

THE VRA AT A CROSSROADS: THE ABILITY OF
SECTION 2 TO ADDRESS DISCRIMINATORY
DISTRICTING ON THE EVE OF
THE 2020 CENSUS

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INTRODUCTION

“[A] triumph for freedom as huge as any victory that has ever been won on any battlefield,” President Lyndon B. Johnson declared as he signed the Voting Rights Act of 1965 (VRA or “Act”) into law.¹ For nearly a century following the passage of the Fifteenth Amendment, African Americans had faced blatant obstacles that effectively denied them the right to vote, such as “secret ballots, poll taxes, [and] literacy tests.”² For example, the tactics used to keep black citizens from casting ballots in Mississippi included a literacy test, with questions such as “how many bubbles are in a bar of soap?”³ Since its passage, the voting rights of racial and language minorities protected under the Act have certainly improved, and the overt vote-denying tactics described above have been nearly eradicated.⁴ In fact, black voter “turnout has come to exceed white voter turnout in” states with some of the worst history of racial discrimination.⁵ However, if one scratches slightly below the surface, it becomes clear that minorities have yet to achieve equality in the right to vote.

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1 Maya Rhodan, *The Voting Rights Act at 50: How the Law Came to Be*, TIME (Aug. 6, 2015), <https://time.com/3985603/voting-rights-act-1965-history/>. See generally Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 & 52 U.S.C.).

2 *Id.*

3 *Id.*

4 See *infra* note 81 and accompanying text.

5 See *infra* note 86.

Today, discriminatory efforts against minority voting rights are more discrete and aim to dilute the impact of minority votes rather than deny them from being cast in the first place. The dilution often occurs through redistricting, an exercise that state legislatures must undergo every ten years after promulgation of the census.⁶ Since every congressional district is required to have a roughly equal population, state legislatures are required every decade to adjust the districts, in light of shifting demographics.⁷ However, this constitutionally mandated process can be manipulated to create district maps that strategically lessen the impact of minority votes. North Carolina is home to a recent example of discriminatory districting. There, district lines split “through black communities in Greensboro, Charlotte, Fayetteville and elsewhere” to dilute their voting power.⁸ The North Carolina election map also split North Carolina A&T State University, a historically black college, right down the middle.⁹

The dilution of minority voting strength through districting is a tactic still employed in modern day, but the Act’s ability to combat these discriminatory measures is at a crossroads. After years of broad interpretation of the Act to combat vote discrimination, the Supreme Court, over the past decade, has taken a sharp turn to construe the Act in a far narrower fashion. This has restrained the ability of the Act to combat discriminatory districting. Thus, this Note advocates for the Act to be interpreted in a manner that allows it to meaningfully combat discriminatory efforts in districting. Time is of the essence, as the 2020 census looms, and redistricting efforts begin in state capitols across the country in just over a year. Without an Act that is equipped to meaningfully address discriminatory districting, a wave of district maps that dilute minority voting rights could go unchallenged.

Part I of this Note begins by examining the background of the VRA. In Part I, this Note will briefly summarize the Act’s relationship with the Fifteenth Amendment and the circumstances that prompted its enactment, and detail the development of both section 2 and section 5 of the Act, as they have been used to combat vote discrimination. Part I will also discuss recent Supreme Court decisions that have limited the strength of the Act and set the stage for an analysis of the Act’s inability to combat discriminatory districting.

Part II will highlight two shortcomings of the Act to combat modern day vote dilution. Briefly, these two problems are as follows. First, the sufficient-size *Gingles* precondition, which every plaintiff suing under section 2 for a districting claim must meet, is interpreted too stringently. Second, the Act lacks the capacity to combat one of the most notorious forms of discriminatory districting, “packing.” Part III then proposes two solutions to the above-

6 Justin Levitt, *What Is Redistricting?*, ALL ABOUT REDISTRICTING, <http://redistricting.lls.edu/what.php> (last visited Nov. 29, 2019).

7 *See id.*

8 Amy Gardner et al., *Redistricting Activists Brace for Wall of Inaction as Battle Moves to States*, WASH. POST (Nov. 13, 2019), <https://www.washingtonpost.com/politics/2019/11/12/redistricting-activists-brace-wall-inaction-battle-moves-states/?arc404=true>.

9 *Id.*

identified problems that provide meaningful paths for relief without disturbing the core precedent surrounding the Act. First, coalition districts should be recognized under the first *Gingles* prong. Second, section 2 claims should be interpreted broadly to allow evaluation of minority vote dilution on a statewide or systemwide basis.

I. BACKGROUND

A. *History of the Voting Rights Act of 1965*

The Fifteenth Amendment proclaimed that a citizen's right to vote "shall not be denied or abridged . . . on account of race, color, or previous condition of servitude."¹⁰ However, nearly a century after its enactment, it became clear that the ability to vote was far from race neutral.¹¹ In the various legislative hearings that preceded passage of the Act, Congress came to two principal conclusions.¹² First, efforts to keep black voters effectively disenfranchised amounted to "an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution."¹³ Second, to give meaning to the Fifteenth Amendment, the ineffective remedies of the past would have to be replaced by stricter measures.¹⁴

Therefore, Congress passed the Voting Rights Act of 1965 in an attempt to ensure access to the ballot would be unimpeded by racial discrimination and to ultimately realize political equality.¹⁵ Generally speaking, "the VRA [proscribes] states, counties, and municipalities from abridging or denying the right to vote," either intentionally or in effect, on the basis of "race or color."¹⁶ In addition to African Americans, the VRA protects other racial minority groups, including "Asian Americans, Alaskan Natives, [those] of Spanish descent, . . . American Indians," as well as "language minorities."¹⁷

Further, the Act also protects against vote dilution. Vote denial occurs when one's ability to cast a vote is impeded; vote dilution occurs when the

10 U.S. CONST. amend. XV, § 1.

11 The Attorney General determined the registration of voting-age blacks to be 19.4% in Alabama and 6.4% in Mississippi in 1964, and 31.8% in Louisiana in 1965. *South Carolina v. Katzenbach*, 383 U.S. 301, 313 (1966). Further, the Attorney General estimated that "registration of voting-age whites ran roughly 50 percentage points or more ahead of Negro registration." *Id.*

12 See Amy Rublin, Note, *The Incompatibility of Competitive Majority-Minority Districts and Thornburg v. Gingles*, 29 BUFF. PUB. INTEREST L.J. 111, 117 (2010).

13 *Katzenbach*, 383 U.S. at 309.

14 *Id.*

15 Jamelia N. Morgan, *Disparate Impact and Voting Rights: How Objections to Impact-Based Claims Prevent Plaintiffs from Prevailing in Cases Challenging New Forms of Disenfranchisement*, 9 ALA. C.R. & C.L. L. REV. 93, 94–95 (2018).

16 Lindsey R. Watson, *The Murky Misrepresentation of the Voting Rights Act: Divining Section Two Claims After Bartlett v. Strickland and the 2010 Census*, 1 TENN. J. RACE GENDER & SOC. JUST. 115, 120 (2012).

17 *Id.*

weight attached to one's vote, already cast, is decreased.¹⁸ Most vote dilution claims fall under section 2 of the VRA.¹⁹ However, section 5 also provides an avenue to challenge redistricting efforts, although its scope is limited to a few states.²⁰ Thus, its relationship with section 2 is important for a complete understanding of the Act's capability to combat discriminatory districting.

B. *The Development of Sections 2 and 5 of the VRA*

Section 2 provides in pertinent part that, under subsection (a), no voting procedure shall be "imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right . . . to vote on account of race or color."²¹ To establish a violation of section 2, a plaintiff must prove, under the totality of the circumstances, that those protected under subsection (a) have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."²² In the context of districting, section 2 prohibits states from drawing districts in a manner that dilutes the vote of those protected under the Act.²³

During the VRA's formative years, the Supreme Court and Congress did not see eye to eye. In *Mobile v. Bolden*, the Court built a scienter requirement into vote dilution claims under section 2.²⁴ Black voters alleged that the City's practice of "at-large" voting for City Commissioner positions violated section 2.²⁵ While no African American had ever been elected as a City Commissioner under this at-large voting system, the Court nonetheless found no section 2 violation.²⁶ In doing so, the Court held that the plaintiffs had not proven that the at-large voting system was enacted by the City of Mobile with a discriminatory intent.²⁷ However, Congress swiftly rejected the Court's imposition of a discriminatory intent requirement.²⁸ Within two years of the *Bolden* decision, Congress amended section 2 to establish a results test.²⁹ In sum, a state violates section 2 if the *effect* of any procedure dilutes a minority group's right to vote, regardless of whether the state intended it.³⁰

18 See Marcia Johnson, *The Systematic Denial of the Right to Vote to America's Minorities*, 11 HARV. BLACKLETTER L.J. 61, 68 (1994); Morgan, *supra* note 15, at 96 (description of vote denial).

19 See Johnson, *supra* note 18, at 68 (noting that section 2 is the plaintiff's "choice of law").

20 Adam B. Cox & Richard T. Holden, *Reconsidering Racial and Partisan Gerrymandering*, 78 U. CHI. L. REV. 553, 577 (2011).

21 52 U.S.C. § 10301 (2018).

22 *Id.*

23 See *Thornburg v. Gingles*, 478 U.S. 30, 45 (1986).

24 *City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980) (plurality opinion).

25 *Id.* at 58.

26 *Id.* at 73.

27 *Id.* at 74.

28 See Rublin, *supra* note 12, at 119.

29 *Id.*

30 See Watson, *supra* note 16, at 122.

In 1986, the Supreme Court in *Gingles* articulated a structure for section 2 claims alleging discriminatory districting and laid out three preconditions that plaintiffs must meet to advance their claim.³¹ First, the plaintiff must show that the minority group “is sufficiently large and geographically compact to [comprise] a majority in a single-member district” (“*Gingles I*”).³² Second, the plaintiff must demonstrate the minority group is politically cohesive (“*Gingles II*”).³³ Third, the white majority must vote “sufficiently as a bloc to enable it . . . usually to defeat the minority’s preferred candidate” (“*Gingles III*”).³⁴ If the plaintiff demonstrates all three preconditions, then the court will evaluate, under the totality of the circumstances, whether the district map denies the plaintiffs equal access to the electoral process.³⁵ The Senate promulgated seven factors courts may rely on when evaluating a section 2 claim, under the totality of the circumstances.³⁶ While *Gingles* was decided in the context of a multi-member district, the Court later clarified that the three preconditions applied to section 2 claims in single-member districts as well.³⁷

It is also important to briefly examine section 5 of the VRA, as it also applies to districting. Section 5 only applies to jurisdictions with a notable history of vote-discrimination and precludes these jurisdictions from implementing “any election-related change unless permitted to do so . . . by a federal court or by the U.S. Department of Justice.”³⁸ To gain preclearance of an electoral change from the federal government, the enacting jurisdiction would have to prove: (1) that no discriminatory intent existed and (2) that the electoral change would not result in the denial or abridgment of the right to vote of those protected by the VRA.³⁹ The Court clarified that the second prong was meant to ensure that “no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities” to exercise their right to vote.⁴⁰

While more limited in scope than section 2, section 5 is a more powerful tool to combat discriminatory districting. Under section 5, absence of dis-

31 *Id.* at 122–23.

32 *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986).

33 *Id.* at 51.

34 *Id.*

35 *Watson*, *supra* note 16, at 124.

36 The seven factors include (1) the history voting-related discrimination in the state or district; (2) the extent of racially polarized voting in that area; (3) the extent to which the state or political subdivision has used discriminatory procedures in the past; (4) the exclusion of minorities from the candidate slating process; (5) the extent to which minority group members bear the effects of discrimination make it difficult to participate in the political process; (6) the of use “racial appeals” in political campaigns; and (7) election of minority members in the past. S. REP. NO. 97-417, at 28–29 (1982).

37 *Growe v. Emison*, 507 U.S. 25, 40 (1993).

38 Justin Levitt, *Quick and Dirty: The New Misreading of the Voting Rights Act*, 43 FLA. ST. U. L. REV. 573, 579–80 (2016).

39 *Id.* at 581.

40 *Beer v. United States*, 425 U.S. 130, 141 (1976).

criminary effect must be proven before a district map goes into effect; under section 2, a discriminatory district map will stay in effect until the Court strikes it down (which can take years). Further, the baseline for section 5 claims is the status quo, which makes it easier for plaintiffs to establish a violation via retrogression. In other words, while “section 5 measures dilution by looking to changes from past practice, section 2 measures dilution against hypothetical alternatives.”⁴¹

C. *Recent Changes to the VRA*

For the remainder of the Twentieth Century, the VRA continued to enjoy a broad interpretation for the most part. However, starting in 2003, the Supreme Court, over the course of three decisions, reversed course in interpreting vote dilution claims under section 2 and completely uprooted section 5.

First, in *Georgia v. Ashcroft*, the Court analyzed the redistricting efforts of Georgia’s state senate map following the 2000 Census under section 5.⁴² Compared with the benchmark plan, Georgia’s previous state senate map, “the [proposed] plan reduced . . . the number of districts with a black voting age population” above sixty percent by five.⁴³ Yet, the proposed plan increased the number of districts with a black voting age population between twenty-five percent and fifty percent by four.⁴⁴ On review, the Court vacated the district court’s finding that the state senate map amounted to retrogression in violation of section 5.⁴⁵ In doing so, the Court recognized two methods by which a state may maximize the electoral success of a minority group. A state “may choose to create . . . ‘safe’ districts, where it is highly likely that minority voters” can “elect the candidate of their choice.”⁴⁶ Or a state may choose to create “influence districts,” where “minority voters [alone] may not be able to elect a candidate of their choice but [will likely] play a substantial, if not decisive, role in the electoral process.”⁴⁷ The Court concluded that section 5 does not compel either type of district because both options carry “risks and benefits.”⁴⁸

Further, the Court reasoned that a preference for “safe” or “influence” districts is informed by whether one believes section 5 ensures “descriptive representation” or “substantive representation.”⁴⁹ “[D]escriptive representation” occurs where the race of the representative likely matches “the race of

41 Levitt, *supra* note 38, at 586.

42 *Georgia v. Ashcroft*, 539 U.S. 461, 466 (2003).

43 *Id.* at 470.

44 *Id.* at 470–71.

45 *Id.* at 491.

46 *Id.* at 480.

47 *Id.* at 482.

48 *Id.* at 480 (citing *Thornburg v. Gingles*, 478 U.S. 30, 89 (1986) (O’Connor, J., concurring)).

49 *See id.* at 480–81.

the majority of voters in that district.”⁵⁰ “[S]ubstantive representation” occurs where a minority group may achieve their electoral aspirations through coalitions with others.⁵¹ Ultimately, section 5 “gives States the flexibility to choose one theory of effective representation over the other.”⁵² Thus, the Court did not find retrogression where the reduction in “safe” districts, those with a black voting age population over sixty percent, was offset by an increase in “influence districts,” those with a black voting age population between twenty-five and fifty percent.⁵³

In 2009, the Court, via a 5–4 plurality opinion, reexamined and narrowed the scope of section 2 in *Bartlett v. Strickland*.⁵⁴ At issue was whether a crossover district, or a district where a minority group protected by section 2 could elect the candidate of its choice with the help of crossover votes from the white-majority bloc, is protected by section 2.⁵⁵ In other words, *Strickland* explored the minimum size of a minority group necessary to satisfy the first *Gingles* prong.⁵⁶ The Court held that crossover districts did not satisfy *Gingles* I, because a minority group must constitute over fifty percent of the voting-age population.⁵⁷

In reaching this conclusion, the Court first noted that in order to find a section 2 violation, a plaintiff must show that minorities “have less opportunity than other members of the electorate to . . . elect representatives of their choice.”⁵⁸ Since black voters made up thirty-nine percent of the voting age population, the Court reasoned that they were in no better or worse position to elect the candidate of their choice than any other voting group with the same relative strength.⁵⁹ The Court also seemed motivated to ensure that the *Gingles* standard remained workable.⁶⁰ The Court argued that if white-majority voters, who tended to cross over and vote with the minority, were recognized under *Gingles* I, it would be impossible or at least contradictory to find that the white-majority votes as a bloc to defeat minority-preferred candidates under *Gingles* III.⁶¹ Further, beyond the relationship between the first and third *Gingles* requirements, the Court argued that a rule requiring minority groups to make up at least fifty percent of a given district to satisfy *Gingles* I promotes the need for an objective, workable test.⁶² Put differently,

50 *Id.* at 480

51 *Id.*

52 *Id.* at 482.

53 *See id.* at 487–89.

54 *Bartlett v. Strickland*, 556 U.S. 1, 25 (2009) (plurality opinion).

55 *Id.* at 6.

56 *Watson*, *supra* note 16, at 126.

57 *Strickland*, 556 U.S. at 19–20 (plurality opinion).

58 *Id.* at 14 (alteration in original) (quoting 42 U.S.C. § 1973(b) (2000), now codified at 52 U.S.C. § 10301(b) (2018)).

59 *Id.*

60 “Allowing crossover-district claims would require us to revise and reformulate the *Gingles* threshold inquiry that has been the baseline of our § 2 jurisprudence.” *Id.* at 16.

61 *Id.*

62 *Id.* at 17.

to recognize crossover districts as worthy of section 2 protection would “place courts in the untenable position of predicting many political variables and tying them to race-based assumptions.”⁶³

Ultimately, the *Strickland* Court did not seem to believe that expanding the reach of section 2 to crossover districts would remedy the “special wrong” the VRA was designed to correct.⁶⁴ Thus, to satisfy the *Gingles* I prong, a plaintiff must show, by a preponderance of the evidence, that the minority population of the potential district constitutes more than fifty percent of that district. However, the plurality opinion explicitly excluded coalition districts from its holding.⁶⁵ Coalition districts are those where the combination of two or more minority groups has the ability to elect the candidate of the coalition’s choice.⁶⁶

Underlying the Court’s decision in *Strickland* were concerns regarding essentialism and proportionality in vote dilution claims. “Essentialism” is the practice of classifying individuals into certain groups and making presumptions that all members of a group act in a certain manner solely on the basis of their membership in said group.⁶⁷ “Proportionality,” in the districting context, refers to the notion that the number of representatives in an elected body should be proportional to the racial makeup of the electorate.⁶⁸ In a 1994 case adjudicating a section 2 vote dilution claim, Justices Thomas and Scalia wrote an ardent concurrence to voice their concerns that essentialism and proportionality are intertwined with vote dilution claims.⁶⁹ In *Strickland*, the plurality opinion adopted many of Justices Thomas and Scalia’s critiques of essentialism and proportionality to attack the validity of crossover districts.⁷⁰ Thus, while vote-dilution claims are actionable under section 2,⁷¹ the Court has recently hesitated to expand the Act’s protection of such

63 *Id.*

64 *Id.* at 19. “[I]t is a special wrong when a minority group has 50 percent or more of the voting population and could constitute a compact voting majority but, despite racially polarized bloc voting, that group is not put into a district.” *Id.*

65 *Id.* at 13–14 (“We do not address that type of coalition district here.”).

66 *See id.* at 13.

67 Morgan, *supra* note 15, at 103.

68 *See* Holder v. Hall, 512 U.S. 874, 902–03 (1994) (Thomas, J., concurring).

69 “[T]he core of any vote dilution claim is an assertion that the plaintiff group does not hold seats in the proportion that it should But § 2 makes it clear that the Act does not create a right to proportional representation” *Id.* at 937. The idea “that members of the racial group must think alike and that their interests are so distinct that the group must be provided a separate body of representatives in the legislature to voice its unique point of view . . . ‘is a divisive force in a community.’” *Id.* at 906 (quoting Wright v. Rockefeller, 376 U.S. 52, 66 (1964) (Douglas, J., dissenting)).

70 “[D]etermining whether potential districts could function as crossover districts—would place courts in the untenable position of predicting many political variables and tying them to race-based assumptions.” Bartlett v. Strickland, 556 U.S. 1, 17 (2009) (plurality opinion). “Section 2 does not guarantee minority voters an electoral advantage.” *Id.* at 20. While Justice Thomas and Justice Scalia still felt the need to write separately to emphasize that section 2 does not authorize vote-dilution claims at all, their concurrence was notably shorter. *See id.* at 26 (Thomas, J., concurring). This suggests that perhaps the two

claims, likely due to antiessentialist and antiproportionality sentiment. After *Strickland*, it was still hypothetically possible that a crossover district could be indirectly protected under section 5.⁷² However, any protection under section 5 that existed after *Strickland* was short lived.

In 2013, the Supreme Court considered the validity of section 4.⁷³ Section 4 expounds the coverage formula that determines which jurisdictions are subject to the preclearance requirements of section 5.⁷⁴ Sections 4 and 5 were created to be temporary and were actually set to expire five years after the passage of the VRA.⁷⁵ Yet Congress reauthorized both sections of the Act three more times for a total of thirty-seven more years using the same coverage formula.⁷⁶ In 2006, Congress reauthorized sections 4 and 5 for twenty-five more years under the same coverage formula, and Shelby County, Alabama, subject to the preclearance requirements, brought suit challenging the validity of both sections.⁷⁷

The Court held that the coverage formula approved by Congress in 2006 was outdated; therefore, section 4 was struck down as unconstitutional and could no longer serve as the basis for subjecting a jurisdiction to preclearance under section 5.⁷⁸ Central to the Court's reasoning was the standard, set forth in *Northwest Austin Municipal Utility District Number One v. Holder*,⁷⁹ that a statute's current burdens must be justified by current needs.⁸⁰ The Court noted that many of the discriminatory tactics and discrepancies in voter registration that caused Congress to subject certain states to preclearance requirements were no longer present, and yet the coverage formula had remained the same.⁸¹ Further, the restrictions in section 5 had not been eased, but rather, they had grown more strict.⁸²

justices were more pleased with the plurality's incorporation of antiessentialism and antiproportionality rationale in their opinion.

71 See *supra* text accompanying note 23.

72 One could imagine a scenario where a preclearance state would draw a map that "packed" racial minority votes into a couple of districts. Overall, that would reduce the amount of influence districts across the state, where a minority group would often succeed with crossover votes from the majority. In such a scenario, if the "packing" amounted to retrogression, the crossover districts would be protected under section 5.

73 See *Shelby County v. Holder*, 570 U.S. 529, 535 (2013).

74 52 U.S.C. § 10303 (2018).

75 *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 199 (2009).

76 *Shelby County*, 570 U.S. at 538.

77 *Id.* at 539–40.

78 *Id.* at 557.

79 *Nw. Austin*, 557 U.S. at 203.

80 *Shelby County*, 570 U.S. at 550.

81 *Id.* at 552–53. Between 1965 and 2006, "voting tests were abolished, disparities in voter registration and turnout due to race were erased, and African-Americans attained political office in record numbers." *Id.*

82 The Court "had previously interpreted § 5 to prohibit only those redistricting plans that would have the purpose or effect of worsening the position of minority groups." However, in 2006, "Congress amended § 5 to prohibit laws that could have favored such groups but did not do so because of a discriminatory purpose." *Id.* at 549.

In striking down the coverage formula of section 4, the *Shelby County* Court technically did not disturb the constitutionality of section 5.⁸³ However, short of Congress amending the coverage formula, section 5 also fell victim to the *Shelby County* decision.⁸⁴ In the seven years since then, no such amendment has occurred, and section 5 is essentially moot.⁸⁵

II. PROBLEMS WITH VRA

As the majority noted in *Shelby County*, the VRA has accomplished a great deal in fifty plus years since enactment.⁸⁶ Some have even described the Act as “one of the most effective statutes ever enacted.”⁸⁷ However, in the wake of the three decisions articulated above, the progress of the VRA has been brought to a standstill. If anything, the voting rights of minorities appear to be taking a step back, particularly after *Shelby County*.⁸⁸ For example, Texas immediately instituted a voter ID requirement on the very same day the *Shelby County* decision was issued.⁸⁹ The voter ID requirement was previously held up by a Department of Justice claim opposing it under section 5.⁹⁰

This Note will identify two shortcomings of the VRA in the context of districting. Practical consequences are emphasized over institutional or theoretical problems, because in amending section 2, Congress encouraged courts to engage in practical evaluations and a functional view of the political process.⁹¹

The first shortcoming of the VRA stems from implications of *Strickland*. The Court’s interpretation of *Gingles* I to require a 50 percent minority

83 *Id.* at 557 (“We issue no holding on § 5 itself, only on the coverage formula.”).

84 See Kara Brandeisky et al., *Everything That’s Happened Since Supreme Court Ruled on Voting Rights Act*, PROPUBLICA (Nov. 4, 2014), <https://www.propublica.org/article/voting-rights-by-state-map>.

85 See Kimberly Strawbridge Robinson, *Proposal to Undo Supreme Court Voting Rights Ruling Advances*, BLOOMBERG L. (Oct. 23, 2019), <https://news.bloomberglaw.com/us-law-week/proposal-to-undo-supreme-court-voting-rights-ruling-advances>. Efforts are under way to create a new coverage formula and restore the VRA “to its full vitality,” as the House Judiciary Committee recently voted 19-6 to send the Voting Rights Advancement Act of 2019 to the full chamber for consideration. *Id.* However, it seems unlikely this bill will be considered in the Republican-controlled Senate. *Id.* (Republican lawmaker described the bill as a “poison pill” that “won’t go anywhere in the Senate”).

86 See *Shelby County*, 570 U.S. at 535 (“Census Bureau data indicate that African-American voter turnout has come to exceed white voter turnout in five of the six States originally covered by § 5, with a gap in the sixth State of less than one half of one percent.”).

87 Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 COLUM. L. REV. 2143, 2144 (2015).

88 See *id.* at 2145 (noting that, in the wake of *Shelby County*, “[a] number of states that had been subject to the preclearance process quickly adopted or implemented new, restrictive voting laws”).

89 *Id.* at 2145–46; see also Ryan J. Reilly, *Harsh Texas Voter ID Law ‘Immediately’ Takes Effect After Voting Rights Act Ruling*, HUFFPOST (July 25, 2013), https://www.huffpost.com/entry/texas-voter-id-law_n_3497724.

90 Elmendorf & Spencer, *supra* note 87, at 2146.

91 See *Thornburg v. Gingles*, 478 U.S. 30, 45 (1986).

threshold imposes an extremely high burden on plaintiffs. Majority-minority districts are rare, and thus, a single minority group often needs the help of other voters to elect candidates of their choice.⁹² To illustrate this point, in 2007 only half of the Congressional Black Caucus represented districts where blacks comprised more than fifty percent of the voting population.⁹³ Therefore, in half of those districts, black voters needed the support of nonblack voters to elect black representatives. Majority-minority districts appear more elusive in light of data that suggest a greater percentage of the total African American population is under the voting age than the same percentage of the white population.⁹⁴ In sum, the *Strickland* decision has vastly limited the circumstances where plaintiffs may bring section 2 claims in a manner that is inadequate to match the breadth of minority vote dilution.

The second shortcoming of the VRA is that it is unequipped to combat the “packing” vote dilution tactic. In the context of districting, “cracking” occurs where maps are drawn to divide a minority vote across a multitude of districts, thereby weakening the ability of the minority to elect the candidate of their choice in each district.⁹⁵ “Packing” occurs where maps are drawn to concentrate as much of a minority vote in as few districts as possible, thereby ceding a small number of districts but diminishing minority influence overall.⁹⁶ However, under *Gingles*, when evaluating a section 2 claim, one must concentrate on the violating district alone.⁹⁷ Under this narrow approach, it would be difficult to utilize section 2 to fight vote dilution via “packing,” because the decrease or even increase of minority votes in any given district is not fully understood without context of the changes in the other districts.⁹⁸

92 Of the nation’s 435 Congressional districts, only 122 (28%) are majority-minority. *Majority-Minority Districts*, BALLOTPEDIA, https://ballotpedia.org/Majority-minority_districts (last visited Feb. 16, 2020); see also Terry Smith, *Disappearing Districts: Minority Vote Dilution Doctrine as Politics*, 93 MINN. L. REV. 1680, 1685 (2009).

93 Smith, *supra* note 92, at 1685.

94 See *id.* at 1685–86. Blacks are disproportionately disenfranchised due to prior felony conviction than any other race. CHRISTOPHER UGGEN ET AL., SENTENCING PROJECT, 6 MILLION LOST VOTERS: STATE-LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT, 2016, at 3 (2016), <https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/> (“Over 7.4 percent of the adult African American population is disenfranchised compared to 1.8 percent of the non-African American population.”). This Note does not delve further into the effects of discriminatory incarceration upon the full realization of the Fifteenth Amendment. That topic is better examined under the lens of vote denial, whereas this Note focuses on vote dilution. Yet discriminatory incarceration is crucial to a complete understanding of black voting power.

95 *Messages from Mission 2: Partisan Gerrymander*, USC ANNENBERG CTR., <http://www.redistrictinggame.org/learnaboutmission2.php> (last visited Feb. 16, 2020).

96 See *id.*

97 Thornburg v. Gingles, 478 U.S. 30, 50 (1986) (minority group must be “geographically compact to constitute a majority in a single-member district”); see also Watson, *supra* note 16, at 132.

98 Nate Cohn & Quoctrung Bui, *How the New Math of Gerrymandering Works*, N.Y. TIMES (Oct. 3, 2017), <https://www.nytimes.com/interactive/2017/10/03/upshot/how-the-new-math-of-gerrymandering-works-supreme-court.html> (the “efficiency gap measurement”

The inability of section 2 to address “packing” has worsened after the *Strickland* decision.⁹⁹ By eliminating crossover districts from section 2 protection, *Strickland* encourages states to “pack” minority votes when they redistrict, to ensure that majority-minority districts exist.¹⁰⁰ In doing so, states dilute minority voting strength while they simultaneously claim to be compliant with the Act.¹⁰¹ In sum, as currently interpreted, the VRA offers little to deter one of the most common methods of minority vote dilution.

III. SOLUTIONS

This Part proposes two solutions to the problems highlighted above, which are both compatible with *Ashcroft*, *Strickland*, and *Shelby County*. While this Note does not necessarily endorse those decisions, solutions that work outside their boundaries require more extreme (and unlikely) measures: the Constitution being amended, the Supreme Court reversing its previous VRA jurisprudence, or the replacement of at least one Supreme Court Justice. Therefore, while the following proposed solutions are imperfect, they operate within the realm of what can be accomplished in the near future and importantly, before the critical 2020 redistricting. Section III.A proposes that coalition districts should be recognized under the first *Gingles* prong, and Section III.B argues that section 2 claims should be interpreted broadly to allow evaluation of minority vote dilution on a statewide or systemwide basis.

A. Recognition of Coalition Districts Under *Gingles I*

As mentioned above, the *Strickland* decision explicitly left open the question of whether two distinct racial minority groups can merge to satisfy the minimum-size requirement of *Gingles*.¹⁰² However, the validity of these coalition district claims has been adjudicated by various U.S. courts of appeals, which have split in their conclusions. The Fifth and Eleventh Circuits have held that coalition districts do satisfy the minimum-size requirement, while the Sixth and Seventh Circuits have come to the opposite conclusion.¹⁰³ The

requires evaluating gerrymandered districts in light of “the total number of votes in a state”).

⁹⁹ Watson, *supra* note 16, at 128–29.

¹⁰⁰ *Id.* (“The *Bartlett* holding seemingly encourages states to “pack” minority voters into districts in the interest of reaching the fifty percent threshold, but with the unintended—or possibly intended—consequence of diluting their vote in other districts in the state.”).

¹⁰¹ A recent study of state legislative districts represented by African Americans shows that districts located in parts of the country with some of the worst history of racial discrimination (“the Deep South”) have higher concentrations of black citizens in their constituencies. William D. Hicks et al., *Revisiting Majority-Minority Districts and Black Representation*, 71 POL. RES. Q. 408, 413 (2018). The average percentage of black citizens in legislative districts represented by African Americans are as follows: Deep South: 66%, Rim South 53%, Non-South 46%. *Id.*

¹⁰² *Supra* note 65 and accompanying text.

¹⁰³ Dale E. Ho, *Two Fs for Formalism: Interpreting Section 2 of the Voting Rights Act in Light of Changing Demographics and Electoral Patterns*, 50 HARV. C.R.-C.L. L. REV. 403, 429–30 (2015).

First, Second, and Ninth Circuits have also considered the issue but declined to endorse either position, similar to the Supreme Court.¹⁰⁴ The leading cases for each side are *Campos v. City of Baytown*¹⁰⁵ and *Nixon v. Kent County*.¹⁰⁶ Each will be considered in turn.

In *Campos*, plaintiffs, comprised of both Hispanic and Black citizens, challenged the at-large election system of the City of Baytown, Texas.¹⁰⁷ As of the most recent census prior to litigation, 16.42% of the City's population was Hispanic and 8.95% of the City's population was Black.¹⁰⁸ Yet not a single minority had ever been elected as one of the six members of City Council, and thus, plaintiffs brought a vote dilution claim under section 2.¹⁰⁹

The Fifth Circuit overturned the district court's approval of the City of Baytown's election scheme, finding that it constituted a violation of section 2.¹¹⁰ In doing so, the court held that "nothing in the law . . . prevents the plaintiffs from identifying the protected aggrieved minority to include both Blacks and Hispanics."¹¹¹ The court noted that by affording protection to both blacks and language minorities, section 2 recognizes that both face similar hurdles to equal voting rights that are "pervasive and national in scope."¹¹² Also key to the Fifth Circuit's reasoning is that to establish a section 2 claim, a coalition group must still prove that the two plus minority groups consistently vote together and that the white-majority bloc consistently defeats their preferred candidate in order to satisfy the *Gingles* test.¹¹³ In other words, while meeting the minimum-size requirement may be easier for plaintiffs to prove in coalition district claims, proving political cohesiveness may actually be more difficult.¹¹⁴ Thus, the Fifth Circuit concluded that recognizing coalition districts under section 2 would not provide minority groups a pass to circumvent the *Gingles* requirements or to otherwise gain an advantage.

The Sixth Circuit disagreed with the Fifth Circuit's reasoning and conclusion. In *Nixon*, plaintiffs, three African Americans and three Hispanic-Americans, brought a class action suit against Kent County, Michigan, alleging that the proposed district map diluted their vote and thus violated sec-

104 *Id.*

105 840 F.2d 1240 (5th Cir. 1988).

106 76 F.3d 1381 (6th Cir. 1996).

107 *Campos*, 840 F.2d at 1241.

108 *Id.*

109 *Id.* at 1242.

110 *Id.*

111 *Id.* at 1244.

112 *Id.* (quoting 52 U.S.C. § 1973b(f)(1) (Supp. IV 1987), now codified at 52 U.S.C. § 10303 (2018)).

113 *Id.*

114 See Sara Michaloski, *A Tale of Two Minority Groups: Can Two Different Minority Groups Bring a Coalition Suit Under Section 2 of the Voting Rights Act of 1965?*, 63 CATH. U. L. REV. 271, 274, 294 (2013).

tion 2.¹¹⁵ More specifically, the plaintiffs charged Kent County of “packing” their votes into one of the nineteen districts.¹¹⁶

The Sixth Circuit ultimately held that coalition districts do not fall under the remedial purpose of section 2, and thus, the plaintiffs’ claim was defeated.¹¹⁷ To reach this conclusion, the Sixth Circuit analyzed section 2 under an entirely different lens of statutory interpretation than their Fifth Circuit counterparts. *Campos* interpreted section 2’s silence on coalition districts to signify Congress’ implicit recognition of the protection of such districts.¹¹⁸ Conversely, the *Nixon* majority construed the absence of coalition district language in section 2 to mean such districts were not protected.¹¹⁹ Although the plaintiffs argued that the Voting Rights Act was meant to be interpreted broadly, the Sixth Circuit refuted their contention by pointing to the lack of textual support and the absence of any mention of coalition districts in the legislative history.¹²⁰

The *Nixon* court also argued that policy was on their side. First, the majority argued that while Congress had determined that both African Americans and Hispanic Americans have been discriminated against, it did not follow that Congress sanctioned a *Gingles* I group comprised of a mixture of both groups.¹²¹ Second, the majority argued that recognizing coalition districts would encourage state legislators to “pack” minorities into as few districts as possible under the guise of complying with the Act.¹²² Third, the majority reasoned that allowing coalition districts would render the *Gingles* I requirement meaningless altogether, because it would only pose a barrier to a section 2 claim where “the total of all the protected minorities is less than a majority in any one district.”¹²³ Finally, the majority argued that recognizing coalition districts would provide minorities a political advantage that exceeded the remedial purposes of the Act.¹²⁴

115 *Nixon v. Kent County*, 76 F.3d 1381, 1383 (6th Cir. 1996).

116 *Id.* at 1384 (“Plaintiffs charged defendants of packing district 17 with an excessive percentage of minority voters and of splitting the remaining minority voters among districts dominated by large white majorities.”).

117 *Id.* at 1392.

118 *Campos v. City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988).

119 *See Nixon*, 76 F.3d at 1386 (“Even the most cursory examination reveals that § 2 of the Voting Rights Act does not mention minority coalitions, either expressly or conceptually If Congress had intended to sanction coalition suits, the statute would read ‘participation by members of the classes of citizens protected by subsection (a)’”).

120 *Id.* at 1388–89.

121 *Id.* at 1391. The Sixth Circuit felt their argument was bolstered, because Congress found that African Americans and Hispanic Americans had been discriminated against for different reasons. “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.” *Id.*

122 *See id.*

123 *Id.*

124 *See id.* at 1392; *see also* *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831, 894 (5th Cir. 1993) (en banc) (Jones, J., concurring) (“The crucial problem inherent in the minority coalition theory . . . is that it transforms the Voting Rights Act from a

This Note concludes that the Fifth Circuit view should prevail, and that coalition districts satisfy the first *Gingles* requirement. First, Congress intended a broad interpretation of the Act. Second, the policy reasons advanced by the Nixon opinion are misguided. Finally, independent policy rationale and practical circumstances support the recognition of coalition districts under section 2.

1. Broad Interpretation of the VRA

Given the history that spurred the passage of the Act, section 2 is broad enough to encompass recognition of coalition districts without exceeding Congress' intent. *Nixon* erred by concluding that Congress' silence on coalition districts compels the conclusion that they were not meant to be included within section 2. The Supreme Court, within four years of the Act's passage, concluded that Congress intended to give the Act the "broadest possible scope."¹²⁵ During Congressional hearings on section 2 of the Act, Senator Fong argued that the word "procedure" was not encompassing enough to capture the full array of tactics that might be used to obstruct the ability of racial minorities to elect the candidate of their choice.¹²⁶ In response, "Congress expanded the language in the final version of § 2 to include any 'voting qualifications or prerequisite to voting, or standard, practice, or procedure.'"¹²⁷

Further, *Gingles*, the very case that established the section 2 framework, very clearly determined that Congress intended a "functional" understanding of section 2.¹²⁸ Congressional intent for such an interpretation of section 2 is bolstered by its adoption of a results test to rebuke a narrow interpretation of the Act.¹²⁹ For several decades, the Court, in interpreting section 2, followed Congress' lead by rejecting formalist constructions of the statute and extending the Act's coverage to scenarios where Congress had not explicitly noted it would apply.¹³⁰ While not controlling, it is also telling that several

statute that levels the playing field for all races to one that forcibly advances contrived interest-group coalitions of racial or ethnic minorities.").

125 *Allen v. State Bd. of Elections*, 393 U.S. 544, 566–67 (1969).

126 *Id.* at 566. The Attorney General did not express any problem with replacing "procedure" with a more expansive term, as "procedure" was meant "to be all-inclusive of any kind of practice." *Id.* (quoting *Voting Rights: Hearing on S. 1564 Before the S. Comm. on the Judiciary*, 89th Cong. 191–92 (1965)).

127 *Id.* at 567 (quoting 42 U.S.C. § 1973 (Supp. I 1964), now codified at 52 U.S.C. § 10301 (2018)).

128 *Thornburg v. Gingles*, 478 U.S. 30, 45 (1986).

129 *See, e.g., Chisom v. Edwards*, 839 F.2d 1056, 1061–63 (5th Cir. 1988) (finding that the term "representative" should be interpreted broadly to encompass judicial elections, in light of the 1982 amendments to section 2 to create a results test). *See generally supra* note 29 and accompanying text.

130 *See, e.g., Chisom v. Roemer*, 501 U.S. 380, 395–98 (1991). In *Roemer*, the Court rejected the notion that judicial elections were not covered by section 2 of the Act, even though Congress used the language "to elect *representatives* of their choice." *Id.* ("Respondents contend . . . that Congress' choice of the word 'representatives' . . . is evidence of

pieces of scholarship have also come to the conclusion that Congress passed the Act with the intent it be interpreted broadly.¹³¹ Therefore, even though coalition districts were not explicitly mentioned in the text or legislative history surrounding the Act, the VRA is broad enough to encompass them.

2. *Nixon's* Misguided Policy Rationale

The policy rationale advanced by the Sixth Circuit in *Nixon* for excluding coalition districts from section 2 protection fold under a more thorough analysis. First, the majority concludes that since Congress extended the Act's protection to African Americans and Hispanic Americans at separate times and for separate reasons, the two groups could not together comprise a *Gingles* I group. Yet, Congress extended section 2 protection to Hispanic Americans and other minority groups, because they all faced similar barriers to the ballot box.¹³² "The question is not how to distinguish between majoritarian society's discriminatory motives regarding African-Americans and Hispanic-Americans," but rather, it is whether "plaintiffs do not have an equal opportunity to participate in the political processes."¹³³ If two separate minority groups were subject to the same vote dilution as a result of the same districting scheme and yet were denied the right to bring a section 2 claim for the sole reason that neither minority group, by itself, comprised fifty percent of a district, the purpose of the Act would be defeated.

The second policy rationale advanced by *Nixon* is that recognizing coalition district claims under section 2 would incentivize states to engage in vote dilution via "packing." However, the *Nixon* decision was promulgated before *Strickland*, and therefore, minority groups did not need to comprise fifty percent of the district to satisfy *Gingles* I. Thus, at the time of the *Nixon* decision, it was not clear that a state's inclination to "pack" minority votes would increase as a result of recognizing coalition districts. However, since states are incentivized to "pack" minority votes after *Strickland*, reworking section 2 to address "packing," as suggested in Section III.B, should serve as a sufficient deterrent to this behavior.¹³⁴

congressional intent to exclude vote dilution claims involving judicial elections from the coverage of § 2. We reject that construction . . .").

131 Pamela S. Karlan, *Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1726 (1993) ("[T]he Voting Rights Act's central aim of fully integrating historically excluded minorities into the political process . . . is broadly understood."); Michaloski, *supra* note 114, at 272 ("Since the [Voting Rights] Act's passage, Congress and the Supreme Court have repeatedly broadened the scope of the protection the Act confers.").

132 *Nixon v. Kent County*, 76 F.3d 1381, 1395 (6th Cir. 1996) (Keith, J., dissenting) (explaining that Congress recognized that "many of the same barriers preventing African-Americans from full political participation existed for Hispanic-Americans" and that there is a "pattern of racial discrimination that has stunted the electoral and economic participation of the black and brown communities" (quoting *Graves v. Barnes*, 378 F. Supp. 640, 643 (W.D. Tex. 1974) (per curiam))).

133 *Id.* at 1399 (Keith, J., dissenting) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 44 (1986)).

134 See *infra* notes 153–54 and accompanying text.

The *Nixon* court's third policy rationale essentially argues that allowing multiple minority groups to combine to form a *Gingles* I group would render the "sufficient size" requirement moot, thus making it too easy to bring a section 2 claim.¹³⁵ However, the *Nixon* majority seemingly ignored the Act's remedial purpose; making it easier to combat vote dilution under section 2 advances Congress' intent in passing the Act.¹³⁶ Further, even if the recognition of coalition districts renders *Gingles* I an easier hurdle for plaintiffs to clear, the *Gingles* II bar remains equally high, if not slightly raised. A coalition district plaintiff class must still prove that all minority groups involved consistently vote together. This will presumptively be more difficult to demonstrate where there are multiple minority groups, and thus more diverse interests, included within the coalition.¹³⁷

Finally, the *Nixon* majority claims that beyond any procedural advantages created, recognition of such districts would also provide an undue advantage at the polls for minorities.¹³⁸ In other words, allowing coalition district claims would transform the Act from a tool for "level[ing] the playing field" into a weapon that "forcibly advances" a political advantage for minorities in elections.¹³⁹ The *Nixon* majority is subtly arguing that the spirit of the Act would be violated should it be used to simply give a different group of persons an advantage in the electoral process. However, any theoretical advantage is clearly overstated, because practically it is quite rare for a single racial minority group to meet the *Gingles* I requirement on their own.¹⁴⁰ Notably, the majority of constituents in a congressional district represented by a minority congressman often is not of the same race as the congressman.¹⁴¹ Put differently, without recognizing coalition districts, many of the current districts that are represented by a minority congressperson are not protected under section 2. Thus, any theoretical concern for a perceived electoral

135 See *supra* note 123 and accompanying text.

136 See *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966) ("The Act creates stringent new remedies for voting discrimination.").

137 Michaloski, *supra* note 114, at 294.

138 See *Nixon*, 76 F.3d at 1392.

139 *Id.*

140 Watson, *supra* note 16, at 130 (finding "that 31.4 percent of African Americans were under the age of eighteen, compared to only 23.5 percent of Whites" and that blacks "living in majority-black congressional districts currently experience the greatest population decreases" (footnotes omitted)).

141 Texas presents an excellent illustration of this point. Of Texas' thirty-six Congressional districts, twelve are represented by a minority candidate (either black or Hispanic). *Members of Congress: Texas*, GOVTRACK, <https://www.govtrack.us/congress/members/TX#representatives> (last visited Nov. 24, 2019) (TX-9, TX-15, TX-16, TX-17, TX-18, TX-20, TX-23, TX-28, TX-30, TX-32, TX-33, TX-34). While five of the six Hispanic congresspeople represent districts with a majority of Hispanic constituents, none of the six black congresspeople represent districts with a majority of black constituents. *My Congressional District*, U.S. CENSUS BUREAU, <https://www.census.gov/mycd/?st=48> (last visited Nov. 24, 2019); see also Ho, *supra* note 103, at 435 ("[T]here are eleven Asian American Members of Congress, nine of whom are from majority-minority districts. But only one of those districts is majority Asian American . . .").

advantage is nullified when one considers the reality that it is uncommon for a minority group to elect the candidate of their choice without the help of other voters. With crossover districts now excluded from the Act's protection, recognizing coalition districts is the only means of truly safeguarding the ability of minorities to elect candidates of their choice.

3. Policy Rationale, Independent of *Nixon*

First, recognizing coalition district claims does not undermine the ability to administer a working test, as was the concern with crossover districts in *Strickland*.¹⁴² There, the Court feared that recognizing crossover districts would confuse the *Gingles* analysis; since white-majority solidarity is required under *Gingles* III, allowing some white voters to be recognized under *Gingles* I would necessarily undermine the integrity of the third prong.¹⁴³ However, the same concern is not applicable to the recognition of coalition districts, because the white-majority bloc would not be implicated in two separate prongs.

Second, the Act will not promote “essentialism” of minorities by including coalition district claims under *Gingles* I.¹⁴⁴ By allowing multiple racial minorities to coalesce for the purposes of *Gingles* I, the Act does not presume that all racial minorities vote the same way, because the coalition group must still survive the *Gingles* II cohesiveness test. In other words, the Act does not promote painting all minorities with a broad brush; in fact, it adopts the opposite presumption that a section 2 plaintiff class is not cohesive and requires the plaintiffs to rebut that presumption to advance their claim.¹⁴⁵

Most importantly, in light of changing demographics and other practical circumstances, carving out protection for coalition district claims is important. Minority population growth in the United States continues to outpace white-population growth, and racial minorities are projected to outnumber whites by 2045.¹⁴⁶ The number of individuals who come from a mix of racial

142 See *Bartlett v. Strickland*, 556 U.S. 1, 14, 17 (2009) (plurality opinion).

143 *Id.*

144 Antiessentialist critiques argue that the Act promotes painting minorities with a “broad brush” and a false narrative that all racial groups vote in the same manner. Ho, *supra* note 103, at 405–06.

145 See *supra* note 33 and accompanying text. If anything, section 2 claims that involve a racially homogeneous plaintiff class are no more essentialist than a section 2 plaintiff class comprised with two or more racial groups, because even within a single racial group, there are typically sub-groups and classifications. *Nixon v. Kent County*, 76 F.3d 1381, 1400 (6th Cir. 1996) (Keith, J., dissenting) (“The majority’s position . . . assumes automatic homogeneity of interest within and automatic divergence of interests between racial groups.”).

146 William H. Frey, *The US Will Become ‘Minority White’ in 2045, Census Projects*, BROOKINGS (Mar. 14, 2018), <https://www.brookings.edu/blog/the-avenue/2018/03/14/the-us-will-become-minority-white-in-2045-census-projects/>. “Minorities will be the source of all of the growth in the nation’s youth and working age population, most of the growth in its voters” *Id.*

backgrounds is also increasingly growing.¹⁴⁷ Taking these two facts together, the nonwhite percentage of Americans is increasing while the portion of these nonwhite individuals who identify as a single race is decreasing.

If two different racial minorities cannot combine to form a *Gingles* I group, how will the Act offer protection to those of mixed-race backgrounds? Would a half-black, half-Hispanic individual be able to coalesce with a plaintiff class that is predominantly Hispanic? What if the individual is only ten percent Hispanic? Under the logic of the *Nixon* majority, a plaintiff class would have to be racially “pure.”¹⁴⁸ This would prove increasingly unworkable in light of the demographic changes mentioned above.

Recognizing coalition district claims would also avoid “unnecessarily infus[ing] race into virtually every redistricting,” which was a concern in *Strickland*.¹⁴⁹ Instead of requiring a court to delve into the tricky question of how to count mixed racial backgrounds in a *Gingles* analysis, a court facing a coalition district claim would simply need to know the number of individuals who, in whole or in part, are of a protected class. Thus, recognizing coalition districts is the best means of ensuring minority voting power is not diluted going forward, because the focus will gravitate away from whether any single race constitutes fifty percent of a district and toward whether a minority block, comprising fifty percent of a district, has endured the same discriminatory districting measure.

While statutory interpretation, the legislative history, and various policy rationales point toward inclusion of coalition districts within section 2, perhaps Judge Keith’s dissent in *Nixon* provides the best reasoning:

[I]f the Voting Rights Act was enacted to prevent white voting blocs from silencing African-Americans and if the Voting Rights Act was amended to prevent white voting blocs from rendering meaningless the political participation of Asian-Americans, Native Americans, Hispanic-Americans and Alaska Natives, it is logical to conclude that the Voting Rights Act was intended to prevent white voting blocs from diminishing the voting rights of African-Americans and language minorities at the same time.¹⁵⁰

In sum, after *Strickland*, it is highly unlikely for a racially “pure” minority group, on its own, to comprise fifty percent of any district. For section 2 and the Act as a whole to have any efficacy as a weapon against vote dilution in

147 Gretchen Livingston, *The Rise of Multiracial and Multiethnic Babies in the U.S.*, PEW RES. CTR. (June 6, 2017), <https://www.pewresearch.org/fact-tank/2017/06/06/the-rise-of-multiracial-and-multiethnic-babies-in-the-u-s/> (“One-in-seven U.S. infants (14%) were multiracial or multiethnic in 2015, nearly triple the share in 1980 . . .”).

148 *Nixon*, 76 F.3d at 1401 (Keith, J., dissenting) (“Perhaps what is most disturbing is that the practical effect of the majority’s holding requires the adoption of some sort of racial purity test If we are to make these distinctions, where will they end? Must a community that would be considered racially both Black and Hispanic be segregated from other Blacks who are not Hispanic?”). For an illustration of the impracticalities raised by requiring racial purity, see *infra* note 174.

149 *Bartlett v. Strickland*, 556 U.S. 1, 21 (2009) (plurality opinion) (quoting *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 446 (2006)).

150 *Nixon*, 76 F.3d at 1402 (Keith, J., dissenting).

the context of districting, coalition districts must be recognized under the first requirement of *Gingles*.

B. *Evaluation of Minority Vote Dilution on a Statewide Basis*

The *Gingles* framework, as currently interpreted, is also inadequate to address minority vote dilution via the “packing” method, because *Gingles* is only equipped to analyze discriminatory districting through the lens of a single district.¹⁵¹ But to truly grasp the extent of vote dilution that results from “packing,” one needs to be able to examine all districts on a systemwide basis.¹⁵²

Further, the Supreme Court’s recent decisions have simultaneously made it more likely that redistricting efforts will involve “packing” and have handcuffed protected minority groups to challenge such vote dilution.¹⁵³ By removing crossover districts from *Gingles* I protection, *Strickland* effectively encourages states to pack minority votes into a small number of districts to claim compliance with the Act, even if the overall effect weakens the voting power of minorities.¹⁵⁴ Section 5, where it selectively applied, provided minority groups protection against “packing” efforts, because it permitted a systemwide evaluation, provided a much clearer baseline (the status quo before the proposed electoral change) and required a much less stringent standard for plaintiffs to meet in order to succeed on their claim (retrogression).¹⁵⁵ But the Court in *Shelby County* effectively gutted section 5, leaving minorities without a means to challenge “packing” under the Act.

Therefore, section 2 should be interpreted to provide relief for protected plaintiffs who feel their vote has been diluted on a systemwide level.

151 See *supra* notes 96–98 and accompanying text.

152 See *supra* notes 96–98 and accompanying text.

153 The VRA is not the only means by which racial minorities can challenge “packing” vote dilution tactics. They may also bring suit alleging a racial gerrymander in violation of the Equal Protection Clause. See, e.g., *Ala. Legislative Black Caucus v. Alabama*, 575 U.S. 254 (2015). However, these suits are typically successful where there are egregious forms of discriminatory districting. See, e.g., *Shaw v. Reno*, 509 U.S. 630, 658 (1993) (“[T]he North Carolina General Assembly adopted a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race . . .”). However, even where there is evidence of a racial gerrymander, courts may find it nonetheless constitutional if “narrowly tailored to further a compelling governmental interest.” *Id.*

154 See *supra* notes 99–101 and accompanying text; see also Morgan, *supra* note 15, at 95–96 (“dilutive electoral devices” are “second generation barriers” and have occupied recent focus of VRA litigation). “The drawing of majority-minority districts not only elected more minorities, it also had the effect of bleeding minority voters out of all the surrounding districts.” Steven Hill, *How the Voting Rights Act Hurts Democrats and Minorities*, ATLANTIC (June 17, 2013), <https://www.theatlantic.com/politics/archive/2013/06/how-the-voting-rights-act-hurts-democrats-and-minorities/276893/>.

155 See *supra* notes 39–41 and accompanying text; see also *Bartlett v. Strickland*, 556 U.S. 1, 30 (2009) (Souter, J., dissenting) (“A State with one congressional seat cannot dilute a minority’s congressional vote . . .”).

First, this Section will examine how the *Gingles* analysis will have to be slightly adjusted to provide a meaningful path to success for systemwide claims. Second, this Section will demonstrate that such an interpretation is consistent with the language of the statute, the legislative history, and the Court's recent VRA jurisprudence. Third, this Section will argue that antiessentialist and anti-proportionality arguments again are misplaced. Finally, this Section will look to a modern example of "packing" which highlights the need for the recognition of systemwide claims under section 2.

1. Adjusting the *Gingles* Framework

Under this Note's proposed standard, plaintiffs alleging a section 2 systemwide dilution claim must still meet the second and third preconditions of *Gingles* before receiving "totality of the circumstances" review. However, *Gingles* I would be removed from the analysis because protected minorities rarely comprise fifty percent of an entire state,¹⁵⁶ and the "geographically compact" requirement of the first prong necessarily limits systemwide evaluation.¹⁵⁷ Thus, retaining the sufficient-size requirement would render any protection for systemwide dilution claims illusory. That being said, the plaintiff class would still need to demonstrate *Gingles* II (political cohesiveness) and *Gingles* III (majority bloc usually defeating minority's preferred candidate) to advance their claim. Further, once the *Gingles* requirements have been satisfied, a systemwide dilution claim will still undergo a totality of the circumstances, results test like any other section 2 claim. However, under this Note's proposed standard, retrogression alone would not be enough to entitle plaintiffs to relief, unlike section 5 claims. But it would be a highly persuasive factor in the results test analysis.

This balance ensures that plaintiffs who seek to battle "packing" with systemwide dilution claims have a meaningful path to success under section 2, without uprooting the section 2 analysis from its foundation and precedent. It is also important to note that a plaintiff could still bring a single-district dilution claim under section 2.¹⁵⁸ Moreover, a plaintiff would not necessarily be incentivized to bring a systemwide dilution claim over a single-district claim. While a systemwide dilution claim under the proposed standard would not need to meet *Gingles* I, it would likely find it more difficult to meet *Gingles* II and III than a single-district dilution claim.

156 For example, across the fifty states, only four are "majority-minority." Nadra Kareem Nittle, *Which 4 States Have the Biggest Minority Populations?*, THOUGHTCO. (July 3, 2019), <https://www.thoughtco.com/states-with-majority-minority-populations-2834515> (California, New Mexico, Texas, and Hawaii).

157 *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986) (minority group must be "geographically compact to constitute a majority in a single-member district."); see also *Watson*, *supra* note 16, at 132.

158 Again, coalition districts would be recognized under *Gingles* I in such claims.

2. Systemwide Dilution Claims Are Consistent with the Act and Its Recent Jurisprudence

It is again important to recall that the Act was passed to ensure access to the ballot was unimpeded by the “pervasive evil” of racial discrimination.¹⁵⁹ This led both Congress and the Court to call for a broad and functional interpretation of section 2 of the Act to ensure full participation of minorities in the electoral process.¹⁶⁰ In order to ensure full participation, the Act must be interpreted in a manner that withstands efforts to subvert its purpose. Since *Strickland’s* holding incentivizes state legislatures to “pack” protected minorities,¹⁶¹ Section 2 must be able to address districting efforts that purport to comply with the Act, but really just dilute minority voting power.

Further, in *Ashcroft*, the Court recognized that drawing “influence districts,” “safe districts,” or some combination are appropriate to fulfill the requirements of the Act.¹⁶² However, it is impossible to examine whether a particular state’s map provides minorities an equal ability to elect candidates of their choice without first evaluating the map as a whole.¹⁶³ Surely, section 2 cannot be interpreted in a manner that limits its ability to scrutinize a primary mechanism of vote dilution. Thus, implicit in the *Ashcroft* decision, must be a recognition of systemwide dilution claims.

3. Refuting Essentialism and Proportionality Concerns

Two common theoretical critiques of the Act, antiessentialism and antiproportionality, will likely be employed in arguments against systemwide dilution claims as well. Even in this context, concerns of essentialism once again overlook the political cohesiveness requirement of *Gingles*. Regardless of the size of the plaintiff class or how dispersed they are within a state, the plaintiffs still bear the burden of proving cohesion under this Note’s section 2 systemwide dilution framework. In other words, the Act posits that a group of protected racial minorities is not sufficiently cohesive, and thereby does not presume that all ethnic minorities vote in the same manner.¹⁶⁴ Even if *Gingles II* were not so explicit, the language of the Act itself is also tailored carefully to avoid any essentialist assumptions. Section 2 guards the ability of a protected minority to elect the candidate of his *choice*, not necessarily of his race.¹⁶⁵ Thus, both the language and interpretation of section 2 are carefully worded to avoid painting all minorities with a broad brush. Since creat-

159 See *supra* notes 13–16 and accompanying text.

160 *Supra* notes 126–29 and accompanying text.

161 *Supra* note 99 and accompanying text.

162 See *supra* notes 46–47 and accompanying text.

163 “The efficiency gap measurement aims to summarize the effect of gerrymandering by identifying all of the wasted votes It then adds them up . . . and divides that by the total number of votes in a state.” Cohn & Bui, *supra* note 98 (emphasis added).

164 *Supra* note 144 and accompanying text.

165 52 U.S.C. § 10301 (2018).

ing a path for systemwide dilution claims, as proposed, similarly requires plaintiffs to prove cohesiveness, any antiessentialist critique is misplaced.

Further, while the Act does not guarantee proportional representation,¹⁶⁶ proportionality is inescapably part of the section 2 analysis.¹⁶⁷ The Act was spurred by the lack of proportionality between the number of black citizens and their voting power.¹⁶⁸ Not to mention, the goal of the Act is to ensure minorities have full political equality.¹⁶⁹ Therefore, it is counterintuitive to attack the availability of a systemwide dilution claim on the basis that it involves some level of proportionality analysis. Those who argue against the constitutionality of vote dilution claims on the basis of proportionality ignore the fact that the right to vote is aggregative as well as individual.¹⁷⁰ In other words, one's full right to vote, guaranteed to minority groups by the Act, is not realized simply by being able to cast a ballot unimpeded; rather, an individual's full right to vote is achieved when her ballot has a roughly equal chance of electing the candidate of her choice. That cannot be determined without comparing the strength of an individual's vote to that of others outside the district.¹⁷¹ Therefore, an argument attacking a framework for systemwide dilution claims under section 2 on the basis of proportionality is meritorious only if such a framework *required* proportionality. However, as mentioned, this Note's systemwide dilution framework employs the same totality of the circumstances results test where proportionality is among many factors to consider, but not the dispositive factor.

4. Practical Circumstances Highlight the Need for Systemwide Dilution Claims

A recent Supreme Court decision illustrates the need for section 2 to combat "packing" efforts via systemwide dilution claims.¹⁷² Following the 2010 census, the Virginia assembly drew a new map for the state House of Delegates where blacks constituted the majority of the electorate in only twelve of the one hundred districts.¹⁷³ But 20.7% of the population was black, and thus, the residents of the twelve black-majority districts brought suit under section 5 alleging the House of Delegates map had "illegally

166 *Johnson v. De Grandy*, 512 U.S. 997, 1014 n.11 (1994) ("[T]he ultimate right of [section 2] is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race.").

167 *Id.* at 1027–28 ("[T]o say that proportionality is irrelevant under the [section 2] results test is the equivalent of saying (contrary to our precedents) that no [section 2] vote dilution challenges can be brought to the drawing of single-member districts.").

168 *Supra* note 11 and accompanying text.

169 See Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1838 (1992).

170 Morgan, *supra* note 15, at 117.

171 *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969).

172 *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019).

173 Amy Howe, *Argument Preview: Virginia Racial Gerrymandering Case Returns to Supreme Court*, SCOTUSBLOG (Mar. 11, 2019, 2:26 PM), <https://www.scotusblog.com/2019/03/argument-preview-virginia-racial-gerrymandering-case-returns-to-supreme-court/>.

packed” them into those districts and “dilute[ed] their voting strength in nearby districts.”¹⁷⁴ The Supreme Court first considered the claim in 2017, but remanded the suit to the district court to reconsider eleven of the districts, as the district court had employed the wrong standard to analyze the claim.¹⁷⁵ The district court, reexamining the claim, held that “race predominated over traditional districting factors,” and that such action violated section 5 of the Act.¹⁷⁶

Upon reaching the Court again in 2019, two questions were presented: first, whether the House of Delegates had standing to appeal the district court’s judgment against them, and second, whether the eleven challenged districts constituted an unconstitutional racial gerrymander.¹⁷⁷ The House of Delegates argued, in defense to the substantive second question, that they were simply complying with the requirements of the VRA.¹⁷⁸ While not explicitly mentioned, *Strickland* was likely fresh in the minds of the Virginia legislature when drawing the map, as that case had been decided just a year before redistricting efforts began. Ultimately, the Court chose to uphold the district court’s judgment, but they did not come to this decision on substantive grounds.¹⁷⁹ Rather, the Court found that the House of Delegates had no standing to appeal, and thus, they did not consider the merits of the claim.¹⁸⁰

While the Virginia assembly’s attempt to “pack” was ultimately defeated, this example highlights two concerns raised above. First, Virginia’s attempt

174 *Id.* An estimated 102,164 of the black citizens in Virginia are mixed race. See U.S. CENSUS BUREAU, PROFILE OF GENERAL POPULATION AND HOUSING CHARACTERISTICS: 2010 DEMOGRAPHIC PROFILE DATA (calculated by subtracting 1,551,339 (the number of Virginians who are 100% African American) from 1,653,563 (the number of Virginians who are, in part or in whole, African American)). This districting scheme is being analyzed under the proposed systemwide dilution framework, but to imagine that plaintiffs brought a single-district claim instead illustrates the problematic interpretation of the *Nixon* majority. Without the recognition of coalition districts, these 102,164 individuals would not be allowed to join with those who are racially homogenous to form a *Gingles* I group. See *supra* note 148 and accompanying text. Even if the *Nixon* interpretation of the first *Gingles* requirement was broad enough to include mixed-race individuals, the impracticability of requiring one racial minority to compose fifty percent of the district would not end there. For example, how does the *Gingles* framework encompass those who are half white as opposed to those who come from multiple racial-minority backgrounds?

175 *Howe*, *supra* note 173. The Supreme Court agreed that one of the districts did not violate the constitution. *Id.*

176 *Bethune-Hill v. Va. State Bd. of Elections*, 326 F. Supp. 3d 128, 137 (E.D. Va. 2018). Section 5 was still applicable to Virginia, because the suit was brought in 2011, before *Shelby County* had been decided.

177 *Howe*, *supra* note 172.

178 *Id.* (“[T]he legislature asserts . . . a map is an unconstitutional racial gerrymander . . . if it puts too few minority voters [in a district.]”).

179 *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1950 (2019).

180 *Id.* (“The House, we hold, lacks authority to displace Virginia’s Attorney General as representative of the State . . . [and] as a single chamber of a bicameral legislature, has no standing to appeal the invalidation of the redistricting plan separately from the State of which it is a part.”).

to “pack” black voters into twelve districts and thus dilute their vote was motivated by the post-*Strickland* interpretation of the Act. Second, plaintiffs sued under section 5 of the Act, which was no longer in effect by the time litigation reached the Supreme Court. The Court, tellingly, avoided analyzing the claim under the merits of the Act, likely because *Shelby County* had already section 5, and section 2 is not currently capable of addressing “packing” vote dilution.

In light of the *Strickland* decision, the greatest threat to minority voting rights via districting is vote dilution via “packing,” but section 2, as currently interpreted, is not equipped to remedy such a strategy. Without the bright lines and the easier-to-meet standard of section 5 to address such harmful actions, the section 2 framework must be adjusted to clear a path for systemwide dilution claims. Such claims would still have to survive a *Gingles* analysis, but without any sufficient-size requirement. This compromise will provide a meaningful path for claims challenging “packing” efforts without overburdening states that redistrict in good faith.

CONCLUSION

This Note has detailed the importance of the Voting Rights Act of 1965, and the significant progress it has achieved toward equality in the right to vote. However, this Note has also highlighted the sudden change in direction that the Supreme Court has taken in interpreting the Act. After *Ashcroft*, *Strickland*, and *Shelby County*, the Act has been severely handicapped in its ability to deter vote discrimination, particularly in the context of districting. Among other shortcomings, the modern day VRA is ill-equipped to address vote dilution, particularly via “packing.” Further, minority plaintiffs who wish to challenge a discriminatory districting scheme can only do so if they happen to reside in the rare majority-minority district.

This Note then recommends two feasible solutions to reinvigorate the VRA, that do not call for drastic remedies. First, coalition districts should be recognized to satisfy the sufficient-size requirement of *Gingles* in single-district dilution claims. Second, section 2 should be adjusted to enable evaluation of claims on a statewide or systemwide basis. Both of these changes would provide racial minorities bona fide means to challenge discriminatory districting efforts.

These changes to the Act need to be adopted quickly, as the 2020 census and subsequent redistricting process are fast approaching. The Act, as currently interpreted, is at a crossroads and ill-prepared to address discriminatory districting. If left unchallenged, the dilution of minority votes will lead to a decrease in minority representation. Thus, there will be a decrease in minority input with regards to decisions that will have vast consequences on their future, as well as that of the nation. Ten more years is too long to wait to adequately address vote dilution. The VRA requires change quickly, to avoid a short-lived fate for this “triumph for freedom.”

