tion [on account of race, color, or previous condition of servitude]." 92 U.S. at 220. In *James*, the Court struck down a statute that imposed criminal penalties on private citizens without reference to any state action. The Court held that a "statute which purports to punish *purely* individual action cannot be sustained as an appropriate exercise of the power conferred by the Fifteenth Amendment upon Congress." 190 U.S. at 139 (emphasis added).

In *Lassiter* v. *Northampton County Board of Elections*, 360 U.S. 45 (1959), this Court upheld a literacy test requirement neutral on its face and, for the purposes of the case before the Court, not shown to be discriminatorily applied. The Court proceeded on the assumption that "[l]iteracy and illiteracy are neutral on race, creed, color, and sex, as reports around the world show" (*id.* at 51). It thus did not address the question, posed later, under the Voting Rights Act of 1965, in *Gaston County* v. *United States*, 395 U.S. 285 (1969), whether a literacy test may be imposed upon potential voters in a population in which the effects of inferior education received in segregated schools have produced a higher rate of illiteracy among blacks.

Finally, in *Wright* v. *Rockefeller*, 376 U.S. 52 (1964), in which this Court rejected racial gerrymandering claims based on both the Fourteenth and Fifteenth Amendments, purpose was necessarily the central focus of the case, for as this Court later noted (*Whitcomb* v. *Chavis*, *supra*, 403 U.S. at 156 n.34), the challenge there was to "a single-member

district plan with districts allegedly drawn on racial lines and designed to limit Negroes to voting for their own candidates in safe Negro districts." There was no showing that the allegedly discriminatory line drawing had deprived blacks of the opportunity for political representation.[56]

Not only does no decision of this Court foreclose the Fifteenth Amendment argument we are making here; at least two decisions of this Court support it.

In *Smith* v. *Allwright*, 321 U.S. 649 (1944), this Court considered state election laws that were racially neutral on their face, but that authorized primary elections—among them one conducted by the state's Democratic Party in which blacks were denied the right to vote—and then restricted candidacy in

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[56] Thus, the fact that this Court cited *Wright* in its opinions in *Washington* v. *Davis*, 426 U.S. 229, 240 (1976), and *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977), does not compel the conclusion, suggested by appellants in No. 78-357 (Br. 33-34), that the intent requirement of the Equal Protection Clause, as defined in *Davis* and *Arlington Heights*, must be satisfied in every case arising under the Fifteenth Amendment. Nor does the Court's citation of *Gomillion* v. *Lightfoot*, *supra*, in *Arlington Heights* (429 U.S. at 266) compel such a conclusion. In *Gomillion* petitioners' claim rested solely on the discriminatory purpose of the state law redrawing the city limits of Tuskegee so as to exclude the bulk of the black population, for they did not contend that they would have been entitled to vote in Tuskegee elections had they been excluded from the city for proper reasons. Indeed, Mr. Justice Whittaker (364 U.S. at 349, concurring opinion) saw it as a case presenting the kind of racial discrimination prohibited by the Equal Protection Clause as interpreted by the Court in *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

the general election to those who had won in the primaries. The Court concluded that the state election requirements could be treated as an endorsement, adoption, or enforcement of the political party's discrimination and that the element of state action was thereby supplied. It further observed that the right to vote "is not to be nullified by a State through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election." *Id.* at 664. The parallel with these cases, is, of course, not complete, in light of the major role in the election process that state law gave to the Democratic Party. But the critical factors were the same: the state sanctioned a system that enhanced the opportunity for private discrimination to fence blacks out of the political process, and white voters made use of that system to achieve the forbidden end. The closed Democratic Party functioned as a formalized bloc vote in an at-large system, assuring that candidates need not be accountable, in any measure, to the black element of the electorate.

The parallel with *Terry* v. *Adams*, *supra*, is much closer. There, the state involvement in the challenged discrimination was marginal at best. A racially exclusive private political club in one county in Texas (the Jaybird Association) preselected candidates prior to the state-wide primary; whites then voted as a bloc and their candidate "invariably won in the Democratic July primary and the subsequent general elections for county-wide office." 345 U.S. at 483

(opinion of Clark, J.) As in Mobile, the racial bloc voting was less preclusive as to candidates running for district, rather than county-wide, office. *Id.* at 483 n.13. No new enactment of the state supplied the requisite state action or indicated discriminatory intent. Indeed, the Court found most troublesome the question of relief, since the state itself had done nothing to maximize the potential for racial bloc voting. Nonetheless, eight Justices found a Fifteenth Amendment violation. Mr. Justice Black, writing for himself and Justices Douglas and Burton, followed the reasoning of two decisions of the United States Court of Appeals for the Fourth Circuit,[57] which he described as holding "that no election machinery could be sustained if its purpose or effect was to deny Negroes on account of their race an effective voice in the governmental affairs of their country, state, or community." *Id.* at 466. To Mr. Justice Frankfurter, "[t]he vital requirement is State responsibility —that somewhere, somehow, to some extent, there be an infusion of conduct by officials, panoplied with State power, into any scheme by which colored citizens are denied voting rights merely because they are colored." *Id.* at 473. Finally, Mr. Justice Clark, joined by the Chief Justice and Justices Reed and Jackson, reasoned that "when a state structures its electoral apparatus in a form which devolves upon a political organization the uncontested choice of pub-

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[57] *Rice* v. *Elmore*, 165 F.2d 387 (4th Cir. 1947), cert. denied, 333 U.S. 875 (1948), and *Baskin* v. *Brown*, 174 F.2d 391 (4th Cir. 1949).

lic officials, that organization itself, in whatever disguise, takes on those attributes of government which draw the Constitution's safeguards into play." *Id.* at 484. In short, all these opinions rest ultimately on the opportunity created by the state election machinery for racial bloc voting to be effective in denying blacks meaningful participation in the election process—formally, in the Jaybird primary, and informally in the official primary and general election.

In Mobile, the bloc voting is not accomplished under the umbrella of political association, as in *Terry*, or a slating process, as in Dallas County, Texas, but, as in Bexar County, Texas, is a matter of "custom [or] usage" (cf. 42 U.S.C. 1971(a)) under which the white-backed candidate who qualifies for the run-off election becomes the candidate of the white community. The black third of the electorate may influence who qualifies for the run-off, but, as the district court noted, the lack of residency requirements, the majority vote requirements, and the "place" system ensure that they cannot influence the ultimate selection (Bolden J.S. App. 5b-11b, 21b-22b; Brown J.S. App. 9b-13b, 21b-22b). Indeed, the candidate who has qualified for the run-off by virtue of too-conspicuous black support has received a "kiss of death" (see page 17, *supra*). Here, as in *Anderson* v. *Martin*, *supra*, 375 U.S. at 404, a Fourteenth Amendment case, the statute "promotes the ultimate discrimination which is sufficient to make it invalid." [58]

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[58] Because the present cases involve governmental action (the at-large electoral schemes) that facilitates, and indeed

IV THE DISTRICT COURT'S ORDERS GRANTING SINGLE-MEMBER DISTRICT RELIEF WERE WITHIN THE SCOPE OF ITS REMEDIAL DISCRETION IN THE CIRCUMSTANCES OF THESE CASES

Under the relevant precedents of this Court, having found at-large elections unconstitutionally dilutive in both cases below, the district court was required to adopt all single-member district plans unless it could "articulate a 'singular combination of unique factors' that [would justify] a different result." *Connor* v. *Finch*, 431 U.S. 407, 415 (1977). Neither the city commission nor the school board purports to have powers of self-apportionment, and no legislative action had been taken while the cases were pending—other than passage of the ill-fated 1975 school board bill, and introduction of the flawed 1976 school board bill, discussed in the Statement (*supra*, pages 23-24).

The commission system of city government in its original form requires at-large elections. Disestablishment of at-large elections, therefore, necessarily required the district court to adopt some other system in the *Bolden* case. The district court did not, however, find constitutional fault with the unique feature of commission government, *i.e.*, the assignment of administrative tasks to the individuals who corporately constitute the city's legislature. The

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magnifies, private discrimination, this Court need not decide whether the Fifteenth Amendment may in some circumstances also proscribe electoral schemes that have a disparate racial effect absent state or private discriminatory intent. Cf. *Griggs* v. *Duke Power Co., supra.*

court asked the parties to propose alternative constitutional plans. The *Bolden* defendants might have proposed, for example, a cabinet form of government similar to that used by parliamentary nations whereby the legislature, elected from single-member districts, selects several of its members to hold executive positions. Another possibility might have been a mixed plan in which, *e.g.*, five or six members would be elected from single-member districts and two or three elected at-large, the at-large members to fill administrative posts. See *Beer* v. *United States*, *supra* (city council combining district and at-large representation); *Wise* v. *Lipscomb*, *supra* (same). Still another possibility might have been to offer a plan by which members of a city council, elected from single-member districts, would also run independently for executive positions.

Had the *Bolden* defendants proposed any such nondilutive mixed plan, the district court might well have adjudged that the city's long investment in the commission system constituted a "special circumstance" warranting adoption of such a plan (although we express no view here on the propriety of any particular hypothetical plan). The city defendants, however, submitted no such plan.[59] Required as it was to adopt some scheme, the district court

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[59] We are advised that they suggested only that the district court might monitor the commission for discrimination or that subdistrict residency requirements might be introduced, while retaining at-large elections.

did not abuse its discretion in choosing the "strong mayor-council" system for which many witnesses had expressed a preference.[60] As we have argued (*supra*, pages 59-61), although some leeway is to be given local governments in choosing the governmental form that best suits their local needs and preferences, a particular feature of a local system—such as at-large voting—is impermissible if it serves as an instrument for invidious discrimination.

As for the Mobile County Board of School Commissioners at issue in *Brown*, no special circumstances appear that arguably would have warranted deviation, if requested, from the normal rule that single-member districts should be used in court-ordered reapportionment plans.[61]

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[60] The court-ordered remedial plan, of course, is not permanent. The state legislature is the ultimate repository of power to prescribe or authorize any form of government for the City of Mobile that is not constitutionally prohibited and that meets the requirements of the Voting Rights Act.

[61] The trial court's remedial order in *Brown*—insofar as it establishes an interim six-member board, requires the selection of a temporary non-voting chairman, and postpones elections to fill three school-board seats until 1980 and 1982—may be unnecessary to remedy the constitutional violation and arguably interferes unduly with the internal operations of the school board. The appellants in No. 78-357 do not, however, challenge the district court's relief in their brief, and the appellees in that case have not cross-appealed to this Court from the court of appeals' judgment upholding that relief. Accordingly, only the single-member district feature of that remedy is before this Court.

CONCLUSION

The judgments of the court of appeals should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

DREW S. DAYS, III
Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

ELINOR HADLEY STILLMAN
Assistant to the Solicitor General

BRIAN K. LANDSBERG
JESSICA DUNSAY SILVER
DENNIS J. DIMSEY
MIRIAM R. EISENSTEIN
Attorneys

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