MADNESS WITHOUT METHOD: THE SUPREME COURT'S APPLICATION OF THE INTENT STANDARD TO VOTING RIGHTS CASES

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I. INTRODUCTION

In *Washington v. Davis*,[1] the United States Supreme Court held that, in order to sustain an equal protection claim, plaintiffs would have to prove that a government act or law, having a racially disproportionate impact, was conceived or operated with discriminatory intent.[2] By so holding, the Court thrusted itself, and civil rights litigants, into the middle of a long standing debate between scholars over whether it is desirable or fair to make improper government motivation a requirement of constitutional claims.[3] Since the decision, the Court has applied the intent standard to a wide range of contexts, including education,[4] housing,[5] jury selection,[6] and voting rights.[7]

This Comment argues that the Court's formulation, and application, of the intent standard has proven to be incoherent. First, my focus on the Court's use of the intent standard is methodological. Rather than join the aforementioned scholarly debate, this Comment examines how the Court, through inconsistent readings of its own case authority, has been unable to make consistent determinations as to what level of intent must be proven by plaintiffs, and what kind of evidence is needed to prove intent. Thus, regardless of whether one is a supporter, or a detractor, of the proposition that the intent standard should be a core component of equal protection jurisprudence, the Court's intent standard leaves a lot to be desired.

Second, the cases, from which the Court's application of the intent standard will be criticized, are confined to voting rights claims. The voting rights

1. 426 U.S. 229 (1976).

2. Although the term "intent" is the one used most often, the terms "purpose" and "motive" have also found their way into court decisions and legal scholarship. While it has been suggested that there are subtle distinctions between the three terms, it does not appear that the Court has given these distinctions any great weight. *See* Note, *Making the Violation Fit the Remedy: The Intent Standard and Equal Protection Law*, 92 YALE L.J. 328, 328 n.2 (1982); and Sellers, *The Impact of Intent on Equal Protection Jurisprudence*, 84 DICKINSON L. REV. 363, 363 n.1 (1980).

3. The following citations are by no means exhaustive, but represent some of the most frequently cited sources in this area. *See* Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 S. CT. REV. 95; Clark, *Legislative Motivation and Fundamental Rights in Constitutional Law*, 15 SAN DIEGO L. REV. 953 (1978); Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. Rev. 36 (1977); Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970); Karst, *The Costs of Motive-Centered Inquiry*, 15 SAN DIEGO L. REV. 1163 (1978); Sellers, *supra* note 2; Simon, *Racially Prejudiced Governmental Actions: A Motivational Theory of the Constitutional Ban Against Racial Discrimination*, 15 SAN DIEGO L. REV. 1041 (1978).

4. Austin Independent School District v. United States, 429 US. 990 (1976).

5. Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977).

6. Castaneda v. Partida, 430 U.S. 482 (1977).

7. City of Mobile v. Bolden, 446 U.S. 55 (1980).

cases provide extremely persuasive evidence that the Court's intent standard is such a constitutional maze that even the Justices get lost. Further, voting rights are not only necessary to participate in the political process, but are a prerequisite to the enjoyment of other rights, as the Court stated in *Wesberry v. Sanders*: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."[8] Therefore, to the extent the Court presides over these cases, in which plaintiffs are almost always racial minorities, with an inadequate legal framework to adjudicate their minorities claims, the Court has, and will, continue to compromise opportunities to have their status as American citizens vindicated.

Finally, this Comment explores two possible justifications[9] for developing the intent standard, and then assess if the Court's application of the standard fulfills either justification.

II. *WASHINGTON V. DAVIS* AND ITS PROGENY: A STANDARD IS BORN

A. Washington v. Davis

Even after a few readings, it is difficult to believe that *Washington v. Davis*[10] is the case that single-handedly altered the direction of equal protection jurisprudence. Plaintiffs initiated a class action suit, in federal court,[11] on behalf of all Black applicants who unsuccessfully sought appointment to the District of Columbia's Metropolitan Police Department. Plaintiffs alleged that the Department's recruiting procedures, specifically a written examination, that measures verbal skills and which was given to all applicants, discriminated against Blacks in violation of the due process clause of the fifth amendment, and certain federal civil rights laws.[12] The plaintiffs showed that: Blacks failed Test 21 four times more often than whites; the test had not been proven reliable to measure future job performance; and that the number of Black police officers was not proportionate with the demographic mix of the city.[13] The defendants responded to plaintiffs' third showing by demonstrating that the number of Black police officers was close to proportionate to the percentage of Black men, aged 20-29, in the city, and that the Department actively, recruited Black police officers. Consequently, the central issue be-

8. 376 U.S. 1, 17 (1964).

9. Case authority and legal scholarship point to numerous justifications the Court might have had for formulating an intent standard. *See* Note, *supra* note 2; Binion, *"Intent" And Equal Protection: A Reconsideration*, 1983 SUP. CT. REV. 397, 403-08. However, the focus of this Comment is the efficacy, or lack thereof, of the intent standard as a model for judicial decision making, so the two justifications outlined in this Comment are geared toward that focus.

10. 426 U.S. 229 (1976).

11. Davis v. Washington, 348 F. Supp. 15 (D.D.C. 1972).

12. At the time plaintiffs initiated this action, Title VII of the Civil Rights Act of 1964 did not subject government employers to its provisions. Consequently, state employees sought relief from discriminatory practices under the fourteenth amendment, while federal employees sought relief under the fifth amendment. In 1972 Congress amended Title VII to apply to government employers. See Pub. L. No. 92-261, § 4, 86 Stat. 104, 42 U.S.C. § 2000e-5(c) (state and local government) and Pub. L. No. 92-261, § 11, 86 Stat. 111, 42 U.S.C. § 2000e-16 (federal government). Davis v. Washington, 512 F.2d 956, 957 n.2 (D.C. Cir. 1975).

13. Washington v. Davis, 426 U.S. at 235 (citing Davis v. Washington, 348 F. Supp. 15 (D.D.C. 1972)).

came Test 21, upon which the district court ruled that the test was related to job performance.[14] Consequently, the district court granted defendants' motion for summary judgment, while denying plaintiffs' cross-motion. Plaintiffs appealed.

The court of appeals reversed.[15] It felt that the plaintiffs were entitled to the protections of Title VII of the Civil Rights Act of 1964.[16] This determination gave the plaintiffs the benefit of, *Griggs v. Duke Power.*[17] *Griggs* held that "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."[18] The court of appeals upheld the lower court's finding that Test 21 excluded up to four times as many Blacks as Whites, but found that Test 21 did not measure the range of skills of a police officer. Consequently, the appellate court held that Test 21 was not sufficiently job related to survive *Griggs.*[19] In addition, the court of appeals found that the racial composition of the police department was not relevant to the issue of the validity of Test 21.[20] Having made these findings, it reversed. The case came to the United States Supreme Court on a petition for certiorari.

Thus the specific issue before the Supreme Court was whether *Griggs* was correctly applied to Test 21.[21] As the Court itself conceded, the petitioners did not contest that Title VII, and *Griggs*, represented the appropriate basis for resolving this litigation.[22] On this particular issue, the Court affirmed the district court's finding that the racial composition of the police force was improving, and that Test 21 was related to the selection of quality trainees. The Court concluded that the Department had " 'negated any inference that the Department discriminated on the basis of race or that a police officer qualifies on the color of his skin rather than ability.' "[23] In essence, the Court had found that there was no proof of disproportionate impact. On this basis, the Court could have simply reversed the court of appeals, and everyone could have gone home. But that was not the case.

Based on what it perceived was "a plain error not presented,"[24] the Court refused to extend to plaintiffs the benefit of "the" 1972 amendments to Title VII, thereby depriving them of the *Griggs* standard for adjudicating the equal protection claim, despite the fact that all of the parties, and the court of appeals, were willing to litigate under these standards.[25] *Washington* focused on the disproportionate impact a government practice had on racial minorities

14. Davis v. Washington, 348 F. Supp. at 17.
15. Washington v. Davis, 512 F.2d 956 (D.D.C. 1975).
16. *Id.* at 957 n.2. As the circuit court acknowledged, it was using the statutory standard of review under Title VII to adjudicate plaintiffs' constitutional claim, a practice which had been used to dispose of many employment discrimination cases.
17. 401 U.S. 424 (1971).
18. *Id.* at 431.
19. *Id.* at 964-65.
20. *Id.* at 960 n.24.
21. *Washington*, 426 U.S. at 238 n.8.
22. *Id.*
23. *Id.* at 246 (citation omitted).
24. *Id.* at 238.
25. The Court of Appeals for the District of Columbia noted, "The many decisions disposing of employment discrimination claims on constitutional grounds have made no distinction between the constitutional standard and the statutory standard under Title VII." 512 F.2d at 957 n.2 (citations omitted).

and the Court declared that for an equal protection claim, the practice would have to be "traced to a racially discriminatory purpose."[26] The Court supported its position by drawing on cases in the areas of jury selection,[27] voting rights,[28] and education[29] to posit the assertion that discriminatory "intent" was not a new concept to equal protection jurisprudence. Because the circuit court did not require that the plaintiffs prove that Test 21 was conceived, or administered, with discriminatory intent, the Court rejected the plaintiffs' claim.[30] Having made the argument that equal protection claims require a showing of intent, the Court explained how intent could be demonstrated: "Necessarily, an invidious discriminatory purpose may often be inferred from the *totality of the relevant facts*, including the fact, if it is true, the law bears more heavily on one race than another."[31]

The Court's unveiling of this intent standard was unjustified. Having decided against the plaintiffs on the narrow factual issues presented by the litigants, it was unnecessary, if not abusive, for the Court to submit another basis for rejecting the plaintiffs claims. Second, the Court's own case authority provides ample evidence that the Court had taken confusing, if not contradictory, stances on the issue of intent in constitutional claims.[32] For instance, five years prior to *Washington*, in *Palmer v. Thompson*,[33] declared, "No case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it."[34] While *Palmer*, acknowledged that "There is language in some of our cases interpreting the Fourteenth and Fifteenth Amendments which may suggest that the motive or purpose behind a law is relevant to its constitutionality,"[35] it concluded "The focus in those cases was on the actual effect of the enactments, not upon the motivation which led the states to behave as they did."[36] *Washington*'s holding was also contrary to the lower courts that had considered the issue.[37] While these decisions are not controlling, they suggest a prevailing wisdom within the federal judiciary that the Court in *Washington* chose to dismiss. In short, the Court did not have to decide *Washington* as it did.

Regardless of what one thinks about the intent standard, one has to admit that *Washington* represents as extreme a case of judicial overreaching. Although the Court posited that intent could be demonstrated by the "totality of relevant facts," *Washington* left some questions unanswered: What constitutes intent? What is evidence of intent? How much evidence is needed to

26. *Washington*, 426 U.S. at 240.

27. *Id.* at 239 (citing Strauder v. West Virginia, 100 U.S. 303 (1880)).

28. *Id.* at 240 (citing Wright v. Rockefeller, 376 U.S. 52 (1960)).

29. *Id.* (citing Keyes v. School Dist. No. 1, 413 U.S. 189 (1973)).

30. *Id.* at 242.

31. *Id.* (emphasis added).

32. *See* Schwemm, *From Washington to Arlington Heights and Beyond: Discriminatory Purpose in Equal Protection Litigation*, 1977 U. ILL. L. REV. 961, 972-86; Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 544-48 (1977); Ely, *supra* note 3, at 1208-12.

33. 403 U.S. 217 (1971).

34. *Id.* at 224.

35. *Id.* at 225.

36. *Id.*

37. 426 U.S. at 244 n.12. *See also* Binion, *supra* note 10, at 410 n.55; Perry, *supra* note 32, at 555 n.88-90.

demonstrate intent? Shortly after *Washington*, the Court handed down two decisions that attempted to answer these questions.

B. Arlington Heights v. Metropolitan Housing Corp.

Seven months after the Court decided *Washington*, it committed another act of overreaching in *Arlington Heights v. Metropolitan Housing Corp.*[38] A non-profit developer who owned a tract of land in the Village of Arlington Heights, Illinois. The developer petitioned to have the tract rezoned so it could build low and moderate-income housing. The Village refused to rezone. Plaintiff brought a suit in Federal court charging that the refusal to rezone deprived lower income individuals, a disproportionate number of whom were Black, of affordable housing, in violation of the equal protection clause of the fourteenth amendment.[39] The district court held that, in light of evidence establishing that the Village's refusal to rezone was motivated by a legitimate concern for property values, and a lack of evidence proving discrimination against racial minorities, as distinguished from the underprivileged, the Village's decision not to rezone was not in violation of the fourteenth amendment.[40]

The court of appeals reversed.[41] The Seventh Circuit found that the rezoning denial disproportionately burdened Blacks, especially in light of the fact that the general area around the Village was characterized by historical and ongoing residential segregation. The court also found that the Village could not posit a compelling interest to justify its denial of the rezoning.[42] Therefore, it found that plaintiff had made out a claim of racial discrimination in violation of the fourteenth amendment.[43] As previously noted, before *Washington*, every Court of Appeal had rejected using "an intent" standard in favor of "an effects" standard.

The Court reversed the Seventh Circuit, indicating that the correct standard to be applied was discriminatory intent, and that plaintiff failed to prove such intent.[44] In light of the fact that the *Arlington Heights* plaintiffs did not have notice that the Court was going to change the legal standard, reversal was an especially overbearing response. The normal procedure would have been to vacate the court of appeal's decision and remand it back to that court for a reconsideration of its ruling in light of *Washington*.[45]

In any case, the Court began to outline some of the evidentiary sources federal courts could draw on to establish that discriminatory intent was the primary or dominant motivation for the challenged action. These sources include: the historical background of the decision; the specific sequence of events leading up to the challenged decision; departures from the normal procedural sequence; and the legislative or administrative history, which could

38. 429 U.S. 252 (1977).

39. Metropolitan Housing Corp. v. Arlington Heights 373 F. Supp. 208, 209 (N.D. Ill. 1974). The plaintiff also sought relief through sections 1981, 1982, and 1983 of the Civil Rights Act, as well as section 3601 of the Fair Housing Act.

40. 373 F. Supp. at 211.

41. Metropolitan Housing Corp. v. Arlington Heights, 517 F.2d 409 (7th Cir. 1975).

42. *Id.* at 414-15.

43. *Id.* at 415.

44. *Arlington Heights*, 429 U.S. at 270 (footnote omitted).

45. *Id.* at 272 (White, J., dissenting).

include contemporary statements by members of the decision making body, minutes of its meetings, or reports.[46] The Court indicated that these sources were a starting point for the inquiry and were by no means exclusive.

The Court then addressed the concern of what quantum of intent plaintiffs would have to establish to make out an equal protection claim. Recognizing that "[r]arely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern . . ."[47] the Court determined that a plaintiff would have to prove that, absent the discriminatory motive, the defendant would have never made the challenged decision.[48] The Court reaffirmed this analysis in a case decided on the same day, *Mt. Healthy City Board of Education v. Doyle*.[49]

Arlington Heights did provide some welcome refinements to the Court's intent analysis by describing some appropriate areas of inquiry, as well as the quantum of intent plaintiffs must demonstrate in order to sustain an equal protection claim. However, it bears repeating that this analysis came about as a result of judicial overreaching that not only denied the plaintiffs an opportunity to properly litigate the issue of intent, but also denied their claim altogether.

C. Austin Independent School District v. United States

After an initial reading, the Court's decision in *Austin Independent School District v. United States*[50] looks like any number of orders in which it vacates a judgment and remands the case back to the lower court. However, what was at stake was central to how equal protection claims were going to be litigated. The case whose judgment the Court vacated was *United States v. Texas Education Agency*.[51] The court of appeals had to decide what kind of intent was necessary to make out an equal protection claim in a school desegregation case. The court of appeals affirmed the formulation which "after *Keyes* . . . must be viewed as incorporating in school segregation law the ordinary rule of tort law that a person intends the natural consequence of his actions."[52] Having read *Keyes* in this manner, the court noted "We are not the first circuit to read the 'natural and foreseeable consequences' test into the *Keyes* requirement of segregative intent."[53] Therefore, the court of appeals found that school authorities, who assigned children to schools based on a neighborhood assignment policy, "that creates segregated schools in a district with ethnically segregated residential patterns,"[54] acted with the requisite intent because "*A segregated school system is the foreseeable and inevitable result of such an assignment policy*."[55] The court found the school's policy unconstitutional,[56] and subsequently ordered a busing remedy.[57]

46. *Id.* at 267.
47. *Id.* at 265.
48. *Id.* at 270 n.21.
49. 429 U.S. 274 (1979).
50. 429 U.S. 990 (1976).
51. 532 F.2d 380 (5th Cir. 1976).
52. *Id.* at 388 n.4.
53. *Id.* at 389 n.6.
54. *Id.* at 392.
55. *Id.* (emphasis added).
56. *Id.*
57. *Id.* at 397-99.

The Supreme Court vacated the judgment, and remanded the case back to the Fifth Circuit for reconsideration of its opinion, in light of *Washington*,[58] and a determination of whether the busing remedy was appropriate.[59] In a concurrence, Justice Powell expressed concern that "the Court of Appeals may have erred by a readiness to impute to school officials a segregative intent far more pervasive than the evidence justified."[60]

Upon remand, the Fifth Circuit determined that neither *Washington* nor *Arlington Heights* required an abondonment of the tort concept of intent.[61] Consequently, the court of appeals affirmed its findings that the evidence "overwhelmingly supports the conclusion that the Austin School Board . . . engaged in acts showing a pervasive intent to segregate Mexican Americans."[62]

It appears that, despite the Fifth Circuit's affirmance of its earlier holding, the Court's remand was a repudiation of the tort standard. Any doubt as to the Court's view on the subject was removed when it made this declaration:

> We have never held that as a general proposition the foreseeability of segregative consequences makes out a prima facie case of purposeful racial discrimination and shifts the burden of producing evidence to the defendants if they are to escape judgments; and even more clearly there is no warrant in our cases for holding that such foreseeability routinely shifts the burden of persuasion to the defendants.[63]

This statement seems to put the Court directly at odds with its *Keyes* decision in which it stated: "In the context of racial segregation in public education, the courts, including this Court, have recognized a variety of situations in which *'fairness' and 'policy' require state authorities to bear the burden of explaining actions or conditions which appear to be racially* motivated."[64] As the Court attempted to refine its own intent analysis, it moved further and further away from the precedents it relied on in *Washington*, that supported its intent standard. Having done this, the Court appeared to opt for a subjective standard of intent, "which would require a court to determine whether the official decision makers harbored a subjective desire to segregate or discriminate . . ."[65] as opposed to the objective standard, "by which the official decision makers would be held to have intended the reasonably foreseeable consequence of their decisions."[66]

It would seem that if one were to analogize the intent standard to a bottle of wine, it appears to have been brought out before its time. It was introduced in *Washington* when it didn't have to be: it was refined, and used as the basis for reversal, in *Arlington Heights*, when it wasn't appropriate to do so; and it was covertly refined in *Austin* to become a standard that has abandoned the suspect case precedent the Court relied upon in *Washington*. The Court has introduced further refinements to the standard, but those will not be discussed here, not because they are insignificant, but because they will not deflect the

58. *Austin*, 429 U.S. at 991.
59. *Id.*
60. *Austin*, 429 U.S. 991, 991 (Powell, J., concurring)(footnote ommitted).
61. United States v. Texas Education Agency, 564 F.2d 162, 168 (5th Cir. 1977).
62. *Id.* at 163.
63. Dayton Board of Education v. Brinkman, 443 U.S. 526, 536 n.9 (1979).
64. 413 U.S. at 209 (emphasis added).
65. *Texas Education Agency*, 564 F.2d at 167 (footnote omitted).
66. *Id.* (footnote omitted).

criticism that will be made briefly.[67]

III. Underlying Justifications For The Intent Standard

When the Court decided *Washington*, it not only decided on a new standard with which to evaluate equal protection claims, it began to put the weight of case precedent behind its own normative view of the world. It is possible, if not probable, as that the Court's adoption of the intent standard can be explained as: the judiciary's continuing search for a decision making model; and as the Court's description of the types of discrimination it feels the Equal Protection Clause was meant to prohibit.

A. *The Intent Standard As A Judicial Decisionmaking Tool*

Contrary to the litigants of any given case, a judge is more concerned with the process by which he or she will make a decision, rather than with the decision itself. This is because the duty of the judge is "[t]o identify judicial relations, to classify them, and to introduce order and clarity into the field of human events by the use of logical tools. Mentally, he grasps the kind of problems involved and the solutions available for that class of problems which the pending case exemplifies."[68] Two of the tools that judges frequently employ are rules and standards. While both are policy directives, "having the force of law,"[69] they are to be distinguished in that a rule "[r]equires for its application nothing more than the occurrence or the nonoccurrence of a phenomenon"[70] while the standard is usually described in very broad terms, "because the lawmaker recognizes that the details will have to be filled in at a later date as cases arise."[71] Given the development of the intent requirement, through *Washington* and its progeny, it would be more appropriate to characterize it as a standard. As indicated by *Arlington Heights*, the Court had not determined exactly what is evidence of intent and what is not, although it did enumerate some appropriate areas of inquiry. Even though a standard doesn't possess specific factual triggers, it still has to meet certain requirements to be a useful tool for judicial decision making: "Legal consistency, clarity of concepts, and ideas for the classification of materials . . . are important attributes for the execution of the complicated process of comprehending the case and its meaning and for rendering final judgment . . . ."[72] Therefore, if a purported standard fails to possess sufficient clarity, and consistency, the standard will be vulnerable to "the destructive nature of inconsistencies and self-contradictions . . . created by a lack of adequate rationality in the law . . . ."[73] It is at this point that the concerns of judges and litigants merge, because it is important to both that each has a clear indication what to expect from the other before the litigants ever get court.[74] Therefore, if the intent standard is to have any

67. See Comment, *Proof of Racially Discriminatory Purpose Under the Equal Protection Clause: Washington v. Davis, Arlington Heights, Mt. Healthy, and Williamsburgh*, 12 HAR. C.R.-C.L. L. REV. 725 (1977).

68. J. CRETO-RUA, JUDICIAL METHODS OF INTERRUPTATION OF THE LAW 25 (1981).

69. Leedes, *The Supreme Court Mess*, 57 TEXAS L. REV. 1361, 1376 (1979) (footnote omitted).

70. *Id.* at 1375 (footnote omitted).

71. *Id.* at 1376 (footnote omitted).

72. J. CRETO-RUA, *supra* note 68, at 25.

73. *Id.* at 26.

74. *Id.* at 209.

validity, it not only must provide judges a clear, consistent method for adjudicating cases, but it must reasonably inform the litigants of what they have to prove once they get into court.

B. *The Intent Standard As The Court's Normative View of Discrimination*

By requiring plaintiffs to demonstrate that a defendant acted with discriminatory intent, in order to make out an equal protection claim, the Court has shifted the focus of the discussion. Ordinarily, the "starting place for a discussion of racial discrimination would seem to be the concrete experience of a person who belongs to the group that been discriminated against."[75] Simply put, discrimination results in an injury suffered, or a burden endured, by an individual because of their race. This reflects what Alan Freeman has characterized as the "victim perspective."[76] The core principal behind the victim perspective is that eliminating discrimination requires that the conditions that racial minorities suffer under, as a result of discrimination, must be corrected.[77]

On the other hand, the intent standard shifts the equal protection inquiry from the injury the plaintiff suffered to the act or acts of the defendant who caused the injury. This is characteristic of the "perpetrator perspective."[78] The underlying premise of the perpetrators perspective is that:

> Discrimination becomes the actions of individuals, the atomistic behavior of persons and institutions who have been abstracted out of society as part of a quest for villains. It is a notion of racial discrimination as something that is caused by individuals, or individual institutions, producing discrete results that can be identified as discrimination and thereafter neutralized.[79]

As previously mentioned, the Court's decision in *Austin* amounted to a repudiation of the tort standard of intent, and the embracing of a subjective standard of intent. Some commentators regard this shift as a move toward, at the very least, a criminal standard of intent.[80] This being the case, one would have to conclude that the Court's perception of people who discriminate is that they possess evil motives, and that litigation based on equal protection claims are geared more toward stopping the wrongdoers rather than compensating the victims.

Having examined the legal background of the Court's intent standard, and the underlying justifications for it, it is time to examine how the court has applied it in the area of voting rights, because no other area so aptly demonstrates the Court's true understanding of the intent standard, as well as the Court's ability and willingness to deal with perpetrators.

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75. Freeman, *Antidiscrimination Law: A Critical Review,* in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 96, 97 (D. Kairys ed. 1982).

76. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052-53 (1980) (footnote omitted).

77. Freeman, *supra* note 76, at 98.

78. Freeman, *supra* note 77 at 1083.

79. Freeman, *supra* note 76, at 98-99.

80. *See* Sellers, *supra* note 2, at 376; Soifer, *Complacency and Constitutional Law*, 42 OHIO ST. L.J. 383, 404 (1981); Binion, *supra* note 10, at 429.

IV. VOTING RIGHTS CASES AND THE INTENT STANDARD

A. Mobile v. Bolden *and* Rogers v. Lodge: *A Tale of Two Standards*

Mobile v. Bolden,[81] and *Rogers v. Lodge*[82] involved claims by Black citizens, of Mobile, Alabama, and Burke County, Georgia, respectively, that by conducting at large elections since 1911, impermissibly diluted their voting strength[83] in violation of the fourteenth and fifteenth amendments.[84] In order to understand how the Court performed in each of these cases, it will be necessary to take a brief look at the case authority it had to draw on in the area of voter dilution.

The concept that the right to vote is denied, or abridged, by dilution of voting strength was derived from the Court's decision in *Reynolds v. Sims*.[85] In *Reynolds* the court found that a citizen's right to vote is impermissibly diluted when there are population disparities among legislative districts. The Court outlined the basic principle:

> There is more to the right to vote then the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote, includes the right to have the ballot counted. . . .It also includes the right to have the vote counted at full value without dilution or discount. . .that federally protected right suffers substantive dilution. . .[where a] favored group [has] full voting strength. . .[and] groups not in favor have their votes discounted."[86]

Shortly thereafter, the Court found that multi-member districts could effect a dilution of the voting strength of a given minority:

> 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.[87]

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81. 446 U.S. 55 (1980).

82. 458 U.S. 613 (1982).

83. The concept of vote dilution has evolved from case law where courts have acknowledged that certain election districting schemes can have the effect of inhibiting or minimizing the ability of voters to elect candidates who will represent their interests. The dilution has usually taken one of two forms: First, there are the apportionment cases, where there are significant, population disparities between districts. The claim that is usually made is that where one has districts of disparate populations, where each district elects the same number of representatives, the voters in the relatively large districts are having their votes diluted because it takes more of them to elect the same number of representatives as there are in the relatively small districts.

Second, there are the cases which involve the use of multi-member districts. Most political entities are divided into single-member districts, or wards, from which the voters in each district will elect one representative. In a multi-member district, no such division is made, and the entire populace of that political entity will elect all of the representatives. Racial minorities claim that such a system prevents them from electing any of their candidates. What is claimed is that even though racial minorities will also constitute a numerical minority in their particular political entity, single-member districts allow racial minorities to comprise a large enough number in a given district so that they will be a voting presence to be reckoned with. However, a multi-member district will pit the racial minorities against the white majority, vying for all of the candidates. Given that these elections are usually winner-take-all, and voting usually occurs along racial lines, the racial minorities lose any chance to elect any of their candidates. This is the claim of the plaintiffs in *Mobile* and *Rogers*.

84. Both cases involved claims pertaining to section 2 of the Voting Rights Act of 1965. 42 U.S.C. § 1973 (1976). However, the Court didn't reach that claim in either case.

85. 377 U.S. 533 (1964).

86. *Id.* at 555 n.29.

87. Forrson v. Dorsey, 379 U.S. 433 (1965).

In 1973, the Court in *White v. Regester*[88] upheld a District Court order invalidating the multi-member districts in Bexar and Dallas Counties, Texas. "Based on the totality of the circumstances," the Court found that, given the history of discrimination against Blacks in Dallas County, and Mexican-Americans in Bexar County, both groups were "not permitted to enter into the political process in a reliable and meaningful manner."[89] Unfortunately, the court, having relied on the District's Court's "intensely local appraisal,"[90] refrained from formulating any rules that would assist in applying a "totality of the circumstances" test.

Shortly after *White*, the Fifth Circuit, "which had heard more voter discrimination cases than any other Court,"[91] formulated a test to measure voter dilution in *Zimmer v. McKeithen*.[92] Having examined *White* and *Whitcomb v. Chavis*,[93] the court gleaned the following "factors,"[94] which included:

1) A lack of access by blacks to the slating of candidates or the candidate selection process;
2) Unresponsiveness of elected city officials to the needs of blacks;
3) A tenuous policy underlying the preference for multi-member or at-large districts;
4) A history of racial discrimination precluding blacks from effectively participating in the political system;
5) Enhancing factors, such as:
   a. At large election district
   b. Majority vote requirements;
   c. No provision for single-shot voting;

and

   d. No residence requirement[s].[95]

The Fifth Circuit went on to note that, "[T]he fact of dilution is established upon proof of the existence of an aggregate of these factors. The Supreme Court's recent, pronouncement in *White v. Regester* ". . .demonstrates, however, that all these factors need not be proved in order to obtain relief."[96]

1. The Bolden v. Mobile: District Court

The plaintiffs brought their action against the City, in District Court,[97] during which time, the Court had decided *Washington*. The District Court recognized that it had to address the issue of whether *Washington* precluded the usage of the test set out in *White* and *Zimmer*.[98] The court resolved this issue by determining that, since *Washington* didn't expressly comment or overrule *White* or *Zimmer, Washington* did not overrule them," [n]or did it

88. 412 U.S. 755 (1973).
89. *Id.* at 767-69.
90. *Id.* at 769.
91. D. BELL, RACE, RACISM AND AMERICAN LAW 181 (2d ed. 1980).
92. 485 F.2d 1297 (5th Cir. 1973), *aff'd on other grounds sub nom.*, East Carroll Parish School Board v. Marshall, 429 US. 690 (1976).
93. 403 U.S. 124 (1971).
94. *Zimmer*, 485 F.2d at 1305.
95. *Id.*
96. *Id.*
97. Bolden v. City of Mobile, 423 F. Supp. 384 (S.D. Ala. 1976).
98. *Id.* at 394.

establish a new Supreme Court purpose test."[99] The other issue before the district court, was whether the City's electoral scheme was conceived or operated with segregative lower intent when, in 1911, Blacks could not vote.[100] The court, while it concluded that the legislature "[i]n 1911, was acting in a race-proof situation,"[101] found that three factors required a finding that the 1911 scheme was infected with intent. First, the historical context under which the election system was implemented not only indicated that there was an ongoing scheme to disenfranchise Blacks, but that it was natural and foreseeable, in 1911, that the city's election scheme would dilute the voting strength of Blacks who would eventually become voters.[102] Second, to the extent the present effects of the electoral scheme dilute minority voting strength, and the present legislature has done nothing to remedy it, the 1911 electoral scheme has become infected with discriminatory intent.[103]

Finally, the court, applied the *Zimmer* test and found that most of its factors were in plaintiff's favor,[104] which led to the conclusion that Mobile's form of government "results in an unconstitutional dilution of black voting strength."[105] The district court then ordered that Mobile's multi-member district be converted into smaller single member districts, and that the city government be converted to a mayor-council format.[106] The city appealed.

a) Mobile v. Bolden: *The Court of Appeals*

The case came before the Fifth Circuit as one of four cases, consolidated on appeal, to argue claims of racial vote dilution.[107] The first case, *Nevett v. Sides*,[108] centered its inquiry on two key, legal issues: First, do fourteenth or fifteenth amendment voter dilution claims require a showing of intent?[109] Second, can the *Zimmer* test be read to comply with the evidentiary demands of the intent standard?[110]

In resolving the first issue, the Fifth Circuit relied on *Washington, Austin*, and *Arlington Heights*, for the basic proposition that government acts, that are racially neutral on their face, must be traced to a discriminatory intent to make out an equal protection claim.[111] The court then referred to *Wright v. Rockefeller*,[112] which involved a congressional districting scheme that was challenged as being a racial gerrymander. The plaintiffs in *Wright* lost because

99. *Id.* at 398.
100. *Id.* at 394. The City argued that, since the Blacks were disenfranchised by the 1901 Constitution of Alabama, the 1911 decision was "race-proof." In addition, the city asserted that the form of government proposed was adapted to increase efficiency, and to abandon of "the then corrupt aldermanic elections."
101. *Id.* at 397.
102. *Id.*
103. *Id.* at 399-402.
104. *Id.*
105. *Id.* at 402.
106. *Id.* at 402-4.
107. Nevett v. Sides, 571 F.2d 209 (5th Cir. 1978). Bolden v. City of Mobile, 571 F.2d 238 (5th Cir. 1978); Blacks United for Lasting Leadership v. City of Shreveport, 571 F. 2d 248 (5th Cir. 1978); Thomasville Branch of NAACP v. Thomas County, 571 F.2d 257 (5th Cir. 1978).
108. 571 F.2d 209 (5th Cir. 1978) ("Nevett II").
109. *Id.* at 215.
110. *Id.*
111. *Id.* at 217-18.
112. 376 U.S. 52 (1964).

they "failed to prove that the New York Legislature was either motivated by racial considerations or in fact drew the districts on racial lines."[113] Since *Wright* was cited with approval, in *Washington* and *Arlington Heights*, the Fifth Circuit was persuaded that the Court was indicating that intent is a necessary element in an equal protection vote dilution claim.[114] The court of appeals then posited the argument that a racial vote dilution claim is very similar to a claim of racial gerrymandering in that "[A]n invidious at-large scheme merely achieves the same end, denial of effective participation, by submerging an interest group in a constituency large enough and polarized enough to place that group in the minority consistently."[115] Consequently, the Fifth Circuit found that a racial vote dilution claim, predicated on the fourteenth amendment, required a showing of intent.[116]

In analyzing the fifteenth amendment jurisprudence, the Court of Appeals once again referred to *Wright*, which had been litigated on both fourteenth and fifteenth amendment claims, for the proposition that fifteenth amendment claims require a showing of intent as well.[117] *Wright* was "the direct descendant"[118] of another case cited by *Wright* and the Fifth Circuit, *Gomillion v. Lightfoot*.[119] *Gomillion* was a redistricting case, where the city of Tuskegee, by redrawing its boundaries, transformed itself from what "was square in shape . . . into a strangely irregular twenty-eight sided figure"[120] which excluded all but "four or five of its 400 Negro voters while not removing a single white voter or resident."[121] The Black plaintiffs claimed that they were deprived of the right to vote in Tuskegee, in violation of the fourteenth and fifteenth amendments. Although their claims were rejected by the lower court, the Court held that "If these allegations upon a trial remained uncontradicted or unqualified, the conclusion would be irresistible . . . that the legislation is solely concerned with . . . fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote."[122] The Fifth Circuit also found that its own precedents were consistent with the readings given to *Gomillion* and *Wright*.[123] Thus, the Fifth Circuit found that both fourteenth and fifteenth amendment claims of vote dilution required a showing of intent.[124]

On the second issue the Fifth Circuit examined the *Zimmer* test, taking each factor into consideration to determine to what extent the test constitutes "[o]ther evidence that a court must consider in determining whether the districting scheme exists because of invidious racial considerations."[125] The court held "that a finding of dilution under *Zimmer* raises an inference of

113. *Id.* at 56.
114. *Nevett*, 571 F.2d at 218.
115. *Id.* at 219.
116. *Id.*
117. *Id.* at 221.
118. *Bolden*, 423 F. Supp. at 395.
119. 364 U.S. 339 (1960).
120. *Id.* at 341.
121. *Id.*
122. *Id.*
123. *Nevett II*, 571 F.2d at 221.
124. *Id.*
125. *Id.* at 222.

intentional discrimination. . . ."[126]

After *Nevett II*, the Fifth Circuit decided *Bolden v. City of Mobile, Alabama*.[127] At the very onset, the court indicated that it was incorporating the legal analysis of voting dilution cases from *Nevett II*.[128] The court upheld the factual findings of the District Court as amply supporting "the inference that Mobile's at-large system unconstitutionally depreciates the value of the black vote."[129] Therefore, the court reaffirmed its holding in *Nevett II* by concluding that complying with the *Zimmer,* test gives rise to "[t]he inference that the system has been maintained with the purpose of diluting the black vote . . . ."[130] Having upheld the district court findings, the Fifth Circuit upheld the remedy as appropriate and constitutional.[131] The City appealed.

b) Mobile v. Bolden: *Supreme Court Opinion*

The Court, in a decision that included six different opinions, reversed. Justice Stewart wrote the plurality opinion.[132]

Initially, Stewart considered the fifteenth amendment claim. Stewart indicated that the early fifteenth amendment cases stood for the principle that the amendment prohibited the states from discriminating against Blacks "[in matters having to do with voting."[133] He further indicated that later cases required that the alleged infringement be traced to a discriminatory purpose.[134] Part of his support for this proposition were *Gomillion* and *Wright*.[135] However, in his next breath, Stewart dismissed the plaintiffs claim because of the lower court findings that "Negroes in *Mobile* 'register and vote without hindrance. . .' "[136] His argument is internally inconsistent. If the fifteenth amendment pertains to matters having to do with voting, then it is not limited to just the acts of registration and voting. Stewart's own case authority, *Wright* and *Gomillion*, dealt with the drawing of district lines, which will certainly determine where one votes, but not necessarily whether one can vote. In both cases,[137] no one was hindered from registering or voting, yet if one is to accept Stewart's reading of both cases, the only showing the *Gomillion* and *Wright* plaintiffs would have needed, to make out an actionable claim, would have been intent. In addition, Stewart's analysis completely ignored the voter dilution jurisprudence that included *Forrson v. Dorsey*.[138] Certainly one's voting strength is a matter having to do with voting. In short, if one were to accept Stewart's propositions as being correct, and forgive his faux pas on the

126. *Id.* at 225.
127. *Bolden*, 571 F.2d 238 (5th Cir. 1978).
128. *Id.* at 241.
129. *Id.* at 245.
130. *Id.*
131. *Id.* at 247.
132. City of Mobile v. Bolden, 446 U.S. 55 (1980).
133. *Id.* at 61.
134. *Id.* at 62.
135. *Id.* at 62-63.
136. *Id.* at 65.
137. At this point, it is not necessary to criticize the Court's reading of specific holdings in specific cases. The point of this section is that the Court cannot reconcile its arguments with its own readings of the cases.
138. *See Mobile*, 446 U.S. at 103, 112-24 (Marshall, J., dissenting) (citing Forrson v. Dorsey, 379 U.S. 433 (1965)).

dilution analysis, the only issue in dispute would have been whether the City's at-large scheme was conceived or operated with an intent to dilute the plaintiffs voting strength. That brings us to the fourteenth amendment claim.

In positing that fourteenth amendment/equal protection claims require a showing of discriminatory intent, Stewart relied on *Washington, Arlington Heights*, and *Keyes*.[139] As already discussed, *Washington* and *Arlington Heights* were built on very shaky case authority, while the Court's decisions in *Austin* and *Dayton Board of Education v. Brinkman* put the court at odds with *Keyes*. Further, one of the vote dilution cases Stewart cited for authority upholding the intent standard was *White*. On the surface this seems appropriate because *White* and *Washington* were both authored by Justice White. In addition, Justice White formulated roughly the same test for both cases.[140] However, Stewart noted that the lower courts used the *Zimmer* test, which he found was "most assuredly insufficient to prove an unconstitutionally discriminatory purpose in the present case."[141]

However, Stewart trips over his own authorities, because *Zimmer*, as previously discussed, was based on *White* and *Chavis*. In addition, *White* demonstrated that plaintiffs didn't have to meet all of the criteria that was listed, so to the extent that the *Mobile* plaintiffs had fulfilled most of the *Zimmer* criteria, *Mobile* is a stronger case for finding vote dilution than *White*. Finally, the lower courts went to great lengths to acknowledge that intent was the standard for vote dilution claims, and that *Zimmer* could be reconciled with *Washington* and *Arlington Heights*, but Stewart ignored this analysis.

In an attempt to discredit the plaintiffs case, Stewart proceeded to examine each of the *Zimmer* factors, and dismiss each one as being inadequate to support a claim of racial vote dilution. Most noteworthy was his response to the third factor, which was the substantial history of official discrimination against Blacks in Alabama: "But past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself illegal."[142]

The problems with Stewart's approach are evident: First, if Stewart had applied his version of the *Zimmer* test to the plaintiffs in *White*, they would have lost more decisively than the *Mobile* plaintiffs. Second, his application of the *Zimmer* test is just plain wrong, because both *White* and *Zimmer* were based on an aggregate of factors which would help courts assess if impermissible vote dilution had occurred. What Stewart did was to treat each of the *Zimmer*, factors as a rule, a condition whose occurrence or nonoccurrence would determine how a court would decide whether minority. In the end, Stewart's approach disavows the standards posited in *Washington* and *White*.

Perhaps most striking about Stewart's analysis is that *it did nothing to illuminate what the evidentiary requirements of an intent standard are*. To disapprove of the factors enumerated in *Zimmer* is one thing; to do so without a competing formulation to measure *Zimmer* against is, at the very least, incoherent, and at the very most, nihilistic. Stewart's opinion appears to suggest

139. *Bolden*, 446 U.S. at 68.

140. *Compare White*, 412 U.S. at 769 ("totality of the circumstances") *with Washington*, 426 U.S. at 242 ("totality of the relevant facts").

141. *Mobile*, 446 U.S. at 69.

142. *Id.*

that he knows discriminatory intent when he sees it, but does not demonstrate what he looks at to see it.

The concurrences of Justice Blackmun and Stevens prove to be of little value. Blackmun, who concurred only in the result, was persuaded that intent was proven but felt that the remedy was too extreme, and that the District Court "should have considered alternative remedial orders . . . ."[143] Unfortunately for the *Mobile* plaintiffs, Blackmun's concern was misplaced. First, the district court, in issuing its remedial order, offered the *Mobile* plaintiffs and the City an opportunity to submit proposals for the restructuring of the government.[144] The City declined to submit a plan. Second, if *Mobile's* system of government had served to deny Blacks true access to the political process, the District Court's remedy was consistent with the nature of the wrong. Finally, since the remedy was found to be appropriate and constitutional, Blackmun's concurrence merely makes him a co-conspirator in the plurality's opinion.

Justice Stevens concurrence puts him at odds with case authority and is internally inconsistent. First, Stevens disavowed focusing on the subjective intent of government officials, preferring to look at the "[o]bjective effects of the political decision . . . ."[145] Stevens believed that *Gomillion* offered the "proper standard. . . ."[146] Unfortunately, Stevens reading of *Gomillion* as objective evidence of intent is at odds with *Arlington Heights*, which indicated that *Gomillion*-type cases "are rare," and that the Court "must look to other evidence."[147] In addition, Stevens disavowed the *Zimmer* test without indicating why it didn't offer objective evidence of intent. Also, Stevens argues that the electoral process is an inherently political one, so that protection from electoral abuses, such as those alleged in *Mobile*, should be extended only to political groups, for it would be undesirable to create "an incentive to define groups by racial characteristics."[148] However, if Stevens is to adhere to the *Gomillion* test, he has to concede that political and electoral abuses have, and will occur, due to racial motivations. In addition, the history of Alabama revealed that not only was there an ongoing conspiracy in the state to disenfranchise Blacks, but that as of result of its labors, the city was able to deny to Blacks equal access to the city's goods and services. Even if the *Mobile* plaintiffs were to demonstrate that it represented a coherent political group, a fact Stevens' doesn't want to accept, Stevens would be inclined to uphold "a political decision that is supported by valid and articulable justifications,"[149] even if "[s]ome participants in the decision making process were motivated by a purpose to disadvantage a minority group."[150] Ironically, while Stevens is the only one who concurred in the result with some idea of what an intent standard is, his standard is not only removed from reality, it is at odds with the plurality's analysis.

Justice White, in his dissent, found that the *Mobile* plaintiffs provided ample evidence from which to "support an inference of purposeful discrimina-

143. *Id.* at 82.
144. *Mobile*, 423 F. Supp. at 404.
145. *Mobile*, 446 U.S. at 90.
146. *Id.*
147. *Arlington Heights*, 429 U.S. at 266.
148. *Id.*
149. *Mobile*, 446 U.S. at 92.
150. *Id.*

tion."[151] He also criticized the plurality for misapplying, if not expressly rejecting, the "totality of the circumstance" approach adopted in *White, Washington*, and *Arlington Heights*. Justice White expressed his concern that the plurality's approach "leaves the courts below adrift on unchartered—seas. . . ."[152]

Justice Marshall, in a scathing dissent,[153] was thoroughly convinced that the *Mobile* plaintiffs had demonstrated that the city's electoral system had been, and continued to be, infected with discriminatory intent.[154] In addition, Marshall criticized the Court's intent analysis on three levels. Marshall found that the Court's application of the intent standard to the vote dilution claim was a novel, and inappropriate, intrusion into the fundamental rights branch of equal protection jurisprudence, which prohibits government abridgement, regardless of intent.[155] Marshall also found that the vote dilution jurisprudence, after *White*, obviated the need to show intent, because the Court "considered equal access to the political process as meaning more than merely allowing the minority the opportunity to vote."[156] Finally, Marshall argued that the common law presumption of foreseeability should apply to cases, such as these, when the *Mobile* plaintiffs clearly showed "that maintenance of the challenged multimember districting would have the foreseeable effect of perpetuating the submerged electoral influence of Negroes . . . ."[157] Once the presumption was invoked, the city would have had to show that its refusal to remedy the inequities of the electoral scheme was "in spite of, not because of,"[158] the discriminatory effect of the scheme. Needless to say, Justice Marshall's opinion is completely at odds with the plurality.

Justice Brennan dissented, joining Justice Marshall in his opinion that discriminatory impact is all that need be proven in voter dilution case.[159] He also agreed with the dissents of White and Marshall that, even if intent had to be shown, the *Mobile* plaintiffs had met that burden.[160]

Whether or not one agrees with the outcome reached in *Mobile*, the plurality's incoherent application of case authority and its conclusions, coupled with the diverse views of the Justices as to how the intent standard should be applied, leaves one with the clear impression that the Court was extremely confused about the content of its own standard. Unfortunately, *Rogers* did very little to alleviate this confusion.

c) Rogers v. Lodge

However divided the Court came out in *Mobile*, it appeared that *Mobile* had sounded the death knell for the *Zimmer* test. As it turned out, reports of

151. *Id.* at 103.
152. *Id.*
153. "The plurality's requirement of proof of *intentional discrimination*, so inappropriate in today's cases, may represent an attempt to bury the legitimate concerns of the minority beneath the soil of a doctrine almost as impermeable as it is specious." *Mobile*, 446 U.S. 103, 141 (Marshall, J., dissenting) (emphasis in original).
154. *Id.* at 123.
155. *Id.* at 119-20.
156. *Id.* at 112.
157. *Id.* at 137.
158. *Id.*
159. *Id.* at 94.
160. *Id.*

Zimmer's death were greatly exaggerated. In a decision that snatched the *Zimmer* test from the jaws of death, the Court upheld the lower courts' usage of *Zimmer*, to invalidate the at-large elections scheme in Burke County, Georgia, in *Rogers v. Lodge*. The case was practically identical to *Mobile*,[161] but the Court, by a six to three majority, took an unexpectedly accommodating posture toward the *Zimmer* test. The Court's attempt to distinguish *Rogers* from *Mobile* was far from persuasive.

First, the Court found that *Mobile* was based on the plurality's perception that the lower courts were of the mistaken belief that the *Zimmer* test obviated the necessity of finding intent in voter dilution claims.[162] On the other hand, in *Rogers* the Court found that the District Court, by relying upon *Nevett II*, "[d]emonstrated its understanding of the controlling standard by observing that a determination of discriminatory intent is 'a requisite to a finding of unconstitutional vote dilution' under the Fourteenth and Fifteenth Amendments."[163] What the Court apparently forgot was that the Fifth Circuit, in *Mobile*, specifically incorporated the intent analysis of *Nevett II* to avoid repetition. In addition, the District Court, in *Mobile*, merely held that, by virtue of the Court's failure to overrule *White* or *Zimmer*, the Court had not adopted a *new* intent standard, thus the District Court felt that it was appropriate to apply *Zimmer* to voter dilution cases. Thus, it does not appear that the lower courts in *Mobile* and *Rogers* took sufficiently different views of the *Zimmer* test to warrant the different outcomes in the two cases. In *Rogers* the Court tries to milk a distinction out of dicta in that district court's opinion that indicated "that it was 'not limited in its determination only to the *Zimmer* factors' but could consider other relevant factors as well."[164] However, the Court found that the district court stayed within the factors enumerated in *Zimmer*.[165] While the Court might have had an argument, if *Rogers* had been decided on criteria not enumerated in *Zimmer*, the Court could not distinguish *Rogers* from *Mobile* based on how *Rogers* could have been decided.

Second, in *Rogers* the Court indicated that it was extremely reluctant to overturn the factual findings of two lower courts unless said findings were "clearly erroneous."[166] However, to the extent that the lower courts in both *Rogers* and *Mobile* were in agreement as to both factual and legal findings, the Court is left with a contradiction, not a distinction. If one factors out *Mobile*'s misperception of the lower courts' analysis of the intent standard and the *Zimmer* test, there is essentially no factual difference between these two cases.

Finally, in *Rogers* the Court assessed the *Zimmer* factors in the aggregate, rather than individually as the *Mobile* plurality had done. The Court indicated, "Both the District Court and the Court of Appeals thought the supporting proof in this case was sufficient to support an inference of intentional discrimination. The supporting evidence was organized primarily around the factors which *Nevett v. Sides* . . . had deemed relevant . . . these

161. See Binion, *supra* note 10, at 427-8; Blacksher and Menefee, *At-Large Elections and One Person, One Vote: The Search for the Meaning of Racial Vote Dilution*, in MINORITY VOTE DILUTION, 203, 219-20 (C. DAVIDSON ed. 1984); *see* Note, *supra* note 2, at 348-49.

162. *Rogers*, 458 U.S. at 620.

163. *Id.* at 621.

164. *Id.*

165. *Id.* at 622.

166. *Id.* at 623.

factors were primarily those suggested in *Zimmer* . . . ."[167]

Justices Powell and Rehnquist, who were half the plurality in *Mobile*, dissented. Finding that *Mobile* was the controlling precedent in this case, and that *Rogers* was no more compelling than *Mobile*, concluded that the *Rogers* plaintiffs' "fell *far* short [,] of showing that [an at-large electoral scheme was] 'conceived or operated [as a] purposeful devic[e] to further racial . . . discrimination.' "[168] It should be noted however, that Chief Justice Burger, who was the third member of the *Mobile* plurality, defected to the majority in *Rogers*.

Justice Stevens, true to his concurrence in *Mobile*, dissented. Stevens believed that, even though the situation of the *Rogers* plaintiffs was one worthy of a remedy, he believed that the majority provided a remedy "without identifying an acceptable, judicially manageable standard for adjudicating cases of this kind."[169] Stevens also clung to his position that judicial inquiry into the subjective intentions of legislators, and over the long run, counter productive.[170] Finally, Stevens argued that a voting rights jurisprudence that was race-conscious would "tend to perpetuate race as a feature distinct from all others: a trait that makes persons different in the eyes of the law."[171] While Stevens may be right, his enigmatic viewpoint compels him to reject the claims of plaintiffs who have proved their case to the satisfaction of a majority of the Court. In short, he appears to be of no assistance to plaintiffs, and of no influence on the court.

d) *Mobile and Rogers: A Standard In Disarray*

On first impression, the Court's decisions in *Washington, Arlington Heights*, and *Austin* represented the formulation, and refinement, of a judicial standard. However, if one accepts the notion that a standard is a tool employed by the courts to facilitate clear, logical, and consistent decision-making, then the intent standard, as evidenced by the Court's application of it in *Mobile* and *Rogers*, is incoherent. *Mobile* and *Rogers* were characterized by a judicial confusion that a standard is supposed to alleviate.

The confusion took place on two levels, the first being substantive. While one could properly disagree with the plurality's reading of many of the cases it cited in *Mobile*, it wasn't necessary because the plurality couldn't square its decision with its own reading of the cases. Characteristic of this difficulty was the plurality's inability to acknowledge that the *Zimmer* test was derived from *White*, which, when applied to the *Mobile* plaintiffs, gave the plaintiffs a stronger case than the plaintiffs in *White*.

The second level of confusion was methodological. In both *Mobile* and *Rogers*, the Court applied the *Zimmer* test to the plaintiff's voter dilution claims. However, *Mobile* assessed the factors in the *Zimmer* test individually, deciding that no one factor was sufficient to demonstrate discriminatory intent. On the other hand, *Rogers* assessed the *Zimmer* factors in the aggregate, finding that the assemblage of factors weighed in the plaintiffs' favor. Thus,

167. *Id.* at 624.
168. *Rogers*. 458 U.S. 628, 629 (Powell, J., dissenting) (citations omitted) (emphasis in original).
169. *Id.* at 633 (Stevens, J., dissenting).
170. *Id.* at 642-49.
171. *Id.* at 652.

one can trace the inconsistent outcomes in *Mobile* and *Rogers* to the inconsistent application of the *Zimmer* test.

Such confusion could have been avoided if the Court had some idea of what constitutes evidence of intent. Without this idea, the Court appears to have drifted back, before *Arlington Heights*, to a "totality of the circumstances" approach which "reduces equal protection claims to particularized findings of fact, capable of tolerating the same discriminatory practices in Mobile, Alabama, found to be unconstitutional in Burke County, Georgia."[172] Without greater clarity and specificity, the Court's application of the intent standard has been, and will be, strongly influenced by the individual conceptions of the Justices, as evidenced by the six different opinions in *Mobile*. However, this tendency has not been limited to voting rights cases.[173] This state of affairs is disturbing because lower courts and litigants will be unable to litigate equal protection claims with any idea, or confidence, as to how the Court will resolve the intent issue. While the *Rogers* plaintiffs were probably content at the Court's favorable decision, the *Mobile* plaintiffs have to be wondering where they went wrong.

e) *A Postscript*

Shortly after *Mobile* was decided, civil rights groups lobbied Congress to amend the 1965 Voting Rights Act to statutorily overturn *Mobile*.[174] Two days before *Rogers* was decided, Congress passed amendments to the Voting Rights Act that clearly established that plaintiff need only demonstrate discriminatory effect to make out a voting discrimination claim, which includes vote dilution.[175] The Report of the Senate Judiciary Committee stated that in *Mobile*.

> A plurality of the Supreme Court broke with precedent and substantially increased the burden on plaintiffs in voting discrimination cases by requiring proof of discriminatory purpose. The Committee has concluded that this intent test. . .diverts the judicial inquiry form the crucial question of whether minorities have equal access to the electoral process to a historical question of individual motives.[176]

Ironically, however, the amendments codified the *White-Zimmer*, analysis,[177] labeling it a "result" test.[178] Thus, while Congress has statutorily overturned the intent standard, it has entrenched the same analytical tools which the Court has demonstrated it has little proficiency in applying. Since the

172. Note, *supra* note 2, at 349 (footnote omitted).
173. *Binion, supra* note 10, at 403 n.30.
174. D. BELL, *supra* note 91, at 44 (2d. 1980) (Supp. 1984) (footnote omitted).
175. The original qualification provided in pertinent part:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any state or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color . . . 42 U.S.C. Sect. 1973 (1976).

The amended Sect. 2 provides in pertinent part:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any state or political subdivision in a manner *which results* in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . 42 U.S.C. 1973 (1982).

176. S. REP. NO. 417, 97th Cong., 2d Sess. 16 (1982).
177. *Id.* at 2, 27, 28 n.113.
178. *Id.* at 2.

amendments were passed, the Court has had an opportunity to decide a vote dilution case, *Thornburg v. Gingles*.[179] While a plurality of the Court upheld a voter dilution claim, under the effects test, four members of the Court have indicated that the current state of vote dilution analysis leaves a great deal to be desired.[180]

If both Congress and the Court could use the same authority to formulate an intent standard at one point in time, and then an effect standard later on, one has to wonder whether there was ever a valid foundation laid for the intent standard in the first place. Further, given that the Justices on the Court have such divergent views on what the intent test is, and how it is to be applied, one has to question whether the intent test was ever sufficiently coherent to warrant calling it a standard. Thus far, the indications have been that it never was.

B. Hunter v. Underwood, City of Richmond v. United States, *and* Davis v. Bandemer *Can The Supreme Court Be Trusted With Perpetrators?*

In Section III B, it was suggested that the Court's adoption of an intent standard, with its predisposition toward identifying and stopping perpetrators, is an endorsement of a criminal standard. This means that plaintiffs would have the same burdens placed on them that are placed on criminal prosecutors. Therefore, civil litigants, who would ordinarily be required to prove their claims based on "a preponderance of the evidence," would now have to prove their claims "beyond a reasonable doubt." In a criminal proceeding, once the prosecution has met its burdens, the perpetrator would be found guilty. With an equal protection claim, once the plaintiff demonstrates intent, the Court must apply strict scrutiny, which in theory shifts the burden of proof to the defendant. As a practical consequence, once the court invokes strict scrutiny, the defendant generally loses.[181] Thus, even if the Court's adoption of the intent standard increases the plaintiff's burden of proof, one should be able to assume that once plaintiffs have met this burden, the Court would get its perpetrator.

The three cases that will be discussed have one thing in common: incontrovertible proof of discriminatory intent. However, only in one case did the Court strike down the challenged government enactment. In the other two cases, there are strong indications that the Court's interest in tracing down perpetrators is considerably less than enthusiastic.

1. Hunter v. Underwood: *The Smoking Gun Is Found*

In *Hunter v. Underwood*,[182] the Court had to decide the constitutionality of Article VIII, Section 182 of the Alabama Constitution of 1901, which provided for the disenfranchisement of persons convicted of certain enumerated felonies and misdemeanors, including any crime "involving moral turpi-

179. 478 U.S. 30 (1986).

180. *Id.* at 83 (O'Connor, J., concurring).

181. *Sellers, supra* note 2, at 268 (footnote omitted).

182. 471 U.S. 222 (1985). All of the facts and procedural history relevant to the analysis will be provided from the Supreme Court's opinion.

tude. . . ."[183] The appellees were a Black woman and a White man, each of whom had been convicted of the misdemeanor of presenting a worthless check.[184] Each were precluded from voting by the Board of Registrars, of Montgomery and Jefferson Counties, respectively, because the Board had determined that presenting a worthless check was a crime "[i]nvolving moral turpitude."[185] As plaintiffs, they brought suit in district court, seeking declaratory and injunctive relief.[186] They charged that the misdemeanors enumerated in Section 182 were conceived, and adopted, by the Alabama Constitutional Convention of 1901, with the intention to disenfranchise Blacks, and that Section 182 "has had the intended effect."[187]

While district court "found that disenfranchisement of blacks was a major purpose for the convention at which the Alabama Constitution of 1901 was adopted,"[188] the court was not persuaded that the misdemeanors enumerated in Section 182 "[were] based upon the racism present at the constitutional convention."[189] In addition, the court was apparently persuaded that disenfranchisement of those convicted of crimes was a permissible basis for Alabama to have enacted Section 182.[190]

On appeal, the court of appeals reversed.[191] The Eleventh Circuit, following the approach established in *Arlington Heights* and *Mt. Healthy*, found that the plaintiffs had established by a "preponderance of the evidence" that discriminatory intent was a motivating factor in the adoption of Section 182.[192] This being the case, the Court of Appeals found that "there could be no finding that there was a competing permissible intent for the enactment of Section 182.[193] Finally, the Court of Appeals determined that Section 182 would not have been adopted in absence of the discriminatory intent, rendering Section 182 violative of the fourteenth amendment.[194] The Court of Appeals granted relief to the plaintiffs. The case went up to the Supreme Court on appeal.

The Court, in a unanimous opinion authored by Justice Rehnquist, affirmed the Eleventh Circuit.[195] What is significant about this case, is the

183. *Id.* at 223-24. Section 182 of the Alabama Constitution provides in pertinent part:
"The following persons shall be disqualified both from registering, and from voting, namely:
"All idiots and insane persons; those who shall by reason of conviction of crime be disqualified from voting at the time of the ratification of this Constitution; those who shall be convicted of treason, murder, arson, embezzlement, malfeasance in office, larceny, receiving stolen property, obtaining property or money under false pretenses, perjury, subornation of perjury, robbery, assault with intent to rob, burglary, forgery, bribery, assault and battery on wife, bigamy, living in adultery, sodomy, incest, rape, miscegenation, crime against nature, or any crime punishable by imprisonment in the penitentiary or of any infamous crime or crime involving moral turpitude . . ."
Ala. Const. Art. VIII, § 182.

184. *Id.* The Appellants were members of the Alabama Board of Registrars.

185. *Id.* at 224.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* at 225 (citing Underwood v. Hunter, 730 F.2d 614 (11th Cir. 1984)).

192. *Id.*

193. *Id.*

194. *Id.*

195. With the exception of Justice Powell, who took no part in the consideration or the decision of this case, the eight members of the Court were unanimous.

amount of "incriminating" evidence adduced at trial, as well as the court's uncharacteristically unsympathetic response to the government's claims.

Although Section 182 was racially neutral on its face, it was determined that, just two years after the ratification of the Alabama Constitution, Section 182 had disenfranchised "approximately ten times as many blacks as whites."[196] Even at the time of trial, in Montgomery and Jefferson Counties, Blacks were approximately twice as likely as Whites to be disenfranchised under Section 182.[197]

While the impact of Section 182 on blacks was conspicuous, the intent of the delegates of the Constitutional Convention was even more so. With the aid of the testimony, of two historical experts as well as several historical studies, and the proceedings of the convention, appellees demonstrated that "the Alabama Constitutional Convention of 1901 was part of a movement that swept the post-Reconstruction South to disenfranchise blacks."[198] If one were looking for a "smoking gun," the statement made by the president of the convention, in his opening address would be sufficient: "And what is it that we what to do? Why it is within the limits by the Federal Constitution, to establish white supremacy in this state."[199] Given the prevailing environment, appellees argued that the offenses, especially the misdemeanors, that were enumerated in Section 182, were selected by the delegates because they believed that the offenses were committed more frequently by Blacks.[200] Since the Eleventh Circuit's opinion was based on "a thorough analysis" of the evidence, the Court held that the Eleventh Circuit's opinion "demonstrates conclusively that Section 182 was enacted with the intent of disenfranchising blacks."[201] Even the counsel for appellants' counsel conceded that race was a factor in the adoption of Section 182.[202]

Once the Court made the determination that Section 182 was conceived and adopted with discriminatory intent, the next step would have been for it to apply strict scrutiny to Section 182. Even though strict scrutiny, in practice, is usually the death knell to the challenged government enactment or practice, its usage still requires the Court to balance the needs of the state with that of the injured party. However, one gets the impression that the Court's disposition of the appellants claims had less to do with strict balancing and more to do with summary dismissal. This point is significant, not because of the relative merit, or lack thereof, of the appellants' claims, but because the nature of the Court's response indicates that it is doing something other than applying strict scrutiny.

The appellants' first claim was that Section 182 was adopted to disenfranchise both Blacks and poor Whites, not out of a racially discriminatory motive, but because Southern Democrats feared that these groups would be recruited by Republicans.[203] While the Court was reluctant to accept this claim, it argued that even if the claim was correct, the claim conceded that

196. *Hunter*, 471 U.S. at 227 (citing Underwood v. Hunter, 730 F.2d at 620).
197. *Id.*
198. *Id.* at 229 (citation omitted).
199. *Id.* (citation omitted).
200. *Id.* at 227, 232.
201. *Id.* at 229.
202. *Id.* at 230.
203. *Id.* at 230-31.

"discrimination against blacks, as well as against poor whites, was a motivating factor for the provision. . . ."[204] While this point is probably valid, the Court also argued that this claim conceded that Section 182 would not have been adopted "in the absence of the racially discriminatory motivation."[205] In light of the evidence adduced at trial, this argument may have been valid, but it was quite a leap for the Court to make this point if is was going to hypothetically concede the claim. If Southern Democrats were really fighting for their political lives, the disenfranchisement of poor Whites might have been a sufficiently compelling basis for adopting Section 182. However, the Court could have argued that since Section 182 was disenfranchising a substantially greater number of Blacks than Whites, poor Whites were not a sufficiently large group to warrant adoption of Section 182. While this point may be self-evident, there may have been a reason why the Court did not make it: it may have found the evidence of intent so compelling, and not without good reason, that it really was not, conceding the claim, even hypothetically. Rather, the Court's response may have been a subtle rejection of the claim. If so, the Court wasn't applying strict scrutiny, because it was refusing to accept that discriminatory intent was not the primary motivation for Section 182. The Court concluded:

> Under the view that the Court of Appeals could properly take of the evidence, on additional purpose to discriminate against poor whites would not render nugatory the purpose to discriminate against all blacks, and it is beyond peradventure that the latter was a "but-for" motivation for the enactment of Section 182.[206]

In short, the Court, having decided that Section 182 was racially motivated, did not balance competing interests because the statute was hopelessly tainted, and no race neutral justification would purge Section 182 of the taint.

The appellants second claim was that the state had a legitimate interest in disenfranchising persons who have been convicted of crimes involving moral turpitude.[207] The Court dismissed this claim by noting that the Eleventh Circuit's opinion which "convincingly demonstrated that such a purpose was not a motivating factor of the 1901 convention."[208] As with the previous claim, the Court would not balance the competing race neutral justification with the racial justification because it had decided that any justification cited for Section 182 was either tainted by, or could be traced back to, the discriminatory intent. As was previously mentioned, the Court upheld the finding that the offenses enumerated in Section 182 were those that the delegates thought were committed mostly by Blacks.

Finally, appellants claimed that, even if Section 182 was adopted with discriminatory intent, the provision eventually became legitimate.[209] In support of this claim, appellants indicated that "some of the more blatantly discriminatory selections, such as assault and battery on the wife and miscegenation, have been struck down by the courts. . . ."[210] Appellants ar-

204. *Id.* at 231.
205. *Id.*
206. *Id.* at 232.
207. *Id.*
208. *Id.*
209. *Id.* at 232-33.
210. *Id.* at 233.

gued that the remaining enumerated offenses were "acceptable bases for denying the franchise."[211] The Court determined that, since Section 182 was adopted in 1901 with discriminatory intent, and that it disenfranchised substantially more Blacks than Whites—then and now—it still violated equal protection under *Arlington Heights*.[212] However, the Court attempted to narrow its holding by the following cryptic disclaimer: "Without deciding whether Section 182 would be valid if enacted today without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate against blacks. . . ."[213] This disclaimer, is awkward because it allows for the possibility that the Court could rule favorably for plaintiffs without them demonstrating intent, so long as there was disparate impact—but that would require a repudiation of *Washington* and the intent standard. If the Court is implying that such a case is different than *Hunter*, then it has simply confirmed the "taint" analysis.

Thus, it appears that the Court's disposition of *Hunter* had more in common with a criminal trial than a civil action. There is little doubt that if the appellees had to demonstrate that Section 182 was conceived and adopted with discriminatory intent, beyond a reasonably doubt, they had sufficient evidence to do so. The fact that the Court was unanimous in its decision is a clear indication that the Justices found the appellees' case compelling. However, it also appears that, rather than invoking strict scrutiny, the Court determined that the convention was guilty of acting with discriminatory intent. Although the appellants were allowed to present their claims on appeal, the Court's dismissal of their claims reduced their appeal to an empty ritual. *Hunter* seems to indicate that once the Court is convinced that the government acted with discriminatory intent, it is found guilty, and the outcome is unavoidable.

2. City of Richmond v. United States: *A Good Lie Trumps The Bad Truth*

The product of complex and protracted litigation, *City of Richmond v. United States*[214] involved a claim that the annexation of adjacent county land, by Richmond, Virginia, had the purpose and effect of diluting the voting strength of Black residents, in violation of Section 5 of the Voting Rights Act.[215]

211. *Id.*
212. *Id.*
213. *Id.*
214. 422 U.S. 358 (1975).
215. Section 5 of the Voting Rights Act provides in pertinent part:
Section 1973c. Alteration of voting qualifications and procedures; action by state or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge District Court; appeal to Supreme Court.
Whenever a state or political subdivision. . .shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting. . .such state or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. . .Provided, that such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has submitted. . .to the Attorney General and the Attorney General has not interposed an objection

Pursuant to Section 5, Richmond, Virginia, instituted an action for a declaratory judgment "that its annexation of approximately 23 square miles of adjacent county land, as modified by its change in the method of electing its City Council from an at-large system to a nine-ward, single-member district plan, did not have the purpose and would not have the effect of denying or abridging the right to vote on account of race or color."[216] The District Court referred the case to a Master, for a hearing to determine if the annexation had the purpose or the effect of diluting the Black vote.[217] The Master determined that the City failed to carry the burden of proving that the annexation did not have a discriminatory purpose or effect.[218] The record before the Master, including a brief history of the events that led to the annexation, provided evidence of discriminatory intent as compelling, if not more so, than what was presented in *Hunter.*

In 1962, the City attempted to annex 51 square miles of adjacent county land,[219] for the purpose of urban expansion.[220] The annexation suit laid dormant until 1969, at which time, a settlement was reached whereby the City was to annex only 23 of the original 51 square miles.[221]

Between 1962 and 1969, Black voting strength in the City increased as Blacks were becoming a majority of the City's population, and were voting in a higher percentage than Whites.[222] City elections, which were conducted at-large, were becoming characterized by racial block voting, and Blacks were making political headway, as evidenced by the 1968 election when three Black-supported candidates won seats on the nine-seat City Council.[223]

The increasing political influence of Blacks caused Richmond's White political leadership to worry that they would lose majority control in the City Council, during the 1970 elections.[224] The intensity with which this concern was felt was expressed by the Mayor of Richmond: "As long as I am the Mayor of the City of Richmond the niggers won't take-over this town."[225] It was this concern that was the driving force behind Richmond's negotiation, and settlement of the annexation suit. In fact, the mayor required assurances from Chesterfield County that at least 44,000 additional white citizens would be obtained by the City before he would agree upon settlement of the annexation suit."[226]

This annexation had the effect the City had hoped. The 1970 census revealed that Blacks made up 52 percent of the City's preannexation population,

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within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. . . .

42 U.S.C. § 1973c (1970).

216. City of Richmond v. United States, 376 F. Supp. 1344 (D.D.C. 1974).
217. *Id.* at 1346.
218. *Id.*
219. *Id.* at 1349.
220. *Id.* at 1351, 1351 n.42.
221. *Id.* at 1349 & n.26.
222. *Id.* & n.27.
223. *Id.* & n.28.
224. *Id.* at 1349.
225. *Id.* at 1350 n.29.
226. *Id.* at 1350 (footnote omitted).

but only 42 percent of the postannexation population.[227] The effect of the annexation on City elections became manifest. The White political leadership maintained its 6-3 majority on the City Council, and only one Black councilman was elected.[228] None of the six White supported councilmen received even ten percent of the Black vote.[229] Because the annexation suit was settled out of court, without a declaratory judgment from the district court, or approval from the Attorney General, the 1970 elections were in violation of Section 5's procedural mandate.[230]

Armed with the Master's findings, the district court had little difficulty in finding that the 1969 annexation was discriminatory in purpose and effect, thus violative of Section 5's substantive, as well as procedural, mandate.[231] The City contended that the taint of any discriminatory purpose or effect was removed in 1973, when the City switched its election format from an at-large system to a nine-ward, single-member plan.[232] Of the nine wards, four were predominantly White, four were predominantly Black, and one had a Black population of 40.9 percent.[233] The City argued that the ward system would ensure that Blacks could occupy four of the City Council's nine seats, with the hope of obtaining a fifth.[234]

The district court indicated that for the City's plan to purge the annexation of the taint of the discriminatory purpose, the City would have to demonstrate that the ward plan eliminated the dilutive effects of the annexation;[235] and that the City had an objectively verifiable, legitimate basis for the annexation. The District Court found that the City's ward plan failed the first requirement because the plan was not "calculated to neutralize to the extent possible any adverse effect upon the participation of black voters."[236] This finding was reinforced by the fact that an alternative plan was submitted to the court, by one of the intervenors in the suit. This alternative plan was identical to the City's, except that the ninth ward was 59 percent Black.[237] In addition, the court found that, given the City's growing Black population, it was entirely possible, if not probable, that Blacks would acquire a majority of council seats under the City's old election scheme.[238] This, plus the fact that the City feared that Blacks would take over the City Council in the 1970 election, suggested that the City's ward plan was designed to avoid deannexation.[239]

The District Court also determined that, even though the City's purpose in annexation, in 1962, was urban expansion, the City specifically negotiated a settlement to the annexation suit, in 1969, for the purpose of diluting black

227. *Id.* at 1350-51 (footnote omitted).
228. *Id.* at 1351 (footnote omitted).
229. *Id.* (footnote omitted).
230. *Id.*
231. *Id.* at 1352.
232. *Id.*
233. *Id.* at 1354.
234. *Id.*
235. *Id.* at 1353.
236. *Id.* at 1356-57. The senior planner for the city designed the wards without regard to the racial living patterns in the city. The only direction the city gave him was that he was to try to attain population equality between the wards.
237. *Id.* at 1357 (footnote omitted).
238. *Id.* at 1355-56.
239. *Id.* at 1355 (footnote omitted).

voting strength, without regard to urban expansion.[240] Having found that the City "[h]as failed to present substantial evidence that its original discriminatory purpose did not survive adoption of the ward system"[241] the court denied the City declaratory relief.[242] The City appealed.

Despite compelling evidence that the City annexed the adjacent county land solely to dilute the voting strength of Blacks, the Court vacated the District Court's decision. The Court's disposition of the key issues of this case represents a shocking result in light of to its disposition of *Hunter*.

As in *Hunter*, the Court upheld the findings of the lower court that the challenged government action was conceived and adopted with discriminatory intent.[243] However, the Court also determined that "[t]he controlling factor in this case is whether there are now objectively verifiable, legitimate reasons for the annexation. . . ."[244] In this vein, the Court found that the Master and the district court gave inadequate consideration to the evidence in deciding whether such a justification, namely economic and administrative growth was present.[245] The Court remanded the case to district court for a more extensive inquiry into that issue.[246]

It is truly incomprehensible how the Court could take such a sympathetic view toward the City's annexation, when there is every reason to hold the City in contempt. First, the Court discounts that the 1969 annexation negotiation, and settlement, took place in an atmosphere thick with concern "about results of the 1970 city of Richmond Council races going all black."[247] The annexation settlement was conditioned solely on the City obtaining 44,000 white voters prior to the 1970 City Council election. Second, the annexation, and the 1970 city election, were in violation of section 5 because the City did not have the approval of the district court or the Attorney General. Third, true to the plan, Black voting strength was emasculated. In short, the acts of the City were illicit from beginning to end.

Unlike *Hunter, Richmond* represents the breakdown between a civil finding of intent and a criminal trial. In *Hunter*, once the Court was convinced that the state had acted with discriminatory intent, the state was found guilty, and its justifications for its actions were viewed with unrelenting skepticism. Whereas in *Richmond*, the Court invites the criminal to offer a "post hoc rationalization"[248] that would purge the crime of its illicit qualities. If the intent standard represents the Court's elevation of a civil proceeding to a criminal trial, the Court's generosity here is irrational. Certainly, a criminal does not benefit from the unforeseen consequences of his crime. If a burglar breaks into a house, and robs it, but in the process, his presence scares off an arsonist, his crime of burglary is not diminished because he prevented the house from being burned down. Or better yet, if the arsonist had arrived after the burglar did his deed, and then burned down the house, if the burglar was captured, and

240. *Id.* at 1350 (footnote omitted).
241. *Id.* at 1353.
242. *Id.* at 1357.
243. *Richmond*, 422 U.S. at 373.
244. *Id.* at 375.
245. *Id.* at 378.
246. *Id.*
247. *Richmond*, 376 F. Supp. at 1349 n.29.
248. *Richmond*, 422 U.S. at 382 (Brennan, J., dissenting).

his ill-gotten gains retrieved, he would be no less guilty because he may have saved the homeowners the loss of the goods he stole. Here, the Court was willing to give the City a chance to prove that there was an economic benefit, however fortuitous and unforeseen, to offset its crime of electoral theft against the black residences to *Richmond*.

Even if the City was held to a civil standard of liability and responsibility, it would still be found liable for an intentional tort. The actor would be held liable for the foreseeable consequences of his actions, but at the same time, he would not be credited for the unforeseeable benefits of his actions. However, the Court's decision in *Austin* was a repudiation of the tort standard of intent. But in any case, the civil and criminal models of liability and guilty would not allow the guilty parties to benefits from consequences they did not intend to take place, as the City was allowed to do in *Richmond*.

The Court's resolution of *Richmond* is especially egregious because of the way it emasculates Section 5. The Court allowed the City to recharacterize its actions, and motives, and the City was better off for having violated Section 5 than if it had pursued declaratory judgment in 1969 and lost. In addition, *Richmond* sends a message to perpetrators that they can annex their way out of racial shifts in the political wind, so long as they can come up with a plausible story to justify their sudden lust to expand.

So far, *Hunter* and *Richmond* represent cases where the Court has sent mixed signals as to how it disposes of perpetrators once it finds that they have acted with a discriminatory intent. *Richmond* also presents an example of what can happen when the perpetrator openly admits a discriminatory intent for its actions.

3. Davis v. Bandemer: *To The Perpetrator Goes The Spoils*

In *Davis v. Bandemer*,[249] the Court had to decide the constitutionality of Indiana's 1981 state reapportionment, which was challenged as being a political gerrymander. The appellees were Indiana Democrats who claimed that the gerrymander diluted their voting strength on the basis of their political affiliation, in violation of the equal protection clause.

The Indiana Legislature is bicameral, with a 50 member Senate, and a 100 member House of Representatives. Members of the House serve two-year terms, while members of the Senate serve four-year terms. Elections for all House seats are every two years, while the Senate elections are staggered, so that half of the seats are up for election every two years. All members are elected from legislative districts, Senate members are elected solely from single-member districts, while House members are elected from both single-member and and multi-member districts. Throughout the period covered by this litigation, the House, Senate, and the Governor's seat were controlled by the Republicans.[250]

In 1982, the appellees, as plaintiffs, brought suit in District Court.[251] They were joined by the Indiana NAACP State Conference of Branches, along with four local branches.[252] The evidence produced by the plaintiffs demon-

249. 478 U.S. 109 (1986).
250. *Id.* at 113-15.
251. Bandemer v. Davis, 603 F. Supp. 1479 (S.D. Ind. 1984).
252. *Id.* at 1482. Their claim was that Indiana's reapportionment plans intentionally fractured

strated that the Legislature's reapportionment plans were developed in an atmosphere that was openly hostile to the Democrats, and that the effect of the plans on the 1982 election were clearly adverse to the Democrats.

Shortly after the 1980 census, the Legislature maneuvered the legislative process into a conference committee that consisted of Republicans.[253] Four Democrats were appointed to the committee as advisors, but they had no voting power and were denied access to the Committee's mapmaking process.[254] During this process a computer firm, contracted by the Republican State Committee, to assist the committee in drawing district boundaries was employed.[255] The Democratic advisors were also denied access to the information that the committee fed the computer, as well as to the computer.[256] While the Democrats were permitted to submit its own maps, they were informed that those maps would not be used.[257] The committee submitted a report to the Legislature on the last day of the 1981 session.[258] The Democrats were allowed "[o]nly 40 hours to review the districting of 4,000 precincts."[259] The Legislature, along party lines, voted overwhelmingly for the report.[260]

Although the District Court found that there was no discernible pattern to the reapportionment plan, the effects of the plan on the 1982 elections were clearly hostile to the Democrats. In the House elections, Democrats received 51.9% of the vote, but only 43 Democrats were elected, while the Republicans received 48.1% of the vote, and won 57 seats.[261] In the Senate elections, Democrats received 53.1% of the vote, and won 13 of the 25 seats, while the Republicans received 46.9% of the vote, and won 12 seats.[262] While this appears balanced, the Democrats argued at trial that those victories occurred in "safe" districts, which was consistent with the Republican's plans, which involved "stacking" Democrats into districts where they already had sizeable majorities, consequently other districts became vulnerable to Republican victories that would not have been had otherwise.[263] In addition to the disparate results, the court found that the shape of many boundaries were "[o]ften contorted, with little apparent emphasis on community of interest, do not adhere

Black population concentrations, constituting racial vote dilution in violation of the Fourteenth and Fifteenth Amendments, as well as Section 2 of the Voting Rights Act. *Id.* at 1489. However, the District Court determined that, because Blacks in Indiana vote overwhelmingly Democratic, the vote dilution they have suffered is a product of their political affiliation, not their race. *Id.* at 1488-90. Thus, their claim was considered as identical to the Democrats. *Id.* They did not appeal this determination. *Davis*, 478 U.S. at 118 n.8.

253. *Bandemer*, 603 F.Supp. at 1483.

254. *Id.*

255. *Id.* at 1483-84.

256. *Id.* at 1484.

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.* at 1486. If one were to use proportional representation as a standard by which to measure the discrepancy in results, the Democrats suffered an approximately 17% drop in voting strength, while the Republicans acquired an appropriate 17% gain in voting strength. What this means is that approximately five Democratic votes equaled four actual votes.

262. *Id.*

263. *Id.* This allegation was subsequently borne out by the results of the 1984 Senate elections, where the Democrats received 42.3% of the vote, but less than 30% (7 of 25) of the available seats. *Davis*, 478 U.S. at 182-83 (Powell, J., concurring and dissenting) (footnote omitted).

to any remote definition of compactness, and likely have resulted in confusion to voters."[264]

The plaintiffs contended that the Legislature made use of multi-member districts to stack Blacks and Democrats into districts where they were population minorities.[265] The strongest evidence of the effects of this scheme were two counties in which Democrats were 46.6% of the population, but won only 14% of the available House seats.[266] The court concluded that "such a disparity speaks for itself."[267]

While the evidence adduced at trial provides persuasive evidence that the reapportionment plans were conceived with discriminatory intent, *Davis* is distinctive in that the key officials in the government openly admitted that the plans were conceived, and adopted, with the intention to secure as many seats for Republicans as possible.[268]

The district court found that the plaintiffs demonstrated that the reapportionment plan was conceived with discriminatory intent and that the plan produced a discriminatory effect adverse to the plaintiffs.[269]

Despite upholding the finding of the district court that the 1981 reappointment was conceived and adopted with discriminatory intent, the Court reversed. The Court's analysis of this case bears a striking resemblance to Justice Stewart's analysis of *Zimmer* in *Mobile* in that the Court isolated key facts from each other in order sustain arguments that would not have survived if the facts were kept together.

First, the Court disapproved of the district court's finding that the reappointment had a discriminatory effect. It relied upon case precedent that held that the lack of proportional representation does not equal vote dilution, and that legislatures are not obligated to allocate seats to parties in proportion to the votes they receive.[270] The court posits that this proposition is based on the presumption that an "individual or a group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district."[271] As such, the Court was unwilling to presume that the Democrats would be neglected by the Republicans.

The Court made this argument without once referring to the facts. The 1982 and 1984 election results do not reflect just a lack of proportional representation; they represent a serious denigration of the voting strength of Democratic voters. By using proportional representation as a measure, the Indiana Legislature so diluted the Democratic vote that in the 1982 House election, one out of five votes were destroyed by the reappointment, while in the 1984 Senate election, it was one out of three. While the Democrats may not have a right to proportional representation, proportional representation serves as a threshold through which the Court could ascertain, with certainty, just how egregious the dilution is, which in this case, is manifest.

264. *Bandemer*, 603 F.Supp. at 1488.
265. *Id.* at 1488-89.
266. *Id.* at 1489.
267. *Id.*
268. *Id.* at 1484.
269. *Id.* at 1495.
270. *Davis*, 478 U.S. at 129-31 (citations omitted).
271. *Id.* at 132.

It is mind boggling how the Court could support its argument by maintaining a presumption that losing voters are adequately represented by the competing party's representative. More realistically, as Justice Powell noted, "Even the most conscientious state legislators do not disregard opportunities to reward persons or groups who were active supporters in their election campaigns. Similarly, no one doubts that partisan considerations play a major role in the passage of legislation and the appointment of state officers."[272] Since the Republicans already had a majority in the Legislature, one has to wonder as to how altruistic their impulses were when they undertook to further diminish the influence the Democrats. To the extent that the Republicans denied the Democrats access to the mapmaking process, the Court should have viewed the election results with great concern.

Further, the Court argues that it would be unsatisfactory to decide a claim of discrimination based on one election.[273] The Court also argued that there was no proof that the Democrats would be trapped in a minority status "[i]n the Assembly throughout the 1980's or that the Democrats would have no hope of doing any better in the reapportionment that would occur after the 1990 census."[274]

Given that the Republicans utilized their legislative majority to oppressively reapportion the Democrats out of the political process, it would be in Indiana's best interest if the Court were to intervene in the situation as soon as possible. It stands to reason that if the Republicans are given a free reign into the 1990's to perpetuate their discriminatory electoral policy, the injury suffered by Indiana, and Indiana Democrats, could be so severe that the Court's remedy might be inadequate because a great deal of damage will have been done by then. If the Court were to issue a remedy now, Indiana would have to redraft its plans to avert the crisis the Court apparently wants to wait for Indiana to have. The Court's problem is not that the Democrats haven't been injured; rather, it is that they haven't been injured enough. One has to wonder what model of liability would permit the Court to view Indiana's situation with such indifference, when it was made clear by the District Court that the Legislature had no rational reason, outside of the political discrimination, for the reapportionment.[275]

As in *Mobile*, the Court picks and chooses the facts it feels are key to making a decision, stripping the plaintiff's case of its context and its significance. In addition, the Court disapproves of the plaintiff's evidence of discriminatory effect, but doesn't explain how a complaining minority would show that it "[h]ad less opportunity . . . to participate in the political processes and to elect legislators of that choice."[276] Thus, we are left again with the impression that the Court has retreated to a posture where it knows discriminatory effect when it sees it, but it cannot explain how it knows it. It is ironic that twelve years after *Washington*, when disparate impact was easy to prove, but intent was difficult to ascertain, we now have *Davis*, where intent is easily ascertained, but discriminatory effect is conceptually elusive.

272. *Davis*, 478 U.S. 161, 170 (Powell, J., concurring and dissenting).
273. *Davis*, 478 U.S. at 135.
274. *Id.*
275. *Bandemer*, 603 F. Supp. at 1495.
276. *Davis*, 478 U.S. at 136 (citing Whitcomb v. Chavis, 403 U.S. at 149).

On balance, the Court's decisions in *Davis* and *Richmond* seem to indicate that *Hunter* was an aberration. If one accepts the notion that the intent standard is grounded in the perpetrator perspective, the Court must be viewed as an unreliable keeper of the flame.

V. CONCLUSION

The purpose of this Comment has been to highlight three incoherent aspects of the Supreme Court's application of the intent standard to equal protection analysis, especially as it has been applied to voting right cases. First, the creation, and refinement of the intent standard, in *Washington* and its progeny, grew out of cases characterized by judicial overreaching and dubious case authority. Second, as demonstrated in *Mobile* and *Rogers*, the standard lacked sufficient substance, clarity, and consistency to harmonize two cases that were fundamentally identical. Third, the Court's disposition of cases with incontrovertible findings of discriminatory intent leaves one uncertain as to whether the Court is as disposed to find perpetrators as the standard itself demands.

It has been twelve years since the Court decided *Washington*, but the Court's disposition of cases now, under the intent standard, is every bit as unsatisfactory as the court's earlier decisions. Given that the individual Justices continue to have their own personal conceptions of what type of evidence constitutes, intent, litigants and lower courts can look forward to inconsistent, if not egregious, results from the Court. While the legislative response to *Mobile* was not entirely satisfactory, it appears that statutory intervention is the best hope for relief that litigants, and the courts, will have from the Court's analytically deficient application of the intent standard.