PROVING INTENTIONAL DISCRIMINATION IN EQUAL PROTECTION CASES: THE GROWING BURDEN OF PROOF IN THE SUPREME COURT

I

INTRODUCTION

The U.S. Supreme Court has for almost a century recognized that neutral state action—that is, action that does not on its face deny any group the equal protection of the laws—may nevertheless operate invidiously to discriminate against racial minorities.[1] With varying degrees of enthusiasm, the Court has recognized the principle that a discriminatory result may invalidate a neutral law as violative of the equal protection clause of the fourteenth amendment.[2]

Yet, the application of this principle to the facts of particular cases has rarely been easy. What was an appropriate *ratio decidendi* in cases involving blatant maladministration of the laws[3] has become encumbered by qualifications and heightened standards of proof when applied to laws whose unequal effects are more subtle. A paradigmatic example analyzed in this Note is at-large electoral districts, whose deleterious effects on minority voting strength will be set forth in detail below. Such cases are problematic because it is frequently difficult, if not impossible, to distinguish between partisan political struggles, which courts must avoid,[4] and the struggle for equal protection of the laws, in which courts must join if they are to fulfill their role in a constitutional system.

The premise of this Note is that the Supreme Court's response to this dilemma has been less than satisfactory. When faced with increasingly subtle mechanisms of discrimination, the Court has been unwilling to invalidate state action that, though neutral on its face, tends to perpetuate racial stereotypes, oppression, and political impotence. The Court instead has placed increasing emphasis on judicial restraint and deference to local initiative. The legal underpinning of this growing restraint has been the requirement that plaintiffs demonstrate that state officials conceived or maintained the challenged law for a discriminatory purpose.[5] In an age when bigoted

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1. The first notable case was Yick Wo v. Hopkins, 118 U.S. 356 (1886).

2. *E.g.*, White v. Regester, 412 U.S. 955 (1973); Whitcomb v. Chavis, 403 U.S. 124 (1971); Fortson v. Dorsey, 379 U.S. 433 (1965); Gomillion v. Lightfoot, 364 U.S. 339 (1960); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

3. *E.g.*, Gomillion v. Lightfoot, 364 U.S. 339 (1960); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

4. Gaffney v. Cummings, 412 U.S. 735, 754 (1973).

5. *See, e.g.*, City of Mobile v. Bolden, 446 U.S. 55 (1980); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976).

legislators can no longer be expected to make their motivations public, the Court has placed an extraordinary burden on plaintiffs by focusing on purpose rather than effect.[6]

This Note traces the development of the intent requirement in equal protection cases before the Supreme Court. It will be shown that, until recently, a racially discriminatory impact was deemed sufficient to invalidate neutral state laws. Within the last six years, however, there has been a profound shift in the Court's view of equal protection law. In the areas of employment,[7] housing,[8] and, most significantly, voting rights,[9] the Court has declared that only a showing of discriminatory purpose will invalidate a neutral state law.

The keystone case in this development is the recent decision in *City of Mobile v. Bolden.*[10] This case is particularly significant because it applies the intent requirement to an area that has traditionally been accorded the greatest constitutional respect: voting. *Mobile* is also important because it is the Court's latest and potentially most far-reaching pronouncement on the law of equal protection. This Note will argue that the decision greatly enhances the burden of proof in that area, and represents a major obstacle to successful litigation. Finally, *Mobile* is also an extremely ambiguous decision that, as Justice White observed, "leaves the courts below adrift on uncharted seas . . . ."[11]

The *Mobile* decision thus forms the centerpiece of this discussion, but the scope of the analysis is broader. It attempts to clarify an uneven line of precedent by tracing the emergence of the intent requirement and its latest exposition by the Supreme Court. The goal is to articulate the Court's new standards in equal protection cases. Ultimately, the hope is that an analysis of both *Mobile* and the older cases will provide potential litigants with guidelines for equal protection practice in the 1980's.

Accordingly, this Note will summarize the most significant cases in equal protection law, focusing on the tension between the intent require-

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6. The intent requirement has been widely criticized. *See, e.g.,* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1031-32 (1978); E. Chester, *Arlington Heights v. Metropolitan Housing Development Corp.: An Implicit Endorsement of Exclusionary Zoning?,* 55 N.C. L. REV. 733, 740-42 (1977); R. Schwemm, *From Washington to Arlington Heights and Beyond: Discriminatory Purpose in Equal Protection Litigation,* 1977 U. ILL. L. F. 961, 1034 (1977); *The Supreme Court, 1979 Term,* 94 HARV. L. REV. 77, 138 (1980); *The Supreme Court, 1975 Term,* 90 HARV. L. REV. 58, 120 (1976); Comment, *Village Refusal to Rezone to Allow for Construction of Racially Integrated Low Income Housing Held not Violative of Equal Protection Absent a Showing that Discriminatory Intent or Purpose is a Motivating Factor,* 27 DRAKE L. REV. 166, 175-76 (1977); Comment, *Proof of Intent Required to Establish Discrimination,* 30 RUTGERS L. REV. 1283, 1311-12 (1977).

7. *E.g.,* Washington v. Davis, 426 U.S. 229.

8. *E.g.,* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252.

9. *E.g.,* City of Mobile v. Bolden, 446 U.S. 55.

10. *Id.*

11. *Id.* at 103 (White, J., dissenting).

ment and the impact standard.[12] Then, *Mobile* will be analyzed to see how it fits—or fails to fit—into that evolution.[13] The following section will examine how the lower courts have interpreted and applied the intent requirement in the equal protection cases before them.[14] Drawing from those cases and the opinions of the Court in *Mobile*, this Note will then set out the standards with an eye to determining how the burden of proof of discriminatory official motivation can be met.[15] The Note will conclude with a critique of the current criteria and will propose alternative standards.[16] The suggested standards, while assuming the continued application of the intent requirement, would afford plaintiffs a more realistic prospect of prevailing in equal protection litigation.

II

THE DEVELOPMENT OF THE INTENT REQUIREMENT IN THE SUPREME COURT

A. Disproportionate Impact: The "Easy" Cases

Where the Supreme Court has found the impact of neutral state action especially shocking, it has had little difficulty invalidating the challenged action without pausing to consider the role of legislative purpose. The Court first invalidated a facially neutral law on equal protection grounds in *Yick Wo v. Hopkins*.[17] In that case, the city of San Francisco passed an ordinance prohibiting the operation of laundries in wooden buildings without special permission of the Board of Supervisors. At the time of the ordinance, 310 of San Francisco's 320 laundries were wooden; of these, 240 were owned by Chinese immigrants. The Board of Supervisors refused to grant variances to the Chinese, but permitted Caucasians to continue to do business in wooden buildings. When the case was first brought, 150 Chinese merchants had been jailed.[18]

The Supreme Court held that the ordinance, as applied, denied the petitioners the equal protection of the laws.[19] In so holding, the Court made no reference to the intent or purpose of the officials who enacted the

12. *See infra* text accompanying notes 17-104.
13. *See infra* text accompanying notes 105-49.
14. *See infra* text accompanying notes 150-90.
15. *See infra* text accompanying notes 191-226.
16. *See infra* text accompanying notes 227-55.
17. 118 U.S. 356.
18. *Id.* at 361.
19. *Id.* at 373. The Court said:

> [T]he facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied . . . with a mind so unequal and oppressive as to amount to a practical denial by the State of the equal protection of the laws . . . .

ordinance, but focused instead on the law's "necessary tendency and ultimate actual operation."[20] The fact that 200 Chinese residents had been denied permission to pursue their trade, while 80 Caucasians were permitted to continue, was sufficient to invalidate the ordinance, since "[n]o reason for . . . [the law] is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong . . . ."[21] Absent a compelling justification for the discriminatory result, the ordinance could not stand.[22]

For all its finality, the rule of *Yick Wo* is not entirely clear. It has often been cited for the proposition that a racially disproportionate impact, if dramatic, will be sufficient to invalidate a law on equal protection grounds.[23] Yet, the case may turn more on the conduct of the officials who administered the ordinance than on the inevitable effect of the ordinance itself.[24] The Court's language seems to support this interpretation.[25] However, since a finding of disproportionate impact on a particular nationality or race is logically prerequisite to a finding of maladministration of the law, *Yick Wo* most likely rests on a combination of these two factors, with disproportionate impact a necessary starting point.[26]

Evidence of disproportionate impact was considered dispositive in *Gomillion v. Lightfoot*.[27] The Supreme Court held that petitioners stated a valid claim for relief in their challenge to a racial gerrymander on fourteenth and fifteenth amendment grounds. The Alabama legislature had redrawn the city limits of Tuskegee in such a way that all but four or five of its 400 black voters were excluded from the town and thereby deprived of their

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20. *Id.* at 373.

21. *Id.* at 374.

22. *Id.*

23. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. at 266 (1977); Washington v. Davis, 426 U.S. at 242 (1976).

24. Tribe, for one, makes this distinction. L. TRIBE, AMERICAN CONSTITUTION LAW 1025-26 (1978).

25. The Court stated:

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

118 U.S. at 373-74.

26. Although the necessity of showing invidious discriminatory effect in the first instance may seem too self-evident to mention, it became significant in two later cases, in which the Court strongly indicated that discriminatory intent was insufficient to invalidate state action absent a showing of discriminatory impact. *See* Palmer v. Thompson, 403 U.S. 217 (1971); Wright v. Rockefeller, 376 U.S. 52 (1964).

27. 364 U.S. 339.

vote.[28] No white votes were lost.[29] The Court declared that the "uncouth twenty-eight-sided figure"[30] drawn by the legislature:

> is not immune to attack simply because the mechanism employed by the legislature is a redefinition of municipal boundaries . . . . While in form this is merely an act redefining metes and bounds, . . . the inescapable human effect of this essay in geometry and geography is to despoil colored citizens, and only colored citizens, of their heretofore enjoyed voting rights.[31]

Since the immediate impact of this bizarre configuration was so clearly discriminatory, the Court did not concern itself with whether or not the legislature had been motivated by discriminatory intent. In fact, the decision is devoid of any references to purpose or intent.[32]

B. Impact or Intent? The Court Vacillates

The Court rejected a subsequent challenge to an allegedly discriminatory gerrymander in *Wright v. Rockefeller*.[33] The plaintiffs in that case asserted that the reapportionment of Manhattan's 17th, 18th, 19th, and 20th Congressional Districts had created virtually all-black and all-white constituencies.[34] In upholding the apportionment, the Supreme Court suggested that a showing of discriminatory intent was necessary to make out a *prima facie* case under either the fourteenth or fifteenth amendment. The Court reasoned that plaintiffs had not stated a valid claim because they "failed to prove that the New York Legislature was either motivated by racial considerations or in fact drew the districts on racial lines."[35]

The facts of *Wright* may be more instructive than the law. Although plaintiffs asserted that blacks and whites had been segregated into separate districts, the Court found no evidence that the reapportionment adversely affected blacks. The Court implied that the opposite situation—black neighborhoods split between one district and another—might well be unconstitutional because it would be the product of racial considerations.[36] Absent

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28. *Id.* at 341. The entire campus of Tuskegee Institute was also excluded. *See id.* at 348.

29. *Id.*

30. *Id.* at 340.

31. *Id.* at 347.

32. An underlying assumption that purposeful discrimination existed might be inferred from the Court's references to the use of state power for unconstitutional ends, *see* 364 U.S. at 347, but the lack of explication indicates that the Court did not rely in its holding on any finding of discriminatory purpose. *See* United States v. O'Brien, 391 U.S. 367, 384-85 (1968) (citing *Gomillion* for impact standard).

33. 376 U.S. 52.

34. *Id.* at 54.

35. *Id.* at 56.

36. *Id.* at 57-58. Among the intervenors in favor of the challenged apportionment was Adam Clayton Powell. *Id.* at 53.

any showing of discriminatory impact, the only evidence of intent—demographic statistics and irregular boundaries—was found to be inconclusive.[37]

Despite the intimations of an intent standard in *Wright v. Rockefeller*, the Court subsequently recognized that an equal protection claim could rest on impact alone. In *Fortson v. Dorsey*,[38] the Court upheld a Georgia State Senate districting plan that called for the creation of multi-member districts.[39] Since equal protection did not require single-member districts,[40] and the plaintiffs had failed to produce any evidence of racially discriminatory impact,[41] the claim had no basis. However, the Court added:

> It might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population.[42]

The Court did not explain exactly what "circumstances" would prove that a districting scheme had an invidious effect in violation of the equal protection clause. It was evident that some review of the facts would be necessary, because the Court would not invalidate a statute based only on the plaintiffs' predictions of disproportionate impact.[43] Instead, the law must be shown to have already disadvantaged the plaintiffs in some clearly discernable way.[44]

The most sweeping statements in favor of an "impact-only" standard came in a first amendment case decided at the height of the Vietnam War era, *United States v. O'Brien*.[45] In that case, the Supreme Court upheld a

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37. Justice Douglas, dissenting, condemned the apportionment as a deliberate attempt to segregate black voters by means of "zigzag, tortuous lines" and thereby create a species of "separate but equal" government. *Id.* at 59-67 (Douglas, J., dissenting).

38. 379 U.S. 433.

39. Multi-member districting has been extensively criticized because of its dilutive effect on minority voting strength. The Court in *Whitcomb v. Chavis* summarized this view:

> Criticism [of at-large electoral systems] is rooted in their winner-take-all aspects, their tendency to submerge minorities and to overrepresent the winning party as compared with the party's statewide electoral position, a general preference for legislatures reflecting community interests as closely as possible and disenchantment with political parties and elections as devices to settle policy differences between contending interests. The chance of winning or significantly influencing intra-party fights and issue-oriented elections has seemed to some inadequate protection to minorities, political, racial, or economic; rather their voice, it is said, should also be heard in the legislative form where public policy is finally fashioned.

403 U.S. at 158-59. *See also* Bonapfel, *Minority Challenges to At-Large Elections*, 10 GA. L. REV. 353 (1976); Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162 (1977).

40. 379 U.S. at 436.

41. *Id.* at 437.

42. *Id.* at 439. *See also* Burns v. Richardson, 384 U.S. 73, 89 (1966) (following Fortson v. Dorsey).

43. 379 U.S. at 437.

44. *Id.*

45. 391 U.S. 367.

conviction for draft card burning against the claim that Congress had criminalized the act with the intent to suppress freedom of expression. The Court found that the statute advanced a substantial governmental interest and declared further that "[i]t is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."[46] Rather than confine this view to the first amendment area, Justice Warren, speaking for the Court, went on to observe that *Gomillion* stands "not for the proposition that legislative motive is a proper basis for declaring a statute unconstitutional, but that the inevitable effect of a statute on its face may render it unconstitutional."[47] The Court even suggested that a motivational inquiry would be improper.[48]

Three years later, the Court reached the same conclusion. In *Palmer v. Thompson*,[49] the city of Jackson, Mississippi had closed its segregated public pools in response to a declaratory judgment that operation of segregated public facilities violated the thirteenth and fourteenth amendments.[50] Black residents then challenged the closings on equal protection grounds, arguing that the city's action was racially motivated and therefore unconstitutional.[51] A divided Court[52] held for the city, reiterating the rule that the proper area of inquiry was the "actual effect" of the action.[53] Invalidating a law solely because of the motivations of its sponsors, Justice Black argued, would invite manipulation of the legislative process.[54] The Court reasoned that, since the pool closings adversely affected blacks and whites alike,[55] the black plaintiffs had failed to establish a *prima facie* case under the equal protection clause.

The discriminatory impact standard took an uncertain turn in *Whitcomb v. Chavis*,[56] a case decided in the same term as *Palmer v. Thompson*. In *Whitcomb*, the Court was faced with an equal protection challenge to the multi-member state legislative district encompassing Marion County, Indi-

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46. *Id.* at 383.

47. *Id.* at 384. Since the statute in question lacked the requisite "inevitable unconstitutional effect," it was valid. *Id.* at 385.

48. *Id.* at 385-86.

49. 403 U.S. 217 (1971).

50. Clark v. Thompson, 206 F. Supp. 539 (S.D. Miss. 1962), *aff'd*, 313 F.2d 637 (5th Cir. 1963), *cert. denied*, 375 U.S. 951 (1963).

51. 403 U.S. at 224.

52. The vote was 5 to 4 with Douglas, White, Marshall, and Brennan dissenting. Justice Black authored the majority opinion, in which Burger, Blackmun, Harlan, and Stewart concurred.

53. 403 U.S. at 225 (citing *Gomillion*).

54. "If the law is struck down for this reason, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature . . . repassed it for different reasons." *Id.*

55. *Id.* at 225. *See id.* at 235 (Douglas, J., dissenting) (suggesting that black citizens were more adversely affected than whites by closing of public pools).

56. 403 U.S. 124 (1971).

ana. The Court upheld the electoral scheme, relying once again on the rule that plaintiffs "must carry the burden of proving that multi-member districts unconstitutionally operate to dilute or cancel the voting strength of racial or political elements."[57] Yet, the Court employed language elsewhere in its opinion that seemed to form the germ of an intent standard.[58] The other principles enunciated by the Court in this decision, however, are more certain. The majority made it plain that failure to win elections is not in itself a violation of the Constitution, and that underrepresentation of minorities is inherent in a republican form of government.[59] More specifically, the Court declared that the effects of multi-member districts were as yet undetermined and refused to hold such systems per se invalid.[60]

The ambiguity of *Whitcomb* is evidenced by the fact that it has today become authority for both the impact standard and the intent requirement, depending on which Justice is cited.[61] Whatever the intended effect of *Whitcomb* on equal protection analysis, the most complete expression of the impact standard awaited the 1972 term.

C. *The* White *Test*

White v. Regester[62] presented another claim of racial vote dilution arising from the operation of a multi-member districting system.[63] The Court restated the ground rules—that multi-member districts are not per se unconstitutional and that the lack of electoral success does not itself constitute a claim under the equal protection clause—but went on to uphold the district court's decision, based on detailed findings of fact that the systems in question violated the Constitution.[64]

At no point did the Court suggest that plaintiffs were required to demonstrate discriminatory purpose. Instead, the proper inquiry was whether, considering the "totality of the circumstances," the multi-member system restricted access to the political process.[65] Among the relevant facts for consideration were: the history of official discrimination in Texas and the "residual impact" of that history,[66] the majority vote rule for nomination in primary elections,[67] the substantial underrepresentation of blacks or

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57. *Id.* at 144.

58. "But there is no suggestion here that Marion County's multi-member district . . . [was] *conceived or operated as purposeful devices* to further racial or economic discrimination." *Id.* at 149 (emphasis added).

59. *Id.* at 154-55.

60. *Id.* at 149-60. *See* 1978 ANN. SURV. OF AM. LAW 91, 109-112.

61. *Compare* City of Mobile v. Bolden, 446 U.S. at 66 *with id.* at 119 (Marshall, J., dissenting).

62. 412 U.S. 755.

63. *Id.* at 756.

64. *Id.* at 767, 769.

65. *Id.* at 769.

66. *Id.* at 766, 768.

67. *Id.* at 766.

chicanos in the state legislature,[68] the demonstrated lack of legislative responsiveness to minority needs,[69] and, in one county, the "cultural and economic realities" of life in chicano communities.[70] The Court upheld the lower court's finding that "the multi-member district . . . invidiously excluded Mexican-Americans from effective participation in political life"[71] and that blacks "were generally not permitted to enter into the political process in a reliable and meaningful manner."[72]

The *White* opinion appears to recommend a sensitive and comprehensive analysis of local conditions, both economic and political, in weighing the constitutionality of a facially neutral law. Such a fact-intensive procedure encourages deference to the findings of the trial court, which is in the best position to consider the evidence. The detailed record resulting from this "intensely local appraisal"[73] of the effect of the challenged law would be largely beyond second-guessing by the Supreme Court. The effect of the *White* standard was that although plaintiffs were required to produce a substantial quantum of proof—sociological, historical, economic, demographic, and political evidence would all be relevant—they could meet that burden with readily ascertainable and objective facts.

D. The Rise of the Intent Standard after White

Only three years after *White*, the Court set forth, in *Washington v. Davis*,[74] an intent requirement for equal protection cases. The plaintiffs, unsuccessful black applicants to the District of Columbia police force, claimed that the required verbal skills test was not job-related and excluded a disproportionate number of blacks from the force.[75] The Court, having concluded that Title VII of the Civil Rights Act of 1964 did not apply to the plaintiffs,[76] held that only purposeful discrimination could violate equal protection; a mere showing of disproportionate impact would not suffice.[77]

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68. *Id.* at 766-67.
69. *Id.* at 769.
70. *Id.*
71. *Id.* at 769.
72. *Id.* at 767.
73. *Id.* at 769-70.
74. 426 U.S. 229.
75. *Id.* at 235.
76. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e)-2 (1976), prohibits discrimination in employment on the basis of race, color, religion, sex, age, or national origin. The Supreme Court has held that the statute requires only a showing of disproportionate impact. Griggs v. Duke Power Co., 401 U.S. 424 (1971). At the time the complaint in *Washington* was filed, however, Title VII did not apply to employees of the District of Columbia. 426 U.S. at 238 n.10.
77. 426 U.S. at 239. In so holding, the Court was forced to reconcile its conflicting precedents. It did this by citing earlier cases which appeared to rest exclusively on intent (Akins v. Texas, 325 U.S. 398 (1945); Strauder v. West Virginia, 100 U.S. 303 (1880)); by citing Wright v. Rockefeller, 376 U.S. 52, which, I have argued, is inconclusive on the intent-

The reasoning, if not the precedent, underlying this ruling was clear. The Court feared that an impact-only standard would throw into doubt the constitutionality of any neutral law that happened to disadvantage minorities, even if the effect was only incidental.[78] As the cases reveal, however, such a fear is groundless. In the past, the Court recognized only substantially disproportionate impact as rising to the level of a violation of the Constitution,[79] and, in fact, upheld challenged laws under the impact standard just as often as it invalidated them.[80] Moreover, the impact standard had not always been the favored test of liberal-minded Justices, as a review of the angry dissents in *Palmer v. Thompson* demonstrates.[81] The suggestion that the impact standard would open the floodgates of litigation was not an exaggeration.

Despite its holdings, the Court in *Washington* built some flexibility into its intent requirement. By remarking that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another,"[82] the Court may simply have restated the "totality of the circumstances" test from *White*.[83] The Court further suggested that discriminatory effect alone may prove invidious intent, if the impact is inexplicable on other grounds.[84] Taken as a whole, then, *Washington* may not have represented much more than a semantic departure from *White* and the disproportionate impact standard.[85] On the other hand, the assertion that impact is only a starting point in most equal protection cases imposes a greater burden of proof than previously required.[86] Plaintiffs would have

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impact issue (*see supra* text accompanying notes 33-37); by distinguishing *Palmer v. Thompson* on the dubious basis that "the decision did not involve, much less invalidate, a statute or ordinance having neutral purposes but disproportionate racial consequences," 426 U.S. at 243; and by wholly ignoring *United States v. O'Brien, White v. Regester,* and *Gomillion v. Lightfoot*. The Court took care not to confront troublesome or flatly contrary holdings. The doctrinal confusion resulting from this facile jurisprudence reached epic proportions in *City of Mobile v. Bolden*.

78. 426 U.S. at 248.

79. *See, e.g.*, White v. Regester, 412 U.S. 755; Gomillion v. Lightfoot, 364 U.S. 339; Yick Wo v. Hopkins, 118 U.S. 356.

80. *Compare* Palmer v. Thompson, 403 U.S. 217 and Whitcomb v. Chavis, 403 U.S. 124 *with* White v. Regester, 412 U.S. 755; Gomillion v. Lightfoot, 364 U.S. 339; Yick Wo v. Hopkins, 118 U.S. 356.

81. 403 U.S. at 231 *passim* (1976) (dissenting opinions of White, Douglas, Brennan, and Marshall, JJ.) (pool closing showed clear racial animus).

82. 426 U.S. at 242.

83. *See supra* text accompanying notes 62-72.

84. 426 U.S. at 242.

85. Stevens observed that the line between impact and intent "is not nearly as bright, and perhaps not quite as critical, as the reader of this Court's opinion might assume." 426 U.S. 229, 254 (1976) (Stevens, J., concurring). *Accord,* Perry, *The Disproportionate Impact Theory of Racial Discrimination,* 125 U. PA. L. REV. 540, 578-80 (1977).

86. For this reason, among others, *Washington* has generally not been well received by commentators. *See, e.g., The Supreme Court, 1975 Term,* 90 HARV. L. REV. 58, 120 (1976); Note, *Racial Vote Dilution in Multimember Districts: The Constitutional Standard After Washington v. Davis,* 76 MICH. L. REV. 694 (1978).

to present impact factors as adduced in *White*, plus an added quantum of evidence probative of intent. The Court failed to state the type of additional evidence which would suffice.[87]

Justice Stevens attempted to articulate an intent test in his concurrence. Having first expressed reservations about the practical distinction between impact and purpose,[88] Stevens recommended that evidence of intent should focus on objective facts rather than the subjective state of mind of legislators. "It is unrealistic," he argued, "to require the victim of alleged discrimination to uncover the actual subjective intent of the decisionmaker or, conversely, to invalidate otherwise legitimate action because an improper motive affected the deliberation of a participant in the decisional process."[89] Accordingly, the best evidence would be objective, with the finding of intent resting on the principle that "the actor is presumed to have intended the natural consequences of his deeds."[90] This tort-based standard offered a promising alternative to the semantic confusion of the Court, but it never achieved a majority.[91]

The following term, the Court extended the intent requirement to claims alleging racially exclusionary zoning. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[92] involved a challenge to an affluent suburb's denial of rezoning that would have allowed the construction of racially integrated low- and moderate-income housing. The Court, citing *Washington,* held that the decision did not violate equal protection solely because it adversely affected a disproportionate number of blacks.[93] Instead, plaintiffs would have to prove that a racially discriminatory purpose lay behind the village's decision.[94] Since the plaintiffs had not produced evidence of such a purpose, the decision of the lower court could stand.[95]

The Court also enunciated in greater detail the kind of evidence required in equal protection cases. The intent standard would necessitate a "sensitive inquiry into . . . circumstantial and direct evidence,"[96] including evidence of impact, but "[a]bsent a pattern as stark as that in *Gomillion* or *Yick Wo*, impact alone is not determinative."[97] Among the other relevant

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87. The Court did not consider any particular intent evidence, because the parties had briefed and argued the case on the assumption that Title VII controlled. 426 U.S. 229, 238 nn.8, 10 (1976).

88. 426 U.S. at 254 (Stevens, J., concurring).

89. *Id.* at 253 (Stevens, J., concurring).

90. *Id.*

91. The Supreme Court rejected the tort standard by implication in *City of Mobile v. Bolden,* 446 U.S. at 71-72 n.17.

92. 429 U.S. 252.

93. *Id.* at 265.

94. *Id.*

95. *Id.* at 270.

96. *Id.* at 266.

97. *Id.; see supra* text accompanying notes 17-32.

facts would be the historical background of the challenged decision, the sequence of events leading to the decision, any departures from the normal procedural sequence attending the decision, any substantive departures from established law or policy of the community, and whatever legislative or administrative history is available, including statements of officials, minutes of meetings, reports, and testimony.[98] This inquiry would seem to flesh out what the *Washington* Court meant by the "totality of the relevant facts."[99]

The question lingered, however, about the effect of *Arlington* and *Washington* on the impact-only standard articulated in *White*. *Arlington* and *Washington* both failed to discuss or distinguish *White*, implying perhaps that the Court intended to leave it alone. At this point *White* could be distinguished because, like the other vote-dilution cases, it implicated a fundamental right.[100] Thus, one could argue that a showing of discriminatory effect should be sufficient where a law impinged disproportionately on minorities' exercise of such rights.[101] Intent, on the other hand, would be required in cases involving rights to which there are no constitutional entitlements.[102] This distinction within the class of cases requiring strict scrutiny may look like little more than constitutional hair-splitting, but it is consistent with the Court's tradition of deference to neutral state decision-making

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98. 429 U.S. at 267-68.

99. 426 U.S. at 242.

100. *See* Reynolds v. Sims, 377 U.S. 533, 561-62 (1964) ("[T]he right of suffrage is a fundamental matter in a free and democratic society"); Yick Wo v. Hopkins, 118 U.S. at 370 ("[Voting] is regarded as a fundamental political right, because preservative of all rights").

101. Under the two-tier model of equal protection review developed by the Warren Court and largely adopted by the Burger Court, laws impairing a fundamental right or creating a suspect classification are subject to "strict" constitutional scrutiny. Such scrutiny almost invariably leads to the invalidation of the challenged enactment. Minimum rationality, or "weak" scrutiny is reserved for routine socioeconomic legislation. Laws subjected to this level of review are almost always upheld. *See* GUNTHER, CONSTITUTIONAL LAW: CASES AND MATERIALS 670 *et seq.* (10th ed. 1981); TRIBE, AMERICAN CONSTITUTIONAL LAW 994-999, 1000-1060 (1978).

Interests besides voting deemed "fundamental" by the Court include: interstate travel, Shapiro v. Thompson, 394 U.S. 618 (1969); privacy (contraception), Griswold v. Conn., 381 U.S. 479 (1965); family relationships, Prince v. Mass., 321 U.S. 158 (1944); procreation, Skinner v. Okla., 316 U.S. 535 (1942); child rearing and education, Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); and equal litigation opportunity, Griffin v. Ill., 351 U.S. 12 (1956). *See* City of Mobile v. Bolden, 446 U.S. at 113 n.9 (Marshall, J., dissenting); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1000-1010 (1978).

102. This analysis thus draws a distinction between cases implicating fundamental rights and cases involving suspect classifications. Although both types of cases would, under the two-tier model of equal protection jurisprudence, invoke "strict scrutiny," the present analysis calls for the most exacting scrutiny where fundamental interests are at issue. Although a majority of the Court has never fully subscribed to this multi-tiered analysis, Justice Marshall has endorsed it both as a way of explaining past decisions and as an analytical method that places the greatest possible protections around fundamental interests. *See* Mobile, 446 U.S. 55, 119 n.20 (1980) (Marshall, J., dissenting). *See also* Note, *Discriminatory Effect of Elections-at-Large: The "Totality of the Circumstances" Doctrine*, 41 ALBANY L. REV. 363, 380-81 (1977); Note, *Racial Vote Dilution in Multimember Districts: The Constitutional Standard After Washington v. Davis*, 76 MICH. L. REV. 694, 720-21 (1978).

affecting the distribution of resources or services to citizens.[103] Such deference would be inappropriate where the right impaired is deemed fundamental under the Constitution.[104]

E. City of Mobile v. Bolden

In light of the constitutional distinction that was permissible between *White v. Regester*, on the one hand, and *Washington* and *Arlington* on the other,[105] the Supreme Court's decision in *City of Mobile v. Bolden* was by no means inevitable. Factually, at least, *Mobile* most resembled *White*. A number of black citizens of Mobile, Alabama brought a class action under the Voting Rights Act[106] and the fourteenth and fifteenth amendments to abolish the city's at-large commission system.[107] In the district court, the plaintiffs had offered evidence that, due to rigid racial bloc voting—also known as "white backlash"—in Mobile, the at-large electoral scheme permitted white voters to bury the votes of blacks.[108] Since black candidates were forced to run in a single city-wide district against white opponents, they were invariably defeated.[109] As a result, although blacks made up 35.4% of the city population,[110] no black had served on the City Commission since its inception in 1911.[111] The plaintiffs also revealed instances of pervasive and continuous official indifference to the needs of blacks,[112] and

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Alternatively, one might make the distinction in more conventional terms, i.e., between cases requiring application of the "minimum rationality" test and cases calling for strict constitutional scrutiny. Under this analysis, *Arlington* and *Washington* involved routine socioeconomic regulation that required only minimum rationality scrutiny. *White* and *Mobile*, by contrast, fell under the strict scrutiny tier because they implicated the fundamental right of voting. This analysis is unsatisfactory, however, because the minimum rationality standard would not be adequately protective of minority rights in cases like *Washington* and *Arlington*. *See, e.g., The Supreme Court, 1975 Term*, 90 HARV. L. REV. 58, 119-20 (1976).

103. *See, e.g.*, Washington v. Davis, 426 U.S. at 248; San Antonio Ind. School District v. Rodriguez, 411 U.S. 1 (1973); Jefferson v. Hackney, 406 U.S. 535, 546-49 (1972); Dandridge v. Williams, 397 U.S. 471 (1970).

104. *See supra* note 100.

105. *See supra* text accompanying notes 99-103.

106. 42 U.S.C. §§ 1971 to 1974e (1976).

107. Bolden v. City of Mobile, 423 F. Supp. 384 (S.D. Ala. 1976).

108. The district court found that "white backlash" doomed both black candidates and white candidates who were "identified with a favorable vote in the black wards, or identified with sponsoring particularized black needs." *Id.* at 388.

109. Regression analysis revealed that there was a "strong correlation" between a candidate's race and the vote received. *Id.* at 388. In addition, "[p]ractically all active candidates for public office [in Mobile] testified that it is highly unlikely that anytime in the foreseeable future, under the at-large system, that a black can be elected against a white." *Id.*

110. *Id.* at 389-90.

111. *Id.* at 388.

112. The court found that city officials were slow to provide black neighborhoods with adequate drainage systems and street maintenance as compared with white neighborhoods, *id.* at 391, and that black areas generally suffered from lower priority than white in the allocation of city resources. *Id.* at 392. "Very few" blacks had been appointed to the various city boards. *Id.* at 389-90. Finally, the court admonished Mobile officials for their "sluggish and timid response" to a recent spate of cross-burnings, allegations of police brutality, and a "mock lynching" involving police officers. *Id.* at 392.

introduced evidence of patterns of past[113] and present[114] discrimination, the effects of which blacks had not yet overcome. In light of these facts and several "enhancing factors,"[115] the district court concluded that the at-large system "substantially" diluted the votes of blacks.[116]

Turning to the issue of intent, the district court asserted that a showing of discriminatory purpose was necessary,[117] but that it was satisfied by the evidence. The court acknowledged that the system was not created for a discriminatory purpose, since at the time of its inception, in 1911, Alabama blacks had already been disenfranchised. Nevertheless, adopting the tort-based standard of intent from Justice Stevens' concurrence in *Washington*, Judge Pittman concluded that Alabama legislators had intended the "natural and foreseeable consequence" of the electoral system.[118] This fact,

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113. "[M]assive official and private racial discrimination" existed prior to passage of the Voting Rights Act of 1965. *Id.* at 387. Over the years, federal courts had interceded to strike down poll taxes and racial gerrymandering. *Id.* at 393. In addition, Mobile was the target of suits that resulted in the abolition of discriminatory jury selection, *id.* at 393, and the desegregation of the municipal golf course, public transportation, and the city airport. *Id.* at 389.

114. At the time this case was brought (1976), the city of Mobile was subject to a court order enjoining discrimination, *id.* at 389, and the Treasury Department had informed the city that its street resurfacing program violated the anti-discrimination provisions of the Revenue Sharing Act. *Id.* at 391. The Police Department was not desegregated until 1973, and then only by court order. *Id.* at 389.

115. The "enhancing factors" were derived from a seminal Fifth Circuit vote dilution case, Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom.* E. Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976). The district court in *Mobile* summarized the factors as follows:

> (1) The citywide election encompasses a large district . . . .
> (2) The city has a majority vote requirement . . . .
> (3) There is no anti-single shot voting provision but the candidates run for position by place or number.
> (4) There is a lack of provision for the at-large candidates to run from a particular geographic sub-district, as well as a lack of residence requirement.

423 F. Supp. at 393-94 (footnote omitted).

The "enhancing factors" were said to exacerbate the effects of multimember districts, but were not prerequisite to a finding of unconstitutional vote dilution. 485 F.2d at 1305 and n.21. The *Zimmer* opinion provided the standard for the Fifth Circuit's review of vote dilution cases after 1973. Even more significant than the aforementioned "enhancing factors" was the *Zimmer* court's reliance on *White v. Regester* to permit an inference of invidious discrimination

> where a minority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that the existence of past discrimination in general precludes . . . effective participation in the election system . . . .

485 F.2d at 1305 (footnote omitted).

The Supreme Court declined to approve the *Zimmer* test in E. Carroll Parish School Bd. v. Marshall, and expressly disapproved it in City of Mobile v. Bolden, 446 U.S. at 73. *See infra* text accompanying notes 123-28.

116. 423 F. Supp. at 394.

117. *Id.* at 395.

118. *Id.* at 397.

together with the state's subsequent failure to change the scheme in the face of ample evidence of its discriminatory effect, satisfied the necessary showing of intent: "there is a 'current' condition of dilution of the black vote resulting from intentional state legislative *inaction* which is as effective as . . . intentional state action."[119]

Having determined that Mobile's at-large government violated the equal protection clause, the district court abolished the system and ordered the creation of a mayor-council government containing nine single-member districts, pending the submission of a constitutional plan by the city or state.[120] The Court of Appeals for the Fifth Circuit affirmed.[121]

A divided Supreme Court reversed.[122] Justice Stewart, writing for the plurality, began by announcing the rule that purposeful discrimination alone will violate the equal protection clause.[123] The primary authority for the rule, not surprisingly, was *Washington*, *Arlington*, and *Wright*.[124] But Stewart also asserted that *White* was "consistent" with the intent standard.[125] In doing so, he gave *White* an interpretation that its authors could never have intended. Nevertheless, this strained revision of precedent need not have had a material effect on the burden of proof in equal protection cases. By moving *White* into the intent area, the Court might have been indicating that the *White* impact test would now suffice as an intent test. Thus, only a semantic shift would have occurred; a fundamental interest, like voting, would continue to invoke close and thorough scrutiny of the law's effect in light of local economic, social, and political conditions. If, under this theory, the plaintiffs in *Mobile* had produced the variety of evidence that was present in *White*, the Court could have again invalidated the challenged law by drawing an inference of discriminatory purpose.

The validity of this theory, however, was belied by the Court's reasoning, since the evidence adduced in *Mobile* was declared "most assuredly insufficient"[126] to prove intent. In dismissing the evidence produced at trial,[127] the Court threw the continued vitality of *White* into serious question. The facts that no black had been elected to the Mobile City Commission, that city officials had discriminated against blacks in the allocation of

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119. *Id.* at 398.

120. *Id.* at 404.

121. City of Mobile v. Bolden, 571 F.2d 238 (5th Cir. 1978).

122. 446 U.S. 55. Justice Stewart wrote for a plurality of four; Blackmun concurred in the result; Stevens concurred in the judgment; and Brennan, White, and Marshall dissented.

123. 446 U.S. at 66.

124. *See supra* text accompanying notes 33-37 and 73-103.

125. "*White v. Regester* is . . . consistent with 'the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.' " 446 U.S. at 69 (quoting Washington v. Davis, 426 U.S. at 240).

126. 446 U.S. at 73.

127. *See supra* text accompanying notes 105-17.

services, that there had been a long history of official discrimination in the area, and that the at-large system diluted black voting strength, were all considered separately and each was rejected as proof of intentional discrimination.[128] The Court did not explain why these facts were not weighed together as the "totality of the circumstances" test would seem to require.[129] Further, the Court condemned the use of social and historical evidence in general, making the surprisingly broad observation that "these gauzy sociological considerations have no constitutional basis."[130]

The result of this exercise was that the decisive factors in *White* were shorn of all constitutional significance. Although *White* was declared to be of continuing vitality,[131] the criteria derived from it by the Fifth Circuit[132] were rejected, and no attempt was made to distinguish the facts from those present in *Mobile.* By reaffirming *White* and rejecting the fact-intensive "totality of the circumstances" analysis in the same breath, the Court left lower courts and plaintiffs with few articulated standards and little viable precedent. Worse, the Court did not explain what kind of facts would be sufficient to prove purposeful discrimination.

The two concurrences shed little light on the questions left unanswered by the plurality. Justice Blackmun agreed with the dissenters that the evidence proved an intent to discriminate, but voted for reversal because the abolition of the city electoral system was not "commensurate with the sound exercise of judicial discretion."[133]

Justice Stevens concurred in the judgment, noting that "there is a fundamental distinction between state action that inhibits an individual's right to vote and state action that affects the political strength of various groups that compete for leadership in a democratically governed community."[134] Under this view, cases that fell into the first group would be subjected to strict scrutiny, while cases in the latter group would not.[135] Stevens seems to have articulated the reasoning behind the Court's result by drawing a distinction between direct impingement on the right to vote and the mere lack of electoral success. Stevens' explanation of why *White* involved the impairment of a fundamental right while *Mobile* did not, however, is not convincing.[136]

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128. 446 U.S. at 73-74.

129. Justice White interpreted the plurality's method as an outright rejection of the "totality of the circumstances" test, and warned that mass confusion in the lower courts would result. 446 U.S. at 103 (White, J., dissenting).

130. *Id.* at 75 n.22.

131. *Id.* at 69.

132. The Court expressly disapproved the constitutional test announced in Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973), *aff'd on other grounds sub nom.* E. Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976). 446 U.S. at 73. *See supra* note 113.

133. 446 U.S. at 80 (Blackmun, J., concurring).

134. *Id.* at 83 (Stevens, J., concurring).

135. *Id.* at 83-84 (Stevens, J., concurring).

136. Stevens thought that the fact that black voters "register and vote without hindrance" in the city of Mobile distinguished the case from *White.* 446 U.S. at 84 and n.2. In

Stevens departed from the plurality by arguing in favor of a more objective test, stating as he had in *Washington*[137] that a subjective intent standard could only have absurd results. The standard under Stevens' analysis, however, would be quite high: plaintiffs would need to demonstrate an adverse effect at least equal to that required in *Gomillion*.[138] Stevens outlined three factors that would be necessary to make out a violation of equal protection: first, the challenged system must be "manifestly not the product of a routine or a traditional political decision"; second, it must have a "significant adverse impact on a minority group"; and finally, it must be "unsupported by any neutral justification."[139] Under such a standard of review, all but the most outrageous results would escape constitutional scrutiny. Indeed, it is difficult to imagine an enactment that does not have some conceivable "neutral justification." Anything less aberrant than the *Gomillion* gerrymander, it seems, would be constitutionally permissible. Stevens' use of *Gomillion* as a minimum evidentiary standard reflects a heightened level of tolerance toward systemic violations of constitutional rights which is wholly consistent with the plurality opinion's view. Whether phrased in terms of purpose or effect, neither Stevens nor the plurality will find a constitutional violation except in the most egregious of cases.

In dissenting, Justice White acknowledged the necessity of proving intent, but refused to see a distinction between *White* and the facts of the present case.[140] Justice Brennan argued, also, that there was ample evidence of discriminatory intent, but dissented chiefly because he believed that disproportionate impact, not discriminatory intent, was the proper constitutional standard.[141] In a lengthy and spirited dissent, Justice Marshall read the vote dilution cases, *Fortson*, *Whitcomb*, and *White*, as requiring only a showing of discriminatory effect.[142] This was so, argued Marshall, because those cases involved a fundamental right. *Washington* and *Arlington*, by contrast, represented another strand of equal protection law involving suspect classifications. In the latter category, neutral classifications having a racially disproportionate impact would be invalidated only upon a showing of discriminatory intent,[143] because they involved matters, like public em-

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White, however, registration and voting were also unrestricted, but a history of exclusion by means of poll taxes and restrictive registration procedures had left a "residual impact" that discouraged black and chicano participation in the political process. 412 U.S. at 768 (1973). Since this same history was also present in *Mobile*, Stevens' distinction is untenable. Bolden v. City of Mobile, 423 F. Supp. at 387-90; *see supra* notes 111-12.

137. 426 U.S. at 253 (Stevens, J., concurring). *See supra* text accompanying notes 87-90.

138. 446 U.S. at 90-91 (Stevens, J., concurring) (citing Gomillion v. Lightfoot, 364 U.S. 339).

139. *Id.*

140. White found it "remarkable" that the plurality should endorse *White*, yet reject an evidentiary standard derived directly from it. 446 U.S. at 101 (White, J., dissenting).

141. *Id.* at 94 (Brennan, J., dissenting).

142. *Id.* at 108-11 (Marshall, J., dissenting).

143. *Id.* at 112-14 (Marshall, J., dissenting); *see supra* text accompanying notes 86-93.

ployment and housing, to which there are no constitutional entitlements.[144]

Since Mobile's system impinged on a fundamental right, Marshall reasoned, a showing of that impact alone would suffice.[145] Vote dilution, in any form, is constitutionally unacceptable under the rule of *Reynolds v. Sims*.[146] Marshall rejected the plurality's characterization of his dissent as a call for guaranteed proportional representation for blacks, stating that the fundamental rights approach to vote dilution would merely provide a "minimally intrusive guarantee of political survival for a discreet political minority that is effectively locked out of governmental decision-making processes.[147]

Although *Mobile* is not a model of clarity or coherence, a tentative generalization can be made about its effect on equal protection analysis. The plurality of four, with Justice Stevens concurring, made it plain that the Court will not invalidate a facially neutral statute unless the law is shockingly oppressive, anachronistic, and inexplicable on other than racial grounds. Subtler mechanisms of discrimination, under this standard, must inevitably escape constitutional scrutiny. Absent a legislative solution,[148] the result may well be continued second-class citizenship without a remedy.[149]

II

THE RESPONSE IN THE FEDERAL COURTS

Faced with the rejection of the sophisticated discriminatory intent formula[150] that had been developed for equal protection cases over a period of

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144. 446 U.S. at 120-21 (Marshall, J., dissenting).

145. *Id.* at 122-23 (Marshall, J., dissenting).

146. 377 U.S. 533. In *Reynolds,* the Court held that malapportionment resulting from uneven population growth in state legislative districts constituted a violation of the equal protection clause: "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.* at 555. Drawing on this principle, Justice Marshall concluded that "[i]n the present cases, the alleged vote dilution, though caused by the combined effects of the electoral structure and social and historical factors rather than by unequal population distribution, is analytically the same concept: the unjustified abridgement of a fundamental right." 446 U.S. at 116 (Marshall, J., dissenting).

147. 446 U.S. at 123 (Marshall, J., dissenting).

148. As of this writing, debate had begun on the extension of the Voting Rights Act of 1965, with civil rights advocates lobbying aggressively for the codification of an impact standard in racial vote dilution cases. A bill introduced by Senator Mathias and Representative Rodino contained language expressly designed to nullify the Supreme Court's ruling in *Mobile.* N.Y. Times, April 8, 1981, § A, at 10, col. 3. The bill was passed overwhelmingly by the House of Representatives but was expected to encounter stiff opposition in the Senate. *Doubt Cast on Voting Rights Bill,* NAT'L LAW J., February 15, 1982, at 5, col. 1.

149. Marshall warned that "[i]f this Court refuses to honor our long-recognized principle that the Constitution 'nullifies sophisticated as well as simple-minded modes of discrimination,' . . . it cannot expect the victims of discrimination to respect political channels of seeking redress." 446 U.S. at 141 (Marshall, J., dissenting) (quoting Lane v. Wilson, 307 U.S. 268, 275 (1939)).

150. *See supra* note 113.

ten years,[151] the Fifth Circuit[152] and its component district courts must now retool. How these courts respond to the Supreme Court's decision in a given case is a reflection of the durability and coherence of that decision. Already, signs of confusion are appearing, with one panel of the Court of Appeals recognizing a "more rigorous test"[153] and another asserting that *Mobile* failed to provide a "clear holding on the need to prove discriminatory intent in order to establish a violation of the Constitution."[154] Beyond the rhetoric,[155] however, it is most important to see how the lower courts have adjusted the burden of proof in terms of the quality and quantity of evidence necessary to make out a *prima facie* case of intentional discrimination. In general, the courts reviewing challenged electoral systems have been slow to reject the test derived from *White v. Regester*, choosing instead to require a greater amount of evidence of the same kind. One panel of the Fifth Circuit, for example, has suggested that intent may be inferred from a combination of the *Zimmer* factors and other evidence "such as depressed socioeconomic conditions."[156]

In *Lodge v. Buxton*,[157] the same panel undertook a lengthy and thoughtful analysis of *Mobile* and provided a detailed review of the evidence required to overcome the plaintiff's burden in equal protection cases. The court formulated the burden in general terms as follows: "[P]laintiff must establish that the racially neutral at-large system was created *or maintained* for the purpose of preventing minority groups from effectively participating in the electoral process."[158] The court's reference to discriminatory maintenance of the challenged law, as opposed to creation, represents an area of inquiry that seems to have survived *Mobile*. Although the Supreme Court would not entertain a claim that legislators intended a particular result merely because it was reasonably foreseeable,[159] it expressly did not reject the idea that maintaining a law in the face of its discriminatory effects might well be probative of intent.[160]

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151. *See* Jones v. City of Lubbock, 640 F.2d 777 (5th Cir. 1981) (*per curiam*) (Goldberg, J., specially concurring).

152. At the time the cases discussed in this article were decided, the Fifth Circuit was comprised of Alabama, Florida, Georgia, Louisiana, Mississippi, Texas, and the Canal Zone. It had adjudicated most of the significant equal protection cases of the last decade.

153. Corder v. Kirksey, 639 F.2d 1191, 1194 (5th Cir. 1981).

154. Jones v. City of Lubbock, 640 F.2d at 778 (Goldberg, J., specially concurring) (footnote omitted).

155. Since the distinction between intentional discrimination and discriminatory impact is not always self-evident, the more important distinction for the purpose of this analysis is between higher and lower burdens of proof.

156. Thomasville Branch of NAACP v. Thomas Co., 639 F.2d 1384, 1385-86 (5th Cir. 1981).

157. 639 F.2d 1358 (5th Cir. 1981) (*cert. granted sub nom.* Rogers v. Lodge, 49 U.S.L.W. 2642 (U.S. June 12, 1981) (No. 81-2100)).

158. *Id.* at 1363 (emphasis added) (footnote omitted).

159. 446 U.S. at 71 n.17: "[I]f the District Court meant that the state legislature may be presumed to have 'intended' that there would be no Negro Commissioners, simply because that was a foreseeable consequence of at-large voting, it applied an incorrect legal standard."

160. *Id.* at 74 n.21.

The *Lodge* court focused on the discriminatory consequences of the challenged system and on the historical and social facts of black life in the subject county.[161] It reviewed the findings of the district court on the subject of racial bloc voting, underrepresentation, depressed socioeconmic conditions, and inadequate educational opportunities.[162] The court also considered the "enhancing factors" from *Zimmer.*[163]

The most significant factor for the court, however, was evidence of official unresponsiveness.[164] It is this element, the court explained, that would make out a *prima facie* case when considered together with the "totality of the circumstances."[165] Since the district court had weighed all relevant evidence, including that of official indifference to black needs, and properly concluded that the electoral system was maintained for a discriminatory purpose, its decision invalidating the scheme and ordering single-member districts was upheld.[166] The circuit court did not perceive any cataclysmic change in legal standards after *Mobile*, concluding that "the most significant factor" in *Mobile* was that "the evidence adduced was insufficient to allow an inference of discriminatory purpose."[167] By thus limiting *Mobile* to its facts, the court could avoid a dramatic doctrinal shift and uphold a decision rendered prior to *Mobile.*[168]

Other courts, however, have been less willing to dismiss *Mobile* as a fact-bound aberration. One panel of the Fifth Circuit recognized that "we must apply a more rigorous test when drawing the inference of racially discriminatory purpose,"[169] yet chose to leave the articulation of such a test to later cases.[170] In *McMillan v. Escambia County*,[171] another panel declared that official unresponsiveness is no longer relevant,[172] and that the proper equal protection inquiry must be more circumscribed: "was the system purposefully designed or perpetuated to minimize the voting strength of a recognizable, distinct class which has been singled out for different

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161. 639 F.2d at 1376-80.

162. *Id.*

163. *Id.* at 1380; *see supra* note 113.

164. *Id.* at 1376-77; *see also* Cross v. Baxter, 639 F.2d 1383 (5th Cir. 1981).

165. 639 F.2d 1358, 1374.

166. *Id.* at 1381.

167. *Id.* at 1374. *Contra,* Lodge v. Buxton, 639 F.2d at 1382 (Henderson, J., dissenting) (*Mobile* standard eschews socioeconomic data).

168. 639 F.2d at 1375-76. The same view was taken in United States v. Uvalde Consol. Indep. School Dist., 625 F.2d 547 (5th Cir. 1980), in which the court asserted in dictum that "the fundamental reasoning of our decision in *Bolden,* and its companion, *Nevett v. Sides,* . . . survives the Supreme Court's decision intact. Thus, 'a showing of racially motivated official action that infringes the right to vote is sufficient to state a cause of action.' " 625 F.2d at 552 (quoting Nevett v. Sides, 571 F.2d 209, 221 (5th Cir. 1978)).

169. Corder v. Kirksey, 639 F.2d 1191, 1194 (5th Cir. 1981).

170. The court reasoned that since the plaintiffs had presented no evidence probative of intent, a detailed discussion of the *Mobile* intent formula was unnecessary. *Id.* at 1195.

171. 638 F.2d 1239 (5th Cir. 1981).

172. *Id.* at 1248.

treatment under the laws . . . ?"[173] Despite the heightened burden of proof, the court held that both an at-large school board system and city council system had been enacted in circumstances strongly suggesting the presence of a discriminatory purpose.[174] In the case of the school board electoral system, the evidence revealed that historically, Florida law had required single-member districts for school board elections. When, however, Florida's "white primary" system was invalidated in 1945,[175] the legislature immediately set up an at-large system. The facts of its birth plus evidence of the at-large system's later use as a means of defeating black initiatives[176] convinced the court that the system had been created for an invidious discriminatory purpose.

Evidence of the city council system's dicriminatory origin came from the testimony of former officials and contemporary newspaper accounts describing the racial impact of the at-large system as the primary reason for its establishment.[177] The combination of substantive departures from Florida's traditional districting policy and more direct evidence of intent compelled the conclusion that the challenged systems could not be explained on grounds other than race.[178] The circuit court's decision suggests that where the challenged system is new enough to allow an inquiry into the circumstances surrounding its enactment and the attitudes of its supporters, the heightened burden imposed by *Mobile* may not be insurmountable. However, this does nothing for the victims of laws that have been enacted by legislators long dead in times ill-remembered.[179] Thus, the most entrenched systems of discrimination may be beyond the purview of the Constitution.

A more marked shift in judicial attitudes was evident in a Texas racial gerrymander case, *Caserta v. Village of Dickinson*.[180] There, a referendum held for the purpose of incorporating Dickinson, Texas, excluded a large proportion of the area's blacks and Mexican-Americans from the village's boundaries.[181] Invoking the "high burden that plaintiffs face" in four-

173. *Id.*

174. *Id.* at 1245.

175. *Id.*

176. *Id.* at 1246-47.

177. *Id.* at 1247-48.

178. *Id.* at 1245, 1248. The court's emphasis on departures from established policy and on the historical background of the challenged decision was taken directly from the intent factors described in *Arlington, supra* note 91. For a similar approach taken in a post-*Mobile* case under the Voting Rights Act of 1965, 42 U.S.C. § 1973, *see* Hale County v. United States, 496 F. Supp. 1206 (D.D.C. 1980) (change to at-large county commission system had discriminatory purpose and effect).

179. The difficulty of establishing the discriminatory motivation behind legislation two generations old compounded by *Mobile* which rejects the notion that invidious purpose may be inferred where the discriminatory effects of the law were "foreseeable." 446 U.S. at 71-72 n.17 (1980).

180. 491 F. Supp. 500 (S.D. Tex. 1980).

181. The Court stated:

> The record is replete with evidence demonstrating that the northwesterly Village boundary drawn along State Highway 3 had the effect of excluding approximately

teenth amendment claims, the court held that the plaintiffs had failed to prove racially discriminatory motive.[182] The court so held despite the clear parallel to *Gomillion* and the Supreme Court's acknowledgement in *Washington* that impact alone, if dramatic, may prove intent.[183] The district court distinguished *Gomillion* by reciting the legitimate political reasons that had been given for the Dickinson boundaries. But the court failed to recognize that *Gomillion* also held that such reasons should not avail if the racial impact is so gross as to overcome official protestations of legitimacy.[184] The effective exclusion of minority neighborhoods from the town imposed a disenfranchisement sufficiently comparable to *Gomillion* to make a *prima facie* case and subject the village line-drawing to strict scrutiny.

Between the extremes of *Caserta* and *Jones v. City of Lubbock*[185] most courts have responded to *Mobile* by acknowledging a higher, but not insurmountable, burden of proof.[186] Although an inference of intent from circumstantial evidence is still permissible,[187] the *Zimmer* criteria are no longer sufficient by themselves.[188] An added factor in the evidentiary mix, whether expressed as "depressed socioeconomic conditions"[189] or as official "unresponsiveness,"[190] seems to be required. Generalization at this early stage of the judicial process, however, is unwise. The federal courts have been markedly vague in their interpretation of equal protection law after *Mobile*, reflecting, perhaps, the indecision in the higher court.

III

Proving Intent: The Relevant Facts

In the wake of *Mobile,* as after *Washington* and *Arlington,*[191] both the popular press and the law reviews sensed a dramatic shift in the Supreme

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> one-half of a predominantly Black area . . . . Less exacting evidence was adduced to indicate that an area . . . which contains a segment of the Mexican-American community as well as other high ethnic concentrations, was to a large degree excluded from the Village boundaries.

Id. at 503.

182. *Id.*

183. *See* Washington v. Davis, 426 U.S. at 242; *supra* text accompanying notes 75-77.

184. *See* Gomillion v. Lightfoot, 364 U.S. at 346-47.

185. *See supra* note 149.

186. *See, e.g.*, Tasby v. Estes, 643 F.2d 1103 (5th Cir. Unit A, 1981); Lodge v. Buxton, *supra* notes 157-58, 161-67; Thomasville Branch of NAACP v. Thomas County, *supra* note 156; Cross v. Baxter, *supra* note 164; McMillan v. Escambia County, *supra* notes 171-78; United States v. Uvalde Consol. School Dist., *supra* note 168.

187. Corder v. Kirksey, 639 F.2d 1191, 1194 (5th Cir. 1981).

188. Lodge v. Buxton, 639 F.2d at 1373; Thomasville Branch of NAACP v. Thomas County, *supra* note 156.

189. Thomasville Branch of NAACP v. Thomas County, *supra* note 156.

190. Lodge v. Buxton, 639 F.2d at 1376-77.

191. *See supra* note 85.

Court's posture toward racial discrimination.[192] Although under some circumstances it may be desirable to make such predictions, it is more profitable to discuss exactly what the Court has done to affect the evidentiary burden by reviewing in detail the Court's assessment of the evidence adduced at trial. In so doing, it is important to bear in mind that although *Mobile* is important—chiefly because of its breadth and recent vintage—it does not exist in isolation. Any Supreme Court decision is really a part of two dynamics: first, the train of precedent which rolls behind it, and second, the perpetual motion of trial, appeal and remand by which living law is created. Any pronouncements or dicta taken from *Mobile* can be fully understood only in that context, and the following analysis is intended to apply to equal protection litigation in general rather than vote dilution cases alone.

A. Disproportionate Impact

A showing of racially discriminatory effect is the necessary first step in an intent inquiry.[193] But the plurality in *Mobile* also made it clear that the impact must be devastating to permit an inference of intent; statistical disparities[194] and underrepresentation[195] did not impress the Court as long as blacks were permitted to "register and vote in Mobile 'without hindrance.'"[196] The absence of blacks on the city commission and their scarcity in other local government posts were merely the results of a system that, in the Court's view, would "tend to disadvantage any voting minority."[197]

The weight of impact likely to be required was considered in some detail by Justice Stevens in his concurrence.[198] According to Stevens, impact is significant only if it rises to the level of the racial gerrymander in *Gomillion*.[199] He formulated the burden of proof as follows: "[I]f the commission form of government in Mobile were extraordinary, or if it were nothing more than a vestige of history, with no greater justification than the grotesque figure in *Gomillion*, it would surely violate the Constitution."[200] The "extraordinariness" of a given system would probably depend on the

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192. *See, e.g., The Supreme Court, 1979 Term*, 94 HARV. L. REV. 138 (1980); N.Y. Times. May 12, 1980, § 1, at 1, col. 1; N.Y. Times, April 26, 1980, § 1, at 16, col. 1; N.Y. Times, April 23, 1980, § 1, at 22, col. 3.

193. *E.g.*, Washington v. Davis, 426 U.S. at 241-42.

194. 446 U.S. at 73.

195. *Id.* at 77 n.24.

196. *Id.* at 73.

197. *Id.* at 74. The Court has consistently maintained that "the disaster of losing too many elections" does not work a constitutional deprivation. White v. Regester, 412 U.S. at 765-66; Whitcomb v. Chavis, 403 U.S. at 153-55.

198. *See supra* text accompanying notes 132-37.

199. 446 U.S. at 90-91 (Stevens, J., concurring).

200. *Id.* at 91.

extent of its use statewide,[201] or even nationwide.[202] More importantly, the challenged law would have to be an aberration, a significant, "grotesque" departure from established policy in order to violate the Constitution under either Stevens' effects test or the plurality's intent standard. This burden recalls the requirement of evidence of "substantive departures" from established law in *Arlington*.[203] But Stevens, in suggesting *Gomillion* as the minimum standard, has indicated that a much higher burden of proof than *Arlington*'s will henceforth be in effect.[204]

B. History of Official Discrimination

Mobile represents the first time that the Court explicitly rejected the use of historical evidence in the intent inquiry. The Court claimed that such evidence has limited probative value, and so must be given "little credence."[205] This is startling in light of the use of history and its "residual impact" in *White*,[206] and the endorsement of inquiries into the "historical background of the decision" in *Arlington*.[207] The Court's insistence on removing a challenged law from its historical setting appears to reflect a belief that the South has largely achieved racial justice and must no longer be singled out for overzealous judicial attack.[208]

However, the federal courts have yet to abandon historical evidence to the extent that it is part of the so-called *Zimmer* test.[209] Since intent may well be impossible to prove without the use of circumstantial evidence, including evidence of the relevant region's track record in protecting impor-

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201. *Id.* at 92 n.14.

202. *Id.* at 59-60 & n.7. Although the plurality did not formally take this into consideration, the ubiquity of at-large electoral systems appears to have been a point in their favor.

203. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. at 267.

204. *See, e.g.*, Caserta v. Village of Dickinson, 491 F. Supp. 500 (S.D. Tex. 1980). *Caserta* suggests that, after *Mobile*, even gross racial gerrymandering would not easily fail the Court's equal protection test. *See supra* text accompanying notes 178-182.

205. 446 U.S. at 74.

206. *See supra* text accompanying note 66.

207. *See supra* note 97.

208. 446 U.S. at 74 ("Past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful."). *See also* Note, *Challenges to At-Large Election Plans: Modern Local Government on Trial*, 47 U. CIN. L. REV. 64 (1978). With reference to historical evidence, the author argues: "[p]rofound shifts in racial attitudes above and below the Mason-Dixon Line during the last quarter century suggest that such slipshod determinations are obsolete and inequitable in any region." *Id.* at 75. This feeling also prevailed among those who opposed extension of the Voting Rights Act in its present form, because of the requirement that several southern states obtain prior approval of the Attorney General before implementing any changes in their electoral systems. *See* N.Y. Times, April 8, 1981, § A, p. 10, col. 3.

209. *See, e.g.*, Lodge v. Buxton, *supra* note 157; Davis v. E. Baton Rouge Parish School Bd., 498 F. Supp. 580, 587 (M.D. La. 1980) (*Mobile* standards do not apply because "[t]his is not a voting rights case and the racially discriminatory motivation is established by reasons of the former Louisiana laws requiring a dual educational system").

tant rights, it is likely that history will continue to be a significant index of racial attitudes. But the Court is clearly hostile to presuming racism on the basis of past discrimination, and will likely consider historical evidence only if it provides direct evidence of the racial motivation lying behind the challenged law.

C. *The Meaning of "Intent"*

Although "intent" and "impact" appear to have required identical kinds of proof in the past,[210] the *Mobile* plurality defined intent narrowly enough to preclude certain kinds of evidence commonly adduced by plaintiffs in equal protection cases. The Court rejected the "foreseeability" standard of intent that had been derived from Justice Stevens' concurrence in *Washington* and refused to recognize official inaction as evidence of intent.[211] "'Discriminatory purpose,'" the Court explained, "implies more than intent as volition or intent as awareness of consequences . . . . It implies that the decisionmaker . . . selected or reaffirmed a particular course of action . . . 'because of' not merely 'in spite of,' its adverse effects upon an identifiable group."[212] The "because of" standard represents a substantial departure from the view expressed in *Arlington* that discriminatory intent need only be one motivating factor in the decision, not the sole reason behind it.[213] To require proof that a particular law was passed "because of" its discriminatory effects fails to recognize that laws are frequently passed for a multitude of reasons, some of them evil, some of them not.[214] The new standard also necessarily places more emphasis on direct, rather than circumstantial evidence of intent. Direct evidence of the motivations of officials, legislators, or the electorate is necessarily subjec-

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210. *See generally* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252; Washington v. Davis, 426 U.S. at 254 (Stevens, J., concurring); Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 578 (1977) (intent as defined by the Supreme Court is really disproportionate racial impact in disguise).

211. 446 U.S. at 71 n.17.

212. *Id.* (quoting Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979)).

213. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. at 265-67.

214. The Court acknowledged this fact in *Arlington* when it stated that:

> *Davis* does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislative or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one.

429 U.S. at 265 (footnote omitted).

As an example, at-large electoral systems, despite their undeniable discriminatory effect, were also long considered an antidote to entrenched political corruption. *See* Kirksey v. City of Jackson, 506 F. Supp. 491, 502 (S.D. Miss. 1981) (concluding in dicta that at-large system enacted by referendum in 1912 not discriminatorily motivated).

tive, and so not as readily ascertainable, nor as reliable, as indirect, objective evidence.[215]

D. Presence of a Fundamental Interest

The *Mobile* Court did not perceive any threat to the fundamental interest of voting because the consequence of vote dilution, electoral defeat, is not prohibited by the Constitution.[216] A distinction is thus made between the direct impingement of a fundamental right by the state and the tangential impairment of that right attributable to political, economic, or social factors.[217] The latter deprivation, the Court indicated, is unfortunate but not unconstitutional.[218] What the Court did not weigh, however, was the complicity of official action in the latter situation. The basis of the *Mobile* plaintiffs' claim was not simply that an identifiable group had been losing elections,[219] but that the electoral system had been implemented with that result in mind. Nevertheless, the Court will not recognize the impairment of a right, like voting, that is threatened in fact[220] but not in law.[221]

E. The "Totality of the Circumstances" Approach

The *Mobile* opinion represents a new direction not only in the kind of evidence required, but also in the analytical method courts must employ in weighing that evidence. Previously, the Court had determined that the challenged law must be reviewed in light of the "totality of the circumstances."[222] Thus, intent would be proven only by a combination of many different kinds of evidence.[223] If, considered together, the disparate facts demonstrated that the challenged law was inexplicable on other than racial grounds, the plaintiffs would prevail. The *Mobile* plurality, however, sidestepped this method by considering each quantum of evidence separately.[224] This necessarily increases the plaintiffs' burden to produce direct evidence

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215. Washington v. Davis, 426 U.S. at 252 (Stevens, J., concurring); Norris v. Alabama, 294 U.S. 587, 598 (1935). For an example of the successful use of both subjective and objective intent evidence, *see* United States v. Parma, 494 F. Supp. 1049 (N.D. Ohio 1980).

216. 446 U.S. at 77.

217. *Id.* at 83 (Stevens, J., concurring).

218. *Id.* at 75-76.

219. The plurality's characterization of the dissent's viewpoint is inaccurate. Marshall acknowledges at the start that political defeat alone does not work a constitutional deprivation. *Id.* at 111 n.7 (Marshall, J., dissenting).

220. *Compare* 446 U.S. at 75 *with* 446 U.S. at 116 n.14 (Marshall, J., dissenting).

221. *Id.* at 73 ("Negroes register and vote in Mobile 'without hindrance'".).

222. *See, e.g.*, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. at 266 ("totality of the relevant facts"); Washington v. Davis, 426 U.S. at 242 ("totality of the revelant facts"); White v. Regester, 412 U.S. at 769 ("totality of the circumstances"); Fortson v. Dorsey, 379 U.S. at 439 ("circumstances of a particular case" might render law unconstitutional).

223. *See, e.g.*, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. at 267-68 (1977).

224. 446 U.S. at 73-74.

of intent and discourages the use of circumstantial evidence to create an inference of discriminatory purpose.[225] Only a "smoking gun," perhaps, will suffice to prove intent. The prospects of producing documentary or testimonial evidence of the kind demanded by the Court would seem to be extremely bleak.[226]

V

THE SEARCH FOR AN EQUITABLE INTENT STANDARD: CRITICISM AND PROPOSALS

A. The Role of Disproportionate Impact

One consequence of the heightened burden of proof exemplified by *Mobile* is that the disproportionate impact must be unusually egregious to be considered at all probative of discriminatory purpose. The Court was not impressed, for example, with the ample evidence relating to the exclusion of blacks from political life in the city of Mobile.[227] As long as the right to vote was secure, there was little "impact" on the plaintiff class. As Justice Stevens' concurrence in *Mobile* suggests, only a deprivation equal to or greater than that imposed by the gerrymander in *Gomillion* would be probative of impermissible purpose.[228] This would effectively deny discrete minority groups a constitutional remedy where the challenged statute does not bear the clearest stamp of racism.

If purpose must be shown, as we must now acknowledge, *White v. Regester*[229] provides a model for reasoned use of impact evidence in that inquiry. The plaintiffs need not show that the statute is utterly disenfranchising, unique, or even "uncouth." Instead, statistical and historical evidence can be marshalled to show a consistent pattern of underrepresentation and political powerlessness. While such consequences will not, of course, be *per se* unconstitutional, they can be considered together with evidence of past discrimination and present neglect to create an inference of discriminatory legislative purpose. The burden should then be shifted to the defendants to produce evidence sufficient to rebut the inference of intentional discrimination.[230] This analysis can be extended to all cases where the challenged law, although not a political or historical aberration, has consequences serious enough to merit heightened scrutiny.

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225. Justice White argued that the abandonment of the "totality of the circumstances" approach would leave the lower courts "adrift on uncharted seas with respect to how to proceed on remand." 446 U.S. at 103 (1980) (White, J., dissenting).

226. *See, e.g.*, Washington v. Davis, 426 U.S. at 253 (Stevens, J., concurring).

227. Bolden v. City of Mobile, 423 F. Supp. 384, 388-89 (S.D. Ala. 1976). *See supra* notes 105-112.

228. *See supra* text accompanying notes 135-37.

229. *See supra* text accompanying notes 62-72.

230. *See, e.g., The Supreme Court, 1975 Term*, 90 HARV. L. REV. 58, 120 (1976). The author favors an emphasis on impact evidence rather than motivational evidence because "'discrete and insular' minorities [that are] forced to prove that . . . cumulative, officially

B. The Use of History

It is axiomatic that a facially fair law will not be invalidated because of its presumed or predicted effect,[231] or solely because a discriminatory purpose lay behind its enactment. Instead, both intent and impact must be shown. These can best be demonstrated by, first, the larger historical setting of the challenged law and, second, by the particular circumstances of its enactment.[232] A long-term pattern of official discrimination makes it likely that the effects of social degradation persist, even years after *de jure* barriers have fallen.[233] The plaintiffs must try to show that the challenged state action effectively ratifies a particular minority group's historical position of inferiority in the guise of a law that applies equally to all.[234] Thus, if the challenged enactment is the product of a political system that has demonstrated persistent hostility to minorities in the past, it is not unreasonable to infer illegitimate motivation where the detrimental effect on minorities is plain and the other relevant facts are consistent with such a conclusion.[235]

A narrower historical inquiry into the circumstances of the law's enactment may also be revealing. Rather than attempt to divine the inner motivations of legislators,[236] courts should, if possible, examine the events attending the birth of the challenged legislation. Thus, assuming the requisite showing of disproportionate impact, the fact that an at-large electoral system was created in the first legislative session after the judicial abolition of a "white primary" would strongly suggest a cause and effect relationship and, hence, invidious motive.[237] Similarly, an at-large system created immediately after the passage of the Voting Rights Act of 1965, accompanied by a

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imposed disadvantage is wrongful must confront the difficulties of establishing illegitimate motivation—difficulties that are particularly pronounced when that motivation takes the form of indifference to the burdens imposed on such minorities." *Id.*

231. *See, e.g.*, Fortson v. Dorsey, 379 U.S. at 437.

232. *See, e.g.*, Washington v. Davis, 426 U.S. at 252 (Stevens, J., concurring); Palmer v. Thompson, 403 U.S. 217, 224 (1971); *see also* Wright v. Rockefeller, 376 U.S. 52 (1964) (showing of impact).

233. *See, e.g.*, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 267 (1977); White v. Regester, 412 U.S. 755, 768-69 (1973).

234. *See, e.g.*, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. at 267; White v. Regester, 412 U.S. at 768; Lodge v. Buxton, 639 F.2d 1358, 1376-80 (5th Cir. 1981); McMillan v. Escambia County, 638 F.2d at 1245-46.

235. In so doing, courts would not invariably condemn action by states that have long histories of official discrimination. Historical evidence does not—indeed, must not—by itself create a presumption of unconstitutionality. But it does help define the political system that produced the challenged law, and the values imbedded in that system. Professor Tribe, in his discussion of *Washington v. Davis,* explains the use of historical evidence this way: "It seems clear . . . that . . . a continuing history of pervasive racial prejudice in the crucial and interrelated areas of housing, employment, and education both explains and perpetuates official choices which combine to keep racial minorities separate, and to limit their mobility in society." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1030 (1978).

236. *See, e.g.*, Washington v. Davis, 426 U.S. at 253 (Stevens, J., concurring).

237. McMillan v. Escambia County, 638 F.2d at 1245. *See also* Paige v. Gray, 538 F.2d 1103 (5th Cir. 1976) (change to at-large system after invalidation of "white primary" suggests purposeful discrimination).

legislative resolution condemning the Act, would give rise to an inference of impermissible purpose.[238]

C. *Redefining Intent*

As noted earlier,[239] the Supreme Court's latest articulation of the intent standard requires that legislators choose the challenged action solely "because of" its discriminatory impact. Such a standard places greater emphasis than before on subjective motivation.[240] Since legislators today are not likely to admit to impermissible motives or leave behind direct evidence of such motives,[241] this reliance on subjectivity is hardly realistic.[242] Intent should be defined more broadly and more objectively. It should encompass action taken despite its foreseeable consequences, as well as persistent official inaction in the face of a law's patently harmful effect on minority groups.

The *Mobile* Court's reluctance to recognize official or legislative neglect as a component of intent deprives plaintiffs of an important kind of evidence, because preservation of the *status quo* is often precisely the method by which minorities are denied full participation in society.[243] Failure to recognize inaction would also create an absurd result: where a neutral law has been enacted for a benign purpose, yet becomes, over time, a mechanism of discrimination, it would never violate the Constitution. Instead, under the Court's theory, a neutral law must be the result of a

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238. *See* Hale County v. United States, 496 F. Supp. 1206, 1217-18 (D.D.C. 1980). Although decided under § 1973c of the Voting Rights Act of 1965, 42 U.S.C. §§ 1971-1974e (1976), this case rested partly on the finding that a discriminatory purpose lay behind changes in the county's electoral system. The court's discussion of the evidence leading to an inference of intent is instructive for equal protection clause cases.

239. *See supra* text accompanying notes 210-11.

240. *See supra* text accompanying notes 208-13; F. Samford, *Toward a Constitutional Definition of Racial Discrimination*, 25 EMORY L.J. 509 (1976). Samford endorses the intent standard in theory, but argues that "[f]inding discriminatory purposes . . . must be a more objective undertaking than trying to psychoanalyze legislators." 25 EMORY L.J., at 572. Samford's own definition of intent is as follows: "'[p]urposeful' means that a decision would not have been made 'but for' its differential impact on a racial minority; the personal feelings of the decisionmakers are not relevant." 25 EMORY L.J. at 574.

241. *See* Thomas, *Burden of Proof in Equal Protection Discriminatory Impact Cases: An Emerging Standard*, 26 CATH. U. L. REV. 815, 830 (1977); Note, *Zoning—Arlington Heights v. Metropolitan Housing Development Corp.: An Implicit Endorsement of Exclusionary Zoning?*, 55 N.C. L. REV. 733, 746 (1977).

242. Where direct evidence of subjective purpose is adduced, however, it carries tremendous weight. *See, e.g.*, United States v. City of Parma, 494 F. Supp. 1049 (N.D. Ohio, 1980). In that case, decided under the Fair Housing Act, 42 U.S.C. §§ 3601-3631 (1976), racially discriminatory motivation was proven by a detailed record of meetings, statements, political campaigns, and official and unofficial actions making it plain that the rejection of low income housing was motivated by racial animus. The high point—or low point—of the record was the statement by the City Council President, at a public meeting, that "I do not want Negroes in the City of Parma." 494 F. Supp. at 1065.

243. *See The Supreme Court, 1975 Term*, 90 HARV. L. REV. 58, 120 (1976).

discriminatory motive at its inception in order to be invalid. But, since a law's harmful effect may well be the result of changing demographic, ethnic, political, or economic conditions rather than of any defect in its conception,[244] the failure of responsible officials to change it is probative of intent and ought to be recognized as such.[245]

In addition, emphasis should be placed on how officials have responded to alternatives to the challenged law. Evidence that, for example, a less racially oppressive electoral system was proposed and rejected for no articulable reason, suggests that the law in force is serving a discriminatory purpose.[246] The Supreme Court appears not to have foreclosed this area of inquiry, for it expressly declined to decide the issue of whether the "maintenance" of an oppressive law would violate the Constitution.[247]

D. The Presence of a Fundamental Interest

We have noted how the Supreme Court appears to give little weight to "indirect" impingements on fundamental rights.[248] By according such equivocal protection to those interests, the Court is in danger of permitting all but the most flagrant constitutional deprivations to persist.[249] For example, the Court believes that the right to vote is resilient enough to overcome the effects of vote dilution, since there is a marketplace of political power which is open to all. However, it is inappropriate to leave the preservation of an important right to the fate of partisan political struggle.[250] Until *Mobile*, the Court's decisions were at least consistent with the proposition

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244. *See, e.g.*, Reynolds v. Syms, 377 U.S. 533 (1964). Although the Alabama Legislature was properly apportioned in 1900, uneven population growth had substantially diluted the votes of citizens in the more populous districts. The Court struck down the apportionment as violative of the equal protection clause. *Id.* at 568 (1964).

245. *See* City of Mobile v. Bolden, 446 U.S. at 136 (Marshall, J., dissenting); Note, *Group Representation and Race-Conscious Apportionment: The Role of States and the Federal Courts*, 91 HARV. L. REV. 1847 (1978).

246. The district court in *Mobile* found that "whenever a redistricting bill of any type is proposed by a county delegation member, a major concern has centered around how many, if any, blacks would be elected." Bolden v. City of Mobile, 423 F. Supp. 384, 397 (S.D. Ala. 1976).

In a similar vein, the Justice Department recently rejected a redistricting plan proposed for the city of Richmond, Virginia, concluding that the plan had been conceived with intent to dilute black voting strength. The Justice Department disapproved the scheme in part because another plan, which could have preserved black voting strength and was proposed by the Virginia Senate's lone black member, had been rejected by a vote of 35 to 3. N.Y. Times, July 25, 1981, p. 6, col. 1.

247. City of Mobile v. Bolden, 446 U.S. at 74-75 n.21.

248. *See supra* text accompanying notes 132-36.

249. *See supra* text accompanying notes 136-37.

250. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1006 (1978): "[T]he distinction between 'absolute' and 'relative' deprivations seems all but meaningless in the context of interests—like the right to vote or to acquire skills—which become effective exclusively or largely in competitive settings." *See also The Supreme Court, 1975 Term*, 90 HARV. L. REV. 58, 119-20 (1976).

that vote dilution constituted the impairment of a fundamental right.[251] If any fundamental interest is to be sufficiently preserved, the distinction between levels of impairment—a distinction made without reference to fixed principles—must be abandoned. State action which impinges on the exercise of a fundamental right, even indirectly, must not be permitted to escape strict constitutional scrutiny.[252] Instead, proof of injury to a right deemed "fundamental" under the Court's decisions should create a *prima facie* case and shift the burden to defendants to demonstrate a compelling state interest in the challenged law.[253]

E. Reinstating the "Totality of the Circumstances" Method

Implicit in this discussion is the proposition that all the evidence, of whatever nature, must be weighed in its entirety if a court is to consider intelligently the constitutionality of neutral state action. Indeed, it seems a perversion of the judicial function to chop the evidence into conceptual bits and decide the case on the basis of each fragment considered in isolation. A court can no more make a rational decision on this basis than we can guess at the dimensions of a picture by gazing at one square inch of the canvas.

The lower federal courts must sense this problem, for none have rejected the "totality of the circumstances" technique.[254] If anything, they have brought still more areas of inquiry within the "circumstances" to be considered in equal protection cases.[255] This places greater pressure on plaintiffs' attorneys to produce well-developed factual records. The sheer weight of evidence in these cases may well be determinative. In the face of more comprehensive fact-findings below, it should not be an idle hope that the Court will find its atomized evidentiary review untenable.

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251. *See supra* text accompanying notes 99-103; Note, *Racial Vote Dilution in Multimember Districts: The Constitutional Standard After Washington v. Davis*, 76 MICH. L. REV. 694, 722-26 (1978).

252. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1032 (1978). Professor Tribe argues that inequalities bearing on fundamental rights are "particularly injurious when they interfere with either of the two major sources of political and legal legitimacy—namely, voting and litigating—or with the exercise of intimate personal choices." *Id.* at 1002-03 (footnotes omitted). He proposes an "intermediate approach" which would "reserve strict judicial scrutiny for those governmental actions which, given their history, context, source, and effect, seem most likely to reflect racial prejudice, either in the sense of hostile or unfavorable attitudes toward racial minorities or in the sense of blindness to minority welfare." *Id.* at 1032.

253. *See* City of Mobile v. Bolden, 446 U.S. at 137 (Marshall, J., dissenting); F. Samford, *Toward a Constitutional Definition of Racial Discrimination*, 25 EMORY L.J. 509, 575 (1976); *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 28, 120 (1976).

254. *See supra* text accompanying notes 148-88.

255. The court in *Corder v. Kirksey*, for example, declared that "a clear majority of the Supreme Court would endorse the constitutional validity of recourse to a factually based inferential determination of the existence of racially discriminatory purpose." 639 F.2d 1191, 1195 (5th Cir. 1981).

VI

CONCLUSION

The Supreme Court has imposed ever-higher burdens of proof in equal protection challenges to neutral state laws. The outcome, best exemplified by *Mobile*, can only be a sharp curtailment in challenges to laws that weigh more heavily on some groups than others. By according little weight to evidence of historical discrimination, discriminatory impact, official indifference to minority interests, and the systemic weakening of fundamental interests, the Court has tilted the balance of power toward the states. As a result, minorities must turn to the uncertain vagaries of majoritarian politics for the vindication of their rights.

In order to more fully implement the constitutional guarantee of equal protection of the laws, emphasis should once more be placed on the "totality of the circumstances" approach, which combines a variety of circumstantial and direct evidence and permits an inference of interest from an aggregation of objective facts. Although the intent requirement may be here to stay, it need not present an insurmountable burden of proof. If it does, the inequities that must inevitably result will make full citizenship for minorities a more elusive goal than ever.

STEPHEN RINEHART

As this article went to press, the Supreme Court decided in Rogers v. Lodge, ___ *U.S.* ___*; 102 S. Ct. 3272 (1982), that the Fifth Circuit did not err in affirming the district court's finding that the at-large system for electing the Board of Commissioners of Burke County, Georgia, had been maintained for a discriminatory purpose in violation of the fourteenth and fifteenth amendments. Justice White's majority opinion, while reiterating the principle that only intentional discrimination is violative of the equal protection clause, emphasized that the Court must defer to the lower court's historical and sociological findings of fact unless they are "clearly erroneous." Justice White recited the facts and concluded, without further analysis, that "[n]one of the District Court's findings underlying its ultimate finding of intentional discrimination appears to be clearly erroneous." The Court did not apparently perceive any inconsistency with the* Mobile *decision's implicit rejection of historical and sociological analysis and the totality of circumstances approach.*

Justice Powell's dissent, joined by Justice Rehnquist, argued that the majority opinion was irreconcilable with Mobile, *because that case had found sociological evidence "insufficient as a matter of law" to prove discriminatory intent. Justice Stevens dissented separately, attacking the*

Court's growing tendency to emphasize subjective intent instead of "objective circumstances" in equal protection analysis.

The significance of Rogers v. Lodge *is unclear. The Court seemed once again to endorse the wide-ranging "totality of the circumstances" analysis, exemplified by* White v. Regester. *Yet it failed to reconcile this approach with* Mobile. *The result in* Lodge *can perhaps best be explained by the great weight of evidence presented; it seems to have persuaded Justices Burger and Blackmun, who voted with the majority in* Mobile. *The lower federal courts will probably take* Lodge *as a signal to continue their fact-intensive approach to the intent issue.*