

"The rule is the same in other contexts. *Wright* v. *Rockefeller,* 376 U. S. 52 (1964), upheld a New York congressional apportionment statute against claims that district lines had been racially gerrymandered. The challenged districts were made up predominantly of whites or of minority races, and their boundaries were irregularly drawn. The challengers did not prevail because they failed to prove that the New York Legislature 'was either motivated by racial considerations or in fact drew the districts on racial lines'; the plaintiffs had not shown that the statute 'was the product of a state contrivance to segregate on the basis of race or place of origin.' *Id.,* at 56, 58. The dissenters were in agreement that the issue was whether the 'boundaries . . .

were purposefully drawn on racial lines.' *Id.*, at 67." *Washington* v. *Davis*, *supra*, at 240.

More recently, in *Arlington Heights* v. *Metropolitan Housing Corp.*, *supra*, the Court again relied on *Wright* v. *Rockefeller* to illustrate the principle that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." 429 U. S., at 252. Although dicta may be drawn from a few of the Court's earlier opinions suggesting that disproportionate effects alone may establish a claim of unconstitutional racial vote dilution, the fact is that such a view is not supported by any decision of this Court.[13] More importantly, such a view is not consistent with the meaning of the Equal Protection Clause as it has been understood in a variety of other contexts involving alleged racial discrimination. *Washington* v. *Davis*, *supra* (employment); *Arlington Heights* v. *Metropolitan Housing Corp.*, *supra* (zoning); *Keyes* v. *School Dist. No. 1, Denver, Colo.*, 413 U. S. 189, 208 (public schools); *Akins* v. *Texas*, 325 U. S. 398, 403–404 (jury selection).

[13] The dissenting opinion of MR. JUSTICE MARSHALL reads the Court's opinion in *Fortson* v. *Dorsey*, 379 U. S. 433, to say that a claim of vote dilution under the Equal Protection Clause could rest on either discriminatory purpose or effect. *Post*, at 5. In fact, the Court explicitly reserved this question and expressed no view concerning it. That case involved solely a claim, which the Court rejected, that a state legislative apportionment statute creating some multimember districts was constitutionally infirm on its face. Although the Court recognized that "designedly or otherwise," multimember districting schemes might, under the circumstances of a particular case, minimize the voting strength of a racial group, an issue as to the constitutionality of such an arrangement "[w]as not presented by the record," and "our holding ha[d] no bearing on that wholly separate question." *Id.*, at 439.

The phrase "designedly or otherwise" in which this dissenting opinion places so much stock, was repeated, also in dictum, in *Burns* v. *Richardson*, 384 U. S. 73, 88. But the constitutional challenge to the multimember constituencies failed in that case because the plaintiffs demonstrated neither discriminatory purpose nor effect. *Id.*, at 88–90, and nn. 15 and 16.

In only one case has the Court sustained a claim that multimember legislative districts unconstitutionally diluted the voting strength of a discrete group. That case was *White* v. *Regester, supra.* There the Court upheld a constitutional challenge by Negroes and Mexican-Americans to parts of a legislative reapportionment plan adopted by the State of Texas. The plaintiffs alleged that the multimember districts for the two counties in which they resided minimized the effect of their votes in violation of the Fourteenth Amendment, and the Court held that the plaintiffs had been able to "produce evidence to support the finding that the political processes leading to nomination and election were not equally open to participation by the group[s] in question." 412 U. S., at 766–767. In so holding, the Court relied upon evidence in the record that included a long history of official discrimination against minorities as well as indifference to their needs and interests on the part of white elected officials. The Court also found in each county additional factors that restricted the access of minority groups to the political process. In one county, Negroes effectively were excluded from the process of slating candidates for the Democratic Party, while the plaintiffs in the other county were Mexican-Americans who "suffer[ed] a cultural and language barrier" that made "participation in community processes extremely difficult, particularly . . . with respect to the political life" of the county. *Id.*, at 768 (footnote omitted).

White v. *Regester* is thus consistent with "the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose," *Washington* v. *Davis*, 426 U. S., at 240. The Court stated the constitutional question in *White* to be whether the "multimember districts [were] *being used invidiously* to minimize or cancel out the voting strength of racial groups," *White* v. *Regester, supra*, at 765 (emphasis added), strongly indicating that only a purposeful dilution of the plaintiffs' vote would offend the

Equal Protection Clause.[14] Moreover, much of the evidence on which the Court relied in that case was relevant only for the reason that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact." *Arlington Heights* v. *Metropolitan Housing Corp.*, 429 U. S., at 264–265. Of course, "[t]he impact of the official action—whether it 'bears more heavily on one race than another,' *Washington* v. *Davis*, *supra*, at 242—may provide an important starting point." *Arlington Heights* v. *Metropolitan Housing Corp.*, *supra*, at 266. But where the character of a law is readily explainable on grounds apart from race, as would nearly always be true where, as here, an entire system of local governance is brought into question, disproportionate impact alone cannot be decisive, and courts must look to other evidence to support a finding of discriminatory purpose. See *ibid.*; *Washington* v. *Davis*, *supra*, at 242.

We may assume, for present purposes, that an at-large election of city officials with all the legislative, executive and administrative power of the municipal government is constitutionally indistinguishable from the election of a few members

[14] In *Gafney* v. *Cumming*, 412 U. S. 735, a case decided the same day as *White* v. *Regester*, 412 U. S. 755, the Court interpreted both *White* and the earlier vote dilution cases as turning on the existence of discriminatory purpose:

"State legislative districts may be equal or substantially equal in population and still be vulnerable under the Fourteenth Amendment. A districting statute otherwise acceptable, may be invalid because it fences out a racial group so as to deprive them of their pre-existing municipal vote. *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960). A districting plan may create multimember districts perfectly acceptable under equal population standards, but invidiously discriminatory because they are *employed* "to minimize or cancel out the voting strength of racial or political elements of the voting population." *Fortson* v. *Dorsey*, 379 U. S. 433, 439 (1965). See *White* v. *Regester*, *post*, p. 755; *Whitcomb* v. *Chavis*, 403 U. S. 124 (1971); *Abate* v. *Mundt*, 403 U. S., at 184, n. 2; *Burns* v. *Richardson*, 384 U. S., at 88–89." *Gafney* v. *Cummings*, *supra*, at 751 (emphasis added).

seemingly inconsistent findings that there were no inhibitions against Negroes becoming candidates, and that in fact Negroes had registered and voted without hindrance. 423 F. Supp., at 387. Finally, with little additional discussion, the District Court held that Mobile's at-large electoral system was invidiously discriminating against Negroes in violation of the Equal Protection Clause.[17]

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[17] The only indication given by the District Court of an inference that there existed an invidious purpose was the following statement: "[i]t is not a long step from the systematic exclusion of blacks from juries which is itself such an 'unequal application of the law . . . as to show intentional discrimination,' *Akins* v. *Texas*, 325 U. S. 398, 404, . . . to [the] present purpose to dilute the black vote as evidenced in this case. There is a 'current' condition of dilution of the black vote resulting from intentional state legislative *inaction* which is as effective as the intentional state action referred to in *Keyes* [v. *School District No. 1, Denver Colo.*, 413 U. S. 189]." 423 F. Supp., at 398.

What the District Court may have meant by this statement is uncertain. In any event the analogy to the racially exclusionary jury cases appears mistaken. Those cases typically have involved a consistent pattern of discrete official actions that demonstrated almost to a mathematical certainty that Negroes were being excluded from juries because of their race. See *Castaneda* v. *Partida*, 430 U. S. 482, 495–497, and n. 17; *Patton* v. *Mississippi*, 332 U. S. 463, 464; *Pierre* v. *Louisiana*, 306 U. S. 354, 359; *Norris* v. *Alabama*, 294 U. S. 587, 591.

If the District Court meant by its statement that the existence of the at-large electoral system was, like the systematic exclusion of Negroes from juries, unexplainable on grounds other than race, its inference is contradicted by the history of the adoption of that system in Mobile. Alternatively, if the District Court meant that the state legislature may be presumed to have "intended" that there would be no Negro Commissioners, simply because that was a foreseeable consequence of at-large voting, it applied an incorrect legal standard. "'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Adm'r of Mass.* v. *Feeney*, 442 U. S. 256, 279 (footnotes omitted).

In affirming the District Court, the Court of Appeals acknowledged that the Equal Protection Clause of the Fourteenth Amendment reaches only purposeful discrimination,[18] but held that one way a plaintiff may establish this illicit purpose is by adducing evidence that satisfies the criteria of its decision in *Zimmer* v. *McKeithen, supra.* Thus, because the appellees had proved an "aggregate" of the *Zimmer* factors, the Court of Appeals concluded that a discriminatory purpose had been proved. That approach, however, is inconsistent with our decisions in *Washington* v. *Davis, supra,* and *Arlington Heights, supra.* Although the presence of the indicia relied on in *Zimmer* may afford some evidence of a discriminatory purpose, satisfaction of those criteria is not of itself sufficient proof of such a purpose. The so-called *Zimmer* criteria upon which the District Court and the Court of Appeals relied were most assuredly insufficient to prove an unconstitutionally discriminatory purpose in the present case.

First, the two courts found it highly significant that no Negro had been elected to the Mobile City Commission. From this fact they concluded that the processes leading to nomination and election were not open equally to Negroes. But the District Court's findings of fact, unquestioned on appeal, make clear that Negroes register and vote in Mobile "without hindrance," and that there are no official obstacles in the way of Negroes who wish to become candidates for election to the Commission. Indeed, it was undisputed that the only active "slating" organization in the city is comprised of Negroes. It may be that Negro candidates have been defeated, but that fact alone does not work a constitutional deprivation.

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[18] The Court of Appeals expressed the view that the District Court's finding of discrimination in light of the *Zimmer* criteria was "buttressed" by the fact that the Attorney General had interposed an objection under § 5 of the Voting Rights Act of 1965 to the state statute designating the functions of each Commissioner. 571 F. 2d, at 246. See n. 6, *supra.*

Whitcomb v. *Chavis*, *supra*, at 160; see *Arlington Heights*, *supra*, at 266, and n. 15.[19]

Second, the District Court relied in part on its finding that the persons who were elected to the Commission discriminated against Negroes in municipal employment and in dispensing public services. If that is the case, those discriminated against may be entitled to relief under the Constitution, albeit of a sort quite different from that sought in the present case. The Equal Protection Clause proscribes purposeful discrimination because of race by any unit of state government, whatever the method of its election. But evidence of discrimination by white officials in Mobile is relevant only as the most tenuous and circumstantial evidence of the constitutional invalidity of the electoral system under which they attained their offices.[20]

Third, the District Court and the Court of Appeals supported their conclusion by drawing upon the substantial history of official racial discrimination in Alabama. But past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful. The ultimate question remains whether a discriminatory intent has been proved in a given case. More distant instances of official discrimination in other cases are of limited help in resolving that question.

Finally, the District Court and the Court of Appeals

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[19] There have been only three Negro candidates for the City Commission, all in 1973. According to the District Court, the Negro candidates "were young, inexperienced, and mounted extremely limited campaigns" and received only "modest support from the black community. . . ." 423 F. Supp., at 388.

[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 in assessing the invidiousness of Mobile's system of government. To the extent that the inquiry should properly focus on the state legislature, see n. 21, *infra*, the actions of unrelated governmental officials would be, of course, of questionable relevance.

pointed to the mechanics of the at-large electoral system itself as proof that the votes of Negroes were being invidiously canceled out. But those features of that electoral system, such as the majority vote requirement, tend naturally to disadvantage any voting minority, as we noted in *White* v. *Regester, supra.* They are far from proof of a racially discriminatory purpose or intent upon the part of the appellants in this case.[21]

B

We turn finally to the arguments advanced in Part I of MR. JUSTICE MARSHALL'S dissenting opinion. The theory of this dissenting opinion—a theory much more extreme than that espoused by the District Court or the Court of Appeals—appears to be that every "political group," or at least every such group that is in the minority, has a federal constitutional right to elect candidates in proportion to its numbers. Moreover, a political group's "right" to have its candidates elected is said to be a "fundamental interest," the infringement of which may be established without proof that a State has acted with the purpose of impairing anybody's access to the political process. This dissenting opinion finds the

[21] According to the District Court, voters in the city of Mobile are represented in the state legislature by three state senators, any one of whom can veto proposed local legislation under the existing courtesy rule. Likewise, a majority of Mobile's 11-member House delegation can prevent a local bill from reaching the floor for debate. Unanimous approval of a local measure by the city delegation, on the other hand, virtually assures passage. 423 F. Supp., at 397.

There was evidence in this case that several proposals that would have altered the form of Mobile's municipal government have been defeated in the state legislature, including at least one that would have permitted Mobile to govern itself through a mayor and city council with members elected from individual districts within the city. Whether it may be possible ultimately to prove that Mobile's present governmental and electoral system has been retained for a racially discriminatory purpose, we are in no position now to say.

"right" infringed in the present case because no Negro has been elected to the Mobile City Commission.

Whatever appeal the dissenting opinion's view may have as a matter of political theory, it is not the law. The Equal Protection Clause of the Fourteenth Amendment does not require proportional representation as an imperative of political organization. The entitlement that the dissenting opinion assumes to exist simply is not to be found in the Constitution of the United States.

It is of course true that a law that impinges upon a fundamental right explicitly or implicitly secured by the Constitution is presumptively unconstitutional. See *Shapiro* v. *Thompson*, 394 U. S. 618, 634, 638; *id.*, at 642–644 (concurring opinion). See also *San Antonio Ind. School District* v. *Rodriguez*, 411 U. S. 1, 17, 30–32. But plainly "[i]t is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws," *id.*, at 33. See *Lindsey* v. *Normet*, 405 U. S. 56, 74; *Dandridge* v. *Williams*, 397 U. S. 471, 485. Accordingly, where a state law does not impair a right or liberty protected by the Constitution, there is no occasion to depart from "the settled mode of constitutional analysis of legislat[ion] . . . involving questions of economic and social policy," *San Antonio Ind. School District* v. *Rodriguez*, *supra*, at 33.[22] MR. JUSTICE MARSHALL's dissenting opinion would discard these fixed principles in favor of a judicial inventiveness that would go "far toward making this Court a 'super-legislature.' " *Shapiro* v. *Thompson*, *supra*, at 655, 661. We are not free to do so.

Almost a hundred years ago the Court unanimously held

[22] The presumption of constitutional validity that underlies the settled mode of reviewing legislation disappears, of course, if the law under consideration creates classes that, in a constitutional sense, are inherently "suspect." See *Strauder* v. *West Virginia*, 100 U. S. 303; see also *Lockport* v. *Citizens for Community Action*, 430 U. S. 259; *McLaughlin* v. *Florida*, 379 U. S. 184.

that "the Constitution of the United States does not confer the right of suffrage upon any one. . . ." *Minor* v. *Happersett*, 21 Wall. 162, 178. See *Lassiter* v. *Northampton County Bd. of Elections*, 360 U. S. 45, 50–51. It is for the States "to determine the conditions under which the right of suffrage may be exercised . . . , absent of course the discrimination which the Constitution condemns," *ibid.* It is true, as the dissenting opinion states, that the Equal Protection Clause confers a substantive right to participate in elections on an equal basis with other qualified voters. See *Dunn* v. *Blumstein*, 405 U. S. 330, 336; *Reynolds* v. *Sims*, 377 U. S. 533, 576. But this right to equal participation in the electoral process does not protect any "political group," however defined, from electoral defeat.[23]

The dissenting opinion erroneously discovers the asserted entitlement to group representation within the "one person-one vote" principle of *Reynolds* v. *Sims*, *supra*, and its pro-

[23] The basic fallacy in the dissenting opinion's theory is illustrated by analogy to a defendant's right under the Sixth and Fourteenth Amendments to a trial by a jury of his peers in a criminal case. See *Duncan* v. *Louisiana*, 391 U. S. 145. That right, expressly conferred by the Constitution, is certainly "fundamental" as that word is used in the dissenting opinion. Moreover, under the Equal Protection Clause, a defendant has a right to require that the State not exclude from the jury members of his race. See *Castaneda* v. *Partida*, 430 U. S. 482, 493. But "[f]airness in selection has never been held to require proportional representation of races upon a jury," *Akins* v. *Texas*, 325 U. S. 398, 403; nor has the defendant any "right to demand that members of his race be included," *Alexander* v. *Louisiana*, 405 U. S. 625, 628–629. The absence from a jury of persons belonging to racial or other cognizable groups offends the Constitution only "if it results from purposeful discrimination." *Castaneda* v. *Partida*, *supra*, at 493. See *Alexander* v. *Lousiana*, *supra*; see also *Washington* v. *Davis*, 426 U. S. 229, 239–240. Thus, the fact that there is a constitutional right to a system of jury selection that is not purposefully exclusionary does not entail a right to a jury of any particular racial composition. Likewise, the fact that the Equal Protection Clause confers a right to participate in elections on an equal basis with other qualified voters does not entail a right to have one's candidates prevail.

geny.[24] 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." *Id.*, 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 has been "diluted" in the sense in which that word was used in the *Reynolds* case.

The dissenting opinion places an extraordinary interpretation on these decisions, an interpretation not justified by *Reynolds* v. *Sims* itself or by any other decision of this Court. It is, of course, true that the right of a person to vote on an

[24] The dissenting opinion also relies upon several decisions of this Court that have held constitutionally invalid various voter eligibility requirements: *Dunn* v. *Blumstein*, 405 U. S. 330 (length of residence requirement); *Evans* v. *Cornman*, 398 U. S. 419 (exclusion of resident military personnel); *Kramer* v. *Union Free School District*, 395 U. S. 621 (property or status requirement); *Harper* v. *Virginia Board of Elections*, 383 U. S. 663 (poll tax requirement). But there is in this case no attack whatever upon any of the voter eligibility requirements in Mobile. Nor do the cited cases contain implicit support for the position of the dissenting opinion. They stand simply for the proposition that "if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest." *Kramer* v. *Union Free School District*, *supra*, at 627. It is difficult to perceive any similarity between the excluded person's right to equal electoral participation in the cited cases, and the right asserted by the dissenting opinion in the present case, aside from the fact that they both in some way involve voting.

equal basis with other voters draws much of its significance from the political associations that its exercise reflects, but it is an altogether different matter to conclude that political groups themselves have an independent constitutional claim to representation.[25] And the Court's decisions hold squarely that they do not. See *United Jewish Organizations* v. *Carey*, 430 U. S. 144, 166–167; *id.*, at 179–180 (concurring opinion); *Whitcomb* v. *Chavis*, 403 U. S. 149–150, 153–154, 156–157; *White* v. *Regester*, 412 U. S. 755, 765–766.

The fact is that the Court has sternly set its face against the claim, however phrased, that the Constitution somehow guarantees proportional representation. In *Whitcomb* v. *Chavis*, 403 U. S. 124, the trial court had found that a multimember state legislative district had invidiously deprived Negroes and poor persons of rights guaranteed them by the Constitution, notwithstanding the absence of any evidence whatever of discrimination against them. Reversing the trial court, this Court said:

"The District Court's holding, although on the facts of

[25] It is difficult to perceive how the implications of the dissenting opinion's theory of group representation could rationally be cabined. Indeed, certain preliminary practical questions immediately come to mind: Can only members of a minority of the voting population in a particular municipality be members of a "political group?" How large must a "group" be to be a "political group?" Can any "group" call itself a "political group?" If not, who is to say which "groups" are "political groups?" Can a qualified voter belong to more than one "political group?" Can there be more than one "political group" among white voters (*e. g.*, Irish-American, Italian-American, Polish-American, Jews, Catholics, Protestants)? Can there be more than one "political group" among nonwhite voters? Do the answers to any of these questions depend upon the particular demographic composition of a given city? Upon the total size of its voting population? Upon the size of its governing body? Upon its form of government? Upon its history? Its geographic location? The fact that even these preliminary questions may be largely unanswerable suggests some of the conceptual and practical fallacies in the constitutional theory espoused by the dissenting opinion, putting to one side the total absence of support for that theory in the Constitution itself.

this case limited to guaranteeing one racial group representation, is not easily contained. It is expressive of the more general proposition that any group with distinctive interests must be represented in legislative halls if it is numerous enough to command at least one seat and represents a majority living in an area sufficiently compact to constitute a single-member district. This approach would make it difficult to reject claims of Democrats, Republicans, or members of any political organization in Marion County who live in what would be safe districts in a single-member district system but who in one year or another, or year after year, are submerged in a one-sided multi-member district vote. There are also union oriented workers, the university community, religious or ethnic groups occupying identifiable areas of our heterogeneous cities and urban areas. Indeed, it would be difficult for a great many, if not most, multi-member districts to survive analysis under the District Court's view unless combined with some voting arrangement such as proportional representation or cumulative voting aimed at providing representation for minority parties or interests. At the very least, affirmance of the District Court would spawn endless litigation concerning the multi-member district systems now widely employed in this country." *Whitcomb* v. *Chavis, supra,* at 156–157 (footnotes omitted).

V

For the reasons stated, the judgment is reversed and the case is remanded to the Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

DR 3/13/80

I agree with Lewis.

MEMORANDUM

To: Mr. Justice Powell

Re: No. 77-1844, City of Mobile v. Bolden

I have read the Court opinion in this case. I do not believe that it should cause problems for Pullilove. The Court's first constitutional holding is that intent must be shown to demonstrate a violation of the Fifteenth Amendment. Pullilove will not deal with the Fifteenth Amendment.

The Court reiterates that intent must also be shown to establish a violation of the Fourteenth Amendment. Of course, this is not new. In his dissent in Pullilove Justice Stewart may well contend that the legislative history of the set-aside does

contractors. The response would not be to challenge use of the "intent" standard; rather you could conclude that, given the deference that must be afforded Congress because of its powers under the enforcement clauses of the post-Civil War Amendments, there is enough evidence for this Court to accept Congress' judgment that intentional discrimination existed.

Finally, the Court in Mobile rejects the claim that there is any right to proportional representation guaranteed by the Fourteenth Amendment. This is perfectly consistent with your view in Regks that the University could not set aside a percentage of seats simply on the basis of racial preference. I see nothing in the Mobile opinion that is inconsistent with your view in Fullilove that percentages may be used to redress a proven constitutional violation.

1, 3, 4, 6, 8, 9, 10, 11,
12, 14, 15, 16, 19-21,
22, 23, 25, 26, 27, 30,
32, 33, 34, 36, 37
FOOTNOTES RENUMBERED

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

From: Mr. Justice Marshall

Circulated: _____

Recirculated: 19 MAR 1980

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 77-1844 AND 78-357

City of Mobile, Alabama, et al., Appellants,
77-1844 v.
Wiley L. Bolden et al.

Robert R. Williams et al., Appellants,
78-357 v.
Leila G. Brown et al.

On Appeals from the United States Court of Appeals for the Fifth Circuit.

[February —, 1980]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN* joins, dissenting.

The American ideal of political equality, conceived in the earliest days of our colonial existence and fostered by the egalitarian language of the Declaration of Independence, could not forever tolerate the limitation of the right to vote to white propertied males. Our Constitution has been amended six times in the movement toward a democracy for more than the few,[1] and this Court has interpreted the Fourteenth Amendment to provide that "a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction," *Dunn* v. *Blumstein*, 405 U. S. 330, 336 (1972). The Court's decision today is in a different spirit. The Court concludes that, in the absence of proof of intentional discrimination by the State, the right to vote provides the politically powerless with nothing more than the right to cast meaningless ballots.

Thurgood's distinction between a "vote dilution" test ~~and~~ (which he would apply without requiring purposeful discrimination) is no different from "proportional representation" for groups that regularly remain unrepresented.

*MR. JUSTICE BRENNAN joins all of this opinion but the second paragraph of Part IV.

[1] U. S. Const., Amdts. 15, 17, 19, 23, 24, 26.

The District Court in both of these cases found that the challenged multimember districting schemes unconstitutionally diluted the Negro vote. These factual findings were upheld by the Court of Appeals, and the majority does not question them. Instead, the Court holds that districting schemes do not violate the Equal Protection Clause unless it is proved that they were enacted or maintained for the purpose of minimizing or canceling out the voting potential of a racial minority. The Court requires plaintiffs in vote-dilution cases to meet the stringent burden of establishing discriminatory intent within the meaning of *Washington* v. *Davis*, 426 U. S. 229 (1976); *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252 (1977); and *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256 (1979). In my view, our vote-dilution decisions require only a showing of discriminatory impact to justify the invalidation of a multimember districting scheme, and, because they are premised on the fundamental interest in voting protected by the Fourteenth Amendment, the discriminatory-impact standard adopted by them is unaffected by *Washington* v. *Davis*, *supra*, and its progeny. Furthermore, an intent requirement is inconsistent with the protection against denial or abridgement of the vote on account of race embodied in the Fifteenth Amendment and in § 2 of the Voting Rights Act of 1965, 42 U. S. C. § 1973.[2] If, however, proof of discriminatory intent is now to be necessary to support a vote-dilution claim, I would impose upon the plaintiffs a standard of proof less rigid than that provided by *Personnel Administrator of Mass.* v. *Feeney*, *supra*.

I

The Court does not dispute the proposition that multimem-

[2] I agree with the Court, see *ante*, at 3–5, that the prohibition on denial or infringement of the right to vote contained in § 2 of the Voting Rights Act, 42 U. S. C. § 1973, contains the same standard as the Fifteenth Amendment. I disagree with the majority's construction of that Amendment, however. See Part II, *infra*.

ber districting can have the effect of submerging electoral minorities and overrepresenting electoral majorities.[3] It is for this reason that we developed a strong preference for

[3] The Court does not quarrel with the generalization that in many instances an electoral minority will fare worse under multimember districting than under single-member districting. Multimember districting greatly enhances the opportunity of the majority political faction to elect all representatives of the district. In contrast, if the multimember district is divided into several single-member districts, an electoral minority will have a better chance to elect a candidate of its choice, or at least to exert greater political influence. It is obvious that the greater the degree to which the electoral minority is homogeneous and insular and the greater the degree that bloc voting occurs along majority-minority lines, the greater will be the extent to which the minority's voting power is diluted by multimember districting. See E. Banfield and J. Wilson, City Politics 91–96, 303–308 (1963); R. Dixon, Democratic Representation 12, 476–484, 503–527 (1968); Bonapfel, Minority Challenges to At-Large Elections: The Dilution Problem, 10 Ga. L. Rev. 353, 358–360 (1976); Derfner, Racial Discrimination and the Right to Vote, 26 Vand. L. Rev. 523, 553–555 (1973); Comment, Effective Representation and Multimember Districts, 68 Mich. L. Rev. 1577, 1577–1579 (1970). Recent empirical studies have documented the validity of this generalization. See Berry and Dye, The Discriminatory Effects of At-Large Elections, 7 Fla. St. U. L. Rev. 85, 113–122 (1979); Jones, The Impact of Local Election Systems on Black Political Representation, 11 Urb. Aff. Q. 345 (1976); Karnig, Black Resources and City Council Representation, 41 J. Pol. 134 (1979); Karnig, Black Representation on City Councils: The Impact of District Elections and Socioeconomic Factors, 12 Urb. Aff. Q. 223 (1976); Sloan, "Good Government" and the Politics of Race, 17 Soc. Prob. 161 (1969); The Impact of Municipal Reformism: A Symposium, 59 Soc. Sci. Q. 117 (1978).

The electoral schemes in these cases involve majority-vote, numbered-post, and staggered-term requirements. See *Bolden* v. *City of Mobile*, 423 F. Supp. 384, 386–387 (SD Ala. 1976); *Williams* v. *Brown*, 428 F. Supp. 1123, 1126–1127 (SD Ala. 1976). These electoral rules exacerbate the vote-dilutive effects of multimember districting. A requirement that a candidate must win by a majority of the vote forces a minority candidate who wins a plurality of votes in the general election to engage in a run-off election with his nearest competitor. If the competitor is a member of the dominant political faction, the minority candidate stands little chance of winning in the second election. A requirement that each candidate must

single-member districting in court-ordered reapportionment plans. See *ante,* at 9, n. 10. Furthermore, and more important for present purposes, we decided a series of vote-dilution cases under the Fourteenth Amendment that were designed to protect electoral minorities from precisely the combination of electoral laws and historical and social factors found in the present cases.[4] In my view, the treatment of these cases in

run for a particular "place" or "post" creates head-to-head contests that minority candidates cannot survive. When a number of positions on a governmental body are to be chosen in the same election, members of a minority will increase the likelihood of election of a favorite candidate by voting only for him. If the remainder of the electorate splits its votes among the other candidates, the minority's candidate might well be elected by the minority's "single-shot voting." If the terms of office holders are staggered, the opportunity for single-shot voting is decreased. See *City of Rome* v. *United States,* — U. S. — (1980); *Zimmer* v. *McKeithen,* 485 F. 2d 1297, 1305 (CA5 1973) (en banc), aff'd on other grounds *sub nom. East Carroll Parish School Bd.* v. *Marshall,* 424 U. S. 636 (1976) (*per curiam*); Bonapfel, *supra*; Derfner, *supra.*

[4] The Court notes that at-large elections were instituted in cities as a reform measure to correct corruption and inefficiency in municipal government, and suggests that it "may be a rash assumption" to apply vote-dilution concepts to a municipal government elected in that fashion. See *ante,* at 13, and n. 15. To the contrary, local governments are not exempt from the constitutional requirement to adopt representational districting ensuring that the votes of each citizen will have equal weight. *Avery* v. *Midland County,* 390 U. S. 474 (1968). Indeed, in *Beer* v. *United States,* 425 U. S. 130, 142, n. 14 (1976), and *Abate* v. *Mundt,* 403 U. S. 182, 184, n. 2 (1971), we assumed that our vote-dilution doctrine applied to local governments.

Furthermore, though municipalities must be accorded some discretion in arranging their affairs, see *Abate* v. *Mundt, supra,* there is all the more reason to scrutinize assertions that municipal, rather than State, multi-member districting dilutes the vote of an electoral minority:

"In statewide elections, it is possible that a large minority group in one multi-member district will be unable to elect any legislators, while in another multi-member district where the same group is a slight majority, they will elect the entire slate of legislators. Thus, the multi-member electoral system may hinder a group in one district but prove an advantage in another. In at-large elections in cities this is not possible. There

judge's decision be justified. Although we have held that multimember districts are not unconstitutional per se, see note 10, supra, it does not follow that the Court's conclusion that under our prior cases proof of discriminatory intent is a necessary prerequisite for the invalidation of multimember districts

A

In Fortson v. Dorsey, 379 U. S. 433 (1965)—the first reapportionment case to reach this Court, we stated explicitly that such a claim could not rest on either discriminatory purpose or effect:

> "It might well be that, designedly or otherwise, a multimember districting arrangement adopted, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." Id., at 439 (emphasis added).

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is an way to achieve out the discrimination against a particular minority group because the white vote in the large district. The plaintiff's [illegible]." Brief and Oral Argument, 6, at 37.

That statute similar was included as part of a "reform" movement

We reiterated these words in *Burns* v. *Richardson*, 384 U. S. 73 (1966), interpreted them as the correct test to apply to vote-dilution claims, and described the standard as one involving "invidious effect," *id.*, at 88. We then held that the plaintiffs had failed to meet their burden of proof:

> "[T]he demonstration that a particular multi-member scheme *effects an invidious result* must appear from evidence in the record. . . . That demonstration was not made here. In relying on conjecture as to the effects of multi-member districting rather than demonstrated fact, the court acted in a manner more appropriate to the body responsible for drawing up the districting plan. Speculations do not supply evidence that the multi-member districting *was designed to have or had* the invidious effect necessary to a judgment of the unconstitutionality of the districting." *Id.*, at 88–89 (emphasis added) (footnote omitted).

It could not be plainer that the Court in *Burns* considered discriminatory effect a sufficient condition for invalidating a multimember districting plan.

In *Whitcomb* v. *Chavis*, 403 U. S. 124 (1971), we again repeated and applied the *Fortson* standard, *id.*, at 143, 144, but determined that the Negro community's lack of success at the polls was the result of partisan politics, not racial vote dilution. *Id.*, at 150–155. The Court stressed that both the Democratic and Republican parties had nominated Negroes, and several had been elected. Negro candidates lost only when their entire party slate went down to defeat. *Id.*, at 150, nn. 29–30; 152–153. In addition, the Court was impressed that there was no finding that officials had been unresponsive to Negro concerns. *Id.*, at 152, n. 32, 155.

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[1] As the majority notes, see *ante*, at 10, we indicated in *Whitcomb* v. *Chavis*, 403 U. S. 124, 149 (1971), that multimember districts were unconstitutional if they were "conceived or operated as purposeful devices to further racial or economic discrimination." The Court in *Whitcomb* did

More recently, in *White* v. *Regester*, 412 U. S. 755 (1973), we invalidated the challenged multimember districting plans because their characteristics, when combined with historical and social factors, had the discriminatory effect of denying the plaintiff Negroes and Mexican-Americans equal access to the political process. *Id.*, at 766–770. We stated that

> "it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." *Id.*, at 766.

We held that the three-judge District Court had properly applied this standard in invalidating the multimember districting schemes in the Texas counties of Dallas and Bexar. The District Court had determined that the characteristics of the challenged electoral systems—multimember districts, a majority-vote requirement for nomination in a primary elec-

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not, however, suggest that discriminatory purpose was a necessary condition for the invalidation of multimember districting. Our decision in *Whitcomb*, *id.*, at 143, acknowledged the continuing validity of the discriminatory impact test adopted in *Fortson* v. *Dorsey*, 379 U. S. 433, 439 (1965), and restated it as requiring plaintiffs to prove that "multi-member districts unconstitutionally *operate* to dilute or cancel the voting strength of racial or political elements." *Whitcomb* v. *Chavis*, *supra*, at 144 (emphasis added).

Abate v. *Mundt*, 403 U. S. 182 (1971), decided the same day as *Whitcomb*, provides further evidence that *Whitcomb* did not alter the discriminatory-effects standard developed in earlier cases. In *Abate*, *supra*, at 184, n. 2, we rejected the argument that a multimember districting scheme had a vote-dilutive effect because "[p]etitioners . . . have not shown that these multimember districts, by themselves, operate to impair the voting strength of particular racial or political elements . . . , see *Burns* v. *Richardson*, 384 U. S. 73, 88 (1966)."

tion, and a rule mandating that a candidate running for a position in a multimember district must run for a specified "place" on the ticket—though "neither in themselves improper nor invidious," reduced the electoral influence of Negroes and Mexican-Americans. *Id.*, at 766.[6] The District Court identified a number of social and historical factors that, when combined with the Texas electoral structure, resulted in vote dilution: (1) a history of official racial discrimination in Texas, including discrimination inhibiting the registration, casting of ballots, and political participation of Negroes; (2) proof that minorities were still suffering the effects of past discrimination; (3) a history of gross underrepresentation of minority interests; (4) proof of official insensitivity to the needs of minority citizens, whose votes were not needed by those in power; (5) the recent use of racial campaign tactics; and (6) a cultural and language barrier inhibiting the participation of Mexican-Americans. *Id.*, at 766–770. Based "on the totality of the circumstances," we affirmed the District Court's conclusion that the use of multimember districts excluded the plaintiffs "from effective participation in political life." *Id.*, at 769.[7]

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[6] See n. 3, *supra*.

[7] *White* v. *Regester*, 412 U. S. 755 (1973), makes clear the distinction between the concepts of vote dilution and proportional representation. We have held that, in order to prove an allegation of vote dilution, the plaintiffs must show more than simply that they have been unable to elect candidates of their choice. See *White* v. *Regester*, *supra*, at 765–766; *Whitcomb* v. *Chavis*, 403 U. S. 124, 149–150, 153 (1971). The Constitution, therefore, does not contain any requirement of proportional representation. Cf. *United Jewish Organizations* v. *Carey*, 430 U. S. 144 (1977); *Gaffney* v. *Cummings*, 412 U. S. 735 (1973). When all that is proved is mere lack of success at the polls, the Court will not presume that members of a political minority have suffered an impermissible dilution of political power. Rather, it is assumed that these persons have means available to them through which they can have some effect on governmental decisionmaking. For example, many of these persons might belong to a variety of other political, social, and economic groups that have

It is apparent that a showing of discriminatory intent in the creation or maintenance of multimember districts is as unnecessary after *White* as it was under our earlier vote-dilution decisions. Under this line of cases, an electoral districting plan is invalid if it has the effect of affording an electoral minority "less opportunity than . . . other residents in the district to participate in the political processes and to elect legislators of their choice." *id.*, at 766. It is also apparent that the Court in *White* considered equal access to the political

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some impact on officials. In the absence of evidence to the contrary, it can be assumed that officials will not be improperly influenced by such factors as the race or place of residence of persons seeking governmental action. Furthermore, political factions out of office often serve as watchdogs on the performance of the government, bind together into coalitions having enhanced influence, and have the respectability necessary to affect public policy.

Unconstitutional vote dilution occurs only when a discrete political minority whose voting strength is diminished by a districting scheme proves that historical and social factors render it largely incapable of effectively utilizing alternative avenues of influencing public policy. See n. 19, *infra*. In these circumstances, the only means of breaking down the barriers encasing the political arena is to structure the electoral districting so that the minority has a fair opportunity to elect candidates of its choice.

The test for unconstitutional vote dilution, then, looks only to the discriminatory effects of the combination of an electoral structure and historical and social factors. At the same time, it requires electoral minorities to prove far more than mere lack of success at the polls.

We have also spoken of dilution of voting power in cases arising under the Voting Rights Act of 1965, 42 U. S. C. § 1971 *et seq.* Under § 5 of that Act, 42 U. S. C. § 1973c, a state or local government covered by the Act may not enact new electoral procedures having the purpose or effect of denying or abridging the right to vote on account of race or color. We have interpreted this provision as prohibiting *any* retrogression in Negro voting power. *Beer* v. *United States*, 425 U. S. 130, 141 (1976). In some cases, we have labeled such retrogression a "dilution" of the minority vote. See, *e. g.*, *City of Rome* v. *United States*, — U. S. — (1980). Vote dilution under § 5, then, involves a standard different from that applied in cases such as *White* v. *Regester*, *supra*, in which diminution of the vote violating the Fourteenth or Fifteenth Amendments is alleged.

process as meaning more than merely allowing the minority the opportunity to vote. *White* stands for the proposition that an electoral system may not relegate an electoral minority to political impotence by diminishing the importance of its vote. The Court's holding requiring proof of discriminatory purpose in the present cases is, then, squarely contrary to *White* and its predecessors.[8]

B

The Court fails to apply the discriminatory effect standard of *White* v. *Regester* because that approach conflicts with what the Court takes to be a elementary principle of law. "[O]nly if there is purposeful discrimination," announces the Court, "can there be a violation of the Equal Protection Clause of the Fourteenth Amendment." *Ante*, at 10. That proposition is plainly overbroad. It fails to distinguish between two distinct lines of equal protection decisions: those involving suspect classifications, and those involving fundamental rights.

We have long recognized that under the Equal Protection Clause classifications based on race are "constitutionally suspect," *Bolling* v. *Sharpe*, 347 U. S. 497, 499 (1954), and are subject to the "most rigid scrutiny," *Korematsu* v. *United States*, 323 U. S. 214, 216 (1944), regardless of whether they infringe on an independently protected constitutional right. Cf. *Regents of the University of California* v. *Bakke*, 438 U. S. 265 (1978). Under *Washington* v. *Davis*, 426 U. S. 229 (1976), a showing of discriminatory purpose is necessary to impose strict scrutiny on facially neutral classifications having a racially discriminatory impact. Perhaps because the plaintiffs in the present cases are Negro, the Court assumes that

[8] The Court's holding is also inconsistent with our statement in *Dallas County* v. *Reese*, 421 U. S. 477, 480 (1975) (*per curiam*), that multimember districting violates the Equal Protection Clause if it "in fact operates impermissibly to dilute the voting strength of an identifiable element of the voting population." See also *Chapman* v. *Meier*, 420 U. S. 1, 17 (1975).

their vote-dilution claims are premised on the suspect-classification branch of our equal protection cases, and that under *Washington* v. *Davis*, *supra*, they are required to prove discriminatory intent. That assumption fails to recognize that our vote-dilution decisions are rooted in a different strand of equal protection jurisprudence.

Under the Equal Protection Clause, if a classification "impinges upon a fundamental right explicitly or implicitly protected by the Constitution, . . . strict judicial scrutiny" is required, *San Antonio Ind. School District* v. *Rodriguez*, 411 U. S. 1, 17 (1973), regardless of whether the infringement was intentional.[9] As I will explain, our cases recognize a fundamental right to equal electoral participation that encompasses protection against vote dilution. Proof of discriminatory purpose is, therefore, not required to support a claim of vote dilution.[10] The Court's erroneous conclusion to the contrary

[9] See *Shapiro* v. *Thompson*, 394 U. S. 618 (1969) (right to travel); *Reynolds* v. *Sims*, 377 U. S. 533 (1964) (right to vote); *Douglas* v. *California*, 372 U. S. 353 (1963); and *Griffin* v. *Illinois*, 351 U. S. 12 (1956) (right to fair access to criminal process). Under the rubric of the fundamental right of privacy, we have recognized that individuals have freedom from unjustified governmental interference with personal decisions involving marriage, *Zablocki* v. *Redhail*, 434 U. S. 374 (1978); *Loving* v. *Virginia*, 388 U. S. 1 (1967); procreation, *Skinner* v. *Oklahoma*, 316 U. S. 535 (1942); contraception, *Carey* v. *Population Services International*, 431 U. S. 678 (1977); *Eisenstadt* v. *Baird*, 405 U. S. 438 (1972); *Griswold* v. *Connecticut*, 381 U. S. 481 (1965); abortion, *Roe* v. *Wade*, 410 U. S. 113 (1973); family relationships, *Prince* v. *Massachusetts*, 321 U. S. 158 (1944); and child rearing and education, *Prince* v. *Society of Sisters*, 268 U. S. 510 (1925); *Meyer* v. *Nebraska*, 262 U. S. 390 (1923). See also *Moore* v. *East Cleveland*, 431 U. S. 816 (1977).

[10] As the present cases illustrate, a requirement of proof of discriminatory intent seriously jeopardizes the free exercise of the fundamental right to vote. Although the right to vote is indistinguishable for present purposes from the other fundamental rights our cases have recognized, see n. 9, *supra*, surely the Court does not intend to require proof of discriminatory purpose in those cases. The Court fails to articulate why the right to vote should receive such singular treatment. Furthermore, the Court

is the result of a failure to recognize the central distinction between *White* v. *Regester*, 412 U. S. 755 (1973), and *Washington* v. *Davis*, *supra:* the former involved an infringement of a constitutionally protected right, while the latter dealt with a claim of racially discriminatory distribution of an interest to which no citizen has a constitutional entitlement.[11]

Nearly a century ago, the Court recognized the elementary proposition upon which our structure of civil rights is based: "[T]he political franchise of voting is . . . a fundamental

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refuses to recognize the disutility of requiring proof of discriminatory purpose in fundamental rights cases. For example, it would make no sense to require such a showing when the question is whether a state statute regulating abortion violates the right of personal choice recognized in *Roe* v. *Wade*, 410 U. S. 113 (1973). The only logical inquiry is whether, regardless of the legislature's motive, the statute has the effect of infringing that right. See, *e. g.*, *Planned Parenthood* v. *Danforth*, 428 U. S. 52 (1976).

[11] Judge Wisdom of the Court of Appeals below recognized this distinction in a companion case, see *Nevett* v. *Sides*, 571 F. 2d 209, 231–234 (CA5 1978) (specially concurring opinion). See also Comment, Proof of Racially Discriminatory Purpose Under the Equal Protection Clause: *Washington* v. *Davis*, *Arlington Heights*, *Mt. Healthy*, and *Williamsburgh*, 12 Harv. C. R.–C. L. L. Rev. 725, 758, n. 175 (1977); Note, Racial Vote Dilution in Multimember Districts: The Constitutional Standard After *Washington* v. *Davis*, 76 Mich. L. Rev. 694, 722–726 (1978); Comment, Constitutional Challenges to Gerrymanders, 45 U. Chi. L. Rev. 845, 869–877 (1978).

Washington v. *Davis*, 426 U. S. 229 (1976), involved alleged racial discrimination in public employment. By describing interests such as public employment as constitutional gratuities, I do not, of course, mean to suggest that their deprivation is immune from constitutional scrutiny. Indeed, our decisions have referred to the importance of employment, see *Hampton* v. *Mow Sun Wong*, 426 U. S. 88, 116 (1976); *Meyer* v. *Nebraska*, 262 U. S. 390, 399 (1923); *Truax* v. *Raich*, 239 U. S. 33, 41 (1915), and we have explicitly recognized that in some circumstances public employment falls within the categories of liberty and property protected by the Fifth and Fourteenth Amendments, see, *e. g.*, *Arnett* v. *Kennedy*, 416 U. S. 134 (1974); *Perry* v. *Sindermann*, 408 U. S. 593 (1972). The Court has not held, however, that a citizen has a constitutional right to public employment.

political right, because preservative of all rights." *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370 (1886). We reiterated that theme in our landmark decision in *Reynolds* v. *Sims*, 377 U. S. 533, 561–562 (1964), and stated that, because "the right of suffrage is a fundamental matter in a free and democratic society[,] ... any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Ibid.* We realized that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.*, at 555. Accordingly, we recognized that the Equal Protection Clause protects "[t]he right of a citizen to equal representation and to have his vote weighted equally with those of all other citizens." *Id.*, at 576. See also *Wesberry* v. *Sanders*, 376 U. S. 1, 17 (1964); *Gray* v. *Sanders*, 372 U. S. 368, 379–380 (1963).[12]

Reynolds v. *Sims* and its progeny[13] focused solely on the discriminatory *effects* of malapportionment. They recognize that, when population figures for the representational districts of a legislature are not similar, the votes of citizens in larger

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[12] We have not, however, held that the Fourteenth Amendment contains an absolute right to vote. As we explained in *Dunn* v. *Blumstein*, 405 U. S. 330 (1972):

"In decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction. [Citing cases.] This 'equal right to vote' . . . is not absolute; the States have the power to impose voter qualifications, and to regulate access to the franchise in other ways. . . . But as a general matter, 'before that right [to vote] can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny.'" *Id.*, at 336 (quoting *Evans* v. *Cornman*, 398 U. S. 419, 426, 422 (1970)).

[13] *Avery* v. *Midland County*, 390 U. S. 474 (1968), applied the equal-representation standard of *Reynolds* v. *Sims*, 377 U. S. 533 (1964), to local governments. See also, *e. g.*, *Connor* v. *Finch*, 431 U. S. 407 (1977); *Lockport* v. *Citizens for Community Action*, 430 U. S. 259 (1977); *Hadley* v. *Junior College Dist.*, 397 U. S. 50 (1970).

districts do not carry as much weight in the legislature as do votes cast by citizens in smaller districts. The equal protection problem attacked by the "one person, one vote" principle is, then, one of vote dilution: under *Reynolds*, each citizen must have an "equally effective voice" in the election of representatives. *Reynolds* v. *Sims*, *supra*, at 565. In the present case, the alleged vote dilution, though caused by the combined effects of the electoral structure and social and historical factors rather than by unequal population distribution, is analytically the same concept: the unjustified abridgement of a fundamental right.[14] It follows, then, that a showing of discriminatory intent is just as unnecessary under the vote-dilution approach adopted in *Fortson* v. *Dorsey*, 379 U. S. 433 (1965), and applied in *White* v. *Regester*, 412 U. S. 755 (1973), as it is under our reapportionment cases.[15]

cases

[14] In attempting to limit *Reynolds* v. *Sims* to its facts, see *ante*, at 20–21, the majority confuses the nature of the constitutional right recognized in that decision with the means by which that right can be violated. *Reynolds* held that under the Equal Protection Clause each citizen must be accorded an essentially equal voice in the election of representatives. The Court determined that unequal population distribution in a multidistrict representational scheme was one readily ascertainable means by which this right was abridged. The Court certainly did not suggest, however, that violations of the right to effective political participation mattered only if they were caused by malapportionment. The majority's assertion to the contrary in this case apparently would require it to read *Reynolds* as recognizing fair apportionment as an end in itself, rather than as simply a means to protect against vote dilution.

[15] Proof of discriminatory purpose has been equally unnecessary in our decisions assessing whether various impediments to electoral participation are inconsistent with the fundamental interest in voting. In the seminal case, *Harper* v. *Virginia Board of Elections*, 383 U. S. 663 (1966), we invalidated a $1.50 poll tax imposed as a precondition to voting. Relying on our decision two years earlier in *Reynolds* v. *Sims*, 377 U. S. 533 (1964), see *Harper*, *supra*, at 667–668, 670, we determined that "the right to vote is too precious, too fundamental to be so burdened or conditioned," *id.*, at 670. We analyzed the right to vote under the familiar standard that "where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them

Indeed, our vote-dilution cases have explicitly acknowledged that they are premised on the infringement of a fundamental right, not on the Equal Protection Clause's prohibition of racial discrimination. Our first vote-dilution decision, *Fortson* v. *Dorsey*, *supra*, involved a 1962 Georgia reapportionment statute that allocated that 54 seats of the Georgia Senate among the State's 159 counties. Thirty-three of the

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must be closely examined and carefully confined." *Ibid.* In accord with *Harper*, we have applied heightened scrutiny in assessing the imposition of filing fees, *e. g.*, *Lubin* v. *Panish*, 415 U. S. 709 (1974); limitations on who may participate in elections involving specialized governmental entities, *e. g.*, *Kramer* v. *Union Free School District*, 395 U. S. 621 (1969); durational residency requirements, *e. g.*, *Dunn* v. *Blumstein*, 405 U. S. 330 (1972); enrollment time limitations for voting in party primary elections, *e. g.*, *Kusper* v. *Pontikes*, 414 U. S. 51 (1973); and restrictions on access to the ballot, *e. g.*, *Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U. S. 173 (1979).

To be sure, we have approved some limitations on the right to vote. Compare, *e. g.*, *Salyer Land Co.* v. *Tulare Lake Basin Water Storage District*, 410 U. S. 719 (1973), with *Kramer* v. *Union Free School District No. 15*, *supra*. We have never, however, required a showing of discriminatory purpose to support a claim of infringement of this fundamental interest. To the contrary, the Court has accepted at face value the purposes articulated for a qualification of this right, and has invalidated such a limitation under the Equal Protection Clause only if its purposes either lacked sufficient substantiality when compared to the individual interests affected or could have been achieved by less restrictive means. See, *e. g.*, *Dunn* v. *Blumstein*, *supra*, at 335, 337, 343–360.

The approach adopted in this line of cases has been synthesized with the one person, one vote doctrine of *Reynolds* v. *Sims*, 377 U. S. 533 (1964), in the following fashion: "It has been established in recent years that the Equal Protection Clause confers the substantive right to participate on an equal basis with other qualified voters wherever the State has adopted an electoral process for determining who will represent any segment of the State's population." *San Antonio Ind. School Dist.* v. *Rodriguez*, 411 U. S. 1, 59, n. 2 (STEWART, J., concurring) (citing *Reynolds* v. *Sims*, *supra*; *Kramer* v. *Union Free School District No. 15*, *supra*; *Dunn* v. *Blumstein*, *supra*). It is plain that this standard requires no showing of discriminatory purpose to trigger strict scrutiny of state interference with the right to vote.

senatorial districts were made up of from one to eight counties each, and were single-member districts. The remaining 21 districts were allotted among the seven most populous counties, with each county containing at least two districts and electing all of its senators by countywide vote. The plaintiffs, who were registered voters residing in two of the multidistrict counties,[16] argued that the apportionment plan on its face violated the Equal Protection Clause because countywide voting in the seven multidistrict counties denied their residents a vote equal to that of voters residing in single-member constituencies.[17] We were unconvinced that the plan operated to dilute any Georgian's vote, and therefore upheld the facial validity of the scheme. We cautioned, however, that the Equal Protection Clause would not tolerate a multimember districting plan that "designedly or otherwise, . . . operate[d] to minimize or cancel out the voting strength of racial or *political* elements of the voting population." *Id.*, at 439 (emphasis added).

The approach to vote dilution adopted in *Fortson* plainly consisted of a fundamental-rights analysis. If the Court had believed that the equal protection problem with alleged vote dilution was one of racial discrimination and not abridgement of the right to vote, it would not have accorded standing to the plaintiffs, who were simply registered voters of Georgia alleging that the state apportionment plan, as a theoretical matter, diluted their voting strength because of where they lived. To the contrary, we did not question their standing, and held against them solely because we found unpersuasive their claim on the merits. The Court did not reach this result by inadvertence; rather, we explicitly recognized that we had

[16] See *Dorsey* v. *Fortson*, 228 F. Supp. 259, 261 (ND Ga. 1964) (three-judge court), rev'd, 379 U. S. 433 (1965).

[17] Specifically, the plaintiffs contended that countywide voting in the multidistrict counties could, as a matter of mathematics, result in the nullification of the unanimous choice of the voters of one district. *Fortson* v. *Dorsey*, 379 U. S. 433, 437 (1965).

adopted a fundamental-rights approach when we stated that the Equal Protection Clause protected the voting strength of political as well as racial groups.

Until today, this Court had never deviated from this principle. We reiterated that our vote-dilution doctrine protects political groups in addition to racial groups in *Burns* v. *Richardson*, 384 U. S. 73, 88 (1966), where we allowed a general class of qualified voters to assert such a vote-dilution claim. In *Whitcomb* v. *Chavis*, 403 U. S. 124 (1971), we again explicitly recognized that political groups could raise such claims, *id.*, at 143, 144. In *White* v. *Regester*, 412 U. S. 735 (1973), the plaintiffs were Negroes and Mexican-Americans, and accordingly the Court had no reason to discuss whether nonminority plaintiffs could assert claims of vote dilution.[18] In a companion case to *White*, however, we again recognized that "political elements" were protected against vote dilution. *Gaffney* v. *Cummings*, 412 U. S. 735, 751 (1973). Two years later, in *Dallas County* v. *Reese*, 421 U. S. 477 (1975) (*per curiam*), we accorded standing to urban dwellers alleging vote dilution as to the election of the county commission and stated that multimember districting is unconstitutional if it "in fact operates impermissibly to dilute the voting strength of an *identifiable element* of the voting population." *Id.*, at 480 (emphasis added). And in *United Jewish Organizations* v. *Carey*, 430 U. S. 144 (1977), the plurality opinion of MR. JUSTICE WHITE stated that districting plans were subject to attack if they diluted the vote of *"racial or political groups."* *Id.*, at 167 (emphasis in original).[19]

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[18] The same is true of our most recent case discussing vote dilution, *Wise* v. *Lipscomb*, 437 U. S. 535 (1978).

[19] In contrast to a racial group, however, a political group will bear a rather substantial burden of showing that it is sufficiently discrete to suffer vote dilution. See *Dallas County* v. *Reese*, 421 U. S. 477 (1975) (*per curiam*) (allowing city dwellers to attack a countywide multimember district). See generally Comment, Effective Representation and Multimember Districts, 68 Mich. L. Rev. 1577, 1594–1596 (1970).

Our vote-dilution decisions, then, involve the fundamental-interest branch, rather than the antidiscrimination branch, of our jurisprudence under the Equal Protection Clause. They recognize a substantive constitutional right to participate on an equal basis in the electoral process that cannot be denied or diminished for any reason, racial or otherwise, lacking quite substantial justification. They are premised on a rationale wholly apart from that underlying *Washington* v. *Davis*, 426 U. S. 229 (1976). That decision involved application of a different equal protection principle, the prohibition on racial discrimination in the governmental distribution of interests to which citizens have no constitutional entitlement.[20] 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.[21]

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[20] The dispute in *Washington* v. *Davis*, 426 U. S. 229 (1976), concerned alleged racial discrimination in public employment, an interest to which no one has a constitutional right, see n. 11, *supra*. In that decision, the Court held only that "the invidious quality of a law *claimed to be racially discriminatory* must ultimately be traced to a racially discriminatory purpose." *Id.*, at 240 (emphasis added). The Court's decisions following *Washington* v. *Davis* have also involved alleged discrimination in the allocation of interests falling short of constitutional rights. *Personnel Adm'r of Massachusetts* v. *Feeney*, 442 U. S. 256 (1979) (alleged sex discrimination in public employment); *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252 (1977) (alleged racial discrimination in zoning). As explained in *Feeney*, *supra*, "[w]hen some other independent right is not at stake . . . and when there is no 'reason to infer antipathy,' . . . it is presumed that 'even improvident decisions will eventually be rectified by the democratic process.'" *Id.*, at 272 (quoting *Vance* v. *Bradley*, 440 U. S. 93, 97 (1979)).

[21] Professor Ely has recognized this distinction:

"The danger I see is . . . 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

Washington v. *Davis*, then, in no way alters the discriminatory impact test developed in *Fortson* v. *Dorsey*, 379 U. S. 433 (1965), and applied in *White* v. *Regester*, 412 U. S. 755 (1973), to evaluate claims of dilution of the fundamental right to vote. In my view, that test is now, and always has been, the proper method of safeguarding against inequitable distribution of political influence.

The majority's response is that my approach amounts to nothing less than a constitutional requirement of proportional representation for groups. See *ante*, at 18–23. That assertion amounts to nothing more than a red herring: I explicitly reject the notion that the Constitution contains any such requirement. See n. 7, *supra*. The constitutional protection against vote dilution found in our prior cases does not extend to those situations in which a group has merely failed to elect representatives in proportion to its share of the population. To prove unconstitutional vote dilution, the group is also required to carry the far more onerous burden of demonstrating that it has been effectively fenced out of the political process. See *ibid.* Typical of the majority's mischaracterization of my position is its assertion that I would provide protection against vote dilution for "every 'political group,' or at

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people are not entitled as a matter of substantive constitutional right). . . . 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 nonprovision, 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).

least every such group that is in the minority." *Ante*, at 18. The vote-dilution doctrine can logically apply only to groups whose electoral discreteness and insularity allow dominant political factions to ignore them. See nn. 7 and 19, *supra*. In short, the distinction between a requirement of proportional representation and the discriminatory effect test I espouse is by no means a difficult one, and it is hard for me to understand why the Court insists on ignoring it.

The plaintiffs in No. 77–1844 proved that no Negro had ever been elected to the Mobile City Commission, despite the fact that Negroes constitute about one-third of the electorate, and that the persistence of severe racial bloc voting made it highly unlikely that any Negro could be elected at-large in the foreseeable future. *Bolden* v. *City of Mobile*, 423 F. Supp. 384, 387–389 (SD Ala. 1976). Contrary to the Court's contention, see *ante*, at 18–19, however, I do not find unconstitutional vote dilution in this case simply because of that showing. The plaintiffs convinced the District Court that Mobile Negroes were unable to use alternative avenues of political influence. They showed that Mobile Negroes still suffered pervasive present effects of massive historical official and private discrimination, and that the city commission had been quite unresponsive to the needs of the minority community. The City of Mobile has been guilty of such pervasive racial discrimination in hiring employees that extensive intervention by the Federal District Court has been required. *Id.*, at 389, 400. Negroes are grossly underrepresented on city boards and committees. *Id.*, at 389–390. The city's distribution of public services is racially discriminatory. *Id.*, at 390–391. City officials and police were largely unmoved by Negro complaints about police brutality and "mock lynchings." The District Court concluded that "[t]his sluggish and timid response is another manifestation of the low priority given to the needs of the black citizens and of the [commissioners'] political fear of a white backlash vote when black citizens'

Id., at 392.

needs are at stake." *Id., at 392.* See also the dissenting opinion of my Brother WHITE, *ante.*

A requirement of proportional representation would indeed transform this Court into a "super-legislature," *ante,* at 19, and would create the risk that some groups would receive an undeserved windfall of political influence. In contrast, the protection against vote dilution recognized by our prior cases serves as a minimally intrusive guarantee of political survival for a discrete political minority that is effectively locked out of governmental decisionmaking processes. So understood, the doctrine hardly "'create[s] substantive constitutional rights in the name of guaranteeing equal protection of the laws.'" *ante,* at 19, quoting *San Antonio Ind. School District* v. *Rodriguez,* 411 U. S. 1, 33 (1973). Rather, the doctrine is a simple reflection of the basic principle that the Equal Protection Clause protects "[t]he right of a citizen to equal representation and to have his vote weighted equally with those of all other citizens." *Reynolds* v. *Sims,* 377 U. S. 533, 576 (1964).[22]

[22] The foregoing disposes of any contention that, merely by citing *Wright* v. *Rockefeller,* 376 U. S. 52 (1964), the Court in *Washington* v. *Davis,* 426 U. S. 229, 240 (1976), and *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U. S. 252, 265 (1977), intended to bring vote-dilution cases within the discriminatory-purpose requirement. *Wright* v. *Rockefeller, supra,* was a racial gerrymander case, and the plaintiffs had alleged only that they were the victims of an intentional scheme to draw districting lines discriminatorily. In focusing solely on whether the plaintiffs had proved intentional discrimination, the Court in *Wright* v. *Rockefeller* was merely limiting the scope of its inquiry to the issue raised by the plaintiffs. If *Wright* v. *Rockefeller* had been brought after this Court had decided our vote-dilution decisions, the plaintiffs perhaps would have recognized that, in addition to a claim of intentional racial gerrymandering, they could allege an equally sufficient cause of action under the Equal Protection Clause—that the districting lines had the effect of diluting their vote.

Wright v. *Rockefeller,* then, treated proof of discriminatory purpose as a sufficient condition to trigger strict scrutiny of a districting scheme, but had no occasion to consider whether such proof was necessary to attain

II

Section 1 of the Fifteenth Amendment provides:

> "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

Today the Court gives short shrift to the argument that proof of discriminatory intent is not a necessary condition to relief under this Amendment. See *ante*, at 5–8. I have examined this issue in another context and reached the contrary result. *Beer* v. *United States*, 425 U. S. 130, 146–149, and nn. 3–5 (1976) (dissenting opinion). I continue to believe that "a showing of purpose or of effect is alone sufficient to demonstrate unconstitutionality," *id.*, at 149, n. 5, and wish to explicate further why I find this standard appropriate for Fifteenth Amendment claims. First, however, it is necessary to address the majority's apparent suggestion that the Fifteenth Amendment protects against only denial, and not dilution, of the vote.[22]

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that relief. Its citations in *Washington* v. *Davis*, *supra*, and *Arlington Heights*, *supra*, were useful to show the relevancy, but not the necessity, of evidence of discriminatory intent. These citations are in no way inconsistent with my view that proof of discriminatory purpose is not a necessary condition to the invalidation of multimember districts that dilute the vote of racial or political elements.

In addition, any argument that, merely by citing *Wright* v. *Rockefeller*, the Court in *Washington* v. *Davis* and *Arlington Heights* intended to apply the discriminatory-intent requirement to vote-dilution claims is premised on two unpalatable assumptions. First, because the discussion of *Wright* v. *Rockefeller* was unnecessary to the resolution of the issues in both of those decisions, the argument assumes that the Court in both cases decided important issues in brief dicta. Second, the argument assumes that the Court twice intended covertly to overrule the discriminatory-effects test applied in *White* v. *Regester*, 412 U. S. 755 (1973), without even citing *White*. Neither assumption is tenable.

[22] The majority states that "[h]aving found that Negroes in Mobile 'register and vote without hindrance,' the District Court and Court of

A

The Fifteenth Amendment does not confer an absolute right to vote. See *ante*, at 5. By providing that the right to vote cannot be discriminatorily "denied *or* abridged," however, the Amendment assuredly strikes down the diminution as well as the outright denial of the exercise of the franchise. An interpretation holding that the Amendment reaches only complete abrogation of the vote would render the Amendment essentially useless, since it is no difficult task to imagine schemes in which the Negro's marking of the ballot is a meaningless exercise.

The Court has long understood that the right to vote encompasses protection against vote dilution. "[T]he right to have one's vote counted" is of the same importance as "the right to put a ballot in a box." *United States* v. *Mosley*, 238 U. S. 383, 386 (1915). See *United States* v. *Classic*, 313 U. S. 299 (1941); *Swafford* v. *Templeton*, 185 U. S. 487 (1902); *Wiley* v. *Sinkler*, 179 U. S. 58 (1900); *Ex parte Yarbrough*, 110 U. S. 651 (1884). The right to vote is protected against the diluting effect of ballot-box stuffing. *United States* v. *Saylor*, 322 U. S. 385 (1944); *Ex parte Siebold*, 100 U. S. 371 (1880). Indeed, this Court has explicitly recognized that the Fifteenth Amendment protects against vote dilution. In *Terry* v. *Adams*, 345 U. S. 461 (1953), and *Smith* v. *Allwright*, 321 U. S. 649 (1944), the Negro plaintiffs did not question their access to the ballot for general elections. Instead they argued, and the Court recognized, that the value of their votes had been diluted by their exclusion from participation in primary elections and in the slating of candidates by political parties. The Court's struggles with the concept of "state action" in those decisions were necessarily premised on the understanding that vote dilution was a claim cognizable under the Fifteenth Amendment.

Appeals were in error in believing that the appellants invaded the protection of that Amendment in the present case." *Ante*, at 8.

denying or abridging a Negro's right to vote. The Nineteenth Amendment does the same for women. If a State in a statewide election weighted the male vote more heavily than the female vote or the white vote more heavily than the Negro vote, none could successfully contend that that discrimination was allowable. See *Terry* v. *Adams*, 345 U. S. 461. . . . Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in the geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment.

* * * * *

". . . The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote." *Gray* v. *Sanders*, 372 U. S. 368, 379, 381 (1963).

The majority's suggestion that the Fifteenth Amendment reaches only outright denial of the ballot is wholly inconsistent not only with our prior decisions, but also with the gloss the majority would place upon the Fourteenth Amendment's protection against vote dilution. As I explained in Part I, *supra*, I strongly disagree with the Court's conclusion that our Fourteenth Amendment vote-dilution decisions have been based upon the Equal Protection Clause's prohibition of racial discrimination. Be that as it may, the Court at least does not dispute that the Fourteenth Amendment's language—that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws"—protects against dilution, as well as outright denial, of the right to vote on racial grounds, even though the Amendment does not mention any right to vote and speaks only of the denial, and not the

diminution, of rights. Yet, when the Court construes the language of the Fifteenth Amendment—which explicitly acknowledges the right to vote and prohibits its denial *or* abridgement on account of race—it seemingly would accord protection against only the absolute abrogation of the ballot.

An interpretation of the Fifteenth Amendment limiting its prohibitions to the outright denial of the ballot would convert the words of the Amendment into language illusory in symbol and hollow in substance. Surely today's decision should not be read as endorsing that interpretation.[24]

B

The majority concludes that our prior decisions establish the principle that proof of discriminatory intent is a necessary element of a Fifteenth Amendment claim.[25] In contrast, I continue to adhere to my conclusion in *Beer* v. *United States*, 425 U. S. 130, 148, n. 4 (1976) (dissenting opinion), that "[t]he Court's decisions relating to the relevance of purpose-and/or-effect analysis in testing the constitutionality of legislative enactments are somewhat less than a seamless web." As I there explained, at various times the Court's decisions have seemed to adopt three inconsistent approaches: (1) that purpose alone is the test for unconstitutionality; (2) that effect alone is the test; and (3) that purpose or effect, either

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[24] The Court could have decided this case adversely to the plaintiffs simply by relying on this interpretation. That it has not disposed of the case in this fashion suggests that its decision is based upon its conclusion that proof of discriminatory intent is necessary to support a claim under the Fifteenth Amendment.

[25] The Court does not attempt to support this proposition by relying on the history surrounding the adoption of the Fifteenth Amendment. I agree that we should resolve the issue of the relevancy of proof of discriminatory purpose and effect by examining our prior decisions and by considering the appropriateness of alternative standards in light of contemporary circumstances. That was, of course, the approach used in *Washington* v. *Davis*, 426 U. S. 229 (1976), to evaluate that issue with regard to Fourteenth Amendment racial discrimination claims.

alone or in combination, is sufficient to show unconstitutionality. *Ibid.* In my view, our Fifteenth Amendment jurisprudence on the necessity of proof of discriminatory purpose is no less unsettled than was our approach to the importance of such proof in Fourteenth Amendment racial discrimination cases prior to *Washington* v. *Davis*, 426 U. S. 229 (1976). What is called for in the present cases is a fresh consideration—similar to our inquiry in *Washington* v. *Davis*, *supra*, with regard to Fourteenth Amendment discrimination claims—of whether proof of discriminatory purpose is necessary to establish a claim under the Fifteenth Amendment. I will first justify my conclusion that our Fifteenth Amendment precedents do not control the outcome of this issue, and then turn to an examination of how the question should be resolved.

1

The Court cites *Guinn* v. *United States*, 238 U. S. 374 (1915); *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960); *Wright* v. *Rockefeller*, 376 U. S. 52 (1964); *Lassiter* v. *Northampton County Bd. of Elections*, 360 U. S. 45 (1959); and *Lane* v. *Wilson*, 307 U. S. 268 (1939), as holding that proof of discriminatory purpose is necessary to support a Fifteenth Amendment claim. To me, these decisions indicate confusion, not resolution of this issue. As the majority suggests, *ante*, at 5–6, the Court in *Guinn* v. *United States*, *supra*, did examine the purpose of a "grandfather clause" in the course of invalidating it. Yet 24 years later, in *Lane* v. *Wilson*, *supra*, 307 U. S., at 277, the Court struck down a more sophisticated exclusionary scheme because it "operated unfairly" against Negroes. In accord with the prevailing doctrine of the time, see *Arizona* v. *California*, 283 U. S. 423, 455, and n. 7 (1931), the Court in *Lane* seemingly did not question the motives of public officials.

In upholding the use of a literacy test for voters in *Lassiter* v. *Northampton County Bd. of Elections*, *supra*, the Court apparently concluded that the plaintiff had failed to prove

either discriminatory purpose or effect. *Gomillion* v. *Lightfoot, supra,* can be read as turning on proof of discriminatory motive, but the Court also stressed that the challenged redrawing of municipal boundaries had the "essential inevitable effect" of removing Negro voters from the city, *id.*, at 341, and that "the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their theretofore enjoyed voting rights," *id.*, at 347. Finally, in *Wright* v. *Rockefeller,* 376 U. S. 52 (1964), the plaintiffs alleged only purposeful discriminatory redistricting, and therefore the Court had no reason to consider whether proof of discriminatory effect would satisfy the Fifteenth Amendment.[26]

The majority ignores cases suggesting that discriminatory purpose is not necessary to support a Fifteenth Amendment claim. In *Terry* v. *Adams,* 345 U. S. 461 (1953), a case in which no majority opinion was issued, three Justices approvingly discussed two decisions of the United States Court of Appeals for the Fourth Circuit[27] holding "that no election machinery could be sustained if its purpose *or* effect was to deny Negroes on account of their race an effective voice in the governmental affairs of their country, state, or community." *Id.*, at 466 (opinion of Black, J., joined by Douglas and Burton, JJ.) (emphasis added). More recently, in rejecting a First Amendment challenge to a federal statute providing criminal penalties for knowing destruction of a Selective Service registration certificate, the Court in *United States* v. *O'Brien,* 391 U. S. 367, 383 (1968), stated that "[i]t is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." The Court in *O'Brien, id.*, at 385, interpreted *Gomillion* v. *Lightfoot, supra,*

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[26] See n. 22, *supra.*

[27] *Rice* v. *Elmore,* 165 F. 2d 387 (CA4 1947), cert. denied, 333 U. S. 875 (1948), and *Baskin* v. *Brown,* 174 F. 2d 391 (CA4 1949).

as turning on the discriminatory effect, and not the alleged discriminatory purpose, of the challenged redrawing of municipal boundaries. Three years later, in *Palmer* v. *Thompson*, 403 U. S. 217, 224–225 (1971), the Court relied on *O'Brien* to support its refusal to inquire whether a city had closed its swimming pools to avoid racial integration. As in *O'Brien*, the Court in *Palmer*, *supra*, at 225, interpreted *Gomillion* v. *Lightfoot* as focusing "on the actual effect" of the municipal boundary change, and not upon what motivated the city to redraw its borders. See also *Wright* v. *City of Emporia*, 407 U. S. 451, 461–462 (1972).

In holding that racial discrimination claims under the Equal Protection Clause must be supported by proof of discriminatory intent, the Court in *Washington* v. *Davis*, 426 U. S. 229 (1976), signaled some movement away from the doctrine that such proof is irrelevant to constitutional adjudication. Although the Court, *id.*, at 242–244, and n. 11, attempted mightily to distinguish *Palmer* v. *Thompson*, *supra*, its decision was in fact based upon a judgment that, in light of modern circumstances, the Equal Protection Clause's ban on racial discrimination in the distribution of constitutional gratuities should be interpreted as prohibiting only intentional official discrimination.[28]

These vacillations in our approach to the relevance of discriminatory purpose belie the Court's determination that our prior decisions require such proof to support Fifteenth Amendment claims. To the contrary, the Court today is in the same unsettled position with regard to the Fifteenth Amendment as it was four years ago in *Washington* v. *Davis*, *supra*, regarding the Fourteenth Amendment's prohibition on racial discrimination. The absence of old answers mandates a new inquiry.

2

The Court in *Washington* v. *Davis* required a showing of

[28] See nn. 20–21, *supra*, and accompanying text.

discriminatory purpose to support racial discrimination claims largely because it feared that a standard based solely on disproportionate impact would unduly interfere with the far-ranging governmental distribution of constitutional gratuities.[29] Underlying the Court's decision was a determination that, since the Constitution does not entitle any person to such governmental benefits, courts should accord discretion to those officials who decide how the government shall allocate its scarce resources. If the plaintiff proved only that governmental distribution of constitutional gratuities had a disproportionate effect on a racial minority, the Court was willing to presume that the officials who approved the allocation scheme either had made an honest error or had foreseen that the decision would have a discriminatory impact and had found persuasive, legitimate reasons for imposing it nonetheless. These assumptions about the good faith of officials allowed the Court to conclude that, standing alone, a showing that a governmental policy had a racially discriminatory impact did not indicate that the affected minority had suffered the stigma, frustration, and unjust treatment prohibited under the suspect classification branch of our equal protection jurisprudence.

Such judicial deference to official decisionmaking has no place under the Fifteenth Amendment. Section 1 of that Amendment differs from the Fourteenth Amendment's prohibition on racial discrimination in two crucial respects: it explicitly recognizes the right to vote free of hindrances

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[29] The Court stated:

"A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white." *Washington* v. *Davis*, 426 U. S. 229, 248 (1976).

See n. 20, *supra*.

related to race, and it sweeps no further. In my view, these distinctions justify the conclusion that proof of racially discriminatory impact should be sufficient to support a claim under the Fifteenth Amendment. The right to vote is of such fundamental importance in the constitutional scheme that the Fifteenth Amendment's command that it shall not be "abridged" on account of race must be interpreted as providing that the votes of citizens of all races shall be of substantially equal weight. Furthermore, a disproportionate-impact test under the Fifteenth Amendment would not lead to constant judicial intrusion into the process of official decisionmaking. Rather, the standard would reach only those decisions having a discriminatory effect upon the minority's vote. The Fifteenth Amendment cannot tolerate that kind of decision, even if made in good faith, because the Amendment grants racial minorities the full enjoyment of the right to vote, not simply protection against the unfairness of intentional vote dilution along racial lines.[illegible]

In addition, it is beyond dispute that a standard based solely upon the motives of official decisionmakers creates significant problems of proof for plaintiffs and forces the inquiring court to undertake an unguided, tortuous look into the minds of officials in the hope of guessing why certain policies were adopted and others rejected. See *Palmer* v. *Thompson*, *supra*, at 224–225; *United States* v. *O'Brien*, *supra*, at 383–384; cf. *Keyes* v. *School District No. 1*, 413 U. S. 189, 226, 227 (1973) (POWELL, J., concurring in part and dissenting in part). An approach based on motivation creates the risk that officials will be able to adopt policies that are the products of discriminatory intent so long as they sufficiently mask their

[illegible] Even if a municipal policy is shown to dilute the right to vote, however, the policy will not be struck down if the city shows that it serves highly important local interests and is closely tailored to effectuate only those interests. See *Dunn* v. *Blumstein*, 405 U. S. 330 (1972). Cf. *Abate* v. *Mundt*, 403 U. S. 182 (1971).

motives through the use of subtlety and illusion. *Washington* v. *Davis* is premised on the notion that this risk is insufficient to overcome the deference the judiciary must accord to governmental decisions about the distribution of constitutional gratuities. That risk becomes intolerable, however, when the precious right to vote protected by the Fifteenth Amendment is concerned.

I continue to believe, then, that under the Fifteenth Amendment an "[e]valuation of the purpose of a legislative enactment is just too ambiguous a task to be the sole tool of constitutional analysis. . . . [A] demonstration of effect ordinarily should suffice. If, of course, purpose may conclusively be shown, it too should be sufficient to demonstrate a statute's unconstitutionality." *Beer* v. *United States*, 425 U. S. 130, 149, n. 5 (1976) (MARSHALL, J., dissenting). The Court's refusal in this case even to consider this approach bespeaks an indifference to the plight of minorities who, through no fault of their own, have suffered diminution of the right preservative of all other rights.[31]

[31] In my view, the standard of *White* v. *Regester*, 412 U. S. 755 (1973), see n. 7, *supra*, and accompanying text, is the proper test under both the Fourteenth and Fifteenth Amendments for determining whether a districting scheme has the unconstitutional effect of diluting the Negro vote. It is plain that the District Court in both of the cases before us made the "intensely local appraisal" necessary under *White*, *supra*, at 769, and correctly decided that the at-large electoral schemes for the Mobile city commission and county school board violated the *White* standard. As I earlier note with respect to No. 77-1844, see ~~p. —~~, *supra*, the District Court determined: (1) that Mobile Negroes still suffered pervasive present effects of massive historical official and private discrimination; (2) that the city commission and county school board had been quite unresponsive to the needs of the minority community; (3) that no Negro had ever been elected to either body, despite the fact that Negroes constitute about one-third of the electorate; (4) that the persistence of severe racial bloc voting made it highly unlikely that any Negro could be elected at-large to either body in the foreseeable future; and (5) that no state policy favored at-large elections, and the local preference for that scheme was outweighed by the fact that the unconstitutional vote dilution could

PP. 20-21,

III

If it is assumed that proof of discriminatory intent is necessary to support the vote-dilution claims in these cases, the question becomes what evidence will satisfy this requirement.[32] The Court assumes, without any analysis, that these cases are appropriate for the application of the rigid test developed in *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256, 279 (1979), requiring that "the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." In my view, the *Feeney* standard creates a burden of proof far too extreme to apply in vote-dilution ~~case~~ cases.[33]

This Court has acknowledged that the evidentiary inquiry involving discriminatory intent must necessarily vary depending upon the factual context. See *Village of Arlington Heights* v. *Metropolitan Housing Authority*, 429 U. S. 252, 266 (1977); *Washington* v. *Davis*, 426 U. S. 229, 253 (STEVENS, J., concurring). One useful evidentiary tool, long recognized by the

be corrected only by the imposition of single-member districts. *Bolden* v. *City of Mobile*, 423 F. Supp. 384 (SD Ala. 1976); *Brown* v. *Moore*, 428 F. Supp. 1123 (SD Ala. 1976). The Court of Appeals affirmed these findings in all respects. *Bolden* v. *City of Mobile*, 571 F. 2d 238 (CA5 1978); *Brown* v. *Moore*, No. 77-1583 (CA5 June 2, 1978). See also the dissenting opinion of my Brother WHITE, *ante*.

[32] The statutes providing for at-large election of the members of the two governmental bodies involved in these cases, see n. ~~28~~ 31, *supra*, have been in effect since the days when Mobile Negroes were totally disenfranchised by the Alabama Constitution of 1901. The District Court in both cases found, therefore, that the at-large schemes could not have been adopted for discriminatory purposes. *Bolden* v. *City of Mobile*, 423 F. Supp. 384, 386, 397 (SD Ala. 1976); *Brown* v. *Moore*, 428 F. Supp. 1123, 1126–1127, 1138 (SD Ala. 1976). The issue is, then, whether officials have maintained these electoral systems for discriminatory purposes. Cf. *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U. S. 252, 257–258, 268–271, and n. 17 (1977).

[33] As the dissenting opinion of my Brother WHITE demonstrates, however, the facts of these cases compel a finding of unconstitutional vote dilution even under the majority's standard.

common law, is the presumption that "[e]very man must be taken to contemplate the probable consequences of the act he does." *Townsend* v. *Wathen*, 103 Eng. Rep. 579, 580–581 (K. B. 1808). The Court in *Feeney*, *supra*, at 279, and n. 25, acknowledged that proof of foreseeability of discriminatory consequences could raise a "strong inference that the adverse effects were desired," but refused to treat this presumption as conclusive in cases alleging discriminatory distribution of constitutional gratuities.

I would apply the common-law foreseeability presumption to the present cases. The plaintiffs surely proved that maintenance of the challenged multimember districting would have the foreseeable effect of perpetuating the submerged electoral influence of Negroes, and that this discriminatory effect could be corrected by implementation of a single-member districting plan.[34] Because the foreseeable disproportionate impact was so severe, the burden of proof should have shifted to the defendants, and they should have been required to show that they refused to modify the districting schemes in spite of, not because of, their severe discriminatory effect. See *Feeney*, *supra*, at 284 (MARSHALL, J., dissenting). Reallocation of the burden of proof is especially appropriate in these cases, where the challenged state action infringes on the exercise of a fundamental right. The defendants would carry their burden of proof only if they showed that they considered submergence of the Negro vote a detriment, not a benefit, of the multimember systems, that they accorded minority citizens the same respect given to whites, and that they nevertheless decided to maintain the systems for legitimate reasons. Cf. *Mt. Healthy City Board of Education* v. *Doyle*, 429 U. S. 274, 287 (1977);

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[34] Indeed, the District Court in the present cases concluded that the evidence supported the plaintiffs' position that unconstitutional vote dilution was the natural and foreseeable consequence of the maintenance of the challenged multimember districting. *Brown* v. *Moore*, 428 F. Supp. 1123, 1138 (SD Ala. 1976); *Bolden* v. *City of Mobile*, 423 F. Supp. 384, 397–398 (SD Ala. 1976).

Village of Arlington Heights v. *Metropolitan Housing Corp.*, 429 U. S. 252, 270, n. 21 (1977).

This approach recognizes that

> "[f]requently 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." *Washington* v. *Davis*, 426 U. S. 229, 253 (STEVENS, J., concurring).

Furthermore, if proof of discriminatory purpose is to be required in these cases, this standard would comport with my view that the degree to which the government must justify a decision depends upon the importance of interests infringed by it. See *San Antonio Ind. School District* v. *Rodriguez*, 411 U. S. 1, 70 (MARSHALL, J., dissenting).

The Court also fails to recognize that the maintenance of multimember districts in the face of foreseeable discriminatory consequences strongly suggests that officials are blinded by "racially selective sympathy and indifference."[35] Like outright racial hostility, selective racial indifference reflects a belief that the concerns of the minority are not worthy of the same degree of attention paid to problems perceived by whites. When an interest as fundamental as voting is diminished along racial lines, a requirement that discriminatory purpose must be proved should be satisfied by a showing that official action was produced by this type of pervasive bias. In the present cases, the plaintiffs presented strong evidence of such bias: they

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[35] Brest, The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle, 90 Harv. L. Rev. 1, 7 (1976). See also Note, Racial Vote Dilution in Multimember Districts: The Constitutional Standard After *Washington* v. *Davis*, 76 Mich. L. Rev. 694, 716–719 (1978).

showed that Mobile officials historically discriminated against Negroes, that there are pervasive present effects of this past discrimination, and that officials have not been responsive to the needs of the minority community. It takes only the smallest of inferential leaps to conclude that the decisions to maintain multimember districting having obvious discriminatory effects represent, at the very least, selective racial sympathy and indifference resulting in the frustration of minority desires, the stigmatization of the minority as second-class citizens, ~~the~~ and the perpetuation of inhumanity.[36]

[36] The Court, *ante*, at 18, n. 21, indicates that on remand the lower courts are to examine the evidence in these cases under the discriminatory intent standard of *Personnel Adm'r of Massachusetts* v. *Feeney*, 442 U. S. 256 (1979), and may conclude that this test is met by proof of the refusal of Mobile's state-legislative delegation to stimulate the passage of legislation changing Mobile's city government into a mayor-council system in which council members are elected from single-member districts. The Court holds, then, only that the District Court and the Court of Appeals in each of the present cases evaluated the evidence under an improper legal standard, and not that the evidence fails to support a claim under *Feeney*, *supra*. When the lower courts examine these cases under the *Feeney* standard, they should, of course, recognize the relevancy of the plaintiffs' evidence that vote dilution was a foreseeable and natural consequence of the maintenance of the challenged multimember districting, and that officials have apparently exhibited selective racial sympthy and indifference. Cf. *Dayton Bd. of Educ.* v. *Brinkman*, — U. S. — (1979); *Columbus Bd. of Educ.* v. *Penick*, — U. S. — (1979).

Finally, it is important not to confuse the differing views the Court and I have on the elements of proving unconstitutional vote dilution. The Court holds that proof of intentional discrimination, as defined in *Feeney*, *supra*, is necessary to support such a claim. The Court finds this requirement consistent with the statement in *White* v. *Regester*, 412 U. S. 755, 766 (1973), that unconstitutional vote dilution does not occur simply because a minority has not been able to elect representatives in proportion to its voting potential. The extra necessary element, according to the Court, is a showing of discriminatory intent. In the Court's view, the evidence presented in *White* going beyond mere proof of underrepresentation of the minority properly supported an inference that the multimember districting scheme in question was tainted with a discriminatory purpose.

The Court's approach should be satisfied, then, by proof that an elec-

IV

The American approach to government is premised on the theory that, when citizens have the unfettered right to vote, public officials will make decisions by the democratic accommodation of competing beliefs, not by deference to the mandates of the powerful. The American approach to civil rights is premised on the complementary theory that the unfettered right to vote is preservative of all other rights. The theoretical foundations for these approaches are shattered where, as in the present cases, the right to vote is granted in form, but denied in substance.

It is time to realize that manipulating doctrines and drawing improper distinctions under the Fourteenth and Fifteenth Amendments, as well as under Congress' remedial legislation enforcing those Amendments, make this Court an accessory to the perpetuation of racial discrimination. The Court's requirement of proof of *intentional discrimination*, so inappropriate in today's cases, may represent an attempt to bury the legitimate concerns of the minority beneath the soil of a doctrine almost as impermeable as it is specious. If so, the superficial tranquility created by such measures can be but short-lived. If this Court refuses to honor our long-recognized principle that the Constitution "nullifies sophisticated as well

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toral scheme enacted with a discriminatory purpose effected a retrogression in the minority's voting power. Cf. *Beer* v. *United States*, 425 U. S. 130, 141 (1976). The standard should also be satisfied by proof that a scheme maintained for a discriminatory purpose has the effect of submerging minority electoral influence below the level it would have under a reasonable alternative scheme.

The Court does not address the question whether proof of discriminatory effect is necessary to support a vote-dilution claim. It is clear from the above, however, that if the Court at some point creates such a requirement, it would be satisfied by proof of mere disproportionate impact. Such a requirement would be far less stringent than the burden of proof required under the rather rigid discriminatory effects test I find in *White* v. *Regester*, *supra*. See n. 7, *supra*, and accompanying text.

as simple-minded modes of discrimination," *Lane* v. *Wilson*, 307 U. S. 268, 275 (1939), it cannot expect the victims of discrimination to respect political channels of seeking redress. I dissent.

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

Intersecting Opinion. I've joined Potter

From: Mr. Justice Stevens

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SUPREME COURT OF THE UNITED STATES

No. 77-1844

City of Mobile, Alabama, et al., Appellants, v. Wiley L. Bolden et al. | On Appeal from the United States Court of Appeals for the Fifth Circuit.

[March —, 1980]

MR. JUSTICE STEVENS, concurring in the judgment.

At issue in this case is the constitutionality of the city of Mobile's commission form of government. Black citizens in Mobile, who constitute a minority of that city's registered voters, challenged the at-large nature of the elections for the three positions of City Commissioner, contending that the system "dilutes" their votes in violation of the Fifteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment. While I agree with the Court that no violation of respondents' constitutional rights has been demonstrated, my analysis of the issue proceeds along somewhat different lines.

In my view, there is a fundamental distinction between state action that inhibits an individual's right to vote and state action that affects the political strength of various groups that compete for leadership in a democratically governed community. That distinction divides so-called vote dilution practices into two different categories "governed by entirely different constitutional considerations," see *Wright* v. *Rockefeller*, 376 U. S. 52, 56 (Harlan, J., concurring).

(8)

In the first category are practices such as poll taxes or literacy tests that deny individuals access to the ballot. Districting practices that make an individual's vote in heavily populated districts less significant than an individual's vote in

a smaller district belong in the same category. See *Baker* v. *Carr*, 369 U. S. 186; *Reynolds* v. *Sims*, 377 U. S. 533.[1] Practices in this category are tested by the strictest of constitutional standards, whether challenged under the Fifteenth Amendment or under the Equal Protection Clause of the Fourteenth Amendment.

This case does not fit within the first category. The District Court found that black citizens in Mobile "register and vote without hindrance"[2] and there is no claim that any individual's vote is worth less than any other's. Rather, this case draws into question a political structure that treats all individuals as equals but adversely affects the political strength of a racially identifiable group. Although I am satisfied that such a structure may be challenged under the Fifteenth Amendment as well as under the Equal Protection

[1] In *Reynolds* v. *Sims*, the Court quoted Mr. Justice Douglas' statement that the right to vote "includes the right to have the vote counted at full value without dilution or discount . . . ," 377 U. S., at 555, n. 29, as well as the comment in *Westbury* v. *Sanders*, 376 U. S. 1, 14, that "one man's vote in a congressional election is to be worth as much as another's." 377 U. S., at 559.

[2] This finding distinguishes this case from *White* v. *Regester*, 412 U. S. 755. In *White* the Court held that, in order to establish a Fourteenth Amendment violation, a group alleging vote dilution must

"... produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." 412 U. S., at 766.

The Court affirmed a judgment in favor of black and Mexican-American voters on the basis of the District Court's express findings that black voters had been "'effectively excluded from participation in the Democratic primary selection process,'" *id.*, at 767, and that "'. . . cultural incompatibility . . . conjoined with the poll tax and the most restrictive voter registration procedures in the nation ha[d] operated to effectively deny Mexican-Americans access to the political processes in Texas even longer than the Blacks were formally denied access by the white primary.'" *Id.*, at 768.

making its members' right to vote, in MR. JUSTICE MARSHALL'S words, "nothing more than the right to cast meaningless ballots." *Post*, at 1. I agree with MR. JUSTICE MARSHALL that the protections afforded by the Fifteenth Amendment need not and should not be so narrowly construed. I do not agree, however, with his view that every "showing of discriminatory impact" on an historically and socially disadvantaged racial group, *post*, at 2, 9, n. 7, is sufficient to invalidate a districting plan.[8]

Neither *Gomillion* nor, for that matter, any other case decided by this Court establishes a constitutional right to proportional representation for racial minorities.[9] What *Gomillion* holds is that a sufficiently "uncouth" or irrational racial gerrymander violates the Fifteenth Amendment. As Mr. Justice Whittaker's concurrence in that case demonstrates, the same result is compelled by the Equal Protection Clause of the Fourteenth Amendment. See 364 U. S., at 349. The fact that the "gerrymander" condemned in *Gomillion* was equally vulnerable under both Amendments indicates that the essential holding of that case is applicable, not

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[8] I also disagree with MR. JUSTICE MARSHALL to the extent that he implies that the votes cast in an at-large election by members of a racial minority can never be anything more than "meaningless ballots." I have no doubt that analyses of presidential, senatorial and other statewide elections would demonstrate that ethnic and racial minorities have often had a critical impact on the choice of candidates and the outcome of elections. There is no reason to believe that the same political forces cannot operate in smaller election districts regardless of the depth of conviction or emotion that may separate the partisans of different points of view.

[9] And this is true regardless of the apparent need of a particular group for proportional representation because of its historically disadvantaged position in the community. See *Cousins* v. *City Council of City of Chicago*, 466 F. 2d 830, 852 (CA7 1972) (STEVENS, J., dissenting), cert. denied, 409 U. S. 893. This does not mean, of course, that a legislature is constitutionally prohibited from according some measure of proportional representation to a minority group, see *United Jewish Organizations* v. *Carey*, 430 U. S. 144.

merely to gerrymanders directed against racial minorities, but to those aimed at religious, ethnic, economic and political groups as well. Whatever the proper standard for identifying an unconstitutional gerrymander may be, I have long been persuaded that it must apply equally to all forms of political gerrymandering, including racial gerrymandering. See *Cousins* v. *City Council of City of Chicago*, 466 F. 2d 830, 848–852 (CA7 1972) (STEVENS, J., dissenting), cert. denied, 409 U. S. 893.[7]

This conclusion follows, I believe, from the very nature of a gerrymander. By definition, gerrymandering involves drawing district boundaries (or using multimember districts or at-large elections) in order to maximize the voting strength of those loyal to the dominant political party and to minimize the strength of those opposed to it.[8] 466 F. 2d, at 847. In

[7] This view is consistent with the Court's Fourteenth Amendment cases, in which it has indicated that attacks on apportionment schemes on racial, political, or economic grounds should all be judged by the same constitutional standard. See, *e. g.*, *Whitcomb* v. *Chavis*, 403 U. S. 124, 149 (districts that are "conceived or operated as purposeful devices to further racial *or economic* discrimination" are prohibited by the Fourteenth Amendment) (emphasis supplied); *Fortson* v. *Dorsey*, 379 U. S. 433, 439 (an apportionment scheme would be invalid under the Fourteenth Amendment if it "operate[d] to minimize or cancel out the voting strength of racial *or political* elements of the voting population") (emphasis supplied).

[8] Gerrymanders may also be used to preserve the current balance of power between political parties, see, *e. g.*, *Gaffney* v. *Cummings*, 412 U. S. 735, or to preserve the safe districts of incumbents, cf. *Wright* v. *Rockefeller*, 376 U. S. 52. In *Gaffney* the Court pointed out that ". . . it requires no special genius to recognize the political consequences of drawing a district line along one street rather than another. It is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area. District lines are rarely neutral phenomena. They can well determine what district will be predominantly Democratic or predominantly Republican, or make a close race likely. Redistricting may pit incumbents against one another or make very difficult the election of the most experienced legislator. The

seeking the desired result, legislators necessarily make judgments about the probability that the members of certain identifiable groups, whether racial, ethnic, economic or religious, will vote in the same way. The success of the gerrymander from the legislators' point of view, as well as its impact on the disadvantaged group, depends on the accuracy of those predictions.

A prediction based on a racial characteristic is not necessarily more reliable than a prediction based on some other group characteristic. Nor, since a legislator's ultimate purpose in making the prediction is political in character, is it necessarily more invidious or benign than a prediction based on other group characteristics.[9] In the line-drawing process, racial, religious, ethnic, and economic gerrymanders are all species of political gerrymanders.

From the standpoint of the groups of voters that are affected by the line-drawing process, it is also important to recognize that it is the group's interest in gaining or maintaining political power that is at stake. 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. For the political strength of a group is not a function of its ethnic, racial, or religious composition; rather, it is a function of numbers—specifically the number of persons who will vote in the same way. In the long run there is no

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reality is that districting inevitably has and is intended to have substantial political consequences." Id., at 753.

[9] Thus, there is little qualitative difference between the motivation of a legislator who has taken a position on the abortion issue who attempts to gerrymander his district to include or exclude certain religious groups and the motivation of a legislator who has taken a political position generally thought to be offensive to a particular racial group who attempts to ensure that that group will remain a minority of the voters in his district.

more certainty that individual members of racial groups will vote alike than that members of other identifiable groups will do so. And surely there is no national interest in according special constitutional protection to racial minorities if the effect will be to make it especially desirable to define political groups by racial characteristics.[10]

My conclusion that the same standard should be applied

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[10] As Mr. Justice Douglas wrote in his dissent in *Wright* v. *Rockefeller*:

"Racial electoral registers, like religious ones, have no place in a society that honors the Lincoln tradition—'of the people, by the people, for the people.' Here the individual is important, not his race, his creed, or his color. The principle of equality is at war with the notion that District A must be represented by a Negro, as it is with the notion that District B must be represented by a Caucasian, District C by a Jew, District D by a Catholic, and so on. Cf. *Gray* v. *Sanders*, 372 U. S. 368, 379. The racial electoral register system weights votes along one racial line more heavily than it does other votes. That system, by whatever name it is called, is a divisive force in a community, emphasizing differences between candidates and voters that are irrelevant in the constitutional sense. Of course race, like religion, plays an important role in the choices which individual voters make from among various candidates. But government has no business designing electoral districts along racial or religious lines.

. . . . . .

"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 religious partisan. Since that system is at war with the democratic ideal, it should find no footing here." 376 U. S. 52, 66–67.

See also my dissent in *Cousins*, *supra*:

"In my opinion an interpretation of the Constitution which afforded one kind of political protection to blacks and another kind to members of other identifiable groups would itself be invidious. Respect for the citizenry in the black community compels acceptance of the fact that in the long run there is no more certainty that these individuals will vote alike than will individual members of any other ethnic, economic, or social group. The probability of parallel voting fluctuates as the blend of

whenever a group challenges a district boundary or an at-large system of elections on the ground that its political power has been adversely affected thereby leads me also to conclude that the standard cannot condemn every adverse impact on one or more political groups without spawning more dilution litigation than the judiciary can manage. Difficult as the issues engendered by *Baker* v. *Carr*, 369 U. S. 186, may have been, nothing comparable to the mathematical yardstick used in apportionment cases is available to identify the difference between permissible and impermissible adverse impacts on the voting strength of political groups.

In its prior cases the Court has phrased the standard as whether the districting practices in question "unconstitutionally operate to dilute or cancel the voting strength of racial or political elements." *Whitcomb* v. *Chavis*, 403 U. S. 124, 144. In *Zimmer* v. *McKeithen*, 485 F. 2d 1297 (CA5 1973), the Fifth Circuit attempted to outline the types of proof that would satisfy this rather amorphous standard. Today, the Court rejects the *Zimmer* analysis, holding that the primary, if not the sole, focus of the inquiry must be on the intent of the political body responsible for making the districting decision. While I agree with the Court that the proper standard must distinguish between routine political decisions and decisions motivated solely by an intent to discriminate against an identifiable group, I do not believe that it is appropriate to focus on the subjective intent of the decisionmakers.

The proper standard, I believe, is suggested by three characteristics of the gerrymander condemned in *Gomillion*:

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political issues affecting the outcome of an election changes from time to time to emphasize one issue, or a few, rather than others, as dominant. The facts that a political group has its own history, has suffered its own special injustices, and has its own congeries of special political interests, do not make one such group different from any other in the eyes of the law. The members of each go to the polls with equal dignity and with an equal right to be protected from invidious discrimination." 466 F. 2d, at 852.

(1) the 28-sided configuration was, in the Court's word, "uncouth," that is to say, it was manifestly not the product of a routine or a traditional political decision; (2) it had a significant adverse impact on a minority group; and (3) it was unsupported by any neutral justification and thus was either totally irrational or entirely motivated by a desire to curtail the political strength of the minority. These characteristics suggest that a proper test should focus on the objective effects of the political decision rather than the subjective motivation of the decisionmaker. In this case, if the commission form of government in Mobile were extraordinary, or if it were nothing more than a vestige of history, with no greater justification than the grotesque figure in *Gomillion*, it would surely violate the Constitution. The conclusion would follow simply from its adverse impact on black voters plus the absence of any legitimate justification for the system, without reference to the subjective intent of the political body that has refused to alter it.

Conversely, I am also persuaded that a political decision that affects group voting rights may be valid even if it can be proved that irrational or invidious factors have played some part in its enactment or retention.[11] The standard for testing the acceptability of such a decision must take into account the fact that the responsibility for drawing political boundaries is generally committed to the legislative process and that the process inevitably involves a series of compromises among different group interests. If the process is to work, it must reflect an awareness of group interests and it must tolerate some attempts to advantage or to disadvantage particular

[11] "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." *Washington* v. *Davis*, 426 U. S. 229, 253 (STEVENS, J., dissenting).

segments of the voting populace. Indeed, the same "group interest" may simultaneously support and oppose a particular boundary change.[12] The standard cannot, therefore, be so strict that any evidence of a purpose to disadvantage a bloc of voters will justify a finding of "invidious discrimination"; otherwise, the facts of political life would deny legislatures the right to perform the districting function. Accordingly, a political decision that is supported by valid and articulable justifications cannot be invalid simply because some participants in the decisionmaking process were motivated by a purpose to disadvantage a minority group.

The decision to retain the commission form of government in Mobile, Ala., is such a decision. I am persuaded that some support for its retention comes, directly or indirectly, from members of the white majority who are motivated by a desire to make it more difficult for members of the black minority to serve in positions of responsibility in city government. I deplore that motivation and wish that neither it nor any other irrational prejudice played any part in our political processes. But I do not believe otherwise legitimate political choices can be invalidated simply because an irrational or invidious purpose played some part in the decisionmaking process.

As the Court points out, Mobile's basic election system is the same as that followed by literally thousands of municipalities and other governmental units throughout the Nation.

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[12] For example, if 55% of the voters in an area comprising two districts belong to group A, their interests in electing two representatives would be best served by evenly dividing the voters in two districts, but their interests in making sure that they elect at least one representative would be served by concentrating a larger majority in one district. See *Cousins* v. *City Council of Chicago*, *supra*, 466 F. 2d, at 855, n. 30 (STEVENS, J., dissenting). See also *Wright* v. *Rockefeller*, 376 U. S. 52, where the maintenance of racially separate congressional districts was challenged by one group of blacks and supported by another group having the dominant power in the black-controlled district.

Ante, at 3.[13] The fact that these at-large systems characteristically place one or more minority groups at a significant disadvantage in the struggle for political power cannot invalidate all such systems. See *Whitcomb* v. *Chavis*, 403 U. S. 124, 156–160. Nor can it be the law that such systems are valid when there is no evidence that they were instituted or maintained for discriminatory reasons, but that they may be selectively condemned on the basis of the subjective motivation of some of their supporters. A contrary view "would spawn endless litigation concerning the multimember districts now widely employed in this Country," *id.*, at 157, and would entangle the judiciary in a voracious political thicket.[14]

[13] I emphasize this point because in my opinion there is a significant difference between a statewide legislative plan that "happens" to use multimember districts only in those areas where they disadvantage discrete minority groups and the use of a generally acceptable municipal form of government that involves the election of commissioners by the voters at large. While it is manifest that there is a substantial neutral justification for a municipality's choice of a commission form of government, it is by no means obvious that an occasional multimember district in a State which typically uses single member districts can be adequately explained on neutral grounds. Nothing in the Court's opinion in *White* v. *Regester*, 412 U. S. 755, describes any purported neutral explanation for the multimember districts in Bexar and Dallas Counties. In this connection, it should be remembered that *Kilgarlin* v. *Hill*, 386 U. S. 120, did not uphold the constitutionality of a "crazy quilt" of single-member and multimember districts; rather, in that case this Court merely upheld the findings by the District Court that the plaintiffs had failed to prove their allegations that the districting plan constituted such a crazy quilt.

[14] Rejection of Mr. Justice Frankfurter's views in the specific controversy presented by *Baker* v. *Carr*, 369 U. S. 186, does not refute the basic wisdom of his call for judicially manageable standards in this area: "Disregard of inherent limits in the effective exercise of the Court's 'judicial Power' not only presages the futility of judicial intervention in the essentially political conflict of forces by which the relation between population and representation has time out of mind been and now is determined. It may well impair the Court's position as the ultimate organ of 'the supreme Law of the Land' in that vast range of legal problems, often strongly entangled in popular feeling, on which this Court must pronounce.

In sum, I believe we must accept the choice to retain Mobile's commission form of government as constitutionally permissible even though that choice may well be the product of mixed motivation, some of which is invidious. For these reasons I concur in the Court's judgment of reversal.

The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements." 369 U. S., at 267 (Frankfurter, J., dissenting).

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 2, 1980

Re: No. 77-1846 - City of Mobile v. Bolden

Dear Potter:

I have finally decided not to write and thus to add to the many pages already submitted for this case. Therefore, please note at the end of your opinion: "MR. Justice Blackmun concurs in the result."

Sincerely,

Mr. Justice Stewart

cc: The Conference

THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J.
		11/9/79						
Join PS 1/1/80	Join dissent except part IV	1st draft (77-1844) 1-4-80 1st draft PC (78-357) 1-4-70	1st Draft dissent 3/17/80	will dissent 1/17/80	await dissent 2/6/80	letter to Justice Stewart	Join 1/9/80	1st d con Join 3/2
Join PS 3/11/80	2/27/80 Join BLW	2nd Draft 1/14/80 3rd Draft	1st draft circule 3/17/80 2nd Draft	1st Draft 2/22/80 2nd Draft	both cases Con opinion 357 4/2/80	Join PS 1/15/80	Join PS in 78-357 4/9/80	2nd 3/2 Join
	3/13/80 Join TM 3/14/80	3/13/80 4th Draft 3/25/80	3/19/80 2nd Draft 78-357	3rd Draft 3/25/80 4th Draft	will not write - con in Judgment 4/2/80	Join PS in 78-357 4/9/80		78- 4/8
	Join BLW 78-357 3/20/80	5th Draft 4/3/80	3/25/80 3rd Draft 4/8/80	4/4/80 5th Draft 4/16/80	1st Draft Con op 4/3/80			
	3rd Draft 4/18/80	2nd Draft PC 78-357 4/8/80	4th Draft 4/17/80	6th Draft 4/18/80	2nd Draft 4/4/80 Con opinion 77-1844 typed draft 4/11/80 1st Draft 4/14/80			

77-1844 City of Mobile v. Bolden
78-357 Williams v. Brown