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Why Courts Should Forbid Minority Coalition Plantiffs under Section 2 of the Voting Rights Act Absent Clear Congressional Authorization

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Why Courts Should Forbid "Minority Coalition" Plaintiffs under Section 2 of the Voting Rights Act Absent Clear Congressional Authorization

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Voting rights litigation has always been among the most complicated areas of the law. It is a field that does not lend itself to easy judicial standards, a fact that led Justice Frankfurter to urge his judicial brethren not to enter the "political thicket" many years ago.[1] Even had the judiciary been inclined to take his advice,[2] political developments made such abstention impossible. In 1965 Congress passed the Voting Rights Act ("VRA"),[3] making voting rights a proper subject of judicial supervision. But the difficulties described by Frankfurter persist. And, as if the prototypical bipolar voting rights case with a white majority and a black minority were not complicated enough, the last decade has brought a whole array of new questions about what to do when more than one statutorily protected group enters the mix.[4]

One such question facing federal courts is whether two or more minority groups may combine, or "aggregate," themselves into one substantial minority coalition for purposes of challenging voting systems and practices under Section 2 of the VRA,[5] or whether each legislatively protected group must bring such a

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[1] See *Colegrove v Green*, 328 US 549, 556 (1946) (plurality opinion) (arguing that voting rights suits were generally beyond the competence of the courts and that "[c]ourts ought not to enter this political thicket").

[2] It was not, of course, so inclined. In *Baker v Carr*, 369 US 186, 209–10 (1962), the Supreme Court ignored Frankfurter's warning, holding that voting rights cases were proper subjects of judicial intervention.

[3] Voting Rights Act of 1965, Pub L No 89-110, 79 Stat 437 (1965), codified as amended at 42 USC §§ 1971, 1973–1973ff-6 (1994).

[4] For an example of such questions see Florence Adams, *Latinos and Local Representation: Changing Realities, Emerging Theories* 19–24 (Garland 2000).

[5] Voting Rights Act of 1965, Title I, § 2, at 854 as amended by the Voting Rights Act Amendments of 1982, Pub L No 97-205, § 3, 96 Stat 134 (1982), and codified at 42 USC § 1973 et seq (1994).

claim separately. The federal circuit courts have split on this question,[6] and the Supreme Court has expressly refused to rule on the issue.[7]

Aggregation of minority groups is not a matter of interest only to academics. A great deal more is at stake than the convenience of parties or the courts. The approach the courts adopt in addressing aggregation can mean the difference between a successful Section 2 challenge and a dismissal on the grounds that the plaintiff class is insufficiently large. In the latter scenario, a court would hold that the plaintiffs did not suffer a legally cognizable harm because no alternative system would have produced a better result.[8]

Much of the argument in the courts, and almost all of the scholarship on this subject, has focused on the question of Congress's purpose under Section 2 with respect to minority coalitions.[9] Lawyers and academic commentators have tended to focus their analysis on the text and legislative history of Section 2, without producing wholly satisfactory results. Neither the advocates nor the opponents of aggregation contend that the text of Section 2 specifically addresses this question.[10] Nor do they con-

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[6] Compare *Campos v City of Baytown*, 840 F2d 1240, 1244 (5th Cir 1988) (permitting aggregation on the grounds that blacks and Hispanics in Texas shared a common history of political repression), with *Nixon v Kent County*, 76 F3d 1381, 1387–90 (6th Cir 1996) (en banc) (prohibiting such aggregation on the grounds that neither a faithful reading of the text of the VRA, nor its legislative history, nor sound policy considerations favored allowing such aggregation).

[7] *Growe v Emison*, 507 US 25, 41 (1993) ("[a]ssuming (without deciding) that it was permissible for the District Court to combine distinct ethnic and language minority groups for purposes of assessing compliance with § 2").

[8] See text accompanying notes 33 and 34.

[9] See generally Sebastian Geraci, Comment, *The Case Against Allowing Multiracial Coalitions to File Section 2 Dilution Claims*, 1995 U Chi Legal F 389 (stressing that congressional intent and the VRA's purpose militate against aggregation); Angelo N. Ancheta and Kathryn K. Imahara, *Multi-Ethnic Voting Rights: Defining Vote Dilution In Communities of Color*, 27 USF L Rev 815 (1993) (arguing for aggregation); Rick G. Strange, *Application of the Voting Rights Act to Communities Containing Two or More Minority Groups—When is the Whole Greater than the Sum of the Parts?*, 20 Tex Tech L Rev 95 (1989) (arguing for aggregation, but only after the plaintiff class has met a heightened burden of proof with respect to the cohesiveness of the proposed coalition).

[10] See, for example, *Nixon*, 76 F3d at 1386 (Keith dissenting) ("Even the most cursory examination reveals that § 2 of the Voting Rights Act does not mention minority coalitions, either expressly or conceptually."); id at 1394 (Keith dissenting) (advocating aggregation and noting that "the Voting Rights Act does not indicate whether a coalition of African-Americans and Hispanic-Americans may constitute a single '*class* of citizens protected by [the Voting Rights Act]'").

tend that there is any evidence of specific intent in the legislative history with respect to minority coalitions.[11]

With respect to broader purpose, however, critics of aggregation certainly believe that congressional intent is clear.[12] They point to the VRA's textual silence, explicit or implicit, on the question of minority coalitions as an indication that Congress could not have intended such coalitions,[13] and to the fact that in the one circumstance in which *any* form of aggregation was addressed in the VRA, Congress disallowed it.[14] They further argue that aggregation would be a "radical departure from the VRA's purpose of ending racial discrimination," making it a mere tool of political interests.[15]

Conversely, proponents of aggregation argue that Congress clearly intended minority coalitions.[16] Proponents of aggregation contend that nothing in the VRA prohibits minority coalitions;[17] that Congress cited at least one minority coalition case in the legislative history of 1975 amendments to the VRA;[18] and that minority coalitions would be consistent with Congress's stated purpose of extending the scope of VRA protection with the 1982

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[11] See id at 1387 (majority) ("[N]either party contends that the extensive legislative history of the Act contains any direct evidence that Congress even contemplated coalition suits, far less intended them. The committee report for the 1975 amendments does not make any reference, implicit or explicit, to the issue of aggregation."). See also Strange, 20 Tex Tech L Rev at 111–12 & n 99 (cited in note 9) ("Congress provided no answer in either the Act's wording or in accompanying committee reports [concerning aggregation].").

[12] See, for example, *Nixon*, 76 F3d at 1386 (examining the text and legislative history and determining that neither supports minority coalitions under Section 2).

[13] See id at 1386 ("Even the most cursory examination reveals that § 2 of the Voting Rights Act does not mention minority coalitions, either expressly or conceptually.").

[14] See id at 1387 n 7 (noting that "Congress has only once addressed the aggregation of separately protected groups and then in the negative"), citing 42 USC § 1973b(f)(3) (1994) (stating that language minorities may not aggregate their numbers for purposes of meeting the threshold numeric requirements for foreign-language ballots of 42 USC § 1973b).

[15] See, for example, Geraci, 1995 U Chi Legal F at 398 (cited in note 9) ("The real purpose, therefore, in protecting a multiracial coalition, would be to protect *ideas*, not an historically oppressed racial minority.").

[16] See, for example, *Nixon*, 76 F3d at 1393 (Keith dissenting) (contending that the basic purpose of the VRA supports minority coalitions).

[17] See id at 1397–99 (Keith dissenting).

[18] See id at 1395 (Keith dissenting) ("In its discussion of the history of discrimination and the need for expanded protection in the 1975 amendments, the Senate cited at least one case in which African-Americans and Hispanics brought a joint claim under the voting rights act."), citing *Wright v Rockefeller*, 376 US 52 (1964).

amendments.[19] Positive action on the part of Congress would resolve this dilemma, but none appears immediately forthcoming.[20]

Rather than rehash this extensive body of commentary, this Comment takes as its initial premise the idea that because the text and legislative history are insufficiently determinate, courts should focus their attention to two other traditional tools of statutory interpretation—substantive canons of construction,[21] and consequential arguments[22]—to ultimately resolve this impasse.[23] Relying on these two sources of interpretation, this Comment maintains that, in the absence of a clear congressional enactment to the contrary, courts should refuse to sanction minority coalition plaintiffs in Section 2 actions. Unique aspects of voting rights litigation would make the consequences of aggregation overwhelmingly undesirable.

Part I briefly summarizes the development of the federal circuit courts' division over aggregation. Part II analyzes the appli-

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[19] Id at 1399 (Keith dissenting) ("[The *Nixon* majority's reading] of 'protected class' is inconsistent with the purpose of the 1982 amendments to extend application of the Act.").

[20] A search of the Lexis database, "Congressional Full Text Bills—Current Congress" on October 28, 2002, for <'voting rights act and ((nixon or kent) or aggregat! or minority coalition)'> produced twenty-five results, none of which were relevant.

[21] While there are a number of possible variations on the traditional tools, these three—text, legislative history, and substantive canons of construction—are assuredly among them. See, for example, Carlos E. Gonzalez, *Reinterpreting Statutory Interpretation*, 74 NC L Rev 585, 720 (1996) ("In the first step the court uses traditional tools of statutory interpretation, such as text, legislative history, and canons and presumptions of construction, to determine the range of plausible meanings to ambiguous statutory clauses."); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv L Rev 405, 437 (1989) (discussing the "use of traditional tools of statutory construction," such as text (including the statute's structure), legislative history, and "interpretive principles . . . properly invoked to press language in particular directions").

[22] Whether or not, as a normative matter, one believes that resort to policy arguments is appropriate, as a descriptive matter policy consequences are a traditional tool of statutory construction. See Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L J 511, 515 ("To begin with, it seems to me that the 'traditional tools of statutory construction' include not merely text and legislative history but also, quite specifically, the consideration of policy consequences. Indeed, that tool is so traditional that it has been enshrined in Latin: *'Ratio est legis anima; mutata legis ratione mutatur et lex.'* ('The reason for the law is its soul; when the reason for the law changes, the law changes as well.')"); Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 Tex L Rev 1073, 1096 (1992) ("It may be surprising, however, that the data reveal that the Court frequently and openly invokes pragmatic or policy considerations to support statutory results.").

[23] Congress's intent with respect to the amended Section 2 has proven to be a hotly debated topic on the Supreme Court. As Justice O'Connor has recognized, "[t]here is an inherent tension between what Congress wished to do and what it wished to avoid [in passing the 1982 amendments to Section 2]." *Thornburg v Gingles*, 478 US 30, 84 (1986) (O'Connor concurring). See also *Holder v Hall*, 512 US 874, 933–34 (1994) (Thomas concurring) (noting considerable ambiguities in the legislative history of the 1982 amendments).

cability of the federalism canon in *Gregory v Ashcroft*[24] to the VRA and argues that, while the legal applicability of *Gregory* to the VRA is still unresolved after *Chisom v Roemer*,[25] the reasons that have been offered to date for exempting the VRA from the operation of the *Gregory* canon are unpersuasive. Part III reviews the policy consequences of permitting minority coalitions, arguing that those consequences further support a rule against aggregation. It further evaluates the policy justifications put forth by aggregation's proponents and argues that they fail to establish that minority coalitions should be permitted. Part IV rejects the suggestion that courts should adopt a nuanced standard of cohesiveness among a proposed, aggregated plaintiff class to determine when minority coalitions are appropriate, rather than adhering to a bright-line rule against aggregation. Finally, Part V suggests that courts can ameliorate the harsher results of forbidding aggregation under the VRA by permitting aggregation in vote dilution suits brought under the Equal Protection Clause of the Fourteenth Amendment.[26] Since plaintiffs challenging voting systems under the Equal Protection Clause are required to show discriminatory intent, rather than merely disparate impact,[27] the risk of either party using aggregation as a sword, rather than a shield, is substantially decreased.

I. THE DIVIDE OVER AGGREGATION IN THE FEDERAL CIRCUIT COURTS

Section 2 of the VRA prohibits states and their political subdivisions from denying or abridging the right of any U.S. citizen to vote on the basis of race, color, or inclusion in a language minority (that is, people whose first language is not English).[28] The Section further provides:

> A violation of [this prohibition] is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation

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[24] 501 US 452 (1991).

[25] 501 US 380 (1991).

[26] Plaintiffs can bring vote dilution suits under Section 2 of the VRA or under the Equal Protection Clause of the Fourteenth Amendment. See, for example, *City of Mobile v Bolden*, 446 US 55, 62 (1980) (holding that vote dilution claims brought under the Equal Protection Clause require a showing of discriminatory intent to succeed).

[27] Id.

[28] 42 USC § 1973(a).

> by members of a *class of citizens protected by subsection (a) of this section* 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.[29]

Exactly what constitutes a protected "class of citizens" is at the heart of the debate over aggregation. No one questions that blacks or Asians or Native Americans or Hispanics are among the protected classes.[30] The real question is whether, for example, combinations of blacks *and* Asians, blacks *and* Hispanics, or Hispanics *and* Native Americans also constitute protected classes.

The answer to this question matters a great deal in some instances because of the test announced by the Supreme Court in the seminal VRA case of *Thornburg v Gingles*.[31] To press a successful vote dilution challenge to a multimember district[32] system under Section 2, plaintiffs must meet a three-pronged test:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . . Second, the minority group must be able to show that it is politically cohesive. . . . Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed . . . — usually to defeat the minority's preferred candidate.[33]

Courts have held that failure to meet any one of the three prongs is fatal to a plaintiff's case.[34] Furthermore, the *Gingles*

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[29] 42 USC § 1973(b) (emphasis added).

[30] See *Nixon v Kent County*, 76 F3d 1381, 1389 (6th Cir 1996) (en banc) (listing groups to which the VRA unquestionably applies).

[31] 478 US 30 (1986).

[32] "A multimember district is any district in which voters elect more than one candidate to a governmental body." Daniel R. Ortiz, Note, *Alternative Voting Systems as Remedies for Unlawful At-Large Systems*, 92 Yale L J 144, 145 n 8 (1982). It can be contrasted with a single-member districting system in which "voters are divided into as many separate districts as there are seats in the elected body." Id at 144 n 4.

[33] *Gingles*, 478 US at 50–51 (footnotes and internal citations omitted).

[34] See, for example, *Overton v City of Austin*, 871 F2d 529, 538 (5th Cir 1989) ("We need not address all of [the plaintiffs'] contentions, however, because failure to establish any single criterion of [*Gingles*] is fatal to their case."); *McNeil v Springfield Park District*, 851 F2d 937, 942 (7th Cir 1988) ("To pass the summary judgment threshold, . . . the *Gingles* preconditions [must be] met.").

framework is not limited to multimember districts; the Court has extended the *Gingles* test to encompass other challenged voting systems such as single-member districts and majority-minority districts.[35]

To satisfy the first *Gingles* prong, some plaintiffs seek to combine minority groups into a coalition if no single group would itself be able to constitute a majority in one district. For example, in *Nixon v Kent County*,[36] blacks alone only constituted a functional majority in one Board of Commissioners district.[37] When black voters were combined with Hispanic voters, however, the total minority percentage would have been sufficient to permit the minority class to control two of the County's districts.[38] Therefore, the plaintiffs would have made a prima facie case of vote dilution against a proposed plan that gave minorities control of only one district.[39] If, however, the court forbad aggregation (as it ultimately did) there would be no grounds for a suit: the black population constituted a majority in one district, and they controlled one district.[40] Because the Hispanic population did not amount to a majority in any district under any plausible redistricting plan, Hispanics could not complain that they did not control a commission seat.[41]

A. Early Cases: The Assumed Validity of Aggregation

Prior to *Nixon*, the weight of legal authority came down exclusively on the side of permitting minority coalitions. Most courts, including the Supreme Court, assumed without explicitly deciding that such combinations were acceptable for purposes of vote dilution suits under Section 2.[42] As a practical matter, how-

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[35] *Growe v Emison*, 507 US 25, 40–41 (1993) (single-member districts); *Voinovich v Quilter*, 507 US 146, 158 (1993) (majority-minority districts). See also *Brooks v Miller*, 158 F3d 1230, 1239 (11th Cir 1998) (applying *Gingles* criteria to Section 2 claim challenging a majority vote requirement). A majority-minority district is one "in which a majority of the population is a member of a specific minority group." *Voinovich*, 507 US at 149.

[36] 76 F3d 1381 (6th Cir 1996) (en banc).

[37] Id at 1384. Part of plaintiffs' challenge was to a decision by the Kent County Board of Commissioners to reduce the number of districts from 21 to 19. Plaintiffs could have controlled two seats if the old system of 21 seats was retained. Id.

[38] Id.

[39] *Nixon*, 76 F3d at 1384.

[40] Id.

[41] Id.

[42] See, for example, *Growe v Emison*, 507 US 25, 41 (1993) (stressing that, assuming coalition suits were to be permitted, "proof of minority political cohesion is all the more essential" and dismissing the case for failure to meet that proof); *Badillo v City of Stockton*, 956 F2d 884, 891 (9th Cir 1992) (same); *Romero v City of Pomona*, 665 F Supp 853 (C

ever, the assumption often had little consequence. Courts that permitted plaintiffs to combine into coalitions of sufficient size to satisfy the first *Gingles* prong typically dismissed the suits.[43] They did so on the ground that the plaintiff class, while sufficiently large, was now insufficiently cohesive to meet the second *Gingles* prong.[44] For example, in *Growe v Emison*,[45] the Supreme Court assumed that members of various minority groups in Minneapolis could form a coalition to challenge congressional and state legislative districts.[46] It then dismissed the challenge, however, because plaintiffs failed to demonstrate sufficient cohesion, proof that the Court deemed "all the more essential" in coalition cases.[47] Despite the difficulties faced by the early plaintiffs, these initial cases established the precedent for permitting aggregation. As the racial and ethnic diversity of jurisdictions throughout the United States continues to grow, the issue of whether courts should adhere to these precedents will become increasingly significant.

B. Explicit Approval of Minority Coalitions in the Fifth and Eleventh Circuits and Tacit Approval in the Second Circuit

The Fifth Circuit is the only federal circuit court to explicitly approve aggregation of minority groups, rather than assume its validity, *and* to find that the resulting plaintiff class was suffi-

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D Cal 1987), affd, 883 F2d 1418 (9th Cir 1989) (same). Besides the federal courts, at least two state Supreme Courts made a similar assumption. See *Wilson v Eu*, 823 P2d 545, 549–50 (Cal 1992) (approving a special masters' redistricting plan that created majority-minority districts for blacks *and* Hispanics); *Mellow v Mitchell*, 607 A2d 204, 219 (Pa 1992) (assuming that blacks and Hispanics could aggregate if sufficiently cohesive, but rejecting aggregation because no evidence of such cohesion existed). And finally, one California district court held that a minority coalition was acceptable, but dismissed because even the coalition was insufficiently large to satisfy the first *Gingles* prong. *Skorepa v City of Chula Vista*, 723 F Supp 1384, 1390 (S D Cal 1989). This precedent cannot really be attributed to the Ninth Circuit, as can the Second Circuit's tacit approval, see text accompanying notes 55-58, because *Skorepa* was never considered on appeal by the Ninth Circuit.

[43] *Growe*, 507 US at 41–42; *Badillo*, 956 F2d at 891; *Romero*, 665 F Supp at 864–66. Though this Comment speaks in terms of the "early cases," the fact is that the trend developed in *Growe*, *Badillo*, *Romero*, etc., continues still. See *Frank v Forest County*, 194 F Supp 2d 867, 879 (E D Wis 2002) (noting the circuit split, but refusing to decide the question because the case was decided on other grounds).

[44] *Growe*, 507 US at 41–42; *Badillo*, 956 F2d at 891; *Romero*, 665 F Supp at 864–66; *Frank*, 194 F Supp 2d at 868. See also *Skorepa*, 723 F Supp at 1390 (dismissing because minority coalition failed to satisfy the first, rather than the second, *Gingles* precondition).

[45] 507 US 25 (1993).

[46] Id at 41.

[47] Id.

ciently cohesive to meet the second prong of the *Gingles* test. It did so in two separate cases: *League of United Latin American Citizens, Council No 4386 v Midland Independent School District*[48] ("*LULAC I*") in 1987, and *Campos v City of Baytown*[49] in 1988. The *LULAC I* court found that forming a coalition would be "mutually beneficial" to both blacks and Hispanics.[50] It premised this holding on the fact that the groups not only shared a history of victimization from discriminatory practices, but also "inseparable" political goals.[51] The *Campos* court similarly found that both Hispanics and blacks had traditionally faced discrimination, and thus "[i]f, together, they are of such numbers residing geographically so as to constitute a majority in a single member district, they cross the *Gingles* threshold as potentially disadvantaged voters."[52]

Following the Fifth Circuit's lead and without further analysis, the Eleventh Circuit has also explicitly held, rather than merely assumed, that aggregation will be allowed.[53] Having done so, however, it followed the pattern of most of the other cases and dismissed the action for lack of cohesiveness.[54]

Finally, in *Bridgeport Coalition for Fair Representation v City of Bridgeport*,[55] the Second Circuit became the only circuit besides the Fifth to both permit aggregation and fail to dismiss for lack of cohesiveness, but it did so implicitly.[56] In *Bridgeport*, the Second Circuit upheld the substantive terms of a district court's preliminary injunction mandating that the City of Bridgeport create five minority-majority districts, including one black/Hispanic majority district.[57] Unlike the Fifth Circuit, the *Bridgeport* court did not explicitly address the aggregation issue

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[48] 812 F2d 1494, 1500–01 (5th Cir 1987), vacd en banc on state law grounds, 829 F2d 546 (5th Cir 1987).

[49] 840 F2d 1240, 1244 (5th Cir 1988).

[50] 812 F2d at 1500–01, quoting *League of United Latin American Citizens, Council No 4386 v Midland Independent School District*, 648 F Supp 596, 606 (W D Tex 1986) (lower court decision).

[51] *LULAC I*, 812 F2d at 1500–01.

[52] *Campos*, 840 F2d at 1244.

[53] See *Concerned Citizens of Hardee County v Hardee County Board of Commissioners*, 906 F2d 524, 526 (11th Cir 1990), citing *Campos*, 840 F2d at 1244, and *LULAC I*, 812 F2d at 1500–01.

[54] *Concerned Citizens of Hardee County*, 906 F2d at 527.

[55] 26 F3d 271 (2d Cir 1994), vacd on other grounds and remd, 512 US 1283 (1994).

[56] Id at 276 (noting that the proposed coalition presented substantial evidence on the political cohesiveness of blacks and Hispanics in Bridgeport, while the City presented little or no evidence on the question).

[57] Id at 272–73.

in its opinion. Nevertheless, the district court opinion that the court upheld had expressly held that minority coalitions were acceptable, citing to *Campos* and *LULAC I*.[58]

C. The Opponents of Aggregation

Though every court that considered minority coalitions in the early cases ultimately permitted them, aggregation was not without its critics. The *LULAC I* decision drew a sharp dissent from Judge Patrick Higginbotham, who argued that the decision to sanction minority coalition plaintiffs moved Section 2 vote dilution cases beyond Congress's original intention, which was to protect victims of "chronic bigotry."[59] Instead, he contended, the *LULAC I* majority protected what amounted to nothing more than simple political coalitions.[60] Judge Higginbotham elaborated on his reasons for denying aggregation in his dissent from an order denying en banc rehearing of *Campos* ("*Campos* Rehearing Dissent").[61] Beyond the question of congressional intent, he articulated two policy reasons for opposing the aggregation approach. First, he argued that even if Congress's intent was unclear (which he did not believe), courts should not allow minority coalitions without explicit congressional authorization in light of the tremendous impact that aggregation would have on all state and local electoral systems.[62] Second, he feared that permitting aggregation could actually limit the protections of the VRA, as defendants aggregate minorities to suit their needs as well.[63]

Judge Higginbotham's reasoning soon gained other adherents on the Fifth Circuit. Several years after *Campos*, Judge Edith Jones, joined by four other Fifth Circuit judges, echoed these same themes while concurring in *League of United Latin American Citizens, Council No 4434 v Clements*[64] ("*LULAC II*"). The *LULAC II* plaintiffs challenged the county-based system for

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[58] *Bridgeport Coalition for Fair Representation v City of Bridgeport*, 1993 US Dist LEXIS 19741, *20–21 (D Conn), affd by 26 F3d 271 (2d Cir 1994), vacd and remd on other grounds by 512 US 1283 (1994).

[59] *LULAC I*, 812 F2d at 1504 (Higginbotham dissenting).

[60] Id.

[61] *Campos v City of Baytown*, 849 F2d 943, 945–46 (5th Cir 1998) (Higginbotham dissenting) (denying a request for rehearing en banc).

[62] Id at 945.

[63] Id at 945–46.

[64] 999 F2d 831, 894 n 2 (5th Cir 1993) (Jones concurring) (endorsing Higginbotham's dissents in *LULAC I* and *Campos*).

electing state judges in Texas.[65] The court individually analyzed the claims of vote dilution for each county.[66] Consistent with Fifth Circuit precedent, the court permitted minority coalitions of blacks and Hispanics to act as plaintiffs in some counties; in others the groups proceeded alone.[67] The *LULAC II* court rejected all of the challenges in turn.[68] Judge Jones concurred in the dismissals, but wrote separately to opine that the illegitimacy of minority coalitions constituted an alternative ground for the results.[69]

LULAC II is unique in that the plaintiffs were not alone in using aggregation to further their litigation aims. In two counties, Harris and Tarrant, only black voters opposed the system of judicial elections.[70] The district court found that blacks' votes were being diluted in those counties, a finding that the defendants challenged on the ground that the district court had failed to consider a contest in which the black-preferred candidate was Hispanic, as well as evidence that blacks and Hispanics were politically cohesive.[71] The Fifth Circuit never reached the issue with respect to Harris County because the court determined that, whether or not the additional elections were included, the finding of vote dilution was clearly erroneous and the defendant deserved to prevail.[72] But, with respect to Tarrant County, the Fifth Circuit determined that it *was* erroneous not to have aggregated blacks and Hispanics for purposes of analyzing vote dilution.[73]

Finally, in *Nixon*, a majority of the Sixth Circuit adopted Judge Higginbotham's reasoning in his *Campos* Rehearing Dissent.[74] It became the first federal circuit court to prohibit minority coalitions, thereby creating the current circuit split.[75]

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[65] Id at 837 (majority).

[66] Id at 877–93.

[67] Id.

[68] *LULAC II*, 999 F2d at 877–93.

[69] Id at 894 (Jones concurring). That the court permitted minority coalitions is particularly ironic since Judge Higginbotham wrote for the majority in *LULAC II*.

[70] Id at 880, 885 (majority).

[71] Id at 881.

[72] *LULAC II*, 999 F2d at 881 n 37.

[73] Id at 886.

[74] *Nixon*, 76 F3d at 1388 ("We, however, share the concerns articulated by Judge Higginbotham in his dissent from the denial of rehearing in *Campos*.").

[75] Id (acknowledging the split and explaining that "[a]lthough we do not take lightly disagreement with the views of our sister circuits, we are not constrained to follow them if, in our opinion, they are based upon an incomplete or incorrect analysis. . . . Given the settled principles of statutory interpretation, which none of the aforementioned courts acknowledged, let alone applied, and § 2's clear text, we decline plaintiffs' invitation to follow [the authority supporting aggregation].").

II. THE FEDERALISM CANON OF *GREGORY V ASHCROFT*

Most of the academic commentary on minority coalitions has centered around the question of Congress's intent in passing the VRA amendments in 1982.[76] This inquiry has taken two closely-related approaches: determining whether there is textual support for aggregation, and discussing extra-textual evidence of congressional intent that suggests that Congress intended to permit or prohibit aggregation. This is well-traveled terrain, and revisiting it in any detail would prove unprofitable.[77] When text and purpose are ambiguous, however, courts often turn to canons of construction to resolve ambiguities.[78] This section analyzes the "plain statement" federalism rule announced in *Gregory* and argues that it should lead courts to forbid minority coalitions.

A. *Gregory v Ashcroft*, Federalism, and a Plain Statement Rule

Judge Higginbotham first raised the idea of demanding a clear statement from Congress in the *Campos* Rehearing Dissent, stating, "Playing with the structure of local government in an effort to channel political factions is a heady game; we should insist that Congress speak plainly when it would do so."[79] When Judge Higginbotham first invoked this clear statement standard for interference with state political systems, it was not supported with any citation to precedent. Two years later, however, the Supreme Court handed down *Gregory*. The *Gregory* Court adopted the principle that proper respect for state prerogatives demands that whenever Congress seeks to use its constitutional authority to impair fundamental attributes of state sovereignty, it must do so explicitly.[80] That is, courts should not infer such abrogations in reviewing statutes that potentially tread on core state functions.[81]

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[76] See text accompanying note 9.

[77] See text accompanying note 9.

[78] The point of this section is not to enter the debate over the legitimacy of canons of construction that has raged in the academic literature over the past few decades. See Russell Holder, Comment, *Say What You Mean and Mean What You Say: The Resurrection of Plain Meaning in California Courts*, 30 UC Davis L Rev 569, 587 n 113 (1997) (noting that the "canons have been the subject of much controversy in this century"). Rather, this Comment takes it as a given that, as an empirical matter, canons are typically regarded as a traditional tool of statutory interpretation. See note 21.

[79] *Campos* Rehearing Dissent, 849 F2d at 945.

[80] 501 US at 461 ("This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.").

[81] Id.

Though it is unclear whether, as a legal matter, the *Gregory* canon applies to the VRA,[82] the *Gregory* Court's justifications for that rule[83] are instructive for determining as a matter of policy whether courts should sanction minority coalitions.

At issue in *Gregory* was the application of the Age Discrimination in Employment Act ("ADEA") to Missouri's state judges.[84] In 1967, Congress passed the ADEA to protect citizens over the age of forty from, among other things, dismissal on the basis of their age.[85] The Act contained a specific exception, however, for "appointee[s] on the policymaking level."[86] Missouri's state constitution required state judges to retire at the age of seventy.[87] The question for the *Gregory* Court was whether Missouri's judges, who were initially appointed but then subject to retention elections, were policymaking appointees.[88]

Finding the language of the ADEA too ambiguous to adequately resolve the question, the Court employed a plain statement rule to find that the ADEA did not apply to Missouri's state judges.[89] The Court explained that, "[they would] not read the ADEA to cover state judges unless Congress has made it clear that judges are *included*."[90] They justified this rule by citing respect for traditional state prerogatives. The federalist structure, the Court contended, preserves the responsiveness of local government, allows states to function as social laboratories competing for citizens, and protects fundamental liberties by acting as a counterweight to the power of the federal government.[91]

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[82] See subsection II B.

[83] 501 US at 460–61, quoting *Will v Michigan Department of State Police*, 491 US 58, 65 (1989), which stated:

> [I]f Congress intends to alter the "usual constitutional balance between the States and the Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute." . . . Congress should make its intention "clear and manifest" if it intends to pre-empt the historic powers of the States. . . . "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision."

[84] 29 USC §§ 621–634 (1994).

[85] 29 USC §§ 621, 631(a).

[86] 29 USC § 630(f).

[87] See Mo Const Art V, § 26 (2000).

[88] 501 US at 467.

[89] Id at 470.

[90] Id at 467.

[91] Id at 458. As Justice O'Connor, writing for the majority, said:

The Court deemed establishing the qualifications of elected officials to be of particular importance to the integrity of internal state governance.[92] As Justice O'Connor wrote, "Congressional interference with this decision of the people of Missouri, defining their constitutional officers, would upset the usual constitutional balance of federal and state powers. For this reason, 'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' this balance."[93] When applied to the controversy over aggregation, the principle expressed by this sweeping language would appear to caution against expanding the provisions of Section 2 more broadly than Congress clearly anticipated, for the legislative reapportionment and the design of voting systems is unquestionably a traditional state function.[94]

It is important to be clear exactly what is at stake here: if courts apply the *Gregory* canon to prevent aggregation attempts by VRA plaintiffs, they would not necessarily negate the general validity of applying the VRA to the states, even though the VRA arguably interferes with core state functions. The VRA, by definition, is a clearly stated congressional intrusion into the tradi-

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> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry . . . Perhaps the principal benefit of the federalist system is a check on abuses of government power. "The 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties.'"

Id, quoting *Atascadero State Hospital v Scanlon*, 473 US 234, 242 (1985).

[92] *Gregory*, 501 US at 460 ("This provision goes beyond an area traditionally regulated by the States; it is a decision of the most fundamental sort for a sovereign entity. Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign.").

[93] Id (citation omitted).

[94] See, for example, *Growe*, 507 US at 34 ("[T]he Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts. 'We say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court.' Absent evidence that these state branches will fail timely to perform that duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it.") (citations omitted), quoting *Chapman v Meier*, 420 US 1, 27 (1975).

tional state domain of election administration,[95] and it is well-settled that the VRA is within Congress's power to enact.[96] The question here, however, concerns the *incremental reach* of the statute. Just because Congress clearly intended to interfere with state election systems by passing and amending the VRA, it does not inevitably follow that courts should infer an intention to interfere to such a degree as to encompass minority coalitions. There was no question in *Gregory* that the ADEA applied to at least *some* state officials, thereby abrogating traditional state prerogatives.[97] The question before the *Gregory* Court was how far that abrogation extended.[98]

B. Ambiguity over Whether the *Gregory* Canon Applies to the VRA: *Chisom v Roemer*

As noted, however, a question exists about the application of the *Gregory* canon to the VRA, or indeed to any legislation passed pursuant to Congress's constitutional authority under the Fourteenth and Fifteenth Amendments[99] as opposed to Congress's Article I powers. The lower courts have, not surprisingly, disagreed on the applicability of the *Gregory* canon to the VRA.[100] This ambiguity may explain why the *Gregory* canon was not invoked by either Judge Jones in her *LULAC II* concurrence[101] or by the

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[95] See *Chisom*, 501 US at 412 (Scalia dissenting) (noting that "here the question is whether judges were excluded from *a general imposition upon state elections that unquestionably exists* [as a result of the VRA]") (emphasis added).

[96] See *South Carolina v Katzenbach*, 383 US 301, 308 (1966) (upholding the constitutionality of the VRA).

[97] See 501 US at 456 (noting that under 29 USC § 630(b)(2) "[t]he term 'employer' [was] defined to include 'a State or political subdivision of a State.'").

[98] See text accompanying notes 84 to 88.

[99] Unlike the ADEA (the statute at issue in *Gregory*), which was arguably passed pursuant to Congress's power under the Fourteenth Amendment, 501 US at 467, the VRA was passed pursuant to Congress's authority under the Fifteenth Amendment. See generally *South Carolina v Katzenbach*, 383 US 301 (1966). For purposes of this analysis, however, that distinction is generally regarded as irrelevant. See *City of Rome v United States*, 446 US 156, 208 n 1 (1980) (Rehnquist dissenting) ("[T]he nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments has always been treated as coextensive . . . For this reason, it is not necessary to differentiate between the Fourteenth and Fifteenth Amendment powers for the purposes of this opinion.") (citations omitted).

[100] Compare *Nipper v Smith*, 39 F3d 1494, 1532 n 75 (11th Cir 1994) (suggesting that *Gregory* applies to the VRA), with *Farrakhan v Locke*, 987 F Supp 1304, 1308–09 (E D Wash 1997) (rejecting applicability).

[101] This failure is perhaps particularly ironic, because the *LULAC II* majority opinion (written by Judge Higginbotham) mentions the *Gregory* clear statement rule seemingly with approval, though the citation was unrelated to aggregation and the clear statement rule was not ultimately the basis on which the court applied *Gregory* to *LULAC II*. See 999 F2d at 872.

Nixon majority. How future courts resolve this ambiguity ultimately depends on how much weight they give to the Supreme Court's silence in *Chisom*, decided the same day as *Gregory*, about whether the *Gregory* canon applies to the VRA.

In *Chisom*, the Supreme Court faced the question of whether Louisiana state supreme court justices were "representatives," such that the VRA's amended Section 2 covered elections for that position.[102] The *Gregory* canon suggested that the Court would read an ambiguous use of language in favor of traditional state prerogatives, such as choosing constitutional officers.[103] In spite of this, the Court read the word "representatives" broadly to include judges and all other "winners of representative, popular elections."[104] In the process the Court did not deign to distinguish the federalism canon that it handed down that day in *Gregory*, choosing to ignore it.[105] Instead, the *Chisom* Court invoked an alternative canon of statutory construction: as remedial legislation, it reasoned, the VRA should be liberally construed to achieve its purpose of combating racial discrimination.[106] Several years later, the *Nixon* dissent invoked this "remedial legislation" canon as well.[107]

Though the *Chisom* majority ignored the seeming disparity between that case and *Gregory*, Justice Scalia noted the inconsistency in his dissent to *Chisom*.[108] While Justice Scalia did not see any linguistic ambiguity to be resolved by *Gregory*'s default rule,[109] and was thus "content to dispense with the 'plain statement' rule [of *Gregory*] in the present case,"[110] he thought it indicative of the *Chisom* Court's flawed approach that it did not even consider the *Gregory* canon.[111] Nevertheless, Justice Scalia suggested that *Gregory* might plausibly be distinguished on three

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[102] 501 US at 386–87.

[103] See id at 411 (Scalia dissenting) (noting that the *Gregory* canon would support a holding in favor of the defendant state).

[104] Id at 399 (majority).

[105] The *Chisom* Court did cite *Gregory* once, but only for the proposition that judges are policymakers. See id at 399 n 27.

[106] *Chisom*, 501 US at 403 ("[T]he [VRA] should be interpreted in a manner that provides 'the broadest possible scope' in combating racial discrimination.").

[107] *Nixon*, 76 F3d at 1398 (Keith dissenting), quoting *Chisom v Edwards*, 839 F2d 1056, 1059 (5th Cir 1988).

[108] *Chisom*, 501 US at 411–12 (Scalia dissenting).

[109] Id at 410 (Scalia dissenting) ("There is little doubt that the ordinary meaning of 'representatives' does not include judges.").

[110] Id at 412.

[111] Id ("[I]t says something about the Court's approach to this decision that the possibility of applying that rule never crossed its mind.").

grounds. First, in *Gregory*, reading the statute to include judges would have made them the only exception to a general exemption for high level officials, whereas an alternative reading in *Chisom* would have made judges the only exception from a general statutory imposition.[112] Second, in *Gregory*, it was debatable whether Congress was invoking its powers under the Fourteenth Amendment (rather than the Commerce Clause), whereas in *Chisom* it was obvious that Congress was acting pursuant to the Civil War amendments.[113] The *Gregory* Court recognized, after all, that federalism arguments have less logical force against Fourteenth Amendment legislation because the Civil War amendments were specifically designed to intrude on state prerogatives in a way that the Commerce Clause was not.[114] Finally, Justice Scalia noted that the Court had implicitly rejected a plain statement rule as applied to Section 2 in *City of Rome v United States*.[115] Whether these arguments ultimately have legal force against applying the *Gregory* canon to aggregation remains to be seen, but as the next section will demonstrate, they would appear to be weak threads upon which to hang the distinction between *Chisom* and *Gregory*.

C. Evaluating the Reasons for Rejecting *Gregory*'s Application to the VRA

Upon closer examination, the reasons proposed by the *Chisom* majority and Justice Scalia for distinguishing *Chisom* and *Gregory* are unconvincing. First, the remedial nature of the VRA does little to distinguish *Gregory* and *Chisom*, and invoking of the remedial legislation canon does nothing to resolve the tension between the two cases. The ADEA, after all, was remedial legislation as well.[116] That fact did not spare it from the operation of the *Gregory* canon.

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[112] *Chisom*, 501 US at 411–12 ("[I]nterpreting the statute to include judges would have made them the only high-level state officials affected, whereas here the question is whether judges were excluded from a general imposition upon state elections that unquestionably exists.").

[113] Id.

[114] *Gregory*, 501 US at 468, quoting *City of Rome v United States*, 446 US 156, 179 (1980) ("[T]he principles of federalism that constrain Congress' exercise of its Commerce Clause powers are attenuated when Congress acts pursuant to its powers to enforce the Civil War Amendments. This is because those 'Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty.'") (citation omitted).

[115] 446 US 156, 178–80 (1982) cited by *Gregory*, 501 US at 412 (Scalia dissenting).

[116] See *McKennon v Nashville Banner Publishing Co*, 513 US 352, 358 (1995) ("Congress designed the remedial measures in [the ADEA and Title VII, upon which the ADEA

Next, it is unclear what force Justice Scalia's first distinction has in the context of the debate over aggregation. Certainly Section 2 contains a blanket prohibition—a general imposition upon state elections—against degrading the right to vote.[117] On the other hand, the blanket prohibition applies only to certain, select plaintiffs or classes of citizens.[118] As in *Gregory*, permitting aggregation would read a statute to include the greater by detailing the lesser. Unlike *Chisom*, courts are not carving out an exception from an otherwise recognized class of covered individuals. It is the very coverage as an initial matter that is in question, as in *Gregory*. Thus, the distinction proposed by Justice Scalia, whatever its force in the context of *Chisom*, is inapposite in the case of minority coalitions.

Furthermore, the language of *Gregory* itself appears to dispense with Justice Scalia's distinction between the Commerce Clause and the Fourteenth Amendment. After all, the *Gregory* Court specifically declared that, "[i]n the face of such ambiguity, we will not attribute to Congress an intent to intrude on state governmental functions regardless of whether Congress acted pursuant to its Commerce Clause powers *or § 5 of the Fourteenth Amendment.*"[119] It further stated that, in declaring the "'appropriate test for determining when Congress intends to enforce' the guarantees of the Fourteenth Amendment, [the Court] adopted a rule fully cognizant of the traditional power of the States."[120] This rule was that "[b]ecause such legislation imposes congressional policy on a State involuntarily, and because it often intrudes on traditional state authority, [the Court] should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment."[121]

A further reason to think that *Gregory* applies in Fourteenth Amendment cases is the fact that *Gregory* explicitly rested upon the "clear statement" rule of *Pennhurst State School & Hospital v Halderman*,[122] which addressed the Fourteenth Amendment,

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was modeled] to serve as a 'spur or catalyst' to cause employers 'to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges' of discrimination.").

[117] See text accompanying notes 28 and 29.

[118] 42 USC § 1973 (setting out the application to racial minorities); 42 USC § 1973b(f)(2) (setting out the application to language minorities).

[119] 501 US at 470 (emphasis added).

[120] Id at 469 (citation omitted).

[121] Id, quoting *Pennhurst State School & Hospital v Halderman*, 451 US 1, 16 (1981).

[122] 451 US 1 (1981).

rather than the Commerce Clause.[123] Most telling of all on this point, perhaps, is the fact that Justice Stevens, the author of the *Chisom* opinion, joined Justice White's concurrence in *Gregory*. There, White acknowledged that "[the] plain statement rule will apply with full force to legislation enacted to enforce the Fourteenth Amendment."[124]

Finally, Justice Scalia himself pointed out that, while *City of Rome* tacitly rejected applying the plain statement rule to Section 2, that decision considered the *unamended* Section 2 of 1965.[125] Prior to the 1982 amendments, courts treated Section 2 as no more than a restatement of the Fifteenth Amendment.[126] They regarded coverage of the statutory and constitutional provisions as "coextensive."[127] In that context, there would be no need for a plain statement rule, because Congress had not encroached upon the sovereignty of states to any greater extent than the Fifteenth Amendment itself. When Congress added the results test of Section 2 in 1982,[128] however, it increased the statutory coverage beyond that of the Fifteenth Amendment; while the amended Section 2 disregards intent, discriminatory intent is the touchstone of the Fifteenth Amendment.[129] It is Congress's move *beyond* the constitutional requirements that demands a plain statement rule like that announced in *Gregory*. Furthermore, as Justice Scalia noted, *City of Rome* was decided before the plain statement rule of *Gregory* had achieved its current force.[130]

In *Nixon*, the case prohibiting aggregation, the majority ultimately distinguished *Chisom*. It reasoned that, although it was undisputed in *Chisom* that Section 2 covered judicial elections prior to 1982, it was equally undisputed in the context of aggregation that the terms of Section 2 did not permit minority coalitions under any previous iteration of the VRA.[131] Thus, while the *Chisom* court thought it would have been "anomalous" for Congress to remove judicial elections from Section 2's coverage without comment, it would be equally anomalous for Congress to au-

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[123] Id at 16.

[124] *Gregory*, 501 US at 479 (White, with Stevens joining, concurring).

[125] *Chisom*, 501 US at 412 (Scalia dissenting).

[126] See id at 392 (majority), citing *City of Mobile v Bolden*, 446 US 55, 60–61 (1980).

[127] *Chisom*, 501 US at 392.

[128] See *Gingles*, 478 US at 43–44 (citing a report of the Senate Judiciary Committee for the proposition that Congress meant results, not intent, to be the basis of an action under section 2 of the VRA).

[129] *Bolden*, 446 US at 74.

[130] *Chisom*, 501 US at 412 (Scalia dissenting).

[131] *Nixon*, 76 F3d at 1389.

thorize minority coalitions without comment.[132] Though it remains to be seen how the Supreme Court will ultimately resolve the tension between *Chisom* and *Gregory*, the distinctions proposed to date are unpersuasive.

III. THE CONSEQUENCES OF COURTS PERMITTING AGGREGATION MILITATE AGAINST SUCH A RULE

In addition to canons of construction, courts are also inclined to resolve statutory ambiguity by considering the policy consequences of alternative interpretations.[133] The purpose of this Part is to examine and evaluate the policy justifications advanced by each side of the debate over minority coalitions. First, this Part examines the policy rationales articulated by Judge Higginbotham in the *Campos* Rehearing Dissent (and adopted by the *Nixon* court) for forbidding aggregation: (1) reluctance to unduly interfere with state election systems, and (2) a fear that bad faith actors might use aggregation defensively.[134] After analyzing these rationales, this section briefly raises a concern wholly ignored by courts and academics alike: the probability that defensive aggregation once accepted for Section 2 claims will be expanded to VRA Section 5 cases as well, thereby posing risks to minority voters that parallel those presented by defensive aggregation in Section 2 cases. It finally considers the strength of the policy justifications put forth by aggregation's proponents.

A. Hesitation to Unduly Burden Parties to Litigation

While Judge Higginbotham's language about the "heady game" of "playing with the structure of local government to channel political factions"[135] supports the federalism canon of *Gregory*, it could just as easily be justified as a concern about placing excessive burdens on litigants.[136] Apart from any argument for protecting state prerogatives against federal tyranny, permitting aggregation could have a detrimental impact of a more prosaic nature on states and municipalities seeking to comply in good faith with Section 2, effects that can be measured in dollars and

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[132] Id.

[133] See note 22.

[134] *Nixon*, 76 F3d at 1391, quoting *Campos* Rehearing Dissent, 849 F2d at 945–46 (Higginbotham dissenting).

[135] See text accompanying note 79.

[136] Judge Higginbotham did not elaborate on the conceptual foundations that underlie this concern.

cents.[137] Voting rights litigation, particularly at the municipal level, is an onerous undertaking. It is "complex and difficult,"[138] resulting in a process that is "expensive and labor intensive."[139] VRA challenges can put "enormous burdens on the budgets and energies of city or special district staffs and elected politicians alike; they constitute[,] in effect, major crises in the political life of the jurisdictions; and, in some cases, litigation threaten[s] literally to bankrupt the city or special district."[140]

Courts are not typically sympathetic to defendants who plead financial burdens as a reason to read the law in a manner that avoids litigation altogether.[141] The operative principle seems to be "if you can't do the time, don't do the crime." But Section 2 does not require a "crime"; that section essentially imposes strict liability on states and municipalities, significantly increasing the risk that these burdens will fall upon jurisdictions that have made every effort to comply in good faith with the requirements of the VRA.[142] These burdens should give courts pause about permitting

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[137] The litigation bill can run to hundreds of thousands of dollars even for a small jurisdiction of a few thousand people, bringing the jurisdiction to the verge of bankruptcy if it is forced to defend a VRA suit. See Adams, *Latinos and Local Representation* at 137 (cited in note 4) (noting that the Alta Vista Hospital District in Dinuba, California, tallied legal bills of $200,000 for a district of only 13,000 people). See also id at 73 (noting that in the City of Dinuba, California, the costs of VRA litigation added up to nearly $60 per person, more than the annual cost of Dinuba's Fire Department).

[138] See *Jenkins v Red Clay Consolidated School Board District Board of Education*, 4 F3d 1103, 1136 (3d Cir 1993) (noting that "Voting Rights challenges, by their nature, are often complex and difficult").

[139] Adams, *Latinos and Local Representation* at xv (cited in note 4) (noting that voting rights litigation is very "expensive and labor intensive").

[140] Id.

[141] See, for example, *Gerber v Hickman*, 264 F3d 882, 891–92 (9th Cir 2001), vacd and rehearing en banc granted, 273 F3d 843 (rejecting the California Department of Corrections' argument that fear of expensive equal protection litigation brought by female prisoners was a sufficient "penological interest" to justify restricting artificial insemination to male prisoners); *Ting v AT&T*, 182 F Supp 2d 902, 907 (N D Cal 2002) (holding that a contract clause prohibiting class actions against AT&T could not be justified by AT&T's interest in reducing litigation costs).

[142] By "strict liability" I simply mean that there is no requirement that any culpable intent be proven—merely that plaintiffs suffered a specified harm. See, for example, Vernon Palmer, *A General Theory of the Inner Structure of Strict Liability: Common Law, Civil Law, and Comparative Law*, 62 Tul L Rev 1303 (1988), which includes the following definition of strict liability:

> [S]trict liability rests upon an inelastic concept of unlawful harm. When the legal order creates a strict liability measure, it creates a guarantee of safety or *an obligation of result, favoring the security of a particular class of individuals*. This obligation guarantees against certain losses or injuries resulting from a lawful, but perilous, activity. Thus unlawfulness characterizes only the harm and not the activity producing it. Only the materialization of the injury is unlawful or wrongful. . . . The injurer is

minority coalitions as long as questions remain about Congress's intention to sanction them. Such reticence is not without precedent. Indeed, in construing § 16(b) of the Securities Exchange Act of 1934,[143] the Supreme Court has held that Congress should be expected to impose strict liability "expressly or by unmistakable inference."[144] The Court continued, "It is inappropriate to reach the harsh result of imposing § 16(b)'s liability without fault on the basis of unclear language."[145]

Concededly, minority coalitions are not the primary cause of substantial harm to good faith actors; they merely magnify a risk inherent in Section 2 litigation. The risk arises in the first instance from the fact that, under Section 2, plaintiffs need not demonstrate that the defendant jurisdiction acted with any discriminatory intent.[146] To prevail, plaintiffs need only show that the challenged electoral system has the *result* of diluting minority voting strength.[147] Congress made a policy judgment, deciding that requiring plaintiffs to prove discriminatory intent would create profound evidentiary difficulties that would erect unacceptably high barriers to most suits, even meritorious ones.[148] Specifi-

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> liable almost automatically if he has caused the defined event (*e.g.*, death) or the defined type of damage—*regardless of whether he acted intentionally, unintentionally, or with the utmost care.*

Id at 1309 (emphasis added).

[143] 15 USC § 78p(b) (2000).

[144] *Foremost-McKesson, Inc v Provident Securities Co*, 423 US 232, 252 (1976).

[145] Id. See also *Gollust v Mendell*, 501 US 115, 122 (1991) ("Because the statute imposes 'liability without fault within its narrowly drawn limits,' we have been reluctant to exceed a literal, 'mechanical' application of the statutory text in determining who may be subject to liability, even though in some cases a broader view of statutory liability could work to eliminate an 'evil that Congress sought to correct through § 16(b).'") (internal citations omitted).

[146] See Voting Rights Act Extension, S Rep No 417, 97th Cong, 2d Sess 15–16 (1982), reprinted in 1982 USCCAN 177, 192–93 ("Senate Report") ("The proposed amendment to section 2 of the voting rights act is designed to restore the legal standard that governed voting discrimination cases prior to the Supreme Court's decision in [*City of Mobile v Bolden*, 446 US 55 (1980)]. In pre-*Bolden* cases plaintiffs could prevail by showing that a challenged election law or procedure, in the context of the total circumstances of the local electoral process, had the result of denying a racial or language minority an equal chance to participate in the electoral process. Under this results test, it was not necessary to demonstrate that the challenged election law or procedure was designed or maintained for a discriminatory purpose.").

[147] See text accompanying note 128.

[148] See Senate Report, 1982 USCCAN at 194 (cited in note 146) ("The intent test focuses on the wrong question and places an unacceptable burden upon plaintiffs in voting discrimination cases."). The purpose of this Comment is not to question the wisdom of this difficult policy choice. It is worth noting, however, that Section 2's constitutionality as amended has never been explicitly decided. Justice Kennedy has suggested on several occasions that he does not believe the question to be adequately resolved. See *Chisom*, 501

cally, they feared that an intent requirement presented grave risks that bad faith actors could infringe minorities' voting rights with impunity, so long as they were not foolish enough to commit to paper the fact that they were doing so.[149] On the other hand, plaintiffs would not need any evidence of intent at all to prove that a result was discriminatory. Instead, plaintiffs could prove such results by objective evidence. Thus, the legislative history of the VRA includes a number of concrete factors that indicate discriminatory results.[150] To protect minority voting rights, Congress made a conscious choice to separate liability from culpability, willingly taking the chance that some innocent jurisdictions would bear the brunt of unjustified liability under the VRA.

However, this policy decision does not force courts to exacerbate the risk to innocent jurisdictions by allowing aggregation, which provides states and municipalities no reliable means of structuring their voting systems to avoid either lawsuits or liability. Permitting aggregation would multiply the number of protected groups to levels so unwieldy that they would be practically impossible for legislators and administrators to adequately address. Those legislators and administrators would have to assess each voting system or districting plan for its impact on each of the groups currently protected, and then for every possible combination of those groups.[151] Congress has made no clear statement that they favor such a morass. Moreover, simple notions of fairness dictate that there should be some form of safe harbor that allows jurisdictions to demonstrate compliance with Section 2

US at 418 (Kennedy dissenting) ("I write to add only that the issue before the Court is one of statutory construction, not constitutional validity. Nothing in today's decision addresses the question whether § 2 of the Voting Rights Act of 1965, as interpreted in [*Gingles*], is consistent with the requirements of the United States Constitution."); *Johnson v De Grandy*, 512 US 997, 1028–29 (1994) (Kennedy concurring) (expressing similar doubts).

[149] Senate Report, 1982 USCCAN at 215 (cited in note 146):

> The inherent danger in exclusive reliance on proof of motivation lies not only in the difficulties of plaintiff establishing a prima facie case of discrimination, but also in the fact that the defendants can attempt to rebut that circumstantial evidence by planting a false trail of direct evidence in the form of official resolutions, sponsorship statements and other legislative history eschewing any racial motive, and advancing other governmental objectives.

[150] See note 233.

[151] See, for example, Katharine Inglis Butler, *Redistricting in a Post*-Shaw *Era: A Small Treatise Accompanied by Redistricting Guidelines for Legislators, Litigants, and Courts*, 36 U Rich L Rev 137, 263 (2002) (laying out guidelines to enable jurisdictions to avoid VRA challenges, and listing a step that includes evaluation of the proposed plan's impact on minority populations).

without shouldering the burden of costly, elaborate litigation and possible negative judgments. In a world without aggregation, the safe harbor is fairly clear: there are a limited number of protected racial and language minorities, and as a practical matter the jurisdiction usually need only assess the impact of a given voting practice on each of those select groups.[152]

One can imagine a multiracial jurisdiction, perhaps in Southern California, in which each of the major racial categories from the 1990 census was represented (white, black, Native American, Asian/Pacific Islander, and Other), as well as the Hispanic ethnic category.[153] In the absence of aggregation, such a jurisdiction could make a straightforward, good faith effort to comply with Section 2 by considering the impact of a proposed voting system—perhaps a redistricting plan—on each of the five minority groups.[154] Permitting minority coalitions potentially increases the number of groups that the jurisdiction must consider to several times that number.[155] That number may be further increased by the Census Bureau's change in the 2000 Census to a multiracial census.[156] Depending on how multiracial individuals are categorized for purposes of voting rights litigation, the number of po-

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[152] The idea that this would constitute a "safe harbor" is a practical, rather than legal, characterization. The Supreme Court has specifically disavowed the notion that such considerations, even if they result in perfectly proportional representation of all minorities, are a per se safe harbor to a Section 2 challenge. *De Grandy*, 512 US at 1018–21 (rejecting as dispositive Florida's defense that minorities were represented proportionally). As a practical matter, however, the Court did recognize that proportionality can be relevant evidence that points against a violation. Id at 1020 ("[P]roportionality in the sense used here is obviously an indication that minority voters [may] have an equal opportunity, in spite of racial polarization."). See also id at 1028–29 (Kennedy concurring) (agreeing that proportionality is relevant, though not dispositive, evidence in vote dilution cases and noting that "[o]perating under the constraints of a statutory regime in which proportionality has some relevance, States might consider it lawful and proper to act with the explicit goal of creating a proportional number of majority-minority districts in an effort to avoid [Section] 2 litigation").

[153] The 1990 Census was structured in such a way that one could choose both a racial category and check the ethnicity box for "Hispanic origin." Thus, for each of these the appropriate category is actually Non-Hispanic white, Non-Hispanic black, Non-Hispanic Asian/Pacific-Islander, Non-Hispanic American Indian, or Non-Hispanic "Other." See Deborah Davis, *Multiracial Categories A Better Fit for Many*, Santa Fe New Mexican A-1 (Mar 23, 2001).

[154] It need not, of course, consider the impact of the voting practice on the jurisdiction's white population, as least so long as whites constitute a majority in the jurisdiction, since the VRA presumably only protects minorities.

[155] For example, where B=black, A=Asian, I=American Indian, O="Other", and H=Hispanic, the jurisdiction would have to consider the following 23 combinations: B, BA, BAI, BAIO, BAIOH, BI, BIO, BIOH, BO, BOH, BH, A, AI, AIO, AIOH, AO, AOH, AH, I, IO, IOH, IH, and H.

[156] Including, for example, such coalitions as B-AI or H-BO, etc.

tential plaintiff classes that public officials would need to consider could increase considerably.[157] Administratively, this increased effort could potentially overwhelm the resources of election administrators across the country.

Furthermore, as the number of possible plaintiff combinations increases, so does the possibility that the interests of two or more of these groups will conflict, putting state and local officials in the unenviable position of being sued no matter what system they adopt. If they adjust the voting rules to avoid suit by a coalition group, they may well open themselves up to suit from each of the individual constituent groups. Another possible scenario might arise where there are three groups with varying political cohesion among them, for example, blacks, Hispanics, and Native Americans. A jurisdiction would then be put in a very difficult position if Hispanics have enough in common with blacks and American Indians to form a coalition with either, but blacks lack sufficiently concurrent political interests with Indians to justify a black-Indian class or a black-Hispanic-Indian class. As the Sixth Circuit put it in *Nixon*, "For this court to give the states, under the Voting Rights Act, a puzzle which is difficult to solve is one thing. To give the states, under the guise of 'construction,' a puzzle which is impossible to solve is quite another."[158] The *Nixon* majority believed that such a puzzle was "precisely the result urged by plaintiffs" in seeking a minority coalition.[159]

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[157] The Office of Management and Budget has already established a framework for categorizing mixed race respondents for purposes of civil rights enforcement. See OMB Bulletin No 00-02, available online at <http://www.whitehouse.gov/omb/bulletins/text/b00-02.html> (visited Feb 23, 2002) [on file with U Chi Legal F], cited by Executive Office of the President, Provisional Guidance on the Implementation of the 1997 Standards for Federal Data on Race and Ethnicity, 66 Fed Reg 3829 (2001). The Justice Department has published similar guidelines for actions under VRA Section 5. Office of the Assistant Attorney General, Civil Rights Division; Guidance Concerning Redistricting and Retrogression Under Section 5 of the Voting Rights Act, 42 USC 1973c, 66 Fed Reg 5412 (2001). But these guidelines do not bind courts—only executive agencies charged with enforcing civil rights. See Nathan Persily, *Color By Numbers: Race, Redistricting, and the 2000 Census*, 85 Minn L Rev 899, 936 n 141 (2001) ("Note that the OMB guidelines apply only to agencies entrusted with the enforcement of civil rights laws, and thus courts are not bound by them in a Section 2 case."). Furthermore, these guidelines have been widely criticized, and "there remains the possibility that a court could strike down the OMB rules as either unconstitutional or inconsistent with the Voting Rights Act." Id. See also id at 933 ("Critics of the OMB guidelines have described them as a modern version of the 'One Drop Rule'—the Jim Crow-era law where one drop of black blood, or one iota of black ancestry, made someone black.").

[158] *Nixon*, 76 F3d at 1391.

[159] Id.

B. The Defensive Use of Aggregation by Bad Faith Actors

Judge Higginbotham's second policy reason for opposing minority aggregation in the *Campos* Rehearing Dissent was a fear that it could ultimately limit the protections of the VRA.[160] Specifically, he was concerned that crooked jurisdictions would seize upon aggregation, a tool initially approved to help minorities, to defend themselves from challenges by a single minority group.[161] As Judge Higginbotham put it, "[W]ould this court accept the consolidation theory if it had been made by a city defending against a claim that minority interests of Black or language minorities had been submerged by the way in which the district lines were drawn?"[162] In other words, if blacks or Hispanics challenged a voting practice or system, would proponents of aggregation be willing to accept as a defense the claim that "minorities" constituted majorities in enough districts that the individual group has no cause to complain?

Proponents of minority coalitions have treated the question of this "defensive aggregation" in cursory fashion when they have treated it at all. Indeed, only two critics[163] have addressed the matter in any detail: the Sixth Circuit's Judge Damon Keith, who summarily dismissed the concern in a dissent to *Nixon*;[164] and one commentator, Aylon M. Schulte.[165] Neither considered defensive aggregation to be a serious problem. As Schulte put it, "Although at first glance this argument may be appealing, in practice it does not seem to be a real concern."[166] Closer analysis suggests, however, that such a perfunctory dismissal is unjustified.

The primary argument advanced by both Judge Keith and Schulte is that existing voting rights doctrine is adequate to ad-

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[160] See text accompanying note 63.

[161] *Campos* Rehearing Dissent, 849 F2d at 945–46 (Higginbotham dissenting).

[162] Id at 946.

[163] I have found one source other than Higginbotham's *Campos* dissent, Jones's *LULAC II* concurrence, and the *Nixon* opinion that expressed concern with defensive aggregation. See Ancheta and Imahara, 27 USF L Rev at 823 (cited in note 9). But Ancheta and Imahara merely raise the idea of a coalition defense and point out some of the difficult questions associated with it. Id at 823–24. They do not attempt any in-depth analysis of the question.

[164] 76 F3d at 1402–03 (Keith dissenting).

[165] Aylon M. Schulte, Note, *Minority Aggregation Under Section 2 of the Voting Rights Act: Toward Just Representation in Ethnically Diverse Communities*, 1995 U Ill L Rev 441, 475–77 n 253.

[166] Id. See also *Nixon*, 76 F3d at 1403 (Keith dissenting) (asserting that the cohesiveness prong of *Gingles* is sufficient to address this concern).

dress attempts at defensive aggregation.[167] Implicitly referring to the second *Gingles* prong, Keith argued that such attempts would be impossible because the defendant seeking to aggregate must demonstrate that the coalition is politically cohesive.[168] Schulte gives an example of this proposition by pointing out that, in the context of drawing single-member districts, a jurisdiction could split two communities in such a way that half of each community is in two different districts.[169] Instead of having a Hispanic district and a Native American district, for example, there would be two Hispanic-Native American districts, neither of which could elect a minority-preferred candidate.[170] But given that the minority voters constitute majorities in the two districts, the only possible reason for a minority-preferred candidate to lose would be if the Hispanic voters and the Native American voters do not vote together—if they lack the requisite political cohesion.[171]

The major weakness of this argument is that there is no guarantee that courts will be able to distinguish between a temporary political coalition and a lasting minority coalition founded on a shared history of discrimination. Judge Higginbotham voiced this concern in the context of "offensive" aggregation,[172] but it has equal force in the defensive aggregation context. One can easily imagine a jurisdiction in which two minority groups vote together through a few election cycles because they temporarily share concurrent political interests. When the political issues that bind such groups lose force, however, the coalition may no longer vote cohesively; indeed, the groups' interests may be sharply at odds.[173]

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[167] *Nixon*, 76 F3d at 1403 (Keith dissenting); Schulte, Note, 1995 U Ill L Rev at 475 n 253 (cited in note 165) ("If the plaintiffs were not politically cohesive and did not share the same interests in issues and candidates, then the defendant's mere claim that the plaintiffs are politically cohesive would not make it so.").

[168] *Nixon*, 76 F3d at 1403 (Keith dissenting) ("The very same standard that a coalition of one or more groups must reach in order to demonstrate entitlement to Section 2 protection precludes attempts to submerge divergent interests. The coalition created must be in all circumstances politically cohesive.").

[169] Schulte, Note, 1995 U Ill L Rev at 475 n 253 (cited in note 165).

[170] Id.

[171] Id.

[172] See text accompanying note 60.

[173] Some opponents of aggregation have cited social science literature demonstrating that minority groups are often more hostile to each other than they are to the white majority. See, for example, *LULAC II*, 999 F2d at 897–98 (Jones concurring), quoting Katherine I. Butler and Richard Murray, *Minority Vote Dilution Suits and the Problem of Two Minority Groups: Can a "Rainbow Coalition" Claim the Protection of the Voting Rights Act?*, 21 Pac L J 619, 688–89 (1990) (explaining the "rarity of documented political alliances between minority groups" in terms of different attitudes and perceptions amongst the

Nevertheless, the defendant jurisdiction could use a string of three or four elections with "cohesive voting" to establish a sufficient degree of political cohesion between the erstwhile allies. This strategy would be particularly effective if the parties are only required to meet a preponderance of the evidence standard, which the Fifth Circuit adopted in *Campos*.[174]

Schulte raises another argument implicitly based on the first *Gingles* prong in the context of challenges to at-large voting.[175] He points out that, to successfully defend against a vote dilution claim, the challenged jurisdiction must show that minority voters constitute over half the voting age population in the jurisdiction.[176] By its very tone, Schulte's argument suggests that such a scenario is too unlikely to merit serious consideration. Demographic changes, however, have quickly overtaken this easy dismissal. There are currently many jurisdictions in the United States where whites constitute only a plurality of the population.[177] Indeed, the entire state of California now falls into this category.[178]

Leaving aside all the theoretical rejoinders to dismissals of defensive aggregation, the most convincing argument for the notion that defensive aggregation could pose a serious risk is this: aggregation has *already been used defensively*. It is not a mere figment of a commentator's imagination, but a present reality. As noted above, in *LULAC II* the Fifth Circuit held that the district court committed reversible error when it refused to cede to Tarrant County's request that blacks and Hispanics be aggregated for purposes of analyzing vote dilution.[179]

Schulte, despite initially dismissing the question, ultimately appears to recognize the risks posed by defensive aggregation. He then argues that it ought not to be permitted if it will harm minority interests.[180] He noticeably fails, though, to posit any princi-

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groups and the likelihood that different circumstances "are likely to lead to different, possibly even conflicting, demands on the government").

[174] 849 F2d at 946 (Higginbotham dissenting) (criticizing the failure to at least adopt a clear and convincing evidence standard to prove political cohesion in aggregation cases).

[175] Schulte, Note, 1995 U Ill L Rev at 475 n 253 (cited in note 165).

[176] Id.

[177] See, for example, *Census 2000; Focus: Changes in Ethnic Populations*, LA Times U6 (Apr 1, 2001) (noting that whites were no longer the majority in several cities in Los Angeles County).

[178] Maria L. LaGanga and Shawn Hubler, *California Grows to 33.9 Million, Reflecting Increased Diversity; Population: Data from the 2000 Census Show a Shift Inland. No Racial or Ethnic Group Is a Majority in the State*, LA Times A1 (Mar 30, 2001).

[179] See text accompanying note 73.

[180] Schulte, Note, 1995 U Ill L Rev at 477 n 253 (cited in note 165).

pled justification for preventing defendants from using aggregation when plaintiffs are allowed to do so, other than to simply assert that "it is up to plaintiffs to shape their vote dilution claims."[181] Surely this is generally true, as it is in most litigation. But such control over litigation is never absolute. For example, the Federal Rules of Civil Procedure specifically provide for civil defendants to compel joinder of additional plaintiffs if they would be necessary or indispensable.[182] Moreover, in class action suits, the interests of the plaintiffs in individually prosecuting a separate action is only one factor for courts to consider in determining whether to certify a class action.[183] Schulte does not explain why courts should take the unusual step of giving VRA plaintiffs a tool that they deny VRA defendants in the absence of specific statutory language to that effect.

C. Expanding the Logic of Defensive Aggregation to VRA Section 5 Claims

A closely-related and reasonably foreseeable consequence of permitting aggregation under Section 2 is the risk that jurisdictions will use defensive aggregation to water down the robust protections of VRA Section 5. While it is beyond the scope of this Comment to explore this subject in detail, it is worth a brief detour simply to point out the problems that such an expansion could create.

By way of background, under VRA Section 5, certain designated jurisdictions must submit any proposed change of their electoral system to either the Attorney General of the United States or the United States District Court for the District of Columbia.[184] The Attorney General or D.C. District Court must "preclear" the change before it can go into effect by certifying that the change will not impermissibly work to the detriment of minority voters.[185] The advantage of using Section 5 over Section 2 is that, for certain jurisdictions with a history of discouraging minority

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[181] Id.

[182] See FRCP 19.

[183] FRCP 23(b)(3)(A). Other factors are "the extent and nature of any litigation concerning the controversy already commenced by or against members of the class," FRCP 23(b)(3)(B), "the desirability or undesirability of concentrating the litigation of the claims in the particular forum," FRCP 23(b)(3)(C), and "the difficulties likely to be encountered in the management of a class action," FRCP 23(b)(3)(D).

[184] 42 USC § 1973c.

[185] Id.

participation in the voting process,[186] the presumption shifts from "innocent until proven guilty" to "guilty until proven innocent."[187] Since there is no need for an individual plaintiff to initiate a Section 5 action, discriminatory practices will not continue through simple inertia.

The Supreme Court, however, has interpreted the requirements of Section 5 to prohibit only "retrogression."[188] In other words, to gain preclearance and shift the presumption back to "innocent until proven guilty," it is only necessary for a defendant jurisdiction to show that minorities will not be made worse off under the new system than they were under the old system, not that they are as well off as they could possibly be.[189] The Supreme Court has also held that, even if the jurisdiction *intends* to make minorities worse off by virtue of the changes, the Attorney General or D.C. District Court may not withhold preclearance if those changes do not have that *effect*.[190]

The question then arises: may a jurisdiction obtain preclearance by arguing that a proposed change to its district lines are not retrogressive because, for example, although the number of black districts decreased, a corresponding increase in the number of Hispanic districts makes up for it? In other words, could the defendant jurisdiction show that they avoided retrogression of the number of "minority" districts, merely by aggregating the minority populations, even if the position of black voters is significantly weakened in the process? Is it just as good to have five Hispanic districts and one black district as it is to have four Hispanic districts and two black districts?

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[186] To be fair, not all of the Section 5 jurisdictions are jurisdictions with substantial histories of racial animus. See Adams, *Latinos and Local Representation* at 113–14 (cited in note 4) (discussing the idiosyncratic circumstances that led to Kings County, California becoming a "covered" jurisdiction). Nevertheless, the mechanics of Section 5 are set up in such a way as to greatly increase the likelihood that jurisdictions caught in the Section 5 net will be the ones Congress deemed most problematic. See Samuel Issacharoff, Pamela S. Karlan, and Richard H. Pildes, *The Law of Democracy: Legal Structure of the Political Process* 556 (Foundation 2d ed 2001) (noting, "Although [Section 5] was stated in formal, neutral terms, it managed to reach the Deep South and very few other jurisdictions").

[187] See Bernard Grofman and Lisa Handley, *1990s Issues in Voting Rights*, 65 Miss L J 205, 243 n 127 (1995) ("The section 5 preclearance provisions put the burden on covered jurisdictions to demonstrate that changes do not have discriminatory effects or purpose. . . . Thus, the usual 'innocent until proven guilty' standard was seemingly inverted.") (internal citation omitted).

[188] *Beer v United States*, 425 US 130, 141 (1976).

[189] Id at 140–41.

[190] *Reno v Bossier Parish School Bd*, 528 US 320, 335 (2000).

Just as it is difficult to find any principled reason to permit plaintiff aggregation while forbidding defensive aggregation in Section 2 cases, it is likewise difficult to find a compelling distinction between defensive aggregation under Section 5 and Section 2. As the Supreme Court has noted, "section 5 and section 2, virtually companion sections, operate in tandem to prohibit discriminatory practices in voting, whether those practices originate in the past, present, or future."[191]

The possibility of minority aggregation in this context may present an attractive option to certain jurisdictions faced with the Catch-22 of shoring up black districts and inviting a Section 2 challenge or not doing so and being denied preclearance under Section 5. In the 1990s round of redistricting, a number of state and local jurisdictions, with the encouragement of George Bush, Sr.'s Justice Department, worked hard to maximize the number of majority-minority districts to avoid VRA challenges.[192] Those efforts may well come back to haunt these jurisdictions in the litigation related to the post-2000 Census round of redistricting, which has already begun and will inevitably carry on through the entire decade. Throughout the Southwest in particular, black populations have held relatively steady, or grown only slightly, being largely overwhelmed as a percentage of the population by a dramatic influx of new Hispanic residents.[193] As a result, in some jurisdictions blacks no longer have the population to justify controlling the same number of districts that they did during the 1990s.[194] Absent Herculean efforts on the part of those jurisdic-

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[191] *Chisom*, 501 US at 387, quoting *Chisom v Edwards*, 839 F2d 1056, 1064 (5th Cir 1988).

[192] See Susan B. Glasser, *Early Rulings Indicate Justice Dept. to Push Hard to Create Minority Districts in Remap*, Roll Call 19 (Aug 1, 1991). Some critics of DOJ's policies contended that the emphasis on majority-minority districts was not a result of heightened solicitude for minority voting rights, but was rather a conscious political strategy to help Republicans by "packing" minority, Democratic voters into safe Democratic districts. See, for example, *Black Majority Districts Face Challenge in Court*, Chi Trib 10 (Mar 25, 1994) ("Republicans 'sold their souls,' . . . and helped create the new majority-minority districts because they hoped the surrounding districts would have fewer black voters and therefore elect Republican candidates."); *Hays v Louisiana*, 839 F Supp 1188, 1197 n 21 (W D La 1993), vacd on other grounds at 512 US 1230 (1994) (criticizing the Bush, Sr. Justice Department for "arrogat[ing] the power to use Section 5 preclearance as a sword to implement forcibly its own redistricting policies, rather than as a shield to prevent lamentable historical abuses.").

[193] See generally Adams, *Latinos & Local Representation* (cited in note 4).

[194] Though it is not a Section 5 jurisdiction, this pattern can be seen quite starkly in Los Angeles County congressional districts. In the wake of the 1991 redistricting, blacks elected three representatives to Congress in South Central Los Angeles County: Julian Dixon, Maxine Waters, and Juanita Millender-McDonald. Tony Quinn, *The Dilemma of*

tions, the position of black voters in these areas will inevitably retrogress. Furthermore, any efforts jurisdictions make could well result in a vote dilution challenge under Section 2 by a jurisdiction's Hispanic voters if administrators try to use those Hispanic voters to bolster black incumbents, rather than to create new Hispanic districts.[195]

Despite the attractiveness to jurisdictions facing two unappealing choices, permitting aggregation to avoid the issue would render the burden-shifting framework of Section 5 largely superfluous. The Supreme Court's holding in *Reno v Bossier Parish*[196] requires the Attorney General or D.C. District Court to preclear a plan as long as the proposing jurisdiction avoids retrogression—regardless of the otherwise dilutive impact of the proposed electoral system. Thus, the proposing jurisdiction must merely show that its new plan is no more dilutive than its predecessor.[197] Simply put, if the new system is no worse than the one it replaces, the system meets Section 5's requirements. Thus, the jurisdiction need not show that the proposed minority group is politically cohesive, as is required under *Gingles*. Given this fact, it would be easy for a jurisdiction to augment one minority at the expense of another under Section 5 if aggregation were allowed. And since discriminatory purpose is no bar to preclearance under *Bossier Parish*,[198] the risk is that jurisdictions acting in bad faith will create a "favored minority" that is disproportionately well-represented, correspondingly weakening the position of other

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Population Without Representation, LA Times M3 (May 20, 2001) ("The three black districts—the open Julian Dixon seat and those held by Reps. Maxine Waters and Juanita Millender-McDonald—are a collective 107,000 short. . . . What's more, the people in these districts are increasingly Latino."). An explosion of Hispanic population, however, has overwhelmed the blacks to the point that blacks only now have sufficient population to constitute majorities in only two LA districts. Richard E. Cohen, *Redrawing the House*, Natl J 1022, 1055 (Apr 7, 2001) (noting the problems that this caused California Democrats).

[195] This is likely to be a common trend in areas where the black population has remained constant but the Hispanic population has experienced tremendous growth. See Quinn, *The Dilemma of Population Without Representation*, LA Times at M3 (cited in note 194) (discussing the history of diluting Hispanic voting power in Los Angeles County in order to bolster the seats of white Democrat incumbents in previous decades, and the likelihood that the same process would be followed in the 2001 redistricting to protect black incumbents).

[196] 528 US 320 (2000).

[197] Id at 335 ("[Preclearance] does *not* represent approval of the voting change; it is nothing more than a determination that the voting change is no more dilutive than what it replaces, and therefore cannot be stopped in advance under the extraordinary burden-shifting procedures of § 5, but must be attacked through the normal means of a § 2 action.").

[198] See text accompanying note 190.

less-favored minorities. In this scenario, aggrieved parties could still bring a challenge under Section 2, but the presumption would shift back in favor of the jurisdiction whose plan was precleared.

If courts permit aggregation in Section 2 challenges, then the similarities between Section 2 and Section 5 suggest that courts will permit aggregation in the latter context as well. The mechanics of Section 5 litigation already create a low threshold for covered jurisdictions to meet. They need not institute a new voting device or system that makes minorities better off than they were under the status quo; simply avoiding a worse system is enough. If courts allow aggregation, they will further lower this already-low threshold, substantially rolling back the protections of Section 5.

D. Evaluating the Policy Justifications Supporting Aggregation

Proponents of minority coalitions raise two primary policy justifications for permitting aggregation in Section 2 challenges: (1) that it is illogical or even unconstitutional to insist on such rigid distinctions between the races as opponents of aggregation require, and (2) that aggregation would allow minority groups to more easily meet the *Gingles* criteria to state a vote dilution claim. Neither claim, however, can justify aggregation.

1. Opposing rigid distinctions between the races.

The first policy justification for aggregation is the one advanced by the majorities in *LULAC I* and *Campos*, which one pair of commentators has summarized thus: "Combining Latinos and African-Americans would seem to be a logical choice, since both groups suffer from discrimination, are under-represented in government and are protected under the Voting Rights Act."[199] As the *Nixon* court noted, however, just because each group may have faced discrimination does not mean that each group has faced the same *kind* of discrimination.[200] This is especially true, the *Nixon* court continued, when the findings regarding different groups are

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[199] Ancheta and Imahara, 27 USF L Rev at 822 (cited in note 9).

[200] *Nixon*, 76 F3d at 1391 ("Simply because Congress has found that African Americans have been discriminated against and because Congress has made the same finding regarding Hispanic Americans, there is no basis for presuming such a finding regarding a group consisting of a mixture of both minorities.").

separated by a decade and the bases of the findings are different.[201]

Dissenting from the majority decision in *Nixon*, Judge Keith stated a constitutionalized variation of this argument, characterizing the argument advanced by the *Nixon* court as a "racial purity test."[202] The *Nixon* majority, he argued, unconstitutionally distinguished between plaintiffs solely on the basis of race.[203] Judge Keith suggested, "Today, the majority further discriminates by compartmentalizing the discriminated against into segregated boxes from which their potential to participate fully in political life is significantly diminished."[204] Following in this same vein, Professors Samuel Issacharoff, Pamela Karlan and Richard Pildes point out in their 2001 casebook on the legal structure of political systems that *Nixon* "rests on a controversial vision of 'race.'"[205] Other courts, they point out, have recognized the plasticity of race and ethnicity, which are "as much a social construction as a biological fact."[206] In light of this plasticity, they question whether the distinction between language and racial minorities is tenable.[207]

Keith, Issacharoff, Karlan, and Pildes are probably correct that the distinctions among minority groups are artificial. But the logic of civil rights enforcement demands the ability to somehow distinguish among races, however artificial those distinctions may be.[208] For this reason federal census forms ask citizens to check an otherwise arbitrary box, choosing a racial category. Otherwise, how is a court to know how many "whites" and "blacks" there are in a given jurisdiction in order to determine whether the votes of "blacks" are being impermissibly diluted? Certainly race is not so conceptually plastic that plaintiffs, judges, and commentators find the distinction between whites

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[201] Id ("Congress found that African Americans had been disadvantaged specifically by reason of race, while Hispanic Americans had been disadvantaged by reason of language and education.").

[202] Id at 1401 (Keith dissenting).

[203] Id at 1399–1402 (Keith dissenting).

[204] *Nixon*, 76 F3d at 1402 (Keith dissenting).

[205] Issacharoff, Karlan and Pildes, *The Law of Democracy* at 795 (cited in note 186).

[206] Id.

[207] Id at 796.

[208] See Donald Braman, *Of Race and Immutability*, 46 UCLA L Rev 1375, 1435 n 247 (1999) ("These legislatively-based priorities created the need among Federal agencies for data for the specific population groups that historically had suffered discrimination and differential treatment on the basis of race or ethnicity."), quoting Office of Management and Budget, Standards for the Classification of Federal Data on Race and Ethnicity, 60 Fed Reg 44674–75 (1995).

and non-whites impossible to make. When the entire system of VRA enforcement is predicated on artificial racial categories, it makes no sense to pronounce that in *certain* VRA claims courts are suddenly forbidden to maintain them.

2. Meeting the *Gingles* preconditions.

The second justification advanced by aggregation proponents is that it permits protected groups to maintain Section 2 challenges in cases where they would otherwise be blocked by one of the *Gingles* prongs of sufficiency and compactness, cohesiveness, and white bloc voting.[209] As Judge Jones noted in her *LULAC II* concurrence, however, this position essentially begs the question of whether such coalitions are permissible in the first place.[210] This justification does nothing to answer the question of *why* it is desirable to allow minority coalitions, rather than individual minority groups, to surmount the hurdles created by *Gingles*. Judge Jones further argued that if a minority group lacks a common race or ethnicity, any showing of political cohesion must rest primarily on "shared values, socioeconomic factors, and coalition formation," the same things that unify political minorities.[211] The result would be to increase the possibility that courts will provide a remedy that crosses the line between protection of racial minorities and mandating proportional representation,[212] a remedy specifically disavowed by Section 2.[213] As it is, the *Gingles* decision has frequently been criticized as creating a strong bias toward proportional representation, despite the Court's official affirma-

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[209] Schulte, Note, 1995 U Ill L Rev at 480–81 (cited in note 165).

[210] *LULAC II*, 999 F2d at 895 (Jones concurring) ("The second argument advanced by a court that permitted a minority coalition claim under Section 2 begs the question of statutory construction altogether. This position asserts that because a minority coalition may meet the three-prong *Gingles* test, including the criterion of the minority group's political cohesiveness, it may gain relief from vote dilution.").

[211] *LULAC II*, 999 F2d at 895 (Jones concurring), quoting *LULAC I*, 812 F2d at 1504 (Higginbotham dissenting).

[212] See *LULAC II*, 999 F2d at 896 ("Permitting Section 2 claims by opportunistic minority coalitions, however, artificially escapes [the first *Gingles*] hurdle. As a result, the remedy afforded to the coalition may easily cross the line from protecting minorities against racial discrimination to the prohibited, and possibly unconstitutional, goal of mandating proportional representation.").

[213] 42 USC § 1973(b) ("The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered [in determining whether there has been a violation]: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.").

tion of the Section 2 disclaimer.[214] As one commentator has noted, however, that bias is at least restricted by the requirement that there be "compact, cohesive, and sizable minority groups."[215] Aggregation would allow minority coalitions to evade those minimal constraints.

Schulte attempts to answer Judge Jones's proportional representation critique. He quotes Judge Jones's statement that Section 2 "expressly prohibit[s] proportional representation for minority groups."[216] From this he concludes, "Her words implied that a cause of action exists under the Act if minorities achieve proportional representation."[217] He further maintains that "[h]er interpretation could not have been more incorrect. Although section 2 states that it creates *no right* to proportional representation, it does *not* forbid it. Under the plain language of the Act, therefore, section 2 remedies can strive to achieve proportional representation."[218]

Schulte's argument, however, addresses a straw man that evades the real criticism. The context of Judge Jones's statement makes clear that she is *not* implying a Section 2 cause of action against minorities that achieve proportional representation, nor is she suggesting that minorities may not work to achieve proportional representation. In the same paragraph from which Schulte draws the previous quotation, Judge Jones discusses the risk of a "remedy" that incorporates the "prohibited, and possibly unconstitutional, goal of *mandating* proportional representation."[219] The

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[214] See *Gingles*, 478 US at 93 (O'Connor concurring) ("[E]lectoral success has now emerged, under the Court's standard, as the linchpin of vote dilution claims, and . . . the elements of a vote dilution claim create an entitlement to roughly proportional representation within the framework of single-member districts."). See also Alexander Athan Yanos, Note, *Reconciling the Right to Vote with the Voting Rights Act*, 92 Colum L Rev 1810, 1828 and n 88 (1992) (noting that "[d]espite [the *Gingles* majority's failure to explicitly adopt a bright-line rule mandating proportional representation], many commentators concluded from the decision in *Gingles* that proportional representation had become the standard of measure for determining the presence of minority vote dilution under Section 2 of the Act," and citing to a number of commentators that have so concluded).

[215] Mary A. Inman, Comment, *C.P.R. (Change Through Proportional Representation): Resuscitating a Federal Electoral System*, 141 U Pa L Rev 1991, 2050–51 (1993) ("Despite the 'no proportional representation' disclaimer of the 1982 Voting Rights Act Amendments and the Court's proclaimed cognizance of it, the core value underlying *Gingles*['] three preconditions is a right to proportional representation—but only for compact, cohesive, and sizable minority groups.") (footnotes omitted).

[216] Schulte, Note, 1995 U Ill L Rev at 470 (cited in note 165), quoting *LULAC II*, 999 F2d at 895 (Jones concurring).

[217] Schulte, Note, 1995 U Ill L Rev at 470 (cited in note 165).

[218] Id.

[219] *LULAC II*, 999 F2d at 896 (Jones concurring) (emphasis added).

problem is not with minorities who succeed at the ballot box in numbers roughly proportional to their population, but with judges who mandate proportional representation, which Section 2 specifically disavows. Indeed, Schulte's basic premise is flawed; it is a well-established principle of law that, just because the law does not forbid an action (achieving proportional representation), it does not then inevitably follow that courts may mandate that result or require others (such as the defendant jurisdictions) to further the plaintiffs' aim.[220] This would especially seem to be the case when Congress has expressly disclaimed an intention to impose such a mandate. Put another way, it is entirely probable that Judge Jones would agree with Schulte's conclusion if he had stated it thus: "Under the plain language of the Act, therefore, *minorities* can strive to achieve proportional representation."

Schulte further notes that aggregation does not logically *require* proportional representation.[221] That is arguably true, strictly speaking, but it misses the point of the critique. The claim that Schulte fails to address is that the entire Section 2 framework as interpreted by *Gingles* is strongly biased toward proportional representation, even though the law and *Gingles* officially disclaimed it. The first *Gingles* prong is one of the few barriers to wholesale proportional representation, thereby at least minimally preserving the fine line that Congress walked between codifying the results standard for vote dilution claims and avoiding mandating

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[220] For examples of courts making a distinction between requiring an act and simply not forbidding it, see *Thomas v Arn*, 474 US 140, 148–49 (1985) ("However, we need not decide whether the [Federal Magistrates Act, 28 USC § 636] mandates a waiver of appellate review absent objections. We hold only that it does not forbid such a rule."); *Vanderbilt v Vanderbilt*, 354 US 416, 432–33 n 2 (1957) (Harlan dissenting) ("It is easier to have a flat rule than to make distinctions based on judgment. Yet, from the standpoint of partitioning power among the several states, there may well be wisdom in having a gap between what due process will not forbid and what full faith and credit will not require. Certainly in suits over property and money there may be grounds that are thought good enough to justify a state in exerting its power so far as it relies wholly on its own strength and yet not so good that other states should be bound to lend a hand."), quoting T. R. Powell, *And Repent at Leisure*, 58 Harv L Rev 930, 936 (1945). The Court has also recognized the inverse proposition (albeit in a rather controversial setting): just because the law does not impose a burden (as opposed to creating a right), it does not follow that private actors cannot assume that burden (as opposed to gaining the benefit in the VRA context). See generally *United Steelworkers v Weber*, 443 US 193 (1979) (holding that, though Title VII of the Civil Rights Act of 1964 specifically disavowed a requirement of affirmative action to remedy past wrongs, it did not forbid private actors to implement such a program).

[221] Schulte, Note, 1995 U Ill L Rev at 470 (cited at note 165) ("Not only does section 2 not forbid proportional minority representation, but aggregation does not demand proportional representation.").

proportional representation.[222] Aggregation breaks down that barrier, thus upsetting the balance and violating Congress's clearly stated intention of avoiding that result.

IV. COURTS SHOULD ADOPT A BRIGHT-LINE RULE AGAINST MINORITY COALITIONS

At least one commentator, Rick G. Strange, has suggested that the best way to address the difficult question of minority coalitions is to permit minority coalitions, but at the same time to establish a heightened standard of cohesiveness for the plaintiff class beyond that which the *Gingles* framework already demands.[223] Strange would have a proposed coalition plaintiff class demonstrate similar socio-economic status, similar attitudes toward "significant issues affecting the challenged entity," and a history of supporting the same candidates before even reaching the *Gingles* standards.[224] The idea is to significantly limit the circumstances in which coalition plaintiffs would be possible, thus avoiding many of the instances in which it could be used improperly, while still allowing the most meritorious plaintiffs to reap the benefits of aggregation. This approach is surely appealing as an initial matter. Bright-line rules always present the risk of doing injustice in the individual case,[225] whereas malleable standards hold out the possibility, at least, of allowing judges to tailor cases to individual circumstances.[226] Nevertheless, the nature and mechanics of cases under the VRA make a "standards" approach to aggregation particularly troublesome, regardless of the merits of discretion generally.

As previous commentators have noted, there comes a point at which tailored standards become so numerous and indeterminate

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[222] See *LULAC II*, 999 F2d at 895 (Jones concurring) ("One may be uncertain what Congress might think about permitting minority coalitions to assert vote dilution claims, but Congress clearly walked a fine line in amending Section 2 to codify the results test for vote dilution claims while expressly prohibiting proportional representation for minority groups.").

[223] See, for example, Strange, 20 Tex Tech L Rev at 95 (cited in note 9) (arguing for permitting aggregation, but only once the plaintiff class has met a heightened burden of proof with respect to the cohesiveness of the proposed coalition).

[224] Id at 129.

[225] See, for example, Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 Mich L Rev 1468, 1484 (1985) (advocating a reasonableness "standard" in Fourth Amendment jurisprudence, rather than the current exclusionary rule).

[226] Bernard W. Bell, *Dead Again: The Nondelegation Doctrine, the Rules/Standards Dilemma and the Line Item Veto*, 44 Vill L Rev 189, 199 (1999) ("Standards set forth factors for decisions made on a case-by-case basis.").

as to give possible litigants no idea of what *the law* is.[227] Each case comes to be decided upon its particular facts and consequently has less value as precedent or as a means of putting citizens (or here, jurisdictions) on notice as to what the law expects of them. Section 2 cases already lean strongly toward the fact-specific, limited-precedent side of the spectrum.[228] Another standard, as opposed to a rule, would only increase the immense uncertainty that parties already face in litigating VRA cases.

The fact-specific nature of VRA cases results largely from 42 USC § 1973(b), which instructs courts to judge vote dilution according to a "totality of circumstances" standard.[229] As the Second Circuit recently noted, "This standard is exceptionally vague. One has almost no guidance as to what illegally lessens the opportunity to vote."[230] Further contributing to this difficulty is the fact that Section 2 disavows the two easily administrable standards—intent-based violations on the one hand or proportional representation on the other.[231] Perhaps recognizing this difficulty, the Senate Judiciary Committee's report that accompanied the 1982 amendments to the VRA ("Senate Report")[232] listed nine factors that courts *might* consider as relevant to the totality of circumstances analysis.[233] The Supreme Court adopted these guidelines

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[227] See id at 200–01 ("Standards frustrate the rule of law. They undermine citizens' interests in knowing their rights and responsibilities before, rather than after, they act."); see generally Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U Chi L Rev 1175, 1180 (1989) (arguing that judicial crafting of law in the form of rules rather than standards is essential to the concept of the "rule of law").

[228] See *Gingles*, 478 US at 79 ("This determination [of whether a violation of Section 2 has been committed] is peculiarly dependent upon the facts of each case . . . and requires 'an intensely local appraisal of the design and impact' of the contested electoral mechanisms.").

[229] 42 USC § 1973(b).

[230] *Goosby v Town Bd of the Town of Hempstead*, 180 F3d 476, 500 (2d Cir 1999).

[231] See text accompanying notes 147 and 213.

[232] See Senate Report, 1982 USCCAN at 177 (cited in note 146).

[233] Id at 206–07:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

in *Gingles*.[234] But, as the *Gingles* Court recognized, the Senate Report itself limits the usefulness of these factors.[235] The Senate Report factors do not purport to be an exhaustive list of relevant considerations.[236] The Report states that "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other."[237] Rather, courts must undertake a "searching practical evaluation of the past and present reality" and take a "functional view of the political process."[238]

The result of these vague guidelines is demonstrated by cases such as *Jenkins v Red Clay Consolidated School District Board of Education*,[239] in which a number of Senate factors favored the plaintiffs while others favored the defendants, and the district court was left to decide how to weigh the factors to reach a decision. A court in this instance must decide which factors should be accorded greater weight.[240] It must determine *why* some factors are weightier than others. However, judges have nothing to guide them in making those difficult and often arbitrary decisions. It is beyond the scope of this Comment to address these questions, but

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5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
6. whether political campaigns have been characterized by overt or subtle racial appeals;
7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

[8.] whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

[9.] whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

[234] *Gingles*, 478 US at 36–37.

[235] Id at 46 ("[T]he Senate Report espouses a flexible, fact-intensive test for § 2 violations.").

[236] Senate Report, 1982 USCCAN at 207 (cited in note 146) ("While these enumerated factors will often be the most relevant ones, in some cases other factors will be indicative of the alleged dilution.").

[237] Id.

[238] *Gingles*, 478 US at 45, quoting Senate Report, 1982 USCCAN at 207 (cited in note 146) (internal quotation marks omitted).

[239] 1996 US Dist LEXIS 4747 (D Del), affd as *Jenkins v Manning*, 116 F3d 685 (3d Cir 1997).

[240] Id at *57–*79 (holding that there was no violation of Section 2 in a case where the court found that Senate Factors 1, 2, 5, 8 & 9 leaned in favor of a finding of a violation, while Factors 3, 4, 6 & 7 weighed against such a finding).

they do serve to demonstrate the substantial difficulties that already complicate VRA cases.

When it comes to giving cities and states guidelines by which to establish and conduct their electoral systems, voting rights cases are among the most cryptic. Indeed, Professor Karlan has analogized the recent line of Supreme Court voting rights cases to the awkward period of obscenity jurisprudence[241] between *Redrup v New York*[242] and *Miller v California*,[243] in which the Court "summarily decid[ed] obscenity cases without developing any legal standards that the lower courts could readily apply."[244] In such a chaotic context, throwing an additional standard (rather than a rule) into the precedential mix would further complicate this area of the law.[245] Courts cannot avoid the vagueness of the totality of circumstances test; the language of 42 USC § 1973(b) demands it.[246] Courts can, however, avoid making the situation worse by refusing to graft new, judicially-crafted standards into voting rights law.

V. MINORITY COALITIONS WOULD BE APPROPRIATE IN SUITS ALLEGING EQUAL PROTECTION VIOLATIONS

By deciding that the statutory provisions of the VRA do not extend to minority coalitions, the courts are by no means determining what is required or forbidden in claims alleging violations of *constitutional* guarantees. The courts would only determine the question of the class of citizens for whom Congress afforded statutory protections *greater* than those guaranteed under the Equal Protection Clause of the Fourteenth Amendment and un-

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[241] See Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-Shaw Era*, 26 Cumb L Rev 287, 288 (1996) ("The Court has apparently set itself upon a course of 'Redrupping' congressional districts: reviewing challenged districts one by one and issuing opinions that depend so idiosyncratically on the unique facts of each case that they provide no real guidance to either lower courts or legislatures.") (footnotes omitted).

[242] 386 US 767 (1967).

[243] 413 US 15 (1973).

[244] Karlan, 26 Cumb L Rev at 288 n 7 (cited in note 241).

[245] It should be noted that in litigation under the VRA, standards often represent an improvement—an increase in certainty over the completely open-ended nature of the "totality of the circumstances" test. This was certainly the case in *Gingles*. But this Section does not discuss the merits of standards as compared with nothing at all. This Section argues that a rule would lessen uncertainty to a greater degree than a standard, and the nature of VRA litigation is such that even a little more certainty would represent an improvement.

[246] See text accompanying note 229.

der the Fifteenth Amendment.[247] A vote dilution claim under these Amendments is very similar to a vote dilution claim under Section 2,[248] except that, as noted above, a constitutional claim of vote dilution requires proof of discriminatory intent.[249] If a jurisdiction were to intentionally discriminate against a coalition of minorities, it would be perverse to prohibit that coalition from bringing an action against the jurisdiction. The worry that innocent actors would be caught up in such an intent-based action is greatly reduced, if not eliminated, as courts would likely dismiss frivolous claims against good faith jurisdictions at the summary judgment stage. That such risks are lessened becomes especially clear when compared to the strict liability regime of Section 2's results test.[250]

In addition to avoiding the overexpansion of a strict liability regime that burdens innocent actors, permitting minority coalitions in constitutional actions avoids a number of the other concerns raised by this Comment. First, the question of whether Congress spoke clearly on the matter of minority coalitions is beside the point in the equal protection context; courts avoid the controversy over statutory interpretation of the VRA because they interpret only the Constitution. The federalism concerns of *Gregory* are irrelevant in actions under the Fourteenth and Fifteenth Amendments, as opposed to legislation passed pursuant to Congress's authority under them. As *Gregory* recognized, "those

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[247] Already there are indisputably a number of groups and individuals who are not protected by the provisions of the VRA, but who may bring vote dilution actions under the Constitution. The VRA only applies to vote dilution on the basis of race, so political parties, for example, must bring any claims under the Fourteenth and Fifteenth Amendments. See *Smith v Boyle*, 144 F3d 1060, 1069 n 9 (7th Cir 1998) (Flaum concurring in part and dissenting in part) ("[P]olitical parties are not covered by the Voting Rights Act.").

[248] Prior to 1982, vote dilution claims were almost always constitutional claims, since Section 2 was regarded as a restatement of, and co-extensive with, the Fifteenth Amendment. See Issacharoff, Karlan and Pildes, *The Law of Democracy* at 747 (cited in note 186) ("Section 2 was virtually never used [before 1982]: prior to *Washington v. Davis* and *Nevett v. Sides*, there was little reason to suppose the statutory standard was more protective than the constitutional one, and the plurality opinion in *Bolden* found that section 2 merely restated the constitutional prohibition."). The 1982 amendments to Section 2 were regarded primarily as a way of returning to the constitutional standard that had prevailed prior to the Supreme Court's decision in *City of Mobile v Bolden*, 446 US 55, 62 (1980), which established a discriminatory intent requirement. See Senate Report, 1982 USCCAN at 192 (cited in note 146) ("The proposed amendment to Section 2 of the Voting Rights Act is designed to restore the legal standard that governed voting discrimination cases prior to the Supreme Court's decision in *Bolden*.").

[249] *Bolden*, 446 US at 62 ("The Court's more recent decisions confirm the principle that racially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation.").

[250] See text accompanying note 146.

'Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty.'"[251] As far as the protection of those constitutional provisions extends, the Constitution itself displaces federalism concerns. It is only when Congress goes beyond the protections of the Amendments that federalism concerns have force.

Similarly, in constitutional challenges, the argument that costly lawsuits and complex systems administration unduly encumber jurisdictions has less force than in the VRA context. Unlike VRA cases, the safe harbor to avoid a constitutional vote dilution challenge is very clear. States may not intentionally degrade the right of any citizen to vote.[252] Finally, the question of the effect of Section 2 on the burden-shifting framework of Section 5 becomes moot. That framework, as opposed to vote dilution challenges, is a creature of statute. No one would suggest that the constitutional amendments require such a regime.[253]

Admittedly, the question of defensive aggregation still arises in constitutional vote dilution cases, at least theoretically. The defendant jurisdiction could claim that it did not intend to harm blacks or Hispanics, for example, but to help them as a coalition. Courts need not blindly accept this claim, however. It would have to be well established in the legislative record accompanying the proposed voting change. In constitutional cases subject to heightened scrutiny, like vote dilution cases alleging discriminatory intent,[254] courts are required to engage in a close examination to be certain that "[t]he justification [is] genuine, not hypothesized or invented *post hoc* in response to litigation."[255]

Permitting aggregation in constitutional cases would mitigate, somewhat, the impact of forbidding them in the VRA context, and do so without many of the problems that VRA litigation creates. It is true that the standard of proof is difficult to meet, but a constitutional cause of action provides no less protection for a minority coalition than it does for any nonracial coalition that

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[251] 501 US at 468, quoting *City of Rome*, 446 US at 179.

[252] See *Bolden*, 446 US at 62.

[253] See, for example, *South Carolina v Katzenbach*, 383 US 301 (1966) (discussing Congress's authority to enact such a regime under Section 2 of the Fifteenth Amendment).

[254] See *Hunt v Cromartie*, 526 US 541, 547 (1999) ("[I]n this context, strict scrutiny applies if race was the 'predominant factor' motivating the legislature's districting decision.").

[255] *United States v Virginia*, 518 US 515, 533 (1996) (stating that the Virginia's justifications for maintaining the Virginia Military Institute as a men-only institution against a gender discrimination claim "must be genuine, not hypothesized or invented post hoc in response to litigation.").

states a vote dilution claim.[256] And if Congress believes that such protection is inadequate, they could always amend the VRA to expand the protections contained within it.

CONCLUSION

If Congress wanted to extend the protections of the VRA to include minority coalitions, it could presumably exercise its constitutional authority under the Fourteenth and Fifteenth Amendments and do so.[257] In the absence of a clear statement that it has made such an extension, however, courts should hesitate to extend the VRA's provisions to new, hybrid classes of citizens. Because Congress substituted a results test in vote dilution cases for the constitutional requirement of discriminatory intent, the impact of reading the VRA more broadly than the language of Section 2 demands could be devastating to innocent jurisdictions trying to comply with the VRA. Such a reading could damage the Constitution's federalist system and deplete state and local coffers. Furthermore, plaintiffs could see aggregation turned against them by bad faith defendants opportunistically using a convenient record of a temporary political alliances between otherwise non-cohesive minority groups.

Concern for these results ought to lead courts to adopt a bright-line prohibition of minority coalitions, rather than relying on standards to allow minority coalitions in select circumstances. The vagueness Congress created in Section 2 cases by choosing the totality of circumstances test makes this field of law an unappealing candidate for yet another series of standards.

Notably, rejecting minority coalitions under the VRA does not foreclose their use in claims alleging constitutional violations. Indeed, many of the policy arguments that militate against minority coalitions in VRA cases have less force in direct constitutional challenges. Allowing aggregation in this context softens the impact of prohibiting them in the VRA context.

As Justice Scalia has noted, in the VRA Congress provided "a powerful, albeit sometimes blunt, weapon with which to attack

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[256] See text accompanying note 247.

[257] As noted above, the constitutionality of Congress's 1982 Amendments has never been explicitly decided, so the validity of further revisions can only be presumed, rather than assured. See note 148. See also Issacharoff, Karlan & Pildes, *The Law of Democracy* at 859–66 (cited in note 186) (summarizing the debate over the constitutionality of the amended Section 2).

even the most subtle forms of discrimination."[258] And there is no question that the VRA was passed in response to the real and disturbing problem of racial discrimination in voting. In rooting out such malfeasance, however, it is important to remember the costs that accompany the VRA's departure from the constitutional baseline, and not to allow a narrowly tailored remedial statute to be turned into "some all-purpose weapon for well-intentioned judges to wield as they please in the battle against discrimination."[259] Where Congress has not clearly authorized interference with state electoral systems, as they have not in the case of minority coalitions, courts should refrain from authorizing it for them.

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[258] *Chisom*, 501 US at 406 (Scalia dissenting).

[259] Id at 404.