The Constitutional Significance of the Discriminatory Effects of At-Large Elections

Equal protection doctrine since *Washington v. Davis*[1] has focused on discriminatory intent rather than discriminatory effect. The discriminatory effects of an official action remain useful in proving that a discriminatory purpose motivated the official action.[2] Discriminatory effects also have independent significance in equal protection cases, however. Plaintiffs challenging an at-large electoral scheme[3] under the equal protection clause must prove that official action to establish or maintain the at-large system was motivated by a discriminatory purpose and has resulted in a current discriminatory effect. Current equal protection doctrine, however, does not adequately define discriminatory effect in the electoral context. In *Rogers v. Lodge*,[4] the most recent Supreme Court decision applying the discriminatory purpose standard in an equal protection challenge to an at-large system, the Court found an aggregate of circumstantial evidence sufficient to support an inference of purposeful discrimination behind the maintenance of the at-large system.[5] But because the decision hinged to a great extent on the Court's deference to the concurrent findings of fact of the district court and the court of appeals,[6] the Court did little more than restate the findings below and did not state what discriminatory effects are necessary, at a constitutional minimum, to satisfy the discriminatory effect component of a purposeful discrimination claim in the electoral context.

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

2. *Compare* Rogers v. Lodge, 102 S. Ct. 3272, 3279-81 (1982) (discriminatory purpose inferred from circumstantial evidence) *with* City of Mobile v. Bolden, 446 U.S. 55, 73-74 (1980) (plurality opinion) (rejecting inference of discriminatory purpose based on similar circumstantial evidence). *See infra* notes 23-30.

3. Voters in a multimember district elect more than one representative to a governmental body. Where voting occurs "at large," all voters in the multimember district may vote for candidates for all available positions in any given election. By contrast, under a single-member district system, voters are divided into as many separate districts as there are seats on the elected body.

4. 102 S. Ct. 3272 (1982).

5. *Id.* at 3279-81. The Court found the following factors probative of intent: racial bloc voting, *id.* at 3279; complete lack of representation for a substantial voting minority, *id.*; past discrimination, 3279-80; unresponsiveness of elected officials to minority interests, *id.* at 3280 n.9; depressed socioeconomic status of blacks, *id.* at 3280; subversion of a neutral state policy for invidious purposes, *id.*; and various structural components of the electoral system, *id.* at 3280-81. These factors closely track the factors that Congress has deemed probative of a finding of discriminatory result of an electoral scheme under § 2 of the amended Voting Rights Act. *See* S. REP. NO. 417, 97th Cong., 2d Sess. 27-28 (1982).

6. 102 S. Ct. at 3278-79.

Under current equal protection doctrine, an at-large system[7] is unconstitutional only if it has both a discriminatory purpose[8] and a discriminatory effect. This Note will argue that an at-large system has a discriminatory effect if it diminishes the ability of minority voters[9] to elect representatives of their choice.[10] The Note proposes that either of two conditions, racially polarized voting patterns or a lack of proportional representation, is sufficient to raise a presumption of discriminatory effect. When concurrent, these conditions conclusively prove the existence of discriminatory effect. Although several lower courts have relied heavily on an alternative test for discriminatory effect—the unresponsiveness of elected officials to minority interests[11]—this Note suggests that "unresponsiveness" is neither a necessary nor a sufficient condition for showing that an electoral system has a discriminatory effect.

I. The Discriminatory Effect Requirement

An electoral system violates the equal protection clause only if it was established or maintained for a discriminatory purpose and has a current discriminatory effect. Existing equal protection doctrine fails to define this discriminatory effect requirement.

7. This Note focuses on the use of at-large electoral systems to elect local officials or state legislators. The possible discriminatory effect of referenda or of electoral schemes for electing single candidates to such offices as President, governor, or congressman lies beyond the scope of this Note.

8. Proof of discriminatory purpose is the most difficult hurdle minority plaintiffs face when they challenge at-large electoral schemes under the Equal Protection Clause. *See* Parker, *The Impact of* City of Mobile v. Bolden *and Strategies and Legal Arguments for Voting Rights Cases in Its Wake*, in THE RIGHT TO VOTE 107 (Rockefeller Found. Conf. Rep. 1981) (noting enormous significance of *Bolden* discriminatory purpose requirement); *cf. The Supreme Court, 1979 Term*, 94 HARV. L. REV. 75, 149 (1980) (*Bolden* "decreased the likelihood" of plaintiff success). The adverse impact of *Bolden* on minority plaintiffs has been mitigated by the holding in *Rogers v. Lodge*, *see infra* pp. 978-80, and by the extension and amendment of the Voting Rights Act. The revised § 2 of the Act now permits a finding of illegal discrimination in voting rights based on discriminatory "results." Discriminatory intent need not be proven. *See* S. REP. NO. 417, 97th Cong., 2d Sess. 27-30 (1982).

9. This Note addresses the discriminatory effects of at-large electoral systems on racial and ethnic minorities. It does not discuss potential constitutional voting rights claims of other groups, such as women, political parties, or religions. Because the overwhelming majority of constitutional and statutory voting rights cases have involved blacks, this Note treats blacks as the paradigm in assessing the discriminatory effect of at-large electoral schemes.

10. *See infra* pp. 981-82, 987-88. Numerous other definitions of voting power have been proposed by scholars. *See, e.g.*, Banzhaf, *Multi-Member Electoral Districts—Do They Violate the "One Man, One Vote" Principle?* 75 YALE L.J. 1309 (1966) (using mathematical model to demonstrate that discriminatory effect of multimember legislative districts is caused by unequal distribution of ability to cast tie-breaking votes); Still, *Political Equality and Election Systems*, 91 ETHICS 375, 377-85 (1981) (listing many definitions of political equality).

11. *See, e.g.*, Washington v. Finlay, 664 F.2d 913, 922-24 & n.9 (4th Cir. 1981), *cert. denied*, 102 S. Ct. 2933 (1982); Lodge v. Buxton, 639 F.2d 1358, 1375 (5th Cir. 1981), *aff'd sub nom.* Rogers v. Lodge, 102 S. Ct. 3272 (1982); Cross v. Baxter, 639 F.2d 1383, 1383 (5th Cir. 1981); Bailey v. Vining, 514 F. Supp. 452, 460-61 (M.D. Ga. 1981).

A. *A Discriminatory Effect is a Necessary Element of a Violation of the Equal Protection Clause*

In *Washington v. Davis*,[12] which held that only those official actions taken with a discriminatory purpose violate the equal protection clause, the Supreme Court noted that current discriminatory effect caused by the challenged official action is an "essential element" of an equal protection claim.[13] Similarly, in school desegregation cases, the Court has clearly stated that past discriminatory plans must continue to have a discriminatory effect (segregated schools) in order for plaintiffs to state a valid cause of action under the equal protection clause.[14] In the voting context, if acts taken with a discriminatory purpose are unsuccessful in that they fail to create a discriminatory effect,[15] or if their impact is so diminished over time by changing socioeconomic conditions or demographic or voting patterns that no vestiges of the acts remain to injure plaintiffs,[16] then those

12. 426 U.S. 229 (1976).

13. *Id.* at 240. *See* Personnel Adm'r v. Feeney, 442 U.S. 256, 260 (1979) (suggesting *Washington v. Davis* held that "disproportionate impact must be traced to a purpose to discriminate"). *But cf.* City of Mobile v. Bolden, 446 U.S. 55, 140 n.39 (1980) (Marshall, J., dissenting) ("The plurality does not address the question whether proof of discriminatory effect is necessary to support a vote-dilution claim."); City of Richmond v. United States, 422 U.S. 358, 378 (1975) (dictum) (discriminatory effect may be unnecessary for a valid constitutional claim if discriminatory purpose can be proven); Beer v. United States, 425 U.S. 130, 142 n.14 (1976) (dictum) (absence of retrogressive effect on racial minority of reapportionment plan does not preclude finding of unconstitutionality).

14. *See* Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 464 (1979); *id.* at 490-91 (Rehnquist, J., dissenting); Keyes v. School Dist. No. 1, 413 U.S. 189, 198, 205-06 (1973); Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36, 44 (1977) ("*Keyes* held that both intentional discrimination and adverse impact must be proven."); *cf.* Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 420 (1977) (*Dayton I*) (describing lower courts' duty to determine whether school board's action was "intended to, and did in fact, discriminate against minority pupils, teachers, or staff").

15. *Cf.* United Jewish Orgs. v. Carey, 430 U.S. 144, 166 n.24 (1977) (plurality opinion) (suggesting plaintiffs' case would have failed had they been unable to show that the purposeful gerrymander would have effect of diluting the value of their votes); Wright v. Rockefeller, 376 U.S. 52, 57-58 (1964) (discriminatory effect on blacks of congressional redistricting in doubt due to presence of blacks on both sides of the case).

16. *Cf.* Keyes v. School Dist. No. 1, 413 U.S. 189, 210-11 (1973) (remoteness in time does not excuse actions taken with segregative intent, if segregation resulting from those actions continues to exist); Penick v. Columbus Bd. of Educ., 429 F. Supp. 229, 252 (S.D. Ohio 1977) (former segregative acts have no significance if no substantial impact of those acts remains to injure plaintiffs), *aff'd*, 443 U.S. 449 (1979).

Moreover, if an at-large system established or maintained for a discriminatory purpose has no discriminatory effect, then plaintiffs may suffer no injury and thus lack standing to sue in federal court. *See* Warth v. Seldin, 422 U.S. 490, 499 (1975) (injury to plaintiff necessary to satisfy Article III standing requirement); O'Shea v. Littleton, 414 U.S. 488, 494, 495-96 (1974) (past injuries insufficient to confer standing to seek injunctive relief "if unaccompanied by any continuing, present adverse effects"); Linda R.S. v. Richard D., 410 U.S. 614, 617 (1973) ("some threatened or actual injury resulting from the putatively illegal action" necessary to confer standing); Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1252 n.139 (1970) (discriminatory impact necessary to vest standing). *But see* United States v. SCRAP, 412 U.S. 669 (1973) (standing granted for indirect and speculative future harms); *infra* pp. 977-78 (stigmatic harm may be judicially cognizable injury).

acts do not violate the Constitution.[17] Furthermore, because the scope of a remedy may not exceed what is necessary to remove the effects of a constitutional violation,[18] courts must precisely identify those discriminatory effects resulting from discriminatorily motivated official action.

Although equal protection doctrine requires identification of the effects of actions motivated by a discriminatory purpose, it is unclear what types of conditions resulting from illicitly motivated official action are required to satisfy the "discriminatory effect" element of an equal protection violation.[19] One widely held view suggests that stigma is "the core of harmful discrimination."[20] Supreme Court decisions suggest, however, that stigma

17. *See, e.g.*, Washington v. Finlay, 664 F.2d 913, 925 (4th Cir. 1981) ("impact or effect must be established as an essential element of [Fourteenth or Fifteenth Amendment] claims [of vote dilution]"), *cert. denied*, 102 S. Ct. 2933 (1982); McMillan v. Escambia County, 638 F.2d 1239, 1248 (5th Cir.) (at-large system unconstitutional if adopted or operated for discriminatory purpose and has discriminatory effect), *appeal dismissed sub nom.* City of Pensacola v. Jenkins, 102 S. Ct. 17 (1981) (case settled); Bolden v. City of Mobile, No. 75-297-P, slip op. at 50 (S.D. Ala. April 15, 1982) (on remand) (plaintiffs must prove discriminatory purpose and "present adverse affects [sic]").

18. *See* Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 420 (1977) (*Dayton I*) (court must tailor scope of remedy to fit nature and extent of constitutional violation); Austin Indep. School Dist. v. United States, 429 U.S. 990, 995 (1976) (Powell, J., concurring) ("[T]he extent of an equitable remedy is determined by and may not properly exceed the effect of the constitutional violation."); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 435-36 (1976) (district court exceeded authority by enforcing desegregation order after constitutional violation fully remedied); Milliken v. Bradley, 418 U.S. 717, 738, 744-45 (1974) (*Milliken I*) (interdistrict remedy inappropriate absent finding of interdistrict violation); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971) (nature of violation determines scope of remedy).

Limitations on remedies apply with special force where plaintiffs seek injunctive relief to restructure or eliminate an important local institution. In *Bolden*, Justice Blackmun voted to reverse both courts below on the ground that the district court's remedy—substituting a mayor-council plan using single-member districts for the three-member commission elected at-large—exceeded the extent of the constitutional violation. 446 U.S. at 80-83 (Blackmun, J., concurring in the result). *See* Kirksey v. City of Jackson, 461 F. Supp. 1282, 1311 (S.D. Miss. 1978) (federalism discourages federal court from restructuring state-created municipal electoral system), *vacated*, 625 F.2d 21 (5th Cir. 1980).

19. This effect requirement has not played an important role in the Court's major discriminatory purpose cases to date, both because the effects of the challenged actions in those cases were starkly obvious and because, prior to *Rogers v. Lodge*, the Court's inquiries had ended with a finding that the intent requirement had not been satisfied. *See* Rogers v. Lodge, 102 S. Ct. 3272, 3279-81 (1982) (racial bloc voting, past discrimination, abject poverty, and electoral rules caused election of all-white county commission that was unresponsive to black interests); Bolden v. City of Mobile, 423 F. Supp. 384, 388-92 (S.D. Ala. 1976) (noting presence of racially polarized voting, unresponsiveness of commissioners to black needs and interests, and absence of black representation on city commission), *rev'd*, 446 U.S. 55 (1980) (evidence insufficient to support finding of intent to discriminate); Personnel Adm'r v. Feeney, 442 U.S. 256, 260 (1979) (noting "devastating impact" of veterans' preference on women's state civil service employment opportunities, but held, no intent to discriminate against women); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 255-59 (1977) (zoning ordinance prohibiting multi-family dwellings resulted in virtual exclusion of racial minority groups, but held, no intent to discriminate); Washington v. Davis, 426 U.S. 229, 237 (1976) (black applicants failed written test at a rate four times that of white applicants, but held, no intent to discriminate).

20. Nevett v. Sides, 571 F.2d 209, 235 & n.7 (5th Cir. 1978) (*Nevett II*) (Wisdom, J., specially concurring). *See* Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424-27 (1960) (implication of inferiority caused by segregation is "hurtful to human beings"); Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 8-12 (1976) (stigmatic injury violates antidiscrimination principle even where material harm seems slight or problematic); Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 158-59 (1955) (official

may not be sufficient to satisfy the discriminatory effect requirement.[21] Therefore, plaintiffs will stand on surer ground if they can adduce evidence of discriminatory effect that is more concrete than stigmatic harm.[22]

B. *Current Equal Protection Doctrine Does Not Define Discriminatory Effect in the Electoral Context*

The Supreme Court has yet to outline clearly the role of discriminatory effects of an electoral system within the discriminatory purpose framework. Prior to *Bolden*, challenges to the constitutionality of at-large electoral systems focused on the discriminatory effects of those systems.[23] In

humiliation "psychologically injurious and morally evil"); Karst, *The Supreme Court, 1976 Term—Foreward: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 5-11 (1977) (equal citizenship principle guards against imposition of stigma); Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1030-32, 1050-51 (1979) (moral irrelevance of race). Under this view, actions taken with a discriminatory purpose inflict stigmatic harm, and thus proof of discriminatory purpose creates a presumption of discriminatory effect that satisfies the effect requirement of an equal protection claim.

21. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 294 n.34 (1978) (Powell, J.) (equal protection clause not framed in terms of stigma); *cf.* Palmer v. Thompson, 403 U.S. 217, 224-26 (1971) (illicit legislative motivations do not alone violate equal protection).

But on other occasions, members of the Court have emphasized the significance of stigma to an equal protection claim. *See* United Jewish Orgs. v. Carey, 430 U.S. 144, 165 (1977) (plurality opinion) (purposeful racial gerrymander that "represented no racial slur or stigma" to any race did not violate equal protection); Palmer v. Thompson, 403 U.S. 217, 266-68 (1971) (White, J., dissenting) (stigmatic harm caused by closing of city pools following desegregation decree violative of Fourteenth Amendment); *cf.* City of Memphis v. Greene, 101 S. Ct. 1584, 1613 (1981) (Marshall, J., dissenting) (symbolic harm judicially cognizable).

22. The stigma attached to past official actions taken with discriminatory intent may also dissipate as the more tangible effects of those actions dissipate. Moreover, since "stigma" is not objectively measurable, it is highly manipulable, and courts have few standards by which to judge whether a given official action causes stigmatic harm. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 294 n.34 (1978) (Powell, J.) (stigma reflects standardless subjective judgment with no clearly defined constitutional meaning). *Compare* City of Memphis v. Green, 101 S. Ct. 1584, 1600-01 (1981) (closing of street through historically all-white neighborhood merely an "inconvenience" and a "routine burden of citizenship") *with id.* at 1614 n.18 (Marshall, J., dissenting) (same street closing "a badge or incident of slavery forbidden by the Thirteenth Amendment").

23. *See* White v. Regester, 412 U.S. 755, 765-67 (1973) (holding at-large system unconstitutional without expressly requiring showing of discriminatory intent); Whitcomb v. Chavis, 403 U.S. 124, 149 (1971) (lack of proportional representation of minorities not a constitutional violation unless they had less opportunity than others "to participate in the political processes and to elect legislators of their choice"); Fortson v. Dorsey, 379 U.S. 433, 439 (1965) (at-large system may be unconstitutional if "designedly or otherwise" it operates to minimize or cancel out minority voting strength); Burns v. Richardson, 384 U.S. 73, 88 (1966) (*Fortson* standard satisfied by proof of an "invidious effect"); S. REP. NO. 417, 97th Cong., 2d Sess. 19-23 (1982) (prior to *Bolden*, plaintiffs could have prevailed upon showing of effect or intent).

For proof of effect, the Court demanded that plaintiffs show "real-life impact," Whitcomb v. Chavis, 403 U.S. 124, 146 (1971), not hypothetical or purely mathematical impact. *See* White v. Regester, 412 U.S. 755, 765-66 (1973); Whitcomb v. Chavis, 403 U.S. 124, 144-46 & n.23 (1971) (rejecting mathematical theory showing how multimember districts create unequal distribution of ability to cast tie-breaking votes); Burns v. Richardson, 384 U.S. 73, 88 (1966) ("[s]peculations" and "conjecture" no substitute for "demonstrated fact"); Fortson v. Dorsey, 379 U.S. 433, 437-38 (1965). *See also* Kendrick v. Walder, 527 F.2d 44, 48 (7th Cir. 1975) ("actual impact on voters' rights must be demonstrated"); Gilbert v. Sterrett, 509 F.2d 1389, 1392 (5th Cir.) (rejecting predictions of plaintiffs' political expert), *cert. denied*, 423 U.S. 951 (1975).

Bolden, the plurality extended the discriminatory intent requirement of *Washington v. Davis* to the electoral context.[24] The plurality stated that the discriminatory effect of an at-large system, no matter how severe, does not alone violate the Equal Protection Clause.[25]

The *Bolden* plurality's piecemeal treatment of each element of plaintiffs' circumstantial proof[26] and the plurality's resulting refusal to draw an inference of discriminatory purpose suggested that it would be difficult for plaintiffs to win an at-large "vote dilution" case on equal protection grounds without direct evidence of the subjective intent of the relevant decisionmakers.[27] In *Rogers v. Lodge*, however, the Court upheld an inference of discriminatory purpose in the maintenance of an at-large system based on circumstantial evidence alone.[28] On facts strikingly similar to those in *Bolden*,[29] the Court reached the opposite result, this time profess-

24. 446 U.S. at 66-67 (plurality opinion); *accord*, Rogers v. Lodge, 102 S. Ct. 3272 (1982) (vote dilution claim subject to standard of proof generally applicable to equal protection cases).

25. 446 U.S. at 70. The plurality reasoned that a number of facially race-neutral "good government" rationales can easily justify the use of at-large systems. *Id.* at 70 & n.15. *See* Washington v. Finlay, 664 F.2d 913, 925, 926 (4th Cir. 1981) *cert. denied*, 102 S. Ct. 2933 (1982); Kirksey v. City of Jackson, 663 F.2d 659, 663 (5th Cir. 1981); *cf.* Kendrick v. Walder, 527 F.2d 44, 51-53 (7th Cir. 1975) (Pell, J., dissenting) (giving history of commission form of government). Recent scholarship, however, has questioned the ostensible "good government" motives behind the implementation of at-large electoral systems during the Progressive Era. The municipal reform movement may have been designed "to develop and insulate the power of emerging metropolitan elites from sustained pressures from the masses as expressed in machine politics." M. SCHIESL, THE POLITICS OF EFFICIENCY 192 (1977) (footnote omitted). *But see* Jordan v. City of Greenwood, 534 F. Supp. 1351, 1352-53 (N.D. Miss. 1982) (rejecting plaintiffs' expert historian's view that adoption of commission form of government was racially motivated). *See generally* B. RICE, PROGRESSIVE CITIES 78 (1977) (municipal reform movement a power struggle between white "business elites" and ethnic, minority, and working class groups that derived political power from ward system). The discriminatory effect of many "good government" reforms is well-documented in City of Mobile v. Bolden, 446 U.S. 55, 105-06 n.3 (1980) (Marshall, J., dissenting) (citing six recent empirical studies).

26. 446 U.S. at 73-74 (plurality opinion). *See id.* at 102, 103 (White, J., dissenting) (criticizing plurality for viewing in isolation each element of plaintiffs' proof of intent).

27. *But see, e.g.*, Perkins v. City of West Helena, 675 F.2d 201, 207 (8th Cir. 1982) (noting prior to *Rogers v. Lodge* that circumstantial evidence is sufficient to prove discriminatory intent behind maintenance of at-large system).

28. Prior to *Rogers v. Lodge*, the Court adverted to the value of evidence of discriminatory effect in proving discriminatory purpose, *see* City of Mobile v. Bolden, 446 U.S. 55, 70 (1980) (plurality opinion); Personnel Adm'r v. Feeney, 442 U.S. 256, 274, 279 n.24 (1979); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977) (impact evidence "may provide an important starting point" for proof of intent); Washington v. Davis, 426 U.S. 229, 242 (1976) (discriminatory purpose may be inferred from "totality of the relevant facts"), but, outside the school desegregation context, the Court generally permitted inferences of discriminatory purpose only in those special cases where starkly disproportionate impacts could not be rationalized by any legitimate state policy. *See, e.g.*, Castaneda v. Partida, 430 U.S. 482 (1977) (inferring discriminatory purpose from disproportionate impact of Texas keyman jury system); Turner v. Fouche, 396 U.S. 346 (1970) (same inference drawn from system for selecting school board members); Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886) (inferring discriminatory purpose from overwhelming statistical disparity in application of facially neutral statute). *But see, e.g.*, Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 463-65 (1979) (inferring segregative intent of school board from its actions having foreseeable disparate impact).

29. Both cases involved racial bloc voting in an at-large system established in 1911, resulting without exception in all-white elected commissions that were unresponsive to the black community.

ing reluctance to overturn the concurrent findings of two lower courts.[30] In repeating with approval the factors that the courts below had found probative, the Court did not indicate what quantum of "discriminatory effect" evidence is necessary either (1) to permit an inference of discriminatory purpose or (2) to satisfy the discriminatory effect requirement of an equal protection claim if direct evidence of intent exists[31] or if an inference of discriminatory purpose can be drawn from circumstantial factors other than "impact" evidence.[32] Nor did the *Bolden* plurality reach the issue of what constitutes the discriminatory effect of an at-large system,[33] because the plurality ruled that plaintiffs' case failed for lack of adequate proof of discriminatory purpose.[34]

The content of this effect requirement was the subject of considerable confusion in the federal courts prior to *Rogers v. Lodge*. Lower courts differed over whether proof of the unresponsiveness of elected officials to minority needs and interests constituted a necessary element of an equal protection cause of action.[35] For example, a Fifth Circuit panel in *Lodge v. Buxton*[36] stated that in constitutional "vote dilution" cases, the unresponsiveness of the governing body is a necessary, but not sufficient, element of the plaintiff's claim.[37] The Supreme Court in *Rogers v. Lodge*,

Both jurisdictions had relatively recent histories of official discrimination in many areas, and both had voting rules, such as a majority-vote requirement and numbered posts, that disadvantaged voting minorities. Approximately one-third of the registered voters in both jurisdictions were black.

30. Rogers v. Lodge, 102 S. Ct. 3272, 3278-79 (1982). Such solicitude for the findings of lower courts was absent from the *Bolden* reversal of the district court and Fifth Circuit decisions.

31. *See, e.g.*, McMillan v. Escambia County, 638 F.2d 1239, 1247 (5th Cir.) (discriminatory motives for change to at-large system expressed by two city council members), *appeal dismissed sub nom.* City of Pensacola v. Jenkins, 102 S. Ct. 17 (1981) (case settled).

32. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266-68 (1977) (listing circumstantial factors probative of intent). It is not necessary to prove any specific combination of the *Arlington Heights* factors to permit an inference of discriminatory purpose. Thus, proof of the non-impact *Arlington Heights* factors could lead to a finding of discriminatory purpose in the absence of the first factor—impact.

33. *But cf.* 446 U.S. at 140 n.39 (Marshall, J., dissenting) (discriminatory effect requirement satisfied by retrogression in the minority's voting power when an electoral scheme is *enacted* with a discriminatory purpose, or by submergence of "minority electoral influence below the level it would have under a reasonable alternative scheme" when an electoral scheme is *maintained* for a discriminatory purpose).

34. *Id.* at 70-74 (plurality opinion).

35. *Compare* Lodge v. Buxton, 639 F.2d 1358, 1375 (5th Cir. 1981) (proof of unresponsiveness of elected officials a necessary element of plaintiffs' prima facie case), *aff'd sub nom.* Rogers v. Lodge, 102 S. Ct. 3272 (1982) *and* Washington v. Finlay, 664 F.2d 913, 923-24 & n.9 (4th Cir. 1981) (absent direct denial of voting rights, unresponsiveness necessary for proof of discriminatory effect), *cert. denied*, 102 S. Ct. 2393 (1982) *with* McMillan v. Escambia County, 638 F.2d 1239, 1248-49 (5th Cir.) (responsiveness irrelevant to proof of discriminatory purpose or effect of electoral system), *appeal dismissed sub nom.* City of Pensacola v. Jenkins, 102 S. Ct. 17 (1981) (case settled). *See generally* McDonald, *Response*, in THE RIGHT TO VOTE 94-96 (Rockefeller Foundation Conf. Rep. 1981) (sharply criticizing "unresponsiveness" requirement); Note, *Affirmative Action and Electoral Reform*, 90 YALE L.J. 1811, 1822 n.69 (1981) (describing two possible theories of impact requirement of equal protection).

36. 639 F.2d 1358 (5th Cir. 1981), *aff'd sub nom.* Rogers v. Lodge, 102 S. Ct. 3272 (1982).

37. 639 F.2d at 1374, 1375 & n.35. *See* Cross v. Baxter, 639 F.2d 1383, 1383-84 (5th Cir. 1981)

while affirming the *Lodge v. Buxton* finding of discriminatory purpose, correctly rejected the short-lived unresponsiveness requirement. The Supreme Court in *Rogers v. Lodge* also contradicted the *Bolden* plurality in noting that evidence of unresponsiveness, like other discriminatory effects, is probative of discriminatory purpose.[38]

While unresponsiveness is clearly not a necessary element of proof of discriminatory effect of an electoral system, the Court has offered little guidance as to what minimal discriminatory effect is required in an equal protection challenge to an electoral system. This effect requirement is less important where the discriminatory effect of official action is powerful enough, as in *Rogers v. Lodge*, to support an inference of discriminatory purpose. The content of this effect requirement would be more important where discriminatory intent could be proven with non-impact evidence.[39] In the latter case, a discriminatory effect must be proven not to demonstrate the presence of discriminatory intent, but only to establish that the plaintiffs were actually harmed by the illicitly motivated official action.

II. Alternative Definitions of Discriminatory Effect

Discriminatory effect is, generally, the withdrawal of a benefit from or imposition of a burden on a specific class of persons.[40] In the electoral context, the relevant benefit or burden must be defined by a theory of representation. In evaluating the effect of a discriminatorily motivated electoral system, a court must refer to the benefits typically derived from representative government. If an electoral system denies some portion of those benefits to members of a particular group, then the system has a

(lack of unresponsiveness dispositive). *See also* Washington v. Finlay, 664 F.2d 913, 923 n.9 (4th Cir. 1981) (unresponsiveness necessary for proof of discriminatory effect), *cert. denied*, 102 S. Ct. 2393 (1982).

Because 76% of the municipalities in the "Solid South" (Ala., Ark., Fla., Ga., La., Miss., N.C., S.C., Tex., & Va.) employ at-large elections for city council, *see* Sanders, *Governmental Structure in American Cities*, in 1979 MUNICIPAL Y.B. 97 n.2, 99 (Table 4.), the *Lodge v. Buxton* rule threatened to have a significant impact on constitutional challenges to at-large systems. Of the states included in the "Solid South," all but Arkansas (8th Cir.) are within federal circuits bound by precedents handed down by the Fourth or Fifth Circuits, both of which had used the *Lodge v. Buxton* "unresponsiveness" standard. Alabama, Florida, and Georgia are in the recently formed Eleventh Circuit, which is bound by Fifth Circuit precedents.

38. Rogers v. Lodge, 102 S. Ct. 3272, 3280 n.9 (1982) (dictum) ("[U]nresponsiveness is an important element but only one of a number of circumstances a court should consider in determining whether discriminatory purpose may be inferred.") *Cf.* City of Mobile v. Bolden, 446 U.S. 55, 73-74 (1980) (plurality opinion) (evidence of unresponsiveness "relevant only as the most tenuous and circumstantial evidence" of discriminatory purpose).

39. *See supra* p. 980 & notes 31-32 (possibility of proof of discriminatory intent independent of "effect" evidence).

40. *See also* R. DWORKIN, TAKING RIGHTS SERIOUSLY 227 (1977) (equal treatment requires equal distribution of some opportunity, resource, or burden); Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 141 (1976) (criterion innocent on its face may nonetheless disadvantage minorities); Note, *supra* note 35, at 1822 n.69.

discriminatory effect.

The Constitution does not, of course, embody a single theory of representation to which all electoral systems must conform.[41] Consequently, courts have encountered a number of pitfalls in their attempts to define discriminatory effect in this context. Some courts have invoked theories of representation that rest on empirically invalid assumptions,[42] while others have relied exclusively on one theory and have ignored benefits possible under competing theories.[43] This Note proposes a definition of discriminatory effect that is both comprehensive and properly less stringent than those requirements derived from prior definitions.

A. *Theories of Representation that Courts Currently Use to Define Discriminatory Effect Are Inadequate*

Courts have used a number of theories of representation to define the discriminatory effects of electoral schemes in adjudicating constitutional challenges to those schemes. The two primary theories employed—Madison's theory that the presence of many factions will prevent majority tyranny and the theory that representation exists only to ensure responsive governments—are both inadequate.[44]

1. *Madisonian Theory of Faction*

In *The Federalist*, Madison posited that majority tyranny is unlikely in a large, diverse electorate composed of many different factions.[45] Madison assumed that transitory majorities are built from coalitions in flux across issues and over time. Majority tyranny against any faction of substantial size is unlikely, under Madison's theory, because the factions composing the temporary majority realize that the factions excluded from the coali-

41. *See* City of Mobile v. Bolden, 446 U.S. 55, 66 (1980) (plurality opinion) (multimember legislative districts not per se unconstitutional); Whitcomb v. Chavis, 403 U.S. 124, 154-55 (1971) (lack of proportional representation of an interest group not unconstitutional); Reynolds v. Sims, 377 U.S. 533, 579 (1964) (single-member, multimember, and floterial districts permitted); Baker v. Carr, 369 U.S. 186, 302 (1962) (Frankfurter, J., dissenting) (Fourteenth Amendment provides no guide on issues concerning representation); *cf.* Wright v. Rockefeller, 376 U.S. 52, 66-67 (1964) (Douglas, J., dissenting) (proportional representation systems violate "principle of equality" and the "democratic ideal").

42. *See infra* p. 984 & note 51.

43. *See supra* pp. 980-81; *infra* pp. 984-86.

44. Each of these theories deserves special attention. The Madisonian theory of faction is an important justifying principle for the American constitutional system, *see infra* pp. 982-83 & notes 45-46, and courts have continued to apply Madison's theory even where the assumptions are empirically invalid. *See infra* pp. 983-84. The "unresponsiveness" requirement was a source of conflict in the lower federal courts as they grappled with the ambiguities of *Bolden*. *See supra* note 35.

45. THE FEDERALIST No. 10, at 135 (J. Madison) (B. Wright ed. 1961) (the more factions required for a majority, the less likely it is that the majority will have a common motive to invade the rights of other citizens). *See* R. DIXON, DEMOCRATIC REPRESENTATION 40-42 (1968). *But cf.* R. DAHL, A PREFACE TO DEMOCRATIC THEORY 30 (1956) (noting inconsistencies in Madison's theory).

tion may be the necessary element of some future winning coalition. All groups of substantial size could expect to be "courted" by other factions seeking to build a majority.

Under certain circumstances, Madison's theory of factional politics remains persuasive today. If coalition-building occurs freely across racial lines, a politically cohesive, geographically insular minority may have as much political influence in an at-large system as in a single-member district system.[46] But when the minority faction is a "discrete and insular" minority that is consistently excluded from the coalition-building process,[47] the ostensible protection against majority tyranny provided by Madison's theory evaporates. In a race-conscious polity in which a bloc-voting majority consistently votes against and thereby defeats minority candidates or candidates representing minority interests,[48] minority voters who support minority candidates will have no influence on the outcome of an election.[49]

46. *See, e.g.*, City of Rome v. United States, 446 U.S. 156, 219 (1980) (Rehnquist, J., dissenting) ("Under . . . [an at-large] system, Negroes have some influence in the election of all officers; under . . . [a single-member district system], minority groups have more influence in the selection of fewer officers") (quoting Fairley v. Patterson, 393 U.S. 544, 586 (1969) (Harlan, J., dissenting)) (emphasis deleted by Rehnquist, J.). *See also* Wright v. Rockefeller, 376 U.S. 52, 57-58 (1964) (minority plaintiffs and intervenors disagreed over desirability of concentrating minority voters in a few districts); Dove v. Moore, 539 F.2d 1152, 1155 n.4 (8th Cir. 1976); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 13-9, at 759 (1978) (difficult to gauge "the relative value of having one ardent spokesman or many mildly sympathetic listeners in the legislative halls"). *But see* Note, *supra* note 35, at 1813 n.15 (discussing benefits to minorities of concentration in a few districts). Concentration of a minority group in a single-member district may, however, segregate the group by preventing coalition-building. *See* United Jewish Orgs. v. Carey, 430 U.S. 144, 172-73 (1977) (Brennan, J., concurring in part) (preferential districting could be "contrivance to segregate"); Kirksey v. Board of Supervisors, 554 F.2d 139, 161 (5th Cir.) (en banc) (Hill, J., dissenting) (questioning advantages to blacks of "safe" black districts), *cert. denied*, 434 U.S. 968 (1977).

47. *See* City of Mobile v. Bolden, 446 U.S. 55, 122 (1980) (Marshall, J., dissenting) (dominant political factions can ignore discrete and insular electoral minorities); Derfner, *Multi-Member Districts and Black Voters*, 2 BLACK L.J. 120, 127 (1972) (difficulty in forming coalitions isolates minority from political process); Fiss, *supra* note 40, at 152 (coalition-building difficult for blacks, because they have been "subjects of fear, hatred, and distaste"). It is proper for courts to show a special solicitude for those "discrete and insular minorities" that are shut out of the pluralist political process. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); J. ELY, DEMOCRACY AND DISTRUST 151 (1980).

Some jurists and commentators, however, claim that the black struggle for political recognition and responsive governments is no different from the struggle undertaken by white ethnic minorities. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 292 (1978) (Powell, J.); J.Q. WILSON, NEGRO POLITICS 24 (1960). *But see* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 400 (1978) (Marshall, J.) (Negro experience different in kind, not just degree); D. BELL, RACE, RACISM, AND AMERICAN LAW 126 (2d ed. 1980) (caste-like status of blacks excludes them from political "give and take"); W. NELSON & P. MERANTO, ELECTING BLACK MAYORS 18-20 (1977) (criticizing "ethnic analogy").

48. *See infra* note 77 (racial bloc voting not uncommon). Black interests often diverge widely from white interests on many political matters, not just those relating directly to race. *See* G. POMPER, VOTERS' CHOICE 131-32 (1975).

49. *See* Allen v. State Bd. of Elections, 393 U.S. 544, 569 (1969) (change to at-large elections could nullify the ability of minority voters "to elect the candidate of their choice just as would prohibiting some of them from voting"). Single-member districting in the same polity would not give a minority control over the governing body. Single-member districting could, however, give a geographically insular minority of sufficient size control over the election of a proportion of candidates equal to the minority's proportion in the overall population.

Even in situations where the Madisonian assumption of fluid electoral coalitions is invalid due to voting along racial lines,[50] some courts have nonetheless continued to apply the Madisonian theory of faction to conclude that it is indeterminable whether the minority will receive greater benefits from a multimember, at-large system or from a single-member district system.[51] To continue to apply the Madisonian theory in a polarized setting ignores that under an at-large system, but not under a single-member district system, the minority will be unable to elect representatives of its own choice.[52]

2. *Governmental Responsiveness to Minority Needs and Interests*

Courts have also examined the responsiveness of officials elected under an at-large system to determine whether a challenged electoral system has a discriminatory effect.[53] Courts usually measure the responsiveness of an elected body to the interests of its minority constituents by searching for discrimination in the elected body's allocation of government services, jobs, and appointments.[54] Prior to the extension of the intent requirement in *Bolden*, unresponsiveness often played a key role in constitutional tests of at-large electoral schemes.[55] After *Bolden* and prior to *Rogers v. Lodge*,

50. Modern explanations of a properly functioning pluralist democracy are, like Madison's theory, invalid for those who are excluded from the political process. *See* R. DAHL, DEMOCRACY IN THE UNITED STATES 54 (3d ed. 1976) (theory of polyarchy does not apply to excluded groups, mainly blacks); T. LOWI, THE POLITICS OF DISORDER 32-35 (1971) (static groups prevent coalition-building). *But cf.* Posner, *The* DeFunis *Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 30-31 ("realistic analysis" of political process indicates that blacks, like other minorities, are able to procure policies in their favor).

51. *See, e.g.*, United Jewish Orgs. v. Carey, 430 U.S. 144, 185, 186-87 (1977) (Burger, C.J., dissenting) (rejecting notion that whites and non-whites form "homogeneous entities," despite presence of racial bloc voting); United States v. Board of Supervisors, 571 F.2d 951, 956 (5th Cir. 1978) (questioning benefit to black minority of concentration of voting power, despite a "high rate" of racial bloc voting); Kirksey v. Board of Supervisors, 554 F.2d 139, 155-56 (5th Cir.) (en banc) (Gee, J., specially concurring) (lamenting pro-minority gerrymandering leading to "a tribal, rather than a republican, form of government," despite severe racial bloc voting) (footnote omitted), *cert. denied*, 434 U.S. 968 (1977).

52. *See infra* pp. 987-88.

53. *See* White v. Regester, 412 U.S. 755, 766-70 (1973) (unconstitutionality of at-large system due to several factors, including representatives' lack of good faith concern for minority interests); Whitcomb v. Chavis, 403 U.S. 124, 155 (1971); Zimmer v. McKeithen, 485 F.2d 1297, 1305 (5th Cir. 1973) (en banc), *aff'd per curiam on other grounds sub nom.* East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976). These cases were decided under what appeared to be an equal protection "effects" standard. *See* Bonapfel, *Minority Challenges to At-Large Elections: The Dilution Problem*, 10 GA. L. REV. 353, 379-87 (1976) (discussing importance of responsiveness under pre-*Bolden* "effects" standard); *supra* note 23 (Court emphasized discriminatory effects in pre-*Bolden* vote dilution cases).

54. *See, e.g.*, Lodge v. Buxton, 639 F.2d 1358, 1376-77 (5th Cir. 1981) (examining public schools, county hiring and appointments, and road paving), *aff'd sub nom.* Rogers v. Lodge, 102 S. Ct. 3272 (1982); Bolden v. City of Mobile, 423 F. Supp. 384, 389-92 (S.D. Ala. 1976) (examining public employment, city committees, public works, road paving, sidewalks, and parks and recreation), *rev'd on other grounds*, 446 U.S. 55 (1980).

55. *See* cases cited *supra* note 53.

some courts required proof of unresponsiveness as a necessary element of an equal protection challenge to an at-large electoral system.[56]

Rogers v. Lodge properly rejected the *Lodge v. Buxton* unresponsiveness requirement.[57] The unresponsiveness requirement is based on an inadequate theory of representative government.[58] Such a requirement implies that an electoral system adequately represents minority constituents as long as the elected officials provide the minority with governmental services and jobs equivalent to services and jobs provided to majority constituents.[59] Such a theory would condone benign dictatorships.[60] If official action taken for a discriminatory purpose results in the dilution or elimination of minority voters' power to elect candidates of their choice, the absence of other discriminatory effects, such as unresponsiveness, should not preclude a finding of an equal protection violation.[61] Even if nonminority officials elected under a purposefully discriminatory electoral system prove that they are responsive to minority needs, such a system denies minority voters those benefits available to them in a system in which they are able to elect representatives of their choice.[62]

56. *See, e.g.*, Washington v. Finlay, 664 F.2d 913, 923-24 & n.9 (4th Cir. 1981), *cert. denied*, 102 S. Ct. 2933 (1982); Lodge v. Buxton, 639 F.2d 1358, 1374, 1375 & n.35 (5th Cir. 1981), *aff'd sub nom.* Rogers v. Lodge, 102 S. Ct. 3272 (1982). *See supra* notes 35-39 & pp. 980-81 (discussing confusion surrounding *Lodge v. Buxton* "unresponsiveness" requirement).

57. Rogers v. Lodge, 102 S. Ct. 3272, 3280 n.9 (1982) (dictum) (unresponsiveness not essential, but rather "only one of a number of circumstances a court should consider" as proof of discriminatory purpose). The *Lodge v. Buxton* unresponsiveness requirement was all the more surprising and inappropriate considering the *Bolden* plurality's treatment of evidence of responsiveness. *See* City of Mobile v. Bolden, 446 U.S. 55, 74 (1980) (plurality opinion) (unresponsiveness is "tenuous and circumstantial" evidence of discriminatory purpose).

58. At times courts have been reluctant to find a constitutional basis for choosing among competing theories of representation. *See, e.g.*, Corder v. Kirksey, 639 F.2d 1191, 1197 n.2 (5th Cir. 1981) (questioning whether courts should choose among competing theories of representative government); *see also* Baker v. Carr, 369 U.S. 186, 300-02 (1962) (Frankfurter, J., dissenting) (Fourteenth Amendment "provides no guide for judicial oversight of the representation problem"). But ever since *Baker v. Carr* removed the "political question" roadblock to federal court challenges to the structure of state and local electoral systems, the federal judiciary has had the responsibility to make "at least some hard substantive decisions of political theory." L. TRIBE, *supra* note 46, § 13-7, at 750 n.4.

59. *See* H. EULAU & K. PREWITT, LABYRINTHS OF DEMOCRACY: ADAPTATIONS, LINKAGES, REPRESENTATION, AND POLICIES IN URBAN POLITICS 438 (1973) ("core issue in representation is not how leaders are chosen . . . but whether they are responsive").

60. Contentment of the governed should not be sufficient to define representation. *See* C. PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 8-9 (1970) (only effective electoral power can ensure responsiveness); H. PITKIN, THE CONCEPT OF REPRESENTATION 230-34 (1967) (benevolent dictatorship not a representative government). According to Pitkin, a representative government must be defined by long-term systematic arrangements, such as free and genuine elections, that institutionalize responsiveness. *See* H. PITKIN, *supra*, at 234.

61. *Cf.* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 n.14 (1977) ("A single invidiously discriminatory governmental act . . . would not necessarily be immunized by the absence of such discrimination in the making of other comparable decisions.")

62. *See* McDonald, *supra* note 35, at 97 ("[E]qual political participation means vastly more to a race of people and to constitutional analysis than garbage collection and street paving."); Note, *supra* note 35, at 1813-14 & nn.15-20; *infra* p. 988. Under the "unresponsiveness" requirement of *Lodge v. Buxton*, elected officials could thwart otherwise valid equal protection claims simply by providing

An unresponsiveness test has practical drawbacks. Evidence of unresponsiveness is often difficult and expensive to collect.[63] Furthermore, because the court is likely to have no "good government" standard against which to compare the defendant government's performance,[64] the degree of responsiveness of a government to the interests of a minority group may be indeterminate.

B. *Diminution of the Minority's Ability to Elect Candidates of Its Choice Constitutes the Discriminatory Effect of an At-Large Electoral System*

Members of a racial minority may form a majority of voters in a district under a single-member district scheme,[65] but form only a minority of

effectively disfranchised minorities with municipal services equivalent to those provided to whites. *See* Zimmer v. McKeithen, 485 F.2d 1297, 1306-07 n.26 (5th Cir. 1973) (en banc) (if absence of unresponsiveness foreclosed constitutional claim, "the voting strength of minorities could be freely diluted without fear of constitutional restraint"), *aff'd per curiam on other grounds sub nom.* East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976); McDonald, *supra* note 35, at 95-96 (likening the *Lodge* "unresponsiveness" requirement to the "separate but equal" analysis of Plessy v. Ferguson, 163 U.S. 537 (1896)).

The *Lodge v. Buxton* panel may have intuitively believed that an actively discriminatory government is bound to result from a purposefully discriminatory electoral system, and that the absence of the former precludes a finding of the latter. For like reasoning, see Kirksey v. City of Jackson, 461 F. Supp. 1282, 1313 (S.D. Miss. 1978) (lack of unresponsiveness "weighs heavily against an inference of intentional discrimination"), *vacated*, 625 F.2d 21 (5th Cir. 1980). But the majority might desire a discriminatory electoral system not so that elected officials could actively discriminate against minorities, but rather to withhold from minorities the symbolic and tangible benefits that result from the election of minority group members to office. *See* G. FREDRICKSON, WHITE SUPREMACY 280 (1981) (nonwhite suffrage a symbolic issue); *infra* p. 988. The *Lodge v. Buxton* and *Kirksey v. City of Jackson* courts failed to distinguish the harm to minorities from a discriminatory electoral process and the harm to minorities from discriminatory actions by government officials. A constitutional attack on an at-large system challenges the means for electing representatives, not the performance of those representatives once in office. *See* City of Mobile v. Bolden, 446 U.S. 55, 73-74 (1980) (plurality opinion).

63. *See* Avila, Mobile *Evidentiary Analysis*, in THE RIGHT TO VOTE 135 (Rockefeller Foundation Conf. Rep. 1981) (amassing voluminous proof of unresponsiveness drains scarce litigation resources); Brief for Plaintiffs-Appellees at 29-30, Lodge v. Buxton, 639 F.2d 1358 (5th Cir. 1981) (on file with the *Yale Law Journal*) (proving unresponsiveness element of an equal protection challenge to an at-large system could comprise many separate full-scale discrimination suits), *aff'd sub nom.* Rogers v. Lodge, 102 S. Ct. 3272 (1982).

64. *Cf.* Bonapfel, *supra* note 53, at 379-87 (detailing divergent treatment of unresponsiveness evidence); Comment, *Effective Representation and Multimember Districts*, 68 MICH. L. REV. 1577, 1599 (1970) (search for unresponsiveness "at best subjective, qualitative, and uncertain" (footnote omitted)). Standards under which courts have evaluated the responsiveness of elected officials to the needs of a minority group have varied widely. *Compare* Hendrix v. McKinney, 460 F. Supp. 626, 632-36 (M.D. Ala. 1978) (finding unresponsiveness despite governing body's "mixed" record in equal provision of government services) *and* Zimmer v. McKeithen, 485 F.2d 1297, 1306 n.26 (5th Cir. 1973) (en banc) (finding at-large system unconstitutional despite complete absence of proof of unresponsiveness), *aff'd per curiam on other grounds sub nom.* East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976) *with* David v. Garrison, 553 F.2d 923, 929-30 (5th Cir. 1977) (remanding for further factual findings despite district court findings of no black policemen or firemen in a city that is 28% black, dilapidated housing, poor enforcement of building codes, and inferior streets in the black area).

65. Courts have dismissed challenges to at-large systems where blacks constituted such a small

voters in a multimember district that utilizes at-large voting. Because of the prevalence of residential segregation,[66] minorities are likely to form a higher percentage of the electorate in certain single-member districts than in an at-large district. In an at-large system, minority voters may be unable to elect a candidate of their choice.[67]

This Note proposes that the potential benefit of representative government denied to a minority group by an at-large system is the ability to elect a representative of the group's choice.[68] Thus, an at-large system is unconstitutional if adopted or retained for a discriminatory purpose and if it diminishes the minority's ability to elect representatives of its choice.[69]

percentage of the voting population that an at-large system would have no " 'actual impact' on the plaintiffs' voting power." Vollin v. Kimbel, 519 F.2d 790, 790-91 (4th Cir.) (blacks, comprising only 5.8% of voters, not entitled to representative on five-person county board), *cert. denied*, 423 U.S. 936 (1975). But even if blacks do not form a large enough group in a single district to elect a candidate with only black votes, an at-large system with racially polarized voting might still have a discriminatory effect relative to the single-member district plan if voting is less polarized in their single-member district than in the at-large district as a whole. The less racially polarized the voting, the greater are minority opportunities to form decisive biracial coalitions. *See* City of Mobile v. Bolden, 446 U.S. 55, 105 n.3 (1980) (Marshall, J., dissenting) (greater degree of bloc voting leads to greater minority vote dilution in multimember district).

66. *See* REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 242-50 (Bantam ed. 1968); Note, *Tipping the Scales of Justice: A Race-Conscious Remedy for Neighborhood Transition*, 90 YALE L.J. 377, 377 & nn. 1-2 (1980) (residential segregation a fact of urban life in modern America).

Although often present, geographical concentration of the minority group is not a necessary element of an equal protection violation. Presence or absence of identifiable minority neighborhoods will, however, affect the type of remedy chosen to erase the effects of a violation. Where the minority is geographically concentrated, courts can remedy the effects of a constitutional violation by ordering a conversion from an at-large system to a single-member district system. If the minority is not geographically concentrated, a change to a single-member district system generally will not benefit the minority. In such cases, other structural remedies might be appropriate. These possible remedies include a change to proportional, limited, or cumulative voting, or elimination of either a majority-win requirement, *see infra* note 104 (defining majority-win requirement), or an anti-single shot voting rule, *see infra* note 106 (defining anti-single shot provisions). *See generally* Note, *supra* note 35, at 1817-18 (listing structural measures for increasing minority representation).

67. *See* Rogers v. Lodge, 102 S. Ct. 3272, 3275 (1982) (distinct minority may be able to elect several representatives under a single-member district system, but may be unable to do so under an at-large system); Allen v. State Bd. of Elections, 393 U.S. 544, 569 (1969) (change from district to at-large voting could reduce or entirely eliminate minority voters' ability to elect a candidate of their choice "just as would prohibiting some of them from voting"); Perkins v. City of West Helena, 675 F.2d 201, 203 n.2 (8th Cir. 1982) (describing vote dilutive effect of at-large elections).

68. This discriminatory effect can exist even in municipalities in which white officials are responsive to minority interests, if the minority community would prefer to be represented by a minority group member. *Cf.* City of Rome v. United States, 446 U.S. 156, 218 (1980) (Rehnquist, J., dissenting) (blacks expressed preference for black representatives, despite responsiveness of white officials).

69. The Supreme Court has used a similar definition of discriminatory effect under the pre-clearance provision of § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (1976). *See, e.g.*, City of Rome v. United States, 446 U.S. 156, 183, 185 (1980) (finding that changes in at-large system with a bloc-voting white majority would dilute black voting strength and "depriv[e] Negroes of the opportunity to elect a candidate [of their choice]"); City of Petersburg v. United States, 354 F. Supp. 1021, 1029 (D.D.C. 1972) (annexation to city with racial bloc voting in an at-large system that "impair[ed] the ability of blacks to elect candidates of their choice" had discriminatory effect), *aff'd mem.*, 410 U.S. 962 (1973); *cf.* Note, United Jewish Organizations v. Carey *and the Need to Recognize Aggregate Voting Rights*, 87 YALE L.J. 571, 588-89 & n.99 (1978) (minority group access to legislative representation is fundamental to significant political participation).

The ability to elect minority representatives provides minority voters with substantial benefits.[70] Minority representatives serve as spokesmen for minority interests within the decisionmaking body[71] and may act as a check on discriminatory rhetoric,[72] assumptions, and actions by members of that body. In addition, they serve as role models for minority group members.[73] Minority representatives can also increase minority pride, political consciousness, participation, and identification with the government.[74] Finally, they can erode harmful stereotypes concerning the natural or proper role of minorities in politics.[75]

III. Implementing the Proposed Definition of Discriminatory Effect

This Note proposes two evidentiary criteria for determining whether a given at-large system frustrates the ability of a minority to elect candidates of its choice and therefore has a discriminatory effect. These criteria are: (1) racially polarized voting patterns in the at-large system,[76] and (2) less

70. *See* L. COLE, BLACKS IN POWER 221-23 (1976) (summarizing support for position that "the election of blacks makes a difference"). *But see* United States v. Board of Supervisors, 571 F.2d 951, 956 (5th Cir. 1978) (election of blacks has limited significance); Karnig, *Black Representation on City Councils: The Impact of District Elections and Socioeconomic Factors*, 12 URB. AFF. Q. 223, 236-39 (1976) (unclear whether black presence in elective office makes a difference); Morris, *Black Electoral Participation and the Distribution of Public Benefits*, in THE RIGHT TO VOTE 176 (Rockefeller Foundation Conf. Rep. 1981) (high expectations about benefits of electing blacks to office often "sets the stage for swift and deep disillusionment").

The importance to blacks of electing black candidates is strongly indicated by the persistent and varied attempts by whites to minimize black political strength. These attempts have included intimidation, disenfranchisement, grandfather clauses, literacy tests, poll taxes, white primaries, gerrymandering, and structural devices. *See* Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 533-44, 552-60 (1973); Note, *supra* note 35, at 1815 & nn.27-32.

71. *See* L. COLE, *supra* note 70, at 152 (white elected officials may vote for measures that they would not have thought to introduce); L. TRIBE, *supra* note 46, § 13-8, at 750 n.2 (having a voice in the legislative body has value independent of the minority's ability to cast a deciding ballot, due to the potential for persuasion).

72. *Cf.* Plaintiffs' Second Supplemental Proposed Findings of Fact at 11-12, Lodge v. Buxton, No. CV 176-55 (S.D. Ga. 1978) (on file with *Yale Law Journal*) (ex-commissioner testified that all-white commissioners used term "nigger" in city commissioner meetings), *aff'd*, 639 F.2d 1358 (5th Cir. 1981), *aff'd sub nom.* Rogers v. Lodge, 102 S. Ct. 3272 (1982).

73. *Cf.* L. COLE, *supra* note 70, at 109, 112 (black role model important for whites as well as blacks).

74. *See id.* at 108-10 (blacks identify with black elected officials); C. PATEMAN, *supra* note 60, at 43 (participation aids acceptance of collective decisions); U.S. COMM'N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: UNFULFILLED GOALS 63 (1981) (lack of blacks in municipal office in near-majority black town created apathy and hopelessness among blacks); Hamilton, *Response*, in THE RIGHT TO VOTE 191 (Rockefeller Foundation Conf. Rep. 1981) (presence of blacks in office signals to blacks that the system is legitimate and ought to be supported); Note, *supra* note 35, at 1813-14 & nn.15-20 (listing benefits to minority of electing more minority legislators); Note, *supra* note 69, at 590 n.106 (increased black representation reduces black alienation, thus reducing incidence of violence and protest born from frustration).

75. *Cf.* R. DIXON, *supra* note 45, at 469 ("Getting 'one of their own' into high political office has long been viewed as the final token [sic] of full integration of ethnic minorities into American society."); Morris, *supra* note 70, at 175 (symbolic value of blacks in office).

76. Although court opinions often mention the phenomenon of racial bloc voting, they frequently refer to its presence or absence without precisely explaining either the concept itself or how the court

than proportional representation of the minority group on the elected body. If either polarized voting patterns or underrepresentation is present, a discriminatory effect should be presumed. A defendant should be given an opportunity to rebut this presumption, however. Where the two conditions exist concurrently, discriminatory effect is conclusively proven.

A. *Racially Polarized Voting Patterns*

1. *Relevance to Proof of Discriminatory Effect*

Racial bloc voting[77] in an at-large system with a majority-win requirement indicates that minority voters are unable to elect representatives of their choice.[78] Voting is sufficiently polarized to cause the at-large system to have this discriminatory effect[79] if a percentage of white voters large enough to constitute a majority of the electorate casting ballots votes consistently against, and thus defeats, black candidates.[80] A finding of polarized voting is not, however, limited to situations where the majority bloc comprises only white voters. Rather, some black "crossover" voters

made its finding. *See, e.g.*, Lodge v. Buxton, 639 F.2d 1358, 1378 (5th Cir. 1981), *aff'd sub nom.* Rogers v. Lodge, 102 S. Ct. 3272 (1982); Blacks United for Lasting Leadership v. City of Shreveport, 71 F.R.D. 623, 628-29 (W.D. La. 1976), *remanded*, 571 F.2d 248 (5th Cir. 1978). *But see* McMillan v. Escambia County, 638 F.2d 1239, 1241-42 n.6 (5th Cir.) (detailed analysis of racially polarized voting), *appeal dismissed sub nom.* City of Pensacola v. Jenkins, 102 S. Ct. 17 (1981) (case settled); City of Port Arthur v. United States, 517 F. Supp. 987, 1007 n.136 (D.D.C. 1981) (lengthy review of expert testimony on racially polarized voting), *prob. juris. noted*, 102 S. Ct. 1272 (1982).

77. Racial bloc voting is a recurring phenomenon in many jurisdictions. *See* United Jewish Orgs. v. Carey, 430 U.S. 144, 166-67 (1977) (plurality opinion) (voting for or against a candidate because of his race "is not rare"); Beer v. United States, 425 U.S. 130, 144 (1976) (White, J., dissenting) (racial bloc voting is a "fact of life"); Note, *supra* note 69, at 589 & n.102 (statistical studies show that voters tend to cast ballots along racial lines and that race is a more important factor than class).

78. Courts have recognized that racial bloc voting by a white majority in an at-large system causes the system to have a discriminatory effect. *See* Rogers v. Lodge, 102 S. Ct. 3272, 3275 (1982) ("The minority's voting power in a multimember district is particularly diluted when bloc voting occurs . . . ."); Perkins v. City of West Helena, 675 F.2d 201, 213 (8th Cir. 1982) ("virtually impossible" for black candidates to win in at-large system with bloc voting); Blacks United for Lasting Leadership v. City of Shreveport, 571 F.2d 248, 255-56 n.1 (5th Cir. 1978) (Wisdom, J., dissenting) (bloc-voting white majority "makes it a foregone conclusion that at-large voting has discriminatory effects"); Hendrix v. McKinney, 460 F. Supp. 626, 629 (M.D. Ala. 1978); *cf.* Dove v. Moore, 539 F.2d 1152, 1155-56 (8th Cir. 1976) (at-large system has no discriminatory effect without polarized voting).

79. A court hearing a constitutional challenge to a proposed change from a single-member district system to an at-large system should not have to wait for elections to occur to conclude that the proposed system has a discriminatory effect. The court could, instead, perform a hypothetical, forward-looking analysis into the discriminatory effects of the proposed change, similar to judicial inquiry under § 5 of the Voting Rights Act. *See* Allen v. State Bd. of Elections, 393 U.S. 544 (1969). *But cf. supra* note 23 (in constitutional cases courts have demanded that discriminatory effects be real, not theoretical).

80. *See* McMillan v. Escambia County, 638 F.2d 1239, 1241-42 n.6 (5th Cir.) (noting "established pattern of sufficient polarized voting to regularly defeat black candidates"), *appeal dismissed sub nom.* City of Pensacola v. Jenkins, 102 S. Ct. 17 (1981) (case settled). For example, in an at-large system with an electorate that is 75% white and 25% black, if two-thirds or more of the white voters—50% of the voting electorate—consistently vote against black candidates, then those candidates cannot win.

may join the white bloc to form a majority against black candidates. In such situations, courts may still find polarized voting, if a politically cohesive bloc of black voters voted for the defeated black candidates.[81] Where white voters alone consistently form majorities against black candidates, black votes become irrelevant to electoral outcomes, and thus proof of black electoral cohesion is not necessary to prove that voting is sufficiently polarized to cause the at-large system to have a discriminatory effect.[82]

The presence of blacks in office does not prove that black voters are able to elect candidates of their choice. Where an overall pattern, albeit with exceptions, of racially polarized voting exists, only black candidates who have received the majority "seal of approval" can be elected.[83] Black candidates must, under such circumstances, moderate their stands on issues of particular importance to blacks in order to gain the support of needed white voters.[84] For this reason, even where the minority has achieved proportionate representation on the governing body,[85] courts can still presume the discriminatory effect of an at-large system from the existence of a fairly consistent pattern of racially polarized voting.[86]

Many circumstances exist in which a bloc-voting white majority and its political leaders and organizations can thwart genuine minority choice despite the election of minority candidates.[87] For example, a white-controlled

81. If some black voters cross over and vote for white candidates, then fewer white voters need to vote for white candidates to defeat black candidates. At a certain point, enough black voters cross over so that they no longer form a cohesive voting bloc and are therefore not harmed, as a class, by the white bloc vote. No *a priori* cut-off point for minimal minority cohesion can be established. Rather, district courts must make such intensely factual appraisals on a case-by-case basis.

82. Black cohesion is irrelevant in such a situation, because black voters may well have adapted to the impossibility of electing black candidates. This adaptation could take the form of voting for white candidates or simply not registering or voting. *See infra* pp. 995-96.

83. If voting is racially polarized in an at-large system, only those minority candidates who cater to and are accepted by white political groups can escape defeat by the white bloc vote. *See* Avila, *supra* note 63, at 133.

84. *Cf.* Berry & Dye, *The Discriminatory Effects of At-Large Elections*, 7 FLA. ST. L. REV. 85, 88 (1979) (blacks who appeal to the white majority "are often not the most effective advocates of black interests").

85. *See* Kirksey v. Board of Supervisors, 554 F.2d 139, 149 n.21 (5th Cir.) (en banc) (election of black candidates not dispositive on issue of black voting strength), *cert. denied*, 434 U.S. 968 (1977); Zimmer v. McKeithen, 485 F.2d 1297, 1307 (5th Cir. 1973) (en banc) (success of black candidates does not foreclose constitutional challenge to at-large electoral system), *aff'd per curiam on other grounds sub nom.* East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976).

86. *See* Nevett v. Sides, 571 F.2d 209, 214 (5th Cir. 1978) (*Nevett II*) (racially polarized voting found where six of seven black candidates in 1968 won city council seats, and all eight black candidates in 1972 lost).

87. Majority support for certain minority candidates in specific elections leading to proportional representation for the minority should not foreclose a finding of discriminatory effect. Otherwise, courts would be inviting attempts to thwart potentially successful constitutional challenges to purposefully discriminatory at-large systems by electing minority candidates to office. *See* Zimmer v. McKeithen, 485 F.2d 1297, 1307 (5th Cir. 1973) (en banc), *aff'd per curiam on other grounds sub nom.* East Carrol Parish School Bd. v. Marshall, 424 U.S. 636 (1976). *But see id.* at 1310 (Coleman, J., dissenting in part) (arguing that the election of three blacks in two years under the at-large system foreclosed finding that black voting strength had been cancelled or minimized).

slating organization might hand-pick minority candidates or at least regulate their flow onto the ballot.[88] Alternatively, in many at-large systems, the only minority candidates ever elected or re-elected are those the majority-dominated governing body has appointed to fill vacancies.[89] Such endorsement by majority leaders may "cue" the majority electorate to the acceptability of the minority candidate.[90] Finally, in multimember districts with primary elections in each sub-district, but with an at-large general election, the bloc-voting white majority may vote for what it sees as the "lesser of two evils"—the black nominee who received the least support from the black voters in the primary.[91]

2. *Measuring Racial Bloc Voting*

Statistical evidence of polarization is obtained by comparing voting results between precincts or wards that are racially homogeneous.[92] The comparison is usually performed for elections in which a minority candidate opposes a white candidate.[93] Racial bloc voting may be immediately obvious from an examination of voting returns.[94]

Voting polarization is clearest where a percentage of the voters in

88. *See, e.g.*, White v. Regester, 412 U.S. 755, 766-67 (1973) (only two blacks elected since Reconstruction were also the only two blacks ever slated by white-dominated Democratic Party slating organization); Avila, *supra* note 63, at 133 (citing cases involving discriminatory slating groups).

89. *E.g.*, McMillan v. Escambia County, 638 F.2d 1239, 1241 n.6 (5th Cir.) (two appointed blacks were sole exceptions to pattern of black candidate defeat by white bloc vote), *appeal dismissed sub nom.* City of Pensacola v. Jenkins, 102 S. Ct. 17 (1981) (case settled); Dove v. Moore, 539 F.2d 1152, 1153 (8th Cir. 1976) (black appointed to fill vacancy became only black ever elected).

90. *See* McMillan v. Escambia County, 638 F.2d 1239, 1241 n.6 (5th Cir.) (noting how endorsements from white community leaders defused the normal white bloc vote against black candidates), *appeal dismissed sub nom.* City of Pensacola v. Jenkins, 102 S. Ct. 17 (1981) (case settled). In a racially polarized community, black candidates who are acceptable to the white majority tend not to be effective advocates of black interests. *See supra* p. 990 & notes 83-86. *But cf.* Dove v. Moore, 539 F.2d 1152, 1153, 1155-56 (8th Cir. 1976) ("substantial and crucial" white voter support for previously appointed black candidate precluded finding of racial bloc voting).

91. Sloan, *"Good Government" and the Politics of Race*, 17 SOC. PROB. 161, 167 (1969) ("the evidence suggests that strong support in [primary election in the black candidate's] home district is the political kiss of death" in the general election) (emphasis deleted).

92. *E.g.*, McMillan v. Escambia County, 638 F.2d 1239, 1241 n.6 (5th Cir.) (calculating statistics from precincts that were 95% or more of one race), *appeal dismissed sub nom.* City of Pensacola v. Jenkins, 102 S. Ct. 17 (1981) (case settled); City of Port Arthur v. United States, 517 F. Supp. 987, 1007 n.136 (D.D.C. 1981) (calculating polarization statistics from precincts that were at least 90% white or 90% black), *prob. juris. noted*, 102 S. Ct. 1272 (1982).

93. *See, e.g.*, cases cited *supra* note 92; *cf.* Hale County v. United States, 496 F. Supp. 1206, 1213 n.52 (D.D.C. 1980) (questioning probative value of county's polarized voting data based on elections involving only white candidates). *But cf.* Bolden v. City of Mobile, 423 F. Supp. 384, 388-89 (S.D. Ala. 1976) (noting polarization in elections between two white candidates, where one candidate was identified with black interests), *rev'd on other grounds*, 446 U.S. 55 (1980).

94. *See, e.g.*, City of Petersburg v. United States, 354 F. Supp. 1021, 1026 & n.10 (D.D.C. 1972) (inferring city-wide racial bloc voting from extremely polarized election returns from two nearly all-black wards and two nearly all-white wards), *aff'd mem.*, 410 U.S. 962 (1973). *See also* Nevett v. Sides, 571 F.2d 209, 223 n.18 (5th Cir. 1978) (*Nevett II*) (racial bloc voting may be indicated by "consistent lack of success of qualified black candidates").

"white" precincts sufficient to constitute a majority of the voting electorate consistently vote against minority candidates.[95] Even where the white bloc vote alone does not form a consistent majority to defeat minority candidates, polarization can frequently be measured by correlating the percentage of registered minority voters in a precinct with the percentage of the vote minority candidates received in that precinct.[96] The higher the correlation, the more severe the racially polarized voting.

If the white bloc vote alone does not determine electoral outcomes, substantial crossover voting by either race reduces the likelihood of a finding of racially polarized voting by reducing the correlation between the race of the voters and the vote received by candidates of that race.[97] Defining a cut-off point below which correlations will not indicate racially polarized voting is necessarily arbitrary.[98]

Where voting results by precinct are not available, an analysis of overall election results may demonstrate a pattern of polarized voting.[99] This might occur, for example, where a black candidate wins a plurality in a

95. *See supra* pp. 989-90 & notes 79-80 (polarized voting due to bloc-voting white majority).

96. *E.g.*, McMillan v. Escambia County, 638 F.2d 1239, 1241 n.6 (5th Cir.) (racial bloc voting found, based on "very high correlation" between percentage of blacks in a precinct and number of votes a black candidate receives in that precinct), *appeal dismissed sub nom.* City of Pensacola v. Jenkins, 102 S. Ct. 17 (1981) (case settled); Kirksey v. Board of Supervisors, 402 F. Supp. 658, 672 n.4 (S.D. Miss. 1975) (correlations close to unity provided "persuasive" evidence of racial bloc voting), *rev'd on other grounds*, 554 F.2d 139 (5th Cir.) (en banc), *cert. denied*, 434 U.S. 968 (1977). *See* City of Rome v. United States, 472 F. Supp. 221, 226 n.36 (D.D.C. 1979) (correlation method surest way of demonstrating racial bloc voting), *aff'd*, 446 U.S. 156 (1980); City of Port Arthur v. United States, 517 F. Supp. 987, 1007 n.136 (D.D.C. 1981) (computing "polarization score" for "white versus black" elections by subtracting percentage of votes cast for a black candidate in 90% white precincts from percentage of votes cast for that candidate in 90% black precincts), *prob. juris. noted*, 102 S. Ct. 1272 (1982). *See generally* J. LOEWEN, SOCIAL SCIENCE IN THE COURTROOM 179-84 (1982) (describing use of correlations in voting rights litigation).

More sophisticated statistical analyses have also been used to demonstrate correlations indicating racial bloc voting. *See, e.g.*, Bolden v. City of Mobile, 423 F. Supp. 384, 388-89 (S.D. Ala. 1976) (regression analysis using votes received by candidates as dependent variable and race and income as independent variables), *rev'd on other grounds*, 446 U.S. 55 (1980).

97. If the white majority votes only for white candidates and some blacks cross over and vote for whites, the correlation could be relatively low and yet blacks would nonetheless be unable to elect candidates of their choice. *See infra* pp. 995-96 (underrepresentation alone creates presumption of discriminatory effect due to adaptive behavior of black minority in an at-large system). If the black minority votes only for black candidates and whites cross over and vote for blacks, a finding of racial bloc voting sufficient to foreclose the black bloc from electing candidates of its choice can be made unless enough whites vote with the black bloc to form a winning coalition behind black candidates. *See supra* p. 990. Of course, actual voting behavior will always fall between these two polar examples of pure bloc voting by either race. Courts must rely on correlation statistics, which by definition reflect crossover voting by either race, and other evidentiary sources to determine the severity of racial bloc voting.

98. *Cf.* Note, *supra* note 69, at 599 (suggesting that Congress should therefore create rules defining bloc voting).

99. *See* Nevett v. Sides, 571 F.2d 209, 223 n.18 (5th Cir. 1978) (*Nevett II*) (racial bloc voting may be indicated by "consistent lack of success of qualified black candidates"); City of Rome v. United States, 472 F. Supp. 221, 226-27 & n.36 (D.D.C. 1979) (finding substantial degree of racial bloc voting even though returns were no longer available or could not be broken down by district), *aff'd*, 446 U.S. 156 (1980).

general election but loses in the runoff election,[100] or where a black candidate wins the primary from a black sub-district but loses in the at-large general election.

Plaintiffs are not, however, limited to the use of statistical analysis to demonstrate racial bloc voting. Reference to the local political, historical, and socioeconomic context can help to support a court's finding of sufficient polarization to cause an at-large system to suppress a minority's ability to elect candidates of its choice.[101] Statistics must be evaluated in their full factual context and in light of the testimony of voters, elected officials, and experts from relevant disciplines.[102]

An at-large system may possess certain structural features that will help determine whether racial bloc voting is sufficiently substantial to cause an at-large system to diminish the ability of a minority to elect candidates of its choice. These structural features enable relatively slight degrees of racial bloc voting in an at-large system to decrease a minority's opportunity to elect candidates of its choice.[103] These factors include majority-win requirements,[104] numbered posts,[105] anti-single shot (full slate)

100. *See* City of Rome v. United States, 446 U.S. 156, 184 & n.20 (1980) (black candidate won plurality of votes against three white opponents in general election, but lost run-off election due to racial bloc voting).

101. *Cf.* Teamsters v. United States, 431 U.S. 324, 340 (1977) (usefulness of statistics depends on surrounding facts and circumstances).

102. *See* City of Rome v. United States, 446 U.S. 156, 184 n.20 (1980) (black citizens believed they could not win under current electoral system); City of Port Arthur v. United States, 517 F. Supp. 987, 1007 n.136 (D.D.C. 1981) (conflicting expert testimony on polarization), *prob. juris. noted*, 102 S. Ct. 1272 (1982); Kirksey v. Board of Supervisors, 468 F. Supp. 285, 291-93 (S.D. Miss.) (expert testimony), *appeal dismissed per curiam*, 608 F.2d 669 (5th Cir. 1979); Bolden v. City of Mobile, 423 F. Supp. 384, 388 (S.D. Ala. 1976) (practically all candidates testified that a black could not be elected under at-large system), *rev'd on other grounds*, 446 U.S. 55 (1980).

103. *See* Rogers v. Lodge, 102 S. Ct. 3272, 3287-88 & n.22 (1982) (Stevens, J., dissenting) (certain structural features of at-large system "[made] it especially difficult for a minority candidate to win an election"); City of Mobile v. Bolden, 446 U.S. 55, 106 n.3 (1980) (Marshall, J., dissenting) (majority-vote, numbered-post, and staggered-term requirements "exacerbate the vote-dilutive effects of multimember districting"); White v. Regester, 412 U.S. 755, 766 (1973) (such factors enhance the opportunity for racial discrimination); Zimmer v. McKeithen, 485 F.2d 1297, 1305 (5th Cir. 1973) (en banc) (these factors enhance circumstantial proof of vote dilution), *aff'd per curiam on other grounds sub nom.* East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976). *But cf.* City of Mobile v. Bolden, 446 U.S. 55, 74 (1980) (plurality opinion) (these structural factors "naturally" disadvantage any voting minority and are "far from proof" of purposeful racial discrimination). *See generally* WASHINGTON RESEARCH PROJECT, THE SHAMEFUL BLIGHT 127-31 (1972); Derfner, *supra* note 70, at 553-55.

104. A majority-win rule requires the winning candidate to receive more than half of the votes cast in an election. If no candidate in the general election receives a majority of votes, a run-off election is held. *See* City of Rome v. United States, 446 U.S. 156, 184 n.20 (1980) ("dilutive effect of the majority vote/runoff election scheme"); Graves v. Barnes, 343 F. Supp. 704, 725 (W.D. Tex. 1972) (majority-vote requirement "strengthen[s] the majority's ability to submerge a political or racial minority in a multi-member district"), *aff'd in part, rev'd in part, sub nom.* White v. Regester, 412 U.S. 755 (1973); Derfner, *supra* note 70, at 553 n.125 (in absence of majority-win requirement, black minority may win a plurality election if white vote is split).

105. Numbered post laws designate each position in a multimember election by a separate number and allow each voter to vote for only one candidate in each position. Numbered post provisions,

provisions,[106] staggered terms,[107] size of the multimember district,[108] and lack of sub-district residency requirements.[109]

3. *Rebutting the Presumption of Discriminatory Effect Raised By the Presence of Racially Polarized Voting Patterns*

A showing of fairly consistent polarized voting despite the existence of proportional representation for the minority[110] raises a presumption of discriminatory effect. To rebut the presumption, the defendant must show that the minority candidates elected had received substantial support from the minority electorate. The defendant might carry this burden by demonstrating that the winners of primary elections from minority sub-districts have been elected at-large, or that minority voter turnout is significantly higher in elections where minority group members are elected than in elections involving no minority candidate.[111] Lack of minority voter interest in a candidate of their own minority group usually indicates that the candidate is not the candidate of their choice, but rather that minority voters face a majority-controlled ballot from which to choose.

like anti-single shot laws, *see infra* note 106, and staggered terms, *see infra* note 107, prevent a minority from concentrating its votes to take advantage of a split among majority group voters. *See* Graves v. Barnes, 343 F. Supp. 704, 725 (W.D. Tex. 1972) (numbered posts "highlight the racial element where it does exist"), *aff'd in part, rev'd in part, sub nom.* White v. Regester, 412 U.S. 755 (1973); Dunston v. Scott, 336 F. Supp. 206, 213 n.9 (E.D.N.C. 1972) (explaining potential of "numbered seat law" to curtail minority voting power); Derfner, *supra* note 70, at 554-55 & n.128 (Justice Department has objected to higher percentage of numbered place systems than any other change submitted under § 5 of the Voting Rights Act).

106. Anti-single shot laws require voters to vote for as many candidates as there are offices to be filled. *See* City of Rome v. United States, 446 U.S. 156, 184 n.19 (1980) (defining single-shot voting); Nevett v. Sides, 571 F.2d 209, 217 n.10 (5th Cir. 1978) (*Nevett II*) (describing how anti-single shot voting rules discourage minority voters); U.S. COMM'N ON CIVIL RIGHTS, POLITICAL PARTICIPATION 35-39 (1968) (full-slate voting requirements may dilute black votes by forcing black voters to vote for white candidates); Derfner, *supra* note 70, at 554 & n.127 (such laws deprive black voters of potential political influence); Suitts, *Blacks in the Political Arithmetic After* Mobile: *A Case Study of North Carolina*, in THE RIGHT TO VOTE 69 (Rockefeller Foundation Conf. Rep. 1981) (blacks elected to county commissions in North Carolina for the first time in this century after North Carolina's anti-single shot rule was deemed unconstitutional in 1972).

107. *See* City of Rome v. United States, 446 U.S. 156, 185 n.21 (1980) (staggered terms may deny minority opportunity for single-shot voting); Derfner, *supra* note 70, at 555 & n.129 (staggered terms achieve via chronological separation same end as numbered posts).

108. Rogers v. Lodge, 102 S. Ct. 3272, 3280-81 (1982) (size of at-large district burdened black voting and campaigning).

109. *See id.* at 3281 (lack of residency requirement means that all candidates could reside in " 'lily-white' neighborhoods"); White v. Regester, 412 U.S. 755, 766 n.10 (1973) (lack of residency requirement permits all candidates to be selected from outside black neighborhoods).

110. *See supra* pp. 990-91 (possible coexistence of overall pattern of polarized voting and proportional representation).

111. *See* McMillan v. Escambia County, 638 F.2d 1239, 1242 n.6 (5th Cir.) (when whites run against whites, black voter turnout drops, indicating lack of interest in candidates), *appeal dismissed sub nom.* City of Pensacola v. Jenkins, 102 S. Ct. 17 (1981) (case settled); *cf.* H. PRICE, THE NEGRO AND SOUTHERN POLITICS 77 (1957) (Negroes vote only in elections of direct meaning to them).

B. *Minority Underrepresentation*

1. *Relevance to Proof of Discriminatory Effect*

Like racially polarized voting patterns, the less than proportional representation of a minority group on an elected body is a valuable indicium that the minority is unable to elect candidates of its choice. Lack of proportional representation in an at-large system is not, of course, a *per se* constitutional violation.[112] But where a minority is underrepresented in an at-large system created or maintained for a discriminatory purpose, that underrepresentation should satisfy the discriminatory effect component of an equal protection claim.[113]

Minority underrepresentation on an elected body does not necessarily mean that the minority is unable to elect candidates of its choice. Such a condition could result from a situation where the minority group has no particularized political interests or where the group perceives that its interests receive adequate representation from a non-minority representative.

Often, however, minority underrepresentation indicates that the minority is not able to elect candidates of its choice. Minority underrepresentation on governing bodies elected at-large often reflects minority adaptation to past and present racial discrimination[114] and perceived political weak-

112. *E.g.*, Rogers v. Lodge, 102 S. Ct. 3272, 3288 n.21 (1982) (Stevens, J., dissenting); City of Mobile v. Bolden, 446 U.S. 55, 66, 75-76 (1980) (plurality opinion); *id.* at 122 (Marshall, J., dissenting); White v. Regester, 412 U.S. 755, 765-66 (1973); Whitcomb v. Chavis, 403 U.S. 124, 149-50 (1971). The Supreme Court has, however, disfavored at-large systems in a number of contexts. *See* Lucas v. Colorado Gen'l Assembly, 377 U.S. 713, 731 (1964) (criticizing "undesirable features" of at-large elections); Allen v. State Bd. of Elections, 393 U.S. 544, 569 (1969) (Fairley v. Patterson) (change to at-large system encompassed by pre-clearance provisions of § 5 of Voting Rights Act); Connor v. Finch, 431 U.S. 407, 415 (1977) (single-member districts strongly preferred in court-ordered districting plans).

113. *See* Bolden v. City of Mobile, No. 75-297-P, slip op. at 57 (S.D. Ala. April 15, 1982) (on remand) (failure of any black to be elected to municipal government shows discriminatory effect of at-large plan adopted for discriminatory purpose); *cf.* Castaneda v. Partida, 430 U.S. 482, 493 (1977) (substantial underrepresentation on a grand jury constitutes a constitutional violation if it results from purposeful discrimination).

114. *See* Castaneda v. Partida, 430 U.S. 482, 503 (1977) (Marshall, J., concurring) (citing evidence that minority group members often respond to discrimination and prejudice by attempting to disassociate themselves from the group or by adopting the majority's negative attitudes towards the minority). Racial minorities may continue to fall short of realizing their political potential due to the lingering effects of prior discrimination in voting and other areas. *See* Rogers v. Lodge, 102 S. Ct. 3272, 3279-80 (1982) (historical discrimination restricted opportunity for blacks effectively to participate in the political process); Perkins v. City of West Helena, 675 F.2d 201, 211 (8th Cir. 1982) (past discrimination contributed to black underrepresentation on city's elective and appointive bodies); Hale County v. United States, 496 F. Supp. 1206, 1213-14 (D.D.C. 1980) (attributing lack of black electoral success to current effects of past discrimination in education and occupational and economic status); Karnig, *supra* note 70, at 228 (past discrimination curtails black electoral experience and blunts organizational potential of black candidates).

ness.[115] First, at-large elections exacerbate the effects of low black voter registration and voter turnout rates relative to white rates.[116] Second, black political associations may be reluctant to express open support for a candidate who must appeal to a white majority in an at-large system for fear that such support would be the "kiss of death."[117] Third, potential minority candidates may decline to waste time and money in what they perceive to be a futile attempt to gain sufficient white votes.[118] Fourth, blacks in a solidly black area are likely to be poor, and the greater cost of at-large election campaigns may deter candidates from poor constituencies.[119]

Even where a substantial percentage of voters "cross over" and vote for candidates of a different race or where few or no minority group members run for office, if a minority is underrepresented on a governing body elected at large, then a discriminatory effect should be presumed. Minority voter support for white candidates could be the result of minority adaptation to the perceived impossibility of electing minority candidates. Minority voters need not go through the motions of voting solidly for losing minority candidates in order to show that an at-large system established or maintained for a discriminatory purpose does not permit them to elect candidates of their choice.

2. *Measuring Minority Underrepresentation*

Minority underrepresentation can be determined by comparing current

115. *See* Latimer, *Black Political Representation in Southern Cities*, 15 URB. AFF. Q. 65, 80-81 (1979) (black voter turnout increases substantially when blacks no longer submerged in at-large districts).

116. *See* City of Rome v. United States, 446 U.S. 156, 186 n.22 (1980) (voter registration data "may perpetuate the effects of prior discrimination in the registration of voters" or reflect minority political hopelessness); Ely v. Klahr, 403 U.S. 108, 115 n.7 (1971) (low minority because voter registration figures reflect current effects of past discrimination); Lodge v. Buxton, 639 F.2d 1358, 1378 (5th Cir. 1981) (lingering effects of past exclusion of blacks from voting caused relatively lower black voter registration rate), *aff'd*, 102 S. Ct. 3272 (1982); *see also* Morris, *supra* note 70, at 171 (listing determinants of relatively low black voter turnout rates). If the minority is concentrated in one or more single-member districts rather than in an at-large district, the minority may still be able to elect candidates of its choice, despite its relatively low registration and turnout rates.

117. Brief for the United States as Amicus Curiae at 17-18, City of Mobile v. Bolden, 446 U.S. 55 (1980) (witnesses testified that too-conspicuous black support has been and will continue to be a "kiss of death").

118. *See* City of Rome v. United States, 472 F. Supp. 221, 226 (D.D.C. 1979) (black candidates declined to run in face of race-conscious white majority), *aff'd*, 446 U.S. 156 (1980); U.S. COMM'N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: UNFULFILLED GOALS 43-44 (1981) (at-large system discouraged black candidates).

119. *See* Graves v. Barnes, 343 F. Supp. 704, 720-21 (W.D. Tex. 1972) (multimember districts create "radically unequal" expense problems relative to single-member districts and may eliminate less wealthy candidates), *aff'd in part, rev'd in part, sub nom.* White v. Regester, 412 U.S. 755 (1973); Karnig, *supra* note 70, at 230 (at-large elections require financial resources often beyond the means of residents of black communities); *cf.* Goldblatt v. City of Dallas, 414 F.2d 774 (5th Cir. 1969) (at-large system held constitutional although it required candidates to spend more money campaigning than would a ward system with smaller districts).

minority representation to minority representation prior to the adoption of the current at-large system, or by comparing the proportion of minority group members on the elected body to the proportion of minority group members in the multimember district's voting-age population. Where an at-large scheme enacted with a discriminatory purpose results in a retrogression in minority representation, the retrogression provides ample proof that the purposefully discriminatory scheme has achieved a discriminatory effect.[120] Alternatively, if, as in *Rogers v. Lodge*, defendants have maintained an electoral system for a discriminatory purpose, plaintiffs need not compare the current level of minority representation to its level at some prior time in order to show that the challenged system inhibits the minority's ability to elect candidates of its choice.[121] In such a situation, plaintiffs need only show that their minority group is not proportionally represented on the elected body.

3. *Rebutting the Presumption of Discriminatory Effect Raised by the Presence of Minority Underrepresentation*

If minority underrepresentation exists but racially polarized voting is absent, the defendant may rebut the resulting presumption of discriminatory effect by showing that such underrepresentation is not the result of minority voter adaptation to their inability to elect minority candidates.[122] For example, the defendant could show that the minority does not have distinct needs and interests that lead it as a group to support certain issues and candidates.[123] Alternatively, the defendant might demonstrate that minority voters had actively supported some of the white members of the elected government. This could be shown by election statistics indicating that minority voter turnout in races involving only white candidates was as high as minority voter turnout in races where a minority candidate opposed a white candidate.[124]

In a jurisdiction with a history of official discrimination in voting rights, the defendant must show that the at-large system does not perpetu-

120. *Cf.* Beer v. United States, 425 U.S. 130, 141 (1976) (Voting Rights Act § 5 embodies a nonretrogression principle because House Report defined § 5 to bar any change that would diminish "the ability of minority groups . . . to elect their choices to office").

121. The Court did not derive the *Beer* nonretrogression principle from the Constitution but rather from the Court's interpretation of the intent of Congress in enacting and re-enacting § 5. Therefore, a probable retrogression, while required to establish a discriminatory effect under § 5, is unnecessary for satisfying the discriminatory effect component of an equal protection claim.

122. Since positive proof of "adaptive" voting behavior is elusive, *see* Whitcomb v. Chavis, 403 U.S. 124, 180 (1971) (Douglas, J., dissenting in part and concurring in the result in part), proving the absence of "adaptive" voting behavior could be even more difficult.

123. This proof might involve showing that minority group members in the multimember district are proportionately distributed throughout socioeconomic classes.

124. *Cf. supra* note 111 (in the former situation, minority voters tend not to vote due to lack of interest).

ate the underrepresentation of minorities by enhancing the lingering effects of past official discrimination in voter eligibility or electoral structure.[125] Where blacks have suffered purposeful discrimination in the past, it is more likely that present underrepresentation resulting from a system established or maintained for a discriminatory purpose is caused by adaptive behavior that developed as a response to many forms of discrimination.

C. *Racially Polarized Voting Patterns and Minority Underrepresentation*

In many instances, racial bloc voting in an at-large system will cause minority underrepresentation,[126] and both conditions will thus exist concurrently. In such situations, discriminatory effect is conclusively proven, because these conditions cannot exist together unless the minority is unable to elect candidates of its choice. No imaginable confluence of circumstances could lead a reasonable trier of fact to conclude that racial bloc voting in an at-large system leading to minority underrepresentation did not indicate that the minority group was unable to elect candidates of its choice. Where only one factor—either polarization or underrepresentation—is present, the defendant's attempt to rebut the presumption of discriminatory effect will probably rely heavily on the absence of the other factor.[127] This avenue of rebuttal is, of course, unavailable where both factors are present.

Conclusion

Current discriminatory effect is a necessary, but not sufficient, element of an equal protection claim. Existing equal protection doctrine does not, however, adequately define what discriminatory effect plaintiffs challenging an at-large electoral system must demonstrate. If plaintiffs can prove discriminatory purpose with non-impact evidence, then proof of either racially polarized voting patterns or minority underrepresentation on the elected body should satisfy the equal protection effect requirement. Either

125. *See supra* pp. 995-96 & note 114.

126. *See, e.g.*, Rogers v. Lodge, 102 S. Ct. 3272, 3279 (1982) (no black ever elected to county commission in county with racial bloc voting, despite substantial black population); *id.* at 3289 (Stevens, J., dissenting) (bloc voting in at-large sysatem maintained white control of local government); City of Rome v. United States, 446 U.S. 156, 183-84 & n.20 (1980) (no black ever elected to city commission in city with racial bloc voting, despite substantial black population); City of Mobile v. Bolden, 446 U.S. 55, 97-98 (1980) (White, J., dissenting) (same).

127. *See supra* pp. 994-95 (possible methods for rebutting presumption of discriminatory effect raised by presence of racially polarized voting patterns); pp. 997-98 (possible methods for rebutting presumption of discriminatory effect raised by presence of minority underrepresentation).

of these conditions indicates that under the at-large system minorities are probably unable to elect candidates of their choice.