From the SelectedWorks of Bernice M. Bird

December 9, 2012

Section 2 as an “Adequate Substitute” for Section 5: Proposing an “Effects-Only” Test as an Amendment to Section 2 of the Voting Rights Act of 1965

Bernice M. Bird

Available at: http://works.bepress.com/bernice_bird/3/
Section 2 as an “Adequate Substitute” for Section 5: Proposing an “Effects-Only” Test as an Amendment to Section 2 of the Voting Rights Act of 1965

Bernice Bird*

**TABLE OF CONTENTS**

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>INTRODUCTION</td>
<td>..................................................................................................................</td>
<td>2</td>
</tr>
<tr>
<td>I.</td>
<td>VOTING RIGHTS ACT OF 1965: PURPOSES OF SECTIONS 2 AND 5</td>
<td>4</td>
</tr>
<tr>
<td>A.</td>
<td>Reauthorization History</td>
<td>..................................................................................................................</td>
</tr>
<tr>
<td>II.</td>
<td>LEGISLATIVE INTENT OF THE “RESULTS” OR “INTENT” TEST</td>
<td>..................................................................................................................</td>
</tr>
<tr>
<td>III.</td>
<td>RETURN TO BOLDEN: JUDICIAL INTERPRETATION OF THE AMENDED “RESULTS” TEST</td>
<td>..................................................................................................................</td>
</tr>
<tr>
<td>A.</td>
<td>Thorburng v. Gingles: “Effects” Test Only</td>
<td>..................................................................................................................</td>
</tr>
<tr>
<td>B.</td>
<td>LULAC: Intent Evidence Admissible under the “Results” Test</td>
<td>..................................................................................................................</td>
</tr>
<tr>
<td>D.</td>
<td>Regression to the Bolden-Intent Standard</td>
<td>..................................................................................................................</td>
</tr>
<tr>
<td>IV.</td>
<td>SECTION 2 AS AN INADEQUATE SUBSTITUTE FOR SECTION 5</td>
<td>..................................................................................................................</td>
</tr>
<tr>
<td>V.</td>
<td>AMENDING SECTION 2: “EFFECTS-ONLY” TEST</td>
<td>..................................................................................................................</td>
</tr>
<tr>
<td>CONCLUSION</td>
<td>..................................................................................................................</td>
<td>16</td>
</tr>
</tbody>
</table>

---

* American University Washington College of Law, expected LL.M., 2013; Barry University Dwayne O. Andreas School of Law, 2012, J.D., cum laude; Florida International University, 2007, M.S., summa cum laude (Counseling Psychology); Rollins College, 2003, B.S., cum laude (Psychology).
INTRODUCTION

Heralded as the single most important piece of civil rights legislation,\(^1\) the Voting Rights Act of 1965 (“VRA”) may look entirely different for the upcoming generation of minority voters next year. The U.S. Supreme Court will review the constitutionality of Section 5 in *Shelby County, Ala. v. Holder*,\(^2\) which will likely be heard in October of 2013.\(^3\) *Shelby County* may determine the end of Section 5, given that in 2009 the Court in *Northwest Austin Municipal Utility District Number One v. Holder (NAMUDNO)* urged Congress to revise Section 5 because, primarily, “things have changed in the South.”\(^4\) If the Supreme Court strikes down Section 5 in *Shelby County*, Section 2 will remain as the only means of redress for voting discrimination under the VRA.

Under Section 2’s “results” or “intent” test, plaintiffs can either bring a claim of intentional discrimination or discriminatory effects, based on the totality of the circumstances.\(^5\) Congress made clear that it had amended Section 2 in 1982 for the purpose of decreasing the burden imposed upon minority plaintiffs set forth by the *Bolden*-intent standard.\(^6\) The

\(^2\) *Shelby County, Ala. v. Holder*, 811 F. Supp. 2d 424 (D.C. Cir. 2011) (denying preclearance to political division Shelby County, Ala. because redistricting plan to create nonpartisan elections were shown to have a probable retrogressive effect on African American voters).
\(^3\) 2012 WL 3018430 (Nov. 9, 2012) (petition of writ of certiorari granted).
\(^4\) *Nw. Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 198, 202 (2009). The Court further stated that Section 5 may be unconstitutional because:

> The evil that § 5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance. The statute's coverage formula is based on data that is now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions.

amendment empowered plaintiffs to prove unequal access to the election process under either the “intent” or “results” standard, with the exception that unequal representation in the election process did not establish a claim under Section 2. However, the inclusion of an intent-test, alongside commentary of Congress’s repudiation of its mandated use, had confused the judiciary on whether to require application of the intent test. As a result, various jurisdictions have created different concoctions of “intent” and “results” tests, which ultimately have affected plaintiffs similarly to the Bolden-intent standard.

This paper proposes an “effects-only” test as another amendment to Section 2 in order to enhance the adequacy of it as a substitute to Section 5 in the event that the Shelby County Court holds Section 5 unconstitutional. This paper neither offers a normative judgment into Section 5’s current effectiveness in remedying discrimination, nor does it condone rejection of Section 5. Instead, this paper examines whether Section 2, as is, serves as an “adequate substitute” for Section 5 in redressing voter discrimination. Thus, this paper asserts that both the Supreme Court and federal judiciary interpret the “results” or “intent” test contrary to the legislative intent by requiring discriminatory intent, or evidence thereof, in addition to discriminatory effect.

Part I examines the purposes of Sections 2 and 5 of the Voting Rights Act of 1965. Section A of Part I reviews the reauthorization history and relevant amendments to the remedial provisions under the VRA, particularly Sections 2, 4, and 5. Part II investigates the legislative

---

7 Id.
8 See Thornburg v. Gingles, 478 U.S. 30 (1986); League of United Latin American Citizens, Council No. 4434 v. Clements, 999 F. 2d 831, 855 (5th Cir. 1993); Nipper v. Smith 39 F.3d 1494, 1497 (11th Cir. 1994). For more Section 2 litigation see also Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir. 1990); Uno v. City of Holyoke, 72 F. 3d 973 (1st Cir. 1995); Goosby v. Town Bd. of Town of Hempstead, N.Y., 180 F. 3d 476 (2d Cir. 1999).
9 “Results” and “effects” are used interchangeably throughout the Senate Report. See 1982 Senate Report. Therefore, this paper also uses the terms “results” and “effects” interchangeably when proposing the amendment of the “effects-only” test.
intent of the “results” or “intent” test by examining the Senate Judiciary Committee’s report on the 1982 amendment to the “results” test.

Part III serves as an overview of notable judicial interpretations that have deviated from the legislative intent of the amended Section 2. Section A analyzes the leading case on the amended Section 2, *Thornburg v. Gingles*, as endorsing an “effects-only” analysis. Section B notes that the Fifth Circuit in *League of United Latin American Citizens v. Clements (LULAC)* rejected the majority opinion in *Gingles*, and instead, adopted Judge O’Connor’s concurring opinion, which argued for a “results” test where intent evidence should be admitted. Section C briefs the Eleventh Circuits opinion in *Nipper v. Smith*, which required both discriminatory intent and evidence of discriminatory effect. Section D argues that the post-amendment judicial interpretations have reverted the analysis of Section 2’s “results” test to a *Bolden*-intent standard in requiring a determination of intent evidence in some variant.

Part IV presents the arguments made in Senate hearings on the inadequacy of Section 2 as a substitute for Section 5, given the burden of proof on plaintiffs and cost of litigation. Part V offers suggestions on amending the current “results” or “intent” test to an “effects-only” test as a substantial factor in improving the adequacy of Section 2 as a substitute for Section 5, in the event that Section 5 no longer exists upon the ruling of *Shelby County*.

I. VOTING RIGHTS ACT OF 1965: PURPOSES OF SECTIONS 2 AND 5

The Voting Rights Act of 1965 “was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century.”11 The remedial provisions “Section 5 and [S]ection 2, virtually companion sections, operate in tandem to prohibit discriminatory practices in voting, whether those practices

---

11 South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966)
originate in the past, present, or future.”

Section 2 codifies the nationwide, anti-discrimination mandate found in the Fifteenth Amendment in stating that “[n]o 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 [United States] citizen to vote on account of race or color.” A private plaintiff or the Attorney General may bring a suit enforcing a violation of Section 2 upon a showing of the totality of the circumstances that the challenged law denies a protected class of citizens the right to vote. In sum, the purpose of Section 2 is to “protect the right of minority voters to be free from election practices, procedures or methods, [which] deny them the same opportunity to participate in the political process as other citizens enjoy.”

In contrast, Section 5 was implemented to effectively prohibit and enjoin “bad actors” from enacting new practices, unless they could prove to the District Court of District of Columbia that the laws were not intended to discriminate and the laws would not have a discriminatory effect on a segment of society’s opportunity to vote (i.e., Section 5’s “effects” test). Section 5 was enacted for the purpose of redressing discriminatory voter practices, primarily in the Southern states. Prior to the enactment of the VRA, the Department of Justice litigated these practices on a case-by-case determination, however, this proved to be both an onerous and costly burden on administrative resources. Thus, litigation under the VRA sought

---

13 City of Mobile v. Bolden, 446 U.S. 55 (1980). The Court in Mobile held that the plaintiff had to show that the voting law was enacted with a discriminatory purpose in order to file suit under Section 2. Id.
15 Id.
to reduce the costly case-by-case adjudication of discrimination suits brought under the Civil Rights Act of 1964.\textsuperscript{20}

\textit{A. Reauthorization History}

Congress has reauthorized the VRA four times. In 1970, the Act was reauthorized for 5 years; in 1975, for 7 years; and in 1982, the VRA was reauthorized for 25 years.\textsuperscript{21} The coverage formula was reauthorized in 1970 to address the need to remedy continuing voter discrimination.\textsuperscript{22} Moreover, the formula included the date “November 1, 1968,” as an additional reference point in calculating which jurisdictions should be covered under Section 5.\textsuperscript{23} In 1975, the coverage formula was extended for another seven years to protect against discrimination of “language minority” populations in states where such groups encompass over five percent of the voting population.\textsuperscript{24} As a result, portions of California, Florida, Michigan, New York, North Carolina, and South Dakota are now covered.\textsuperscript{25}

In 1982, Congress amended Section 2 upon extension of the Act. Section 2 was amended to afford plaintiffs the option of either two burdens of proof.\textsuperscript{26} First, plaintiffs may choose to proffer evidence of an election law’s discriminatory intent against a minority population, under the \textit{Arlington Heights}\textsuperscript{27} and \textit{Washington v. Davis}\textsuperscript{28} tests.\textsuperscript{29} Or, second, plaintiffs may opt to demonstrate that a challenged law resulted in the abridgement of a minority voter’s participation

\footnotesize
\begin{itemize}
\item \textsuperscript{20} \textit{Id.}
\item \textsuperscript{23} \textit{Id.}
\item \textsuperscript{24} \textit{Id.}
\item \textsuperscript{25} \textit{Id.}
\item \textsuperscript{26} \textit{See infra} Section II(A) for more discussion on a history of the 1982 amendment to Section 2.
\item \textsuperscript{27} \textit{Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 266 (1977).}
\item \textsuperscript{28} \textit{Washington v. Davis, 426 U.S. 229 (1976).}
\item \textsuperscript{29} 1982 Senate Report 1982 at 27-28.
\end{itemize}
in the election process, under the totality of the circumstances. Moreover, the amendment noted that the lack of proportional representation in the electoral process did not demonstrate discriminatory effects.

In 2006, Congress reauthorized Section 5 for another 25 years under the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006. The congressional findings revealed that the reauthorization was necessary because “vestiges of discrimination in voting continue to exist as demonstrated by second generation barriers constructed to prevent minority voters from fully participating in the electoral process.”

With the reauthorization of Section 5 in 1982 and 2006, Section 4’s coverage formula remained the same. Section 2 remains in effect permanently; however, Section 5 is effective only until 2031.

II. LEGISLATIVE INTENT OF THE “RESULTS” OR “INTENT” TEST

The Senate Judiciary Committee amended the plaintiff’s burden of proof under Section 2 to reflect either a “results” or “intent” test; however, the burden is commonly known as the “results” test. The amendment of Section 2 was “designed to make clear that plaintiffs need not prove a discriminatory purpose in the adoption or maintenance of the challenged system or practice in order to establish a violation.” Essentially, the Judiciary Committee enacted the amendment to “restore[] the legal standards, based on the controlling Supreme Court precedents,

---

30 Id. at 27-28.
31 Id.
33 Id.
34 Id.
which applied in voting discrimination claims prior to . . . Mobile v. Bolden.”37 In effect, the Committee codified38 White v. Regester.39

In White, the Supreme Court upheld the decision of the District Court for the Western District Texas that two multi-member Texas counties violated the equal protection rights of Mexican-American citizens, based on the totality of the circumstances, due to their exclusion from the political process.40 The Senate Judiciary Committee noted that the White Court did not analyze the “motivation of the legislators.”41 The Committee also relied on Whitcomb v. Chavis, which similarly ruled that discriminatory intent of the legislature was not necessary in showing that Indiana’s state reapportionment plan did, in fact, result in the exclusion of African-American voters.42 Following soon thereafter, the seminal Fifth Circuit holding in Zimmer v. McKeithen adopted the analytical framework in both White and Whitcomb in reasoning that vote dilution cases could be analyzed under either the “intent” or “results” standard.43

37 Id. at 2.
38 Id.
40 Id. at 95.
43 1982 Senate Report at 23; See also Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973). The Zimmer court crafted its own factors in examining the context of voter discrimination:

[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 districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts. The fact of dilution is established upon proof of the existence of an aggregate of these factors. The Supreme Court’s recent pronouncement in White v. Regester, supra, demonstrates, however, that all these factors need not be proved in order to obtain relief.

Id. at 1305.
The Committee noted that the Supreme Court deviated from the “results” or “intent” holdings set forth in *White* and *Whitcomb* and, instead, held in *Mobile v. Bolden* that plaintiffs must proffer evidence of discriminatory intent and effect of election laws in order to succeed in Section 2 challenges.\(^{44}\) Notably, the *Bolden* plurality opinion stated that “racially discriminatory motivated is a necessary ingredient of a Fifteenth Amendment violation.”\(^{45}\) The Judiciary Committee argued that, not only did the *Bolden* Court unnecessarily deviate from precedent, but it heightened the burden on plaintiffs by requiring proof of discriminatory intent.\(^{46}\) Moreover, the Committee found that the *Bolden*-intent test was an “unacceptably difficult burden on plaintiffs [that] diverts the judicial inquiry from the crucial question of whether minorities have equal access to the electoral process to a historical question of individual motives.”\(^{47}\)

Thus, the operation of the amended Section 2 made it so that “[p]laintiffs must either prove such [discriminatory] intent, or, alternatively, must show that the challenged system or practice, in the context of all the circumstances in the jurisdiction in question, results in minorities being denied equal access to the political process.”\(^{48}\) The Committee set forth comprehensive factors as guidelines for the courts in assessing Section 2 claims, noting that not all factors need to be met:\(^{49}\)

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-

\(^{45}\) *Id.* at 62
\(^{46}\) 1982 Senate Report at 16.
\(^{47}\) *Id.*
\(^{48}\) *Id.* at 27 (emphasis added).
\(^{49}\) *Id.* at 29.
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.
8. Whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group;
9. Whether the policy underlying the state or political subdivision’s use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.\(^{50}\)

Despite congressional guidance in the 1982 Report, the courts thereafter have consistently confused the proper application of the “results” or “intent” tests, and, instead, have mandated a need for necessary evidence of discriminatory intent in election laws.

III. RETURN TO BOLDEN: JUDICIAL INTERPRETATION OF THE AMENDED “RESULTS” TEST

After the 1982 Amendments, the judicial branch interpreted the “results” test in various permutations depending on the jurisdiction. The “results” test had evolved in the eyes of the judiciary from solely an “effects” test,\(^{51}\) to an “effects” test admitting intent evidence,\(^ {52}\) to a test requiring both discriminatory “intent” and “effect.”\(^ {53}\) The judicial interpretations were a far cry from the “intent” or “effects” test enumerated within the 1982 Senate Report. Notably, the confusion seems to have stemmed from the line of cases related to racial bloc voting procedures

\(^{50}\) Id.
\(^ {52}\) League of United Latin American Citizens, Council No. 4434 v. Clements, 999 F. 2d 831, 855 (5th Cir. 1993).
\(^ {53}\) Nipper v. Smith 39 F.3d 1494, 1497 (11th Cir. 1994).
and the Senate Judiciary Committee’s note that plaintiff’s “would have to prove”\(^{54}\) denial of fair access to the election process on account of racial bloc voting schemes. Unfortunately, however, the various judicial interpretations resulted in the necessity of plaintiffs proffering evidence of discriminatory intent, contrary to the legislative intent.

_A. Thornburg v. Gingles: “Effects” Test Only_

The most oft-cited\(^{55}\) Supreme Court case that interpreted Section 2’s “effect” or “intent” test after the 1982 Amendments was _Thornburg v. Gingles_.\(^{56}\) The Gingles Court interpreted the Senate Report as endorsing solely the “effects” test under Section 2. The Supreme Court struck down the North Carolina General Assembly’s redistricting plan in an at-large election, through use of multi-member districts, as unconstitutional because it diluted the votes of African-Americans in impairing their right to elect representatives of their choice.\(^{57}\) The Court crafted a three-prong test of “preconditions” for plaintiffs to prove that a procedure would dilute minority votes in a racial bloc voting scheme:

First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district . . . . Second, the minority group must be able to show that it is politically cohesive. . . . Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it-in the absence of special circumstances, such as the minority candidate running unopposed[.]\(^{58}\)

---

\(^{54}\) 1982 Senate Report at 34.
\(^{55}\) 478 U.S. 30 (1986). Notably, Thornburg v. Gingles is not the first case to interpret Section 2, as amended. The Court heard Rogers v. Lodge in 1982 and held that plaintiffs must prove discriminatory purpose of dilution of minority votes in at-large elections. 458 U.S. 613 (1982). However, the Court in _Gingles_ did not cite to the holding of _Rogers_ and instead limited its application to the dicta. _Gingles_, 478 U.S. 30 (1986).
\(^{56}\) 478 U.S. 30 (1986).
\(^{57}\) _Id._ at 34.
\(^{58}\) _Id._ at 50
The test was created because the amended Section 2 required that plaintiffs prove existence of racial bloc voting procedures. After satisfying the “preconditions,” then the court could analyze plaintiffs’ claims on the totality of the circumstances within the “results” or “intent” test. Justice Brennan, in writing for the majority, reasoned that Congress intended for scrutiny of Section 2 claims to be solely under the “results” standard in limiting inquiry to voting behavior:

Under the old intent test, plaintiffs might succeed by proving only that a limited number of elected officials were racist; under the new intent test plaintiffs would be required to prove that most of the white community is racist in order to obtain judicial relief. It is difficult to imagine a more racially divisive requirement.

Thus, Justice Brennan rejected the need for any proof of race-based discrimination, as it would require plaintiffs to proffer evidence of race-based legislative intent, which was nearly impossible to attain. Justices White and O’Connor filed separate concurring opinions, upon which the lower federal courts relied heavily in crafting separate interpretations of the “intent” test. Justice White argued that evidence of racial bias in political affiliation was necessary in establishing a claim under Section 2 for racial bloc voting. Moreover, Justice O’Connor argued that intent evidence should be considered in determining whether minority voters suffered discriminatory effects.

**B. LULAC: Intent Evidence Admissible under the “Results” Test**

59 *Id.* at 33.
60 *Id.*
61 *Id.* at 72.
62 *Id.*
63 *Id.* at 83-100.
64 See League of United Latin American Citizens, Council No. 4434 v. Clements, 999 F. 2d 831, 855 (5th Cir. 1993).
65 Gingles, 478 U.S. at 83 (White, J., concurring).
66 *Id.* at 100. (O’Connor, J., concurring) (“Evidence that a candidate preferred by the minority group in a particular election was rejected by white voters for reasons other than those which made that candidate the preferred choice of the minority group would seem clearly relevant in answering the question whether bloc voting by white voters will consistently defeat minority candidates.”)
The Fifth Circuit Court subsequently applied Justice O’Connor’s interpretation of the “results” test as binding. The Fifth Circuit Court in the *League of United Latin American Citizens v. Clements (LULAC)* rejected the majority opinion.67 The Fifth Circuit determined, in doing the calculus on proper *stare decisis*, that: “[F]ive justices rejected Justice Brennan’s proposed standard for proving racial bloc voting . . . For this reason, we believe that it is to these opinions, not Justice Brennan's, that we should look in attempting to define the contours of the inquiry into legally significant bloc voting.”68 Thus, intent evidence on racial voting differences, with regard to political affiliation, is admissible under the “results” test in the Fifth Circuit.

**C. Nipper v. Smith: Discriminatory Intent Plus Effect**

Moreover, in *Nipper v. Smith*, the Eleventh Circuit Court required proof of discriminatory purpose as an element to a Section 2 voting dilution claim.69 The Eleventh Circuit noted that the disagreement over the use of race-based evidence in *Gingles* left the *Nipper* Court without direction in determining whether racial bias must be demonstrated in the crafting of voter legislation.70 Thus, the *Nipper* court determined that in the Eleventh Circuit proof of “the totality of the circumstances must demonstrate that the voting community is driven by racial bias and that the electoral scheme in question permits that bias to dilute the plaintiff minority's voting strength.”71

**D. Regression to the Bolden-Intent Standard**

Seemingly, court precedent has regressed to the era of the *Mobile* Court’s mandate for a showing of both discriminatory purpose and effect in voting dilution cases. This may possibly have resulted in the confusion stemming from reading the congressional record on the amended

68 *Id.*
69 *Nipper v. Smith* 39 F.3d 1494, 1497 (11th Cir. 1994).
70 *Id.* at 1495-97.
71 *Id.* at 1497.
Section 2 on racial bloc voting. The Senate Judiciary Committee spoke volumes against the intent-test as imposing upon minority plaintiffs a heightened burden to bring discrimination suits, given that intent evidence is burdensome to produce. Moreover, the Committee recognized that “racial politics [dominated] the electoral process.”72 However, the Committee seemed to rebuke affiliating the “results test” with the protected classes in these instances in stating immediately thereafter that:

The results test makes no assumptions one way or the other about the role of racial political considerations in a particular community. If plaintiffs assert that they are denied fair access to the political process, in part, because of the racial bloc voting context within which the challenged election system works, they would have to prove it.73

Seemingly, the language that plaintiffs would “have to prove” schemes of racial politics and that the results test “makes no assumptions . . . about the role of racial political considerations” indicates the requisite showing for discriminatory intent in racial bloc voting suits. A careful reading of the Senate Report would suggest that the Judiciary Committee intended for application of the intent test in only situations of politically charged racial bloc voting suits.

IV. SECTION 2 AS AN INADEQUATE SUBSTITUTE FOR SECTION 5

The issue of whether Section 2 could serve as an adequate substitute for Section 5 did not arise until 2006 during the reauthorization hearings of Section 5. The Senate Judiciary Committee heard witness testimony on whether there was a continuing need for Section 5 and, as an ancillary matter, whether Section 2 could serve as an “adequate substitute”74 in lieu of Section

72 1982 Senate Report at 33.
73 Id. at 34 (emphasis added).
Upon Senator Kennedy’s inquiry, Pamela Karlan, Professor of Law at Stanford University, testified that Section 2 would not serve as “an adequate substitute in any way” if Section 5 were not reauthorized. As a former litigator of voting discrimination claims, Professor Karlan argued that Section 2 suits are particularly burdensome for plaintiffs because the citizens bear the entire cost of the litigation, which can span the length of several election cycles. In contrast, state and federal governments pay the litigation fees under Section 5 lawsuits because they have the burden to prove that the voting laws are non-discriminatory.

The crux of these arguments relies on the issue that Section 2 does not function similarly to Section 5. Yet, Section 2 need not be exactly the same as Section 5 in order to be a sufficient remedy for plaintiffs. If Section 2 required an “effects-only” standard, then plaintiffs would be able to sue under Section 2 without proffering intent-evidence thereby lessening the burden of proof. Upon first review, the District Court for the District of Columbia in Shelby County noted that since 1982, only 14 cases went to federal court under Section 2 in the covered jurisdictions, where the Attorney General filed 421 objections during this time. Moreover, voter suppression challenges in noncovered jurisdictions have settled claims under state constitutional grounds, rather than Section 2. Minority plaintiffs’ impediments to federal courts may be due to the rigorous intent-based evidentiary burdens imposed by their respective jurisdictions.

V. AMENDING SECTION 2: “EFFECTS-ONLY” TEST

The “results” or “intent” test currently adopted in Section 2 should be amended to eliminate any reference to a “discriminatory intent” analysis. Instead, the language of the statute

---

75 Id.
76 Id.
77 Id.
78 Id.
should refer only to a “results,” or alternatively named, “effects” test. The “effects-only” test would enable plaintiffs to bring forth challenges under Section 2. The judicial interpretations have consistently heightened the burden of proof contrary to the legislative intent. Specifically, courts have construed the “results” tests as necessitating “intent” analysis. Therefore, an amendment to an “effects-only” standard would meet the legislative intent of the 1982 amendments, and, once again, maneuver legal interpretations away from the burdensome effect of the *Bolden*-intent standard.

Notably, it is unclear when and if the intent test should be applied: perhaps only in allegations of the existence of racial bloc voting schemes or only at the plaintiff’s discretion. Thus, Congress should clarify the points of confusion so that court rulings will cease acting as abridgements to voter rights. Nevertheless, the legislative intent of Section 2 consistently reads as though Congress drafted Section 2 to promote minority access to the polls, in part, through alleviating the burden of proof in bringing civil rights suits against voter discrimination. Therefore, amendments to the language of Section 2 should aptly reflect such intent.

**CONCLUSION**

Truthfully, there will be no equivalent substitute to Section 5, if the Supreme Court in *Shelby County, Ala. v. Holder* determines it is unconstitutional. The goal is to amend Section 2 to serve as an “adequate substitute” to Section 5, primarily, in alleviating the heightened burden that the tapestry of intent-based precedent has cast upon suppressed minority voters. Therefore, an “effects-only” test may serve as a substantial factor in crafting Section 2 as an “adequate substitute.” If implemented, an “effects-only” test could grant voters favorable results in the federal courts.