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## A Tale of Two Minority Groups: Can Two Different Minority Groups Bring a Coalition Suit Under Section 2 of the Voting Rights Act of 1965

### Cover Page Footnote

J.D. Candidate, May 2014, The Catholic University of America, Columbus School of Law; B.A., 2010, The University of Maryland, College Park. The author would like to thank her parents, John and Cathy Michaloski, for their encouragement, guidance and unconditional love, her sister Julia and Skip for their constant love and support, Professor Rienzi for his sound advice and the Catholic University Law Review for their tireless efforts in bringing this Note to publication. This Note is dedicated to the memory of the author's grandfather, Leo John Michaloski, a Justice Department attorney who will be remembered for his zealous advocacy and gentle spirit.

# A TALE OF TWO MINORITY GROUPS: CAN TWO DIFFERENT MINORITY GROUPS BRING A COALITION SUIT UNDER SECTION 2 OF THE VOTING RIGHTS ACT OF 1965?

*Sara Michaloski*<sup>+</sup>

Perhaps what is most disturbing is that the practical effect of the majority's holding requires the adoption of some sort of racial purity test, so that minority group members can be properly identified and kept in their place. If we are to make these distinctions, where will they end? . . . Perhaps we will return to a time of classifying African-Americans as quadroons and octoroons for the purpose of racial classification."<sup>1</sup>

Half a century before "minority coalitions" were made a noticeable issue before the courts,<sup>2</sup> hundreds of Americans—both black and white—united on Sunday, March 7, 1965, in Selma, Alabama to rally for equal voting rights.<sup>3</sup> On that fateful day, fifty unsympathetic state troopers and numerous others attacked

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1. *Nixon v. Kent Cnty.*, 76 F.3d 1381, 1401–02 (6th Cir. 1996) (Keith, J., dissenting) (internal citations omitted). "Quadroon" and "octoroon" are racial classifications used in early American history to describe people who are one-quarter and one-eighth, respectively, of African-American ancestry. MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 805, 954 (10th ed. 1997). Judge Keith's criticism of a "racial purity test" is in reference to the *Nixon* majority's finding that two minority groups could not combine, or form a minority coalition, to seek protection of Section 2 of the Voting Rights Act. *See Nixon*, 76 F.3d at 1393, 1401–02.

2. Christopher E. Skinnell, Comment, *Why Courts Should Forbid "Minority Coalition" Plaintiffs Under Section 2 of the Voting Rights Act Absent Clear Congressional Authorization*, 2002 U. CHI. LEGAL F. 363, 363 (2002) (defining a "minority coalition" as occurring where two or more minority groups aggregate to claim the protection of the Voting Rights Act and challenge a voting practice or procedure under Section 2).

3. DAVID MICHAEL HUDSON, *ALONG RACIAL LINES: CONSEQUENCES OF THE 1965 VOTING RIGHTS ACT* 53 (1998); NICK KOTZ, *JUDGMENT DAYS* 282 (2005). Selma is located in Dallas County and had a population of 15,000 people in 1965, half of whom were African-American. HUDSON, *supra*, at 53. Only 156 of these 15,000 African-American citizens, however, were registered to vote. *Id.*

the peaceful protesters on Edmund Pettus Bridge, knocking many to the ground and beating them.<sup>4</sup> That day will be forever known as “Bloody Sunday.”<sup>5</sup>

President Lyndon B. Johnson recognized the dire situation exemplified by Bloody Sunday when he introduced the draft bill of the Voting Rights Act of 1965 (“the Act”).<sup>6</sup> Congress passed the Act to fulfill the Fifteenth Amendment’s guarantee against racial discrimination in voting.<sup>7</sup> Section 2 of the Act explicitly prohibits any voting qualification, or prerequisite to voting, or standard, practice, or procedure that results in a denial or abridgement of the right of any citizen to vote on account of race or color.<sup>8</sup>

Since the Act’s passage, Congress and the Supreme Court have repeatedly broadened the scope of the protection the Act confers.<sup>9</sup> Congress has amended the Act twice: first, to include language minorities within the Act’s protection,<sup>10</sup> and second, to clarify that those claiming protection under Section 2 need only show how a particular voting scheme would produce discriminatory results rather than having to prove the procedure was created with discriminatory intent.<sup>11</sup> The Supreme Court has also reinforced and expanded the Act’s

4. KOTZ, *supra* note 3, 282–84 (2005); *see also* Bruce Ackerman & Jennifer Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax*, 103 NW. U. L. REV. 63, 95–96 (2009) (“[T]he escalating voting rights campaign ... reached its climax on ‘Bloody Sunday’ March 7, when a peaceful march was shattered by a brutal display of police violence on the Edmund Pettus Bridge.”).

5. *See* Ackerman & Nou, *supra* note 4, at 95–96 (explaining that the “brutal display of police violence” that occurred on Bloody Sunday marked a pivotal point in the voting rights campaign). Many scholars consider Bloody Sunday as the catalyst that brought about the Voting Rights Act of 1965. *Id.* at 90; BRIAN K. LANDSBERG, *FREE AT LAST TO VOTE: THE ALABAMA ORIGINS OF THE 1965 VOTING RIGHTS ACT*, 148 (2007) (stating that the brutal attack on Bloody Sunday prompted the enactment of new legislation).

6. *See* 111 CONG. REC. 5059 (1965) (statement President Lyndon B. Johnson) (impressing upon Congress the egregious nature of the problem, its impact on the country and its population and the importance of passing legislation to correct it). The Act was enacted on August 6, 1965. *See* Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006 & Supp. 2012)). Once the Act was passed, President Johnson hailed it as “a triumph for freedom as huge as any victory that has ever been won on any battlefield.” Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act, 2 PUB. PAPERS 840, 840 (Aug. 6, 1965).

7. *See* ALEXANDER KEYSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 212 (2000) (noting that the Act was “a curious milestone” as it merely served to enforce the Fifteenth Amendment). 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,” and that “Congress shall have the power to enforce this article by appropriate legislation.” U.S. CONST. Amend. XV.

8. 42 U.S.C. § 1971(a) (2006).

9. *See infra* Part I.C.1–3 and accompanying text.

10. Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400 (codified as amended at 42 U.S.C. §§ 1973a to 1973bb-1 (2006 & Supp. 2012)).

11. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified in scattered sections of 42 U.S.C. (2006 & Supp. 2012)).

protection by upholding its constitutionality and broadly construing its terms, although with notable exceptions.<sup>12</sup>

Although the Act protects both African-Americans and language minorities, there is disagreement over whether those groups can aggregate to bring a suit under Section 2 of the Act. One scholar has noted that the expansion of the Act's scope to include language minorities created the potential for minorities to bring coalition suits.<sup>13</sup> Forty-five years after its enactment, circuits differ on whether the Act's contemplated "protected class" should be interpreted narrowly or broadly, and specifically, whether two minority groups can combine to form a "coalition suit"<sup>14</sup> to claim a Section 2 violation.<sup>15</sup> Plaintiff groups permitted to pursue an aggregate claim have been unable to satisfy the threshold factors required to state a voting dilution claim, as set forth by the Supreme Court in *Thornburg v. Gingles*—typically failing to meet the requirement that the coalition be politically cohesive.<sup>16</sup> The Supreme Court has reserved ruling on the matter thus far.<sup>17</sup>

This Note examines the origin and meaning of Section 2 of the Act to analyze whether permitting coalition suits is consistent with congressional intent. Part I analyzes the history of voting discrimination in America, the congressional intent behind Section 2 of the Act, and the Act's ultimate purpose. It also

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12. See *South Carolina v. Katzenbach*, 383 U.S. 301, 337 (1966) (upholding the constitutionality of various provisions of the Act, including Section 4(b)), *abrogated by* *Shelby County v. Alabama*, 133 S. Ct. 2612 (2013); *Chisom v. Roemer*, 501 U.S. 380, 384 (1991) (holding judicial elections are covered by Section 2 of the Act). Although the Supreme Court has typically construed the terms of the Act broadly, the Court has deviated from this pattern twice. First, in *Mobile v. Bolden*, the Court found that plaintiffs suing under the Act had to prove that the voting scheme in question was created with discriminatory intent. 446 U.S. 55, 78–79 (1980). Congress counteracted the Court's holding in *Bolden* by passing the 1982 Amendment. See *infra* notes 62–66 and accompanying text (discussing *Bolden* and the purpose of the 1982 amendment). Second, the Court invalidated Section 4(b) of the Act in *Shelby County v. Holder*, declaring the section unconstitutional because Congress did not update the coverage formula provided for by that section to account for the current state of affairs. 133 S. Ct. at 2631.

13. Aylon M. Schulte, *Minority Aggregation Under Section 2 of the Voting Rights Act: Towards Just Representation in Ethically Diverse Communities*, 1995 U. ILL. L. REV. 441, 442 (1995).

14. This Comment uses "coalition suit" and "aggregate class" interchangeably to refer to two minority groups that combine to bring a claim for a Section 2 violation.

15. Compare *Campos v. City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988) (holding that the law does not prevent African-Americans and Hispanics from aggregating to create one aggrieved minority group for the purposes of a section 2 claim) and *League of United Latin Am. Citizens, Council No. 4386 v. Midland Indep. Sch. Dist.*, 812 F.2d 1494, 1499–502 (5th Cir. 1987) (assuming African-American and Mexican Americans could aggregate to pursue a Section 2 claim), with *Nixon v. Kent Cnty.*, 76 F.3d 1381, 1392–93 (6th Cir. 1996) (holding that a textual analysis of Section 2 does not reasonably support allowing separately protected minorities to aggregate to bring suit).

16. See, e.g., *Grove v. Emison*, 507 U.S. 25, 41–42 (1993) (assuming aggregation was proper but concluding that the plaintiffs could not satisfy the political cohesion factor).

17. See *id.* at 41 (assuming *arguendo* that minority groups could aggregate to bring suit).

reviews caselaw setting out what factors courts should consider when determining whether a voting practice or procedure is discriminatory and the burden of proof a class must meet to show a violation. Part II explains that the circuits are currently divided on whether two minority groups can (1) aggregate to bring a cause of action under Section 2 and (2) whether such a coalition could ever satisfy the political cohesion requirement. Finally, Part III analyzes the circuit split and concludes that the Fifth Circuit's expansive interpretation of the Act—allowing minority groups to aggregate—best accords with the fundamental purpose and underlying congressional intent of the statute.

## I. TEARING DOWN THE WALLS: THE FIGHT FOR THE RIGHT TO VOTE<sup>18</sup>

### A. *Prior to the Act's Passage States Successfully Employed Various Discriminatory Voting Schemes*

*"[I]t is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates."*<sup>19</sup>

Although the Fifteenth Amendment gave all Americans the legal right to vote in 1870, for nearly a century thereafter states employed various discriminatory tactics and techniques to prevent African-American citizens from ever actually reaching the voting booth.<sup>20</sup> Although the Justice Department attempted to combat these voting equities, Department of Justice attorneys handled matters on a case-by-case basis—which in some cases took years to eliminate a single instance of discriminatory practice.<sup>21</sup> But every effort to combat voting

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18. See Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act, 2 PUB. PAPERS 841, 842 (Aug. 6, 1965) (describing the right to vote as "the most powerful instrument ever devised by man for breaking down injustice and destroying the terrible walls which imprison men").

19. Commencement Address at Howard University: "To Fulfill These Rights," 2 PUB. PAPERS 635, 636 (June 4, 1965).

20. S. REP. NO. 97-417, at 114–15 (1982); 111 CONG. REC. 5059 (1965) (statement of President Lyndon B. Johnson) (noting that "every device of which human ingenuity is capable has been used to deny [African-Americans the right to vote]"); 111 CONG. REC. 8296 (1965) (statement of Senator Michael Mansfield) ("[I]n spite of the efforts to enforce previous legislation, discriminatory tests and devices are still with us. . . . Indeed, new forms of discrimination are being devised and applied as quickly as old ones are invalidated by the courts.").

21. S. REP. NO. 97-417, at 5 ("The enforcement of the law could not keep up with the violations of the law."); H.R. REP. NO. 97-227, at 3–4 (1981). For instance, in 1961 the Justice Department examined voting records in Dallas County, Alabama and found that sixty-four percent of the 14,500 white citizens were registered to vote, compared to only one percent of the 15,000 African-American citizens, all due to discriminatory voting practices. HUDSON, *supra* note 3, at 60. In 1965, an Alabama appeals court finally struck down the use of a discriminatory literacy test but took 4 years to complete the process. *Id.* (noting that only 383 of 15,000 African-American citizens were registered to vote prior to the court's decision).

discrimination was counteracted by states engaging in creative new ways to prevent or dilute the African-American vote.<sup>22</sup>

Some states enacted voting rules and procedures that were extremely difficult to comply with, such as literacy tests designed to result in failure,<sup>23</sup> and poll taxes, which disenfranchised thousands of poor minority citizens.<sup>24</sup> More subtle discriminatory voting practices included adopting a multimember or at-large voting system, in which voters were permitted to choose a candidate in all open races, rather than in only their district.<sup>25</sup> Multimember voting systems tend to allow the majority to exert much greater influence in the election.<sup>26</sup>

The Act was met with substantial resistance.<sup>27</sup> In fact, over the years between Reconstruction and the passage of the Act, the disenfranchisement of blacks was

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22. See S. REP. NO. 97-417, at 6. Some states gerrymandered districts to spread and minimize the African-American vote while others would “pack” all the African-American votes into one district to ensure the minority group could not elect more than one representative in an entire state. See Pamela S. Karlan, *All Over the Map: The Supreme Court’s Voting Rights Trilogy*, 1993 SUP. CT. REV. 245, 250 (1993) (defining packing as a strategy in which district lines are drawn such that a few districts have high percentages of a minority group and the rest have lower percentages of that minority group and therefore minority candidates tend to win in the few concentrated districts but the minority vote is diluted in the rest of the surrounding districts); CHARLES L. ZELDEN, *VOTING RIGHTS ON TRIAL*, 74–75 (2002) (listing a variety of ways that states employed to dilute the African-American vote and dissuade African-Americans from voting).

23. See HUDSON, *supra* note 3, at 60 (explaining that the Alabama literacy test, for example, asked voters questions regarding military appropriations, piracy, and congressional procedure). In fact, most of the difficult literacy tests were installed in southern states only *after* the Fifteenth Amendment gave African-Americans the right to vote. See *id.* at 61.

24. Atiba R. Ellis, *The Cost of the Vote: Poll Taxes, Voter Identification Laws, and the Price of Democracy*, 86 DENV. U. L. REV. 1023, 1041–42 (2009). Ranging from \$1.00 to \$2.00 a year, poll taxes were burdensome for impoverished citizens. *Id.* The Twenty-Fourth Amendment was passed to prohibit poll taxes in federal elections in 1964. KEYSSAR, *supra* note 7, at 218.

25. See *Rogers v. Lodge*, 485 U.S. 613, 616 (1982) (noting that at-large voting systems reduce minority groups’ voting strength by increasing likelihood that the political majority will prevail in the election); see also George Bundy Smith, *The Multimember District: A Study of the Multimember District and the Voting Rights Act of 1965*, 66 ALB. L. REV. 11, 11 (2002) (explaining that multimember districting is another method used to impede African-American citizens’ right to vote). These voting schemes were effective in decreasing minority voter participation in the early part of the twentieth century. ZELDEN, *supra* note 22 at 77 (citing various statistics indicating a drastic decrease in both voter registration and turnout among African-American citizens in many southern states).

26. See *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965). The Court explained that the issue of the constitutionality of multimember districts was not presented in *Dorsey*, but warned that such a scheme could possibly “operate to minimize or cancel out the voting strength of racial or political elements of the voting population.” *Id.*; see also Robert Barnes, Comment, *Vote Dilution, Discriminatory Results, and Proportional Representation: What is the Appropriate Remedy for a Violation of Section 2 of the Voting Rights Act?*, 32 UCLA L. REV. 1203, 1204 n.6 (1985) (noting that the Supreme Court has acknowledged that at-large voting systems can be discriminatory, but has never held that they are per se unconstitutional).

27. See HUDSON, *supra* note 3, at 62 (explaining that the Act faced “heated” opposition). Opponents raised many arguments against the Act’s passage, including that the Civil Rights Act of 1964, was adequately dealing with the voting issues and thus passing the Act was too hasty. *Id.* at

supported at times by advanced legal thinkers and others who feared that giving blacks the power to vote would enable them to seek revenge on white communities.<sup>28</sup> Additionally, white supremacy and racial discrimination pervaded the attitudes of the American people for decades.<sup>29</sup> Dr. Martin Luther King, Jr. and other civil rights leaders actively campaigned to draw national attention to voting inequities not only for African-Americans, but also for all who experienced injustice at the hands of the majority.<sup>30</sup> As a result of these campaigns, the American people could no longer ignore the depth of discrimination minority citizens faced in the South, and moved Congress to make a national change—the Voting Rights Act of 1965.<sup>31</sup>

### B. *The Passage of the Act*

*“Because all Americans just must have the right to vote. And we are going to give them that right.”<sup>32</sup>*

On August 6, 1965, President Lyndon B. Johnson signed the Voting Rights Act to combat the long-standing inadequacies of the voting process.<sup>33</sup> The means of accomplishing the Act’s goal of increased voter participation were two-fold: (1) to eliminate the historical practices and procedures that had

62–65. Opponents also argued that the Constitution reserved the right to determine voter qualifications for the states. *Id.* at 64 (noting that businessmen, members of Congress, and academics alike supported denying African-Americans the right to vote).

28. See LANDSBERG, *supra* note 5, at 11–12; see also KEYSSAR, *supra* note 7, at 70–74. In the 1880s African-American scholar George W. Williams noted that although it was certainly unfortunate that African-Americans could not participate in the political system, such a result could not be avoided. LANDSBERG, *supra* note 5, at 11.

29. See LANDSBERG, *supra* note 5, at 21–23. For instance, U.S. Senator Bilbo of Mississippi was investigated but found without fault for “call[ing] on every red-blooded white man to use any means to keep the [offensive racial slur] away from the polls.” *Id.* at 22. The U.S. Senate committee investigating him found “nothing objectionable in those words . . . Bilbo did nothing further than earnestly and sincerely seek to uphold Mississippi law, custom, and tradition.” *Id.*

30. Ediberto Roman, *Coalitions and Collective Memories: A Search for Common Ground*, 58 MERCER L. REV. 637, 637 (2007) (quoting LANI GUINIER & GERALD TORRES, *THE MINER’S CANARY: ENLISTING RACE, RESISTING POWER AND TRANSFORMING DEMOCRACY* (2002)).

31. See *supra* notes 5–7 and accompanying text. Jim Crow laws exacerbated the problem by codifying segregation and discriminatory practices generally. Frances L. Edwards & Grayson Bennett Thompson, *The Legal Creation of Raced Space: The Subtle and Ongoing Discrimination Created Through Jim Crow Laws*, 12 BERKELEY J. AFR.-AM. L. & POL’Y 145, 145 (2010).

32. 111 CONG. REC. 5060 (1965) (statement of President Lyndon B. Johnson).

33. See Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006)). Upon the Act’s passage President Johnson noted, “[t]oday is a triumph for freedom as huge as any victory that has ever been won on any battlefield”. Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act, 2 PUB. PAPERS 409 (Aug. 6, 1965). Senators who drafted the Act hoped it would rejuvenate the Fifteenth Amendment and “not only . . . correct an active history of discrimination, . . . [but also] attempt to do something about accumulated wrongs and the continuance of the wrongs.” 111 Cong. Rec. 8295 (1965) (statement of Sen. Jacob Javits). The Act was considered by many to be a significant instrument for civil rights. See H.R. REP. NO. 97-227, at 3 (1981).

substantially hindered Blacks from voting;<sup>34</sup> and (2) to provide citizens with a private right of action to ensure that states would not find new ways to discriminate.<sup>35</sup>

The Act had an immediate impact throughout the nation, especially in the South, as barriers fell and minority voter registration began to increase—over one million black citizens registered to vote between 1965 and 1972.<sup>36</sup> Despite the increase in voter registration, Congress remained concerned that states would resort to other methods to dilute the strength of the minority vote.<sup>37</sup>

### C. Prior Changes to the Act's Scope

#### 1. Congressional Expansion of the Act to Language-Minority Groups

Since the Act's initial passage, Congress and the Supreme Court have both increased the protection the Act confers.<sup>38</sup> The Act originally protected only African-American citizens, but in 1975, Congress amended the Act to expand the class of citizens protected within its scope to include "language minority citizens"—citizens whose primary language is not English.<sup>39</sup> The amendment was promulgated based on a study by the U.S. Commission on Civil Rights, which determined after extensive research that "language minority citizens," similar to African-American citizens, suffered from high illiteracy rates and

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34. H.R. REP. NO. 97-227, at 4.

35. *Id.* Congress made clear that citizens have a private cause of action to enforce their rights under Section 2. 42 U.S.C. § 1973 (2006). During Senate hearings accompanying the bill, Senators noted that the Act's ultimate goal was to increase voter participation. 111 Cong. Rec at 8296 (1965) (statement of Sen. Mike Mansfield). Additionally, Section 5 requires states to seek federal approval before enacting any new voting qualification, prerequisite, practice or procedure. *See* *Allen v. Bd. of Elections*, 398 U.S. 544, 548-49 (1969).

36. S. REP. NO. 97-417, at 6 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 183; HUDSON, *supra* note 3, at 65 (describing the Act's effect on Southern states and the significant increase in African-American voting registration after its passage).

37. *See* S. REP. NO. 94-295, at 16-17 (1975), *reprinted in* U.S.C.C.A.N. 774, 782-83 (expressing concerns that states may resort to measures such as at-large elections or discriminatory redistricting plans to weaken minority voting power).

38. *See* *Allen v. State Bd. of Elections*, 393 U.S. 544, 565-66 (1969) (stating that "the Act gives a broad interpretation to the right to vote"). The Court held that the Act protects against both subtle and obvious regulations, and again "any state enactment" whatsoever that may have a disparate affect upon the voting power of a minority group. *Id.*

39. Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400 (codified as amended at 42 U.S.C. §§ 1973a to 1973bb-1 (2006 & Supp. 2012)). Language minorities include Hispanic-Americans, Asian-Americans, American Indians, and Alaska Natives. S. REP. NO. 94-295, at 24-25 (noting that "[l]anguage minority citizens, like blacks throughout the South, must overcome the effects of discrimination as well as efforts to minimize the impact of their political participation."); Roman, *supra* note 30, at 651 (explaining how every large group of color in America has suffered oppression at some point, though the form and reason for the oppression has varied among groups). In discussing past instances of exclusion, Roman emphasized the need to focus on and evaluate the effect of oppression of a minority group rather than the reasoning or basis for it. *Id.*

language impediments that denied a large proportion of minority groups participation in the voting process.<sup>40</sup>

Even prior to the 1975 amendments, the Supreme Court implied that language minorities were protected.<sup>41</sup> In *Wright v. Rockefeller*, two minority groups brought a joint claim alleging that a New York redistricting plan violated Section 2 of the Act.<sup>42</sup> Although the two minority groups did not succeed on the merits of their claim, the Court implicitly condoned suits by language minorities and further, condoned coalition suits by allowing the language minority to aggregate with a group of black citizens to bring the claim.<sup>43</sup>

## 2. Congress' Clarification of the Proper Burden of Proof

In the past, even where the Supreme Court has broken with its liberal interpretation of the Act, Congress has typically stepped in to remedy the situation.<sup>44</sup> In 1980, the Court took a drastic turn from its liberal interpretation of the statute in *City of Mobile v. Bolden* by requiring actual proof of discriminatory purpose, thereby substantially increasing the burden on plaintiffs in voting discrimination cases.<sup>45</sup> In 1982, Congress amended Section 2 of the Act in direct response to *Bolden*.<sup>46</sup> Congress believed the "intent test"

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40. S. REP. NO. 94-295, at 25–26. In evaluating the Act's effectiveness of combating voting discrimination, the congressional subcommittee found considerable evidence of barriers to voting faced by minority-language citizens, including high illiteracy rates and the disparate effect of language barriers on registration. *Id.* at 25. Even more troubling, the Committee also found evidence of intimidation at the polls, denial of equal education, and discrimination in "almost every facet of life"—all too similar to the same issues faced by African-Americans in the South ten years prior. *Id.* at 28–29.

41. See *Wright v. Rockefeller*, 376 U.S. 52, 57–58 (1964); see also *White v. Regester*, 412 U.S. 755, 769 (1973) (holding that a multi-member election scheme for the election of state legislators impermissibly and unconstitutionally diluted the Mexican-American and African-American vote). Various other federal courts also allowed non-African-American minorities to bring Section 2 claims. See *Coal. for Educ. Dist. One et al. v. Bd. of Elections of N.Y.*, 495 F.2d 1090, 1093 (2d Cir. 1974) (upholding District Court's finding that certain school board election procedures was invalid under the Voting Rights Act, because they had a disparate impact on African-American, Hispanic, and Chinese voters); *Torres v. Sachs*, 381 F. Supp. 309, 312–13 (S.D.N.Y. 1974) (holding that Puerto Rican citizens were denied their "right to vote" when New York City election procedures were only conducted in English).

42. *Wright*, 376 U.S. at 57–58.

43. See *id.*

44. See *City of Mobile v. Bolden*, 446 U.S. 55, 69–70 (1980); S. REP. NO. 97-417, at 15–17 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 192–94 (explaining that the 1982 amendments were intended to counteract the Supreme Court's holding in *Bolden*).

45. 446 U.S. at 69–70; see also S. REP. NO. 97-417, at 25–26 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 202–03 ("A fair reading of *Bolden* reveals that the plurality opinion was a marked departure from earlier Supreme Court and lower court vote dilution cases."); Howard S. Scarow, *Vote Dilution, Party Dilution, and the Voting Rights Act*, in *THE U.S. SUPREME COURT AND THE ELECTORAL PROCESS* 50 (David K. Ryden ed., 2d ed. 2002) (noting that *Bolden* increased the evidentiary standard by requiring plaintiffs to prove intent to discriminate).

46. S. REP. NO. 97-417, at 15–17 (explaining that the 1982 amendment to the Act was meant to specifically counter the Court's holding in *Bolden* because it placed "an unacceptably difficult

promulgated by *Bolden* focused on the “wrong question” and placed an “unacceptable burden” upon plaintiffs attempting to prove a Section 2 violation.<sup>47</sup>

Instead, Congress declared that the amendment would allow plaintiffs to succeed on a voting discrimination claim if the plaintiffs establish discriminatory results.<sup>48</sup> The results test does not require plaintiffs to prove the actual intent of the legislators, which would have been an “unacceptable” and impossible burden for plaintiffs.<sup>49</sup> The Court first articulated the results test in *White v. Regester*.<sup>50</sup> The results test requires plaintiffs to show how a seemingly fair voting or electoral scheme was really not equally open to minority groups, the result therefore being, less opportunity for the minority groups to vote for the legislators of their choice.<sup>51</sup> The Court in *White* declared that the fact that a

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burden on plaintiffs”); KEYSSAR, *supra* 7, at 293 (noting that Congress amended the Act in response to *Bolden*). The Senate Report accompanying the amendment observed that, after *Bolden*, plaintiffs were unable to meet the new burden of proof and attorneys stopped filing voting dilution suits. S. REP. NO. 97-417, at 16, 26; *see also* Schulte, *supra* note 13, at 447 (discussing the decrease in vote dilution suits after the *Bolden* decision).

47. S. REP. NO. 97-417, at 16; *see also* *Voting Rights: Hearings on S. 1565 Before the Comm. on the Judiciary*, 89th Cong., 191 (1965) (statement of Nicholas Katzenbach, Att’y Gen. of the United States) (“I had thought of the word ‘procedure’ as including any kind of practice of that kind if its purpose or effect was to deny or abridge the right to vote on account of race or color.”).

48. S. REP. NO. 97-417, at 28. Congress recognized that by eliminating the intent requirement, a state would be unable to negate a violation by stating a nonracial interest in the challenged practice or procedure. *See* Frederick G. Slabach, *Equal Justice: Applying the Voting Rights Act to Judicial Elections*, AFFIRMATIVE ACTION AND REPRESENTATION 378 (Anthony A. Peacock ed., 1997); *see also* M. Nycole Hearon, Comment, “We Got Next”: Will Texas Redistricting Dictate a Definitive Answer by the Supreme Court on Minority Aggregation Under Section 2 of the Voting Rights Act? 7 SCHOLAR 71, 75 (2004) (explaining how “[t]he ‘effects test,’ unlike the ‘intent test,’ did not require proof of discriminatory intent to establish a Section 2 violation.”); Rick G. Strange, *Application of Voting Rights Act to Communities Containing Two or More Minority Groups: When is the Whole Greater than the Sum of Its Parts?* 20 TEX. TECH. L. REV. 95, 102 (1989) (noting the three reasons stated in the Senate Judiciary Committee for rejecting the intent test: (1) “it is unnecessarily divisive because it involves charges of racism on the part of individual officials or communities”; (2) “it places an inordinately difficult burden of proof on plaintiffs” and (3) “it asked the wrong question”).

49. S. REP. NO. 97-417, at 27–29.

50. 412 U.S. 755, 765–66 (1973).

51. *See* *Thornburg v. Gingles*, 478 U.S. 30, 46 (1986). The most relevant factors that plaintiffs could use to establish a violation, include:

- (1) The extent of any history of official discrimination in the state . . . 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 . . . is racially polarized;
- (3) the extent to which the state . . . 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) [. . .] whether members of minority group have been denied access [to a candidate slating] process;
- (5) the extent to which members of the minority group . . . 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

racial group does not hold proportional seats in office is not dispositive of discrimination and that an additional showing is required, but Congress has noted that lack of proportionality can be relevant to the discrimination inquiry.<sup>52</sup> Thus, by adopting a lower burden of proof, Congress gave minority groups a realistic means of alleging a voting rights violation under Section 2.<sup>53</sup>

### 3. *The Supreme Court's Treatment of the Act*

Initially the Supreme Court played a strong role in enforcing the Act's prohibitions and solidifying its constitutionality.<sup>54</sup> In 1966, a year after the Act was enacted, the Supreme Court affirmed the constitutionality of the Voting Rights Act in *South Carolina v. Katzenbach*.<sup>55</sup> In *Katzenbach*, South Carolina filed suit against the United States, claiming the Act was unconstitutional and seeking an injunction against the Attorney General's enforcement of various provisions of the Act.<sup>56</sup> The Court held that the sections of the Act at issue are "an appropriate means for carrying out Congress' constitutional responsibilities" to enforce the Fifteenth Amendment and denied South Carolina's request for enjoinder.<sup>57</sup>

In *Chisom v. Roemer* the Court again broadly interpreted the Act's scope and held that the Act applied to the election of judges even though Section 2 of the

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political campaigns have been characterized by overt or subtle racial appeals; (7) extent to which members of the minority group have been elected to public office in the jurisdiction.

S. REP. NO. 97-417, at 28–29 (citations omitted). The report also listed additional factors that have had probative value, such as the responsiveness of officials to the needs of minority groups. *Id.* at 29. In *White*, the Court upheld a district court's finding that the multimember district at issue effectively excluded Mexican-Americans from the political process "in light of [the district's] past and present reality, political and otherwise." *White*, 412 U.S. at 769–70.

52. *White*, 412 U.S. at 765–66; H.R. REP. NO. 97-227, at 30 (1981) (noting that while the amendment does not create a right to it, proportional representation, or lack thereof, can be a "highly relevant" factor in the Section 2 analysis). Although Congress embraced the results test in the 1982 amendment, it explicitly stated that the amendment does not *guarantee* proportional representation. 42 U.S.C. § 1973(b) (2006); *Johnson v. De Grandy*, 512 U.S. 997, 1000 (1994) (holding that although the proportion of elected minority representatives is not dispositive to a section 2 violation, it is certainly a relevant factor); *United States v. Marengo Cnty. Comm'n*, 731 F.2d 1546, 1560 n. 24 (11th Cir. 1984) (explaining that states are not required to adopt proportional representation, but there must be significant opportunities for minority participation).

53. *See Strange*, *supra* note 48, at 102.

54. *See, e.g., South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966) (detailing the Court's role in enforcing civil rights legislation), *abrogated by Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).

55. *Id.* at 308 (emphasizing how the implementation and enforcement of the Voting Rights Act is within the constitutional power of Congress, which supersedes any opposition by the states, and therefore holding that South Carolina's request for enjoinder is forcibly denied).

56. *Id.* at 307.

57. *Id.* at 308. The Court further explained that Congress's means of protecting suffrage supersedes any powers reserved by the states. *Id.* at 324.

Act only referred to the election of “representatives.”<sup>58</sup> In coming to its decision, the Court noted that the Act should be interpreted as broadly as possible to fulfill its remedial goal of eliminating racial discrimination in this country.<sup>59</sup> The Court further explained that, had Congress wanted to exclude judicial elections from the scope of the Act, it would have done so, or at the very least, mentioned it during the amending process.<sup>60</sup>

Even when the Supreme Court has departed from its trend of broadly interpreting the Act, Congress has typically reaffirmed the Act’s protection through the amendment process.<sup>61</sup> In *Mobile v. Bolden*, the Court found that necessary element of a plaintiff’s cause of action under Section 2 required proof of a racially discriminatory motivation (that is to say, proof of *intent*).<sup>62</sup> In *Bolden*, the plaintiffs, a group of black citizens, alleged that an at large election scheme unfairly diluted their voting strength.<sup>63</sup> The district court and the Court of Appeals found black vote dilution, a history of voting discrimination, and questionable voting practices, and therefore invalidated the at-large voting scheme.<sup>64</sup> However, the Supreme Court reversed, holding that because the plaintiffs were technically able to “register” and “vote,” there were no official barriers to the election of a black citizen to the commission.<sup>65</sup> The Court’s holding in *Bolden* was superseded by congressional amendment in 1982, confirming that “results,” rather than intent, were the proper focus for Section 2.<sup>66</sup>

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58. *Chisom v. Roemer*, 501 U.S. 380, 395–96 (1991). Section 2(b) states that a violation of Section 2 occurs if the election process is not equally available to a protected class “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.” 42 U.S.C. § 1973(b) (2006) (emphasis added).

59. *Chisolm*, 501 U.S. at 403–04 (citing *Allen v. State Bd. of Elections*, 393 U.S. 544, 567 (1969)) (listing, further, various examples where the Act had been broadened by interpretation or express legislation and emphasizing how the Act should be interpreted in a manner that provides the “broadest possible scope”).

60. *Id.* at 395–96. The Court further noted that, given the past broad interpretations of the Act by the Court and congressional efforts to broaden the scope of the Act’s protection, its similarly broad interpretation in the present case was logically warranted. *Id.* at 404.

61. See S. REP. NO. 97-417, at 15–17 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 192–94 (stating that Congress has the constitutional authority to remove the intent requirement from Section 2).

62. See *Bolden v. City of Mobile*, 423 F. Supp. 384, 393–94 (S.D. Ala. 1976), *aff’d*, 571 F.2d 238 (5th Cir. 1978), *rev’d*, 446 U.S. 55 (1980).

63. *Bolden*, 446 U.S. at 58.

64. *Id.*

65. *Id.* at 73. With respect to the effects versus the results of the scheme, the Court held that “disproportionate impact alone cannot be decisive, and courts must look to other evidence to support a finding of discriminatory purpose.” *Id.* at 70; see also *United States v. Blaine Cnty.*, 363 F.3d 897, 909 (9th Cir. 2004) (holding that proving a Section 2 violation does not require a showing of intent to discriminate).

66. S. REP. NO. 97-417, at 15–17 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 192–94.

#### D. Section 2 and the Gingles Test

After Congress shifted the focus of a Section 2 claim from proof of intent to proof of discriminatory results, the Supreme Court established a three-part test in *Thornburg v. Gingles*, which plaintiffs seeking Section 2 protection the Act must meet.<sup>67</sup> For a Section 2 claim that a multimember or at-large districting plan diluted the minority vote, the plaintiffs must establish: (1) the minority group is “sufficiently large and geographically compact to constitute a majority in a single-member district”; (2) the minority group is “politically cohesive”; and (3) the minority must show “that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances . . . usually to defeat the minority’s preferred candidate.”<sup>68</sup>

For a Section 2 violation, a court must find “that the political processes . . . are not equally open to participation by [a minority group]” because a minority group has “less opportunity than other members of the electorate to participate” in the election.<sup>69</sup> Because the majority of Section 2 claims allege vote dilution,<sup>70</sup> strong familiarity with the three factors of the *Gingles* threshold test is necessary to gain a thorough understanding of what constitutes a Section 2 violation.

##### 1. First Gingles Factor: The Minority-Majority Test

The first factor of the *Gingles* test is relatively straightforward and only requires a determination of whether the minority group is “sufficiently large and geographically compact to constitute a majority in a single-member district.”<sup>71</sup> “Majority” is typically considered to mean greater than fifty percent.<sup>72</sup> In *Gingles*, the Supreme Court explained that the initial “minority-majority” inquiry acts as a gatekeeper in that it requires the minority group to have, at the very least, the ability to elect representatives in the relevant

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67. See 478 U.S. 30, 50–51 (1986).

68. *Id.*

69. 42 U.S.C. § 1973(b) (2006); see also *Zimmer v. McKeithen*, 485 F.2d 1297, 1304 (5th Cir. 1973) (en banc) (declaring that plaintiffs could succeed on a vote dilution claim by proving either intent or discriminatory results). The Senate looked to the *Zimmer* case when establishing factors indicative of discrimination. See S. Rep. No 97-417, at 23 (discussing the *Zimmer* opinion and its impact on subsequent voting dilution cases).

70. Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643, 650 (2006).

71. 478 U.S. at 50; see also *Pope v. Cnty. of Albany*, 687 F.3d 565, 575 (2d Cir. 2012) (quoting *Gingles*, 478 U.S. at 50).

72. *Pope*, 687 F.3d at 575; see also *Bartlett v. Strickland*, 556 U.S. 1, 18 (2009) (stating that the majority-minority rule requires that the minority group show that it comprises at least fifty percent of the voting age population in the relevant district); *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1019 (8th Cir. 2006) (determining that only a simple majority, not a super-majority, is needed to satisfy the first *Gingles* factor).

district.<sup>73</sup> Because the first factor is only a threshold question, it is satisfied if the minority group is large enough to constitute a simple majority of the population in the relevant area.<sup>74</sup>

2. *Second Gingles Factor: “Politically Cohesive”*

Courts differ on how to interpret the “political cohesion” factor.<sup>75</sup> The factor’s purpose is to establish that the challenged election procedure or practice is the cause of the minority group’s inability to participate in the process.<sup>76</sup> As the Supreme Court explained in *Gingles*, “if the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure [or other procedure] thwarts distinctive minority group interests.”<sup>77</sup> Political cohesion and the third requirement, majority bloc voting, are often established in tandem through statistical evidence.<sup>78</sup> The minority group must be evaluated as a whole “if one part of the group cannot be expected to vote with the other part, the combination is not cohesive.”<sup>79</sup> In sum, a minority group that votes together is politically cohesive.<sup>80</sup>

For minority groups who seek to aggregate, political cohesion is the most difficult factor to establish.<sup>81</sup> Proponents of minority aggregation criticize this requirement because may be many diverse groups within a minority community.<sup>82</sup>

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73. 478 U.S. at 50 n.17 (“Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that statute or practice.”).

74. *Gingles*, 478 U.S. at 50 (explaining that the purpose of the first *Gingles* inquiry is “to prove that a solution is possible, and not necessarily to present the final solution to the problem.”); *Bone Shirt*, 461 F.2d at 1019 (quoting *Dickinson v. Ind. State Election Bd.*, 933 F.2d 497, 503 (7th Cir. 1991)).

75. Jack Quinn, Jonathan B. Sallet & Donald J. Simon, *Congressional Redistricting in the 1990s: The Impact of the 1982 Amendments to the Voting Rights Act*, 1 GEO. MASON U.C.R.L.J. 207, 217–18 (1990) (explaining the various approaches taken by different circuits to the political cohesion inquiry).

76. *Gingles*, 478 U.S. at 51 (defining the second factor of the *Gingles* test).

77. *Id.*

78. *See id.* at 56 (explaining that both the political cohesion factor and the minority bloc voting factor can be established by demonstrating that minority group members typically cast ballots for the same candidate).

79. *Campos v. City of Baytown*, 840 F.2d 1240, 1245 (5th Cir. 1988).

80. *Id.* at 1244.

81. *See Schulte, supra* note 13, at 484 (arguing that aggregation of different heritages should be allowed despite the difficulty in proving political cohesion).

82. *See* Chelsea J. Hopkins, Comment, *The Minority Coalition’s Burden of Proof Under Section 2 of the Voting Right Act*, 52 SANTA CLARA L. REV. 623, 647-48 (2012) (citing Asian-Americans as a group with divergent political views due to differences in age and cultural, and the potential lack of Asian-American candidates). Proving political cohesion is thus difficult for minority groups that seek protection under the Act, but are made up of many smaller populations. *Id.*

### 3. *Third Gingles Factor: Majority Bloc Voting*

The third and final factor of *Gingles* requires a showing that the white majority votes as a bloc, generally enabling it to, absent any special circumstances, to defeat the minority group's candidate of choice.<sup>83</sup> The Court clarified that plaintiffs are not required to show intent or causation to establish the existence of a legally significant racial bloc voting.<sup>84</sup> This requirement can be satisfied through statistical analysis of voting patterns and the study of elections.<sup>85</sup> The existence of bloc voting is significant because it establishes that the minority community is politically cohesive and unable to elect their preferred representatives.<sup>86</sup> Proving the existence of racially polarized voting is essential to a plaintiff's case.<sup>87</sup>

The *Gingles* Court also clarified that a state cannot rebut a plaintiff's prima facie case of racially polarized voting with a showing of intent or causation.<sup>88</sup>

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83. *Gingles*, 478 U.S. at 51.

84. *See id.* at 74. The Court stated, however, that the candidate's race is irrelevant to the analysis. *Id.* at 67. Additionally, previous elections may need to be studied to determine if a pattern of racially polarized elections has occurred in the past and continues into the present. *Id.* at 57 & n.25.

85. *See id.* at 52 (explaining that the district court relied primarily on statistical evidence to determine whether racial bloc voting was occurring). Although North Carolina argued that the racial bloc voting at issue occurred naturally as a result of the differing values and socioeconomic classes of African-American and white voters, the Court in *Gingles* rejected this argument. *Id.* at 66. Both minority and majority would often vote for people of their own race or class. *Id.* at 68. The Court elaborated on the dichotomy of this argument:

We can find no support in either logic or the legislative history for the anomalous conclusion to which appellants' position leads—that Congress intended, on the one hand, that proof that a minority group is predominately poor, uneducated, and unhealthy should be considered a factor tending to prove a §2 violation; but that Congress intended, on the other hand, that proof that the same socioeconomic characteristics greatly influence black voters' choice of candidates should destroy these voters' ability to establish one of the most important elements of a vote dilution claim.

*Id.* at 67.

86. *Id.* at 68. Plaintiffs bear the burden of proving the existence of racial bloc voting. *Id.* at 46.

87. Stephen Ansolabehere, Nathaniel Persily & Charles Stewart III, *Race, Region, and Vote Choice in the 2008 Election: Implications for the Future of the Voting Rights Act*, 123 HARV. L. REV. 1385, 1387, 1392 (2010) (examining data from the 2008 primary and general elections to assess the geographic patterns of voting behavior to determine whether racially polarized voting is key to litigation under Section 2 of the VRA).

88. *Gingles*, 478 U.S. at 74. The Court explained that causation and intent are irrelevant to the inquiry. *Id.* at 63. The Court noted that racially polarized voting "means simply that the race of voters correlates with the selection of a certain candidate or candidates; that is, it refers to a situation where different races (or minority language groups) vote in blocs for different candidates." *Id.* at 62. As part of its analysis the Court rejected the defendants' argument that racially polarized voting is defined by voting choice "caused by race," i.e., made because the voter was black, white, or a particular language minority, and not based on "the voter's other socioeconomic characteristics." *Id.* at 63–64. Instead, the Court emphasized that "[i]t is the *difference* between the choices made by blacks and whites—not the reasons for that difference—that results in blacks

*Gingles* dealt specifically with the discriminatory use of multi-member districts, but the Supreme Court expanded the scope of the *Gingles* holding in *Lulac v. Perry*, applying the *Gingles* test to other voting practices and procedures.<sup>89</sup> While the *Gingles* decision confirmed that the proper inquiry under Section 2 should focus on the “results” of a particular voting scheme as opposed to “intent” behind its employment,<sup>90</sup> it left many other questions unanswered—such as whether two different minority groups can aggregate to state a claim under Section 2 and pass the *Gingles* test.<sup>91</sup>

Section 2 of the Act continues to be a major deterrent to all types of voting rights discrimination.<sup>92</sup> Voting practices leading to Section 2 suits include voting dilution claims, standards for candidate selection, irregularities with registration, polling, and vote counting, and creating voting districts.<sup>93</sup> Justice Ginsburg recently noted the change in Voting Rights cases from “first-generation barriers to ballot access” in 1965 to “second-generation barriers” in the twenty-first century such as racial gerrymandering, and the continual need for the Voting Rights Act to combat them.<sup>94</sup> The issue is becoming increasingly relevant as potentially subtle discriminatory schemes,

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having less opportunity than whites to elect their preferred representatives.” *Id.* at 63. In rejecting appellants’ definition, the Court explained that socioeconomic characteristics tend to overlap with race in insular minority groups, especially where race was the cause of socioeconomic status due to past discrimination, and thus appellant’s definition further entrenches discrimination by allowing defendants to beat the test every time a group’s voting pattern is explicable on socioeconomic grounds other than race. *Id.* at 64–65.

89. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 442 (2006) (holding that the state’s redistricting plan, in the totality of the circumstances, operated to purposely dilute the Latino voting power in the district after a Latino candidate had almost won the last congressional election).

90. *Gingles*, 478 U.S. at 71–74.

91. *See* KEYSSAR, *supra* note 7, at 294 (explaining that many of the terms used by the *Gingles* Court in its test were left undefined, such as “majority,” “cohesive,” and “geographic compactness”).

92. *See* S. REP. NO. 97-417, at 30 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 207 (noting that Section 2 is the foundation for protecting minority groups against barriers to voting). The Senate report accompanying the 1982 amendments to the Act further asserted that, in contrast to the plurality in *Bolden*, Section 2 is directed at *all* types of voting discrimination, including vote dilution. *Id.* at 30 n.120; *see also Gingles*, 478 U.S. at 45 (discussing the Senate report and the fact that the report makes clear that Section 2 prohibits voting discrimination of all types).

93. 3 JOSEPH G. COOK & JOHN L. SOBIESKI, JR., *CIVIL RIGHTS ACTIONS* 18-18 to 18-19 (2006); *see also* *Arakaki v. Hawaii* 314 F.3d 1091, 1098 (9th Cir. 2002) (holding that a statute requiring trustees of the Office of Hawaiian Affairs be citizens with Hawaiian ancestry violated Section 2); *Goodloe v. Madison Cnty. Bd. of Election Comm’rs*, 610 F.Supp. 240, 243 (S.D. Miss. 1985) (holding that the invalidation of predominantly African-American absentee votes violated Section 2); Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections and Common Law Statutes*, 160 U. PA. L. REV. 377, 378 (2012) (suggesting that “electoral arrangements that induce or sustain race-biased voting are vulnerable under Section 2”).

94. *See* *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2636 (2013) (Ginsburg, J., dissenting); *see also* Adam Liptak, *Justices Void Oversight Of States, Issue At Heart Of Voting Rights Act*, N.Y. TIMES, June 2013, at A1, A16.

such as voter identification laws, emerge throughout the country and as Section 2 is now the primary enforcing mechanism of the Voting Rights Act of 1965.<sup>95</sup>

## II. MINORITY COALITION SUITS UNDER SECTION 2 OF THE ACT

A minority coalition consists of two or more minority groups seeking to combine or aggregate as one plaintiff class under Section 2 of the Act.<sup>96</sup> The Supreme Court recently invalidated the Section 4 preclearance requirement of the Act in *Shelby County v. Holder*, but emphasized the importance of Section 2 as a permanent and nationwide prohibition against discriminatory voting practices.<sup>97</sup> The question of whether two minority groups can combine under Section 2 is thus important, not only as an embodiment of the original Act's purpose, but also as a promise of equal voting rights for future generations to come.<sup>98</sup>

### A. *The Minority View: Under A Narrow Interpretation of the Act Minority Coalitions Are Impermissible*

In *Nixon v. Kent County*, the Sixth Circuit prohibited Section 2 minority coalition suits as an unwarranted expansion of the Act's plain language.<sup>99</sup> The

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95. See Sarah Kellogg, *Voter ID Laws: Partisan Electioneering or Good Government?*, THE WASH. LAW., Sept. 2012, at 23–24 (reporting on the increasingly divisive issue of voter identification laws and noting that the issue, may ultimately be decided by the Supreme Court); *Shelby Cnty.*, 133 S. Ct. at 2636 (discussing “second generation” barriers to voting).

96. See Skinnell, *supra* note 2, at 363 (defining a “minority coalition” as occurring where two or more minority groups aggregate to claim the protection of the Voting Rights Act and challenge a voting practice or procedure under Section 2).

97. *Shelby Cnty.*, 133 S. Ct. at 2631 (“Our decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in § 2”). Justice Ginsburg dissenting from the Court's removal of the preclearance requirement stated, “[V]oting discrimination still exists; no one doubts that. . . . But the Court today terminates the remedy that proved to be best suited to block that discrimination.” *Id.* at 2633. She further noted that in its 2007 findings, Congress supported reauthorization of the Act to combat “second generation barriers” that existed as evidence of “continued discrimination” to equal voting rights. *Id.* at 2636. The Justice Department is filing suit against North Carolina, alleging that the state's new law requiring voters to show photo identification “violates the Voting Rights Act by discriminating against African-Americans.” See Josh Gerstein, *Justice Department Challenges North Carolina Voter ID Law*, POLITICO (Sept. 30, 2013 1:04 PM) <http://www.politico.com/story/2013/09/justice-department-north-carolina-voter-id-law-97542.html>. Attorney General Eric Holder stated the Justice Department intends to show how these changes “would contract the electorate and result in unequal access to participation in the political process on account of race.” *Id.*

98. See Jamelle Bouie, *Voting Rights Act Decision Poses A Crucial test for Republicans*, THE DAILY BEAST (June 26, 2013, 4:45 AM), <http://www.thedailybeast.com/articles/2013/06/26/voting-rights-act-decision-poses-a-crucial-test-for-republicans.html> (discussing how, after the Supreme Court struck down Section 4, states are moving to enforce voter-ID laws and other controversial voting laws that may disproportionately affect minority voters).

99. See *Nixon v. Kent Cnty.*, 76 F.3d 1381, 1386–88 (6th Cir. 1996) (performing a strict statutory interpretation and textual analysis of Section 2 and concluding that coalition suits are not permissible).

majority explained that the plain language of the statute “does not mention minority coalitions, either expressly or conceptually;” furthermore, the statutory language in Section 2(a) speaks of “a *class* of citizens” in the singular tense.<sup>100</sup> The court explained that if Congress had intended to allow such coalition suits, the statute would have been written to read “participation by members of *the classes* of citizens protected by subsection (a),” as opposed to referencing only a single class.<sup>101</sup>

The court reasoned that any departure from the plain meaning of the statute is appropriate only “when the statutory language is ambiguous” or when the result of a literal application would run counter to congressional intent.<sup>102</sup> The majority found that the language of Section 2 was unambiguous and—in the absence of any direct evidence suggesting that Congress intended to allow aggregation—there was no ground for deviating from the clear language of the statute.<sup>103</sup>

The *Nixon* majority distinguished the expansive interpretive trend begun in *Chisom v. Roemer* by arguing that the previous versions of the Act had covered judicial elections while neither the earlier versions of the Act nor its legislative history noted the possibility of coalition suits.<sup>104</sup> Furthermore, in response to the

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100. *Id.* at 1386 (quoting 42 U.S.C. § 1973(b) (2006)) (emphasis added). The majority stated coalition suits were a “fundamentally different kind of protection never contemplated by Congress.” *Id.* at 1393.

101. *Id.* at 1386; *see also* League of United Latin Am. Citizens, Council No. 4434 v. Clements, 999 F.2d 831, 894 (5th Cir. 1993) (Jones, J., concurring) (noting that “customary legal analysis” dictates that the Act does not support the minority coalition theory in part because “[b]y negative inference, Congress did not envision that each defined group might overlap with any of the others or with blacks”).

102. *Nixon*, 76 F.2d at 1386 (6th Cir. 1996) (quoting *Kelley v. E.I. DuPont de Nemours & Co.*, 17 F.3d 836, 842 (6th Cir. 1994)). The court noted that neither party argued that the legislative history of the Act directly supported the idea that Congress had considered whether minority groups could aggregate to bring suit. *Id.* at 1387. Critics of aggregation propose that the Act’s silence with respect to aggregation indicates congressional intent not to allow minority coalitions. Skinnell *supra* note 2, at 365 (arguing that minority group aggregation should not be permissible under the Act but proposing that minority groups should seek remedy from the Equal Protection Clause). *But see Nixon*, 76 F.3d at 1395 (Keith, J., dissenting) (citing *Wright v. Rockefeller*, 376 U.S. 52 (1964) (allowing claim brought by Hispanics and African-Americans prior to passage of Act)). The majority agreed with Judge Higginbotham, who argued in his dissent in the denial of rehearing in *Campos* that “[a] statutory claim cannot find its support in the absence of prohibitions” of coalition suits. *Nixon*, 76 F.3d at 1388 (quoting *Campos v. City of Baytown*, 849 F.2d 943, 945 (5th Cir. 1988) (Higginbotham, J., dissenting)).

103. *Nixon*, 76 F.3d at 1386–88. The majority concluded that because the statutory text was unambiguous, it was not necessary or proper to look to legislative history and the court must decide consistent with the plain meaning of the text. *Id.* at 1387, 1390.

104. *Id.* at 1388–90. *But see* *Wright v. Rockefeller*, 376 U.S. 53, 53, 58 (1964) (allowing, prior to the passage of the Act, a minority coalition suit to challenge an “irrational, discriminatory and unequal” redistricting plan, but affirming dismissal of the complaint because plaintiffs had failed on merits of claim). In *Chisom*, the Supreme Court held that the judicial elections fell within the scope of the Act even though the Act’s language referred to elections of “representatives” as the

expansion of the Act in the 1975 and 1982 amendments, the *Nixon* court stated that Congress separately identified each minority as a “homogenous” unit that would not overlap with other protected groups.<sup>105</sup> Therefore, the court limited the Act’s application and coverage to only those classes explicitly referred to in the statutory text for fear that a broad application would usurp the role of the legislative branch.<sup>106</sup>

In support of its strict statutory interpretation approach, the *Nixon* majority addressed policy concerns associated with a broad application of the statute.<sup>107</sup> First, the court held that Congress did not make a finding on whether minority groups are discriminated against as an aggregate group.<sup>108</sup> Second, the court noted that “the coalition suit” could also be used to justify “packing” districts with two minority groups in order to undermine their interests.<sup>109</sup> Additionally, the court feared the effect allowing coalition suits would have on drawing district lines, as legislators would be unsure how to accommodate for one minority group or the combination of two groups when trying to follow the Act’s requirements.<sup>110</sup> Fourth, the court explained that permitting coalitions would effectively eliminate the first *Gingles* requirement by making it such an easy element to establish.<sup>111</sup> Allowing coalition suits poses significant risks for the statute’s effectiveness.<sup>112</sup> Finally, the court expressed concern that allowing coalition suits could change the Act’s purpose from preventing discrimination

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political processes the Act was designed to apply to. *Chisom v. Roemer*, 501 U.S. 380, 403–04 (1969).

105. *Nixon*, 76 F.3d at 1390 (quoting *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 894 (5th Cir. 1993) (Jones, J., concurring)).

106. *See id.* (stating that the law must be applied as it was written).

107. *See id.* at 1390–92 (analyzing various policy rationales for refusing to allow coalition lawsuits under the Act).

108. *See id.* at 1390–91 (noting that the fact that Congress has found that both minority groups have been discriminated against separately does not mean that they are discriminated against together).

109. *Id.* at 1391. The court reasoned that defendants could justify “packing” by arguing that minority groups in the districts that combined small portions of each minority could lump themselves together to form a coalition, glossing over the fact that these individual groups may not actually be politically cohesive and may have been better able to exert its influence if located in a district with a greater population of its individual group members. *Id.*

110. *Id.* (referring to the decisions involved in designing districts in a situation where coalitions are allowed as an “impossible puzzle”).

111. *Id.* (quoting *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986)).

112. *Id.* at 1392 (citing *Campos v. City of Baytown*, 849 F.2d 943, 945 (5th Cir. 1988) (Higginbotham, J., dissenting)). The majority cited Judge Higginbotham’s dissent in the *Campos* rehearing, in which he stated that:

A group tied by overlapping political agendas but not tied by the same statutory disability is no more than a political alliance or coalition . . . so stretching the concept of cohesiveness dilutes its effectiveness as a measure of the causal relationship among the statutory disability, election structures or processes, and election outcomes.

*Id.*

to advancing political interest groups and undermining the very meaning and purpose of democratic government.<sup>113</sup>

*B. The Majority View: The Functional and Holistic Approach to Interpreting the Acceptance of Aggregation Under the Act*

Not all courts have narrowly interpreted the Act as banning minority coalitions. In *Campos v. City of Baytown*, a group of black and Hispanic citizens alleged that the at-large election of the City of Baytown council members and the mayor violated Section 2 of the Act by diluting their minority vote.<sup>114</sup> The Fifth Circuit in *Campos* conducted what has been referred to as a more functional analysis of the Act and found it permissible for African-American and Hispanic voters to aggregate.<sup>115</sup> The majority in *Campos* affirmed that the plaintiffs had met all three factors of the *Gingles* test (including political cohesion) and held that under the totality of the circumstances, the at-large election scheme hindered minority voters' ability to elect the representatives of their choice.<sup>116</sup>

By moving beyond the strict confines of the statutory language, the Fifth Circuit's more functional and holistic approach rejected limiting Section 2 to a homogenous class, embracing instead the remedial purpose of the Act by accepting that minority groups may share a history of discriminatory treatment.<sup>117</sup> This approach takes into consideration the shared discriminatory past and the "lingering socio-economic effects of past official discrimination" experienced by both blacks and Hispanics because it centers on the *results* of discrimination suffered by each group, rather than its *origin*.<sup>118</sup>

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113. *Id.* (quoting *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 894 (5th Cir. 1993) (Jones, J., concurring) (explaining that "[the] crucial problem inherent in the minority coalition theory . . . is that it transforms the Voting Rights Act from a statute that levels the playing field for all races to one that forcibly advances contrived interest-group coalitions or racial and ethnic minorities.")).

114. 840 F.2d 1240, 1242 (5th Cir. 1988).

115. *See id.* ("There is nothing in [the Act] that prevents the plaintiffs from identifying the protected aggrieved minority to include both Blacks and Hispanics."); *Bartlett v. Strickland*, 566 U.S. 1, 32 (2009) (noting that Congress created the "ultimate functional approach" when instituting a totality of the circumstances test for Section 2).

116. *Campos*, 840 F.3d at 1244–50. Furthermore, the *Nixon* dissent also pointed out that all other courts considering the legitimacy of minority coalition claims have assumed them to be permitted so long as the coalition satisfies all three *Gingles* factors. *Nixon*, 76 F.3d at 1396 (Keith, J., dissenting). The *Campos* court also articulated the circumstances under which a minority group coalition could satisfy the political cohesion factor. *Campos*, 840 F.3d at 1244–45. The court stated that the coalition minority group must be considered as a whole, if the whole group, for example, African-Americans and Hispanics alike, can be expected to vote together and there is not evidence showing that one race will not vote for a candidate of the other race, then there is political cohesion. *Id.* at 1245.

117. *See Campos*, 840 F.3d at 1249–50; *Nixon*, 76 F.3d at 1400–01 (Keith, J., dissenting) (elucidating further how different racial groups can share a history of discriminatory experiences).

118. *See Campos*, 840 F.3d at 1249–50; *see also Nixon*, 76 F.3d at 1399 (Keith, J., dissenting) (arguing that the original motivations behind discriminatory behavior are not important and criticizing the *Nixon* majority for focusing on the origins of the discrimination instead of on the

Judge Keith's dissent in *Nixon* further supports implementing such an approach as the *Campos* court suggests.<sup>119</sup> Judge Keith argued that under a proper construction of the Act the term "class of citizens" is ambiguous, and therefore the court must consider the legislative history, congressional intent, and prior case law interpretations of the Act in addition to the Act's plain language when construing the statutory term.<sup>120</sup> Judge Keith suggested that the 1975 amendment including language minorities within the Act's scope was evidence that Congress was cognizant that expanding the class of protected groups could enable minority groups to aggregate to bring suit.<sup>121</sup> Additionally, he noted that the Supreme Court had implicitly allowed a coalition suit brought by a group of African-American and Puerto Rican voters to proceed in *Wright v. Rockefeller*, which was decided *prior* to the 1975 amendments to the Act.<sup>122</sup> Judge Keith argued that because Congress had *knowledge* that plaintiffs had brought coalition suits in the past, as evidenced by *Wright*, Congress would have explicitly prohibited minority coalition claims along with the other 1975 amendments to the Act had they wanted to deny minority groups the ability to bring such suits.<sup>123</sup> Given the arguably vague language of the statute, the legislative history, and the overarching remedial purpose of the Act, Judge Keith suggested that a holistic approach is a better form of statutory interpretation to achieve the intended purposes of the Act.<sup>124</sup>

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results). Judge Keith likened the *Nixon* majority's strict interpretation of the Act to the Supreme Court's rationale in *Plessy v. Ferguson*, noting the "practical effect of the majority's holding requires the adoption of some sort of racial purity test." *Id.* at 1401, 1403 (citing *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896) *overruled by* *Brown v. Bd. of Educ. Of Topeka, Kansas*, 347 U.S. 483 (1954)).

119. *See id.* at 1393, 1395.

120. *Id.* at 1394.

121. *Id.* at 1395.

122. *Id.* (citing *Wright v. Rockefeller*, 376 U.S. 52, 53–54 (1964)).

123. *Id.* *But see id.* at 1388 (majority opinion) (quoting *Campos v. City of Baytown*, 849 F.2d 943, 945 (5th Cir. 1988) (Higgenbotham, J., dissenting)) (explaining that the proper inquiry is whether Congress sought to protect, rather than prohibit, minority coalitions when passing the legislation).

124. *Id.* at 1396–99; *see also* *Allen v. State Bd. of Elections*, 393 U.S. 544, 565–67 (1969) (rejecting a narrow construction of the Act and noting that Congress intended the Act to have a broad scope in order to combat racial discrimination).

### III. WHY THE FUNCTIONAL APPROACH AND “RESULTS” INQUIRY OF THE FIFTH CIRCUIT IN CAMPOS AND THE DISSENT IN NIXON IS THE CORRECT APPLICATION OF THE VOTING RIGHTS ACT

#### A. *It is the Effect, Rather than the Origin of Discrimination that Matters: Differing Minority Groups Can Share a “Common Ground” in Oppression*<sup>125</sup>

The Act’s remedial purpose—to provide all American citizens the opportunity to vote for representatives of their choice—is best served through a broad and inclusive interpretation of the Act.<sup>126</sup> The ultimate inquiry under Section 2 is whether a minority group has less opportunity to participate in the electoral process.<sup>127</sup> This inquiry does not vary based on the composition of the class stating the claim, even if the suit was brought by a minority coalition.<sup>128</sup>

Even otherwise dissimilar minority groups share similar impediments to voting. Congress based the 1975 amendment to the Act on findings that language minorities suffered from the same barriers to voting as African-Americans faced at the time the Act was initially passed.<sup>129</sup> If two minority groups experience oppression at the hands of the majority, and they are able to establish the same burden of proof as one minority group might, then congressional intent to allow minority groups equal participation in our democratic system of government is best served by allowing them to form a coalition.<sup>130</sup>

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125. Roman, *supra* note 30, at 647 (stating that minority groups share a history of discrimination and oppression that serves as a common ground).

126. See *supra* Part II.B.

127. Thornburg v. Gingles, 478 U.S. 30, 44 (1986) (quoting S. REP. NO. 97-417, at 28 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206); Salas v. Sw. Tex. Jr. Coll. Dist., 964 F.2d 1542, 1549 (5th Cir. 1992) (quoting S. REP. NO. 97-417, at 36); see also Nixon, 76 F.3d at 1395 (quoting S. REP. NO. 94-295, at 25, 30 (1975) *reprinted in* 1975 U.S.C.C.A.N. 774 at 791, 796) (Keith, J., dissenting) (noting that Congress recognized that language-minority groups experience similar discrimination to, and face similar barriers as, African-Americans when it passed the 1975 amendments to the Act).

128. The 1982 amendments to the Act clarified that the crux of Section 2 is whether the minority group experiences the *effects* and *results* of discrimination, and that inquiry does not change regardless of the origin, nature, or cause of such prejudice. S. REP. NO. 97-417, at 2 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 179.

129. See S. REP. NO. 94-295, at 24–25. Specifically, Congress pointed to high illiteracy rates combined with discriminatory voting procedures that were only in English, which resulted in little to no minority group voting participation. *Id.*

130. See Nixon v. Kent Cnty., 76 F.3d 1381, 1402 (6th Cir. 1996) (Keith, J., dissenting) (arguing that because African-Americans and Hispanics both experience discrimination and exclusion from the electoral process, the Act should be interpreted as protecting both groups “individually and collectively”); see also Hopkins, *supra* note 82, at 645 (arguing that allowing two minority groups to aggregate better prevents discrimination as it would differentiate between a lack of representation due to the lack of political support versus a lack of representation due to racial discrimination); Roman, *supra* note 30, at 651 (“The more significant point, however, is not the form of oppression or reason for it, but the effectuation of that oppression and the common result of treating these people as something other than full and equal members of this society.”).

*B. Separating Minority Groups for the Purpose of Bringing a Section 2 Claim  
Further the Very Discrimination the Act is Designed to Remedy*

The *Nixon* court explained that African-Americans and Hispanic Americans could not meet the *Gingles* political cohesion factor because Congress had not made findings specific to a coalition of protected minorities.<sup>131</sup> The *Nixon* majority missed the point: the inquiry under Section 2 is whether a minority group has experienced significant barriers to voting that have denied them equal access and less opportunity to participate in elections.<sup>132</sup> Because Congress has found that African-Americans and language minorities receive protection of the Act because they have both experienced significant barriers to voting, this protection should apply regardless of whether the two minorities choose to act separately or as a group.<sup>133</sup>

Separating two different minority groups for the purpose of bringing a Section 2 violation further separates, classifies and labels minority groups, thereby further entrenching their minority status rather than promoting the Act's voting equality goal.<sup>134</sup> In fact, minority groups often have multiple subgroups as a result of differing internal cultures and histories.<sup>135</sup> Would further classifications be needed to separate these individual subgroups even though they all experience discrimination despite their similar political viewpoints and inability to elect political officials of their choice?<sup>136</sup> A strict focus on the racial identity of the minority group overlooks the statute's larger inquiry: whether, based on the totality of the circumstances, a minority group cannot participate equally in the political process.<sup>137</sup> Focusing on the race of the minority group instead of whether that group has experienced barriers to voting furthers

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131. *Nixon*, 76 F.3d at 1391.

132. See *supra* note 88 (explaining how the results test is implemented).

133. See S. REP. NO. 94-295, at 25.

134. *Nixon*, 76 F.3d at 1401. (emphasizing that the disturbing aspect of separating minority groups and disallowing minority coalitions is that it implies a "racial purity test" whereas allowing coalitions would only promote the greater good). Judge Keith further noted that classifying victims of discrimination is reminiscent of the Court's endorsement of segregation in *Plessy v. Ferguson*. *Id.* at 1403.

135. See *Hopkins*, *supra* note 82, at 647-48 (noting that diversity that exists within Asian communities in the United States); *Roman*, *supra* note 30, at 643-44 (noting a grassroots effort by a coalition of Hispanics with diverse interests formed to protest an immigration bill as an example of intraracial and interethnic coalition that was able to unite in a common cause despite cultural differences).

136. See *Nixon*, 76 F.3d at 1402 (posing multiple hypothetical questions on how to draw lines within racial groups, whether those lines should be drawn and hinting at the negative effects of drawing such distinctions).

137. See S. REP. NO. 97-417, at 28 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206 (stating that Section 2 aims to protect minority citizens' rights to participate in the political process).

overbroad stereotypes and prejudices about and against the minority groups instead of providing equality in the political process.<sup>138</sup>

*C. Congressional Amendments and Supreme Court Jurisprudence Illustrate that the Act Should be Interpreted with a Broad Scope and Inclusive Coverage for Minority Groups*

The history of the Act and Supreme Court case law illustrate a tendency to interpret the Act broadly.<sup>139</sup> In particular, three seminal examples support a broad interpretation of the Act with respect to accepting minority coalitions. First, the Act was expanded to include language-minority groups in 1975.<sup>140</sup> The expansion to language-minority groups reflects a trend towards a broad expansion of the Act that may permit coalition suits.<sup>141</sup> Such an interpretation would not require an affirmative congressional amendment for expanded coverage because the issue is rooted in race, and race is already established as a prerequisite for bringing a suit alleging a Section 2 violation.<sup>142</sup> Second, the *Chisom* Court broadly interpreted the Act's language, holding that it applied to the election of judges, despite the Act's use of the term "representatives."<sup>143</sup> Third, in *Grove*, the Supreme Court also assumed without deciding that two minority groups could aggregate and bring a Section 2 claim.<sup>144</sup> As Judge Reavley noted in *Campos*, the law does not prevent two minority groups from bringing a single coalition suit.<sup>145</sup> Half a century of case law interpreting the Act indicates that the Act has a broad and inclusive scope, and further, that even if the Act does not affirmatively assert something it does not mean that the thing not asserted is outside of the Act's scope.<sup>146</sup> If, as a result of discrimination, minority groups have less opportunity to participate in the political process, then

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138. See Schulte, *supra* note 13, at 473 ("[D]ifferences in culture and experiences of discrimination should not be determinative of whether the groups have suffered discrimination in voting and have been denied equal opportunities to elect candidates of their choice.").

139. See *infra* Part I.C.

140. See *supra* Part I.C.1.

141. See *supra* note 13 and accompanying text.

142. See 42 U.S.C. § 1973(a) (2006) (prohibiting States and their political subdivisions from using a voting qualification or prerequisite that denies a citizen's right to vote because of "race or color").

143. See *supra* notes 58–60 and accompanying text.

144. *Grove v. Emerson*, 507 U.S. 25, 41 (1993) (assuming *arguendo* that two minority groups could aggregate prior to passage of the Act in 1965, but finding that the issue was ultimately moot because the coalition could not establish political cohesion).

145. *Campos v. City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988); see also *Hopkins*, *supra* note 82, at 642 ("While neither Congress nor the Supreme Court has expressly adopted minority aggregation, its general treatment . . . suggests general viability.").

146. See, e.g., *Chisom v. Roemer*, 501 U.S. 380, 395-96 (1991) (noting the lack of the word "judges" in the act does not mean judges are outside the act's coverage).

the underlying purpose of the Act would be best served through allowing the minority groups to aggregate.<sup>147</sup>

*D. A Minority Coalition Must Meet the Same Burden of Proof as a Single Minority Group*

The Sixth Circuit's concern that minority groups will misuse coalition suits is misplaced.<sup>148</sup> Even if brought by a coalition, plaintiffs alleging a violation must satisfy the three *Gingles* conditions before a court can even consider whether a violation has occurred.<sup>149</sup> Although the first *Gingles* requirement relating to size may be easier for minority coalitions to establish if coalition suits are allowed, the political cohesion factor will be more difficult to prove, thus limiting when minority group may aggregate.<sup>150</sup>

The Sixth Circuit in *Nixon* emphasized the fear that coalition suits would provide minority groups with unfair political advantages.<sup>151</sup> This fear is contrary to legislative history accompanying the Act, which emphasizes the congressional fear that minority groups were being unfairly excluded from voting elections and thus, from society.<sup>152</sup> Additionally, the remedy for plaintiff groups under Section 2 is an injunction against unfair voting procedures<sup>153</sup> and the goal of Section 2 is equality.<sup>154</sup> Thus, the worst that could happen by allowing two minority groups to combine would be for a court to issue an injunction against a discriminatory procedure to provide equal voting rights—this is the very goal that Congress set to achieve when it implemented the Act in 1965.<sup>155</sup> The effects of discrimination on one minority group, two minority groups, or two sub-sets of a minority group are all the same: disenfranchisement of the minorities in favor of the entrenchment of the

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147. See Schulte, *supra* note 13, at 468 (arguing that Section 2 should apply to coalitions of protected classes as the purpose of the Act was to protect those groups from voter discrimination).

148. Compare *Nixon v. Kent Cnty.*, 76 F.3d 1381, 1393 (6th Cir. 1996) (holding that a broad interpretation of Section 2, allowing for minority coalition suits, was impermissible because it was not intended by Congress), with *infra* note 161 and accompanying text (explaining that even minority coalition suits will be required to satisfy the three *Gingles* factors).

149. See *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986) (explaining the three conditions a minority group must establish in order to bring a Section 2 suit).

150. See *supra* Part I.D.1–3 (explaining that the *Gingles* size factor is a threshold inquiry that is met by showing a simple majority, whereas the political cohesion factor is the most difficult factor to establish).

151. *Nixon*, 76 F.3d at 1391.

152. See *supra* Part II.B.

153. See, e.g., *Brown v. Detzner*, 895 F. Supp. 2d 1236, 1242–46, 1255 (11th Cir. 2012) (rejecting a request for preliminary injunction for an alleged violation of Section 2 on the grounds that the plaintiffs could not show the requisite likelihood of prevailing on their claims).

154. See *supra* Parts I.A & B.

155. See *supra* notes 29–31 and accompanying text.

majority.<sup>156</sup> Because this is exactly what the Act seeks to prohibit, allowing minority groups to combine would only further the Act's purpose of equal voting participation, while denying them the opportunity to lengthen the journey to political equality.<sup>157</sup>

One proponent of minority aggregation has suggested a feasible solution to balance the fear of diluting the Act with Congress's aim to protect minority groups from discrimination.<sup>158</sup> Rick Strange has suggested permitting minority groups to aggregate if the two minority groups: (1) have "similar socio-economic backgrounds"; (2) have "similar attitudes toward significant issues affecting the challenged entity"; and (3) "have consistently voted for the same candidates" as an aggregate group.<sup>159</sup> This approach more accurately reflects congressional intent and avoids forced separation of minority groups and requiring racial purity, while tempering the concern that coalition suits will be abused.<sup>160</sup>

The functional and holistic approach adopted by the Fifth Circuit in *Campos* and the dissent in *Nixon* best reflects the Act's underlying purpose and meaning.<sup>161</sup> The "results" test adopted by the 1982 Amendment to the Act supports the coalition of two minority groups because it focuses on the results and effects of discrimination.<sup>162</sup> The majority in *Nixon*'s focus on the race or type of minority group misses the big picture. Therefore, courts should not preclude two minority groups from bringing a coalition suit under Section 2 merely because the Act's language references only a singular class; instead, courts should analyze the claims under the three *Gingles* factors to determine whether the suit is proper.<sup>163</sup>

#### IV. CONCLUSION

Congress passed the Act as a remedial device to cure past discrimination and aid minority groups in participating in a political system from which they had

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156. See *supra* note 37 and accompanying text (arguing that the focus should be on preventing discrimination against minority groups regardless of whether that group is a minority or multi-minority community because the effects from discrimination are the same).

157. See *supra* Part II.B (articulating the Act's intended goals).

158. See Strange, *supra* note 48, at 153–54; see also Schulte, *supra* note 13, at 457 (arguing that coalition suits should be permitted as long as combined plaintiff groups can satisfy the *Gingles* test as one plaintiff class).

159. See Strange, *supra* note 48, at 129. If the two minority groups establish similar results, the court should permit the minority groups to aggregate. *Id.*

160. See *id.* at 128–29 (arguing that this method is more reflective of congressional intent).

161. See *Campos v. City of Baytown*, 840 F.2d 1240, 1244, 1250 (5th Cir. 1988) (approving aggregate Section 2 claims by analyzing the Act's history); see also *Nixon v. Kent Cnty.*, 76 F.3d 1381, 1393–1403 (6th Cir. 1996) (Keith, J., dissenting) (explaining why minority coalitions should be allowed to bring Section 2 claims by examining the legislative history).

162. See S. REP. NO. 97-417, at 2 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 179–80.

163. See *supra* Parts I.D.1–3; see also *supra* III.A–B (describing the *Gingles* factors and explaining why the analysis adopted by the Fifth Circuit in *Campos* is the best approach).

been so long estranged. To Congress in 1965, political participation meant more than just a vote. It meant an education, the ability to get a job, make a living, and raise a family with the *same opportunity* as the majority. A voting rights analysis requires this “practical evaluation of the ‘past and present reality.’”<sup>164</sup> Accordingly, only a broad interpretation of the statute aligns with congressional intent; if Hispanics and African-Americans view themselves as a single unit of disfavored minorities, they should be treated as one group under the Act. Furthermore allowing minority group coalitions may be “effective democratic vehicles towards social change.”<sup>165</sup> The *Gingles* threshold conditions and ultimate totality of the circumstances test create a burden of proof for plaintiffs that will protect the statute from misapplication, while simultaneously ensuring that the ultimate purpose of the Act is fulfilled.

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164. S. REP. NO. 97-417, at 30 (quoting *White v. Regester*, 412 U.S. 755, 770 (1973)).

165. Roman, *supra* note 30, at 638.