IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 77-1844 and 78-357

CITY OF MOBILE, ALABAMA, et al., *Appellants,*

v.

WILEY L. BOLDEN, et al.

ROBERT R. WILLIAMS, et al., *Appellants,*

v.

LEILA G. BROWN, et al.

ON APPEALS FROM THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the at-large systems of electing the Mobile, Alabama, City Commission and the Mobile

County Board of School Commissioners impermissibly dilute black voting strength in violation of the Equal Protection Clause of the Fourteenth Amendment.

2. Whether these at-large systems deny or abridge the rights of black voters in violation of the Fifteenth Amendment and Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973.

3. Whether the district court's orders granting single-member district relief were within the scope of its remedial discretion in the circumstances of these cases.

INTEREST OF THE UNITED STATES

Congress has given the Attorney General important responsibilities to protect the voting rights of Americans. Under 42 U.S.C. 1971 and 1973j, the United States may institute actions to prevent the denial of the right to vote on grounds of race or color. The United States has brought a number of actions against local governing bodies alleging that particular at-large electoral schemes unlawfully dilute the voting strength of blacks or other minority groups, and has participated as amicus curiae in other voting dilution cases, including the litigation in the court of appeals in No. 77-1844. The Court's decision in the two cases here, which concern at-large schemes found by the courts below to have abridged the voting rights of black voters in the City and in the County of Mobile, Alabama, could affect future efforts by the

United States to seek judicial relief for minority groups in other communities whose voting rights are similarly abridged. The interest of the United States in No. 77-1844 is enhanced by an objection, interposed by the Attorney General in 1976 pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, to special state legislation changing the City of Mobile's elections from three undifferentiated City Commission "places" to at-large elections for three commissioners identified by function.

STATEMENT

These are class actions brought in June 1975 by black citizens alleging that at-large systems for electing the members of certain local governing bodies have operated to dilute the voting strength of blacks in violation of, *inter alia*, the Fourteenth and Fifteenth Amendments and the Voting Rights Act of 1965, 42 U.S.C. 1973.[1] In No. 77-1844 ("*Bolden*"),

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[1] Plaintiffs in both cases also made claims predicated on the First and Thirteenth Amendments and on 42 U.S.C. 1983 and 42 U.S.C. 1985(3). In each case the district court dismissed the 1985(3) claim as to all defendants and in No. 77-1844 the court dismissed the 1983 claim as to the City of Mobile (Bolden A. 26-27; Brown A. 83a). The dismissal of the 1983 claim against the city was granted before this Court's decision in *Monell* v. *New York City Dept. of Social Services*, 436 U.S. 658 (1978), overruling the holding of *Monroe* v. *Pape*, 365 U.S. 167 (1961), that municipal governments are immune from suit under that provision.

a class ultimately certified as "all black persons who are now citizens of the City of Mobile, Alabama" (Bolden A. 35-36) sued the city and its three incumbent city commissioners, challenging the at-large system of electing the commissioners, who perform both executive and legislative functions and who are elected by majority vote to numbered places with designated functions. In No. 78-357 (*"Brown"*), a class later certified as all black citizens of Mobile County (Brown J.S. App. 3b) sued, *inter alia*, the county and its five-member Board of School Commissioners, challenging the at-large system by which those commissioners were elected.[2] Both cases were decided by the district court in favor of the plaintiffs after full trials on the merits.[3]

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[2] The suit also named as defendants the Mobile County Commission and certain county officials, and challenged the at-large system for electing the county commissioners (Brown A. 75a-79a). Plaintiffs prevailed on that claim, but those defendants took no appeal, so that portion of the suit is no longer at issue.

[3] The essential facts in both cases are either undisputed or may be so regarded now, because in each case the court of appeals affirmed the findings of the district court (Bolden J.S. App. 12a; Brown J.S. App. 2a), and this Court does not ordinarily " 'undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.' " *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967), quoting *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949). Much of the evidence presented in *Bolden* was presented in *Brown* as well. See Brown J.S. App. 2b-3b n.1. When referring to testimony or exhibits common to both cases, we will cite only to the *Bolden* record.

A. The Statutory Bases For At-Large Voting

1. *City Commission*

In Alabama, the form of government each city must or may adopt is prescribed by state law. The form available to cities not covered by some other local act or general act of local application is set forth in Title 37 of the Code of Alabama of 1940, now Chapter 11-43 of the 1975 Code, which provides for a "weak mayor-council" system. In Act 281 of 1911,[4] in addition to the forms of municipal government already provided for elsewhere, the state legislature authorized all cities and towns, not under compulsory legislation to do otherwise, to adopt a commission form of government. General Laws of Alabama of 1911, page 330.

As originally passed, this act provided for three commissioners elected at-large to staggered three-year terms. In each election, the voters would designate a first and a second choice, and the winner would be the candidate receiving a majority of first-choice votes or, if there was none, the candidate receiving the majority of first- and second-choice votes. After each election, the commissioners were to choose one of their number as mayor, and divide other administrative responsibilities among the three of them. Act 281, *supra*, Sections 4, 5, 6, 7, 10, and 11. The commissioners were to exercise jointly all legislative and executive power theretofore enjoyed by the mayor,

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[4] Portions of Act 281 are set forth in Bolden J.S. App. 1f-14f.

council, and all independently elected boards and commissions (*id.*, Section 6). Neither this Act nor any later amendment imposed any residency requirement other than residence in Mobile. Elections have, from the beginning, been nonpartisan (Bolden J.S. App. 5b, 6b).

In 1939, the act was amended to provide that the commissioners would serve concurrent four-year terms. Candidates would be required to run either for mayor or for associate commissioner. The two associate commissioners would be elected in a purely at-large vote, the winners being the two receiving the highest numbers of all votes cast. Single-shot voting for associate commissioners was not explicitly prohibited. Ala. Code title 37, Sections 92 and 94.[5] After the election, each commissioner would be assigned a specific set of functions for the duration of his term, as enumerated by the act (*id.*, Section 95).

In 1945, the act was again amended, this time to provide for numbered posts to which candidates, running at large, had to be elected by majorities. Act 295, General Acts of Alabama of 1945, page 490, Sec-

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[5] "Single-shot voting" is the practice of voting for fewer candidates than the number of offices to be filled. It permits a minority group to concentrate its votes on a few candidates and thereby reduce the power of the majority group vote if the latter is distributed among a larger number of candidates. Prohibition of single-shot voting may be achieved by declaring void any ballot that fails to indicate preferences for all positions. R. Dixon, *Democratic Representation; Reapportionment in Law and Politics* 515 (1968).

tion 1.[6] After election, the commissioners were required to designate one of their number as mayor, but no provision was made for assigning specific duties among the three. The act permitted administrative powers to be exercised corporately or, by informal agreement, individually.

Finally, in 1965, the legislature enacted Act 823, General Acts of Alabama of 1965, page 1539.[7] Section 2 of this act designates specific administrative tasks to be performed by each commissioner filling places 1, 2, or 3, and provides that the role of "mayor" (largely ceremonial) be rotated among the three commissioners.[8] After the instant lawsuit was commenced, the City of Mobile submitted Act 823 to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. On March 2, 1976, the Attorney General interposed an objection to the change on the ground that it tends to lock in the use of at-large elections (Bolden R. 478-481).[9] The objection stated (*id.* at 479):

> [I]ncorporating as it does the numbered post and majority vote features, and in view of the

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[6] The 1939 amending act, which was to be in full effect in Mobile in 1945, was held unconstitutional under the Alabama Constitution, on a procedural ground, in *Baumhauer* v. *State*, 240 Ala. 10, 198 So. 272 (1940).

[7] Portions of Act 823 are set forth at Bolden J.S. App. 1g-3g.

[8] The functions are: (1) finance and administration; (2) public safety; and (3) public works and services.

[9] "Bolden R." refers to the *Bolden* record, other than transcripts and exhibits, filed in the court of appeals.

> history of racial discrimination, and evidence of bloc voting in Mobile, we are unable to conclude * * * that section 2 of the Act No. 823 will not have the effect of denying or abridging the right to vote on account of race or color.

The objection letter noted that the move to functional posts would make it impossible for the city to change to single-member district voting, since it would be inappropriate to give one segment of the city exclusive right to elect, for example, the Commissioner of Public Works (Bolden R. 479). No suit has been brought in the District Court for the District of Columbia to seek clearance under Section 5.[10]

Mobile's adoption of the commission form of government took place in 1911, in a context that the district court labeled "race-proof" because the Alabama Constitution of 1901 had already succeeded in disfranchising blacks (Bolden J.S. App. 20b, 28b-29b). Plaintiffs' historical expert, Dr. Melton A. McLaurin, testified that blacks had been active in Alabama politics during the Reconstruction Era, and that Mobile had been a center of black political ac-

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[10] Joseph Langan, a long-term member of the Mobile City Commission and strongly identified with black interests, testified at trial that he had introduced the 1939 amendment discussed above when he was a member of the Mobile delegation to the state legislature, and later was responsible for recommending the 1965 change to predesignation of the tasks of the commissioners (Bolden Tr. 328-331). Defendants' expert, Dr. James E. Voyles, testified that a fixed designation of duties was desirable since it prevents two of the commissioners from combining to reduce the authority of the third (*id.* at 1151).

tivity. The movement to disfranchise blacks at the turn of the century was led by the same reformers who advocated the commission form of government to reduce corruption—corruption being heavily identified with manipulation of the black vote. While race per se was not the motivating force behind the commission reform, Dr. McLaurin testified, those who supported it were aware of the impact at-large elections would have upon the blacks should they ever again regain the vote. Blacks took no part in the legislature that authorized adoption of the commission system or the referendum adopting it in Mobile (Bolden A. 40-51).

2. *Board of School Commissioners*

The Mobile County school system, the first public school system in Alabama, was established in 1826. The system was originally governed by a board of 13-25 commissioners who served five-year terms. See 1825-1826 Ala. Acts, pages 35-36. There is some question whether these commissioners were elected at-large or appointed by the state legislature. Compare Brown J.S. App. 19b with *Board of School Commissioners* v. *Hahn*, 246 Ala. 662, 663, 22 So.2d 91, 92 (1945). In any event, an 1836 Alabama law specified that the school commissioners would be elected at-large, and it set their number at 13. See 1836 Ala. Acts, page 48.

In 1854, the state legislature passed an act creating a public school system for the rest of the State of Alabama. With minor exceptions, this act preserved the independent status of the Mobile County

school system. See 1853-1854 Ala. Acts, page 8. This special independent status of the Mobile County system was subsequently incorporated into the Alabama Constitution. See Section 1 of Article XIII of the Alabama Constitution of 1875; Section 270 of Article XIV of the Alabama Constitution of 1901. In 1876, the Alabama legislature reduced the number of school commissioners from 13 to 9, and required at least two of them to live within six miles of the county courthouse. The commissioners continued to be elected at-large. See 1875-1876 Ala. Acts, pages 363-364.

The current composition and operation of the Mobile County school system are apparently governed by legislation passed in 1919.[11] See 1919 Ala. Local Acts, page 73.[12] At that time blacks were totally disfranchised by operation of provisions of the Alabama Constitution of 1901. The 1919 Act establishes a board of five members, to be elected at-large[13] in

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[11] The district court found it unnecessary to resolve a dispute between the parties as to whether the present system was established by this 1919 local act, or, as plaintiffs contended, by a general act passed in 1939 (Brown J.S. App. 7b-8b, 27b).

[12] The act is set forth at pages 71-74 of appellants' brief in No. 78-357.

[13] Members of other county school boards in Alabama are also elected at-large. Ala. Code Section 16-8-1 (1975), which governs the composition and election of county school boards other than Mobile's, provides that "[t]he county board of education shall be composed of five members, who shall be elected by the qualified electors of the county."

even-numbered years for six-year, staggered terms. There is no district residency requirement. Elections are partisan, and there is a majority vote requirement for the primary, but not for the general elections (Brown J.S. App. 21b-22b).

B. The Black Vote in Mobile Politics: City and County

The long history of racial discrimination with respect to voting in Alabama from 1901 to 1965 is set forth in the cases in which some of those barriers to political rights were struck down. See, *e.g.*, *Davis* v. *Schnell*, 81 F. Supp. 872 (S.D. Ala.) (three-judge court), aff'd per curiam 336 U.S. 933 (1949) (striking down the Boswell Amendment, which introduced an "interpretation test" on the heels of *Smith* v. *Allwright*, 321 U.S. 649 (1944), which invalidated a "white primary"); *United States* v. *State of Alabama*, 252 F. Supp. 95 (M.D. Ala. 1966) (three-judge court) (poll tax). In 1946, there were 275 registered blacks and 19,000 registered whites in the County of Mobile (Bolden A. 51; Bolden Tr. 29). In 1965, when the Voting Rights Act was passed, at least ten Alabama counties were under injunction as a result of earlier suits by the Attorney General attacking discriminatory registration procedures.[14]

Since passage of that Act, blacks in Mobile County have been able to register, vote, and become candi-

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[14] See *Sims* v. *Baggett*, 247 F. Supp. 96, 108 n.24 (M.D. Ala. 1965) (three-judge court). Mobile was not one of the counties under injunction, and federal registrars were not sent to Mobile pursuant to the 1965 Act (Bolden J.S. App. 21b n.8).

dates (Bolden J.S. App. 7b). Blacks constitute approximately one-third of both the city population of more than 190,000 and the county population of approximately 337,000.[15] They are heavily concentrated in the City of Mobile and the City of Prichard (Brown J.S. App. 6b). Because of housing patterns in the City of Mobile, it would be impossible to divide in into three compact, contiguous zones of equal population without creating at least one predominantly black district (Bolden J.S. App. 4b-5b).

It is undisputed that no black person has ever been elected either to the Mobile City Commission or the Mobile County Board of School Commissioners and that, with one exception discussed below, no black or candidate identified with blacks has ever won an at-large election for any office in or for the city or county.

Extensive evidence was introduced to show the degree to which voting in Mobile was polarized along racial lines. Plaintiffs in both cases made use of correlation analyses done by defendants' expert, Dr. James E. Voyles, in his doctoral dissertation,[16] and

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[15] The estimate for the city is derived from 1970 census figures showing blacks to constitute 35.4% of a population of 190,026 (Bolden J.S. App. 4b). The county estimate is based on 1976 figures showing blacks to constitute 32.5% of a population of 337,200 (Brown J.S. App. 6b).

[16] "An Analysis of Mobile Voting Patterns, 1948-1970" (Bolden and Brown Pltf. Ex. 9). Excerpts from Dr. Voyles' dissertation are set forth at Bolden A. 575-590 and Brown A. 459a-503a.

correlation studies by their own expert, Dr. Cort B. Schlichting.[17]

The career of Joseph Langan, a long-term member of the Mobile City Commission and a white man long identified with black interests, furnished the most significant data with respect to city commission elections, for no blacks ran for a commission place until 1973, and then only as minor candidates (see *infra* at page 16). Langan ran for city commissioner and won in 1953 and thereafter, every four years, until he was defeated in 1969 (Bolden A. 104). According to Dr. Voyles' tables and analyses, Langan began as a New Deal Democrat who won, at first, with a coalition of the white vote and such black vote as then existed (Bolden Pltf. Ex. 9 (Voyles' dissertation) at 82-86 and table on 87). Beginning in 1961, racial polarization developed between the lower and lower-middle class black wards on the one hand and the corresponding white wards on the other, the

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[17] Bolden Tr. 92-194 and Bolden Pltf. Exs. 10-53. The basic scheme of these correlation analyses is as follows: if there are two wards, one 100% black and the other 100% white, and 100% of the vote in each goes to opposite candidates, the correlation between race and voting would be 1.0 and race would account for 100% of the voting behavior. No candidate ever produces a perfect correlation, of course, if for no other reason than that no ward is 100% black or white. Any city- or county-wide correlation of .7 or greater indicates that race accounts for at least 49% of the voting behavior (Bolden Tr. 151-153). This is calculated by an accepted mathematical formula whereby the correlation, known as "Pearsons R," is squared to produce the percentage accounted for by race (R^2) (Bolden Tr. 192-193; Brown A. 472a-473a).

blacks voting as a virtual bloc for Langan, but the lower and lower-middle class whites moving away from him (Pltf. Ex. 9 at 91-93).[18] The gap widened with each successive election (*id.* at 93-99), so that in 1969, by which time the black vote had greatly increased, Langan won 94.39% of the vote in the lower-middle class black wards but only 34.35% in the lower-middle class white wards, with an overall correlation of .91 (table at 99; Bolden A. 591). Campaign literature openly identified Langan with the so-called "bloc vote" and with John LeFlore, a well-known black leader in Mobile (Bolden Pltf. Ex. 61, Nos. 48, 49, 55, 56, 58, and 59). One flyer, warning "Bloc Vote or You?", listed the black wards that had voted for Langan in the past and described five ways in which the "bloc vote" is obtained, including such actions as favoring integration and open housing, and using terms of respect when addressing blacks (Bolden Pltf. Ex. 61, No. 56).

At trial, the witnesses disagreed concerning the reason for Langan's ultimate defeat in the 1969 runoff. There had been a partial black boycott of the elections that year instigated by radical leaders. Langan himself attributed the defeat to racial polarization, to his long incumbency, and to the generally low turnout resulting from Hurricane Camille and the black boycott (Bolden A. 109-113). No one, how-

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[18] Langan won 94.31% of the vote in the lower class and 91.30% in the lower-middle class black wards; the overall correlation with race was .71 (Bolden Pltf. Ex. 53 and Bolden Deft. Ex. 25).

ever, disputed that the 1969 run-off election between Langan and Joseph Bailey was the high-water mark of polarization.[19]

During the same period, roughly 1962-1972, three blacks and one white who was highly identified with black interests ran at-large for the Mobile County Board of School Commissioners. Each of them lost in a Democratic primary run-off to a white (or, in the case of Gerre Koffler, herself a white, to a segregationist) candidate. Each of these elections was significantly polarized by race (Bolden A. 131-138, 160-161; Bolden Pltf. Exs. 10, 19, 34, 36, 53).[20] Similarly, in 1969, in a special at-large election held to fill state legislature seats, Clarence Montgomery and T.C. Bell, black candidates, lost in highly polarized voting (Bolden A. 579-580, 591). Legislature races, unlike those for the city commission, are partisan. In this race, the white Republicans and Democrats agreed not to field more than one candidate against either black so that a white would be sure to win each contest (*id.* at 579-580). In 1972, Langan entered the race for the Mobile County Commission and lost in a severely polarized run-off. As in his 1969 Mo-

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[19] Voyles also testified that in the three city commission races that year those who prevailed won *no* black wards and that Langan carried no group of wards (*e.g.*, lower or middle class) that was majority white, and very few white wards at all (Bolden A. 156, 159-161, 165, 169).

[20] This was particularly so in 1966, when the index of correlations for black candidate Russell was more than .90 (Bolden Tr. 163).

bile City Commission contest, Langan was the victim of explicitly racial campaign propaganda linking him to the "bloc vote" (Bolden Pltf. Exs. 43, 53, and 61, Nos. 10, 14, and 16; Bolden Tr. 310-326).

Dr. Voyles hypothesized at trial that although racial polarization reached a peak in 1969, it was tapering off in the 1970's and would soon cease to be a factor in Mobile elections (Bolden A. 500-523). This hypothesis was premised largely upon the 1973 city commission races in which black candidates ran, but blacks voted for white candidates (*id.* at 500-502). The evidence showed, however, that in the 1973 city commission race, three blacks ran, two of them for place 3 and one for place 1. None was particularly well known in the black community, and they ran limited, under-financed compaigns. None reached the run-off stage, and each received his or her only votes in the black wards (Bolden A. 89-90, 591; Bolden Tr. 237-238, 1194-1196; Bolden Pltf. Exs. 47, 48, 49 and 99 at 15). As among the remaining white candidates, race was not a factor, for none was highly identified with black interests; but the pattern of 1969 repeated itself to the extent that the candidate receiving the majority of the black vote lost the election.[21]

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[21] Commissioner Doyle had run unopposed for place 2. Commissioner Mims (place 3) won without a run-off, beating three white and two black opponents, but carrying very few black wards (Bolden Pltf. Exs. 47, 49; Bolden Deft. Ex. 28; Bolden A. 591). In the race for place 1, after Taylor (black) and Bridges (a minor white candidate) dropped out, incumbent Bailey faced a run-off with challenger Gary Green-

Plaintiffs offered evidence of two elections after 1973 to show that race continued to be a significant factor in Mobile politics. In 1974, Lonia Gill, a black, ran against a white, Dan Alexander, for the Board of School Commissioners (Bolden Pltf. Ex. 52; Bolden A. 591). Gill was not regarded as a radical candidate (Bolden Pltf. Ex. 61, No. 2). Like the earlier school board candidates, she was well regarded and reasonably well financed (Bolden Tr. 238-239). Although Alexander did not lead in the first primary, he won by a wide margin in the run-off in a highly polarized vote (Bolden Tr. 361-362). James Buskey, a black, testified that he ran for State Senate District 33 in 1974, the first year of single-member legislative districts, and lost in a close, polarized run-off to a white opponent. The campaign featured racially oriented tactics (Bolden A. 93-94).

Many witnesses, both black and white, testified that they believed it would be futile for a black to attempt to run at-large (see, *e.g.*, Bolden A. 127-129, 206-208). Witnesses experienced in local politics, moreover, indicated that, while endorsement by the Non-Partisan Voters League, a local black political association, could be helpful to a candidate, too-conspicuous black support has been and will continue to be a "kiss of death" (Bolden A. 77-80, 95, 157-159, 198-199, 585; Bolden Tr. 227-230, 253; Bolden

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ough. Both claimed to have sought the black vote. In the run-off, the black vote split, and Bailey lost despite the fact that he received approximately 59% of the black vote (Bolden A. 184, 396-399; Bolden Tr. 1120-1136; Bolden Pltf. Ex. 46; Bolden Deft. Ex. 29).

Pltf. Ex. 98 at 10, 15-17; Bolden Pltf. Ex. 100 at 8-10, 20).

C. Responsiveness of Elected Commissioners to the Particularized Needs of Blacks

Both the Mobile City Commission and the Mobile County Board of School Commissioners have been unresponsive to the particularized needs and interests of the black community. Desegregation of such facilities as transportation, the golf course, and the airport have all been achieved by federal court orders, and a federal suit was required to end racial discrimination by the police department (Bolden J.S. App. 12b). The city had segregated fire departments until the late 1960's, and at the time of trial, Fire Chief Edwards was unsure how many blacks were employed by the department; Creoles and blacks together accounted for 27 persons of 439 (Bolden Tr. 1403-1405). There was, at that time, no program for recruiting black firemen comparable to the affirmative action plan ordered by the federal court for the police department (Bolden A. 277-279, 300). The city's EEO-4 reports to the federal government show that blacks represent about 26% of the city's workforce, but they are heavily concentrated in the lowest service and maintenance job categories (*id.* at 611). Discrimination in city employment is a matter that the Non-Partisan Voters League has frequently called to the attention of the city commission (Bolden Tr. 400-401; Bolden Pltf. Ex. 69). The three circumbent commissioners testified at trial that they saw no need for local anti-discrimination ordinances (Bolden A. 301-302, 480, 498-499).

Blacks have minimal representation on the many boards and committees appointed by the city commissioners to help run the city by licensing skilled tradesmen, floating bonds, redeveloping blighted areas, and fostering the city's cultural life. Blacks accounted, at the time of trial, for about 10% of the total membership on these boards (Bolden J.S. App. 12b; Bolden A. 601-604). Participation on many of these boards requires certain technical expertise or skills. Commissioner Mims testified, however, that the commission sometimes limits the field from which such appointments are made to candidates recommended by voluntary organizations and associations, composed mostly of whites, even when not required to do so by statute or ordinance (Bolden A. 401-405). In most instances, he was unable to offer explanations for the absence of blacks from the boards (*id.* at 401-451). In one instance, that of a now-defunct citizens advisory committee on the Donald Street Freeway, Mims testified that the large black representation was probably accounted for by federal regulations applicable to federally assisted highway programs (*id.* at 407-408). The five-member Housing Board, most of whose clients are black, had one black member (*id.* at 429-434, 602). Mims testified that he thought blacks were adequately represented by the whites (*id.* at 435).

In the spring of 1976, two major racial incidents occurred. One was a "mock lynching" of a black burglary suspect, carried out by a group of policemen; the second was an outbreak of cross-burnings.

The speed and vigor with which the city commission reacted to these was a matter of debate at trial (Bolden Tr. 251-253, 398; Bolden A. 263-289), but the district court concluded that the city's reaction was "timid and slow" (Bolden J.S. App. 18b). At trial, Public Works Commissioner Mims testified that while he deplored cross-burnings, he thought people could do what they pleased on their own property, and he would endorse an ordinance prohibiting the burning of anything, whether crosses or trash, on public property (Bolden A. 480-481). Police Commissioner Doyle testified that while he, too, deplored cross-burnings, he also deplored murder, rape, and robbery, but felt no compulsion to make public statements about any of these acts (Bolden Tr. 767-768; Bolden A. 297-303). The district court concluded (Bolden J.S. App. 18b):

> The lack of reassurances by the city commission to the black citizens and to the concerned white citizens about the alleged "mock" lynching and cross burnings indicates the pervasiveness of the fear of white backlash at the polls and evidences a failure by elected officials to take positive, vigorous, affirmative action in matters which are of such vital concern to the black people.

Black neighborhoods in Mobile have a disproportionate share of the city's substandard housing, and federal requirements governing the use of federal urban renewal funds have been a major factor in such improvements as have been made (Bolden A.

546-555). The city has made some efforts to resurface streets and deal with drainage problems in black neighborhoods, but inequities remain in comparison with white neighborhoods (Bolden J.S. App. 14b-16b; Bolden A. 354-361, 526-539). In 1973 the local NAACP complained to the United States Department of the Treasury that federal revenue sharing funds were being allocated in a discriminatory fashion (Bolden Pltf. Ex. 111 "D"). The Office of Revenue Sharing (ORS) investigated and reached the conclusion that there were a number of inequities in the use of funds affecting, among other things, resurfacing and drainage. After considerable negotiation, ORS was satisfied that Mobile had made a commitment to rectifying the inequities (Bolden J.S. App. 15b; Bolden Pltf. Ex. 111 "X"; Bolden A. 544). On the basis of all the evidence presented, the district court found that the city's response to the critical needs of the black neighborhoods tends to be "sluggish" (Bolden J.S. App. 17b).

Plaintiffs in the *Brown* litigation did not attempt to establish the unresponsiveness of the Board of School Commissioners by testimonial or documentary evidence. Rather, they requested the trial court to take judicial notice of an ongoing school desegregation suit on its own docket, *Davis* v. *Board of School Commissioners of Mobile County*, C.A. No. 3003-63-H (S.D. Ala.). This desegregation suit against the school board has been in continuous litigation since its filing in 1963. It governs all aspects of the desegregation process within the Mobile County school

system. The district court took judicial notice of the fact that plaintiffs in the *Davis* litigation established that the school board was maintaining a racially segregated system, assigning teachers according to race, and failing to comply with a faculty hiring ratio ordered by the court (Brown J.S. App. 13b-18b).

D. Amenability of the Systems to Change by Political Processes

The commission system can be abandoned by any city by initiative and referendum (Ala. Code, Section 11-44-105 (1975)), but, absent special legislation, a Mobile referendum would result either in reversion to the aldermanic system that governed the city prior to adoption of the commission system or conversion to the weak mayor-council system authorized by general law. A referendum held in 1963 pursuant to that section failed to pass (Bolden Tr. 334; Bolden Pltf. Ex. 98, at 68). In 1965, the legislature, in Chapter 3 of Act 823 (see pages 7-8, *supra*), authorized Mobile, by initiative and referendum, to adopt a weak mayor-council scheme calling for the election of seven members at-large to numbered places for four-year terms. Robert Edington, a former state senator, stated in his deposition that it was not possible to put single-member districts into the 1964-1965 bill because it would then have been regarded as a bill to put blacks into city offices (Bolden Pltf. Ex. 98, at 40-43). A referendum in 1973 based upon Act 823 also failed to pass (Bolden A. 256; Bolden Tr. 337).

As a practical matter, the power to pass or veto bills modifying the form of city government resides in the city's delegation to the state legislature. Voters in the City of Mobile help to elect three state senators, any one of whom can veto proposed local legislation under the existing courtesy rule. A majority of Mobile's 11-member House delegation can prevent a local bill from reaching the floor for debate. Unanimous endorsement of a bill of local application by the affected locality's delegation virtually insures passage (Bolden J.S. App. 29b-30b; Brown J.S. App. 35b; Brown Tr. 535-536; Bolden Tr. 742-743).

After the *Bolden* suit was filed, a bill was introduced in the State Senate to make a strong mayor-council system an option the City of Mobile could adopt by referendum. It would provide for a mayor, to be elected at-large, seven council members from single-member districts, and two council members to be elected at-large. State Senator Bill Roberts, the bill's sponsor, testified that his bill was being held up by the "veto" of one senator (Bolden A. 248-258).

Similar bills have been introduced calling for single-member district elections for the Mobile County Commission and the Mobile County Board of School Commissioners, but none has ultimately succeeded in changing the at-large systems. The 1975 legislature failed to pass the bill sponsored by Representative Cain Kennedy, a black legislator from Mobile County, that called for the election of the Mobile County Commissioners from single-member districts (Brown A. 234a, 237a-238a). The 1975 legislature did pass

a bill, also sponsored by Representative Kennedy, calling for the election of the Mobile County Board of School Commissioners from single-member districts (1975 Ala. Acts, Reg. Sess., No. 1150). This bill, passed shortly after the filing of the *Brown* litigation, was, however, struck down in a suit filed by the school commissioners, on the ground that it had been improperly published. *Board of School Commissioners* v. *Moore*, C.A. No. 96204 (Mobile County Cir. Ct., Feb. 17, 1976) (Brown J.S. App. 23b; Brown A. 234a).[22]

In the 1976 legislature, a second single-member district bill (the "Sonnier bill") was introduced at the request of the Board of School Commissioners; but it did not pass because of objections by black legislators who discovered infirmities that would make it vulnerable to legal challenges if it were enacted (Brown J.S. App. 22b-26b; Brown A. 169a-170a, 238a-239a). The defendant school commissioners in *Brown* sought a dismissal from the *Brown* litigation, or in the alternative a severance or a continuance, on the ground that the Sonnier bill would provide a political remedy for the plaintiffs' alleged injuries respecting school commissioner elections (Brown J.S.

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[22] The school commissioners had secured their dismissal as defendants in *Brown* on the grounds that the 1975 act would give plaintiffs the relief they were seeking with respect to the Board (Brown J.S. App. 23b). The school commissioners were rejoined as defendants after they succeeded in invalidating the act on which they had thus relied (*ibid.*).

App. 24b-25b; Brown A. 166a-181a). The district court denied the motions and later, in post-trial submissions, the defendant school commissioners conceded that the Sonnier bill was not a valid redistricting measure (Brown J.S. App. 25b-26b, 57b-58b).[23]

Regardless of its form or which political entity in the City or County of Mobile is concerned, whenever a districting bill is proposed by any member of the Mobile County delegation to the State Senate or House of Representatives, questions are raised concerning how many blacks, if any, might be elected (Bolden J.S. App. 30b; Brown J.S. App. 35b; Brown A. 234a, 268a-269a, 309a-310a; Bolden Pltf. Ex. 98, at 40-43).

E. The District Court's Decisions and Orders

1. In each case, the district court assessed all the evidence introduced at trial in light of the tests for racially based vote dilution set out in *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971); *White* v. *Regester*, 412 U.S. 755 (1973), and *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), aff'd on other grounds *sub nom. East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976).[24]

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[23] The bill was introduced as a general act with local application; but under Article XIV, Section 270, of the Alabama Constitution of 1901, districting changes in the Mobile County school system could be effected only by a local act (Brown J.S. App. 25b-26b).

[24] The two opinions contain a number of identical findings and conclusions, and the rationale for finding an unconstitutional denial of voting rights is the same for both.

In each case it held for the plaintiffs, concluding that the at-large electoral systems at issue unlawfully operate " 'to minimize or cancel out the voting strength' " of black citizens (quoting *Whitcomb* v. *Chavis*, *supra*, 403 U.S. at 143) by "restricting their access to the political process" (Bolden J.S. App. 33b, 41b; Brown J.S. App. 39b, 45b).[25]

The court determined that the State of Alabama had no clear-cut policy either favoring or disapproving at-large elections of local representative bodies, but that both the city and the county had long-established preferences for electing, respectively, the City Commission and the Board of School Commis-

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[25] The so-called "*Zimmer* factors" used by the court in its analysis are virtually identical to factors considered by the district court in *Graves* v. *Barnes*, 343 F. Supp. 704, 724-734 (W.D. Tex. 1972) (per curiam) (three-judge court), aff'd in pertinent part *sub nom. White* v. *Regester*, *supra*. (See discussion, pages 42-46, *infra*.) *Zimmer* identified "primary criteria" relevant to the issue of denial of access or vote dilution and "enhancing criteria" referring to the existence of characteristics of the electoral structure that enhance dilution. 485 F.2d at 1305. The primary criteria listed were: (1) accessibility of the minority group in question to the political process (such as candidate slating); (2) responsiveness of representatives to the group's special political interests; (3) the weight of the state policy supporting the at-large system; and (4) the existence vel non of past discrimination that might preclude effective political participation by members of the group. *Ibid.* The enhancing criteria were: "[E]xistence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts." *Ibid.* (The enhancing criteria are similar to those identified by this Court in *Whitcomb* v. *Chavis*, *supra*, 403 U.S. at 143-144.)

sioners by at-large voting (Bolden J.S. App. 19b, 37b-38b; Brown J.S. App. 19b, 42b-43b). The court further concluded that these at-large systems were initially established without discriminatory purpose, since blacks were effectively disfranchised by other means at the time of the relevant enactments (Bolden J.S. App. 28b; Brown J.S. App. 34b). This history is nonetheless insufficient, the court found, to preclude a finding of present unlawfulness, in light of evidence that in recent years the systems have served to dilute the black vote and have been maintained for this purpose by "intentional state legislative inaction" (Bolden J.S. App. 31b; Brown J.S. App. 37b).

In each case the court's finding of present unlawfulness was based in part on the subsidiary findings that, as a result of (1) the history of racial discrimination in the city, the county, and the state, (2) the pattern of racially polarized bloc voting, and (3) certain structural features of the electoral system—notably the relatively large size of the city and the county, the lack of district residency requirements for candidates, and majority vote requirements—there is no reasonable expectation that either blacks or persons strongly identified with their interests can be elected so long as elections remain at-large (Bolden J.S. App. 34b-35b, 38b-40b, 42b; Brown J.S. App. 13b, 40b-41b, 43b-45b, 47b). The candidates elected in these at-large systems, the court found, have been unresponsive to the interests of black citizens, and this unresponsiveness clearly reflects the

powerlessness of blacks in the political process (Bolden J.S. App. 35b-37b; Brown J.S. App. 13b-18b, 41b-42b).[26] Despite the obvious crippling effect of the at-large systems on black voters as a group, the representatives to the two state legislative bodies from districts in the City and County of Mobile have failed to exercise their critical influence to enact valid legislation to remedy the problem (Bolden J.S. App. 29b-31b; Brown J.S. App. 35b-37b).

The court rejected defendants' arguments that this Court's decisions in *Washington* v. *Davis*, 426 U.S. 229 (1976), and *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), regarding the intent requirement for violations of the Equal Protection Clause, preclude finding a constitutional violation under the test of *White* v. *Regester* absent a showing that the voting system under challenge was originally adopted for discriminatory reasons (Bolden J.S. App. 22b-32b; Brown J.S. App. 27b-37b). The district court concluded that a violation may still be found where evidence adduced under the tests used in this Court's vote dilution cases shows "a present purpose to dilute the black vote" (Bolden J.S. App. 31b; Brown J.S. App. 37b).

2. In *Bolden*, the district court's judgment directed that the August 1977 city elections be conducted pur-

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[26] Regarding the Board of School Commissioners in *Brown*, the district court found evidence of nonresponsiveness in the recalcitrance the commissioners displayed throughout the litigation in *Davis* v. *Board of School Commissioners of Mobile County, supra* (Brown J.S. App. 13b-18b).

suant to a plan to be developed later, featuring a mayor elected at-large and nine councilmen elected from single-member districts (Bolden J.S. App. 1c-3c). In a subsequent order, the court specified in detail a plan for the form of the new government and the boundaries of the districts from which the councilmen were to be elected (*id.* at 1d-63d). This plan was based in part on one submitted by a committee of three chosen by the court from names suggested by the parties (*id.* at 1d).[27] The order for the August 1977 elections was stayed by the district court pending defendants' appeal, and a subsequent order for elections on November 21, 1978, was stayed by the district court pending the further order of this Court (Bolden A. 37).[28]

3. In *Brown*, the district court's judgment ordered that the county be divided into five single-member districts from which members of the Board of School Commissioners would be elected (Brown J.S. App. 2d). Three of the incumbent commissioners lived in what would become district 2, and the terms of all but one incumbent, who lived in what was to be district 4, were due to expire at a time after 1978 (*id.* at 3d-4d). To avoid shortening the term

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[27] The defendants declined the court's initial request to submit a proposed single-member district plan and its later invitation to propose changes in the plan devised by the three-member committee (Bolden J.S. App. 1d). Plaintiffs both submitted their own plan and later made recommendations concerning the committee plan (*ibid.*).

[28] On October 16, 1978, Mr. Justice Powell denied plaintiffs' application to vacate the stay (Bolden A. 38).

to which any incumbent had been elected, the court directed (1) that the single-member district system be introduced in stages, with commissioners for districts 3 and 4 to be elected in 1978, a commissioner for district 5 in 1980, and commissioners for districts 1 and 2 in 1982, and (2) that the Board consist of six members between 1978 and 1980, with the sixth member to be a chairman who would vote only to break a tie (*id.* at 3d-5d).[29] The elections in districts 3 and 4 were held on November 7, 1978, and two black candidates nominated in the September primary were elected without opposition.[30]

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[29] When defendants appealed the order requiring the change to single-member districts, plaintiffs cross-appealed from the district court's failure to order elections in 1978 for all five districts created by the court's decree (Williams A. 151a-152a).

[30] During the period between the primary and general elections, the incumbent Board took several actions that appellees claimed were intended to frustrate the district court's order. First, the Board failed to elect a non-voting chairman as required by the court. Then the Board, preparatory to becoming a six-member body with two black members, adopted a series of rules enhancing the power of any subsequently appointed or elected non-voting chairman and requiring four votes for passage of important procedural and substantive measures. The district judge held three Board members in contempt for their obstructive actions. On October 27, 1978, Mr. Justice Powell issued an order staying the contempt proceedings and the November elections. On October 31, 1978, Mr. Justice Powell vacated the portion of his previous order staying the November elections. The district court thereafter entered an injunction (a) appointing Commissioner Alexander chairman for one year and Commissioner Drago for the

F. The Court of Appeals' Decisions

On review, in decisions by separate panels, the court of appeals affirmed the district court's judgment in each case (Bolden J.S. App. 1a-17a; Brown J.S. App. 1a-2a).

Bolden was decided together with three other "dilution" cases, according to the rationale set out in the lead case, *Nevett* v. *Sides*, 571 F.2d 209 (5th Cir. 1978). In *Nevett*, the panel majority acknowledged that racially discriminatory purpose is a necessary element of any violation of the guarantee of equal access to the political process.[31] Even *White* v. *Regester*, *supra*, and *Zimmer* v. *McKeithen*, *supra*, are "purpose" cases, the court reasoned. Because racially dilutive effect is established simply by a showing of racially polarized voting in an at-large system of elections, the additional factors specified in those cases must bear not on effect, but on purpose. *Nevett*, *supra*, 571 F.2d at 222. Purpose to discriminate need not, however, be manifest at the inception of

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next; (b) enjoining the new rules adopted by the Board; and (c) enjoining the new Board from voting to dismiss this appeal. (Order on Selection of School Board Chairman and on Plaintiffs' Motion to Enjoin New Board Policies, etc., dated November 24, 1978.)

[31] In a separate opinion, Judge Wisdom expressed the view that racially discriminatory effect, alone, should be sufficient for finding that an apportionment scheme violates the Equal Protection Clause of the Fourteenth Amendment and abridges or denies access to the political process on account of race within the meaning of the Fifteenth Amendment and its implementing statutes. See *Nevett*, *supra*, 571 F.2d at 231.

the plan (571 F.2d at 219-220 n.13): "All that is necessary is that the invidiously disproportionate impact 'ultimately be traced to a racially discriminatory purpose.' [*Washington* v.] *Davis*, 426 U.S. at 240."

The court discussed two ways other than proof of discriminatory purpose in the enactment by which the requisite invidious intent may be shown. First, if there is direct evidence that the system was continued *in order that* blacks would not be able to be elected, "the necessary intent is established" (*id.* at 222). The opinion in *Nevett* characterized the *Bolden* case as going off on such direct evidence (*ibid.*). In *Bolden* itself, the court of appeals gave special attention to two findings of the district court in this connection: (1) the finding that whenever *any* redistricting bill is introduced in the state legislature, "a major concern has centered around how many, if any, blacks would be elected," and (2) the finding that the 1965 enactment that locked in the at-large system by giving predetermined functions to the commissioners was "recent action * * * probative of an intent to maintain the plan * * *" (Bolden J.S. App. 14a). Thus the very longevity of the system for electing the City Commission in Mobile "is wholly consistent with the [district] court's ultimate conclusion that the plan has been maintained [for] the purpose of debasing black political input" (*id.* at 10a).

Second, the court of appeals explained, a plan may be found unconstitutional even without such direct evidence of purpose, if it has *become* a device for

excluding a group from effective participation in the political process. *Nevett, supra,* 571 F.2d at 222. Past and present unresponsiveness to the needs of blacks tends to show that elected officials realistically regard blacks as outside of their constituency. Other *Zimmer* factors, if found to be present, support the inference that the at-large system is functioning to implement racially discriminatory objectives. Since the district court in *Bolden* found almost all the *Zimmer* factors in favor of plaintiffs, and its findings were not clearly erroneous, those findings outweigh the city's interest in maintaining its at-large plan (Bolden J.S. App. 12a).

The court of appeals' unreported decision in *Brown* was summary. It held, citing *Bolden,* that none of the district court's findings was clearly erroneous, that the district court applied the law correctly, and that the relief was within the scope of the district court's equitable discretion (Brown J.S. App. 1a-2a).

SUMMARY OF ARGUMENT

I

1. In *White* v. *Regester,* 412 U.S. 755, 765 (1973), aff'g *Graves* v. *Barnes,* 343 F. Supp. 704 (W.D. Tex. 1972) (three-judge court), this Court held that a showing that multimember districts in a state legislative reapportionment plan "are being used invidiously to cancel out or minimize the voting strength of racial groups" establishes a violation of the Equal Protection Clause of the Fourteenth Amendment. Plaintiffs' burden is to show not merely that a racial group "has not had legislative seats in proportion to

its potential" but 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 * * * to participate in the political processes and to elect legislators of their choice." 412 U.S. at 765-766.

In *White* v. *Regester* the Court sustained such claims raised by blacks in Dallas County, Texas, and Mexican-Americans in Bexar County, Texas, on the basis of factual findings made by the three-judge district court from "its own special vantage point." *Id.* at 769. Both claims rested in part on the history of racial discrimination in Texas, and on certain features "of the Texas electoral [scheme that] * * * enhanced the opportunity for racial discrimination," *e.g.*, the "place" rule, requiring each candidate to run for a particular place on the ballot and resulting in "a head-to-head contest for each position," and the absence of subdistrict residency requirements—which would even permit all the candidates to reside on a single block. *Id.* at 766-767. In addition, the district court had found with respect to Dallas County that few blacks had been elected from the county since Reconstruction days, that blacks lacked access to the candidate slating process for the Democratic primary, that racial campaign tactics were used to defeat candidates with support from the black community, and that the Dallas County delegation to the legislature did not truly represent the interests of the black community in Dallas. *Graves* v. *Barnes*, *supra*, 343 F. Supp. at 726-727. The district court

had found with respect to Bexar County (1) that few Mexican-Americans had been elected representatives from that county, despite the fact that Mexican-Americans were a population majority there; (2) that the present effects of past discrimination against Mexican-Americans discouraged them from registering to vote; (3) that Anglos voted heavily for Anglo candidates in the primary elections and for Democrats in the general election; and (4) that the Bexar County delegation was unresponsive to the concerns of Mexican-Americans. 343 F. Supp. at 730-733.

Although the state apportionment plan involved in *White* v. *Regester* was recent, multimember districts had a long history in Texas. Thus *White* v. *Regester* applies to discriminatory adherence to at-large voting schemes with dilutive effects as well as to the discriminatory adoption of such schemes.

2. Neither logic nor precedent suggests any reason why the *White* v. *Regester* standard does not equally apply to at-large voting schemes for local government bodies. Precisely the same kinds of exclusion of racial groups from an opportunity for equal participation in the political process can occur, and the Equal Protection Clause applies to political subdivisions as well as to states. *Avery* v. *Midland County*, 390 U.S. 474, 479 (1968). Although consideration of the need of local governments for municipal arrangements that meet their varying individual requirements calls for some flexibility in determining whether local districting plans have met the constitutional one person, one vote requirement

(*Abate* v. *Mundt*, 403 U.S. 182 (1971)), the Equal Protection Clause forbids local, as well as state-wide, governments from maintaining an at-large voting scheme that implements an invidious purpose to cancel out the voting strength of a racial or ethnic group. See *Dusch* v. *Davis*, 387 U.S. 112, 116 (1967); *Beer* v. *United States*, 425 U.S. 130, 142 n.14 (1976); *Abate* v. *Mundt*, *supra*, 403 U.S. at 184 n.2.

3. The *White* v. *Regester* standard is consistent with this Court's decisions in *Washington* v. *Davis*, 426 U.S. 229 (1976), and *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), holding that official action that has a racially disparate effect violates the Equal Protection Clause only if it is also shown to be purposeful discrimination. The weight to be given disparate impact as an indication of discriminatory purpose and the types of additional evidence needed in order to prove purposeful discrimination necessarily vary with the type of state action in question. *Arlington Heights*, *supra*, 429 U.S. at 266.

In vote dilution cases under *White* v. *Regester*, at least three categories of indicia of discriminatory purpose are considered: (1) present disparate effect; (2) a history of discrimination in other matters tending to suggest that racial animus is a factor that motivates or perpetuates the scheme; and (3) unresponsiveness of the elected body to the submerged minority community, tending to demonstrate that the elected officials do not regard that minority as a part of their constituency.

Nothing in *White* v. *Regester* precludes courts from affording defendants an opportunity to show substantial nonracial purposes served by adhering to the challenged electoral scheme or from ruling for defendants if evidence of nondiscriminatory reasons for adhering to the schemes outweighs plaintiffs' evidence of purposeful discrimination.

II

The district court's findings in the present cases support its conclusions that each of the challenged at-large schemes operates to cancel out or minimize the voting strength of the black minority and has been intentionally maintained for this purpose.

1. Analyses of election results reveal not only that no blacks and only one black-identified candidate have ever been elected to either the Mobile City Commission or the Mobile County Board of School Commissioners but also that increased black voter registration and highly visible support in the black community for a particular candidate produce a heavy vote among the white majority for the opposing candidate. Structural features of the electoral schemes similar to those of the Texas counties in *White* v. *Regester* enhance the effects of racially polarized voting. Thus the more that blacks seek to exercise their political rights, the less they enjoy any political effectiveness. This phenomenon is the functional equivalent of the closed slating process in *White* v. *Regester.*

2. The election results themselves not only show discriminatory effect, but also are indicative of discriminatory purpose in maintaining these at-large schemes. Other evidence of such purpose in each case includes the long history of racial discrimination in Alabama in matters affecting the franchise, the evidence that the number of blacks likely to be elected is considered whenever any alternative districting scheme is introduced in the state legislature, and the unresponsiveness of both the city commission and the school board to the particularized interests of blacks.

3. Cognizable evidence of substantial nonracial purposes for maintaining the challenged electoral schemes was not offered in either case. The defense of the commission form of government in *Bolden* came down simply to a defense of at-large voting in itself, since the *Bolden* defendants did not attempt to show that other features of commission government were inconsistent with anything but a purely at-large electoral scheme. At-large voting was likewise the only feature of the electoral scheme at issue in *Brown*. In both cases the claimed justification for at-large voting was essentially that it produced political representatives with a broad, rather than a parochial, view. But where, as in these cases, voting is strongly polarized along racial lines, the broad view is likely to be simply the view of the majority racial group. Reliance on this justification in these circumstances, therefore, tends more to suggest discriminatory purpose than to disprove it.

III

The Fifteenth Amendment provides an independent, alternative ground for affirming the judgments in these cases. It prohibits those denials and abridgments of the franchise on account of race that would constitute purposeful discrimination under the Equal Protection Clause, and it also forbids official maintenance of electoral schemes that enhance the effects of private racial bias in voting and unfairly cancel out the voting strength of a racial minority, whether or not invidious racial purpose is shown on the part of those who adopt or maintain the schemes.

This construction of the Fifteenth Amendment accords with the congressional purpose in its adoption, represents a reasonable reading of its language, is consistent with this Court's decisions under the Fifteenth Amendment, and indeed follows logically from the decision of this Court in *Terry* v. *Adams*, 345 U.S. 461 (1963). In *Terry* this Court struck down, as violative of the Fifteenth Amendment, a state electoral scheme that permitted racially segregated political primaries conducted by a private group to deny black voters meaningful participation in the political process. The electoral schemes challenged in the present cases similarly enhance the effects of racial bloc voting and thereby abridge exercise of the franchise by the black minority.

IV

The district court properly exercised its remedial discretion in each of the present cases in ordering

the implementation of single-member district plans, since at-large voting was the primary cause of the submergence of the black vote in the challenged electoral schemes. Although a plan other than the strong-mayor-council plan adopted in *Bolden* (such as a plan preservative of some features of the commission form of government) might have been constitutionally permissible, the *Bolden* defendants suggested no plan that did not retain at-large voting for all elective positions. The strong-mayor-council plan had the support of a number of witnesses and, in its division of power between mayor and council, is similar to plans used in two large Alabama cities. In both cases the State remains empowered to adopt alternative forms of representation that are constitutionally permissible and meet the requirements of the Voting Rights Act of 1965.

ARGUMENT

I THE EQUAL PROTECTION STANDARD OF *WHITE* v. *REGESTER* GOVERNS THESE CASES

A. *White* v. *Regester* Synthesizes Principles of Apportionment Cases and Racial Discrimination Cases

The "right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights." *Reynolds* v. *Sims*, 377 U.S. 533, 562 (1964), citing *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886). The Equal Protection Clause of the Fourteenth Amendment protects this central right against direct and obvious infringements, such as outright denials of the right to vote based on unwar-

ranted classifications (*e.g.*, *Kramer* v. *Union Free School District No. 15*, 395 U.S. 621 (1969), and *Carrington* v. *Rash*, 380 U.S. 89 (1965)) and against indirect and less obvious infringements, such as burdensome registration requirements that unjustifiably exclude a given class of persons from exercise of the franchise (*e.g.*, *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966)) and malapportioned legislative districts that result in "the debasement or dilution of a citizen's vote" if he lives in a district allotted relatively fewer representatives than other districts by the existing apportionment scheme (*e.g.*, *Reynolds* v. *Sims*, *supra*). The Equal Protection Clause, of course, independently protects persons against state action that discriminates on the basis of race, whether or not that discrimination touches the right to vote. *Brown* v. *Board of Education*, 349 U.S. 294 (1955).

The present cases involve both the right of the black residents of the City and County of Mobile to be free from racial discrimination operating through particular electoral schemes and their right to have their votes accorded the same weight as those of other voters in those jurisdictions.

In several of its early cases concerning vote dilution claims based on the asserted effects of apportionment schemes providing for the at-large election of a number of representatives from a single political subdivision, this Court recognized that, although multimember district systems were not unconstitutional per se, such a system might be subject to

challenge in a particular case if it operated "to minimize or cancel out the voting strength of racial or political elements of the voting population." *Whitcomb* v. *Chavis*, 403 U.S. 124, 142-143 (1971), quoting *Fortson* v. *Dorsey*, 379 U.S. 433, 439 (1965), and *Burns* v. *Richardson*, 384 U.S. 73, 88 (1966). This dictum suggested a synthesis of apportionment principles with the recognized constitutional proscription of racial discrimination. Some of the limits of that synthesis were indicated in *Whitcomb* v. *Chavis*, *supra*, in which this Court rejected a racially based vote dilution claim for failure of proof. The synthesis was most fully elaborated in *White* v. *Regester*, 412 U.S. 755 (1973), in which two such claims were upheld.

In *Whitcomb* the Court rejected the claim that residents of a black ghetto in Marion County (Indianapolis) Indiana had been subjected to invidious discrimination, despite the fact that "the number of ghetto residents who were legislators was not in proportion to ghetto population" (403 F.2d at 149). It did so because "nothing in the record or in the court's findings [indicated] that poor Negroes were not allowed to register or vote, to choose the political party they desired to support, to participate in its affairs or to be equally represented on those occasions when legislative candidates were chosen."

In *White* v. *Regester*, the Court clarified the implications of its negative holding in *Whitcomb*: proof of unlawful vote dilution need not include any one of those particular factors missing in *Whitcomb*, but the evidence must add up to exclusion of the minority

group from meaningful access to the political process. "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." *White* v. *Regester*, *supra*, 412 U.S. at 766. Denial of access to the political process, thus, is the ultimate finding of fact that triggers the legal conclusion that a particular multimember districting scheme or other at-large electoral system is unconstitutional. Determining whether such a denial is taking place is not a simple task, for it cannot be inferred automatically from the failure of black-supported candidates to win elections. 412 U.S. at 765-766. The determination requires that the district court make "an intensely local appraisal of the design and impact" of the electoral scheme at issue "in the light of past and present reality, political and otherwise." 412 U.S. at 769-770.

In *White* v. *Regester*, then, the essential factual analysis supporting the finding of the constitutional violation is that of the district court (*Graves* v. *Barnes*, 343 F. Supp. 704, 724-734 (W.D. Tex. 1972) (three-judge court)), speaking "from its own special vantage point." *White* v. *Regester*, *supra*, 412 U.S. at 769-770. The district court in *Graves* v. *Barnes* focused on four structural features and five dynamic characteristics of the multimember state legislative

elections in Dallas County and Bexar County, Texas, to determine if the black vote and the Mexican-American vote in those counties, respectively, were being invidiously minimized or cancelled out by use of the at-large system. Both districts were large in terms of both population and physical size. In these counties, as in all Texas counties, the primary could be won only by a majority vote; in both the primary and the general election, each candidate had to run for a particular place on the ballot, with the result that each candidate was locked into a single head-to-head contest for a legislative position; and candidates were not required to live in any subdistrict, *i.e.*, it was possible for the entire membership of the delegation to reside on the same city block. See 343 F. Supp. at 725.

The dynamics of exclusion in the two counties were not identical, although in neither case had blacks or Mexican-Americans served in the Texas legislature in anything near their proportion of the population. *Id.* at 726, 732. In Dallas County, a white-dominated slating organization had the power to choose a slate of candidates to run in the all-important Democractic primary, and regularly excluded from its slates both blacks and persons whom blacks would be particularly interested in supporting. *Id.* at 726. If such a person nonetheless ran against the officially slated candidates in the primary, overt racially oriented campaign tactics would be used to bring out the white vote and defeat him. *Id.* at 727.

In Bexar County, there was no formal slating process, but severely polarized racial bloc voting in the Democratic primary assured that no Mexican-American survived as a Democratic candidate in the virtually pro forma general election. 343 F. Supp. at 731. The upshot, in both instances, was that minority interests were rarely represented in the general election.

In both counties there was a long history of discrimination. The minority groups had in earlier times been excluded from access to the political processes by more blatant means—blacks by white primaries and poll taxes, Mexican-Americans by restrictive registration procedures which, combined with linguistic and cultural barriers, made it unlikely they would attempt to register and vote. *Id.* at 725, 731. Because those cultural barriers continued to inhibit Mexican-Americans from registering and voting even in the early 1970's, it was impossible for them to affect the political process even where they were, as in Bexar County, a potential electoral majority (*ibid.*).

Finally, the district court discerned a clear symptom of political exclusion in the continuing unresponsiveness of the Dallas and Bexar County delegations to the particularized interests of blacks and Mexican-Americans. In the 1950's, for example, the Dallas County delegation had led the state legislature's campaign to preserve segregation (*id.* at 726); and the Bexar County delegation had never sponsored any legislation to relieve the plight of Mexican-

Americans, who had long borne the problems of poor housing, poor education, and other concomitants of persisting poverty (*id.* at 725-726, 730, 732).

On the basis of these factors, then, the district court concluded that the *Whitcomb* v. *Chavis* standard had been met: the minorities in both counties were effectively excluded from the political processes and had less opportunity than did whites to elect representatives of their own choosing. On the basis of the district court's findings, this Court affirmed. *White* v. *Regester*, *supra*, 412 U.S. at 767, 769-770.

Although *White* v. *Regester* dealt with districts that were part of a recent reapportionment plan for the Texas legislature,[32] its rationale regarding the racially based vote dilution claim was in no way limited to *changes* in a system made so as to exclude minorities, for the multimember district feature of the scheme had existed for decades. Nor was the Court concerned with the precise reasons motivating the original adoption of multimember districts in Texas. Rather, it looked to the district court's findings concerning how the districting system was operating in Dallas and Bexar counties to determine whether it was "*being used* invidiously to cancel out or minimize the voting strength of racial groups." 412 U.S. at

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[32] Recent changes were relevant for a separate part of the case that concerned population deviations among a number of the districts created by the reapportionment plan, but the claim there rested on "one person, one vote" principles. 412 U.S. at 761-764.

765 (emphasis added).[33] Thus, in striking down multimember districts for Dallas and Bexar counties, this Court acted upon two premises already well established in its apportionment decisions: (1) an apportionment scheme, whenever passed, is always "state action" for Fourteenth Amendment purposes; and (2) denial of equal protection of the laws can be, and often is, accomplished by deliberate state adherence to the same apportionment scheme as well as by a shift to such a scheme.[34]

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[33] With respect to the Bexar County district, the district court observed that "a State may not design a system that deprives [racial or ethnic minorities] of a reasonable chance to be successful [in the political process]." 343 F. Supp. at 734. Echoing that language, this Court noted that the district court had concluded that "the multimember district, as designed and operated in Bexar County, invidiously excluded Mexican-Americans from effective participation in political life * * *." 412 U.S. at 769. No such language was used in either opinion in the analysis of the Dallas County district, however; and the district court made no specific inquiry into the reasons motivating those who originally adopted a multimember district system for Texas. Hence, the references to "design" cannot be taken as indications that a system *maintained* for a discriminatory purpose is impervious to constitutional challenge if it was not originally adopted to serve that purpose.

[34] The Fifth Circuit has explicitly acknowledged those premises in a number of dilution cases. For example, in *Paige* v. *Gray*, 538 F.2d 1108, 1111 (1976), that court said: "[T]he Supreme Court has never indicated that its dilution principles should only be used to test recently enacted provisions. To the contrary, *White* struck down a multimember scheme which had been in operation since at least 1914, although the specific charter provisions at issue were of more

Nor is the *White* v. *Regester* rationale limited by logic or precedent to state-wide electoral schemes, as appellants in No. 78-357 suggest (Br. 52-54, 64-69). See also *Wise* v. *Lipscomb*, No. 77-529 (June 22, 1978) (opinion of Rehnquist, J.). This Court held in *Avery* v. *Midland County*, 390 U.S. 474, 479 (1968), that "[t]he Equal Protection Clause reaches the exercise of state power however manifested, whether exercised directly or through subdivisions of the State." In *Hadley* v. *Junior College District of Metropolitan Kansas City*, 397 U.S. 50 (1970), it made clear that special purpose governmental bodies such as school boards, as well as governing bodies with broader powers, are within the reach of that clause, so long as their members are selected by popular election. *Avery* and *Hadley* were, to be sure, "one person, one vote" apportionment cases, and it is also true that this Court has consistently noted its concern in such cases that "[i]n assessing the constitutionality of various apportionment plans" an allowance be made for the fact that "viable local governments may need considerable flexibility in municipal arrangements if they are to meet changing societal needs * * *." *Abate* v. *Mundt*, 403 U.S. 182, 185 (1971) (citation omitted).

Local government at-large electoral schemes, however, may be used as easily as state multimember

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recent vintage." In *Wallace* v. *House*, 515 F.2d 619, 633 (5th Cir. 1975), vacated on other grounds, 425 U.S. 947 (1976), the court noted: "At-large voting in aldermanic elections has been the state policy of Louisiana since 1898."

legislative districts to exclude minorities from effective participation in the political process; and the desirability of allowing for diversity and flexibility in local government arrangements cannot justify such a discriminatorily operated local at-large scheme.[35] Thus, in *Dusch* v. *Davis*, 387 U.S. 112 (1967), in which this Court held that "one person, one vote" principles were not violated by a metropolitan government plan calling for the imposition of borough residency requirements on an at-large system, the Court noted that the "constitutional test under the Equal Protection Clause is whether there is an 'invidious discrimination.'" 387 U.S. at 116. The district court in *Dusch* had found no such discrimination; but, as this Court observed, quoting from the district court's unreported opinion, the plan could be scrutinized once it was in effect to see if it operated "'to minimize or cancel out the voting strength of

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[35] Permitting "slightly greater percentage deviations" from strict population equality in "local government apportionment schemes" than are allowed for state legislative apportionment plans (*Abate* v. *Mundt*, *supra*, 403 U.S. at 185) is quite a different matter from permitting a local government deliberately to maintain a system that excludes minorities from the political process (*id.* at 184 n.2). A substantial nonracial interest served by a particular local government electoral scheme might, in some cases, however, serve to rebut evidence that the scheme was maintained for an invidious discriminatory purpose. We discuss this point in detail below (pages 59-61). Only at-large voting is truly at issue in the present two cases, and it is entirely conceivable that other features of the commission form of government in the City of Mobile could be retained without injury to any person's constitutional rights (see point IV, *infra*).

racial or political elements of the voting population.' " 387 U.S. at 117. Similarly, in *Beer* v. *United States*, 425 U.S. 130 (1976), in considering the validity, under Section 5 of the Voting Rights Act of 1965, of a reapportionment plan for a city council that provided for five single-member councilmanic districts and two at-large seats, this Court found no cognizable statutory claim (in the absence of a discriminatory purpose in adopting the plan) because the plan improved minority representation on the council; but the Court nonetheless noted that such a plan could be invalidted on constitutional grounds if it discriminated on the basis of race. 425 U.S. at 142 n.14.[36] No constitutional claim had been made in *Beer*, however, and the Court suggested that this was understandable in view of the fact that the plan did not "remotely approach a violation of the constitutional standards enunciated" in *Fortson* v. *Dorsey, supra*, *Burns* v. *Richardson, supra; Whitcomb* v. *Chavis, supra*, and *White* v. *Regester, supra.* 425 U.S. at 142-143.[37]

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[36] Indeed, the Court noted that the plan could be invalidated even if it were "a substantial improvement over its predecessor in terms of lessening racial discrimination," so long as it continued "so to discriminate on the basis of race or color as to be unconstitutional." *Ibid.*

[37] Although this Court in *East Carroll Parish School Board* v. *Marshall,* 424 U.S. 636, 638 (1976), affirmed the court of appeals' judgment in *Zimmer* v. *McKeithen,* 485 F.2d 1297 (5th Cir. 1973) (en banc), "without approval of the constitutional views expressed by the Court of Appeals," it did not reject the proposition that *White* v. *Regester* applies, in a proper case, to at-large systems for electing local government

White v. *Regester*, then, sets a standard by which to test claims that a particular system for electing political representatives—whether it is multimember state legislative districts or other systems of at-large voting—is being used invidiously to exclude a minority group from the political process, and therefore violates the Equal Protection Clause. That standard, as we show below (pages 51-57), is consistent with this Court's subsequent decision in *Washington* v. *Davis*, 426 U.S. 229 (1976), concerning the showing of intent required for establishing a violation of the Equal Protection Clause in a racial discrimination case. It is thus the standard that properly governs the Fourteenth Amendment claims in the two cases here.

B. The Standard of *White* v. *Regester* is the Equal Protection Standard Prohibiting Purposeful Discrimination

In *Washington* v. *Davis*, *supra*, this Court held that official action will not be held unconstitutional solely because it has a racially disproportionate effect. To establish a violation of the Equal Protection Clause, the Court held, proof of a discriminatory purpose must be shown. We agree with the view expressed by the Fifth Circuit in *Nevett* v. *Sides*, 571 F.2d 209, 219 (5th Cir. 1978) (see page 31 *supra*) that this proposition applies to all Fourteenth Amend-

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bodies. Moreover, the Fifth Circuit has since, in *Nevett* v. *Sides*, *supra*, explained its *Zimmer* analysis more carefully within the framework of traditional equal protection principles (see pages 31-33, *supra*).

ment racial discrimination claims, including those involving vote dilution.

This Court made it clear, however, that discriminatory purpose need not be express (426 U.S. at 241); for "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." 426 U.S. at 242. In *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), this Court elaborated on its *Davis* holding, explaining that the "sensitive inquiry" into purpose might be easier, and the probative weight of impact alone greater, in some types of cases than in others. 429 U.S. at 266. As Mr. Justice Stevens had observed in his concurring opinion in *Davis* (426 U.S. at 253):

> The requirement of purposeful discrimination is a common thread running through the cases summarized in Part II [of the Court's opinion]. These cases include criminal convictions which were set aside because blacks were excluded from the grand jury, a reapportionment case in which political boundaries were obviously influenced to some extent by racial considerations, a school desegregation case, and a case involving the unequal administration of an ordinance purporting to prohibit the operation of laundries in frame buildings. Although it may be proper to use the same language to describe the constitutional claim in each of these contexts, the burden of proving a prima facie case may well involve differing evidentiary considerations. The extent of

> deference that one pays to the trial court's determination of the factual issue, and indeed, the extent to which one characterizes the intent issue as a question of fact or a question of law, will vary in different contexts.

Racially based vote dilution cases decided under *White* v. *Regester*, like the two instant cases, necessarily involve different "evidentiary considerations" from those in *Davis* and *Arlington Heights*. This is so in part because the claim concerns not a particular recent decision to take a certain action but rather the invidiously discriminatory maintenance and use of a system that may not have been discriminatory at its inception, and in part because, as noted above (page 41), apportionment principles, as well as racial discrimination law, are concerned.

The reapportionment decisions do not speak in terms either of "purpose" or of "effect." In that context, a purpose to subordinate the "one person, one vote" principle to other considerations (however identified) is inseparable from the effect of doing so (and therefore is properly presumed) and is constitutionally impermissible. *Mahan* v. *Howell*, 410 U.S. 315, 326 (1973). It would, in any event, take little imagination to discern purpose when state legislators, whose members owe their office to a "rotten borough" electoral base, decline to alter representative districts. Nor are those representatives' constituencies likely to endorse candidates who would promise, if elected, to divest the "rotten boroughs" of their disproportionate power in the legislative body. Thus,

this Court's ultimate decision to enter the "political thicket" (*Colegrove* v. *Green*, 328 U.S. 549, 556 (1946)) was based upon the recognition that abridgment of the right to an effective vote, whether by means of apportionment or otherwise, is not amenable to change through conventional political processes.

Because *White* v. *Regester* concerned not merely deliberate discrimination lacking a rational basis but invidious *racial* discrimination, this Court did not limit its inquiry to whether the scheme in question assured quantitatively greater political representation to certain classes of voters without any rational justification. Indeed, it acknowledged that a multimember district cannot be held unconstitutional simply because a distinct racial group fails to win "legislative seats in proportion to its voting potential," 412 U.S. at 765-766.[38] The types of evidence indicative of intent to which the Court looked fall into three categories: (1) present disparate effect; (2) a history of discrimination in other matters tending to suggest that racial animus is a factor that motivates and perpetuates the scheme; and (3) unresponsive-

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[38] Single-member districts are, of course, preferred in court-ordered plans, even without proof that a racial group is adversely affected by multimember districts. *Wise* v. *Lipscomb*, *supra*; *East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976); *Connor* v. *Johnson*, 402 U.S. 690 (1971). They tend to further representative government by, *inter alia*, reducing campaign costs, easing direct communication with representatives, and discouraging bloc voting. *Connor* v. *Finch*, 431 U.S. 407, 415 (1977); *Chapman* v. *Meier*, 420 U.S. 1, 19 (1975). See also *Lucas* v. *Colorado General Assembly*, 377 U.S. 713, 731, n.21 (1964).

ness of the elected body to the submerged minority community, tending to demonstrate that the elected officials do not regard that minority as a part of their constituency.

The first category—present disparate effect—can, as this Court has noted in both *Davis* (426 U.S. at 241, 242) and *Arlington Heights* (429 U.S. at 266), be a strong indicator of discriminatory purpose. As to the second category—history of racial discrimination—it is a familiar principle that inferences may be drawn from evidence of "similar transactions and happenings." McCormick on *Evidence* § 164 (1954 ed.). Hence, where there is a history of official racial discrimination and another substantial disparity occurs, it is permissible to draw at least the tentative inference that race has again been a motivating factor.[39] Finally, regarding evidence of unresponsiveness, as the Fifth Circuit has explained in *Nevett* v. *Sides*, *supra*, 571 F.2d at 220, a finding that this factor is absent, *i.e.*, that the elected representatives do respond to the concerns of the racial minority in question, "weighs heavily against an inference of intentional discrimination because the incumbents are not visibly exploiting their majority status to the detriment of minority constituents." A finding of unresponsiveness would, of course, indicate the oppo-

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[39] Appropriately, for present purposes, the example chosen by the Court in *Arlington Heights* (429 U.S. at 267) for this proposition was *Davis* v. *Schnell*, 81 F. Supp. 872 (S.D. Ala.), aff'd per curiam, 336 U.S. 933 (1949), in which Alabama's "interpretation" test was held invalid.

site.[40] In sum, we submit that the violation found in *White* v. *Regester* was purposeful discrimination. But see *Black Voters* v. *McDonough*, 565 F.2d 1, 4 n.6 (1st Cir. 1977) (dictum).

As appellants in No. 77-1844 note (Br. 28), this Court's decision in *Arlington Heights* indicates that defendants charged with racial discrimination violative of the Equal Protection Clause may rebut a prima facie case—*i.e.*, a showing that the challenged state action was motivated at least in part by a ra-

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[40] In determining whether the at-large system had discriminatory impact, the courts below, as did the district court in *Graves* v. *Barnes*, *supra*, took note of the way in which particular at-large systems allowed private prejudice, in the form of racial bloc voting, to succeed in excluding the minority group from effective participation in the political process. While we do not suggest that the existence of racial bloc voting in an at-large system, without more, makes out a violation of the Equal Protection Clause, it is highly pertinent. This Court has held on several occasions that a scheme of state action may be found invidiously discriminatory because it facilitates or implements racial discrimination by others. See, *e.g.*, *Norwood* v. *Harrison*, 413 U.S. 455 (1973) (state cannot supply free textbooks to private schools with racially discriminatory policies where the aid significantly supports the existence of a separate system of such schools); *Anderson* v. *Martin*, 375 U.S. 399 (1964) (state cannot require ballots to identify race of candidate); *Shelley* v. *Kraemer*, 334 U.S. 1, 19 (1948) (state courts cannot enforce restrictive covenants reflecting private discrimination); *Green* v. *County School Board*, 391 U.S. 430 (1968) (freedom-of-choice plan inadequate to desegregate public schools). In *Norwood* v. *Harrison*, *supra*, the textbook policy was found unconstitutional despite the fact that it had originated during de jure segregation of the public schools and thus embodied no racially discriminatory purpose of its own.

cially discriminatory purpose—by proving that the action in question was supported by other legitimate purposes and "would have resulted even had the impermissble purpose not been considered." 429 U.S. at 270-271 n.21. In applying this principle to vote dilution cases, we submit, a defendant's evidence of substantial nonracial purposes served by taking or continuing the particular state action in question should be weighed by the court against plaintiff's evidence indicative of improper racial purpose before the ultimate finding of invidious discrimination (or lack thereof) is made. As so applied, this principle is, as we show below, entirely consistent with *White* v. *Regester* and cases following it.

In stating this principle in *Arlington Heights*, this Court referred to its decision of the same day in *Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274 (1977). We see little applicability, however, of the holding in *Mt. Healthy* to vote dilution cases, beyond the way in which *White* v. *Regester* applied the general principle, later articulated in *Arlington Heights*, to such cases.

In *Mt. Healthy*, the Court held that where respondent, an untenured school teacher, had shown that his employer's disapproval of his exercise of First Amendment rights was a factor in his discharge, the district court should then have considered evidence proferred by the employer to show that the teacher would have been discharged for other reasons even if he had not chosen to exercise his First Amendment rights. The Court stated that the "constitutional

principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct." 429 U.S. at 285-286. To protect an employee from a discharge that would have occurred anyway, simply because he engaged in such conduct, the Court suggested, would grant him a windfall and unnecessarily harm the employer's legitimate interests at the same time. *Id.* at 286. The "proper test," the Court explained, was one "which likewise protects against the invasion of constitutional rights without commanding undesirable consequences not necessary to the assurance of those rights." *Id.* at 287.

Minority citizens whose voting strength is minimized or cancelled out by a discriminatorily operated election scheme secure no windfall, however, when the scheme is modified to grant them equal opportunity for participation in the political process, even if it can be shown that the scheme might have been adopted or maintained for other reasons absent the improper racial motives of those maintaining and profiting from it. Nor can it fairly be argued that modification of such a scheme to overcome the dilutive effect is "not necessary to the assurance of [the] rights" of racial minorities subject to it—even though the scheme might have been a permissible one had there been no improper racial purpose. See *City of Richmond* v. *United States*, 422 U.S. 358, 378-379 (1975). Like subordination of the "one person, one vote" principle to other considerations in the reapportionment cases (see page 53, *supra*), intentional sub-

ordination to other considerations of the opportunity of a minority racial group for meaningful participation in the political process is, under *White* v. *Regester*, constitutionally prohibited.

It is entirely appropriate, however, after plaintiffs have shown an electoral scheme's disparate racial impact, together with other evidence indicative of discriminatory intent, to permit defendants to show that maintenance of the scheme in fact serves substantial nonracial purposes that could not be attained by any less dilutive system. It would then be for the court to determine whether defendants' countervailing evidence so outweighed plaintiffs' proof as to suggest that the system was not being "operated as [a] purposeful device[] to further racial * * * discrimination" (*Whitcomb* v. *Chavis*, *supra*, 403 U.S. at 149). This would also assure appropriate consideration of the need of local governments for "flexibility in municipal arrangements" to meet "changing societal needs" (*Abate* v. *Mundt*, *supra*, 403 U.S. at 185).[41]

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[41] If this inquiry is made in the course of determining whether purposeful discrimination has been shown, there will be no occasion separately to consider whether an invidiously discriminatory electoral scheme is justified by a compelling state interest. If the court determines that defendants' evidence of substantial nonracial purpose in maintaining the scheme outweighs evidence indicative of improper racial purpose, there will be no purposeful discrimination against which to balance a compelling state interest. If, on the other hand, defendants' evidence of substantial nonracial purpose is found inadequate, then, a fortiori, no compelling state interest may be demonstrated.

In *White* v. *Regester*, this Court had no reason to weigh nonracial justifications for the multimember districts in Dallas and Bexar counties because the district court (343 F. Supp. at 717-718, 723) had found, in considering the use of multimember districts in the Texas reapportionment plan as a whole, that the state had no consistent policy favoring multimember districts in general, and the state's claim that Dallas was maintained as a multimember district to satisfy popular preference was contrary to the evidence, even if such a justification might otherwise suffice (see *Lucas* v. *Colorado General Assembly*, 377 U.S. 713, 736 (1964)).[42]

The Fifth Circuit, in applying its *Zimmer* criteria, drawn largely from *Whitcomb* v. *Chavis*, *supra*, and *White* v. *Regester*, *supra*, has in fact considered legitimate policy reasons proffered for particular electoral schemes in deciding whether violations of

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[42] As this Court noted in *White* v. *Regester* (412 U.S. at 762 n.6), the district court's suggestion that what it saw as an irrational mixture of multimember and single-member districts in the state plan would be an adequate ground to invalidate the plan (343 F. Supp. at 717-718) was simply dictum, since the district court overturned the plan on the ground that large population variations among the districts made it unconstitutional under *Reynolds* v. *Sims*, *supra*. Although this Court reversed the *Reynolds* v. *Sims* holding and also observed that there was no authority for the proposition that "the mere mixture of multimember and single member districts in a single plan, even among urban areas, is invidiously discriminatory," it did not reverse the district court's factual findings on the question whether the state was acting on the basis of legitimate policy considerations in maintaining multimember districts.

the Equal Protection Clause have been made out. In *Zimmer* itself, the court saw this factor as aiding plaintiffs because it found no nonracial policy justification for the at-large electoral schemes in question. *Zimmer* v. *McKeithen*, *supra*, 485 F.2d at 1307. It made clear, however, in both *Nevett* v. *Sides*, *supra*, 571 F.2d at 228, and in its decision on review in No. 77-1844 (Bolden J.S. App. 9a-10a), that it regards the interest of a state or political subdivision in maintaining a particular electoral scheme a factor to be weighed against any showing of discriminatory intent made by plaintiffs under the other *Zimmer* criteria.

In sum, proof of a violation of the Equal Protection Clause under *White* v. *Regester* requires proof of purposeful discrimination, *i.e.*, proof that an electoral scheme has either been designed, or is being deliberately operated, as a device to exclude a racial minority from an equal opportunity to participate in the political process. The *White* v. *Regester* standard is therefore consistent with *Washington* v. *Davis* and *Arlington Heights*, and it permits adequate consideration of the interests of local governments in maintaining political systems that serve their diverse and changing needs. As we show in point II, *infra*, the courts below properly found constitutional violations under that standard.

II UNDER THE STANDARD OF *WHITE* v. *REGESTER*, THE COURTS BELOW CORRECTLY FOUND THAT THE CHALLENGED AT-LARGE SYSTEMS EFFECTIVELY IMPLEMENT A PRESENT PURPOSE TO MINIMIZE OR CANCEL OUT THE VOTING STRENGTH OF BLACK CITIZENS AND THEREBY VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

A. Blacks Are Effectively Excluded from the Political Process by Which the Mobile City Commission and the Mobile County Board of School Commissioners Are Elected

The immediate instrumentality by which whites assure that blacks will be denied representation is racially polarized bloc voting in Mobile. This phenomenon is not present in all jurisdictions—it was not present in Marion County, Indiana, for example —and where present, is not always controlling. In a large electorate, most identifiable group interests are those of some minority: business, labor, the old, the young and so forth. Majoritarian systems demand that these interests form coalitions. Any reasonably large cohesive group—and blacks are roughly one third of the Mobile electorate—would ordinarily be thought significant enough to be able to command a role in the building of a coalition, or several shifting coalitions. And so they do, in jurisdictions where the economic or social concerns that many blacks share with at least some whites are not prevented by racial considerations from playing an important role in the political process.

In Mobile, however, as the expert's "regression analysis" showed, and the district court found (Bol-

den J.S. App. 19b), race is the single most important factor in the political process. Whites will not form coalitions with blacks; in any instance in which blacks are likely to vote as a bloc, whatever interests might otherwise divide whites are submerged in the overriding interest of defeating the candidate who would represent blacks. In one egregious example, the court found (*ibid.*), otherwise competing white factions actually made a formal agreement not to field more than one white candidate so that the white vote would not be split, but would coalesce to defeat the black candidate.

This process is the exact analogue of the exclusionary slating process in Dallas County, Texas, and functions in essentially the same manner as the exclusion of Mexican-Americans in Bexar County, Texas. Thus, the contention of appellants in No. 78-357 (Br. 46-49) that discrimination under *White* v. *Regester* may not be found because there were no formal barriers to political activity and no discriminatory slating organizations simply misses the point. Also, as in the case of the multimember district elections in Dallas County and Bexar County, structural characteristics of the electoral schemes at issue here enhance the effects of racial bloc voting. Both the City and the County of Mobile are large districts. The city commissioners and county school commissioners are all elected at-large to predesignated "places," without subdistrict residency requirements and by majority vote—in the primary in the case of the school commissioners, and in the nonpartisan

election in the case of the city commissioners (Bolden J.S. App. 4b-5b, 21b; Brown J.S. App. 6b, 8b, 22b, 44b).

Appellants also misconceive the importance of the polarized voting phenomenon when they argue that, after all, blacks do vote for white candidates (see, *e.g.*, No. 77-1844 Br. 22-23; No. 78-357 Br. 46-49). Where no candidate is particularly identified with black interests, blacks do indeed vote, but not as a bloc. This is most apparent in the Greenough-Bailey run-off discussed in the Statement, *supra* at page 16, note 21. Both the white vote and the black vote split in that election, and more blacks voted for the loser than for the winner. By contrast, where Langan has been a candidate, or Gerre Koffler (*supra* at pages 13-16), the court found (Bolden J.S. App. 10b) that whites coalesced around their opponents. The ironic effect, the court found, is that black political strength has decreased in direct proportion to the increase in black registration and voting since 1965 (*ibid.*), *i.e.*, the more blacks seek to exercise their political rights, the less effective they will be (see also Bolden A. 157-159, 574). In a system that incorporates the *White* v. *Regester* factors of at-large elections, majority vote, and "place" requirements, the ultimate effect is that none of the elected officials represent the interests of blacks—a fact which, as we show below (pages 74-77), is amply demonstrated by the officials' unresponsiveness to those interests.

Taking cognizance of this effect is not, as appellants argue (No. 77-1844 Br. 20-21; No. 78-357 Br.

21-22), either to make bloc voting itself constitutionally suspect or to demand "proportional representation." It is simply to apply a principle well established in the case law of racial discrimination: "In the problem of racial discrimination, statistics often tell much, and Courts listen." *Alabama* v. *United States*, 304 F.2d 583, 586 (5th Cir.), aff'd, 371 U.S. 37 (1962), quoted in *Graves* v. *Barnes*, *supra*, 343 F. Supp. at 729-730, aff'd in part *sub nom. White* v. *Regester*, *supra*. This Court has recognized that the fact that the interests of a particular group are adequately represented—or even overrepresented —in proportion to their number in the electorate at least undermines a prima facie showing of purposeful discrimination against that group. *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U.S. 144, 165 (White, J.) and 179-180 (Stewart, J.) (1977). By parity of reasoning, where there is consistent underrepresentation of a racial or ethnic group, the opposite conclusion is at least indicated. See *Arlington Heights*, *supra*, 429 U.S. at 266. See also *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 339-340 n.20 (1977).

Even a single-member district scheme, of course, will not necessarily provide electoral minorities with proportional representation. See *Connor* v. *Finch*, 431 U.S. 407, 428 (1977) (Blackmun, J., concurring in part). But where there is a high degree of residential segregation, fairly drawn single-member districts are likely to produce at least some representation for the interests of both blacks and whites. To

be sure, within any given single-member district there may still be racial bloc voting, and the individual voter who is a member of the minority race may find himself part of a perpetual electoral minority. This is not, however, the correct measure of dilution. The single-member district New York apportionment scheme under review in *United Jewish Organizations, supra,* allowed whites to control a substantial majority, although not 100%, of the Kings County legislative delegation. Thus the deliberate consideration of racial factors in drawing district lines in order to assure some minority group representation overall was found permissible even though the white majority thereby became a minority in some districts and suffered consistent defeats at the polls in those districts. The measure of the effect of an electoral scheme is not proportional representation but fair representation. *City of Richmond* v. *United States, supra,* 422 U.S. at 371; *City of Petersburg* v. *United States,* 354 F. Supp. 1021 (D. D.C. 1972), aff'd, 410 U.S. 962 (1973).

The existence of racially disparate representation in a system for electing a given political body, however, when a less dilutive system is feasible, is at least one indication of the existence of constitutionally prohibited discrimination. "[N]othing is as emphatic as zero." *United States* v. *Hinds County School Board,* 417 F.2d 852, 858 (5th Cir. 1969), cert. denied, 396 U.S. 1032 (1970). Where the vote is severely racially polarized, the at-large system functions as if blacks simply did not vote. In 1901,

the Bourbon and Populist factions of the Alabama Democratic Party agreed that it would be better if blacks were entirely removed from the political process so that it would not be necessary to compete, by corrupt or other means, for their vote (see page 69, *infra*). The at-large systems, as they function in Mobile today, disfranchise blacks from meaningful participation in local elections as effectively as the 1901 Alabama Constitution did in its time.

B. Other Evidence, Considered With the Showing of Actual Impact, Demonstrates Purposeful Discrimination

1. *The Relevant History of Racial Discrimination*

Historical background can be revealing evidence of "intent," particularly if it shows a series of official actions taken for invidious purposes. *Arlington Heights, supra,* 429 U.S. at 267. The history of official efforts in Alabama to exclude blacks from the political process strongly supports the inference that current adherence to the at-large plans by the City and the County of Mobile is racially motivated.[43]

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[43] Appellants in No. 78-357 contend (Br. 49-50) that the history of past racial discrimination has no significance in this case because the district court failed to make a specific finding concerning how "the existence of such discrimination 'precludes the effective participation' of blacks in the present electoral system." While this formulation of the significance of past official racial discrimination is to be found in *Zimmer* v. *McKeithen, supra,* 485 F.2d at 1305, and in this Court's analysis in *White* v. *Regester, supra,* of the circumstances of the Mexican-Americans in Bexar County, it is clear that this formulation does not represent the only consideration to be

The Reconstruction Act of March 2, 1867, ch. 153, Section 5, 14 Stat. 428, required, as a precondition to reentry into the Union, that Alabama call a constitutional convention and frame a constitution to extend the elective franchise to male citizens over 21 of whatever race or previous condition of servitude. Having done so, Alabama was readmitted to representation in Congress in 1868 on the "fundamental condition" that it would never amend its constitution so as to deprive of the franchise those permitted to vote under the 1867 state constitution, except on the basis of felony convictions or durational residency requirements. Act of June 25, 1868, ch. 70, 15 Stat. 73. Blacks were active in politics during the post-Reconstruction years, and Mobile was a center of black activism (see pages 8-9, *supra*). Extra-legal means, such as fraud and intimidation were used extensively, however, as whites mounted an effort to regain their former supremacy. M. McMillan, *Constitutional Development in Alabama, 1798-1901: A Study in Politics, the Negro, and Sectionalism* 217-232 (1955)

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given a history of discrimination. In *White* v. *Regester, supra*, 412 U.S. at 766, this Court noted with approval the district court's reference "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." And in *Nevett* v. *Sides, supra*, the Fifth Circuit explained that its "*Zimmer* criteria go to the issue of intentional discrimination * * *." 571 F.2d at 222. As noted above (pages 32, 54-55), a history of official racial discrimination, particularly in matters affecting the franchise, is obviously indicative of intent in enacting or maintaining an electoral scheme that injures the interests of blacks.

("McMillan"); *United States* v. *State of Alabama*, 252 F. Supp. 95, 98 (M.D. Ala. 1966) (three-judge court).

In the 1890's, economic dissatisfaction led to the rise of the Populist wing of the Democratic Party, which began to challenge the hegemony of the Bourbon Democrats. The competition between these two factions made it essential that each manipulate the black vote which, often as not, went to the highest bidder. McMillan, *supra*, at 227. Thus sentiment arose for the disfranchisement of the blacks. W. Skaggs, *The Southern Oligarchy* 129 (1924); see also Bolden A. 45. On March 23, 1900, and July 10, 1902, the State Democratic Executive Committee passed resolutions barring blacks from participating in primary elections. Minutes of the Democratic Executive Committee, Vol. 2, at 52-54; Vol. 5 at 67. The white primary was to continue in Alabama until 1944, when it was held unconstitutional in *Smith* v. *Allwright*, 321 U.S. 649. Meanwhile, a constitutional convention was convened in 1901, the principal purpose and result of which was to devise stratagems that would disfranchise blacks without affecting whites—such devices as subjective "good character" and literacy requirements and a noncompulsory cumulative poll tax. *United States* v. *State of Alabama*, *supra*, 252 F. Supp. at 98-99.

The end of World War II and the demise of the white primary in 1944 brought a resurgence of black political activism in Alabama generally, and in Mobile in particular (Bolden A. 74-75). To thwart that

movement, the Alabama legislature passed the Boswell Amendment to Section 181 of the 1901 Constitution, substituting for the original literacy requirement a new qualification: that registrants be able to understand and interpret any provision of the United States Constitution presented to them. Not surprisingly, potential Negro registrants rarely "understood" or "interpreted" those provisions to the satisfaction of the registrars. Black Mobilians brought and won the suit in which the Boswell Amendment was struck down as unconstitutional on its face and as administered. *Davis* v. *Schnell*, 81 F. Supp. 872 (S.D. Ala.) (three-judge court), aff'd per curiam, 336 U.S. 933 (1949).

Nonetheless, soon after this, in 1951, the legislature passed a similar amendment, replacing the inherently subjective "interpretation" test with the requirement that applicants be able to "read and write any article of the Constitution of the United States in the English language * * *." Alabama Constitution, Article 8, section 181, as amended by Act of December 19, 1951. Discriminatory administration of the new literacy requirement became the basis of a host of suits against individual county registrars under the 1957 and 1960 civil rights acts. See, *e.g.*, *State of Alabama* v. *United States*, 304 F.2d 583 (5th Cir.), aff'd, 371 U.S. 37 (1962). The test was ultimately suspended when, on August 7, 1965, the Attorney General designated Alabama as a state that maintained a "test or device" within the meaning of Section 4(c) of the Voting Rights Act of 1965. 30 Fed.

Reg. 9897. Finally, in a suit brought by the Attorney General under Section 10 of the Voting Rights Act of 1965, a three-judge court invalidated Alabama's long-standing cumulative poll tax. *United States* v. *State of Alabama, supra*, 252 F. Supp. at 104. Thus, every formal barrier to black participation in Alabama politics yielded only to federal legislation and federal court action.

There remained, however, the possibility of rendering the black vote impotent through discriminatory apportionment. In 1957, the Alabama legislature redefined the boundaries of the City of Tuskegee to exclude virtually all of its black residents from municipal elections. This Court struck down that action in *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960). That decision opened the decade in which this Court entered the "political thicket" to correct malapportionment even where race was not a factor. But in Alabama, race, as the district court found (Bolden J.S. App. 30b; Brown J.S. App. 35b-36b), never ceased being a factor in apportionment; for during the 1960's, the state was still battling to retain white supremacy at the polls.

In 1962, a three-judge court in Alabama held that the state's failure to reapportion since 1901, resulting in gross malapportionment of the state legislature, was justiciable, and this Court agreed. *Sims* v. *Frink*, 208 F. Supp. 431 (M.D. Ala. 1962), aff'd *sub nom. Reynolds* v. *Sims, supra.* On remand, the district court considered a multimember district plan promulgated by a special session of the legislature.

Without finding fault with multimember districting as such, the district court noted that the House plan had aggregated counties in a manner that reflected a purpose to dilute the impact of the black vote. *Sims* v. *Baggett*, 247 F. Supp. 96 (M.D. Ala. 1965). Drawing on the principles articulated both in *Gomillion, supra,* and in *Reynolds* v. *Sims, supra,* the court held that this gerrymander violated both the Fourteenth and Fifteenth Amendments. *Sims* v. *Baggett, supra,* 247 F. Supp. at 104-105. "The House plan adopted by the all-white Alabama Legislature was not conceived in a vacuum," the court wrote. "If this court ignores the long history of racial discrimination in Alabama, it will prove that justice is both blind and deaf." *Id.* at 109. The court adopted a different multimember district plan and awaited the legislature's reapportionment to be based on the 1970 decennial census.

The year 1971 came and went without a reapportionment. Meanwhile, blacks in Montgomery, Mobile, and Birmingham brought suit challenging the existence of multimember districts imposed upon their counties by the earlier plan. The ultimate disposition of the 1970-1971 reapportionment cases was a court-ordered plan that introduced an all single-member districting scheme for the 1974 legislative elections. *Sims* v. *Amos,* 336 F. Supp. 924 (M.D. Ala. 1972) (three-judge court), aff'd, 409 U.S. 942 (1972), and that resulted in the election, for the first time, of blacks as members of the Mobile House delegation.

Several features of these last stages of the *Reynolds* v. *Sims* reapportionment in Alabama are of particular significance for the instant case. For one thing, it was state failure to reapportion, rather than state adoption of a new apportionment scheme, that was attacked in the 1970 suit. For another, the challenge by blacks to multimember districting took place only a few years after the Voting Rights Act of 1965 and the poll tax decision of 1966 had removed the remaining overt barriers to black voting. The congeries of circumstances surrounding *Sims* v. *Amos, supra,* indicate that the Alabama State Legislature was content to sit on the 1965 plan, including its racially dilutive features, rather than surrender the one remaining barrier to an effective black vote: multimember districts.

The implications of *Sims* v. *Amos* for the present cases are clear. From the post-war period, when blacks began attempting to assert their political rights through legal challenges to specific voting restrictions, up to the early 1970's, the Alabama State Legislature maintained the at-large schemes of election for the Mobile City Commission and Mobile County Board of School Commissioners. In 1965, when a bill was passed to permit the City of Mobile to adopt a mayor-council government, it was impossible to include single-member districts precisely because that would have resulted in adequate representation for blacks. Indeed, the record reflects that this was the principal consideration with respect to all redistricting bills (see Statement, *supra,* page

25) and explains why court intervention was necessary with respect to the state legislative districts. After these suits were filed, a school board bill did pass, but after it was struck down on procedural grounds, no valid substitute was passed in its stead. And at the time of the *Bolden* trial, a single-member district bill was in limbo because of a veto exercised by a state senator under the prevailing courtesy rule (Statement, *supra*, page 23).

We submit that the totality of these historical facts, both remote and recent, gives rise to the inference that the at-large systems at issue here are being maintained with racially discriminatory purpose. That inference is bolstered by the unresponsiveness of both the city commissioners and the school commissioners (see part 2, *infra*), and has not been rebutted by a showing that the at-large schemes serve any other substantial nonracial governmental interest (discussed in part C, *infra*).

2. *The Unresponsiveness of the City Commission and the Board of School Commissioners to the Particularized Needs of Blacks*

Elected officials, although legally representing the entire electorate, naturally effectuate the will of those they believe to be their constituency, *i.e.*, the majority. Where those officials are elected by single-member district constituencies, ordinarily enough different interests are represented in the governing body as a whole that coalitions must form if any of those interests are to be met. This is not the case where all the members of a governing body are

elected by the same constituency, *i.e.*, an at-large majority. For that reason, among others, single-member districts are preferred in court-ordered reapportionments. See *Chapman* v. *Meier*, 420 U.S. 1 (1975).

The best indicators that the group submerged by an at-large scheme is identifiable by race are the actions of the body so elected. In *Whitcomb* v. *Chavis*, *supra*, 403 U.S. at 149, 155, this Court recognized that in Marion County, Indiana, there was no pattern of racial bloc voting and there were no neglected interests that could be identified as "particularized" to blacks. By contrast, in *White* v. *Regester*, *supra*, 412 U.S. at 766-767, 769, this Court noted that candidates elected from Dallas County had never exhibited "good faith concern for the political and other needs and aspirations of the Negro community," and that the Bexar County delegation was unresponsive to Mexican-American interests.

After *Brown* v. *Board of Education*, *supra*, the Alabama legislature overtly opposed the decision of this Court and set out to nullify it. Much of the saga of the state's "interposition" efforts is set forth in *United States* v. *State of Alabama*, *supra*, 252 F. Supp. at 102. The story is too complex to bear repetition here. Suffice it to say that since the early 1960's, the burden of "interposition" has fallen to local school boards, which could thwart the orders of the federal courts by persistent inaction or evasive action. This was manifestly the situation in the case of Mobile County, as exemplified by the protracted litigation in *Davis* v. *Board of School Commissioners*

of Mobile County, C.A. No. 3003-63-H (S.D. Ala.), outlined in the Statement, *supra*, pages 21-22.

Appellants in No. 78-357 contend (Br. 50-51) that the district court's finding (Brown J.S. App. 41b-42b) of current unresponsiveness in their case, based on the *Davis* litigation, is unsupported because the most recent *Davis* opinion cited was issued in 1970. This argument, however, ignores the fact that the Mobile County schools case are still under the original desegregation order, and that as recently as 1977 the school board has been found to have followed a policy of assigning white principals to predominantly white schools and black principals to predominantly black schools. See Order, Findings of Fact and Conclusions of Law of the District Court dated October 27, 1977, *Davis* v. *Board of School Commissioners of Mobile County*, *supra*. The present unresponsiveness of the school board to minority interests is further demonstrated by its refusal, under pain of contempt, to elect a non-voting chairman as ordered by the district court, and by its efforts to alter board procedures to minimize the influence of the two recently elected black board members. (See Statement, *supra*, page 30, note 30.)

Similarly, there is no indication that the City of Mobile took any step, from 1954 onwards, to disestablish the discrimination and segregation which had traditionally pervaded every phase of city life, except, perhaps, to unify its dual fire departments into a single, all-white force. As recently as 1975, when the *Bolden* case was tried, the city commissioners

demonstrated their marked insensitivity to black interests in their remarks concerning the "mock lynching," cross-burnings, and absence of blacks from the governing boards. (See Statement, *supra* pages 19-20.) The commissioners also expressed the view that there was no need to deal with racial discrimination at the city level because federal law already dealt with it.[44]

The numerous federal court decrees governing various aspects of life in Mobile (*supra*, page 18) are a measure of the city government's abdication. That these decrees were necessary proves dramatically that "[v]oting is * * * a fundamental political right, because preservative of all rights" (*Yick Wo* v. *Hopkins*, *supra*, 118 U.S. at 370). Only a minority that is thoroughly disfranchised needs to depend so pervasively upon the judicial, as opposed to the political, process to acquire the basic human rights which those who are able to affect the political process enjoy as a matter of course. *Black Voters* v. *McDonough*, *supra*, 565 F.2d at 7.

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[44] The evidence of the actual conduct in office of the city commissioners makes it clear that the solicitation of endorsements from the Non-Partisan Voters League (NPVL) by some white candidates has little real significance, and certainly does not, as appellants in No. 77-1844 suggest (Br. 9), mean that the NPVL "[can] not be ignored by candidates or by incumbents."

C. The Evidence of Invidious Discrimination is Not Outweighed by Substantial Nonracial Interests in Maintaining Either of the Challenged At-Large Systems

Strong evidence of discrimination on the basis of race can, as explained above (pages 59-61), be overcome by a showing that the at-large system in question serves some substantial governmental interest not itself rooted in racial discrimination. That racial animus did not motivate initial adoption of the systems is not an adequate showing and, in any event, initial racial purpose is not the type of purpose alleged or proved in these cases. To rebut evidence of racial purpose in the maintenance and use of the plan, evidence is needed that the plan is being used and maintained to serve substantial nonracial purposes. No such evidence appears in the records of these cases. The proffered reasons for maintaining the at-large systems either were contradicted by the defendants' own witnesses (or by conduct of defendants) or are necessarily infected with racial considerations, given the racial polarization in the City and the County of Mobile.

In *Bolden*, there was a conspicuous lack of testimony regarding the present usefulness of the commission form of municipal government, *e.g.*, that it is operating, in fact, more efficiently and with less corruption than mayor-council governments operate elsewhere in the state or the nation. Commissioner Mims, testifying for defendants, did state (Bolden A. 483-484) that he is a strong supporter of com-

mission government, and believes it to be the "most responsive form of government." Commissioner Greenough, also one of defendants' witnesses, said only that he thought the choice of the form of city government was "up to the people of the city to decide," and that he did not see anyone "beating down the walls" to change it (Bolden Tr. 1087). He also conceded he was unable to say whether a transition to a governing body elected from single-member districts would be an advantage or a disadvantage for the city (Bolden Tr. 1087-1088). Aside from these remarks, to the extent that there was testimony from either side's witnesses on the subject, it was to the effect that the "strong-mayor-council" system is preferable, and is the system currently in use in Montgomery and Birmingham (*e.g.*, Bolden A. 251-253, 258-260; Bolden Tr. 332-335, 1152-1154; Bolden Pltf. Ex. 98, at 70-72).[45] Very few large cities continue to use the commission system. Its adoption peaked in 1917. By 1968, the commission form was in effect in 190 cities, representing 6.4% of all cities with populations over 5,000. C. Adrian, *Governing Urban America* 205, 223 (4th ed. 1972). Among political scientists, the prevalent view is that the commission does not work very well because without a strong, unified executive, there is no one to formulate a uni-

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[45] State Senator Roberts, a witness for the *Bolden* plaintiffs, testified that although Birmingham's council members were elected at large (albeit with subdistrict residency requirements), the Mayor of Birmingham believed election from single-member districts to be preferable (Bolden A. 260-261).

fied program or a rational budget. Adrian, *supra*, at 210.

It may be that some features of commission government—for example the combination of legislative and executive functions in officials made answerable to the public through popular election—have substantial considerations in their favor. The *Bolden* defendants never, however, suggested to the district court any hybrid plan by which such features might be retained, together with some kind of council elected from single-member districts, that would alleviate the racial dilution problem.[46] Instead they have insisted on retaining a system in which the entire governing body is elected at large. Their defense of the commission form of government is thus, at bottom, a defense of at-large elections.[47] Their nonracial justification for maintaining their electoral scheme is, accordingly, similar to that of the appellants in No. 78-357.[48]

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[46] We discuss this question in detail in point IV (pages 96-98, *infra*).

[47] This is evident also in the arguments they make to this Court in No. 77-1844 (Br. 19, 32-34).

[48] In the *Brown* trial, Dr. Voyles (testifying as a defense witness) stated that single-member district systems have certain disadvantages that at-large systems do not share. He observed that single-member districts are susceptible to gerrymandering (Brown Tr. 1317) and that they must be redistricted every ten years to comply with "one person, one vote" requirements (*id.* at 1290). There is nothing in the record to suggest, however, that the retention of the at-large system for electing the Mobile County school commissioners was based upon these considerations, and appellants in No. 78-357 (Br. 67-69) do not appear to rely on them.

In both cases it was undisputed that the at-large systems had long histories, but as the court of appeals observed in *Bolden* (Bolden J.S. App. 10a), the fact that a plan has existed for a long time is not a justification for it in the face of evidence that it has come to have discriminatory effects and is being maintained in order to perpetuate those effects. In any event, in the case of the Mobile County Board of School Commissioners any inference to be drawn in its favor from continued adherence to the scheme is weakened by the fact that the state legislature has already seen fit to pass a bill providing for single-member district school board elections, and the school commissioners themselves have at least publicly favored such legislation.[49]

Appellants in both cases also cite the need to elect officials holding city-wide (or county-wide) views, rather than mere parochial interests (No. 77-1844 Br. 33; No. 78-357 Br. 67-69).[50] In an at-large system characterized by racially polarized voting, and a residentially segregated racial minority, however, the broad perspective is likely to be the perspective simply of the majority racial group. The ability to ignore "local" interests includes the ability to be unrespon-

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[49] As explained in the Statement (pages 22-25, *supra*), however, the legislature has not managed to pass a bill invulnerable to challenge on technical grounds.

[50] Of course, in the "strong-mayor-council" form of government prescribed by the district court's judgment in *Bolden*, the mayor, elected by all city voters, could be a strong voice for city-wide interests.

sive, with impunity, to the particularized interests of the minority racial group. In any event, it is not at all clear what logic demands that bodies such as city governments be less "parochial" in the interests they represent than the state legislative delegation from the same geographic area. State legislatures set the broad outlines of public policy within which local governments must operate. But a city government is responsible for every street, every hydrant, park and library—for all the policies which affect the minutiae of every-day life. A school board's actions affect every child every day.

Finally, appellants in both cases (No. 78-357 Br. 64-67; No. 77-1844 Br. 32) rely on the proposition, recognized by this Court in its reapportionment cases, that it is desirable for political subdivisions such as cities and counties to be given some leeway in devising municipal government forms suited to their particular local needs. This argument for allowing retention of an at-large electoral scheme is, of course, only as good as the arguments demonstrating that the scheme is in fact tailored to the particular needs of that locality. Where no such demonstration has been made, it amounts only to a claim that local custom or preference should be respected. As we have argued above (pages 48-50, *supra*), however, while this Court's precedents counsel consideration of the needs of local governments for flexibility in municipal arrangements, they do not suggest either that long-standing local preferences, without more, are enough to outweigh strong evidence that a given scheme is

being maintained to serve a discriminatory purpose or that such preferences justify invidious discrimination. See *Dusch* v. *Davis*, *supra*, 387 U.S. at 116-117. See also *Avery* v. *Midland County*, *supra*, 390 U.S. at 479.

In sum, the defendants in these cases came forward with no cognizable evidence of substantial nonracial reasons for maintaining the challenged at-large voting schemes and hence did not overcome plaintiffs' evidence showing purposeful discrimination under *White* v. *Regester*, *i.e.*, plaintiffs' showing that the schemes "are being used invidiously to cancel out or minimize the voting strength" (412 U.S. at 765) of the black residents of the City and County of Mobile.

III THE FIFTEENTH AMENDMENT AND SECTION 2 OF THE VOTING RIGHTS ACT OF 1965 PROHIBIT THE USE OF AT-LARGE ELECTORAL SCHEMES THAT DENY OR ABRIDGE THE RIGHT TO VOTE ON ACCOUNT OF RACE

The plaintiffs in these cases alleged violations of both the Fourteenth and Fifteenth Amendments, and of Section 2 of the Voting Rights Act of 1965. The court of appeals, in the companion case of *Nevett* v. *Sides*, 571 F.2d 209, 220-221 (5th Cir. 1978), held that the constitutional claims were indistinguishable, and therefore found violations of both provisions in these cases (Bolden J.S. App. 12a; Brown J.S. App. 2a). If this Court holds that the courts below properly found that the challenged electoral schemes represent purposeful discrimination violating the rights

of the plaintiff classes under the Equal Protection Clause of the Fourteenth Amendment, then affirmance of the judgments on the basis of the Fifteenth Amendment as well will logically follow.[51] For it is settled that deliberate official discrimination against blacks in their exercise of the franchise violates the Fifteenth Amendment (*United States* v. *Raines*, 362 U.S. 17, 25 (1960); *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960)); and there is nothing in this Court's decisions under that amendment that would distinguish purposeful discrimination in the operation or maintenance of a scheme from purposeful discrimination in its original design.[52]

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[51] The courts below made no separate determination of the claim under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973 (Bolden J.S. App. 4a-5a n.3; Brown J.S. App. 1a-2a). Since Section 2 represents Congress' rearticulation of the Fifteenth Amendment (see *Voting Rights: Hearings on S. 1564 Before the Senate Comm. on the Judiciary,* 89th Cong., 1st Sess. 208 (1965), its prohibition is at least coextensive with that of the Fifteenth Amendment. We note that an amendment to that section in 1975 (Pub. L. No. 94-73, 89 Stat. 402), by reference to 42 U.S.C. 1973b(f)(2) (Pub. L. No. 94-73, 89 Stat. 401), brings members of language minority groups within the protection of Section 2.

The statutory bases for suits by the United States alleging unlawful racial vote dilution are normally laws enacted pursuant to Section 2 of the Fifteenth Amendment: 42 U.S.C. 1971 and Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973.

[52] Nor is there any ground for arguing that apportionment or vote dilution cases are cognizable only under the Fourteenth Amendment. "The conception of political equality from the Declaration of Independence to Lincoln's Gettysburg Address to the Fifteenth, Seventeenth, and Nineteenth

We submit, however, that the judgments in these cases also may properly be affirmed by this Court under the Fifteenth Amendment, without reaching the Equal Protection Clause claims, so long as the Court accepts the findings of the courts below that the electoral schemes here are official action that enhances the effects of private racial bias in voting and that unfairly cancels out black voting strength. This construction of the Fifteenth Amendment, as we show below, accords with the congressional purpose in its adoption, represents a reasonable reading of its language, does not conflict with the holding of any case this Court has decided under the Fifteenth Amendment, and follows logically from the decision of this Court in *Terry* v. *Adams*, 345 U.S. 461 (1953). Moreover, affirmances rested solely on the Fifteenth Amendment in these cases would wholly avoid any possible difficulties of limiting the deci-

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Amendments can mean only one thing—one person, one vote." *Gray* v. *Sanders*, 372 U.S. 368, 381 (1963) (dictum). In *Allen* v. *State Board of Elections* (*Fairley* v. *Patterson*), 393 U.S. 544 (1969), concerning the coverage of Section 5 of the Voting Rights Act of 1965, this Court observed that "[t]he Act was drafted to make the guarantees of the Fifteenth Amendment finally a reality for all citizens" (*id.* at 556). In holding there that a change from district to at-large elections for county boards of supervisors was a change covered by Section 5 and therefore one requiring clearance, the Court explained that a change to at-large elections could nullify the ability of members of a racial minority "to elect the candidate of their choice just as would prohibiting some of them from voting," where they are "in the majority in one district, but in a decided minority in the county as a whole" (*id.* at 569).

sion, such as those noted by this Court in *Whitcomb* v. *Chavis*, 403 U.S. 124, 156 (1971).[53]

A. The Language and the Legislative Purpose of the Fifteenth Amendment Extend to Practices Such as the Vote Dilution Schemes at Issue Here

The framers of the Fifteenth Amendment envisioned its function as not only preventing the states from disfranchising blacks as a group, but also securing for blacks a role in the political process sufficient to protect them from deprivations of other basic rights. Slavery "will never die," said Senator Ross,

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[53] The order of our analysis in this brief has followed this Court's usual practice, which had led annotators of the Constitution to observe that "challenges to alleged racial gerrymandering are to be litigated under the equal protection clause." The Constitution of the United States of America, Analysis and Interpretation, S. Doc. No. 92-82, 92d Cong., 2d Sess. 1545 (1972 ed.). This Court's decisions in the area of race and voting have followed a winding path as interpretations of the Fourteenth and Fifteenth Amendments have, themselves, evolved. The earliest white primary cases were decided under the Fourteenth Amendment because there was some doubt whether participation in primaries was "voting" for Fifteenth Amendment purposes. See, *e.g.*, *Nixon* v. *Herndon*, 273 U.S. 536 (1927). On the other hand, *Gomillion* v. *Lightfoot*, *supra*, was predicated upon the Fifteenth Amendment in part because it had not yet been settled that debasement of the vote through apportionment or districting fell within the ambit of the Equal Protection Clause. In the era since *Reynolds* v. *Sims*, 377 U.S. 533 (1964), cases alleging racial vote dilution have generally been decided under the Fourteenth Amendment. Not the least of the reasons for this is the fact that the issue has arisen most often in the context of a general one person, one vote challenge to existing apportionment, as it did in *White* v. *Regester*, 412 U.S. 755 (1973).

"until the negro is placed in a position of political equality from which he can successfully bid defiance to all future machinations for his enslavement * * *." Without the right of suffrage "[he] is powerless to secure the redress of any grievance which society may put upon him." Cong. Globe, 40th Cong., 3d Sess. 983 (1869) (hereinafter "Globe"). See also Globe, *supra*, at 696 (Rep. McKee) ("You cannot in any manner so forcibly * * * secure to a man the protection of his rights and immunities in any other way in a free republic like this than by giving into his hands the ballot"); *id.* at 911-912 (Senator Willey), 990 (Senator Morton), and 1629 (Senator Stewart).

The language employed by Congress to implement this purpose clearly limits the amendment's reach to actions in which a governmental body is involved, because the amendment provides that the rights of citizens 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" (emphasis added). The amendment, by its terms, is also limited to denials or abridgments of the right to vote that citizens suffer because of their "race, color, or previous condition of servitude." The language does not, however, as appellants in No. 78-357 suggest (Br. 35-36 n.18), compel a reading that limits the reach of the amendment to actions taken for discriminatory reasons by government officials or bodies. If a state operates an electoral scheme that facilitates private action taken "on account of race,

color, or previous condition of servitude" and the result is elections in which blacks have no effective opportunities to elect candidates of their choice, then it can fairly be said that the voting rights of this excluded minority have been abridged by the state, and abridged on account of race. Cf. *Anderson* v. *Martin*, 375 U.S. 399, 403 (1964) (" 'The crucial factor is the interplay of governmental and private action * * *,' " quoting *NAACP* v. *Alabama*, 357 U.S. 449, 463 (1958)). This is not to say, of course, that the Fifteenth Amendment, any more than the Fourteenth Amendment, guarantees any racial group the right to proportional representation. As we have argued in point I above (pages 42-46), however, there is a distinction between disproportionate representation of a racial group and denial of the opportunity for any meaningful representation at all.

Finally, unlike the broadly phrased Equal Protection Clause, the Fifteenth Amendment reads much like, and undoubtedly served as a model for, modern civil rights legislation prohibiting specific discrimination in specific areas. Phrases such as "because of race" or "on the ground of race" appearing in civil rights statutes have been held not to require a showing of specific racial impetus for measures that perpetuate or further the effects of discrimination, however or whenever that discrimination occurred. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *Metropolitan Housing Development Corp.* v. *Village of Arlington Heights* ("*Arlington Heights II*") 558 F.2d 1283 (7th Cir. 1977), cert. denied, 434 U.S.

1025 (1978). In both cases, the term "because of race" was interpreted in light of congressional objectives. Thus in *Griggs, supra,* 401 U.S. at 429-430, this Court said:

> The objective of Congress in the enactment of Title VII [of the 1964 Civil Rights Act] is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices.

See also *Arlington Heights II, supra,* 550 F.2d at 1290.

We suggest that a similar legislative intent is apparent in the formulation and passage of the Fifteenth Amendment, both originally and as rearticulated in Section 2 of the Voting Rights Act.[54]

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[54] We do not here suggest that the Court should hold that the standard under the Fifteenth Amendment is identical to the "effect" standard in *Griggs, supra.* As we argue below (pages 93-95), we believe that the present cases can be decided squarely under the doctrine of *Terry* v. *Adams, supra,* that a scheme is unconstitutional if it maximizes the effect of purposeful private racial animus.

B. This Court's Decisions Under the Fifteenth Amendment Are Consistent with Our Submission Here

Nearly all of this Court's cases decided under the Fifteenth Amendment have involved challenges to laws enacted or administered with a clear discriminatory intent. Official discriminatory purpose has therefore been "painfully apparent," as the court of appeals observed in *Nevett* v. *Sides*, *supra*, 571 F.2d at 220.[55] In none of this Court's cases in which claims based directly or indirectly on the Fifteenth Amendment were rejected can it be said that plaintiffs had placed before the Court the question whether state action, benign in itself, is rendered unconstitutional by its interaction with private discrimination to produce a discriminatory result. In both *United States* v. *Reese*, 92 U.S. 214 (1875), and *James* v. *Bowman*, 190 U.S. 127 (1903), the question was the power of Congress under Section 2 of the Fifteenth Amendment to impose criminal penalties on individuals for certain actions relating to the exercise by others of the franchise. In *Reese*, the Court found the statute in question beyond the power of Congress because it appeared to reach any "wrongful" interference "to prevent the exercise of the elective franchise without regard to * * *discrimina-

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[55] The laws and practices struck down under the Fifteenth Amendment present a striking array of stratagems to evade the mandate of that amendment. See, *e.g.*, *Guinn* v. *United States*, 238 U.S. 347 (1915) (grandfather clause); *Gomillion* v. *Lightfoot*, *supra* (racial gerrymander); *Alabama* v. *United States*, 371 U.S. 37, aff'g 304 F.2d 583 (5th Cir. 1962) (discriminatory application of voting tests).