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Treading Carefully After *Shelby County*: Minority Coalitions Under Section 2 of the Voting Rights Act

*Audrey Yang†*

### I. INTRODUCTION

While the Fifteenth Amendment's passage in 1870 granted African-Americans suffrage,1 it was not until 1965 that Congress used its granted power to pass the Voting Rights Act of 1965 (the "Act").2 Section 2 of the Act prohibits imposing voting qualifications or prerequisites that result in a denial or abridgement of any citizen's right to vote on account of their race or color.3 Congress amended the statute in 1975 to add language minorities to the definition of minorities4 and again in 1982 to clarify that a Section 2 claim only required a showing of discriminatory results and not discriminatory intent.5 After this final Congressional clarification,6 the Supreme Court announced three threshold elements required to state a Section 2 claim in *Thornburg v. Gingles*, one of which requires the minority group to be "sufficiently large and geographically compact to constitute a majority in the single-member district."7

† B.S., Cornell University, 2005; J.D. Candidate, The University of Chicago Law School, 2016.

1 U.S. CONST. amend. XV, § 1.


3 See id. at §2.

4 See Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400 (codified as amended at 52 U.S.C. § 10301 (2014)) (defining language minority as citizens from "environments where the dominant language is other than English").


6 See id.

The circuits are split over whether two minority groups can aggregate their populations to meet the *Gingles* requirements and bring a Section 2 claim. The Fifth Circuit held that Blacks and Hispanics are permitted to aggregate their claims. The Eleventh, Ninth, and Second Circuits all implicitly assumed that aggregation was permissible without actually performing an analysis of it, possibly because they determined on other grounds that the plaintiffs did not meet the *Gingles* requirements for a Section 2 claim. The Sixth Circuit has expressly disagreed, holding that minority coalitions conflict with the statute's plain meaning and congressional intent.

While some scholarship supports the circuit majority view, which permits aggregation of minority groups, virtually no existing literature supports the circuit minority view, which prohibits aggregation. Minority coalitions contradict the three-part test of *Gingles*, which suggests a requirement of homogeneity of the minority class. Furthermore, recent Supreme Court cases suggest that aggregating minority groups was not Congress's intent. In *Bartlett v. Strickland*, the Court rejected a crossover district, which can occur, for example, when white voters combine with African-American voters to form a majority. While not the same as a minority coalition, the rejection of crossover districts indicates that the Court would maybe not support aggregation either. Additionally, in *Perry v. Perez*, the Court found the district court's redistricting plans suggested an attempt at creating a minority coalition district, which the Court expressly said it did not have a right to do.

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8 See *Campos v. Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988).
10 See *Nixon v. Kent Cnty.*, 76 F.3d 1381, 1393 (6th Cir. 1996).
12 See *Nixon*, 76 F.3d at 1393.
13 See *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986) (requiring numerosity plus geographic concentration and political cohesiveness, which would be redundant if minorities could simply aggregate).
15 See *id.* at 25.
17 See *id.* at 944 (“If the District Court did set out to create a minority coalition district...”)
Moreover, potential voting rights plaintiffs may now have to rely more heavily on Section 2 in light of the Supreme Court's decision in *Shelby County v. Holder*, which held Section 4(b) of the Act unconstitutional. Section 4(b) contained a coverage formula to determine whether a jurisdiction had a history of voting discrimination and would be subject to federal preclearance for new voting legislation under Section 5. Without Section 4(b), Section 5 has no effect and eliminates an important avenue of governmental oversight on states' decisions regarding voting laws. Thus, potential heavy reliance on Section 2 means it could become too powerful of a tool if expanded to allow minority coalitions. *Shelby County* also suggests that the vote dilution problem is not the significant issue it once was, implying that perhaps minority coalitions are unnecessary under the Act.

This Comment examines the background of Section 2 of the Act to determine whether permitting coalition suits is consistent with congressional intent. Part I discusses the legislative history of voting discrimination leading to the passage of the Act, focusing on its intent and purpose. The early judicial interpretations of the Act are discussed as well. Part II explains the current circuit split regarding minority coalitions under Section 2. And Part III discusses reasons why the circuit minority view prohibiting minority coalitions is the proper interpretation of the statute in light of the plain meaning of the statute, congressional intent, current Supreme Court jurisprudence, and public policy. To band together minority groups when the issue of voter dilution is not the significant problem it once was would only tip the scales in the other direction, by giving the minority groups an undue advantage.

A minority group that has experienced voting discrimination can bring an action under Section 2. But if it were so easy to aggregate minority groups to avoid vote dilution, then this would render Section 2 superfluous. This Comment

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18 133 S. Ct. 2612 (2013).
19 See id. at 2631.
21 *Shelby Cnty.*, 133 S. Ct. at 2648 (Ginsburg, J., dissenting).
22 See id. at 2619.
concludes by suggesting an appropriate resolution regarding permissibility of minority coalitions should likely be left to Congress. Congress can properly assess the current situation, look at the statistics, and decide based upon all of the data the best course of action. The courts adjudicating issues between specific parties do not necessarily have this information and should be wary about a ruling that impacts such a significant portion of the population.

II. LEGISLATIVE HISTORY OF SECTION 2 AND SUBSEQUENT JUDICIAL INTERPRETATION

A. The Fifteenth Amendment and the Voting Rights Act of 1965

In 1870, the country ratified the Fifteenth Amendment, which states: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”24 The Supreme Court narrowly construed the reach of the Fifteenth Amendment in its early cases.25 Congress had not enforced the powers bestowed to it by the Fifteenth Amendment, so there was no private remedy, just the ability to enjoin the states from passing legislation that discriminated against voters based on race or color.26 As such, existing facially race-neutral state legislation did not infringe upon any constitutional protections.27

Nearly a century passed before Congress finally exercised its powers under the Fifteenth Amendment and passed the Voting Rights Act of 1965 giving minorities a way to bring claims against discriminatory policies.28 Vote dilution primarily arises when districts are drawn in such a manner that a minority group, geographically concentrated, is split into multiple districts denying the minority group strength in

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24 U.S. CONST. amend. XV, § 1.
25 See, e.g., United States v. Reese, 92 U.S. 214, 217 (1876) (explaining that the Fifteenth Amendment does not confer an individual right of suffrage).
26 See id. at 218.
27 See id.
numbers, also known as “cracking.” Line drawers also dilute votes by unnecessarily packing a minority into a single district when the group’s voting strength would be much greater if the group were split across multiple districts, also known as “packing.” The passage of the Act gave these minority groups an opportunity to combat these discriminatory practices by giving them a private right of action.

B. Section 2 of the Act and Subsequent Supreme Court Cases

Section 2 of the Voting Rights Act prohibits voting qualifications or prerequisites to be imposed that results in a denial or abridgement of any citizens’ right to vote on account of their race or color. The relevant portion states: “No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.” A progression of Supreme Court cases followed, each refining the Court’s interpretation of Section 2 of the Act.

First, in *South Carolina v. Katzenbach*, the Court held that the Act was a constitutional exercise of congressional power under the Fifteenth Amendment. In *Chisom v. Roemer*, the Court further determined that the Act applied to the election of judges as well, even though the Act only referred to the election of “representatives.” The Court subsequently, however, chose

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33 *Id.*
34 383 U.S. 301 (1966).
35 See *id.* at 337 (finding certain provisions of the Act were constitutional, though Section 2 was not challenged in the specific case, this case has stood for the proposition that Congress does in fact have the power to enact legislation related to voting regulation under the Fifteenth Amendment); but see Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2631 (2013) (striking down Section 4(b) of the Act as unconstitutional).
37 *Id.* at 398–401; see Michaloski, *supra* note 9, at 293 (2013) (citing Chisom v. Roemer, 501 U.S. 380, 404 (1991) as an example of the Court broadly interpreting the statute, though it is suspect whether one or two examples is enough to warrant a conclusion of broad interpretation).
to interpret the Act narrowly in *Mobile v. Bolden*,\(^38\) when it found that discriminatory results without a showing of discriminatory intent was not enough to sustain a Section 2 claim.\(^39\) Congress responded by amending the statute to make clear that discriminatory intent was not necessary and that plaintiffs need only show discriminatory effects.\(^40\)

C. *Gingles* and Section 2 Voting Dilution Claim Requirements

Shortly after Congress amended the statute to clarify that plaintiffs only needed to prove a discriminatory purpose and not discriminatory intent, the Supreme Court decided *Thornburg v. Gingles* to establish a three-part test for a vote dilution claim under Section 2.\(^41\)

First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in the 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 . . . . to defeat the minority's preferred candidate.\(^42\)

In announcing the three-part test, the Court looked to the Senate Judiciary Committee Majority Report, which accompanied the amendment to Section 2 and had considered several factors including, among others, the history of discrimination and whether the political candidates of the minority groups had ever been elected.\(^43\)

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\(^{38}\) 446 U.S. 55 (1980).

\(^{39}\) See *id.* at 62.

\(^{40}\) See *Chisom*, 501 U.S. at 403–04.


\(^{42}\) See *id.*

\(^{43}\) *Id.* at 36–37 (citing S. Rep. No. 97-417, at 28–29 (1982)) (listing the factors considered:

(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
The Court noted that the “degree of racial bloc voting” would vary based on the facts, such as “whether evidence that black and white voters generally prefer different candidates” would rise to the “level of legal significance under § 2.”44

The first Gingles element is akin to a numerosity plus geographic concentration requirement, where the minority group must be “sufficiently large” to constitute a “majority in a single-member district.”45 As the Court explained, this requirement is a “threshold matter” because “[u]nless minority voters possess the potential to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured.”46 Thus, this standard “would only protect racial minority votes from diminution proximately caused by the districting plan; it would not assure racial minorities proportional representation.”47 Allowing coalitions would make it easier for minority groups to demonstrate that they could form a majority in a single-member district. For example, if Blacks and Hispanics both existed in a single district, but neither comprised a majority, combining forces would allow them to more easily attain majority status under the first element.

The second Gingles element requires political cohesion. The reasoning is “[i]f the minority group is not politically cohesive, it cannot be said that the selection of a multi-member electoral structure thwarts distinctive minority group interests.”48 A minority group is considered politically cohesive “if it votes

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44 Id. at 57–58.
45 Gingles, 478 U.S. at 50.
46 Id. at 50 n. 17.
47 Id.
48 Id. at 51.
Different minority groups, when aggregated, may be less politically cohesive than single minority groups. The third *Gingles* element requires a showing that the white majority sufficiently votes as a bloc to defeat the minority's preferred candidate. This requirement of racially polarized voting does not require proof of causation or intent.

The Court further explained that while the *Gingles* elements are "generally necessary to prove a §2 claim," they must also be examined in the "totality of circumstances." To meet these conditions, courts began to rely on statistical data to demonstrate the appropriate level of political cohesion and white bloc voting. Thus, the question of minority coalitions would determine whether the plaintiff group would even qualify under the first *Gingles* element, before the second and third elements required analysis. Without minority coalitions, it is possible that there are some potential plaintiff groups that would not even meet the first element. Based on the progression of Section 2 jurisprudence, one cannot characterize the intermittent decisions from the Court as exhibiting a pattern of broad or narrow interpretation.

### III. CIRCUIT SPLIT REGARDING PERMISSIBILITY OF MINORITY COALITIONS UNDER SECTION 2

The circuit courts are split on whether two or more minority groups can come together to form a coalition for the purposes of the *Gingles* three-part test. The majority view, first announced by the Fifth Circuit, is that coalitions are permissible under Section 2. The Eleventh, Ninth and Second Circuits have not taken a firm stance on the issue, but in Section 2 cases have implicitly assumed that aggregation is permissible without

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49 Campos v. Baytown, 840 F.2d 1240, 1244 (5th Cir. 1988).


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

52 Id. at 74.


55 See generally Campos v. Baytown, 840 F.2d 1240 (5th Cir. 1988).
analysis, often resolving the claim on other grounds.\textsuperscript{56} The Eleventh Circuit cited to the Fifth Circuit opinion in its analysis, suggesting the court agrees with the Fifth Circuit, but it did not independently analyze the issue.\textsuperscript{57} The Sixth Circuit, standing alone, holds that coalitions are not permissible for Section 2 claims.\textsuperscript{58}

Although the Supreme Court has not directly addressed the issue of what constitutes a "minority class," the Court has refused to allow a vote dilution claim when the plaintiff class was a combination of a minority group and majority group, forming a crossover district.\textsuperscript{59} In \textit{Bartlett v. Strickland},\textsuperscript{60} the minority group consisted of black voters and the majority group consisted of white voters. The Court applauded the progress of those districts with white voters voting for minority candidates; however, it refused to mandate the creation of crossover districts.\textsuperscript{61} "Only when a geographically compact group of minority voters could form a majority in a single-member district has the first \textit{Gingles} requirement been met."\textsuperscript{62}

The closest the Court has come to answering this question is in \textit{Perry v. Perez},\textsuperscript{63} a case where it held that redistricting plans could not stand if the purpose was to combine two minority groups together to form a majority. The case did not directly raise a Section 2 claim; rather, the redistricting plan was challenged under Section 5.\textsuperscript{64} The Court suggested the redistricting plans could have legitimately been the result of population changes, but if population change was a pretext for forming a minority coalition district, then the district court had "no basis for doing so."\textsuperscript{65} The Court’s reluctance to form a minority coalition via redistricting could shed light on the Court’s sentiments regarding minority coalitions in general.

\textsuperscript{56} See generally Bridgeport Coal. for Fair Representation v. City of Bridgeport, 26 F.3d 271 (2d Cir. 1994); Badillo v. Stockton, 956 F.2d 884 (9th Cir. 1992); Concerned Citizens of Hardee Cnty. v. Hardee Cnty. Bd. of Comm’rs, 906 F.2d 524 (11th Cir. 1990).

\textsuperscript{57} See Hardee Cnty., 906 F.2d at 526.

\textsuperscript{58} See Nixon v. Kent Cnty., 76 F.3d 1381, 1393 (6th Cir. 1996).

\textsuperscript{59} See Bartlett, 556 U.S. at 25.

\textsuperscript{60} See \textit{id}.

\textsuperscript{61} See \textit{id}.

\textsuperscript{62} Id. at 26.

\textsuperscript{63} 132 S. Ct. 934 (2012).

\textsuperscript{64} See \textit{id} at 940.

\textsuperscript{65} Id. at 944.
A. Circuit Majority View Permitting Minority Coalitions under Section 2

Currently, the majority of circuit courts that have ruled on this issue have either explicitly or implicitly supported aggregating minority groups for cases under Section 2. In *Campos v. Baytown*, the Fifth Circuit aggregated Black and Hispanic voters to form a minority group "sufficiently large" as required by *Gingles* in order to find voter dilution.66 Black and Hispanic voters brought suit because they claimed the city’s minority population of 25.4 percent would never command a majority of votes required to elect a member supported by the minority.67 Baytown had an “at-large election system,” which had been in place since 1947.68 In fact, “[n]o minority member . . . ha[d] ever been elected to the Baytown City Council.”69 The court found that the plaintiffs satisfied all three parts of the *Gingles* test.70 In allowing aggregation of Blacks and Hispanics, the court found that “[t]here is nothing in the law that prevents the plaintiffs from identifying the protected aggrieved minority to include both Blacks and Hispanics.”71 Additionally, the court noted “Congress itself recognized ‘that voting discrimination against citizens of language minorities is pervasive and national in scope.”72

In *Concerned Citizens of Hardee County v. Hardee County Board of Commissioners*,73 the Eleventh Circuit stated that “[t]wo minority groups . . . may be a single section 2 minority if they can establish that they behave in a politically cohesive manner,” citing *Campos*.74 The court did not offer any of its own analysis as to why the law supports aggregating two minority groups. Additionally, the plaintiff class changed their theory of recovery to only include Blacks after the district court found that Blacks and Hispanics were not politically cohesive, thus,

66 See *Campos*, 840 F.2d at 1244.
67 *Id.* at 1241–42.
68 *Id.*
69 *Id.* at 1242.
70 *Campos*, 840 F.2d at 1244–49.
71 *Id.* at 1244.
72 *Id.* (quoting 42 U.S.C. § 1973b(f)(1)).
73 906 F.2d 524 (11th Cir. 1990).
74 See *id.* at 526 (finding that the two minority groups lacked political cohesion).
the Eleventh Circuit offered no original analysis. Ultimately, the court did not actually decide the aggregation issue, and any statements it could have made on the issue of aggregation or any accompanying explanations would have been, at best, dicta. Similarly, in Badillo v. Stockton, the Ninth Circuit found that the two minority groups were not politically cohesive, and thus did not address the issue of aggregation under Section 2.

And finally, in Bridgeport Coalition for Fair Representation v. City of Bridgeport, the Second Circuit implicitly supported the possibility of aggregating minority coalitions. The district court found "[w]hite bloc voting in Bridgeport will dilute minority voting except in districts in which clear [minority-majorities] are established, by a single or a combination African-American and Latino voters." The court concluded there was "sufficient evidence to support a conclusion that the Coalition satisfied its burden imposed by Gingles." The Second Circuit agreed, however, the district court implicitly assumed that aggregation was permissible. In a later Second Circuit opinion, Pope v. County of Albany, the court acknowledged the circuit split, and again allowed aggregation of Blacks and Hispanics to satisfy the first part of the Gingles test. But the court found that the plaintiffs failed the third Gingles element, so the court did not discuss the permissibility of aggregating minority groups in any detail.

B. Circuit Minority View Denying Minority Coalitions under Section 2

The only court that has expressly denied aggregation of minority coalitions under Section 2 is the Sixth Circuit. In Nixon v. Kent County, a divided Sixth Circuit held that "[t]he language of the Voting Rights Act does not support a conclusion

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75 Id. at 527.
76 956 F.2d 884 (9th Cir. 1992).
77 See id. at 886 (finding that the two minority groups lacked political cohesion).
78 26 F.3d 271 (2d Cir. 1994).
79 See id. at 275.
80 See id. (emphasis added).
81 See id.
82 687 F.3d 565 (2d Cir. 2012).
83 See id. at 572 n. 5.
84 76 F.3d 1381 (6th Cir. 1996).
that coalition suits are part of Congress' remedial purpose..." It further held that the primary duty of the legislature and the State was to determine where to draw political lines. In *Nixon*, the plaintiff class of Blacks and Hispanics brought a Section 2 claim opposing a redistricting plan, which did not include any districts where the minority group made up a majority. Before turning to the *Gingles* test, the court had to decide whether it would allow aggregation of minority groups. To do this, the court began with a textual analysis of the statute, taking into account the plain meaning of the statute, congressional intent, and interpretation from other courts. The court then looked into the legislative history and considered several policy concerns surrounding aggregation.

The first step "in interpreting a statute is its language." The court noted the absence of any language mentioning "minority coalitions, either expressly or conceptually." Additionally, the statute consistently used "class" in the singular form. As a result, the court concluded that Congress did not intend to protect minority coalitions and if it wanted to, it could either "authorize coalition suits" or amend the statute to use the plural form and refer to "protected classes" instead. The court concluded that the plain meaning of the statute was so clear it was unnecessary to look into the legislative history, but noted that nothing in the legislative history contained "direct evidence that Congress even contemplated coalition suits, far less intended them."

The court then addressed the Fifth Circuit's position in *Campos* in allowing aggregation as protecting coalitions when Congress did not intend to do so. Quoting the dissenting judge from *Campos*, "[t]he question is not whether Congress in the

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85 *Id.* at 1393.
86 *See id.*
87 *Id.* at 1384.
88 *Nixon*, 76 F.3d at 1386.
89 *See id.* at 1386–88.
90 *See id.* at 1390–92.
91 *Id.* at 1386 (quoting Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 409 (1993)).
92 *Nixon*, 76 F.3d at 1386.
93 *Id.*
94 *Id.* at 1387.
95 *Id.*
96 *Nixon*, 76 F.3d at 1388.
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Voting Rights Act intended to prohibit such coalitions; instead the proper question is whether Congress intended to protect those coalitions.\footnote{Id. (quoting Campos v. City of Baytown, Tex., 849 F.2d 943, 944 (5th Cir. 1988) (per curiam) (Higginbotham, J., dissenting)) (emphasis added).} In the dissent’s view, an affirmative grant of protection is required to prevent courts from regulating by "fiat."\footnote{Nixon, 76 F.3d at 1388.}

Additionally, the court discussed policy considerations surrounding aggregation of minority coalitions.\footnote{Id. at 1390–91.} First, the court noted that Congress passed the Voting Rights Act for a specific purpose and upon specific findings of past discrimination and "exclusion from the electoral process."\footnote{Id.: [The Voting Rights Act is premised upon congressional 'findings' that each of the protected minorities is, or has been, the subject of pervasive discrimination and exclusion from the electoral process. Thus, many minorities in society, e.g., Eastern European immigrants or minorities from the Indian subcontinent, are not protected under the Act. The remedies of the Act only extend to members of a minority specifically protected by Congress.]} As such, there are naturally some minority groups that are not protected by the Act because they have no history of being excluded from the electoral process.\footnote{See id. at 1391 (mentioning only African Americans and Hispanic Americans as groups with a history of voting discrimination).} Thus, extending protection to minority coalitions should not be assumed; it is best left to Congress to research and amend if necessary.

There are also situations where minority groups may not have aligned interests, which casts further doubt on whether Congress really intended to protect minority coalitions.\footnote{See Nixon, 76 F.3d at 1390–91} The court found the criterion of numerosity implicit in the first part of the Gingles test, which necessarily means there must be cases when a minority group would fail to meet this threshold.\footnote{See id.} But allowing aggregation would almost always allow minority coalitions to surpass this threshold and could potentially imbalance the political scales in favor of the minorities. "Coalition suits provide minority groups with a political advantage not recognized by our form of government, and not
authorized by the constitutional and statutory underpinnings of that structure.”

C. Recent Supreme Court Decisions Suggest Support for Circuit Minority View

Recent Supreme Court decisions show a trend towards prohibiting aggregation of minority groups. In Bartlett v. Strickland, the Court declined to expand protection of Section 2 to crossover districts. “Crossover districts are, by definition, the result of white voters joining forces with minority voters to elect their preferred candidate.” The Court reasoned that the very purpose of the Act was to “foster this cooperation.” If such cooperation existed and were allowed to join forces to bring suit under Section 2, it would be “iron[ic].” The Court reiterated that “[o]nly when a geographically compact group of minority voters could form a majority in a single-member district has the first Gingles requirement been met.” Although in Bartlett, there were white voters joining forces with minority voters, instead of two minority groups, the bottom line is the Court did not support the idea of groups joining forces to achieve the majority status required by Gingles.

In Perry v. Perez, the Supreme Court also hints that minority coalitions are disfavored. The State submitted new districting plans purportedly due to the population growth in Texas. The Court noted that the lower court’s order suggested that the State “may have intentionally drawn District 33 as a ‘minority coalition opportunity district’ in which the court expected two different minority groups to band together to form an electoral majority.” Another plausible interpretation is that the districts were drawn in order to accommodate for population growth. In maintaining that the impetus was unclear, the Court concluded that “[i]f the District Court did set out to create

104 Id. at 1392.
106 Id. at 25.
107 Id.
108 Id.
111 Id.
112 Id.
a minority coalition district, rather than drawing a district that simply reflected population growth, it had no basis for doing so.”113 Although the case did not raise a Section 2 claim, but was challenged under Section 5, the sentiments of the Court regarding minority coalition districts may forecast its feelings toward minority coalitions in general.

Most recently, in *Shelby County v. Holder*, the Supreme Court struck down Section 4(b) of the Voting Rights Act as unconstitutional.114 Congress had enacted Section 4(b) as a way to protect minority voters residing in districts and states with historically low minority voter turnout and a history of discriminatory voting practices.115 These jurisdictions were subject to federal “preclearance” when enacting new voter laws or redistricting.116 With the Section 4(b) coverage provision eliminated, states are no longer subject to federal preclearance when amending voting laws.117 In the absence of the preclearance requirement, the main way to protect voters from voting discrimination is Section 2; thus, it is even more important to ensure that Section 2 is analyzed properly.

**IV. SUPPORT FOR THE CIRCUIT MINORITY VIEW**

A. Textual & Institutional Arguments

Section 2 of the Act makes no mention of minority coalitions.118 A violation of Section 2 is established if:

> [O]n the totality of circumstances, it is shown that the political processes... are not equally open to participation by members of a class of citizens.... The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have

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113 *Id.*
116 See *id.*; see generally *Perry*, 132 S. Ct. 934.
members of a protected class elected in numbers equal to their proportion in the population.\textsuperscript{119}

The text clearly states "class" repeatedly in the singular form.\textsuperscript{120} Moreover, the purpose of act is remedial—Congress enacted it after extensive findings of voting discrimination, and thus, Congress should be the one to evaluate whether minority coalitions should be allowed under Section 2.\textsuperscript{121} A protected class would not likely ever be in the minority if it were allowed to aggregate with another minority group to satisfy the \textit{Gingles} test. This is based on pure numbers—the ability to aggregate minorities without limit will necessarily allow them to more easily satisfy the \textit{Gingles} numerosity requirement.

The most recent statements of congressional purpose from the 2006 amendments reiterate the fact that Congress is willing and able to make findings regarding the necessity of the Act.\textsuperscript{122} Congress found:

\begin{itemize}
\item (1) ... significant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices ....
\item (2) However, vestiges of discrimination in voting continue to exist as demonstrated by second generation barriers constructed to prevent minority voters from fully participating in the electoral process.
\item (3) The continued evidence of racially polarized voting in each of the jurisdictions covered by the expiring provisions of the Voting Rights Act of 1965 demonstrates that racial and language minorities remain politically vulnerable, warranting the continued protection of the Voting Rights Act of 1965.\textsuperscript{123}
\end{itemize}

\textsuperscript{119} \textit{Id.}
\textsuperscript{120} \textit{See Nixon v. Kent Cnty.}, 76 F.3d 1381, 1386 (6th Cir. 1996).
\textsuperscript{121} \textit{See id.}
\textsuperscript{122} \textit{See 42 U.S.C. §1973b (2006).}
\textsuperscript{123} \textit{Id.}
Congress revisited the Act in 2006 and did not include minority coalitions, and the courts should not read into a statute what is not there.

Arguing in support of permitting aggregation, the Fifth Circuit claims that the absence of any denial of minority coalitions in the statute means they are permissible. This is not a correct mode of statutory analysis. As the dissent notes, Congress' failure to explicitly protect minority coalitions does not suggest that it chose to protect them. Instead, courts must find affirmative protections from Congress. This argument comports with modes of legal interpretation stemming back to the birth of the Constitution, which requires Congress to give an affirmative grant of power. As such, allowing minority coalitions requires an affirmative statement from Congress, the absence of which leaves the courts no choice but to make Congress act.

B. Recent Precedent Suggests that the Supreme Court Supports the Minority View in Nixon

Existing Supreme Court interpretations of Section 2 support a finding that minority coalitions are not included. The Gingles test presupposes that there will be minority groups who will not meet the criteria a "minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in the single-member district." Additionally, in looking at the other two parts of the test, which require political cohesiveness and bloc voting, the theme of homogeneity pervades throughout the Gingles test. The very definition of minority coalitions contravenes the theme of the Gingles test and thus, cannot be said to support aggregation. If minority coalitions were allowed, this could potentially lower

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124 See id.
125 Campos v. Baytown, 840 F.2d 1240, 1244 (5th Cir. 1988).
127 See Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001) (stating that the "textual commitment must be a clear one. Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").
the ease with which the first Gingles element could be met and render the first element less of a bar and more of a formality.

There are two additional cases that strongly suggest the Court would not support minority coalitions under Section 2. In Bartlett v. Strickland, the Court expressly prevented white voters from joining forces with minority voters in order to form a majority in a single-member district. The Court was very clear that such aggregation cannot allow a minority group to meet the first Gingles requirement. Even though the Court believed that such cooperation was the very goal of Section 2, it still did not allow the aggregation of whites and minorities; thus, it would be even less likely for the Court to allow coalitions composed entirely of minorities. In Perry v. Perez, the Court found that a district court's redistricting plans strongly suggested an underlying motive of creating a “minority coalition district.” The court noted that if this were the real motive, then the district court “had no basis for doing so.” This line of reasoning strongly suggests that the Court would not support aggregation of minority groups under Section 2.

In maintaining that both the congressional record and Supreme Court jurisprudence support the circuit majority view permitting minority coalitions, scholars have pointed to situations where Congress and the Court expanded rights under Section 2 or “broadly” interpreted Section 2. First, Congress expanded the Act to include language-minority groups in 1975. Second, the Court in Chisom expanded coverage to suits alleging a Section 2 violation for the election of judges even though the statute uses the term “representatives.” Third, the Court has assumed that two minority groups could aggregate even when the issue was moot because it found there was no political cohesion, as required by the second Gingles element. Although the case has been cited to imply the Court supports

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130 Id. at 25–26.
131 Id.
133 Id.
134 See Weinberg, supra note 9, at 429–30.
135 See Michaloski, supra note 9, at 293.
136 See id.
minority coalitions, the case is best interpreted as the Court side-stepping that issue entirely and finding that a different Gingles element failed.

These arguments are unpersuasive and only tangentially relevant to the issue at hand. First, Congress expanded the Act to include language-minority groups in 1975, but pointing to an instance where Congress expanded the statute to language-minority groups does not indicate that Congress would advocate expanding the Act to permit minority coalitions nor a broad interpretation of every provision of the statute. In fact, it lends credence to the argument that this type of determination should be left to the legislatures to research and decide. Additionally, Congress expanded the provision to include language-minority groups in 1975 when voting discrimination was still a significant problem. In 2006, Congress noted that there has been “significant progress.” Although voting discrimination still exists, the political landscape is much different now than in 1975, and the amendments on which the argument relies is also outdated. Thus, this argument, which is based on the 1975 amendments and data, should be given little to no weight.

Second, the Court in Chisom expanded coverage to suits alleging a Section 2 violation for the election of judges even though the statute uses the term “representatives.” Expanding Section 2 protection for judicial elections does not help determine whether the Court would interpret the term “class” to include minority coalitions. The fact that the Court chose to interpret “representative” broadly to include judges has no bearing on whether it would interpret “class” broadly in an entirely different context. Congress enacted the Act in order to try and eliminate discrimination in voting practices. As such, broadly interpreting “representative” goes to the heart of the goal, because it should not matter for whom one is voting if the goal is to ensure equal access to vote. But interpreting “class”

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138 See Weinberg, supra note 9, at 424.
139 See Groue, 507 U.S. at 41 n. 5.
142 See Michaloski, supra note 9, at 293.
broadly has much different consequences. Per Gingles, a
minority group must constitute a majority of the would-be
district to state a Section 2 claim. If aggregation of minority
groups were allowed, the threshold to meet this requirement
would be lowered since minority groups can simply join forces to
obtain majority status. Furthermore, because one of the Act's
purpose is remedial, it makes no sense to protect potential
minority groups that may be part of a minority coalition that
may not have been subject to past voting discrimination.

Third, the Court has assumed that two minority groups
could aggregate even when the issue was moot because it found
there was no political cohesion, as required by the second
Gingles element. The only argument that actually relates to
the issue in question is the one arising from Growe v. Emerson,
where the Court declined to address the issue of
minority coalitions. Thus, the argument is weak, because the
Court expressly stated that it was “[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.” This adds nothing
to Section 2 jurisprudence. The Court expressly stated it was not
making a decision on the permissibility of aggregating minority
groups. Additionally, the assumptions on which the Court
relied did not affect the outcome of the case. The only thing
this case expounded is that the Supreme Court assumed a
finding the lower court made, which does not imply the Court
endorses minority coalitions. At best, it means the Court
wanted to remain silent on the issue.

Thus, any trends toward a broad interpretation fall away. Even assuming these three arguments did in fact weigh in favor of a broad interpretation, it would be a stretch to say that three

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144 See generally Gingles, 478 U.S. 30; Bartlett, 556 U.S. 1.
149 Id. at 41 (emphasis added).
150 See id.
151 See id.
152 See Michaloski, supra note 9, at 293.
153 Cf. id.
data points articulate a trend, especially when the Court has leaned toward more narrow interpretations.\footnote{154 See generally Mobile v. Bolden, 446 U.S. 55 (1980).}

C. In the Aftermath of \textit{Shelby County}, Courts Must Be More Vigilant and Strict with Regard to Section 2 Claims

With the advent of \textit{Shelby County} and the elimination of Section 4(b), this could mean that minority groups will have to look to Section 2 to obtain remedies against vote dilution.\footnote{155 See Michaloski, supra note 9, at 286 ("The Supreme Court recently invalidated the Section 4 preclearance requirement of the Act in \textit{Shelby County v. Holder}, but emphasized the importance of Section 2 as a permanent and nationwide prohibition against discriminatory voting practices.").} Laws do not exist in isolation and changes to legislation affect other laws. Before \textit{Shelby County}, if a court were to allow minority coalitions, and issued some sort of remedial action requiring redistricting, for example, any new laws a covered district wished to enact would require federal government approval, or preclearance.\footnote{156 See 42 U.S.C. § 1973 (2006).} \textit{Shelby County} abrogated Section 4(b) and rendered the preclearance requirement inoperative.\footnote{157 See Shelby Cnty. v. Holder, 133 S. Ct. 2612, 2631 (2013).} Without having to answer to the federal government, the states are left to their own devices for fashioning remedies they believe are appropriate.\footnote{158 See, e.g., Veasey v. Perry, 71 F.Supp.3d 627, 641-42(S.D. Tex. Oct. 9, 2014) (discussing voter identification laws passed in the State).} No governmental checks on court-mandated remedies exist now, and since any new state law or redistricting is no longer subject to federal approval without the coverage formula under Section 4(b), this power of discretion could be very dangerous, and even more reason to guard Section 2 claims more closely.

It is likely that legislatures are in a better position to understand what is in its citizens' best interest; courts are the wrong institution to decide issues of great consequence.\footnote{159 See Baker v. Carr, 369 U.S. 186, 217 (1962) (enumerating instances when political questions may arise and situations where courts should not intervene); cf. Davis v. Bandemer, 478 U.S. 109, 121-25 (1986) (holding that racial gerrymandering was justiciable under the Equal Protection Clause).} Even if the proper remedy were to allow minority coalitions, if the Court were to decide this incorrectly, this would have a great impact on the general public. The scales may actually start
tipping the other way—in favor of minority groups and actually harming the majority. While on its face, this may seem like a positive outcome, the very abandonment of Section 4(b) in *Shelby County* suggests that the voting discrimination issues are not as drastic as they once were.\(^\text{160}\) Allowing aggregation of minority groups could be a drastic intervention that is unnecessary, and may actually serve to overprotect minorities.\(^\text{161}\) If minority coalitions were allowed, the ability for minorities to bring suit under Section 2 and satisfy Gingles' first element would be much too easy.

Additionally, in *Shelby County*, the Court did not manipulate Section 4 to allow for an interpretation that Congress may not have intended, it held the provision unconstitutional knowing the power to amend or legislate is in the hands of Congress.\(^\text{162}\) The Court acknowledged that it was Congress' constitutional right to amend statutes. Should Congress find that the provision is still required to remedy lingering discriminatory effects, it can do so and is the proper institution to perform a holistic review of the current circumstances of modern day voting dilution issues.\(^\text{163}\) This is especially true when there seems to be a discrepancy between the level of discrimination that the Court believes exists and the level of discrimination that actually exists at the state level.\(^\text{164}\)

Statistical findings in lower courts suggest that without the requisite preclearance and oversight of the federal government, Section 2 could not adequately protect the rights of minority

\(^{160}\) Cf. *Shelby Cnty.*, 133 S. Ct. at 2630–31 (2013):

There is no valid reason to insulate the coverage formula from review merely because it was previously enacted 40 years ago. If Congress had started from scratch in 2006, it plainly could not have enacted the present coverage formula. It would have been irrational for Congress to distinguish between States in such a fundamental way based on 40-year-old data, when today's statistics tell an entirely different story. And it would have been irrational to base coverage on the use of voting tests 40 years ago, when such tests have been illegal since that time. But that is exactly what Congress has done.

\(^{161}\) See id.

\(^{162}\) Id.

\(^{163}\) Id.

\(^{164}\) Compare *Shelby Cnty.*, 133 S. Ct. at 2626 with *Shelby Cnty.*, 679 F.3d 848, 865–66 (D.C. Cir. 2013) (citing several statistics where racial discrimination still exists in voting contexts), and *Harris v. Arizona*, 993 F. Supp. 2d 1042, 1049 (D. Ariz. 2014) (listing voting statistics in detail by district); see also *Veasey*, 71 F.Supp.3d at 636-37 (rebuttering Chief Justice Roberts' assertions that the current conditions in the South no longer justified the "extraordinary" measures he summarily struck down).
voters, specifically in previously covered jurisdictions. But this only relates to previously covered jurisdictions and not every jurisdiction nationwide. Allowing minority coalitions on a nationwide basis would not solve the problem specific to covered jurisdictions. If the Court incorrectly characterizes the data or if it relies upon data that does not fully represent the current situation, issuance of a decision that has a widespread impact on the voting rights of the public may result in unintended effects.

Furthermore, an impact of this magnitude cannot be decided on a case-by-case basis, because the decision will not only bind the parties privy to the dispute, but future plaintiffs as well. Due to its large reach, Congress is in the best position to do the necessary research to ensure that amendments to Section 2 will serve the proper remedial service that is intended while being able to take into account the necessary data and external information. While at first blush, the effect of Shelby County would seem to suggest that Section 2 should be given a broader interpretation, if Shelby County taught us anything, it is that widespread abrogation of legislation could lead to effects that the Court, in judging a single dispute, may not fully appreciate and permitting coalitions is a decision best left to Congress. Following this approach, proper deference to Congress achieves the intended goals and purposes of the Fifteenth Amendment without as much risk of errors in judicial discretion.

V. CONCLUSION

Vote dilution has been and still is an ongoing problem in the United States. For voting issues of this scale, the Constitution specifically vests Congress with the power to enact legislation to remedy these discrepancies. Congress used its power to enact the Act in 1965, and a series of amendments thereafter. Determining whether minority coalitions are permissible under Section 2 should be left to Congress, which is in a better position to take into account the proper data and make an informed decision. Past amendments, whether broad or narrow, cannot

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165 See Shelby Cnty., 679 F.3d at 872–73.
166 See generally Baker v. Carr, 369 U.S. 186, 217 (1962) (enumerating instances when political questions may arise and situations where courts should not intervene).
167 See Shelby Cnty., 133 S. Ct. at 2636 (Ginsburg, J., dissenting) (stating that the findings of Congress should be given “substantial deference”).
inform current political trends because past amendments were based on past statistics to remedy past discrimination.

The Supreme Court has not directly addressed the issue of minority voting coalitions and relying on cases where other provisions of the Act were broadly interpreted cannot be applied to inform this situation, because the goals furthered by the other provisions in the Act are not the same. And, finally, as seen in *Shelby County*, the Court's understanding of the climate of voting discrimination may not align with what is actually happening, and may require a branch of government with representatives from all the states to fully appreciate the breadth of the situation. Thus, the courts should leave the issue of minority coalitions alone and defer to Congress to clarify.