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Randolph M. Scott-McLaughlin*

I. INTRODUCTION

Since the Supreme Court injected the issue of intent into the voting rights arena in *Mobile v. Bolden*,[1] there has been a long and persistent struggle to reverse that decision. In 1982, Congress thought it had put the question of the quantum and quality of proof required to establish a violation of section 2 of the Voting Rights Act[2] to rest when Congress amended that section.[3] However, the courts quickly began

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[1] 446 U.S. 55 (1980).

[2] Section 2 of the Voting Rights Act, as amended in 1982, provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973 b(f)(2), as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (1982).

[3] *See, e.g.*, James F. Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach From the Voting Rights Act*, 69 Va. L. Rev. 633 (1983); Andrew P. Miller and Mark A. Packman, *Amended Section*

a rear guard action to undermine congressional efforts to eliminate the intent requirement as an element of a plaintiff's claim. Both the Supreme Court and the circuit courts have played various roles in the effort to re-assert the intent test in, albeit, a "new and improved" form.[4] Despite Congress' best efforts, the intent test is back. The role of scholars and practitioners is to understand the new test and determine how to satisfy this most stringent requirement. In this article, the contours of the new test will be examined and the question of what proof is required to satisfy the test will be explored.

Part II will discuss the *Mobile* decision and congressional efforts to eliminate the intent test from section 2. Part III will explore the several opinions in *Thornburg* where the question of the intent of Congress when it amended section 2 was discussed. Finally, in Part IV, the circuit court decisions, essentially adopting Justice O'Connor's opinion, will be analyzed to determine the contours of the new intent test and the elements of proof required to meet it. This article concludes that the courts "got it wrong" when they re-introduced the intent standard, and that Congress intended to banish intent as a requirement of a plaintiff's case. However, recognizing that practitioners must live with what is, and not what ought to be,

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2 of the Voting Rights Act: What is the Intent of the Results Test?, 36 Emory L.J. 1 (1987); Frank R. Parker, *The 'Results' Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard*, 69 Va. L. Rev. 715 (1983); Randolph M. Scott-McLaughlin, *Chisom v. Roemer: Where Do We Go From Here?*, 24 Colum. Hum. Rts. L. Rev 1 (1993).

[4] In *Thornburg v. Gingles*, 478 U.S. 30 (1986), a debate raged between Justices Brennan, joined by Justices Marshall, Blackmun and Stevens, and O'Connor, joined by Justices Powell, Rehnquist and Chief Justice Burger, over whether there was any vestige of the intent standard in the amended section 2. Justice Brennan believed that Congress meant to banish intent evidence from the vote dilution inquiry, whereas Justice O'Connor opined that intent proof should not be excluded from a section 2 challenge to an at-large election system. The *Gingles* decision is discussed *infra* in Part Three. The circuit courts that have considered this issue have all agreed with Justice O'Connor's view that intent proof was relevant to the inquiry under the totality of circumstances standard. *See, e.g.,* Goosby v. Town Board of the Town of Hempstead, 180 F.3d 476, (2nd. Cir. 1999)(intent proof relevant to overall vote dilution inquiry); *accord* Lewis v. Alamance County, 99 F. 3d 600 (4th Cir. 1996); *see also* Milwaukee Branch of the NAACP v. Thompson, 116 F.3d 1194 (7th Cir. 1997); Vecinos De Barrio Uno v. City of Holyoke, 72 F.3d 973 (1st. Cir. 1995); Nipper v. Smith, 39 F.3d 1494 (11th Cir. 1994); Sanchez v. Colorado, 97 F.3d 1303 (1996); *cf.* League of United Latin Citizens v. Clements, 999 F. 2d 831 (5th Cir. 1993) (*en banc*).

the article theorizes that the new test is not as difficult to prove as the old intent test.

II. THE RISE AND FALL OF THE INTENT STANDARD: FROM *MOBILE* TO CONGRESS.

A. THE *MOBILE* DECISION

In *Mobile v. Bolden*,[5] the Supreme Court addressed the question of the type of proof required to establish a violation of both section 2 of the Voting Rights Act[6] and the Fifteenth Amendment[7] to the United States Constitution.[8] The opinion focused primarily on the parameters of the Fifteenth Amendment's protections, but also discussed the standard of proof for the section 2 claim as well. Essentially, the Court expressed its belief that both the statutory and constitutional claim should be governed by the same standard.[9]

The Court concluded that the language of section 2 merely elaborated on that of the Fifteenth Amendment, and that the statutory provision was intended to have the same effect as the Amendment

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[5] 446 U.S. 55 (1980).

[6] At the time of the *Mobile* decision, section 2 provided:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State of political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.

42 U.S.C. § 1973 (1965).

[7] Section 1 of the Fifteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

[8] *Mobile*, 446 U.S. 55. African-American citizens of that city brought a class action challenging the constitutionality of the at-large method of electing Mobile's City Commission as a violation of both section 2 and the Fifteenth Amendment. 446 U.S. at 58. The District Court, without ruling on the statutory claim, concluded that the constitutional rights of the plaintiffs and the class they represented had been violated and ordered the creation of a single-member district plan. *Id.* The Fifth Circuit upheld the district court's opinion. *Id.*

[9] *Mobile*, 446 U.S. at 60. The Court was critical of the failure of the lower courts to address the statutory claim as they were required to by general principles of judicial administration. *Id.*, *citing* Spector Motor Service, Inc. v. McLaughlin, 323 U.S. 101, 105 (1944). Nevertheless, the Court concluded that statutory claim added nothing to the plaintiffs' complaint. *Id.*

itself.[10] While noting that the legislative history of section 2 was sparse, the Court observed that the view that this section merely restated the prohibitions of the Fifteenth Amendment was expressed without contradiction during the hearings on the Voting Rights Act that held in the Senate. After its review of the legislative history of section 2, the Court determined that that section of the Voting Rights Act and the Fifteenth Amendment were coterminous.[11]

The Court turned its attention to a delineation of the scope of the Fifteenth Amendment and the standard of proof required to establish a violation of the amendment.[12] As a threshold matter, the Court noted that it was clear that action by a state that is racially neutral violates the Fifteenth Amendment only if motivated by a discriminatory purpose.[13] The Court also found support for this theory of the Fifteenth Amendment in cases involving the establishment of political boundaries[14] and in the reapportionment context.[15] From its review of cases decided under the Fifteenth

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[10] *Mobile*, 446 U.S. at 61.

[11] *Id.*

[12] *Id.* at 61-62.

[13] *Id.* (citing Guinn v. U.S., 238 U.S. 347 (1915)). *Guinn* involved a challenge to a "grandfather" clause that exempted from Oklahoma's literacy requirement persons who were entitled to vote before January 1, 1866, or the descendants of such persons. The *Guinn* Court concluded that the grandfather clause was unconstitutional because it was not "possible to discover any basis in reason for the standard . . . other than the purpose" of circumventing the Fifteenth Amendment. *Id.* at 365.

[14] *See* Gomillion v. Lightfoot, 364 U.S. 339 (1960). *Gomillion* was a challenge to a 1957 Alabama statute that redefined the city boundaries of Tuskegee, Alabama. The effect of the statute was to transmute Tuskegee's borders from a square into an irregular shaped polygon, which removed from the city almost all of the African-American voters, and not one white voter. *Id.* at 341. The *Gomillion* Court held that allegations of a racially motivated gerrymander of a city's boundaries stated a valid claim under the Fifteenth Amendment. *Id.* According to the Court in *Mobile*, the decision in *Gomillion* stands for the proposition that in the absence of an invidious, racially discriminatory motive, a state was constitutionally free to redraw political boundaries without federal court intervention. *Mobile*, 446 U.S. at 63.

[15] *See* Wright v. Rockefeller, 376 U.S. 52 (1964). In *Wright*, the plaintiffs challenged certain congressional district lines drawn by the New York State Legislature following the 1960 census. The complaint charged that minority residents had been overly concentrated (packed) into certain districts. The Supreme Court upheld the dismissal of the complaint on the grounds that the plaintiffs had failed to prove that the legislature was motivated by racial considerations when it

Amendment, the Court held that racially discriminatory motivation was a necessary ingredient of a claim alleging violation of the Amendment.[16]

With respect to the constitutionality of multimember districts, the Court stated that it had never held such districts unconstitutional per se.[17] The Court acknowledged that such legislative reapportionment could violate the Fourteenth Amendment if their purpose was "to minimize or cancel out the voting potential of racial or ethnic minorities."[18] In order to establish such a claim, the plaintiff "must prove that the disputed plan was conceived or operated as [a] [purposeful] device to further racial . . . discrimination."[19] According to the Court, this burden of proof allocation was required under the Fourteenth Amendment's equal protection clause which prohibits only purposeful discrimination.[20]

Despite its conclusion that discriminatory purpose was a prerequisite to a claim of a Fifteenth or Fourteenth Amendment claim, the Court conceded that proof of a statute's impact may be relevant to a constitutional challenge.[21] Nevertheless, the Court concluded that in a challenge to an entire system of local governance, "where the character of the law is readily explainable on grounds" other than race, disproportionate impact alone is not sufficient to establish a constitutional claim.[22] According to the Court in *Mobile*, courts must look to other evidence to support a finding of discriminatory purpose.[23] While the Court was clear that intent proof was required to establish a Fifteenth Amendment claim, it failed to

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drew the challenged congressional lines or that the districts had, in fact, had been drawn along racial lines. *Id.* at 56.

[16] *Mobile*, 446 U.S. at 62.

[17] *See, e.g.*, Whitcomb v. Chavis, 403 U.S. 124 (1971); White v. Regester, 412 U.S. 755 (1973).

[18] *Mobile*, 446 U.S. at 66.

[19] *Id.*

[20] *Id.* at 66-67.

[21] *See* Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 266 (1977) (finding that the impact of the official action -- whether it bears more heavily on one race than another -- may provide an important starting point in determining racially discriminatory purpose).

[22] *Mobile* 446 U.S. at 70.

[23] *Id.*

state what type of proof would suffice to meet the high burden of proof it required.

Justice White in his dissent believed that the Court's decision was a radical departure from its Fifteenth Amendment jurisprudence.[24] He noted that in *White v. Regester*,[25] the Court had unanimously held that the use of multi-member districts in two counties in Texas violated the equal protection clause of the Fourteenth Amendment because, based on a totality of the circumstances, the districts excluded minority voters from effective political participation.[26] In Justice White's opinion, the decision in *Mobile* was flatly inconsistent with *White*.[27] He stated that, contrary to the Court's opinion in *Mobile*, invidious discriminatory purpose could be inferred from proof, under the totality of the circumstances, of objective factors of the kind relied on in *White*.[28]

Mobile was a retreat from the Court's earlier decisions in *White* and *Whitcomb*. In both cases, the Court did not require specific proof of intent. Rather, the Court adopted an approach that required examination of a myriad of objective factors to establish proof of a constitutional violation.[29] In *Mobile*, the Court tried to harmonize the

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[24] *Id.* at 94.

[25] 412 U.S. 755 (1973).

[26] *Id.* at 95.

[27] *Id.* at 101.

[28] *Regester*, 412 U.S. at 766-67. In affirming the district court's opinion, the Court in *White* relied on proof of a history of racial discrimination in Texas, which touched on the right of African-Americans to register and vote and to participate in the democratic process, the use of a majority vote requirement, the use of a "place" rule limiting candidacy for a legislative office from a multimember district to a specified place on the ballot, the lack of minority success at the polls, exclusion of minorities from the slating process employed by a white dominated organization that effectively controlled the nomination of Democratic candidates, and the use of racial appeals. *Id.*

[29] The Fifth Circuit in Zimmer v. McKeithen, 485 F.2d 1297, 1305 (5th Cir. 1973), *aff'd per curiam sub nom* East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976), developed a specific set of factors, gleaned from the *Whitcomb* and *White* decisions:

> [W]here a minority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case is made. Such proof is enhanced by a showing of the existence of large

Fifteenth Amendment jurisprudence with the case law under the equal protection clause of the Fourteenth Amendment, wherein intent proof was required.[30] However, the Court gave little guidance to lower courts as to how to apply this new test in the context of a statutory challenge to a multi-member district. The Court did not state that a plaintiff had to prove that individual legislators were racists. Nor did the Court discuss how a plaintiff could prove that the legislature itself was motivated by a discriminatory purpose. Nor did the Court discuss what role, if any, proof of racism in the electorate should play in the determination of a constitutional or statutory violation. In effect, by equating proof under section 2 with the stringent requirements of the equal protection clause, the Court unsettled voting rights law. In an effort to rectify this defeat, the civil rights community turned to Congress to correct the Court's misinterpretation of section 2.

B. CONGRESSIONAL EFFORTS TO RESTORE THE RESULTS TEST

In 1982, Congress amended the Voting Rights Act, in part, as a response to the *Mobile* decision. The Senate Report, prepared by the Committee on the Judiciary, delineated the purpose of the amended section 2. A review of the Report clearly indicates that Congress intended to reject the intent standard and restore voting rights law to the pre-*Mobile* decisions.[31]

The Senate Report set forth the purpose of the amendment to section 2. The report stated that the amendment was designed to make clear that proof of discriminatory intent is not required to establish a violation of section 2. The purpose of the amendment was to restore the legal standards that applied to vote dilution claims

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districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at- large candidates running for particular geographical sub-districts. The fact of dilution is established upon proof of the existence of an aggregate of these factors.

Id.

[30] *Mobile*, 446 U.S. at 66-67.

[31] S. Rep. No. 417, 97th Cong., 2nd Sess., reprinted in 1982 U.S.C.C.A.N. 177 [hereinafter S. Rep.]. The Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30, 43 n.7 (1986), stated that the Senate Report was the authoritative guide to the meaning of the amended section 2.

prior to the *Mobile* decision. The amendment also included a new subsection to section 2 that delineated the legal standards under the results test.[32] According to the report, the issue to be decided under the results test is whether the political processes are equally open to minority voters.

The discussion concerning the amendment to section 2 provides insight into the scope of the changes made in 1982 to the statute. The report stated that proof of discriminatory purpose should not be a prerequisite to establishing a violation of section 2. The amendment permitted voting rights plaintiffs to prove a violation by showing that minority voters were denied an equal chance to participate in the political process.[33]

In rejecting the intent standard, the Judiciary Committee ("Committee") made several key findings. The Committee concluded that requiring proof of a discriminatory purpose was inconsistent with the original legislative intent and subsequent legislative history of section 2. Second, the *Mobile* decision was a radical departure from both Supreme Court and lower federal court precedent in the voting rights field. Third, the intent test focuses on the wrong question and places an unacceptable burden upon voting rights plaintiffs. Fourth, the amendment was not an effort to overturn the Supreme Court's interpretation of the Constitution, rather it was designed to correct the misreading of section 2 by the Court.[34]

The Committee believed that the rejection of the intent test was consistent with the original legislative understanding of section 2 when the Voting Rights Act was passed in 1965. The proponents of the intent test contended that section 2 was designed to track the Fifteenth Amendment and that the amendment required proof of a discriminatory purpose. Since Congress chose to track the language of the Fifteenth Amendment in the 1965 version of section 2, an intent requirement was also present in the statute.

After examining the legislative history of the 1965 statute, the relevant legislative history of the 1970 extension of the Act, and the general understanding in 1965 of what was required to establish a Fifteenth Amendment violation, the Committee rejected the

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[32] S. Rep., *supra* n. 20, at 2.

[33] S. Rep., *supra* n.20, at 13.

[34] S. Rep., *supra* n.20, at 13.

arguments of the advocates of the intent standard. The Committee noted that throughout the hearings and debates on the original version of section 2, there was no statement by a proponent or opponent of statute indicating that section 2 only reached purposeful discrimination. Moreover, the legislative history of the 1970 extension of the Voting Rights Act confirmed that Congress had not intended to limit the original section 2 to situations where discriminatory intent was proved.[35]

With respect to the constitutional context, the Committee observed that Congress had to make a choice as to whether section 2 should be coextensive with the Fifteenth Amendment or whether the statute should be broader. In 1965 there was no need to choose between these two alternatives. It was possible to regard section 2 as a restatement of the Fifteenth Amendment, and as reaching vote dilution regardless of whether intent was established. According to the Committee, there was no general understanding in 1965, among academics, practitioners and the lower federal courts that the Fifteenth or Fourteenth Amendments always required proof of discriminatory intent to establish a violation.[36] From its review of the case law, at the time of the enactment of section 2, the Committee concluded that proof of intent was not always a prerequisite to a liability finding. In some cases the Supreme Court focused its analysis on discriminatory purposes or results.[37] In other cases, the Court suggested that liability could be established under either test.[38]

To ensure that the courts understood the intent of Congress when it amended section 2, the Committee set out in great detail its understanding of the operation of section 2 and the standards that were to govern litigation under it. The Committee stated that "[t]he amendment of section 2 is designed to make clear that plaintiffs need not prove a discriminatory purpose in the adoption or maintenance of

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[35] S. Rep., *supra* n.20, at 14.

[36] S. Rep., *supra* n. 20, at 15. The Committee noted that in 1965.

[37] Prior to the passage of the Voting Rights Act, the Supreme Court had held that a claim of unconstitutional vote dilution could be established by a showing of either discriminatory results or discriminatory purpose. Fortson v. Dorsey, 379 U.S. 433 (1965); Burns v. Richardson, 384 U.S. 73 (1966). *See, e.g.*, Palmer v. Thompson, 403 U.S. 219, 225 (1971) (finding that proof of discriminatory intent was not determinative of whether there was a violation of the equal protection clause).

[38] S. Rep., *supra* n. 20, at 15.

the challenged system or practice in order to establish a violation."[39] A vote dilution plaintiff could choose to either prove an intentional violation or demonstrate that the challenged system or practice, under the totality of circumstances, resulted in the denial of equal access to the political process. If a plaintiff chose to proceed under the results standard, the court would be required to assess the impact of the challenged system on the basis of objective factors, without making any inquiry about the motivations that lay behind the adoption or maintenance of the practice. The Committee clearly stated that the "specific intent of this amendment is that the plaintiffs may choose to establish discriminatory results without proving *any kind* of discriminatory purpose."[40]

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[39] *Id.* at 21.

[40] S. Rep., *supra* at 22 (emphasis supplied). In order to give guidance to the lower courts, the Committee set out several objective factors that were relevant to a vote dilution claim under section 2:

1. The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
2. The extent to which voting in the elections of the state or political subdivision is racially polarized;
3. The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. If there is a candidate slating process, whether members of the minority group have been denied access to that process;
5. The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
6. Whether political campaigns have been characterized by overt or subtle racial appeals;
7. The extent to which members of the minority group have been elected to public office in the jurisdiction.

S. Rep., *supra* n. 20, at 22. These enumerated factors bear close resemblance to the criteria developed by the Fifth Circuit in *Zimmer*. See note 19, *supra*. Other factors that were deemed relevant to the inquiry where whether there had been a significant lack of responsiveness to the particularized needs of the minority community and whether the policy underlying the challenged practice was tenuous. The Committee cautioned that there was no requirement that any particular number of factors be proved or that a majority of them point one way or another. *Id.* at 22.

In its Report, the Committee also addressed the rationale behind the rejection of the intent test. The Committee believed that the test asked the wrong question. Under the intent test, the focus of the inquiry was not on how the challenged practice impacted the ability of minority voters to participate in the political process; rather, the focus was solely on the motivations of officials, who may have established the practice in the distant past. Under the intent test, so long as the motive for creating a multimember district was not racially discriminatory, the system could not be changed under section 2, regardless of its impact on minority voters in the present. The Committee believed that if minority voters are denied a fair opportunity to participate, the system should be changed, without requiring proof of why the system was created or maintained.[41]

An additional rationale for the rejection of the intent test by the Committee was that it was divisive. In order to satisfy the test, plaintiffs had to brand entire communities or officials as racists. Litigants were required to explore the motivations of individual elected officials and other citizens to determine whether their decisions were motivated by invidious racial considerations. According to the Committee should inquiries threatened to destroy any existing racial progress in a community.[42]

Another reason for eliminating proof of intent from the plaintiff's case was the difficulty in establishing racial motivation. In the cases where the challenged practice was adopted in the past, there may be no evidence regarding intent since legislators may have died and the legislative records regarding the adoption of the challenged system may no longer be in existence. In fact, most smaller cities and counties would not have maintained the kind of official records needed to establish the motivation of the legislature.[43] In cases involving recent enactments, the courts may rule that legislative immunity barred plaintiffs from inquiring into the motives of individual legislators. Moreover, the Committee noted the difficulty in proving the motives of the majority of the electorate when an

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[41] S. Rep., *supra* at 28.

[42] S. Rep., *supra* n. 20, at 28.

[43] *Id.*

election law was adopted or maintained as the result of a referendum.[44]

The Committee was also concerned that reliance on the intent test afforded an opportunity for defendants to "muddy the waters." The Committee feared that defendants would offer non-racial rationalizations for a law, which in fact purposely discriminates. This defect could not be eliminated even in cases where plaintiffs could establish intent by reliance on a wide variety of circumstantial and indirect evidence, because the defendants could attempt to rebut this proof by planting a false trail of direct evidence eschewing racial motive, and advancing other governmental objectives. The Committee concluded that "[s]o long as the court must make a separate ultimate finding of intent, after accepting the proof of the factors involved in the *White* analysis, that danger remains and seriously clouds the prospects of eradicating the remaining instances of racial discrimination in American elections."[45]

It should be clear from this review of the Senate Report that Congress intended to reject the intent test as a necessary element of a vote dilution claim under section 2. The goal of the amendment was to restore the law to the pre-*Mobile* doctrine of *White* and its progeny. Under these cases, a plaintiff had to establish, using objective factors, that the political process or challenged system resulted in denying minority voters an equal opportunity to participate in the process and elect their candidates of choice. In essence, under the totality of circumstances test, employed pre-*Mobile*, a plaintiff had to paint a picture of the political realities in a jurisdiction and demonstrate that minorities had less access to the process than white voters. This was not an easy test and required a wide and far-reaching inquiry into the political life of a polity and the impact of the challenged system on minority voters.

Throughout the Report there are repeated references to why that test was inadequate in the vote rights field. One of the main reasons was that it was almost impossible, in many instances, to find motivation evidence in cases that involved electoral practices that were of ancient vintage. Another concern was that in cases of recent vintage, clever defendants could offer pretextual non-racial

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[44] *Id.*

[45] *Id.* at 29.

explanations for the adoption or maintenance of an electoral system and blunt a plaintiff's efforts to establish intent through circumstantial proof. Congress was concerned that to permit defendants to rebut a plaintiff's evidence by offering nondiscriminatory rationales could limit the ability of section 2 to eradicate racial discrimination.

Moreover, at no point in the Report does the Committee suggest that the amendment was designed to address solely the factual context of the *Mobile* case. *Mobile* was a challenge to the adoption and maintenance by elected officials of an at-large election system. However, the Committee did not limit the rejection of the intent test to cases involving only legislative enactments; thereby allowing other types of intent proof to remain a part of a plaintiff's burden. In fact, there were numerous references in the Report that intent proof of any kind was to be banished from the analysis.

Accordingly, under the new section 2, plaintiffs did not have to offer any intent evidence to establish a voting rights claim. The plaintiff could offer such proof or proceed completely under the results test. Under a fair reading of the Report, if a plaintiff chose to proceed under the objective test, a defendant could not rebut that proof by showing the absence of racially discriminatory intent in the adoption, maintenance or operation of the challenged system. This conclusion flows from the cautionary note sounded by the Committee in its discussion of how defendants, under the old intent test, could offer nonracial explanations to defeat a circumstantial dilution claim, where a court made an inferential finding of intent from the indirect evidence. If the Committee were critical of the use of nonracial rationales under the old intent standard, it would follow that such proof should have no role in the results test.

III. *THORNBURG V. GINGLES*:[46] A NEW FRAMEWORK EMERGES.

In *Gingles*, the Court, in several opinions, grappled with the method of proving a vote dilution challenge to an at-large election system and whether intent was still an element of proof in voting rights case.[47] The majority of the Court agreed with Justice

[46] Thornburg v. Gingles, 478 U.S. 30 (1986).
47 *Id.* at 34-35.

Brennan's conclusion, regarding the framework he established for proving a section 2 case. However, with respect to the issue of intent, the Court was sharply divided.

Justice Brennan, writing for the majority, stated that the essence of a section 2 claim was that an election law, practice or structure, in conjunction with social and historical conditions, resulted in the diminution of the ability of minority voters to elect their preferred candidates.[48] However, the Court cautioned that minority group members who challenge such systems must prove that the use of the challenged structure operates to minimize the ability of the group to elect their preferred candidates.[49]

In order to prevail on a claim that the use of a multimember or at-large election system dilutes minority voting strength, the Court stated that the following circumstances must be found by the district court. The minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a single-member district.[50] Additionally, the minority group must be able to show that it is politically cohesive.[51] Finally, the group must establish that the white majority votes sufficiently as a bloc to enable it to defeat minority candidates.[52] By demonstrating the existence of

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[48] *Id.* at 47.

[49] *Gingles*, 478 U.S. 48.

[50] *Id.* at 50. Unless the minority group has the potential to elect representatives in the absence of the challenged structure, there can be no dilution. The single-member district is the appropriate standard against which to measure the potential of the minority group to elect candidates of its choice because it is the smallest political unit from which representatives are elected. *Id.* n. 17. If the minority group is dispersed throughout an at-large district or county or is so numerically small that it could not constitute a majority in a single-member district, the group cannot maintain that they can elect representatives of their choice in the absence of the challenged structure because a smaller political sub-district or unit could not be created consistent with the Constitution's one-person one-vote standard.

[51] 478 U.S. at 51.

[52] *Id.* at 51. Prior to the 1982 amendments, in the context of a challenge to a multimember or at-large electoral structure, the courts held that in the absence of significant white bloc voting, it could not be contended that the ability of minority group members to elect their chosen representatives was inferior to white voters or that the at-large structure impeded the ability of minorities to win at the polls. *See, e.g.*, McMillan V. Escambia County, Fla., 748 F.2d 1037, 1043 (5th Cir. 1984); United States v. Marengo County Comm'n, 731 F.2d 1546, 1566 (11th Cir.), *appeal*

these factors, the minority group can establish that submergence in a white multi-member district impedes its ability to elect its chosen representatives.

After consideration of the *Gingles* preconditions, the lower court was required to examine the totality of the circumstances and determine, based upon "a searching practical evaluation of the past and present political reality," whether the political processes were equally open to minority voters.[53] The majority instructed that this determination requires an intensely local appraisal of the design and impact of the contested electoral system.[54]

While the majority of the Court agreed with Justice Brennan's framework for proving a section 2 case, they divided over the question of whether causation was relevant to the section 2 inquiry.[55] Justice Brennan rejected any notion that intent proof had any role in a challenge under section 2. He believed that the language of section 2 and the Senate Report made clear that the critical question in a section 2 claim was whether the use of a system or practice resulted in members of a minority group having less opportunity than whites to participate in the political process.[56] Justice Brennan opined that it was the difference between the choices made by blacks and whites, not the reasons for that difference, that resulted in blacks having less opportunity than whites to elect their preferred candidates.[57] Accordingly, in considering proof of racially polarized voting, Justice Brennan was concerned with the correlation between the race of the voter and the selection of certain candidates, not the causes of the correlation.[58]

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dism'd and cert. denied, 469 U.S. 951 (1984); Nevitt v. Sides, 571 F.2d 209, 223 (5th Cir. 1978), *cert. denied*, 446 U.S. 951 (1980).

[53] *Gingles*, 478 U.S. at 45.

[54] *Id.* at 79.

[55] Justices Marshall, Blackmun, and Stevens agreed with the opinion of Justice Brennan that intent was irrelevant in a section 2 claim. 478 U.S. at 33. Justice O'Connor's opinion regarding the role of intent in the section 2 inquiry was joined by Chief Justice Burger, and Justices Powell and Rehnquist. *Id.*

[56] *Gingles*, 478 U.S. 48 n.15.

[57] *Id.* at 63-64.

[58] *Id.* at 64. Justice Brennan was concerned, at this point in the opinion, with how a plaintiff proved the third *Gingles* precondition: Whether the white majority votes consistently as a bloc to enable it to defeat minority candidates. This issue is also termed legally significant racial bloc voting. The defendants in *Gingles* contended

Justice Brennan also rejected the notion that plaintiffs were required to prove that white voters voted against black candidates because of racial animosity. He believed that this argument must be rejected for the same reasons that Congress repudiated the intent test *Mobile* with respect to legislative bodies. The intent test was unnecessarily divisive and involved charges of racism on the part of individual officials or entire communities. Under the old intent test, a plaintiff was required to prove that some elected officials were racists. Under the new intent test, a plaintiff would have to prove that most of the white community was racist in order to obtain judicial relief. As Justice Brennan concluded, "[I]t is difficult to imagine a more racially divisive requirement."[59]

Finally, Justice Brennan rejected the new intent test because, as the Senate Report concluded regarding the old intent test, it asked the wrong question. According to Justice Brennan, all that mattered under section 2 was voter behavior and not its explanations.[60] He feared that requiring proof that racial considerations actually caused voter behavior would result - contrary to congressional intent - in cases where a black minority that functionally has been totally excluded from the political process will be unable to establish a section 2 violation.[61]

Justice O'Connor, while agreeing with the framework established by the majority for proving a section 2 claim, disagreed with Justice Brennan's complete rejection of intent evidence.[62] She stated that if "statistical evidence of divergent racial voting patterns is admitted

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that in establishing this issue a plaintiff should not be permitted to rely solely on bivariate statistical analyses that correlated the race of the voter and the level of voter support for certain candidates. Such statistical evidence, according to the defendants, could not establish that race was the primary determinant of voters' choices. Essentially, the defendants were arguing for a new intent test, where the motivation of voters would have to be taken into account before racially polarized voting could be established. They argued for use of a multivariate approach that would take into consideration a variety of issues, such as party affiliation, age, religion, income, incumbency, education, and campaign expenditures. 478 U.S. 61-62. Justice Brennan completely rejected this methodology, and concluded that "the legal concept of racially polarized voting incorporates neither causation nor intent." *Id.*

[59] *Id.* at 72.

[60] *Id.*

[61] *Gingles*, 478 U.S. at 73.

[62] *Id.* at 84 (O'Conner, J., concurring in judgment).

solely to establish that the minority group is politically cohesive and to assess its prospects for electoral success . . . [a] defendan[t] can not rebut such proof by showing that the divergent racial voting patterns can be explained, in part, by causes other than race."[63]

However, Justice O'Connor refused to banish intent evidence from the overall vote dilution inquiry. She contended that evidence that a candidate preferred by minority voters was rejected by white voters for reasons other than those that made the candidate the preferred choice of minority voters may be relevant in determining whether white voters will vote consistently to defeat minority candidates.[64] According to her analysis, such proof would suggest that another equally preferred minority candidates might be able to attract greater white support in the future.[65]

Justice O'Connor also believed that Congress intended that explanations for white voter behavior should be considered by the courts in the responsiveness context.[66] She opined that in communities riven by racial hostility, such considerations would make it more likely that officials elected without significant minority support would consider minority group interests.[67] Justice O'Connor concluded that in deciding a vote dilution claim all evidence concerning voting preferences should not be considered.[68]

While the opinions of Justices O'Connor and Brennan with respect to the issue of intent appear to be irreconcilable, there are some points where they converge. Justice O'Connor agreed that Congress rejected the intent test of *Mobile*.[69] She agreed that the results test was chosen by Congress as the standard for a section 2 violation. Justice O'Connor also recognized that a plaintiff could choose to establish discriminatory results without proving any kind of discriminatory purpose.[70] However, unlike Justice Brennan, she was unwilling to banish completely intent evidence from the vote dilution inquiry. She believed that such evidence could be helpful to the

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[63] *Id.* at 100.
[64] *Id.*
[65] *Id.*
[66] *Gingles*, 478 U.S. at 100-01.
[67] *Id.*
[68] *Id.*
[69] *Id.* at 98.
[70] *Id.* at 99.

lower courts in determining whether the political processes were equally accessible to all players.[71] Accordingly, while declining to establish intent as an element of a plaintiff's case in chief, she was willing to allow such evidence into the record for the courts to consider in determining the ultimate question.[72]

The problem with permitting the defendants to offer nonracial explanations for divergent voting patterns is that ultimately the burden of disproving these rationales falls back onto the shoulders of the plaintiffs. How is a plaintiff to rebut a showing that white voters are not racists because they have, occasionally, supported a "safe" black candidate who has been slated by the majority party? Will a plaintiff be called upon to commission a political survey of voters or a poll to assess the racial views of current voters? What about cases where the elections were held ten or twenty years ago? How is the plaintiff to meet the evidence that some white voters were not motivated by racial considerations? These thorny issues led Congress to reject intent evidence as posing an insurmountable burden on plaintiffs and requiring entire communities to be branded as racists. Congress and Justice Brennan got it right; requiring intent as an element of a section 2 claim is fraught with difficulty. While understanding Justice O'Connor's reluctance to ban causation evidence from the totality of the circumstance test, by permitting defendants to raise the intent shield, cases where minorities have been shut out of the political process may go unremedied. It was that very evil that led Congress to reject the intent test.

IV. THE REEMERGENCE OF THE INTENT TEST.

Following the decision in *Gingles* the circuit courts have struggled to navigate between Justice Brennan's view that intent had no role in the determination of a section 2 case and Justice O'Connor's view that it could be relevant to the overall inquiry under the totality of the circumstances. The courts that have considered this question have essentially adopted Justice O'Connor's position and have concluded that plaintiffs must prove intent, although it can be demonstrated inferentially.

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[71] *Id.*

[72] *Id.* at 100.

A. *League of United Latin American Citizens v. Clements (LULAC)*[73]

In *LULAC*, the Fifth Circuit explored the question of whether intent proof was required in a section 2 challenge to the at-large election of state supreme court judges.[74] The district court held that in proving the third *Gingles* precondition (legally significant racial bloc voting) plaintiffs need only demonstrate that white and black voters generally supported different candidates.[75] Accordingly, the district court excluded evidence that tended to show that the divergent voting patters were attributable to factors other than race.[76] On appeal, the defendants contended that the district court committed error by refusing to consider the nonracial causes for voter preferences.[77]

The Fifth Circuit *en banc* noted that the scope of the Voting Rights Act was broad, but concluded that section 2's protections extended only to defeats experienced by voters "on account of race or color."[78] The court stated that "without an inquiry into the circumstances underlying unfavorable election returns," the lower courts would not be in a position to determine whether the losses experienced by minority voters were mere losses at the polls or the result of discrimination.[79] According to the *LULAC* court, the inquiry into the

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[73] 999 F.2d 831 (5th Cir. 1993)(*en banc*).

[74] *Id.* at 837-38.

[75] *Id.* at 837.

[76] *Id.* at 850.

[77] *Id.* at 842.

[78] *Id.* at 850. The Senate Report discussed the use of the term "on account of color", and concluded as follows:

> During the committee deliberations, opponents of the results test argued that the reported bill is inconsistent with the results standard because section 2, as amended, still contains the phrase 'a denial or abridgement (of the right to vote) on account of race or color.' The argument is that the words 'on account of' themselves create a requirement of purposeful discrimination.... Congress has used the words 'on account of race or color' in the act to mean 'with respect to' race or color, and not to connote any required purpose of racial discrimination. Any other arguments based on similar parsing of isolated words in the bill that there is some implied 'purpose' component in section 2 . . . are equally misplaced and incorrect.

S. Rep., *supra* note 20, at 192, n. 109.

[79] *LULAC*, 999 F.2d at 850.

reasons for, or causes of, electoral losses must be undertaken in order to determine whether they were the product of partisan politics or racial vote dilution.[80]

The *LULAC* court discussed the conflict between Justice Brennan and Justice O'Connor on this issue.[81] According to the Fifth Circuit five justices rejected Justice Brennan's approach, and, therefore, the opinions by Justices O'Connor and Justice White represented a majority of the Court and should be adhered to and not Justice Brennan's opinion on the issue of intent.[82] Relying primarily on Justice O'Connor's opinion, the *LULAC* court decided that evidence seeking to explain the divergence of voting patterns between blacks and whites could not be excluded from the overall vote dilution inquiry.[83]

While it adopted Justice O'Connor's approach, the Fifth Circuit did not hold that plaintiffs must supply conclusive proof that a minority group's failure to elect representatives of its choice is caused by racial animus in the white electorate.[84] The court believed that such a requirement could be inferred from the text of the amended section 2, the case law pre-*Mobile*, and the Senate Report.[85] In this regard, the court considered whether the plaintiffs had to prove affirmatively the existence of racial bias among the white electorate or merely negate the defendants' proof that partisan politics best explained the divergent voting patterns.[86] The court noted that requiring plaintiffs to establish that white voters were motivated by racial animus when they rejected minority preferred candidates would make the racial bloc voting inquiry difficult and expensive to establish.[87] The court held that whether or not the

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[80] *Id.* at 853.

[81] *See Gingles*, 478 U.S. at 83. Justice White also disagreed with Justice Brennan's views on this issue and filed a concurring opinion. *Id.* Justice White was of the opinion that where partisan affiliation and not race explained the divergence in voting patterns, a violation of section 2 may not be established. *Id.*

[82] *LULAC*, 999 F.2d. at 855.

[83] *Id.* at 856.

[84] *Id.* at 859.

[85] *Id.*

[86] *Id.*

[87] *Id.* at 860.

burden of the plaintiff to prove racial bloc voting includes the burden to explain partisan influence, the result is the same.[88]

The *LULAC* court did not require plaintiffs to prove intent, in their case in chief, but following Justice O'Connor's approach, refused to banish from the racial bloc voting inquiry defendants' proof concerning partisanship. Essentially, the court adopted the view that the determination of a section 2 challenge must rest on a searching and thorough inquiry into the underlying circumstances of the election results offered by plaintiffs to demonstrate racial bloc voting and the causes of the divergence in voting patterns between white and black voters. While acknowledging that the additional inquiry required could be burdensome and costly, the court declined to follow the approach of the district court and exclude such evidence. Without giving guidance to the lower courts as to how a plaintiff rebuts the partisanship evidence, the *LULAC* court unsettled Congress' effort to codify the results standard. Despite Congress' best efforts to elucidate the meaning of the amendments to section 2, the Fifth Circuit adhered to the view that the words "on account of race or color" meant that, despite the Senate Report's rejection of the intent test, plaintiffs had to prove some form of purposeful discrimination.

B. *Nipper v. Smith*[89]

In *Nipper*, African-American voters and an association of African-American attorneys challenged the at-large election of state court judges in Florida.[90] One of the issues confronted by the Eleventh Circuit was whether plaintiffs, in order to prevail on their section 2 claim, had to prove the existence of racial animus among the white electorate.[91] Unlike the court in *LULAC*, the *Nipper* court affirmatively concluded that under the amended section 2, plaintiffs had to prove purposeful discrimination.[92] The Eleventh Circuit also gave guidance to the lower courts as to how a plaintiff meets that burden. After a review of the legislative history and pre-*Mobile*

[88] *Id.* at 860.
[89] 39 F.3d 1494 (11th Cir.1994) (en banc).
[90] *Id.* at 1496-97.
[91] *Id.* at 1520.
[92] *Id.* at 1515.

precedents, the court ruled that racial animus could be established inferentially.[93]

With respect to the threshold question, the *Nipper* court held that section 2 prohibits voting practices that have the effect of allowing a community motivated by racial prejudice to exclude a minority group from participation in the political process.[94] Accordingly, if, under the totality of circumstances, there is insufficient evidence of racial bias operating in the community then a claim of vote dilution can not be established.[95]

The circuit court rejected the plaintiffs argument that section 2 required only proof of disparate election results. The court relied on the language in the statute that limited its reach to cases where the deprivation of the franchise was "on account of race or color."[96] According to the court, Congress intended, by the use of that language, to retain racial bias as the gravamen of a vote dilution claim.[97] Thus, some form of racial discrimination must be established in order to afford plaintiffs judicial relief.[98]

According to the court, the legislative history of the amended section 2 supported the conclusion that racial bias was the cornerstone of a vote dilution claim.[99] The court observed that the intent of Congress in amending section 2 was to restore the "results" test of *White* and *Whitcomb*.[100] Under those cases, a plaintiff had to establish proof of invidious discrimination as an essential element of a Fourteenth Amendment voting rights claim.[101] A plaintiff could establish that element by either proving that legislative officials intended to enact or maintain a discriminatory voting system or by proving the existence of objective factors (so-called *Zimmer* factors, subsequently incorporated in the amended statute as Senate factors) indicating that the minority group had less opportunity to participate

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[93] *Id.* at 1526.
[94] *Id.* at 1534.
[95] *Nipper*, 39 F.3d at 1514.
[96] *Id.* at 1515.
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Nipper*, 39 F.3d at 1517 (noting Congress' "stated purpose to return the Section 2 burden of proof to pre-Bolden standards").
[101] *Id.* at 1519.

in the political process and to elect candidates of its choice.[102] The Supreme Court in *Mobile* eliminated the latter approach and required proof of discriminatory intent.[103]

The *Nipper* court concluded that Congress' intent was to overturn the *Mobile* intent standard and restore the *White* method of proving vote dilution. According to the court, Congress intended to eliminate solely the requirement that racial bias on the part of legislators or other officials was an essential ingredient of a vote dilution claim.[104] Their intent was not to banish consideration of racial bias from the inquiry. Thus, under the amended section 2, a plaintiff could choose to either establish discriminatory motive of the legislators or demonstrate, through proof of the Senate factors, that the electoral system interacts with racial bias in the community and allows that bias to dilute minority voting strength.

In reaching the conclusion that intent was an essential element of a plaintiff's case under section 2, the court rejected the Department of Justice's position, as amicus curiae, that section 2 required no proof whatsoever of intentional discrimination.[105] In support of its position, the Department of Justice relied on the Judiciary Committee's Report wherein it was stated that "the specific intent of [the] amendment is that the plaintiffs may choose to establish discriminatory results without proving *any kind* of discriminatory purpose."[106] The court stated that statements in the Report about avoiding the intent standard must be considered in light of the goal of Congress to overturn the *Mobile* legislative intent requirement.[107] According to the court, "the many references to intent, motivation and purpose throughout the Report . . . must be read to infer to the intent of those responsible for erecting or maintaining the challenged scheme."[108] The court concluded that the legislative history did not reveal any intent on the

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[102] *Id.*

[103] Mobile v. Bolden, 446 U.S. 55, 66 (1980) (finding that "a plaintiff must prove that the disputed plan was conceived or operated as [a] purposeful devic[e] to further racial . . . discrimination").

[104] *Nipper*, 39 F.3d at 1520.

[105] *Id.*

[106] S. Rep., *supra* n. 20, at 28, emphasis supplied.

[107] *Nipper*, 39 F.3d at 1520.

[108] *Id.* at 1522.

part of Congress to limit section 2 inquiry to a purely statistical test, without any consideration of racial bias.[109]

Having concluded that racial bias remained an essential element of a plaintiff's challenge to electoral practices under section 2, the court focussed on operationalizing its decision. The court opined that "proof of the second and third *Gingles* preconditions [minority political cohesion and white bloc voting against minority preferred candidates] is circumstantial evidence of racial bias operating through the electoral system to deny minority voters equal access to the political process."[110] Accordingly, the court held that the existence of those factors, and a feasible remedy, generally would be sufficient to warrant judicial relief.[111]

The defendant can rebut a plaintiff's [circumstantial showing of discriminatory motive], by demonstrating the absence of racial bias in the voting community.[112] One approach available to a defendant would be to demonstrate that the divergent voting patterns could best be explained by other, non-racial circumstances.[113] If the defendant offers such proof, the district court must make a searching inquiry into the past and present reality, under the totality of circumstances test, to determine whether minority voters have been denied equal access to the political process on account of race or color.[114] The court stated that under this burden shifting approach, plaintiffs were not required to proof a negative. Instead, plaintiffs could establish that racial bias was operating in the community by demonstrating through a statistical analysis that there were divergent voting patterns among white and black voters.[115]

Finally, the court observed that vote dilution cases were circumstantial evidence cases.[116] It acknowledged that rarely will there be direct proof that resolves the contested issues. Rather, Congress intended, and *Gingles* confirmed, that the objective factors listed in the Report would be used by districts courts in making a

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[109] *Id.* at 1521-23.
[110] *Id.* at 1524.
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Nipper*, 39 F.3d at 1525.
[116] *Id.*

particularized determination as to whether, in the aggregate, there was sufficient evidence pointing to dilution.[117] Therefore, when confronted with a defendant's rebuttal evidence, the district court must search the record to determine under the totality test whether the challenged system has operated to deny minority voters an equal opportunity to participate in the political process.[118]

The *Nipper* court was the first circuit court to resurrect the intent test from the ashes. Despite Congress' best efforts to consign the intent test to the dustbin of history, the Eleventh Circuit chose to parse the language of the Report to support its conclusion that some form of intent was still required. However, a thorough review of the Report belies that approach. Nowhere in the Report is there any support for the subtle distinctions that the Eleventh Circuit found regarding intent of legislators as opposed to the intent of the voters. Essentially, the court acknowledged that intent of the legislators was not required, but opined that intent of the voters was required to be established by a plaintiff to make out a violation of the amended section 2.[119] While one can understand the desire to harmonize the amended statute with the pre-*Mobile* decisions in *White* and *Whitcomb*, there is little support for the proposition that Congress intended to eliminate only part of the intent test. As Justice Brennan noted in *Gingles*, this new and improved intent test was as pernicious as the old *Mobile* test.

This conclusion is supported by the *Nipper* court's assignment to the plaintiff the burden of rebutting a defendant's non-racial explanations for divergent voting patterns. While the court permitted the intent element to be demonstrated inferentially through statistical proof, the court gave no guidance as to how a plaintiff rebuts direct evidence of a defendant that racial bias was not operating in the community. Clearly, once such rebuttal evidence is received a plaintiff can not rely on the intent inference, but must go beyond the statistical proof and, presumably, offer direct evidence of racial bias or undercut the defendant's evidence by attacking the credibility of the witnesses or the methodology of defense experts. This inquiry unduly complicates a section 2 case and gives almost no guidance to the district courts as to how they are to weigh and balance these

[117] *Id.*
[118] *Id.* at 1526.
[119] *Id.*

competing inferences. The concern is that a defendant may escape a liability finding by offering "non-racial" explanations that mask racial considerations; thereby blunting the efficacy of section 2.

C. *Vecinos De Barrio Uno v. City of Holyoke*[120]

In *Uno*, the First Circuit addressed the issue of what role, if any, intent evidence played in the vote dilution inquiry under section 2.[121] Essentially, the First Circuit followed the lead of the Eleventh Circuit and held that such proof was relevant to a challenge to an at-large election scheme.[122] The *Uno* court also cautioned that permitting such an inquiry raised concerns that defendants could escape a liability finding by offering "non-racial" rationales for divergent voting patterns.

The court began its discussion of section 2 by noting that the *Gingles* preconditions were the foundation for a vote dilution claim.[123] Plaintiffs have to show that the minority group is sufficiently large and compact to constitute a majority in a single-member district. Second, plaintiffs must demonstrate that the minority group is politically cohesive, and that there is significant bloc voting by non-minorities against the community's preferred candidates. According to the court, "proof of all three preconditions creates an inference that members of the minority [group have been] harmed" by the challenged structure or procedure.[124] The court cautioned that the vote dilution inference is not irrebuttable. The inference of vote dilution can be rebutted by other evidence. Accordingly, the court instructed that a district court should be careful not to "wear blinders."[125] The trial court must "sift the evidence produced at trial and gather enough information to paint a picture of the attendant facts and circumstances."[126] After all the evidence is received, the trial court must feel the political fabric for texture and nuance, in order to determine whether the minority group

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[120] 72 F.3d 973 (1st Cir. 1995).
[121] *Id.* at 977.
[122] *Id.* at 981.
[123] *Id.* at 979-80.
[124] *Id.* at 980.
[125] *Id.*
[126] *Id.*

has been denied equal access to the political process. In this regard, the *Uno* court concluded that completing the inquiry demands comprehensive, not limited, canvassing of the pertinent facts.[127]

After establishing the framework for a challenge to an at-large system under section 2, the *Uno* court grappled with the controversy concerning the intent question. The court acknowledged that the Supreme Court in *Gingles* split on this question and that the controversy has raged since then in the circuit courts.[128] The court considered this an issue of relevance. "The court believed that the presence or absence of bias is arguably relevant to the question of whether a minority group lacks equal" electoral access.[129] The court observed that in a community divided along racial lines, the prospects for electoral success differed markedly from its prospects in a more cohesive community.[130] Additionally, sentiments unrelated to race could also affect election results. The court concluded that when it can be demonstrated that voters in a particular community are motivated primarily by non-racial causes, it was reasonable to assume that a minority-preferred candidate who embodied these values might equally be able to engender support among a majority of the white voters.[131]

"The *Uno* court concluded that when racial antagonism is not the cause of an electoral defeat suffered by a [minority-preferred] candidate, the defeat does not prove a lack of electoral opportunity" that section 2 was designed to remedy.[132] Such political defeats may be attributable to the candidate's failure to support popular programmative initiatives, or the candidate's failure to reflect the majority's ideological viewpoints (partisanship), or the popularity of an incumbent.[133] Where such considerations caused the defeat of a minority candidate, section 2 does not provide relief. Following this analysis to its logical conclusion, the court held that plaintiffs cannot prevail on a section 2 claim, if there is significantly probative

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[127] *Uno*, 72 F.3d at 979-80.
[128] *Id.* at 980 (citing *Nipper*, and *LULAC*).
[129] *Id.* at 981.
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.*

evidence that whites voted as a bloc for reasons wholly unrelated to racial animus.[134]

The First Circuit argued that its conclusion drew support from the legislative history of the amended section 2. Without any independent review of the Senate Report or other documents illustrative of congressional intent, the court concluded that the use of the words "on account of race or color" meant that intent was still an issue.[135] Without quoting a single sentence from the Senate Report or the legislative debates, the court determined that when Congress discarded the intent test, it meant only to eliminate from the microscope evidence regarding the intent of the legislators in enacting or maintaining the challenged system.[136]

In reaching this conclusion the Court ignored the clear pronouncement in the Senate Report that under the amended section 2 a plaintiff did not have to prove intent of any kind.[137] Moreover, a thorough review of that report fails to disclose any intention of Congress that some form of the intent standard was alive and well after the amendment. Additionally, the words "on account of race or color" were not intended to require proof of a causation factor, and the Judiciary Committee so stated.[138] Congress could not have been more clear when it rejected the intent standard.[139] Despite Congress' valiant attempt to correct the Supreme Court's misreading of the original section 2, the *Uno* court, like the *LULAC* and *Nipper* courts refused to adhere to congressional intent.

Despite raising the bar for a voting rights plaintiff, the *Uno* court acknowledged that permitting inquiry into the causes of white bloc

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[134] *Uno*, 72 F.3d at 981.

[135] *Id.* at 982-83.

[136] *Id.* at 982.

[137] S. Rep., *supra* n. 20, at 13 ("In our view, proof of discriminatory purpose should not be a prerequisite to establishing a violation of section 2."); *Id.* at 22 ("The specific intent of this amendment is that the plaintiffs may choose to establish discriminatory results without proving any kind of discriminatory purpose.").

[138] S. Rep., supra n.20, at 192, n.109. ("[I]t is patently clear that Congress has used the words 'on account of race or color' in the Act to mean 'with respect to' race or color, and not to connote any required purpose of racial discrimination. Any . . . arguments . . . that there is some implied 'purpose' component in section 2, even when plaintiffs proceed under the results standard, are equally misplaced and incorrect.').

[139] *See supra*, note 40.

voting could jeopardize the effectiveness of section 2.[140] In response, the First Circuit complained that skeptics misunderstood the nature of the showing needed to support a section 2 claim.[141] According to the Court, proof of the second and third *Gingles* preconditions (minority political cohesion and white bloc voting) demonstrates that racial cleavages in voting patterns existed, and that these differences "were deep enough to defeat minority preferred candidates time and again."[142] Proof of these two preconditions, gives rise to a strong "inference that racial bias is operating through the medium [of the challenged structure] to impair minority political [success]."[143]

The dilution inference remains unless the defendant adduces evidence tending to prove that the divergent voting patterns can most logically be explained by factors unconnected to the intersection of race with the challenged structure or practice. Such factors could include organizational disarray, lack of funds, want of campaign experience, the unattractiveness of particular candidates, or the universal popularity of an opponent.[144] However, the court cautioned that even when such proof is forthcoming the defendant does not automatically triumph. Before rejecting a section 2 challenge, "the court must determine whether, [under] the totality of circumstances test (including the original dilution inference and its factual predicate), the minority group was denied meaningful access to the political process on account of race [or color]."[145]

The court stated that this framework imposed a "high hurdle" for defendants who seek to defend against statistical evidence of divergent voting patterns.[146] The court emphasized that plaintiffs are not required to disprove every possible explanation for racially polarized voting in order to establish vote dilution.[147] Plaintiffs have to demonstrate that the three preconditions (alone or in combination with the totality of circumstances) are strong enough that, notwithstanding the countervailing evidence of other causative

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[140] *Uno*, 72 F.3d at 982.
[141] *Id.*
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[143] *Id.*
[144] *Uno*, 72 F.3d at 983. n. 4.
[145] *Id.* at 983.
[146] *Id.*
[147] *Id.*

factors offered by the defendants, the record sustains a claim that racial politics have resulted in diminished electoral opportunities for minority voters.[148]

The First Circuit held plaintiffs to a strict standard and gave comfort to the defendants seeking to defend at-large elections. By allowing a multifactored, multivariable analysis, the Court introduced uncertainty into the voting rights field and beclouded the vitality of section 2. Under this new and improved intent test, faced with statistical showings of divergent voting patterns, defendants can offer a host of expert opinions as to why the voting patterns were so segregated. A defendant will argue that white voters rejected a particular candidate because he did not share their concerns about increasing crime or taxes. Some defendants will argue that the candidate was not well known, had a poor campaign or lacked money and that these factors resulted in her defeat. This velcro approach to litigation belittles the serious threat to democracy that disenfranchisement represents. As the *Uno* court recognized, "In this enlightened day and age, bigots rarely advertise an intention to engage in race-conscious politics."[149] The concerns is that by allowing defendants to posit any number of explanations for divergent voting patterns, election systems that have shut out minority voters will go unremedied because a district chose to credit a defendant's explanations over a plaintiff's statistical showing. Without guiding the district court's assessment of the evidence, the *Uno* court's burden allocation jeopardizes the goals of the Voting Rights Act.[150]

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[148] *Id.*

[149] *Id.* at 984 (noting that "[n]ot surprisingly . . . racially polarized voting tends to be a silent, shadowy thief of the minority's rights").

[150] In the Senate Report the Judiciary Committee reviewed the purpose of the Act:

> Seventeen years ago, Americans of all races and creeds joined to persuade the nation to confront its conscience and fulfill the guarantee of the constitution. From that effort came the Voting Rights Act of 1965. President Lyndon Johnson hailed its enactments as a 'triumph for freedom as huge as any ever won by any battlefield.' The Act has attacked the shameful blight of voting discrimination.

S. Rep., *supra* n. 20, at 4.

D. *GOOSBY V. TOWN BOARD OF THE TOWN OF HEMPSTEAD*[151]

In *Goosby*, the Second Circuit confronted the issues addressed in *Nipper* and *Uno*, i.e. whether intent was an element to be considered in a section 2 case.[152] In this case, the defendants contended that partisanship politics best explained the divergent voting patterns in the Town of Hempstead's Town Board elections.[153] They urged that the statistical proof demonstrating the correlation between partisan affiliation of the voters and the votes cast for particular candidates precluded a finding of legally significant racial bloc voting (third *Gingles* precondition).[154] The district court rejected that approach and instead weighed defendants proof at the totality stage.[155] The circuit court agreed with the district judge's methodology and affirmed his conclusion that partisanship did not best explain the divergence in the vote.[156] Judge Pierre Leval concurred in the result and wrote separately to express his views regarding the role of intent evidence in a section 2 case.[157]

In *Goosby*, the defendants argued that the divergent voting patterns evident in the Town elections resulted from the political choice of the vast majority of white voters to register in and vote for the

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[151] 180 F.3d 476 (2nd. Cir. 1999).

[152] *Id.* at 482.

153 *Id.* (arguing that "Republican Party affiliation was determinant of electoral success in Town-wide elections, the voting block that plaintiff had demonstrated was along partisan, not racial, lines").

[154] *Id.*

[155] In rejecting the defendant's argument the district court stated:

> In evaluating all of the relevant facts as a whole, including the size of the Town, the absence of geographic sub-districts, the lack of access by blacks to the Republican Party slating process, the unfortunate use of racial appeals in political campaigns, the lack of responsiveness by the Town Board to the particularized needs of the black communities, and the stated desire by the Town government to cling to a monolithic, single-voice legislature for a heterogeneous population consisting of many different communities and voices, I conclude that black citizens' failure to elect representatives of their choice to the Town Board is not best explained by partisan politics.

Goosby, 956 F. Supp. 326, 355 (E.D.N.Y. 1997).

[156] *Id.* at 493.

[157] *Goosby*, 180 F.3d at 498 (Leval, J., concurring).

Republican Party and its candidates.[158] According to the defendants, white bloc voting patterns cannot be legally significant under the third *Gingles* precondition unless the plaintiffs prove that the differences are attributable to racial considerations.[159] Under this view of section 2, the district courts should not consider the totality of circumstances unless and until plaintiffs have proven racial animus at the precondition stage.

The Second Circuit rejected the defendants approach. The court concluded that an inquiry into the causes of white bloc voting is not relevant at the *Gingles* precondition stage.[160] Such evidence was relevant, however, in the totality of circumstances inquiry.[161] Accordingly, the court ratified the approach of the district court when it considered and rejected defendant's evidence at the totality stage of the analysis.[162]

Judge Leval voted to affirm the judgment of the district court, "but for slightly different reasons."[163] He began his analysis with a critique of section 2 and the lack of clarity in the amended statute.[164] Judge Leval described the amended section 2 as a "compromise that seeks to have things both ways."[165] He stated that "interpreting such a statute poses a particular challenge" for the judiciary.[166] One approach to statutory interpretation, he stated, suggests that judges should rely on "the text and a dictionary."[167] Judge Leval opined that such an approach is useful where the statute provides clear and definitive instructions, but of little utility when the statute contains no such guidance.[168]

Another approach to statutory construction involves a more activist approach to judicial interpretation. Judge Leval wrote that where

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[158] *Id.* at 484.
[159] *Id.* at 482.
[160] *Id.* at 493.
[161] *Id.*
[162] *Id.*
[163] *Id.* at 498 (Leval, J., concurring).
[164] *Goosby*, 180 F.3d at 500 (noting that "[o]ne has almost no guidance as to what illegally lessens the opportunity to vote").
[165] *Id.* at 501 (citing Baird v. Consolidated City of Indianapolis, 976 F.2d 357, 359 (7th Cir. 1992).
[166] *Id.*
[167] *Id.*
[168] *Goosby*, 180 F.3d at 501.

"Congress was internally divided or lacked a clear idea as to how a general principle should play out in specific [settings], a special relationship . . . between Congress and the courts [arises]."[169] According to Judge Leval, where, as here, the major questions are unanswered, Congress enters into a partnership with the courts.[170] Under this method, the courts have the task of interstitial gap-filling. According to Judge Leval, in fulfilling this task, the courts are assigned the task of providing answers to the unanswered questions based on "common sense and good judgment."[171] The goal of the court should be to "giv[e] effect to the incompletely formulated intentions and compromises of the statute."[172] In his opinion, in the Voting Rights Act Congress has assigned the courts such a partnership role.[173]

On the issue of intent and its role in the amended section 2, Judge Leval opined that Congress' intent was stated imperfectly. The amendment made clear that the statute no longer required discriminatory intent by a state actor, but was unclear as to whether intent was banished from consideration.[174] In his view, retention of the words "on account of race or color" suggests a concern for race-based motivation, at least within the electorate.[175] Judge Leval also found a lack of clarity with respect to section 2's requirement that a plaintiff demonstrate that a minority group has less opportunity to participate in the political process.[176] He believed that some violations of the statute might require race-based intent on the part of officials or voters and others would not require racial animus.[177]

After analyzing the statute and its legislative history, Judge Leval turned to the precedent under the amended section 2 for guidance on the intent question; he found little help. He noted that the Supreme Court has offered no definitive guidance on the issue of intent in

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[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *Goosby*, 180 F.3d at 501.
[173] *Id.*
[174] *Id.* at 499.
[175] *Goosby*, 180 F.3d at 499. Judge Leval acknowledged that construed similar language did not require proof of race-based intent. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).
[176] *Id.* at 500.
[177] *Id.* at 501.

Gingles or subsequently.[178] In *Gingles*, four justices understood section 2 as requiring no evidence of racial intent, and five justices expressed different views.[179]

Judge Leval considered and addressed Justice Brennan's concerns regarding intent. Justice Brennan, relying on the Senate Report, rejected the intent test because it could be divisive and would be difficult to prove.[180] In Judge Leval's opinion, these considerations should not preclude requiring intent evidence.[181] He stated that "the difficulty proving racial animus, in some circumstances, may result from the fact that there was none."[182] He feared that the invalidation of election procedures in the absence of racial motivation could produce enormous disruptions in the political process; a result he believed Congress did not intend.[183]

In his view, "the more deeply judicial intervention intrudes into the political process, the more reluctant courts should be to find a violation without a finding of racial motivation."[184] He believed that, in determining the nature of the intent showing required to demonstrate a violation of section 2, the court should consider whether the complaint alleges a violation of process or outcome.[185] In the former, the law may guarantee a fair process whether or not the unfairness is the product of discriminatory intent. However, where the complaint alleges that a minority group has been unable to elect representatives of their choice, the plaintiffs are complaining about outcomes. In this species of vote dilution claims, it is reasonable to require as a predicate for judicial relief that "discrimination, within the electorate if not the state, has infected the election."[186] When discrimination is present, it can be said that the process [was also unfair in that it was tainted by an] illegitimate animus.[187] Accordingly, where the complaint alleges only bad

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[178] *Id.* at 500.
[179] *Id.*
[180] *Gingles*, 486 U.S. at 71-73.
[181] *Goosby*, 180 F.3d at 501.
[182] *Id.*
[183] *Id.* at 501-02.
[184] *Id.*
[185] *Id.* at 502.
[186] *Id.* at 502, n.4.
[187] *Id.*at 502.

outcomes, a requirement of intentional discrimination would be reasonable.[188]

Judge Leval believed such a requirement was appropriate where the complaint alleges that voters of the protected class have had little success in electing candidates of their choice. In such a case, the remedy for the violation "would require a radical political restructuring - either by redrawing district lines or by changing the nature of representation from at-large to single representative districts."[189] Where the courts are required to intrude to such an extent in the political process, Judge Leval contended that more than defeat at the polls was required.[190] Some showing of intentional discrimination was an essential element.

Having established that intent proof was required in a challenge to an at-large election system, Judge Leval proceeded to create a framework for receiving evidence. He concluded that a plaintiff establishes a prima facie violation by proving the three *Gingles* preconditions.[191] Proof of these three factors supports an inference that race may have been a motivating factor to justify imposing in the defendant the burden to prove that the consistent defeat of minority preferred candidates was not the result of race- based intent on the part of the governing officials or the electorate.[192]

Applying his model to the facts of the case, Judge Leval voted to affirm. He concluded that the district court properly found that the three preconditions were satisfied, and that the burden shifted to the defendants to prove that race was not a motivating factor.[193] Based on the record, he determined that the defendants had not carried their burden of disproving race-based intent.[194] Accordingly, Judge Leval stated his belief that the plaintiffs had proved a section 2 violation.

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[188] *Id.* at 502, n. 4.

[189] *Goosby*, 180 F.3d at 502.

[190] *Id.* at 502, n.4.

[191] *Id.* at 502.

[192] *Id.* at 502-03.

[193] *Id.* at 503.

[194] *Id.* at 50. In support of his conclusion that the defendant had not disproved intent, Judge Leval relied on the following:

> Racial appeals have been features of Town elections on more than one occasion. Town law enforcement officers have engaged in race-conscious policing - - essentially telling black youths visiting from Queens to 'go back were they belong.' Agencies of the Town government have committed acts

V. CONCLUSION

The opinions from *LULAC* to *Goosby* demonstrate the complexity of section 2 and the confusion engendered by its amendment in 1982. Admittedly, the statute was the product of intense pressure and compromise. The language and history of the amendment can be parsed to find that no intent is required and that some intent was required. There is support in the legislative history for the proposition that Congress sought to banish intent as a prerequisite for a vote dilution claim. The Senate Report clearly stated that plaintiffs could prove a section 2 violation without showing motivation of any kind. Of course, the Report is silent as to whether a defendant can offer non-racial explanations to rebut a plaintiff's proof. Additionally, there is no indication in the legislative history that Congress, when it rejected the intent standard, intended to permit an inquiry into motivations of the electorate, while at the same time excluding from the inquiry the intent of legislators. While Congress may not have expressed its intention clearly in the words of the statute, when the Report is examined the relevance of intent evidence to the vote dilution inquiry is clear - such proof was not deemed relevant to the plaintiff's prima facie case.

Notwithstanding the foregoing, faced with the uncertainty regarding the intent question, the courts, as Judge Leval suggested, have played an interstitial role as they sought to give meaning to the words Congress used in the amended section 2. Regardless of whether Congress intended proof of intent on the part of legislators or the electorate to be considered in a section 2 case, the courts have concluded that such evidence should not be banished from the inquiry.

The next question is who has the burden of proving intent of the electorate. When the various circuit court opinions are synthesized, a consistent approach emerges. No court has required that plaintiff establish through direct evidence that race-based considerations

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of racial discrimination to which the Town has made no response. And the Town has a history of indifference to the economic and social needs of the black communities within Hempstead, even though they have lower incomes than the rest of the Town.

Id.

motivated the electorate or the legislature. If such proof is available, it should be received and evaluated. However, section 2 cases are by their very nature circumstantial and require a sifting of the evidence in order to give context and meaning to the nuances of proof. The circuit courts have consistently stated that when the *Gingles* preconditions are established, a rebuttable inference is created that race is operating in the challenged jurisdiction. Proof of the preconditions does not depend on the type of searching evaluation made at the totality stage. In the precondition state, the proof can be purely statistical without any anecdotal testimony.

Once a plaintiff has established the preconditions, the burden of disproving motivation is placed on the defendants. They must come forward with evidence tending to show that other factors motivated the choices made by the electorate, or, in the appropriate case, the legislature. Where such showing is made, the burden of production shifts back to the plaintiff to demonstrate that when viewed through the prism of the totality test, the minority group does not have an equal access to the political process and that racial consideration are at play in the jurisdiction. This requirement is met by offering proof of the Senate Report factors. A review of the evidence of these factors gives the district court a sense of the past and present realities in the community. Where race is a motivating factor, one would expect that proof of the Senate Report criteria will reveal that, contrary to the rationales offered by a defendant, race is playing a role in the society in which the challenged system is operating.

Admittedly, this is a vague and amorphous standard. There are no clear-cut guides to assist a court in reaching the ultimate conclusion. The factors are intended to give context and meaning to the inquiry. In order to evaluate the evidence, the court must immerse itself in an intensely local appraisal of the political reality of the community. Essentially, the court is attempting to determine whether a radical restructuring of a political structure is warranted. Given federalism concerns, such an intrusion into local politics should only be made by a federal court after evaluating all the evidence. This approach gives the court broad discretion to remedy vote dilution violation upon a review of all the evidence.

There remains a concern that a clever defendant could offer pretextual rationales designed to mask racial considerations. Where such proof is offered, the question of how a plaintiff responds is

complex. First, a plaintiff can attack the credibility or methodology of the defense experts. Second, the plaintiff can, through anecdotal testimony, demonstrate that the rationales offered are pretexts for discrimination. Third, the plaintiff can overwhelm the record with proof that race matters in the challenged jurisdiction. Of course, at the end of the day, the determination of the proper balance depends as much on the judicial philosophy of the trial of fact and the circuit court that reviews the trial court's findings and conclusion. This is frequently the case in situations where the test to be employed is a vague and ambiguous one.

The Voting Rights Act has been a powerful engine for changing the face of democracy in the United States. Gone are the days of the literacy test and the poll tax. The Act has ushered in a new day in American politics where African-Americans can finally achieve some modicum of political success, unmarred by racism. Yet, the Act has been limited and restricted by the debate over intent. Perhaps, when the statute is again considered by Congress for extension, the intent question will finally be put to rest. Until then, litigators, on both sides of the equation, will have to struggle to give meaning and context to the words of the statute and the will of the courts.