The Burger Court Opinion Writing Database

Mobile v. Bolden

446 U.S. 55 (1980)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

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

CHAMBERS OF
THE CHIEF JUSTICE

March 11, 1980

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

Dear Potter:

I join.

Regards,

WEB

Mr. Justice Stewart

Copies to the Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 13, 1979

RE: Nos. 77-1844 City of Mobile, Ala. v. Bolden
78-357 Williams v. Brown

Dear Thurgood:

Byron, you and I are in dissent in Mobile, and Byron, Harry, you and I are in dissent in Williams. Would you be willing to undertake the dissent?

Sincerely,

Bill

Mr. Justice Marshall

cc: Mr. Justice White
Mr. Justice Blackmun

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 27, 1980

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

Dear Thurgood:

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

Sincerely,

Bill

Mr. Justice Marshall

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 13, 1980

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

Dear Byron:

Please join me.

Sincerely,

Bill

Mr. Justice White

cc: The Conference

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

From: Mr. Justice Brennan

Circulated: MAR 14 1980

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 77-1844 AND 78-357

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

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

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

[March —, 1980]

MR. JUSTICE BRENNAN.

I join the dissent of MR. JUSTICE MARSHALL because I agree with him that proof of discriminatory impact is sufficient in these cases. I also join the dissent of MR. JUSTICE WHITE because, even accepting the Court's premise that discriminatory purpose must be shown, I agree with him (as to No. 77-1844) and with MR. JUSTICE MARSHALL (as to Nos. 77-1844 and 78-357) that the appellees clearly met that burden.

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marsha
Mr. Justice Blackm
Mr. Justice Powell
Mr. Justice Rehnqui
Mr. Justice Stevens

From: Mr. Justice Brenn

Circulated: _____

Recirculated: MAR 18 1980

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 77–1844 AND 78–357

City of Mobile, Alabama, et al., Applicants,
77–1844 *v.*
Wiley L. Bolden et al,

Robert R. Williams et al., Applicants,
78–357 *v.*
Leila G. Brown et al.

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

[March —, 1980]

MR. JUSTICE BRENNAN.

I join the dissent of MR. JUSTICE MARSHALL because I agree with him that proof of discriminatory impact is sufficient in these cases. I also join the dissents of MR. JUSTICE WHITE because, even accepting the Court's premise that discriminatory purpose must be shown, I agree with him and with MR. JUSTICE MARSHALL that the appellees clearly met that burden.

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 17, 1980

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

Dear Byron and Thurgood:

I have decided to file my joint dissent for these two cases revised as attached. With abject apologies may I therefore ask you to allow me to withdraw from your respective dissents?

Mea Culpa,

Bill

Mr. Justice White
Mr. Justice Marshall

cc: The Conference

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 77-1844 and 78-357

City of Mobile, Alabama, et al., Appellants

v.

Wiley L. Bolden et al.

and

Robert R. Williams et al., Appellants

v.

Leila G. Brown et al.

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

[April __, 1980]

Mr. Justice Brennan, dissenting.

I dissent because I agree with MR. JUSTICE MARSHALL that proof of discriminatory impact is sufficient in these cases. I also dissent because, even accepting the plurality's premise that discriminatory purpose must be shown, I agree with MR. JUSTICE MARSHALL and MR. JUSTICE WHITE that the appellees have clearly met that burden.

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

From: Mr. Justice Brennan

Circulated: _____

Recirculated: APR 18 1

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 77–1844 AND 78–357

City of Mobile, Alabama, et al., Applicants,
77–1844 *v.*
Wiley L. Bolden et al.

Robert R. Williams et al., Applicants,
78–357 *v.*
Leila G. Brown et al.

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

[March —, 1980]

MR. JUSTICE BRENNAN, dissenting.

I dissent because I agree with MR. JUSTICE MARSHALL that proof of discriminatory impact is sufficient in these cases. I also dissent because, even accepting the plurality's premise that discriminatory purpose must be shown, I agree with MR. JUSTICE MARSHALL and MR. JUSTICE WHITE that the appellees have clearly met that burden.

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

From: Mr. Justice Stewart

Circulated: 4 JAN 1980

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1844

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

[January —, 1980]

MR. JUSTICE STEWART delivered the opinion of the Court.

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

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

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

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

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

CHAMBERS OF
JUSTICE POTTER STEWART

January 11, 1980

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

Dear John,

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

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

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

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

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

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

Sincerely yours,

P.S.

Mr. Justice Stevens

Copies to the Conference

To: The Chief Justice
X Mr. Justice Brennan
Mr. Justice White
Mr. [illegible]
Mr. [illegible]
Mr. [illegible]
[illegible]
[illegible]

From: Mr. Justice Stewart

Circulated: _____

Recirculated: 14 JAN 1980

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1844

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

[January —, 1980]

MR. JUSTICE STEWART delivered the opinion of the Court.

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

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

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

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

Supreme Court of the United States
Washington 25, D. C.

CHAMBERS OF
JUSTICE POTTER STEWART

February 25, 1980

MEMORANDUM TO THE CONFERENCE

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

There are enclosed copies of two footnotes that I contemplate appending at appropriate points in my opinion. I shall probably also have some other additions to make.

P.S.

P.S.

FOOTNOTE A - 77-1844, Mobile v. Bolden

The dissenting opinion refers repeatedly and insistently to "the right to vote," as though this were a "right" guaranteed by the Constitution. Such an implication is not only misleading; it is quite mistaken. Almost a hundred years ago the Court unanimously held that "the Constitution of the United States does not confer the right of suffrage upon any one . . . ." Minor v. Happersett, 21 Wall. 162, 178. Thus it is only in the sense described in footnote B, and not in the sense implied in the dissenting opinion, that the "right to vote" can be deemed "fundamental" under our cases.

FOOTNOTE B - 77-1844, Mobile v. Bolden

The dissenting opinion correctly states that Reynolds v. Sims, 377 U.S. 533, and its progeny have established that the Equal Protection Clause confers a substantive right upon qualified voters to participate in elections on an equal basis with other qualified voters. The dissenting opinion is also correct in stating that this standard, popularly known as the "one person-one vote" standard, requires no showing of discriminatory purpose.

But the "one person-one vote" doctrine is not even remotely involved in this case. The City of Mobile is one electoral unit, and all qualified voters therein may "register and vote without hindrance." Once this elementary fact is perceived, it becomes evident that the major thrust of Part I of the dissenting opinion is in this case quite beside the point.

Supreme Court of the United States
Washington 25, D. C.

CHAMBERS OF
JUSTICE POTTER STEWART

February 27, 1980

MEMORANDUM TO THE CONFERENCE

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

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

P.S.

The dissenting opinion relies upon several decisions of this Court that have held constitutionally invalid various voter eligibility requirements: Dunn v. Blumstein, 405 U.S. 330 (length of residence requirement); Evans v. Cornman, 398 U.S. 419 (scope of residence requirement); Kramer v. Union Free School District, 395 U.S. 621 (property or status requirement); Harper v. Virginia Board of Elections, 383 U.S. 663 (poll tax requirement).

But there is in this case no attack whatever upon any of the voter eligibility requirements in Mobile.

6-6, 10-13, 17-23

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

From: Mr. Justice Stewart

Circulated: _____

Recirculated: 13 MAR 1980

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1844

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

[January —, 1980]

MR. JUSTICE STEWART delivered the opinion of the Court.

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

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

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

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

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

From: Mr. Justice Stewart

Circulated: _____

Recirculated: 25 MAR 1980

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1844

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

[January —, 1980]

MR. JUSTICE STEWART delivered the opinion of the Court.

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

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

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

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

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

From: Mr. Justice Stewart

Circulated: _____

Recirculated: 03 APR 1980

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1844

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

[January —, 1980]

MR. JUSTICE STEWART announced the judgment of the Court and delivered an opinion in which THE CHIEF JUSTICE, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST join.

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

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

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

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

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

CHAMBERS OF
JUSTICE POTTER STEWART

May 6, 1980

MEMORANDUM TO THE CONFERENCE

RE: CASES HELD FOR NO. 77-1844, MOBILE V. BOLDEN.

Two cases have been held pending the decision in Mobile, as follows:

No. 78-492, Nevett v. Sides.

The petitioners brought this suit in the United States District Court for the Northern District of Alabama, alleging that the practice of electing at-large the 13-member city council of Fairfield, Ala., abridged the right of Negro citizens of that city to vote in violation of 42 U.S.C. §§1981 and 1983, and of the Fourteenth and Fifteenth Amendments.

Negroes comprise approximately 48 per cent of Fairfield's population, and Negro candidates were elected to six of the thirteen council seats in 1968, but to none of them in 1972. Following trial, the District Court found that the at-large elections impaired Negro voting strength, and ordered that they be replaced by elections from eight single-member districts. The Court of Appeals concluded that the trial court had not made sufficient findings of fact in the light of Zimmer v. McKeithen, 485 F.2d 1297 (CA 5 1973), and remanded the case to it for further consideration. On remand, the trial court found that the petitioners had not established a constitutional violation. The case was consolidated in the Court of Appeals with three other cases involving claims of vote dilution, including Mobile v. Bolden. The Court of Appeals affirmed, Nevett v. Sides, 571 F.2d 209 (CA 5; Tjoflat, Simpson; Wisdom, concurring), agreeing with the trial court that the petitioners had not carried their burden under the so-called Zimmer factors.

The Court of Appeals' view of what proof is necessary to sustain claims of unconstitutional vote dilution was substantially disapproved by five members of the Court in Mobile v. Bolden. However, since the Court of Appeals sustained the findings of the trial court that the petitioners had not carried even the burden imposed by Zimmer, there is no reason for this case to be further considered in the light of Mobile v. Bolden. Accordingly, I shall vote to deny certiorari.

Fill

City of Mobile

77-1844

Supreme Court of the United States

Memorandum

Jan, 19 80

J. Lewis -

Many thanks for your note joining the Mobile opinion.

I gather there may be trouble getting a majority for the dissenting opinion. You have undoubtedly seen the writing of Justice Stevens about it, and regardless

Note sent me by Potter while we were on Bench

Refers to my "joining" in his City of Mobile opinion

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

From: Mr. Justice White

Circulated: 3-12-80

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1844

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

[March —, 1980]

MR. JUSTICE WHITE, dissenting.

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

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

From: Mr. Justice White

Circulated: _____

Recirculated: 19 MAR 1980

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 1

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1844

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

[March —, 1980]

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN joins, dissenting.

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

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

From: Mr. Justice White

Circulated: _____

Recirculated: 8 APR 1980

8-10

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1844

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

[March —, 1980]

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN joins, dissenting.

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

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

From: Mr. Justice White

Circulated: _____

Recirculated: 17 APR 1980

p. 1

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1844

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

[March —, 1980]

MR. JUSTICE WHITE, dissenting.

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

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 10, 1979

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

Dear Bill:

I will be happy to undertake the dissent.

Sincerely,

TM.

Mr. Justice Brennan

cc: Mr. Justice White
Mr. Justice Blackmun

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 17, 1980

Re: No. 77-1844 - City of Mobile v. Bolden
No. 78-357 - Williams v. Brown

Dear Potter:

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

Sincerely,

TM.

Mr. Justice Stewart

cc: The Conference

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 77–1844 AND 78–357

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

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

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

[February —, 1980]

MR. JUSTICE MARSHALL, dissenting.

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

The District Court in both of these cases found that the challenged multimember districting schemes unconstitutionally diluted the Negro vote. These factual findings were upheld

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

1, 3, 4, 6, 8, 9, 10, 11, 12, 14, 15, 16, 19, 20, 21, 23, 25, 26, 27, 30, 32, 33, 34, 36, 37.

Footnotes renumbered

19 MAR 1980

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 77–1844 AND 78–357

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

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

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

[February —, 1980]

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

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

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

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

20, 21, 22,
33, 35-36
footnotes renumbered

25 MAR 1980

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 77-1844 AND 78-357

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

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

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

[February —, 1980]

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

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

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

"Court" and "majority" changed to "plurality" where appropriate.

other changes: 1, 2, 9, 11, 20, 22-23, 26, 34, 35, 36

footnotes renumbered

4 APR 1980

4th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 77–1844 AND 78–357

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

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

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

[April —, 1980]

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

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

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

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

Stylistic changes throughout

See also #19, 23, 26

16 APR 1980

5th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 77–1844 AND 78–357

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

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

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

[April —, 1980]

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

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

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

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

Note: only changed pages circulated.

18 APR 1980

6th DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 77–1844 AND 78–357

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

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

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

[April —, 1980]

MR. JUSTICE MARSHALL, dissenting.

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

The District Court in both of these cases found that the challenged multimember districting schemes unconstitutionally

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

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 13, 1980

MEMORANDUM TO THE CONFERENCE

Attached is a copy of an article in yesterday's New York Times concerning the latest developments in our Mobile case.

Sincerely,

T.M.

ought to be done.
Court of the United State is tired of doing for black folks," James U. Blacksher, one of the white lawyers for the plaintiffs, [illegible] an alternative

XIX .... No. 44,581

uthern Trend to District Voting Halted as High Court Shifts Signals

Black Representation Could Be Set Back as a Result of Ruling Allowing At-Large Elections in Mobile

By JOHN HERBERS
Special to The New York Times

MOBILE, Ala., May 8 — When Mobile's five-member school board met this week, Dan Alexander, the president, moved quickly to the first order of business: He dismissed the board's two black members, declaring that their votes would no longer be valid under a new Supreme Court ruling.

The two black members had been chosen to represent individual, predominantly black districts. Now, however, the High Court has ruled that this city can legally follow its preference and elect public officials at large, that is, to represent the city as a whole, even though that system might preclude the election of blacks or whites who openly espouse black causes.

Across the South, a movement to institute district elections has been halted in its tracks by the ruling. The widespread trend away from at-large voting for city, county, school board and state legislative offices had been proceeding under the pressures of a series of previous Supreme Court rulings.

Switched Under Court Order

The Mobile board had switched reluctantly to district elections in 1978 under a Federal court order that held that at-large elections in this city, where blacks make up one-third of the electorate, were an unconstitutional barrier to black political participation. The two mostly black districts, the first to hold elections under a system of staggered terms, then selected two blacks, Norman G. Cox and Robert Gilliard, to represent them.

On April 22, the Supreme Court overturned the order, which had been approved by the United States Court of Appeals for the Fifth Circuit.

The decision has had major repercussions, not only in Mobile but also across the South and in Washington. Scores of suits in the courts and in preparation must be be redrawn and re-argued on new grounds. Officials of some jurisdictions that had switched to district elections are now considering switching back to the at-large system.

Justice Dept. Re-evaluates Policy

The Justice Department, which had been supporting the movement with lawsuits and briefs in privately sponsored cases, says that it is re-evaluating its policy in the light of the decision, and civil rights lawyers in the South say that there are reports that the department will no longer join in such legal efforts.

The 6-to-3 ruling, which was accompanied by three dissenting and two concurring opinions, has caused considerable confusion. But lawyers on both sides say there is evidence that the High Court made an important reversal and seems to be trying to find ways to withdraw the Federal presence from state and local elections, which for most of the nation's history had been left largely to the states.

"The message from the Supreme Court to the black folks in this community and to blacks in the United States everywhere ought to be clear, and that is the Supreme Court of the United State is tired of doing for black folks," James U. Blacksher, one of the white lawyers for the plaintiffs, told The Azalea City News [illegible]

Ruling Halts Trend to District Election

Continued From Page A1

newspaper in Mobile, a few days after the Court's decision.

"They believe the Civil War is over, they believe Reconstruction is over, they believe Jim Crow is over and they now believe the civil rights movement is over," Mr. Blacksher continued. "The blacks are no longer entitled to consideration in light of 300 years of official oppression. They're just another group out there, like Catholics and Protestants, I suppose."

Mr. Blacksher's opponent in the case, Fred Collins, the Mobile City Attorney, expressed the same opinion in a different way. Citing a passage from Justice Potter Stewart's main decision about the legal complications that might arise if the courts had to rule on the political rights of Irish Americans, Italian Americans, Polish Americans, Jews, Roman Catholics and Protestants, Mr. Collins said in an interview:

"That is what they're talking about. You know, are we going to go to Salt Lake City and make them rearrange their form of government because the Mormons might be over-represented? This is what the Court was talking about: There is nothing in the U.S. Constitution that guarantees anybody the right to win an election."

15 Years of Black Progress

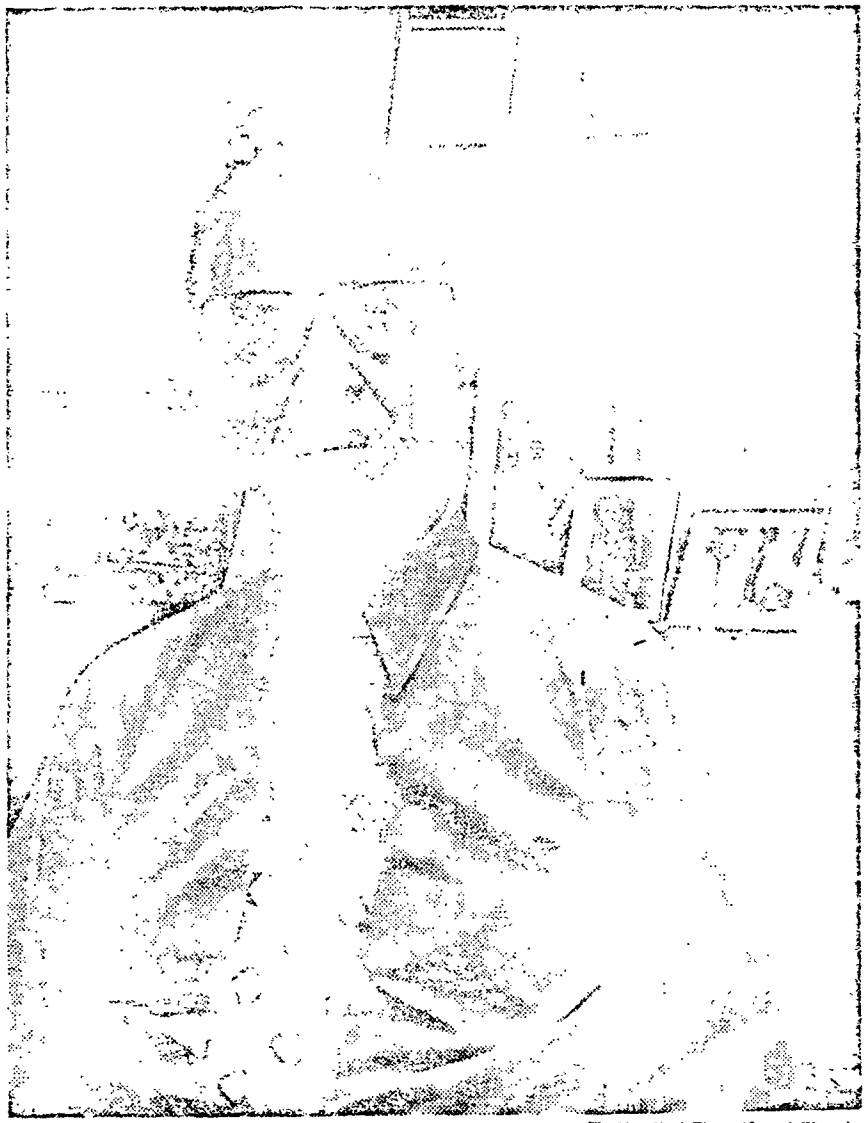
If Mr. Blacksher and Mr. Collins are right, 15 years of steady progress in access to public office and representation for Southern blacks may be ending.

Under the Voting Rights Act of 1965 and a series of Federal court opinions, most barriers against black voting have been removed, and black participation has transformed Southern politics, removing racial discrimination as an issue in most elections. Recent efforts, however, have centered on areas where blacks form substantial minoritities but have not been represented in politics proportionate to their numbers because officials are elected at large. In Mississippi, for example, where blacks make up about 40 percent of the population, the number of blacks in the 174-member Legislature increased from one to 17 after court-mandated redistricting.

Frank Parker, head of the Mississippi office of the Lawyers Committee for Civil Rights Under Law, said that seven cities in that state, Aberdeen, Columbus, Hazlehurst, Meridian, Picayune, West Point and Yazoo City, had voluntarily changed from at-large elections to district elections on the basis of legal precedent that predated the Mobile decision.

In fact, that decision ended a long series of decisions by the Supreme Court and the United States Court of Appeals for the Fifth Circuit, that systems of election had to be changed if the plaintiffs showed that the existing sysyem had the effect of lessening minority voting power.

Officials from four other cities in Mississippi, Jackson, Hattiesburg, Greenville and Greenwood, are in court in an effort to preserve governing boards or commissions that are elected at large, Mr. Parker said. So are a number of cities and counties in other states, including Little Rock, Ark., Jackson, Tenn., East Baton Rouge Parish, La., and Dallas County in Alabama.



The New York Times/Joseph Wetzel

Wiley Bolden, a black activist, at his home in Mobile, Ala. In 1975, he sued to bar the City Commission and the school board from electing officials on an at-large basis, a procedure that could preclude the election of blacks.

The Justice Department has filed suit against South Carolina, seeking to require that at-large elections in large Senate districts be eliminated, but it asked that proceedings in that case be suspended pending its evaluation of the Mobile decision. A similar suit is pending before the State Supreme Court in Florida, where an effort is being made to put more blacks and Republicans in the Legislature, and a number of jurisdictions, including Memphis, anticipated lawsuits challenging their at-large elections.

Rapid Changes in Mobile

Mobile, the subject of the decision, provides a good example of what is at issue in hundreds of other communities. Alabama was a major battleground of the civil rights movement in the 1960's. In most of that period, Mobile, with its long history, its Catholic influence and the languid atmosphere that is characteristic of a number of Gulf ports, never confronted the civil rights movement the way Montgomery and Birmingham did.

In recent years, however, the city has enjoyed rapid economic and population growth. It has become a center of heavy and light industry. Rural people from throughout South Alabama and beyond have moved in to take the jobs, diluting the Catholic and urban influences.

Eighty-six-year-old Wiley Bolden, who founded the first chapter of the National Association for the Advancement of Colored People here, became the plaintiff in a class action lawsuit in 1975 challenging the at-large City Commission, and a companion suit was filed against school board elections. At the trial, the racist campaigns run against white moderates, the poor representation of blacks in the city government and the apparent inability of any black to win elective office were documented.

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 6, 1980

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

Dear Potter:

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

Sincerely,

Harry

Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 2, 1980

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

Dear Potter:

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

Sincerely,

Harry

Mr. Justice Stewart

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 11, 1980

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

Dear Potter:

Now that I am writing separately, you should eliminate the last line appearing on page 24 of your opinion.

Sincerely,

HAB.

Mr. Justice Stewart

cc: The Conference

FILE COPY

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

From: Mr. Justice Blackmun

Circulated: APR 11 1980

Recirculated: _____

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

MR. JUSTICE BLACKMUN, concurring in the result.

Assuming that proof of intent is a prerequisite to appellees' prevailing on their constitutional claim of vote dilution, I am inclined to agree with MR. JUSTICE WHITE that, in this case, "the findings of the District Court amply support an inference of purposeful discrimination," post, at ___ (slip op. at 10). I concur in the Court's judgment of reversal, however, because I believe that the relief afforded appellees by the District Court was not commensurate with the sound exercise of judicial discretion.

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

From: Mr. Justice Blackmun

Circulated: _____

1st PRINTED DRAFT Recirculated: APR 14 1980

SUPREME COURT OF THE UNITED STATES

No. 77-1844

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

[April —, 1980]

MR. JUSTICE BLACKMUN, concurring in the result.

Assuming that proof of intent is a prerequisite to appellees' prevailing on their constitutional claim of vote dilution, I am inclined to agree with MR. JUSTICE WHITE that, in this case, "the findings of the District Court amply support an inference of purposeful discrimination," *post,* at —— (slip op., at 10). I concur in the Court's judgment of reversal, however, because I believe that the relief afforded appellees by the District Court was not commensurate with the sound exercise of judicial discretion.

It seems to me that the city of Mobile, and its citizenry, have a substantial interest in maintaining the commission form of government that has been in effect there for nearly 70 years. The District Court recognized that its remedial order, changing the form of the city's government to a mayor-council system, "raised serious constitutional issues." 423 F. Supp. 384, 404 (SD Ala. 1976). Nonetheless, the court was "unable to see how the impermissibly unconstitutional dilution can be effectively corrected by any other approach." *Id.,* at 403.

The Court of Appeals approved the remedial measures adopted by the District Court and did so essentially on three factors: (1) this Court's preference for single-member districting in court-ordered legislative reapportionment, absent special circumstances, see, *e. g., Connor* v. *Finch,* 431 U. S. 407, 415 (1977); (2) appellants' noncooperation with the District Court's request for the submission of proposed

January 7, 1980

No. 77-1844 Mobile v. Bolden

Dear Potter:

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

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

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

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

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

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

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

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

Sincerely,

Mr. Justice Stewart

LFP/lab

1/7/80

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

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

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

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

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

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

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

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

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

Whether it may be possible reasonably to prove that Mobile's present governmental electoral has been retained for a reasonably discernible voting purpose, we are in no position, on this [illegible]

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

January 15, 1980

77-1844 City of Mobile v. Bolden

Dear Potter:

Please join me.

Sincerely,

Lewis

Mr. Justice Stewart

lfp/ss

cc: The Conference

February 28, 1980

77-1845 City of Mobile v. Bolden

Dear Potter:

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

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

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

Sincerely,

Mr. Justice Stewart

lfp/ss

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

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 9, 1980

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

Dear Potter:

Please join me.

Sincerely,

Mr. Justice Stewart

Copies to the Conference

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 10, 1980

77-1844 - City of Mobile Alabama v. Bolden

Dear Potter:

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

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

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

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

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

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

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

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

Respectfully,

Mr. Justice Stewart

Copies to the Conference

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77–1844

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

[March —, 1980]

MR. JUSTICE STEVENS, concurring in the judgment.

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

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

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

Changes pp. 2-7
footnote 11-15 renumbered

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

From: Mr. Justice Stevens

Circulated: _____

Recirculated: MAR 28 '80

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 77-1844

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

[March —, 1980]

MR. JUSTICE STEVENS, concurring in the judgment.

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

In my view, there is a fundamental distinction between state action that inhibits an individual's right to vote and state action that affects the political strength of various groups that compete for leadership in a democratically governed community. That distinction divides so-called vote dilution practices into two different categories "governed by entirely different constitutional considerations," see *Wright* v. *Rockefeller*, 376 U. S. 52, 58 (Harlan, J., concurring).

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

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

Changes pp. 1, 3, 8, 10, 12

From: Mr. Justice Stevens

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SUPREME COURT OF THE UNITED STATES

No. 77-1844

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

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