

WHY *BARTLETT* IS NOT THE END OF AGGREGATED MINORITY GROUP CLAIMS UNDER THE VOTING RIGHTS ACT

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ABSTRACT

The 2020 election showed the importance of faith in the democratic system and the ability for citizens to cast a ballot for federal, state, and local races. After the election, state legislatures will be redrawing federal, state, and local electoral districts. Those new districts will affect the voting rights of nearly every American. This Note examines Section 2 of the Voting Rights Act of 1965, which has traditionally afforded minority group members the opportunity to challenge discriminatory electoral policies that thwart the ability “to participate in the political process and to elect representatives of their choice.” This is an important avenue that minority group members can seek to remediate biased districting processes.

*Claims brought by one minority group at a time—such as a Black community suing to be a majority in a newly drawn electoral district after being discriminated against in the district drawing process—have been commonplace for several decades. But given the diversifying country, these standard challenges are becoming insufficient. A newer and more controversial theory pursued by litigants under Section 2 is the “aggregated claim”—which is a joint claim brought by two or more minority groups saying essentially, “We’ve been discriminated against collectively.” This Note asks the question of whether aggregated claims are permitted under Section 2 and argues that they are. In particular, this Note examines the impact of a 2009 Supreme Court case, *Bartlett v. Strickland*, on the viability of aggregated claims, and makes a novel*

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argument based on statutory interpretation that such claims should be permitted.

INTRODUCTION

For nearly three decades, constitutional law has required that plaintiffs in racial gerrymandering suits prove the heavy burden that race was the predominant motive for redistricting.¹ In 2017, the Supreme Court limited the ability of legislatures to use race as a tool to achieve representation for minorities—requiring its use to be remedial and necessary to avoid a potential Section 2 claim.² In 2019, the Court dealt another blow to voting rights activists when it held that partisan gerrymandering claims are nonjusticiable,³ possibly making it easier for racialized districting to be done under the guise of nonjusticiable political gerrymandering.

Taking these developments together, voting rights advocates will look to the Voting Rights Act of 1965 (“VRA”) to ensure minority populations can fully participate in the civic process.⁴ Passed pursuant to congressional powers created by the Fifteenth Amendment, the VRA outlawed various discriminatory tactics, such as poll taxes and literacy tests, and created causes of action to challenge the effects of discriminatory election systems.⁵ Unlike racial gerrymandering claims that are typically brought as a constitutional cause of action under the Fourteenth Amendment and require proof of intentional discrimination,⁶ claims under Section 2 of the VRA apply to

1. *Bush v. Vera*, 517 U.S. 952, 959–60 (1996).

2. *Cooper v. Harris*, 137 S. Ct. 1455, 1472 (2017) (noting that while complying with Section 2 of the VRA is a compelling state interest, districts drawn based on incorrect legal interpretations of the VRA would not survive strict scrutiny); Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Race and Representation Revisited: The New Racial Gerrymandering Cases and Section 2 of the VRA*, 59 WM. & MARY L. REV. 1559, 1590, 1598 (2018) (“Thus, when the government cannot justify race-conscious line-drawing on remedial grounds . . . a racial districting plan will not survive strict scrutiny.”).

3. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019).

4. *See, e.g.*, Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 COLUM. L. REV. 2143, 2147–48 (2015) (describing how Section 2 can function as an effective means to challenge districting).

5. Voting Rights Act of 1965, Pub. L. No. 89-110, §§ 4(a), (c), (e)(1), 10, 79 Stat. 437, 438–39, 442.

6. Interestingly, the Fourteenth Amendment at the time of ratification did not promise enfranchisement. *See* Travis Crum, *The Superfluous Fifteenth Amendment?*, 114 NW. U. L. REV. 1549, 1565, 1602 (2020) [hereinafter Crum, *The Superfluous Fifteenth Amendment*] (“[T]he Fourteenth Amendment was originally understood to *not* protect political rights.”). Rather, this

discriminatory effects.⁷ This difference is critical, especially for elected bodies, given that intent is difficult to prove.⁸ Thus, the VRA (as amended) made redress of discrimination significantly easier to achieve for marginalized persons.

A vote dilution claim is one common method of challenging election districts under Section 2. A minority community can challenge election systems or processes as having a discriminatory effect if “the political processes leading to nomination or election . . . are not equally open to participation by members of a [protected class].”⁹ Like with gerrymandering, vote dilution affects the power of one’s vote, not one’s ability to cast a ballot. Plaintiffs can challenge districting that dilutes minority voting power, for which a common remedy is to create one or more new single-member districts (those in which one official is elected from a given district), each with a majority–minority population.¹⁰

Section 2 redistricting claims, which this Note focuses on, were first brought by single-minority group communities, whether they be ethnic or racial minority groups.¹¹ The Court in *Thornburg v. Gingles*,¹² created three preconditions to these claims. It required claimants as a community to show that: (1) they are large and geographically compact enough to be a majority within a single-member district; (2) they are politically cohesive; and (3) “the [racial] majority votes sufficiently as a bloc” to defeat minority-preferred candidates.¹³ As communities became more diverse, two or more minority groups began to bring “aggregated claims,” where a cohesive community is made up of one or more groups protected by the VRA. For instance, there may be a

was a creation of the Supreme Court in *Shaw v. Reno*, 509 U.S. 630 (1993). Travis Crum, *Reconstructing Racially Polarized Voting*, 70 DUKE L.J. 261, 264 (2020) [hereinafter Crum, *Reconstructing Racially Polarized Voting*].

7. See Voting Rights Act, Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified as amended at 52 U.S.C. § 10301 (2018)) (adopting a “results” test for Section 2).

8. See generally Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523 (2016) (discussing the concept of legislative intent, both subjectively and objectively).

9. *Thornburg v. Gingles*, 478 U.S. 30, 43 (1986) (quoting 52 U.S.C. § 10301).

10. See *Grove v. Emison*, 507 U.S. 25, 40 (1993) (“[W]e have strongly preferred single-member districts for federal-court-ordered reapportionment.”). *But see* *Shaw v. Hunt (Shaw II)*, 517 U.S. 899, 917 n.9 (1996) (noting that a complainant does not necessarily have “the right to be placed in a majority-minority district once a violation of the statute is shown,” because “[s]tates retain broad discretion in drawing districts to comply with the mandate of [Section] 2”).

11. See, e.g., *Grove*, 507 U.S. at 34–35 (evaluating a single-minority group claim).

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

13. *Id.* at 50–51.

claim by a community of Hispanic and Black voters, who form a community, typically vote together, and whose voting power is diluted by a majority voting bloc in a given district.¹⁴ Circuit courts that allow aggregated claims apply the *Gingles* preconditions to the minority community collectively, but not all courts, however, have allowed these claims to proceed.¹⁵

This absence of uniformity in the circuit courts highlights a central question: Does Section 2 even allow aggregated claims? The answer has far-reaching implications. American society is becoming increasingly racially diverse. By 2060, non-Hispanic White persons will account for only 43.6 percent of the American population,¹⁶ and biracial populations will triple.¹⁷ Further, American elections are starkly polarized, especially along racial lines.¹⁸ Even if some districts begin to reflect a pluralistic society,¹⁹ there is fear that certain election

14. I use the term “Hispanic” to track both the statutory language (“of Spanish heritage”), 52 U.S.C. § 10503(e), and the language used in the relevant caselaw. Additionally, terms like Latino and Latina are gendered, and while gender-neutral terms such as Latinx exist, these terms are unpopular compared to Hispanic within this community as of the date of publication, and that choice should be honored. See Luis Noe-Bustamante, Lauren Mora & Mark Hugo Lopez, *About One-in-Four U.S. Hispanics Have Heard of Latinx, but Just 3% Use It*, PEW RSCH. CTR. (Aug. 11, 2020), <https://www.pewresearch.org/hispanic/2020/08/11/about-one-in-four-u-s-hispanics-have-heard-of-latinx-but-just-3-use-it> [<https://perma.cc/MF2M-XNKU>].

15. See e.g., *Nixon v. Kent Cnty.*, 76 F.3d 1381, 1386 (6th Cir. 1996) (en banc) (prohibiting an aggregated claim from proceeding to trial); *Campos v. City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988) (allowing an aggregated claim composed of Black and Hispanic voters to proceed); see also *Grove*, 507 U.S. at 41 (stating that if aggregated claims were viable, they would be subject to the same preconditions as single-minority group claims).

16. SANDRA L. COLBY & JENNIFER M. ORTMAN, PROJECTIONS OF THE SIZE AND COMPOSITION OF THE U.S. POPULATION: 2014 TO 2060, at 10 (2015), <https://census.gov/content/dam/Census/library/publications/2015/demo/p25-1143.pdf> [<https://perma.cc/W5VW-JM44>].

17. *Id.* In 2014, roughly 2.5 percent of the population identified as “[t]wo or [m]ore [r]aces,” which is expected to grow to 6.2 percent by 2060. *Id.* at 9.

18. See Jon Huang, Samuel Jacoby, Michael Strickland & K.K. Rebecca Lai, *Election 2016: Exit Polls*, N.Y. TIMES (Nov. 8, 2016), <https://www.nytimes.com/interactive/2016/11/08/us/politics/election-exit-polls.html> [<https://perma.cc/X3C5-WASE>] (reporting that 88 percent of Black voters and 65 percent of Hispanic voters cast a ballot for the Democratic nominee, Hillary Clinton, while 58 percent of White voters cast a ballot for the Republican nominee, Donald Trump). See generally *Election Results 2008*, N.Y. TIMES (Nov. 5, 2008), <https://www.nytimes.com/elections/2008/results/president/national-exit-polls.html> [<https://perma.cc/6C9W-ZYJ8>] (demonstrating correlations between race and preferred political party from 1972 to 2008).

19. Cf. CENSUS BUREAU, U.S. DEP’T OF COM., NORTH CAROLINA: 2010 SUMMARY POPULATION AND HOUSING CHARACTERISTICS 154 (2010) [hereinafter NORTH CAROLINA 2010 SUMMARY] (showing Durham County as 46.4 percent White, 38 percent Black, 4.6 percent Asian, and 13.5 percent Hispanic).

and districting systems could limit the power of minority voices.²⁰ One need not look further than the responses to the 2020 election to see this concept in action.²¹ For a further example, legislatures could pack minorities into one district to weaken their votes elsewhere.²² Finally, the recently closed 2020 census will be used to redraw electoral districts, which Section 2 plaintiffs will almost certainly challenge.²³

Though the Supreme Court has not ruled on the viability of aggregated claims, it portended issues for them by altering the *Gingles*

20. See Amended Complaint at 2, 15, 31, *McLemore v. Hosemann*, 414 F. Supp. 3d 876 (S.D. Miss. 2019) (No. 3:19-cv-383-DPJ-FKB), 2019 WL 7856631 (noting that while Mississippi has the highest percentage of Black citizens of any state in America, no Black person has won statewide office in 130 years, allegedly due to a rule requiring candidates win the majority of the popular vote statewide and win in a majority of the state's 122 House districts); Ariel Hart, Jeff Ernsthause & David Wickert, *Disputed Voting System, Racial Power Gap Persist*, ATLANTA J. CONST. (Dec. 7, 2013), <https://www.ajc.com/news/state--regional-govt--politics/disputed-voting-system-racial-power-gap-persist/xwhYqMwM2eGalkCqMjo2IJ> [<https://perma.cc/W8KN-2XW5>] (describing the disparities in representation from at-large elections).

21. *E.g.*, S.B. 90, 123d Reg. Sess. (Fla. 2021); S.B. 202, 155th Gen. Assemb., Reg. Sess. (Ga. 2021) (signed into law Mar. 25, 2021); H.B. 3920, 87th Leg. (Tex. 2021); see STATE VOTING BILLS TRACKER 2021, BRENNAN CTR. FOR JUST. (2021), <https://www.brennancenter.org/our-work/research-reports/state-voting-bills-tracker-2021> [<https://perma.cc/HK34-FCR2>] (listing over 700 restrictive voting rights bills introduced in forty-three states). Many of these bills seem to be concerned with election security. It is, however, peculiar that in addition to alleged security measures, some bills like the Georgia state legislature's make it a criminal offense to hand out water to persons standing in line to vote. S.B. 202, 155th Gen. Assemb., Reg. Sess. § 33 (Ga. 2021) ("No person shall . . . give, offer to give, or participate in the giving of any money or gifts, including, but not limited to, food and drink, to an elector . . . [w]ithin 25 feet of any voter standing in line to vote at any polling place."); GA. CODE ANN. § 21-2-414(h) (West 2021) (making certain prohibited actions, which S.B. 202, § 33 will add to, misdemeanors). More concerning, however, is that the Georgia bill also adds new identification requirements, limits mail-in voting, and will give partisan state election officials the power to temporarily suspend county election "superintendents" and elect their own. S.B. 202, 155th Gen. Assemb., Reg. Sess. §§ 6, 7, 25 (Ga. 2021).

22. See *Voinovich v. Quilter*, 507 U.S. 146, 153–54 (1993) (describing district packing).

23. See *Wisconsin v. New York*, 517 U.S. 1, 5–6 (1996) (noting that the decennial census is used to draw federal, state, and local election districts). Although the district drawing process is required by federal law, states typically have the responsibility of apportioning federal and local districts. See Justin Levitt & Michael P. McDonald, *Taking the "Re" Out of Redistricting: State Constitutional Provisions on Redistricting Timing*, 95 GEO. L.J. 1247, 1253–54 (2007) ("For all practical purposes, *Wesberry* [*v. Sanders*, 376 U.S. 1 (1964)] and *Reynolds* [*v. Sims*, 377 U.S. 533 (1964)] require a state to redistrict immediately following a census—absent some other decennial timetable."). The process has started as of the publication of this Note, and will likely continue for several months, if not years depending on litigation. For current progress of the 2021 redistricting process, see Justin Levitt, *National Overview*, ALL ABOUT REDISTRICTING, <https://redistricting.ills.edu/national-overview> [<https://perma.cc/942J-TV3X>]. To see the timeline of the 2010 census redistricting, see Justin Levitt, *Maps Across the 2010 Cycle*, ALL ABOUT REDISTRICTING, <https://redistricting.ills.edu/resources/maps-across-the-cycle-2010-congress> [<https://perma.cc/CB3Y-TZ4A>].

preconditions. In 2009, the Court in *Bartlett v. Strickland*²⁴ set a bright-line requirement (or perhaps more accurately clarified the first *Gingles* precondition) for Section 2 redistricting claims: the minority claimants must make up 50 percent or more of the new district they seek.²⁵ The *Bartlett* Court set this rule when considering a crossover claim (as opposed to an aggregated claim). In a crossover claim, a minority group constitutes *less* than 50 percent within a new electoral district but could elect its representatives with the help of allegedly consistent majority “crossover” voters.²⁶ Thus, by adding this new majority requirement, the *Bartlett* Court said, in essence, “no crossover claims.”²⁷ The question remains, however, whether or not this logic extends to aggregated claims.

This Note argues that aggregated claims are properly distinguishable from the crossover claims left unprotected under *Bartlett*. Aggregated claims significantly differ because they feature two or more minority groups combined as one community—a community constituting at least 50 percent of the new polity. Indeed, White crossover voters are not part of the claim itself. They do not join the complaint to the court, are not subject to the statutory tests of Section 2, and are not part of the community alleging discrimination.²⁸ By contrast, all aggregated claimants necessarily assert that they suffer from discrimination because of their minority status. Thus, aggregated claims are more like single-minority group claims than crossover claims, and the *Bartlett* plurality’s rationales that disallowed crossover claims under Section 2 are inapplicable. In other words, this Note argues that two or more groups can identify as a single community and

24. *Bartlett v. Strickland*, 556 U.S. 1 (2009).

25. *Id.* at 13 (plurality opinion).

26. *Id.* at 19. In a crossover claim, a minority group constitutes *less* than 50 percent within a new single-member district but *could* elect its representatives with the help of majority (typically White) “crossover” voters. *Id.*

27. The rationales given by the *Bartlett* Court were that crossover claims (1) are inconsistent with the first and third *Gingles* preconditions; (2) were “contrary to the mandate of [Section] 2,” which only guarantees an “equal” opportunity to elect one’s representatives of choice; (3) increased racial considerations might run afoul of the Equal Protection Clause; and (4) crossover districts instead emphasized racial distinctions instead of continuing progress toward the “waning of racism.” *Id.* at 14–26. By extension, this also meant that legislatures did not have to account for crossover effects when redistricting.

28. *See id.* at 11 (noting that only the minority groups of the crossover coalition are subject to the *Gingles* preconditions, and by implication that White crossover voters cannot count towards meeting the first precondition).

are deserving of the same protection as a single-minority group community.

Scholarly views on aggregated claims under Section 2 are split. Early literature turned to a statutory text and intent debate over whether the VRA could support such claims.²⁹ After *Bartlett*, a dispute arose among scholarly commentators as to whether aggregated claims were dead in the water just like crossover claims,³⁰ because of strong

29. Compare Sebastian Geraci, *The Case Against Allowing Multiracial Coalitions To File Section 2 Dilution Claims*, 1995 U. CHI. LEGAL F. 389, 390–93 (“[T]he legislative history of the VRA suggests that multiracial coalitions are not permissible.”), and Christopher E. Skinnell, *Why Courts Should Forbid Minority Coalition Plaintiffs Under Section 2 of the Voting Rights Act Absent Clear Congressional Authorization*, 2002 U. CHI. LEGAL F. 363, 377 (“Just because Congress clearly intended to interfere with state election systems by passing and amending the VRA, it does not inevitably follow that courts should infer an intention to interfere to such a degree as to encompass minority coalitions.”), with Katherine I. Butler & Richard Murray, *Minority Vote Dilution Suits and the Problem of Two Minority Groups: Can a “Rainbow Coalition” Claim the Protection of the Voting Rights Act?*, 21 PAC. L.J. 619, 623–24 (1990) (“Ultimately we conclude that the dilution suit . . . should be extended to protect a ‘minority coalition’ only in the most unusual of circumstances.”), 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, 427–32 (2015) (noting that using the *Bartlett* rule to prohibit aggregation runs counter to the purposes of the VRA, does not lessen the use of race in district drawing, and would reduce the number of VRA claims), 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 (2014) (noting that allowing aggregation “best accords with the fundamental purpose and underlying congressional intent of the statute”), Rick G. Strange, *Application of Voting Rights Act to Communities Containing Two or More Minority Groups: When Is the Whole Greater than the Sum of Its Parts?*, 20 TEX. TECH. L. REV. 95, 126–29, 153–54 (1989) (warning that aggregated claims may require federal courts to “protect political coalitions” and be dragged into “the world of interest group politics,” but noting that in some narrow cases it may be necessary), and Aylon M. Schulte, Note, *Minority Aggregation Under Section 2 of the Voting Rights Act: Towards Just Representation in Ethnically Diverse Communities*, 1995 U. ILL. L. REV. 441, 467–74 (arguing that “aggregation . . . moves toward more equitable representation” and noting that although the text of Section 2 is silent on whether aggregation is allowed, the congressional purpose and history support using such claims). Kevin Sette concluded that the text and intent of Congress supports aggregated claims. Kevin Sette, Note, *Are Two Minorities Equal to One?: Minority Coalition Groups and Section 2 of the Voting Rights Act*, 88 FORD. L. REV. 2693, 2734 (2020) (arguing that the term “class of citizens” can support multiple minority groups).

30. This Note does not address, rehash, or engage in the early scholarly debate in depth. But for a brief overview of the scholarship, compare Michael Li & Yuri Rudensky, *Rethinking the Redistricting Toolbox*, 62 HOWARD L.J. 713, 724–26 (2019) (“[I]t is easy to see how, without additional developments in the field, the Court’s logic from *Bartlett* could be imported to thwart coalition voting rights efforts on communities of color.”), Audrey Yang, *Treading Carefully After Shelby County: Minority Coalitions Under Section 2 of the Voting Rights Act*, 2015 U. CHI. LEGAL F. 701, 702 (“While not the same as a minority coalition, the rejection of crossover districts indicate that the Court would maybe not support aggregation either.”), and Lauren R. Weinberg, Note, *Reading the Tea Leaves: The Supreme Court and the Future of Coalition Districts Under Section 2 of*

statements against increased racial considerations and the fact that individual minority groups in an aggregated claim might be insufficient under *Bartlett*, even though the Court explicitly reserved this question.³¹ This Note differentiates itself by, first, focusing primarily on *Bartlett*'s impact and, second, providing a still-novel statutory contribution through what this Note calls the singular–plural canon of statutory interpretation.³²

Part I describes the history and doctrine of the Fifteenth Amendment and the VRA as repeated congressional attempts to provide representation for marginalized groups. It details the history of the law, some relevant terminology for voting dilution claims, and the current governing legal standards. Part II addresses both aggregated and crossover claims in the context of Section 2. It discusses the rationales from the *Bartlett* plurality to demonstrate that

the Voting Rights Act, 91 WASH. U. L. REV. 411, 430 (2013) (“However, the Supreme Court’s previous treatment of this and similar issues suggests that it is unlikely that the Perry Court intended to resolve whether section 2 requires the creation of coalition districts in such a cryptic fashion.”), with Matthew Drecun, *Stemming the Tide: Texas’s Demographic Change, the Voting Rights Act, and the Emerging Importance of Bartlett v. Strickland*, 22 TEX. J. ON C.L. & C.R. 103, 134 (2016) (“Minority-coalition districts present different considerations than crossover districts, so the issue should not necessarily be settled by the logic of *Bartlett*.”), and Ryan P. Haygood, *The Dim Side Of The Bright Line: Minority Voting Opportunity After Bartlett v. Strickland*, HARV. C.R.-C.L. L. REV. (Feb. 25, 2010), at 14–15, <https://harvardcrcl.org/the-dim-side-of-the-bright-line-minority-voting-opportunity-after-bartlett-v-strickland-by-ryan-p-haygood> [<https://perma.cc/5HKU-C5Y7>] (arguing that aggregated claims should be allowed).

31. See *Bartlett*, 556 U.S. at 13–14 (plurality opinion) (“[C]oalition-district claims [are those] in which two minority groups form a coalition to elect the candidate of the coalition’s choice. We do not address that type of coalition district here.”).

32. Thus, instead of arguing that “class” of citizens can hold multiple groups, as circuit courts and other articles or notes have done, this Note argues that even if it could not support that interpretation, “class” implicitly contains the plural term “classes” because there is no text which overrides this statutory presumption. See 1 U.S.C. § 1 (2018) (noting that, “unless the context indicates otherwise,” that “words importing the singular include and apply to several persons, parties, or things [and] words importing the plural include the singular”). This Note employs the phrase “singular–plural canon of statutory construction,” to help simplify discussion because caselaw typically refers to this canon by the statutory text of 1 U.S.C. § 1, which is often unwieldy. See *United States v. Hayes*, 555 U.S. 415, 422 n.5 (2009) (quoting 1 U.S.C. § 1); *id.* at 432 (Roberts, C.J., dissenting) (same). Authors use various phrasings in the literature. See, e.g., Grace E. Hart, *State Legislative Drafting Manuals and Statutory Interpretation*, 126 YALE L.J. 438, 458 (2016) (calling this canon the “singular/plural rule”); BJ Ard, Comment, *Interpreting by the Book: Legislative Drafting Manuals and Statutory Interpretation*, 120 YALE L.J. 185 (2010) (referring to this rule as the “singular includes the plural” canon). Justice Antonin Scalia and his co-author Bryan Garner referred to this cannon as the “Gender/Number Canon” in their treatise on textual interpretation. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 129–31 (2012).

aggregated claims remain permissible. Indeed, *Bartlett* does not end the argument over aggregated claims, given the substantive differences between aggregated and crossover claims. Part III discusses the history of a circuit split surrounding the application of Section 2 to aggregated claims and advances a novel statutory argument. Specifically, the singular phrasing of Section 2—using “class” instead of “classes”—does not preclude aggregation because of the singular–plural canon of interpretation.³³

I. THE HISTORY AND DOCTRINE OF THE FIFTEENTH AMENDMENT AND THE VRA (1870–2009)

Reconstruction in America marked the end of the bloody Civil War and the start of a new era in American democracy, where the tenets of federalism and states’ rights were permanently altered. Notably, the Reconstruction Congress passed three amendments to the Constitution—the Thirteenth, Fourteenth, and Fifteenth Amendments.³⁴ The Fifteenth Amendment provides that “[t]he right . . . 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.”³⁵ It, like other Reconstruction Amendments, confers on Congress the power to “enforce this article by appropriate legislation.”³⁶ The Reconstruction period lasted from 1865 to 1877, where the Union occupied and oversaw the southern states under military rule.³⁷ Congress was controlled by Republicans who passed several pieces of legislation aimed at reversing the effects of slavery.³⁸ This effort included three constitutional amendments and several “Reconstruction” acts, such as the Enforcement Act of 1870³⁹ and the Ku Klux Klan Act of 1871, to prevent southern violence at the polls.⁴⁰

33. 1 U.S.C. § 1.

34. *The Reconstruction Amendments*, NAT’L CONST. CTR., <https://constitutioncenter.org/learn/educational-resources/historical-documents/the-reconstruction-amendments> [<https://perma.cc/K66E-CYH2>].

35. U.S. CONST. amend. XV, § 1.

36. *Id.* § 2.

37. Eric Foner, *Reconstruction*, BRITANNICA, <https://www.britannica.com/event/Reconstruction-United-States-history> [<https://perma.cc/6LZT-4P46>].

38. *Id.*

39. An Act To Enforce the Rights of Citizens of the United States To Vote in the Several States of this Union, 16 Stat. 140, 141 (1870).

40. Ku Klux Klan Act of 1871, 17 Stat. 13, 14 (codified at 42 U.S.C. §§ 1983, 1986 (2018)).

After the passage of the Fourteenth Amendment in 1866 (ratified by the States in 1868), which was widely understood at the time of ratification not to confer a right of suffrage on freed slaves,⁴¹ Republicans in Congress sought to enfranchise Black voters nationwide with various measures, including several Reconstruction acts directed at southern states.⁴² The Republicans in Congress, before the waning of their political power, passed the Fifteenth Amendment.⁴³ Though ratified in 1870, the Fifteenth Amendment served as an empty promise for decades.⁴⁴ The right to vote, while treasured, proved hard to exercise because of southern violence.⁴⁵ As a result, from 1870 to 1880, despite Black citizens constituting 10 to 11 percent of the nation, less than 0.5 percent of the members of the House of Representatives were Black.⁴⁶ After Reconstruction ended in 1877, underrepresentation became even worse in Congress.⁴⁷ Soon thereafter, the South employed various schemes to dismantle Black voting influence, such as poll taxes, literacy tests, and grandfather clauses.⁴⁸

41. Crum, *The Superfluous Fifteenth Amendment*, *supra* note 6, at 1551, 1585; see CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866) (statement of Rep. Bingham) (noting that the Fourteenth Amendment did not give power to regulate “suffrage in the several States”).

42. See *supra* note 6.

43. See Crum, *The Superfluous Fifteenth Amendment*, *supra* note 6, at 1551 (“Passed by the lame-duck Fortieth Congress in 1869 and ratified by the states in 1870, the Fifteenth Amendment was the final act in the trilogy of the Reconstruction Amendments.”).

44. 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 (2018).

45. See Crum, *Reconstructing Racially Polarized Voting*, *supra* note 6, at 304, 310 (stating that the Fifteenth Amendment proved “insufficient to protect the right of Black voters”).

46. IDA A. BRUDNICK & JENNIFER E. MANNING, CONG. RSCH. SERV., RL30378, AFRICAN AMERICAN MEMBERS OF THE UNITED STATES CONGRESS: 1870–2020, at 4–6 (2020), <https://crsreports.congress.gov/product/pdf/RL/RL30378> [<https://perma.cc/4AY6-7QM4>]; CENSUS BUREAU, U.S. DEP’T OF COM., UNITED STATES SUMMARY: 2010 POPULATION AND HOUSING UNIT COUNTS 4–5 tbl.3 (2012), <https://www2.census.gov/library/publications/decennial/2010/cph-2/cph-2-1.pdf> [<https://perma.cc/GNY5-9HU5>]; CENSUS BUREAU, U.S. DEP’T OF COM., 1880 CENSUS VOLUME 1: POPULATION, BY RACE, SEX, AND NATIVITY 3 tbl.1(a) (1883), https://www2.census.gov/library/publications/decennial/1880/vol-01-population/1880_v1-13.pdf [<https://perma.cc/6ZWS-M9L9>] (noting the overall population was 40,155,783 as compared to the Black population of 6,580,793 in 1880).

47. IDA A. BRUDNICK & JENNIFER E. MANNING, CONG. RSCH. SERV., RL30378, AFRICAN AMERICAN MEMBERS OF THE UNITED STATES CONGRESS: 1870–2018, at 5–6 (2018), <https://www.senate.gov/CRSpubs/617f17bb-61e9-40bb-b301-50f48fd239fc.pdf> [<https://perma.cc/JPJ7-H4YC>].

48. U.S. COMM’N ON C.R., REPORT OF THE U.S. COMMISSION ON CIVIL RIGHTS, 1959, at 30–34 (1959); see also *South Carolina v. Katzenbach*, 383 U.S. 301, 310–11 (1966) (describing various tactics used by southern states to deprive Black people of the vote); 1 MARSHA J. TYSON

Finally, the Supreme Court gutted civil rights laws and weakened the reach of the Fourteenth and Fifteenth Amendments. The Supreme Court did so by invalidating the Civil Rights Act of 1875,⁴⁹ limiting the Fourteenth Amendment to state action,⁵⁰ holding that the Privileges or Immunities Clause in the Fourteenth Amendment only protects legal rights under federal, but not state, citizenship,⁵¹ and then upholding segregation as constitutional.⁵² The Court also held that the Fifteenth Amendment, while preventing exclusion from voting on the basis of race, did not affirmatively grant a person the right to vote.⁵³ For example, a state could have literacy tests and poll taxes (as of the time the Reconstruction Amendments were passed) because these qualifications are at least facially unrelated to race, even if they denied the right to vote and disproportionately disenfranchised Black voters. And, tools like the poll tax persisted well into the twentieth century.⁵⁴ In fact, the “white primary”—where political parties adopted rules excluding Black voters from voting in primary elections—was ruled unconstitutional only as of 1944.⁵⁵

It was not until 1965 that conditions seriously began to change again. After signing the Civil Rights Act of 1964,⁵⁶ President Lyndon B. Johnson and the Democratic Party turned to voting rights, drafting legislation that relied on congressional authority from the Fifteenth Amendment.⁵⁷ The framers of the VRA aimed at eliminating the blight

DARLING, RACE, VOTING, REDISTRICTING AND THE CONSTITUTION xiv (2001) (same). Grandfather clauses were found unconstitutional in 1915, *Guinn v. United States*, 238 U.S. 347, 366–68 (1915), and poll taxes in federal elections were made illegal by the Twenty-Fourth Amendment, U.S. CONST. amend. XXIV, and the Supreme Court held poll taxes in state elections unconstitutional under the Fourteenth Amendment, *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966).

49. *The Civil Rights Cases*, 109 U.S. 3, 3 (1883).

50. *Id.* at 11.

51. *The Slaughter-House Cases*, 83 U.S. 36, 112–13 (1873).

52. *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

53. *United States v. Reese*, 92 U.S. 214, 217 (1875).

54. *See Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966) (holding poll taxes in state elections unconstitutional under the Fourteenth Amendment).

55. *See Smith v. Allwright*, 321 U.S. 649, 664 (1944) (holding that state primaries conducted by political parties, which are technically private organizations for many purposes, were state action for purposes of the Reconstruction Amendments).

56. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 241.

57. *See Voting Rights Act of 1965*, Pub. L. No. 89-110, 79 Stat. 437, 437 (noting that the VRA was enacted “[t]o enforce the fifteenth amendment to the Constitution of the United States, and for other purposes”).

of racism from the electoral process by outlawing various forms of voting denial, including poll taxes and literacy tests.⁵⁸ In the words of President Johnson, “Experience has clearly shown that the existing process of law cannot overcome systematic and ingenious discrimination. No law that we now have on the books . . . can ensure the right to vote when local officials are determined to deny it.”⁵⁹

In addition to dealing with plainly discriminatory policies, the VRA included two mechanisms to challenge dynamic discriminatory tactics. The first of these was Section 5,⁶⁰ which essentially froze election procedures for jurisdictions that met certain statutory criteria.⁶¹ These jurisdictions would have to get approval from the federal government to change their procedures.⁶² The second mechanism, Section 2, originally stated that states and subdivisions cannot use any voting practice or procedure that would deny the right to vote on account of race.⁶³ Over the VRA’s history, Congress has repeatedly enlarged the scope of Section 2. In 1965, Section 2 covered only racial minorities, as opposed to ethnic or language minorities.⁶⁴ In 1975, Congress amended Section 2 to protect “language minorities,” including Asians, Hispanics, Indigenous Peoples, and Alaskan

58. *Id.* §§ 4(a), (c), (e)(1), 10, at 438–39, 442; *see also* U.S. COMM’N ON C.R., U.S. COMMISSION ON CIVIL RIGHTS REPORT, BOOK 1: VOTING 343–51 (1961) (documenting voting statistics). For example, while 63.6 percent of White voters in Alabama in 1960 were registered, only 13.7 percent of Black voters in the state were. *Id.* at 343.

59. President Lyndon B. Johnson, *Special Message to the Congress: The American Promise* (Mar. 15, 1965) (transcript and video available at the LBJ Presidential Library online archive), <http://www.lbjlibrary.org/lyndon-baines-johnson/speeches-films/president-johnsons-special-message-to-the-congress-the-american-promise> [<https://perma.cc/FJ7S-Q6TX>] (“And should we defeat every enemy, should we double our wealth and conquer the stars, and still be unequal to this issue, then we will have failed as a people and as a nation.”).

60. 52 U.S.C. § 10304 (2018) (originally enacted as Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439).

61. Section 5 froze the election procedures unless a state sought an exemption and its companion, Section 4(b), applied a formula to determine which states were covered by Section 5. *Id.* §§ 4–5, at 438–39. Section 4(b)’s coverage formula was struck down by the Supreme Court. *Shelby Cnty. v. Holder*, 570 U.S. 529, 557 (2013).

62. Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437, 439.

63. *Id.* § 2, at 437 (“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.”).

64. *See id.* (preventing only discrimination that occurs “on account of race or color”).

Natives.⁶⁵ In 1982, Congress amended Section 2⁶⁶ in response to a Court decision that limited Section 2 to claims of discriminatory intent.⁶⁷

At first, plaintiffs tackled vote denial in the “first generation” of voting rights claims.⁶⁸ These claims covered blatant discrimination that denied or hindered ballot box access.⁶⁹ Examples include poll taxes, grandfather clauses, and literacy tests. But, as with many forms of discrimination in the modern world, discrimination in the electoral process did not disappear; it moved underground. This made intentional discrimination standards harder to prove.⁷⁰

Later, plaintiffs turned their attention away from outright vote denial—many forms of which were outlawed by the VRA—to vote dilution, the “second generation” of voting rights claims, brought under the VRA. Vote dilution means to weaken the power of someone’s vote and typically describes the use of election systems to limit the ability “to translate [a group’s] strength into voting power.”⁷¹ Vote dilution is actionable under amended Section 2 and the Constitution.⁷² Vote dilution claimants under Section 2 may challenge any election system that threatens that interest, whether from districting or election rules.⁷³ For instance, minority communities have successfully challenged district drawing, called “cracking” and

65. Voting Rights Act, Amendments of 1975, Pub. L. No. 94-73, § 207, 89 Stat. 400, 402 (codified as amended at 52 U.S.C. § 10310(c)(3)).

66. See Voting Rights Act, Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified as amended at 52 U.S.C. § 10301) (adopting a “results” test for Section 2, which looked to disparate effects rather than discriminatory intent).

67. Thornburg v. Gingles, 478 U.S. 30, 43–44 (1986); S. REP. NO. 97-417, at 2 (1982).

68. Adam B. Cox & Thomas J. Miles, *Judicial Ideology and the Transformation of Voting Rights Jurisprudence*, 75 U. CHI. L. REV. 1493, 1498 (2008).

69. *Id.*

70. See *Gingles*, 478 U.S. at 71–72 (noting that Congress wanted an effects-based, rather than intent-based, test for Section 2 to ease the burden for claimants).

71. *In re Senate Joint Resol. of Legis. Apportionment 1176*, 83 So. 3d 597, 622 (Fla. 2012); see also *Shaw v. Reno*, 509 U.S. 630, 641 (1993) (describing vote dilution).

72. Crum, *Reconstructing Racially Polarized Voting*, *supra* note 6, at 275–77. As Professor Travis Crum notes, the Court never decided whether vote dilution was actionable under the Fifteenth Amendment but did find it actionable under the Fourteenth Amendment. *Id.* The Court first held that dilution was unconstitutional in *White v. Regester*, 412 U.S. 755, 765–70 (1973). James U. Blacksher & Larry T. Menefee, *From Reynolds v. Sims to City of Mobile v. Bolden: Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 HASTINGS L.J. 1, 22 (1982) (noting that vote dilution claims were an implication of the one-person-one-vote principle in *Reynolds v. Sims*, 377 U.S. 533, 568 (1964)).

73. See *supra* note 20 (examples of challenges to election and districting systems under Section 2).

“packing” of election districts.⁷⁴ In cracking, voters are split up amongst multiple districts; in packing, they are concentrated in very few districts.⁷⁵ The goal of both is to weaken the overall voting power of those cracked or packed.⁷⁶

Redistricting suits are those that seek to draw a new district as a remedy for cracking, packing, or other discriminatory practices. These claims often involve three types of election systems: single-member districts, multimember districts, and at-large systems.⁷⁷ Voters in single-member districts elect one official for their jurisdiction, whereas those in multimember districts elect two or more officials for their district.⁷⁸ Voters in at-large elections choose representatives to serve the entire political unit, such as a state, instead of a specified subset, such as a district.⁷⁹ The entire constituency elects these officials.⁸⁰ The most prominent at-large elections are for U.S. senators and the president, but they are also often seen at the city council level. At-large elections typically correlate with decreased minority representation.⁸¹

74. See *infra* note 87 and accompanying text; see also Gill v. Whitford, 138 S. Ct. 1916, 1924 (2018) (describing cracking and packing).

75. *Whitford*, 138 S. Ct. at 1924.

76. See Crum, *Reconstructing Racially Polarized Voting*, *supra* note 6, at 269 (explaining how “politicians can predict that certain redistricting schemes—such as ‘packing’ or ‘cracking’ minority voters . . . will dilute minority voting strength”); see also N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204, 222 (4th Cir. 2016) (discussing the powerful incentive of district drawing to dilute the voting strength of cohesive minority groups).

77. See *infra* note 87 and accompanying text; see also Frank Adams, *Why Legislative Findings Can Pad-Lock Redistricting Plans in Racial-Gerrymandering Cases*, 39 J. MARSHALL L. REV. 1371, 1384 (2006) (discussing redistricting suits involving all three types of election systems).

78. 29 C.J.S. *Elections* § 82, Westlaw (database updated Nov. 2020). Multimember districts can create representation problems. Imagine three communities of roughly the same size that could each make their own single-member districts: A, B, and C. If all three are placed in a single district and given the ability to elect three representatives, and communities B and C vote together, B and C can elect all three representatives.

79. Tim A. Thomas, Annotation, “At-Large” Elections as Violation of § 2 of Voting Rights Act of 1965 (42 U.S.C.A. § 1973), 92 A.L.R. FED. 824, § 1(a) n.1 (1989).

80. See Laughlin McDonald, *The Quiet Revolution in Minority Voting Rights*, 42 VAND. L. REV. 1249, 1257 (1989) (calling at-large voting “[p]erhaps the preeminent form of vote dilution”). Additionally, all the seats in an election can be made at-large seats. See *id.* (“The majority, if it votes as a bloc, can choose all the officeholders, thereby denying a discrete minority an effective opportunity to elect any representatives of its choice.”). Alternatively, a jurisdiction can be separated geographically into single-district elections and then have one or two at-large seats covering the whole jurisdiction. See, e.g., Hart, et al., *supra* note 20 (discussing electoral systems of various Georgia counties).

81. See, e.g., David L. Leal, Valerie Martinez-Ebers & Kenneth J. Meier, *The Politics of Latino Education: The Biases of At-Large Elections*, 66 J. POL. 1224, 1241 (2004) (finding a correlation between at-large elections and Hispanic underrepresentation). As of 1965, 61 percent

In Georgia, thirty-four counties use at-large elections for all seats, while one hundred counties use at-large elections for at least one seat.⁸² In 2013, 60 percent of voters in those at-large contests were White, as were 92 percent of those elected.⁸³

Plaintiffs typically pursue claims for redistricting under Section 2, not the Fourteenth or Fifteenth Amendments. As noted earlier, constitutional gerrymandering claims require a showing of *intentional* discrimination.⁸⁴ Because districting lines are facially neutral, plaintiffs must show that “legitimate districting principles were ‘subordinated’ to race,” such that race was the predominant factor in legislative decisionmaking.⁸⁵ Only then will courts apply strict scrutiny.⁸⁶ By contrast, plaintiffs invoking Section 2 can challenge districting claims, such as cracking and packing, based on discriminatory effects, largely disassociated from evidence of discriminatory intent.⁸⁷

of cities with populations of over 5,000 used at-large elections for all of their representatives, INT’L CITY MANAGERS’ ASS’N, THE MUNICIPAL YEAR BOOK 118 (1965), and in 2013, that number was 60 percent, INT’L CITY/CNTY. MGMT. ASS’N, THE MUNICIPAL YEAR BOOK 28 (2013). And, in 1971, less than 1 percent of city council members were from minority groups (Black, Hispanic, Asian, or Native American), Chandler Davidson & George Korbel, *At-Large Elections and Minority-Group Representation: A Re-Examination of Historical and Contemporary Evidence*, 43 J. POL. 982, 982 (1981), whereas now roughly 10 percent are, INT’L CITY/CNTY. MGMT. ASS’N, 2018 MUNICIPAL FORM OF GOVERNMENT SURVEY: SUMMARY OF SURVEY RESULTS 14 (2019).

82. Hart, et al., *supra* note 20.

83. *Id.*

84. See *Gill v. Whitford*, 138 S. Ct. 1916, 1926–29 (2018) (discussing developing standards for constitutional challenges to politically gerrymandered districting lines); *City of Mobile v. Bolden*, 446 U.S. 55, 66–67 (1980) (“The Court explicitly indicated in *Washington v. Davis* that [the requirement of discriminatory intent] applies to claims of racial discrimination affecting voting just as it does to other claims of racial discrimination.”); Gilda R. Daniels, *Racial Redistricting in a Post-Racial World*, 32 CARDOZO L. REV. 947, 950–51, 951 n.21 (2011) (highlighting a legislature’s discriminatory intent as differentiating justiciable controversies from political questions). Racial gerrymandering claims can also be satisfied by “redistricting . . . so extremely irregular” that it must be race-based. *Shaw v. Reno*, 509 U.S. 630, 642, 646–47 (1993). In other words, intent is implied.

85. *Bush v. Vera*, 517 U.S. 952, 958–59 (1996) (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)).

86. *Id.*

87. See *League of United Latin Am. Citizens v. Perry (LULAC)*, 548 U.S. 399, 425–26 (2006) (discussing *Gingles* requirements, which do not include intent); *Thornburg v. Gingles*, 478 U.S. 30, 34 (1986) (noting that the immediate case involved multimember districts). Districting claims can include single-member districts (for cracking and packing claims), multimember districts, and at-large elections. The Court first applied Section 2 to cracking claims in *Grove v. Emison*, 507 U.S. 25, 40–41 (1993), and packing claims in *Voinovich v. Quilter*, 507 U.S. 146, 153–54 (1993) (discussing a claim that plaintiffs were “packed into two districts”). *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1022, 1044 (D. Md. 1994). The favored remedy for

In the early years after the VRA passed, the Court did not address whether vote dilution claims under Section 2 required proof of discriminatory intent or if disparate impact on representation would suffice.⁸⁸ During this same period, lower federal courts had developed standards using a totality-of-the-circumstances test that looked to disparate effects on minority representation for constitutional claims of vote dilution—which the Court blessed in 1973 in *White v. Regester*.⁸⁹ However, the Court limited Section 2 in 1980 when it decided *City of Mobile v. Bolden*,⁹⁰ a class action challenging the constitutionality of Mobile’s at-large election for city commissioners.⁹¹ The Court stated that Section 2 merely codified a cause of action coextensive with the Fifteenth Amendment.⁹² Because a Fifteenth Amendment claim requires intent to invalidate a facially neutral statute, so did a claim under the old Section 2.⁹³ As a result, the Court threw out the plaintiff’s statutory and constitutional claims.⁹⁴

However, in 1982, Congress amended Section 2 to clarify that it applied to the discriminatory effects of vote dilution.⁹⁵ Congress sought to undo the Court’s interpretation that stunted the sweep of Section 2

parties challenging districting systems through Section 2 is to create a single-member district where the minority group constitutes a majority. *Grove*, 507 U.S. at 40.

88. There was a broader legal debate emerging during the Civil Rights Era of whether the Reconstruction Amendments protected citizens against governmental actions with discriminatory effects in addition to those with discriminatory intent. See Cheryl I. Harris, *Limiting Equality: The Divergence and Convergence of Title VII and Equal Protection*, 2014 U. CHI. LEGAL F. 95, 101–04 (noting that prior to *Washington v. Davis*, 426 U.S. 229 (1976), lower courts routinely applied disparate impact analysis to equal protection clause claims). This culminated in the Court holding that discriminatory intent was required for equal protection clause cases. *Davis*, 426 U.S. at 244–45.

89. *White v. Regester*, 412 U.S. 755, 765–67 (1973) (affirming the district court’s invalidation of multimember voting districts based on discriminatory history and effects that the district court had identified and used); see, e.g., *Zimmer v. McKeithen*, 485 F.2d 1297, 1304–05 (5th Cir. 1973) (en banc) (applying the *White* test to a claim).

90. *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

91. *Id.* at 58 (plurality opinion).

92. *Id.* at 60–61. At this point, the Court settled on the discriminatory intent standard for the Reconstruction Amendments. *Id.* at 62; see also *Davis*, 426 U.S. at 244–45 (concluding that “discriminatory racial purpose” is necessary to support an equal protection claim).

93. *Bolden*, 446 U.S. at 60–62 (plurality opinion).

94. *Id.* at 61, 65.

95. S. REP. NO. 97-417, at 40 (1982). Compare Voting Rights Act of 1965, Pub L. No. 89-110, § 2, 79 Stat. 437, 437 (banning procedures used by “any State or political subdivision to deny or abridge the right . . . to vote on account of race or color”), with 52 U.S.C. § 10301(a) (2018) (banning procedures employed “in a manner which results in a denial or abridgement of the right . . . to vote on account of race or color” (emphasis added)).

because discriminatory effects perpetuate past discrimination, and election systems that “operate, designedly or otherwise, to minimize or cancel out the voting strength . . . of minority groups, are an impermissible denial of the right to have one’s vote fully count, just as much as outright denial of access to the ballot box.”⁹⁶ Congress also wanted to assist plaintiffs by avoiding the difficulties with proving intent.⁹⁷ As currently written, Section 2 declares that a violation occurs:

if, based on the *totality of circumstances*, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.⁹⁸

Although this statement on its face is quite simple, the text leaves little to guide judicial analysis. Because of the ambiguity of the phrase “totality of circumstances,” courts turned to the 1982 amendment Senate Report from the Senate Judiciary Committee for the factors in their totality of the circumstances analysis.⁹⁹ The Senate Report mentions nine nonexhaustive factors, drawn primarily from *White* and the pre-*Bolden* caselaw.¹⁰⁰ These factors include considerations of prior racial polarization in voting, “the extent of any history of official discrimination . . . that touched the right of the members of the minority group to register, to vote or to otherwise participate in the democratic process,” whether the political subdivision has used certain voting practices (antisingle shot provisions, large election districts, and so on) that tend to increase the likelihood for discrimination, and to what degree minority group members have been elected to public office.¹⁰¹

96. S. REP. NO. 97-417, at 28, 40–41.

97. *Id.* at 40.

98. 52 U.S.C. § 10301(b) (emphasis added).

99. *E.g.*, *Thornburg v. Gingles*, 478 U.S. 30, 35–38, 36 n.4 (1986).

100. S. REP. NO. 97-417, at 28–29 (“While these enumerated factors will often be the most relevant ones, in some cases other factors will be indicative of the alleged dilution.” (citation omitted)). The Court thought that this extratextual source was persuasive because these factors were drawn from caselaw, such as the totality-of-the-circumstances test created in *White v. Regester*, 412 U.S. 755 (1973), and refined by lower courts, which the Court stated that Congress wanted to reinstate. *See Gingles*, 478 U.S. at 36 n.4 (tracing the factors to *White* and subsequent development by lower courts).

101. S. REP. NO. 97-417, at 28–29 (citation omitted).

The Court addressed the amended Section 2 in 1986 in *Gingles*.¹⁰² After first observing that the 1982 amendment created a results-based test that effectively overruled *Bolden* via statute,¹⁰³ it then crafted preconditions that must be fulfilled before courts apply the totality-of-the-circumstances test (the nonexhaustive Senate factors referenced above).¹⁰⁴ First, claimants must show that their community is “sufficiently large and geographically compact to constitute a majority in a single-member district.”¹⁰⁵ Second, claimants must demonstrate that they are “politically cohesive,” in that they largely vote together.¹⁰⁶ Third, claimants must “demonstrate that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority’s preferred candidate.”¹⁰⁷ The point of the preconditions is to show that the election system actually dilutes a minority group’s voting power.¹⁰⁸ Thus, the vote dilution claims must meet two independent inquiries: (1) the three *Gingles* preconditions, and then (2) whether the totality-of-the-circumstances (including the nonexhaustive Senate Report factors) demonstrate that the group “ha[s] less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”¹⁰⁹ Applying this analysis, the *Gingles* Court upheld all but one of the lower court’s findings of vote dilution.¹¹⁰

As Professor Travis Crum puts it, “*Gingles* boils down to whether a minority group is residentially segregated and whether there is

102. *Gingles*, 478 U.S. at 30.

103. *Id.* at 35.

104. *Id.* at 48–50. The Senate Report noted three important limitations on Section 2. *Id.* at 46. First, no specific type of election system is a per se violation. S. REP. NO. 97-417, at 16. Second, a dilutive device in the mere presence of “the lack of proportional representation” is not a violation. *Id.* Finally, the results test does not create a presumption of racial blocs, and the burden of proof remains on the plaintiffs. *Id.* at 34.

105. *Gingles*, 478 U.S. at 50.

106. *Id.* at 51.

107. *Id.* (noting that this does not apply in unusual circumstances, such as when minority-favored candidates run unopposed).

108. *See id.* at 47–51 (“[U]nless there is a conjunction of the [preconditions], the use of multimember districts generally will not impede the ability . . . to elect representatives . . .”).

109. *Bartlett v. Strickland*, 556 U.S. 1, 11–12 (2009) (plurality opinion). This order of operations for *Gingles* claims was made clear in *Johnson v. De Grandy*, 512 U.S. 997 (1994), where it noted that *Gingles* factors were necessary but not sufficient to state a Section 2 claim. *Id.* at 1011.

110. *Gingles*, 478 U.S. at 80.

racially polarized voting.”¹¹¹ In other words, the first precondition deals with segregation issues, while the second and third preconditions deal with polarized voting. These new inquiries left several ambiguities to be resolved later.¹¹² Importantly for this Note, the Court then took aim at resolving what degree of segregation and polarized voting were necessary for a successful Section 2 claim.¹¹³

II. A DISTINCTION WITH A DIFFERENCE: THE LIMITATIONS OF *BARTLETT V. STRICKLAND*

With a cause of action and a new test under Section 2, plaintiffs started to challenge the disparate impact of election policies again, this time with more innovative claims than the traditional, single-minority group claims. This Part first describes and outlines the features of two of these tools—crossover claims and aggregated claims—and how they work. Then, it outlines the background and rationales underlying the *Bartlett* decision, the case that held that crossover claims were not viable. Finally, it applies the four primary rationales to aggregated claims and finds that the *Bartlett* decision does not make those claims non-viable.

A. Overview of Aggregated and Crossover Claims

Although *Gingles* addressed claims brought by single-minority groups and accomplished a great deal of change, a further avenue for representation under Section 2 is the aggregated claim.¹¹⁴ As one

111. Crum, *Reconstructing Racially Polarized Voting*, *supra* note 6, at 279. The Court split between Justice William Brennan’s plurality opinion and Justice Sandra Day O’Connor’s concurrence on whether causation was relevant to this latter issue of racially polarized voting, also known as racial bloc voting. Under Justice Brennan’s view, the reason *why* a minority community or majority bloc vote the way they do is irrelevant to Section 2. *Gingles*, 478 U.S. at 63–64. Justice O’Connor believed causation did matter for liability. *Id.* at 100 (O’Connor, J., concurring in the judgment). Justice Byron White’s concurrence cast confusion over which view prevailed, viewing the candidate’s race as relevant. *Id.* at 83 (White, J., concurring).

112. Soon after *Gingles*, which involved a multimember district claim, the Court extended Section 2 to cover single-member district claims, such as those alleging cracking and packing. *Grove v. Emison*, 507 U.S. 25, 40–41 (1993); *see supra* note 87; *see also* *Abbott v. Perez*, 138 S. Ct. 2305, 2330–31 (2018) (applying the *Gingles* test to a challenge to single-member districts drawn by the Texas Legislature).

113. Crum, *Reconstructing Racially Polarized Voting*, *supra* note 6, at 280–81.

114. *See* Chelsea J. Hopkins, *The Minority Coalition’s Burden of Proof Under Section 2 of the Voting Rights Act*, 52 SANTA CLARA L. REV. 623, 651–53 (2012) (describing ways that Section 2 claims can be structured to ensure minority representation through aggregation).

scholar put it, “Much of the growth in [the number of Black elected officials] during the 1990s can be attributed to the [VRA].”¹¹⁵ However, the VRA did not cure the lack of representation in government, though it certainly helped. As a result, aggregated claims may be able to provide some relief in an increasingly diverse world, where structural factors and systemic racism will continue to affect both single and multiple-minority group communities.

Aggregated and crossover claims both involve voter coalitions, but of different groups. An aggregated claim describes two or more *minority* groups that form a politically cohesive community that can meet the *Gingles* preconditions and the totality-of-the-circumstances test.¹¹⁶ The community must be cohesive and vote similarly—with a majority group voting as a bloc against it—to be viable. *Bartlett* added the requirement that the claimants will have to constitute a majority (50 percent or more) in a new single-member district.¹¹⁷ Thus, an aggregated claim could be brought by a group that, if successful, would make a new district that is 44 percent Hispanic and 21 percent Black.¹¹⁸ Alternatively, a group of Black, Hispanic, and Asian voters could collectively constitute roughly 70 percent of a new district.¹¹⁹ By contrast, crossover claims by their nature fail *Bartlett*’s new requirement. In crossover claims, a minority community constitutes less than a majority within a redrawn district, but with majority “crossover” voters—those who vote for minority-preferred candidates—the minority community can effectively elect their preferred candidate. An example of a crossover claim might consist of a Black community, which could form 40 percent of a new district if drawn.¹²⁰ That community would then need to demonstrate a reliable crossover voting effect from majority group members (such as 15 to 20

115. DAVID A. BOSITIS, JOINT CTR. FOR POL. & ECON. STUDIES, BLACK ELECTED OFFICIALS: A STATISTICAL SUMMARY 12 (2001).

116. Rick G. Strange, *Application of Voting Rights Act to Communities Containing Two or More Minority Groups—When Is the Whole Greater than the Sum of the Parts?*, 20 TEX. TECH L. REV. 95, 111 (1989).

117. *Bartlett v. Strickland*, 556 U.S. 1, 26 (2009) (plurality opinion).

118. This example is from part of the remedy offered in *Campos v. City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988).

119. See *DeBaca v. County of San Diego*, 794 F. Supp. 990, 997 (S.D. Cal. 1992) (providing an example of a proposed district “in which African-Americans, Hispanics, and Asian Americans account[ed] for 73.84% of the total population”).

120. See *Bartlett*, 556 U.S. at 46–47 (Breyer, J., dissenting) (discussing the math related to crossover claims).

percent) in the new district that enabled it to elect its preferred candidate.¹²¹

Prior to *Bartlett*, crossover claims did not fare well. Virtually every federal circuit court to encounter crossover claims viewed them as nonactionable under Section 2.¹²² By contrast, federal courts treated aggregated claims, still somewhat controversial, much more favorably.¹²³ However, as this Note details in Part III, there is a continuing circuit split over the viability of these claims.¹²⁴

B. *Bartlett: The End of Crossover Claims*

Because of the similarity of aggregated and crossover claims, the *Bartlett* Court's prohibition of the latter introduces complications for the former. The *Bartlett* Court's treatment of crossover claims, however, illuminates the differences between the two types of claims. This Section elaborates on those differences and highlights why aggregated claims are not precluded under Section 2.

The controversy in *Bartlett* started with census redistricting in the state of North Carolina. In 2006, a three-judge panel in Wake County upheld the state's redistricting plan passed by the North Carolina General Assembly in 2003 against a challenge alleging that the plan violated the North Carolina Constitution's Whole County Provision ("WCP").¹²⁵ The WCP requires the legislature to draw state senate and house districts without dividing counties, unless in conflict with federal law.¹²⁶ Based on census data, each North Carolina House district would have contained 67,078 North Carolinians.¹²⁷

121. *See id.* As noted in *League of United Latin American Citizens v. Perry (LULAC)*, 548 U.S. 399, 445 (2006), Section 2 does not require the creation of "influence" districts, where minority groups cannot elect their preferred candidate but can influence the outcome of an election.

122. *See Pender Cnty. v. Bartlett*, 649 S.E.2d 364, 372 (N.C. 2007) (summarizing circuit court decisions).

123. *See infra* Part III.

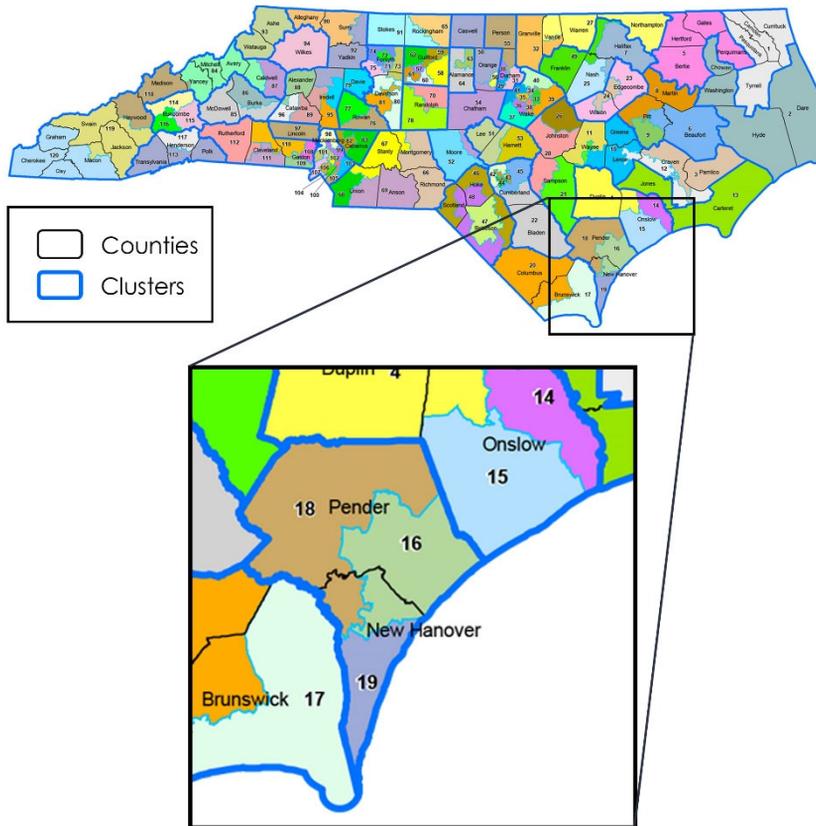
124. *See infra* Part III.

125. *Pender Cnty.*, 649 S.E.2d at 366, 368.

126. *Id.* at 367; N.C. CONST. art. II, §§ 3(3), 5(3).

127. *Pender Cnty.*, 649 S.E.2d at 366.

FIGURE 1. THE HOUSE REDISTRICTING PLAN FOR 2003, WITH A VIEW OF THE PENDER-NEW HANOVER SPLIT¹²⁸



Aside from its obligation to redistrict under the census,¹²⁹ the legislature was also concerned with Section 2, which it believed required the creation of crossover districts.¹³⁰ Thus, the legislature created District 18 as a crossover district with a voting-age population

128. HOUSE REDISTRICTING PLAN, N.C. GENERAL ASSEMBLY (2003), https://www.ncleg.gov/Files/GIS/Plans_Main/House_2003/mapSimple.pdf [<https://perma.cc/8G57-EHSN>] (map coloration, text color, and district line thickness altered to enhance viewability).

129. See *supra* note 23 and accompanying text.

130. *Pender Cnty.*, 649 S.E.2d at 374; see *Stephenson v. Bartlett (Stephenson I)*, 562 S.E.2d 377, 396–97 (N.C. 2002) (holding that the state legislature must draw districts in compliance with the VRA and not wait for litigation).

that was 39.36 percent Black.¹³¹ To create a district with this minority population, the legislature created three districts by splitting Pender County, with a population of 41,082, and combining it with its neighbor to the south, New Hanover County, with a population of 160,307.¹³² The North Carolina Supreme Court reversed the Wake County court, stating that federal law did not require crossover districts in the first instance because Section 2 did not allow crossover claims in after-districting litigation.¹³³ It relied on the fact that most federal circuit courts had rejected crossover claims because the minority did not constitute a majority in a redrawn district.¹³⁴ Accordingly, the districting plan violated the North Carolina Constitution because it lacked federal justification for deviating from the WCP.¹³⁵

The United States Supreme Court granted certiorari,¹³⁶ and Justice Anthony Kennedy wrote for the plurality, which held that Section 2 does not authorize crossover claims.¹³⁷ In rejecting crossover claims, the plurality clarified that the first *Gingles* precondition, originally phrased as requiring a “sufficiently large and contiguous” minority population “to constitute effective voting majorities in single-member districts,” requires a community that will constitute a majority.¹³⁸ In so holding, the plurality provided four rationales.¹³⁹ First, crossover districts are inconsistent with the *Gingles* preconditions because the first precondition requires that the minority population constitute a majority within a new single-member district, and because the White voting bloc—an integral part of dilution—is breaking

131. *Pender Cnty.*, 649 S.E.2d at 366–67. Courts generally use voting-age population (“VAP”), instead of general population. *Id.* at 370. Data showed a Black general population of 41.54 percent, or VAP of 38.37 percent, was needed for a crossover district, and District 18 was 42.89 percent Black with a 39.36 percent Black VAP. *Id.* at 367.

132. *Id.* at 366.

133. *Id.*

134. *Id.* at 372–74.

135. *Id.* at 375.

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

137. *Id.* at 14. Justices Clarence Thomas and Antonin Scalia argued that Section 2 does not authorize any vote dilution claim, *id.* at 26 (Thomas, J., concurring in the judgment), while four dissenting Justices believed that crossover claims were viable under Section 2, *id.* at 26–27 (Souter, J., dissenting); *id.* at 44 (Ginsburg, J., dissenting); *id.* (Breyer, J., dissenting); *see also* Weinberg, *supra* note 30, at 427 n.123 (summarizing the arguments put forward by the *Bartlett* dissenters and other commentators in favor of recognizing crossover or aggregated claims under Section 2).

138. *Bartlett*, 556 U.S. at 15–20 (plurality opinion).

139. *See id.* at 14–23 (providing various arguments against crossover claims).

down.¹⁴⁰ Although what “sufficiently large” meant under the first precondition had been somewhat unclear before, the plurality set a hard-and-fast rule that the minority community must make up at least 50 percent in a new district.¹⁴¹ And the *Gingles* line of cases always framed the Section 2 inquiry as whether minority groups possess “the *potential* to elect representatives in the absence of the challenged structure.”¹⁴² In the plurality’s view, the minority’s choice is distinct from the choice of the coalition of minority and crossover voters.¹⁴³ Thus, “the *potential* to elect representatives” means the ability of the community to constitute a majority within a new single-member district.¹⁴⁴

Second, crossover claims were “contrary to the mandate of [Section] 2,” which only guarantees an “equal” opportunity to elect one’s representatives of choice and requires groups to pull political weight.¹⁴⁵ The claimants were “no better or worse” in terms of their “opportunity to elect a candidate than . . . any other group of voters.”¹⁴⁶ Only if minorities could constitute a majority within their own single-member district but were unable to elect a candidate would they have less opportunity.¹⁴⁷ Minorities must do what all other voters do—argue, debate, and convince others to vote for their candidates.¹⁴⁸ In other words, Section 2 does not guarantee *heightened* political strength by guaranteeing new districts based on purely political coalitions.¹⁴⁹

Third, increased racial considerations associated with crossover claims might run afoul of the Equal Protection Clause.¹⁵⁰ Constitutional avoidance required an interpretation of Section 2 that avoids racial considerations, which are to be used only as a last resort.¹⁵¹

140. *Id.* at 15–16, 19–20.

141. *Id.* at 16–19.

142. *Id.* at 15 (quoting *Thornburg v. Gingles*, 478 U.S. 30, 50 n.17 (1986)).

143. *Id.*

144. *Id.* (quoting *Gingles*, 478 U.S. at 50 n.17).

145. *Id.* at 14–15, 20.

146. *Id.* at 14.

147. *Id.* at 15.

148. *Id.*

149. *See id.* at 14–15 (“Nothing in § 2 grants special protection to a minority group’s right to form political coalitions.”).

150. *Id.* at 21.

151. *Id.* (“To the extent there is any doubt whether § 2 calls for the majority-minority rule, we resolve that doubt by avoiding serious constitutional concerns under the Equal Protection Clause.”).

Mandating crossover districts would “*unnecessarily* infuse race into *virtually every* redistricting.”¹⁵² Thus, the plurality wanted to avoid the intensity and frequency of the racial considerations that crossover claims would introduce into the courts.¹⁵³ But this does not preclude *any* accounting of race, which is tantamount to holding Section 2 unconstitutional. And the plurality stated that “racial discrimination and racially polarized voting are not ancient history,” as work on issues of race “remains to be done.”¹⁵⁴ This means that while racial considerations are not per se illicit in legislation, an interpretation that introduces too much racialization into the districting processes and subsequent litigation is probably off the table. Crossover districts crossed that line.

Finally, while Section 2 ensures equal opportunity, crossover districts instead emphasize racial distinctions instead of progressing toward the “waning of racism.”¹⁵⁵ Thus, permitting crossover claims means that Section 2 would require the cementing of certain developments of racial or ethnic solidarity, instead of the natural evolution of unity. Although the VRA was meant to encourage unity and solidarity, the plurality said the VRA was not meant to require this behavior “by force of law.”¹⁵⁶

C. *Why Bartlett Is Not the End of Aggregated Claims*

Because of the Court’s analysis, however, and the relation between crossover claims and aggregated claims, many scholars thought that *Bartlett* foreclosed the latter claims completely.¹⁵⁷ But not only are crossover claims distinguishable from aggregated claims for a

152. *Id.* (emphasis added) (quoting *League of United Latin Am. Citizens v. Perry (LULAC)*, 548 U.S. 399, 446 (2006) (opinion of Kennedy, J.)).

153. *See id.* at 22 (“Disregarding the majority-minority rule and relying on a combination of race and party . . . would involve the law and courts in a perilous enterprise.”).

154. *Id.* at 25.

155. *Id.* (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994)).

156. *Id.* at 25–26.

157. *See supra* note 30 and accompanying text. Further, in 2012, the Court handed down *Perry v. Perez*, 565 U.S. 388 (2012), which contained the language, “If the District Court did set out to create a minority coalition district . . . it had no basis for doing so,” and cited to *Bartlett* with a “cf.” signal. *Id.* at 399. This alone does not evince an opinion as to the efficacy of aggregated claims, as it does not address the issue fully, and the dissenters in *Bartlett* signed onto the per curiam opinion. *See Weinberg, supra* note 30, at 430 (noting that “it is unlikely that the Perry Court intended to resolve whether Section 2 requires the creation of coalition districts in such a cryptic fashion”).

number of reasons, this Section argues that aggregated claims are largely consistent with the four primary rationales enumerated in *Bartlett* and that aggregated claims are still permitted under Section 2.

1. *Crossover Claims and Inconsistencies with Gingles*. In *Bartlett*, the plurality focused on how the first and third *Gingles* preconditions are at odds with crossover claims. Crossover districts by their very nature represent the result that the VRA was meant to foster—people work together despite their differences and minority groups have a “potential to elect” their desired representatives.¹⁵⁸ By contrast, aggregated claims address the same worries regarding discrimination that motivated the passage of Section 2, but they involve more than one minority group. Aggregated claims also lack the bloc-breaking by the majority that is present in crossover claims. Although aggregated claims embody the falling of some barriers (between minority groups), the relevant barrier for the purpose of Section 2 is between the majority bloc and the minority communities.¹⁵⁹

Importantly, crossover districts fail the first *Gingles* precondition—meaning that the minority community does not constitute a majority within a single-member district if it must rely on crossover voters to elect its representatives.¹⁶⁰ This is because, to the *Bartlett* plurality, the minority’s choice of representative is distinct from the choice of the coalition of the minority and crossover voters.¹⁶¹ The crossover coalition then has the strength to elect representatives of the *coalition’s choice*, but the more entangled the minority group becomes with the majority, the less power the minority community has in its own right.¹⁶² By contrast, aggregated claimants can meet the majority requirement because the relevant community is composed of two or more *minority* groups, which assert that their preferences are being defeated by a majority voting bloc as the result of a discriminatory election system. Although both claims feature a type of

158. *See Bartlett*, 556 U.S. at 14–16 (plurality opinion) (noting, for crossover claims, that majority voting blocs are breaking down and that there is evidence of increasing racial unity).

159. *See id.* at 16 (emphasizing that allowing crossover claims under Section 2 “would create serious tension with the third *Gingles* requirement that the majority votes as a bloc”).

160. If it could, the minority community would simply bring the claim on its own.

161. *Bartlett*, 556 U.S. at 15 (plurality opinion) (“There is a difference between a racial minority group’s ‘own choice’ and the choice made by a coalition.”).

162. *See id.* at 16 (noting that, as crossover effects increase, the strength of majority bloc voting wanes, and as a result of crossover voting the direct power of the minority group unconnected from the coalitional power with crossover voters also will lessen).

“coalition,” the third *Gingles* precondition highlights why these groups are different.

Crossover claims also conflict with the third *Gingles* precondition because the White voting bloc, an integral part of the dilution of minority voting power, is breaking down.¹⁶³ This factor is extremely important, because crossover voting most directly affects the racially polarized voting inquiry of *Gingles* (which is composed of the first two preconditions). The Court brought this tension up despite the fact that the parties *stipulated that the third precondition had been met*—showing just how important this was to the plurality.¹⁶⁴ And, aggregated groups are the most clearly distinguishable on these grounds. Crossover voting by its nature represents a type of bloc breaking.¹⁶⁵ The type of voting patterns alleged in viable aggregated claims do not show these types of bloc-breaking patterns. Indeed, aggregated communities, like single-minority group communities, face similar opposition from a strong majority voting bloc. And, aggregated communities *can* show that their voting power is diluted, just like single-minority group communities can. This “serious tension” with the third *Gingles* precondition is what makes crossover claims, in the eyes of the *Bartlett* plurality, “political coalitions,” and this same logic means that aggregated claims are something else.¹⁶⁶

Further, aggregated claims align with the purposes of *Gingles* gatekeeping function—that the preconditions screen out claims that are not based in discrimination (or at least highly unlikely to be the result of discrimination). The *Bartlett* Court’s reasoning that crossover voters represent a “breaking down” of racial or ethnic barriers tracks with Justice John Paul Stevens’s views on affirmative action and inferring discrimination.¹⁶⁷ Justice Stevens had a view of equal protection that lies in the vein of the antistatutory principle.¹⁶⁸

163. *Id.*

164. *Id.*; Crum, *Reconstructing Racially Polarized Voting*, *supra* note 6, at 281.

165. *See Bartlett*, 556 U.S. at 16 (plurality opinion) (stating that “by definition,” crossover voting means that “white voters join in sufficient numbers with minority voters to elect the minority’s preferred candidate”).

166. *Id.* at 15–16.

167. *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 247 (1995) (Stevens, J., dissenting) (“[A] decision by representatives of the majority to discriminate against the members of a minority race is fundamentally different from those same representatives’ decision to impose incidental costs on the majority . . . to provide a benefit to a disadvantaged minority.”).

168. *See id.* at 247–48 & n.5 (“[A] decision by representatives of the majority to discriminate against the members of a minority race is fundamentally different from those same

Because it is rare, if at all, that a majority would harm its own race intentionally, Justice Stevens believed that legislation that benefited minority groups at the expense of the majority is likely not racial discrimination, or at the very least only benign discrimination.¹⁶⁹ Why after all, would politicians attempt to subjugate a majority of their constituents?¹⁷⁰ If this is true, the majority bloc's actions—if also taken against crossover voters of the same race and ethnicity—are less likely to be discriminatory. More likely, these voters legitimately disagree with the coalition's candidate.¹⁷¹ By contrast, in aggregated claims, the voters *are* racially or ethnically polarized, which supports the inference that this polarization reflects voting against minority interests.¹⁷² After all, Section 2 is a tool to measure oppression by a majority.¹⁷³ And this emphasis on voting polarization makes sense because two of the three preconditions explicitly focus on polarization.¹⁷⁴ These preconditions keep out claims that courts can assume will not (or should not) succeed in fulfilling the purposes of Section 2. But, because aggregated groups meet both the letter and logic of *Gingles*, courts should not bar aggregated claims.

representatives' decision to impose incidental costs on the majority of their constituents in order to provide a benefit to a disadvantaged minority.”)

169. *Id.*; see also *Bartlett*, 556 U.S. at 16 (plurality opinion) (implying that there may be less racially polarized voting because many crossover voters, who are defecting from the majority voting bloc, are voting for minority voter interests).

170. Justice Stevens' view on antisubordination can be seen particularly clearly in his sparring with Justice Thomas in *Adarand*,

I would not find Justice THOMAS' extreme proposition—that there is a moral and constitutional equivalence between an attempt to subjugate and an attempt to redress the effects of a caste system—at all persuasive. It is one thing to question the wisdom of affirmative-action programs It is another thing altogether to equate the many well-meaning and intelligent lawmakers and their constituents—whether members of majority or minority races—who have supported affirmative action over the years, to segregationists and bigots.

Adarand, 515 U.S. at 247 n.5 (Stevens, J., dissenting) (citations omitted).

171. The underlying reasons for polarized voting are irrelevant. See *Thornburg v. Gingles*, 478 U.S. 30, 67, 70–71 (1986) (rejecting the requirement “that the discriminatory intent of individual white voters must be proved in order to make out a § 2 claim”).

172. See *Adarand*, 515 U.S. at 247–48 (Stevens, J., dissenting) (“[A] decision by representatives of the majority to discriminate against the members of a minority race is fundamentally different from those same representatives' decision to impose incidental costs on the majority of their constituents in order to provide a benefit to a disadvantaged minority.”).

173. See *Gingles*, 478 U.S. at 43–44 (noting that in order to determine a violation of § 2 “a court must assess the impact of the contested structure or practice on minority electoral opportunities”).

174. The second *Gingles* precondition considers the cohesiveness of the minority community, and the third precondition reviews the presence of a strong majority voting bloc. *Id.* at 51.

Moreover, the requirement that minorities make up a majority within a redrawn district is partially the result of administrability and judicial resource concerns.¹⁷⁵ Crossover claims do not implicate this interest because they suggest the existence of racial or ethnic unity that Section 2 was designed to foster, without the assistance of the courts.¹⁷⁶ Thus, it is more efficient to let those claims go and focus scarce judicial resources on those that more strongly implicate the antidiscrimination purpose of Section 2. In *Bartlett*, District 18's Black voting-age population would have fallen from 39.36 percent to 35.33 percent had Pender County stayed whole.¹⁷⁷ This minimal change, paired with significant crossover voting, likely did not justify an application of Section 2, though the Court did not explicitly state this. Additionally, this bright-line rule makes judicial administration easier by avoiding the measurement of an unknown variable of crossover voting.¹⁷⁸ The same is not true in aggregated claims. Aggregated claims can meet the *Gingles* preconditions and maintain the Court's bright-line rules.¹⁷⁹ For example, an aggregated claim could be composed of a group of 60 percent Black voters and 40 percent Hispanic voters, who make up over 50 percent of the voting population in a newly drawn single-member district, suffer from a history of majority bloc voting, and vote cohesively together, thus satisfying the *Gingles* preconditions. And aggregated claims represent voting polarization and discrimination similar to single-minority group claims and are therefore worthy of the same protection.

2. *The New Section 2 Mandate: Limits on Political, not Permissible, Coalitions.* In addition to concerns about the *Gingles* framework, the *Bartlett* Court also moved to limit the "mandate" of Section 2.¹⁸⁰ The Court originally interpreted the mandate as broad, flexibly prohibiting

175. *Bartlett v. Strickland*, 556 U.S. 1, 17 (2009) (plurality opinion) ("We find support for the majority-minority requirement in the need for workable standards and sound judicial and legislative administration The same cannot be said of a less exacting standard that would mandate crossover districts under § 2.").

176. *Id.* at 25.

177. *Id.* at 8.

178. *Id.* at 17.

179. *Id.* at 14; Ho, *supra* note 29, at 432.

180. See Drecun, *supra* note 30, at 125–26 ("That Justice Kennedy perceived [the state officials'] decision to pursue [the retention of the minority group's voting strength] as contrary to the law's mandate is a measure of how the Supreme Court's interpretation of the VRA has changed across time.").

all election systems that “operate to minimize or cancel out the voting strength of [minorities in] the voting population.”¹⁸¹ The Court attacked vote dilution that was effectuated through discriminatory districting schemes by first prohibiting multimember districts, then expanding it to single-member districts, and extending Section 2’s coverage to judicial elections.¹⁸² Lower courts have also expansively read the VRA to target voter identification laws, restrictive registration processes, and inequitable access to polling places.¹⁸³ By contrast, the *Bartlett* plurality stated that preserving minority gains in districting ran contrary to the mandate of Section 2, because the VRA was not meant to hand out political *advantages*.¹⁸⁴ It is a protection from “political famine,” not a guarantee of “a political feast.”¹⁸⁵ Applying this logic, crossover claims fare no better or worse than other political groups trying to elect their candidate by forming coalitions.¹⁸⁶ Thus, the Court saw Section 2 as creating a distinction between political coalitions and permissible coalitions. However, both the limiting principle of *Bartlett* and the nature of crossover claims counsel against labeling aggregated claims as merely political coalitions.

Although the plurality did not want lower courts to entangle themselves in politics, the Court did not preclude single-minority group claims, meaning these groups do not impermissibly introduce political

181. *Thornburg v. Gingles*, 478 U.S. 30, 47–48 (1986) (alteration in original) (quoting *Burns v. Richardson*, 384 U.S. 73, 88 (1966)). In *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), the Court focused heavily on Congress’s purpose to tackle “insidious and pervasive evil,” filled with “obstructionist tactics” that had reared their head in “unremitting and ingenious defiance.” *Id.* at 309, 328; Drecun, *supra* note 30, at 125.

182. *Grove v. Emison*, 507 U.S. 25, 40–42 (1993) (applying Section 2 to single-member district “cracking” claims); *Voinovich v. Quilter*, 507 U.S. 146, 153–54 (1993) (single-member district “packing” claims); *Chisom v. Roemer*, 501 U.S. 380, 404 (1991) (judicial elections). As the Fourth Circuit noted, expansions outside of vote dilution have been rare, primarily due to Section 4(b) and 5’s preclearance scheme that was struck down in *Shelby County v. Holder*, 570 U.S. 529 (2013). See *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 239 (4th Cir. 2014) (“[T]he predominance of vote dilution in Section 2 jurisprudence likely stems from the effectiveness of the now-defunct Section 5 preclearance requirements that stopped would-be vote denial from occurring in covered jurisdictions like large parts of North Carolina.”).

183. *League of Women Voters of N.C.*, 769 F.3d at 239, 244–45 (giving examples of where Section 2 had been used to target vote denial, and then applying Section 2 to a law eliminating same-day voter registration and out-of-precinct voting).

184. See *Bartlett*, 556 U.S. at 14–15, 20, 25–26 (plurality opinion) (noting that Section 2 was not meant to require “by force of law” the racial and ethnic unity that it was meant to inspire).

185. *Id.* at 16.

186. *Id.* at 14.

considerations into lower courts' analysis.¹⁸⁷ This is the limiting principle of *Bartlett*. And even for single-minority group claims, some political tie and analysis are necessary to show a lack of opportunity for representation. Indeed, the second *Gingles* precondition is that the relevant community is politically cohesive *enough*. Thus, mere consideration of politics should not automatically bar aggregated claims. And from the standpoint of political entanglement of different coalitions, it seems difficult to distinguish a coalition from a single-minority group and a coalition formed from members of two or more minority groups.

Additionally, aggregated claims are also distinct in appearance from crossover claims. First, crossover voting resembles general, nonracialized political activity: groups bonding over a political goal.¹⁸⁸ Again, (usually White) crossover voters are not part of the claim and do not purport to be direct victims of discrimination on the basis of minority status.¹⁸⁹ By contrast, aggregated claimants can and do allege such discrimination. And while aggregated claims result from a merging of groups, these are two *minority* groups—the type of groups that Section 2 protects from unlawful barriers in voting. At its core, the aggregated community's tie is one of common discrimination, not common politics.

More importantly, perhaps, crossover claims have no limiting principle. What percentage of a single-member district should be able to sustain a crossover claim? In *Bartlett*, minorities constituted roughly 36 percent of the redrawn district. What about 25 percent? 10 percent? Even Justice David Souter in his dissent said that as time goes on, the size of the minority in the new single-member district will decrease because crossover voters will increase as voting blocs break down.¹⁹⁰ Eventually, these voting patterns start to look like political actors working together. However, once crossover claims are barred—where

187. *See id.* at 17 (noting that crossover claims require courts to engage in political inquiries ill-suited for the judiciary).

188. *See id.* at 14–15 (“Recognizing a [Section] 2 claim in this circumstance would grant minority voters ‘a right to preserve their strength for the purposes of forging an advantageous political alliance.’”).

189. Although it is true that crossover voters are indirectly affected by discriminatory behavior, this incidental discrimination that they suffer is exactly the kind of injury the *Bartlett* Court wanted to prevent redress for. *See id.* at 15–16 (noting that the crossover voters suffer from political injury, as opposed to one that is cognizable under Section 2).

190. *Id.* at 33 (Souter, J., dissenting).

the likely uniting factor is political—application of the *Gingles* preconditions and totality-of-the-circumstances test ensures that Section 2 vindicates claims that combat discriminatory effects, not claims that represent political association.

Finally, the suggestive language about opportunities of minority voters in *Bartlett* is misleading. Indeed, aggregated communities could represent the result of an “opportunity to join other voters—including *other racial minorities*, or whites, or both—to reach a majority.”¹⁹¹ But the Court’s point is that in crossover claims, minority groups can join with other groups to elect their representatives without Section 2.¹⁹² At any rate, this concern mirrors the Court’s concerns about the breaking down of bloc voting.¹⁹³ By contrast, when an aggregated community meets the *Gingles* preconditions, including a showing of minority cohesion and electoral losses because of a majority voting bloc, barriers in the electoral process prevent its members from joining with others to achieve electoral success.¹⁹⁴ The mere ability to join in coalitions with others is not enough, and it was never enough under Section 2. Because aggregated claims embody protection against “political famine,” while not representing the “political feast” of crossover claims, the political considerations argument applies with less force.¹⁹⁵

3. *Crossover Coalitions Create Unnecessary Infusions of Race.* The political considerations in *Bartlett* were arguably overshadowed by the concerns over racial considerations being injected into the judicial process.¹⁹⁶ Mere considerations of race, however, cannot explain the

191. *Id.* at 14 (plurality opinion) (emphasis added); see Weinberg, *supra* note 30, at 426 (noting how minorities joining together would form “political coalitions” in the *Bartlett* Court’s view).

192. See *Bartlett*, 556 U.S. at 14 (plurality opinion) (emphasizing that Black voters “standing alone have no better or worse opportunity to elect a candidate than does any other group of voters”).

193. See *id.* at 16 (noting the tension with the focus of *Gingles* on racial bloc voting where White crossover voters are the reason why minority voters could win). See *supra* Part II.B.i for a response.

194. See Drecun, *supra* note 30, at 131 (arguing that electoral barriers for minority voters are linked to their minority status).

195. See *Bartlett*, 556 U.S. at 16–17 (plurality opinion) (noting that crossover claims represent a political feast because they allow heightened protection for political coalitions).

196. Though not every Section 2 case involves questions exclusively about race, such as where ethnic minorities are involved, the Court generally treats ethnic discrimination the same as racial discrimination for equal protection purposes. See, e.g., *Wygant v. Jackson Bd. of Educ.*, 476 U.S.

result in *Bartlett* because this would mean the end of all Section 2 claims. Even single-minority group claims can account for racial percentages, racial divisions in voting, and histories of racial discrimination.¹⁹⁷ However, the frequency and intensity of racial considerations were concerns made apparent from the statement that crossover claims would “*unnecessarily* infuse race into *virtually every* redistricting.”¹⁹⁸ The term “unnecessarily” implies an intensity problem. And the phrase “virtually every” poses a frequency problem. But neither dooms aggregated claims.

As for frequency, crossover districts are ostensibly more likely to occur than aggregated districts. This is because crossover claims allow a minority group to constitute less than a majority within a redrawn district and still succeed on a Section 2 claim. In a White-majority nation, there are always enough White voters to find. Even in diverse states, one can find White and minority populations sufficient to plausibly form crossover claims more often than one can find two different minority populations able to support aggregated claims. For instance, in North Carolina, the number of potential crossover districts—with White voters and either Hispanic or Black voters—that can be drawn within each county based on census data is higher than the potential number of aggregated districts with Black–Hispanic aggregated communities.¹⁹⁹ Though this example has limited

267, 273 (1986) (“Decisions by faculties and administrators of public schools based on race or ethnic origin are reviewable under the Fourteenth Amendment.”).

197. *Thornburg v. Gingles*, 478 U.S. 30, 36–37, 51 (1986). For a discussion of the historical evidence regarding the original understanding of race and the Fifteenth Amendment, see Crum, *Reconstructing Racially Polarized Voting*, *supra* note 6, at 305–11. Needless to say, new swaths of empowered Black voters during Reconstruction garnered the political victories necessary to pass the Fifteenth Amendment, and much of this history seems at odds with some of the modern views on colorblindness as a constitutional requirement. But, given the trend of the Court’s jurisprudence, scholars need to grapple with the fact that colorblindness, even if historically flawed, is not going anywhere. Thus, any theory of aggregated claims will have to fit within *Bartlett*’s framework for the VRA and Fourteenth and Fifteenth Amendments.

198. *Bartlett*, 556 U.S. at 21 (emphasis added) (plurality opinion).

199. See generally NORTH CAROLINA 2010 SUMMARY, *supra* note 19 (summarizing 2010 census data for North Carolina counties by race). This illustration of hypothetical claims in North Carolina relied on the census data for populations of North Carolina counties. Using this, this Note determined, within each county, how many North Carolina General Assembly House crossover or aggregated districts could *theoretically* be created from population sizes as of 2010, assuming that each House district has a population of roughly 75,000. Assuming crossover voting is effective with a minority population of 35 percent of a new district, each crossover district would need to have 26,250 minorities (either Black or Hispanic voters). Aggregated districts would require a minority community (Black and Hispanic voters) with at least 37,500 individuals, or 50

explanatory power, it supports the intuition that crossover claims are more likely to occur than aggregated claims.²⁰⁰

Second, the assumption that because multiple races are involved, aggregated claims feature a heightened intensity of racial considerations is dubious for several reasons. First, aggregation results in less hairsplitting over race than crossover claims.²⁰¹ Crossover claims involve the precise measure of a constantly fluctuating variable of crossover voting, which requires courts to engage in a panoply of race-based assumptions.²⁰² This added question—how many crossover voters there are—is the key distinction.²⁰³ The questions that aggregated claims raise are not as problematic: Are the claimants minorities, and do the claimant communities meet the Section 2 requirements? For aggregated claims, there is no endless list of factors that makes a person a certain race or language minority, even if cohesiveness and geographic compactness of the relevant community may change the outcome of litigation.

Further, disallowing aggregation creates more racial considerations.²⁰⁴ If required to gatekeep all aggregated claims, courts will account more for race²⁰⁵—not less—out of the need to classify claimants based on their races or ethnicities to determine their eligibility for a remedy.²⁰⁶ This contradicts the Court's understanding

percent of the new district. As a result, potential crossover districts are more possible, with fifty-four potential crossovers districts as opposed to forty potential aggregated districts. Still, this illustration is limited and does not inquire into whether these groups are of voting age or meet the *Gingles* preconditions. And it forecloses cross-county districts, though the intracounty analysis makes some sense because of the WCP.

200. The fact that fewer circuits have addressed aggregated claims than crossover claims also provides support for this claim. See *Bartlett*, 556 U.S. at 19 (plurality opinion) (noting that the Fourth, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits declined to allow crossover claims); *infra* notes 236–36 and accompanying text (noting that only the Fourth, Fifth, Sixth, and Eleventh Circuits have squarely addressed aggregated claims).

201. Ho, *supra* note 29, at 432–33.

202. See *Bartlett*, 556 U.S. at 17, 22–23 (plurality opinion) (emphasizing that crossover claims require courts to both ask questions “that even experienced polling analysts and political experts” cannot answer, and make race-based assumptions about voting patterns).

203. See *id.* at 17, 21–22 (describing the question of crossover voting as a “racial measure” that should be avoided).

204. See *Nixon v. Kent Cnty.*, 76 F.3d 1381, 1399 (6th Cir. 1996) (en banc) (Keith, J., dissenting) (“The majority, today, segregates the Black and Hispanic beneficiaries of Voting Rights Act protection *solely* on the basis of race.”).

205. See *id.*

206. *Id.*; see also Ben Boris, Note, *The VRA at a Crossroads: The Ability of Section 2 To Address Discriminatory Districting on the Eve of the 2020 Census*, 95 NOTRE DAME L. REV. 2093,

of the Reconstruction Amendments as barring all but necessary considerations of race.²⁰⁷ Moreover, this belies the *Bartlett* plurality's understanding of "unnecessary" racial considerations. The existence of crossover voting means that a significant portion of majority voters are comfortable with increasing diversity and, therefore, that Section 2 is unneeded. By contrast, an aggregated community's voting power in a successful claim is diluted due to minority status by a majority voting bloc.

Further, in support of their view that aggregated claims are unwise, scholars like Professor Abigail Thernstrom believe that aggregation and all majority-minority redistricting treat minorities as fungible—that these voters all have the same views, interests, and are simply interchangeable (and that minority candidates are unable to compete in today's modern pluralistic elective world).²⁰⁸ Such treatment also ostensibly violates the Court's command not to assume that all minorities think alike.²⁰⁹ However, contrary to Thernstrom's view, aggregation showcases a better understanding of racial complexities. Thernstrom's conclusion results in treating people *only as their race*. In other words, courts denying aggregation essentially say that a minority's views inhere with their race or ethnicity and that these views are fundamentally divergent.²¹⁰ This is also a race-based

2111 (2020) ("Under the logic of the *Nixon* majority, a plaintiff class would have to be racially 'pure.' This would prove increasingly unworkable in light of the demographic changes mentioned above.").

207. See *Miller v. Johnson*, 515 U.S. 900, 922 (1995) (noting that laws classifying citizens on the basis of race are presumptively unconstitutional).

208. Abigail Thernstrom, *Redistricting in Today's Shifting Racial Landscape*, 23 STAN. L. & POL'Y REV. 373, 383, 400–02 (2012) ("[I]n much civil rights literature, it was assumed that members of minority groups were fungible—that all non-White Americans had the same interests."); see also Geraci, *supra* note 29, at 407 (stating that multiracial coalitions risk "treating [minority group members] as fungible commodities"). But see Hopkins, *supra* note 114, at 645 (noting that cohesion testing can alleviate some issues of treating minorities as fungible). Still, most circuits hold that a minority-preferred candidate need not be of the minority community's race or ethnicity. See ELLEN KATZ, VOTING RTS. INITIATIVE, DOCUMENTING DISCRIMINATION IN VOTING: JUDICIAL FINDINGS UNDER SECTION 2 OF THE VOTING RIGHTS ACT SINCE 1982 at 64 n.139, 65 n.141 (2005) (collecting caselaw). Thus, the issue is not so much an assumption of whether minority candidates can compete in a White-majority district contest (in a nation fast-moving demographically anyway), but whether minority communities can effectively achieve representation and policy goals, in a nation with a representative democracy where voting power is supposed to be relatively equal.

209. *Miller*, 515 U.S. at 911–12.

210. Drecun, *supra* note 30, at 137.

assumption of the type that the *Bartlett* plurality wanted to minimize.²¹¹ However, this is not to say that aggregation has no risks. It does. But that is precisely why the preconditions and a totality-of-the-circumstances test exist—to see where discrimination, not merely political coalition building, is taking place. That, after all, is the heart of *Bartlett*. Forbidding aggregation, in some part, denies that minorities can think outside the bounds of their race, ethnicity, or culture.²¹²

Likewise, Thernstrom's view assumes that minorities are discrete, incapable of allying with other minority groups and sharing a common or parallel history of discrimination.²¹³ However, as one author notes, congressional intent inherently aggregates certain groups together—most clearly seen in the case of language minorities under Section 2.²¹⁴ And to think that Chinese, Japanese, Thai, Filipino and Asian Indian Americans can be aggregated as language minorities implicitly assumes enough potential similarity—likely in the form of common discrimination—to aggregate.²¹⁵ Why not all groups, then, who are often “othered” and treated as the same, or discriminated against collectively by White majorities? And this argument undercuts the assertion that aggregation impermissibly treats minority groups as interchangeable. Arguably, if large portions (though obviously not all) minorities share common views *because of* a history of similar discrimination, it is hard to see how aggregation makes them fungible. Their views are not performative or linked to their race for race's sake, but the product of a long and storied history of oppression. Aggregation thus promotes views and the representation of those disadvantaged groups.

211. See *Miller*, 515 U.S. at 911–12 (noting the offensive assumption, in race-based districting, that minorities “think alike, share the same political interests, and will prefer the same candidates at the polls”).

212. See Boris, *supra* note 206, at 2110–11 (“Under the logic of the *Nixon* majority, a plaintiff class would have to be racially ‘pure.’”); Drecun, *supra* note 30, at 137 (“To bar [aggregated] claims categorically . . . would hold that racial identification signifies immutable differences between minority groups.”).

213. Common histories of discrimination may not be necessary—indeed it may be enough to show that they are discriminated against together, even if in different ways. Drecun, *supra* note 30, at 136; Schulte, *supra* note 29, at 472–75. In either scenario, discrimination operates invidiously against both groups concurrently, even if in invariable and indiscriminate ways, precisely the type of evasive and indeterminate inequity the VRA is aimed to stop.

214. Sette, *supra* note 29, at 2728.

215. See 52 U.S.C. § 10503(e) (2018) (defining “language minority group” as “persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage”).

On balance, treating minorities as demarcated boxes is worse than allowing a small amount of fungibility in aggregation.²¹⁶ Section 2 already allows some fungibility within the single-minority group claims because minority voters who vote the same way are interchangeable in the analysis.²¹⁷ If one takes the view that fungibility is a deadly problem, then one might have to undo Section 2 altogether. Further, *Gingles* assists with the fungibility point—because voters must be cohesive and face a majority voting bloc. And the totality-of-the-circumstances test relies heavily on evidence of implicit or explicit discrimination. These will likely help courts root out invidious discrimination, even if it faces two or more groups. And doctrinally, while *Gingles*' political cohesion requirement makes voters within each minority group fungible if they vote cohesively, it does not tell courts to separate these groups arbitrarily—that is, to forbid aggregation.²¹⁸

Moreover, America's increasingly pluralistic nature shows that disallowing aggregation would undermine the use of Section 2 as an important tool to eradicate voting discrimination because “racial discrimination and racially polarized voting are not ancient history.”²¹⁹ Racism in election systems will be able to not just survive but thrive as diversity increases, because the eroding majority can dilute minority voting power as long as it happens against multiple minority groups.²²⁰ The growing diversity of our nation will thus make it easier to hide discriminatory districting, if aggregated claims are not permitted. And the opposition to aggregation has no answer for how to address biraciality and biethnicity.²²¹ Are these people classified as the group they primarily identify with, or are they given no remedy at all? Courts addressing one or more communities with biracial or biethnic members face the task of either considering difficult racial and ethnic complexities or unconstitutionally denying rights based on race or ethnicity. Disallowing this is another form of essentialism—the assumption that all members in a group will act or think in a given way.

216. Ho, *supra* note 29, at 432–33.

217. See *id.* at 433 (“But such concerns . . . are also present in § 2 claims brought on behalf of voters from a single minority group.”).

218. *Nixon v. Kent Cnty.*, 76 F.3d 1381, 1399 (6th Cir. 1996) (en banc) (Keith, J., dissenting).

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

220. Moreover, aggregation embodies a more realistic view of race. Communities will often be discriminated against as a whole rather than simply their Black, Asian, or Hispanic portions.

221. See Boris, *supra* note 206, at 2110–11 (illustrating the problems with classifying voters of mixed-race or mixed-ethnicity backgrounds).

As one student scholar notes, trying to determine racial “purity” sets courts down a dark path.²²² Although the crossover claims in *Bartlett* implicated an offensive assumption about minority group members, prohibiting aggregation implies two offensive assumptions: that minority group members all think alike within their groups, and that minority groups are perfectly separable.²²³

Admittedly, significant racial and political considerations can be problematic, but some must be allowed because single-minority group claims involve both.²²⁴ Crossover claims necessarily entail more considerations of race and politics than single-minority group claims.²²⁵ However, aggregated claims do not necessarily require courts to become as deeply entangled in racial and political considerations as crossover claims require. At some level, the allowable amount of race and politics is a judgment call. Aggregated claims may involve more political considerations than single-minority group claims but have similarly significant racial considerations.²²⁶ More importantly, aggregated claims do not implicate many of the racial and political problems that plague crossover claims, because aggregated claimants do not look outside of the community claiming discrimination for the success of their claim. Thus, aggregated claims are not foreclosed by this argument in *Bartlett*.

4. *The Capture of Natural or Organic Racial Progress.* Finally, the *Bartlett* plurality stressed how Section 2 ensures equal opportunity to elect one’s representatives, but crossover districts suggest that this opportunity already exists.²²⁷ While the Court admired the legislature’s creation of crossover districts that capitalized on racial unity, the plurality stated that Section 2 is not meant to preserve every instance

222. *Id.* at 2111.

223. *See supra* notes 211–11 and accompanying text.

224. *See Bartlett*, 556 U.S. at 22 (plurality opinion) (“Disregarding the majority-minority rule and relying on a combination of race and party to presume an effective majority would involve . . . a perilous enterprise.”).

225. *See id.* at 14–15, 21 (noting the racial and political considerations associated with crossover claims).

226. For example, the court could simply look to the presence of a minority group, without engaging in hairsplitting over its composition, and proceed with standard *Gingles* analysis.

227. *See Bartlett*, 556 U.S. at 14 (plurality opinion) (“But because they form only 39 percent of the voting-age population in District 18, African-Americans standing alone have no better or worse opportunity to elect a candidate than does any other group of voters with the same relative voting strength.”).

of majority–minority unity where it exists.²²⁸ In other words, some developments of unity and progress in the community are organic or natural, and the VRA is not meant to capture these. Instead, the VRA is supposed to be used where growth and unity are absent.

This argument by the *Bartlett* Court provides a sharp distinction between aggregated and crossover claims. First, aggregated claims do not represent growth toward unity the way that crossover claims do. They do not feature White voters crossing racial lines in a way that would make the claims nonactionable under Section 2, as the *Bartlett* Court sees it.²²⁹ Instead, aggregated claims reflect harsh racial divisions in voting between minority groups and the majority. Assuming *Gingles* is met, this means that the majority and minority groups vote as blocs— with the majority nearly always winning out. In crossover claims, the precise opposite is happening—the majority bloc is breaking down. If more majority voters join them, the minority groups can win.²³⁰ Second, under the plurality’s view, Section 2’s enforcement rules can be analogized to the rules that a referee would employ. Generally, courts let the political process continue unless someone commits a foul.²³¹ Crossover districts embody the game being played fairly, but dilution of a minority group’s voting power by a strong majority bloc is a foul. Aggregated claims again look more like single-minority group claims than crossover claims. In both single-minority group and aggregated claims, bloc voting is preventing minority preferences from being elected, and the groups are strongly segregated. By contrast, the *Bartlett* Court’s 50 percent threshold rule implies that in crossover claims, segregation is likely “waning.”²³² Third, unlike crossover claims, aggregated claims represent the entrenchment of racially based voting and districting, not their diminishing.²³³ As Professor Sheryll Cashin predicts, racism will likely get worse as America becomes increasingly pluralistic, and only once society moves past the majority–minority

228. *See id.* at 15 (“Section 2 does not impose on those who draw election districts a duty to give minority voters the most potential, or the best potential, to elect a candidate by attracting crossover voters.”).

229. *Id.* at 14.

230. *See id.* at 24 (noting the tension with the third *Gingles* precondition).

231. This is in line with the *United States v. Carolene Products Co.* view of the Constitution, where courts use more exacting scrutiny when the political processes are turned against “discrete and insular minorities.” *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

232. *See Bartlett*, 556 U.S. at 16–17 (plurality opinion) (noting the tension with the first *Gingles* precondition).

233. *See id.* at 25 (characterizing crossover voting as the “waning” of racial voting).

threshold will the nation be able to begin to heal.²³⁴ Thus, aggregated claims are properly viewed as distinguishable from crossover claims.

III. AGGREGATED CLAIMS UNDER THE TEXT OF SECTION 2

Though distinguishable, the mere fact that aggregated claims may not be foreclosed by prior rationales leaves quite a bit to be desired. This Part sates that desire. To do so, it advances a novel statutory argument, built on the text of Section 2, that aggregated claims are permissible. It first details the arguments featured in the relevant circuit splits, focusing on the Sixth Circuit's analysis of the issue. Then, this Part asserts that the singular-plural canon of interpretation can help legal readers parse the text in a meaningful way—and one which confirms that aggregated claims are indeed permissible.

A. *A Circuit Split Emerges: Aggregated Claims in the Lower Courts*

The question of whether Section 2 allowed aggregated claims resulted in a circuit split starting in the mid-1990s.²³⁵ This split resulted from a sharp textual debate interpreting the phrase “a class of citizens” in Section 2. Earlier courts used the remedial nature of the VRA, without much textual analysis, to allow such claims.²³⁶ In contrast, later

234. SHERYLL CASHIN, *LOVING: INTERRACIAL INTIMACY IN AMERICA AND THE THREAT TO WHITE SUPREMACY* 173–75 (2017); *see also* SHERYLL CASHIN, *INTEGRATION AS A MEANS OF RESTORING DEMOCRACY AND OPPORTUNITY* 75 (2017), https://www.jchs.harvard.edu/sites/default/files/A_Shared_Future_Chapter_2_Integration_Restoring_Democracy.pdf [<https://perma.cc/E6L9-783Y>] (noting that not only will White “cultural dexterity” be necessary, but that mobilization and coalition building to encourage public policies of inclusion and integration will also be necessary).

235. *See infra* notes 236–36.

236. The Fifth Circuit and Eleventh Circuit explicitly allowed such claims. *See* *Concerned Citizens of Hardee Cnty. v. Hardee Cnty. Bd. of Comm’rs*, 906 F.2d 524, 526 (11th Cir. 1990) (allowing such claims); *Campos v. City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988) (same). The Second and Ninth Circuits implicitly allowed aggregated claims to proceed. *See* *Bridgeport Coal. For Fair Representation v. City of Bridgeport*, 26 F.3d 271, 274–77 (2d Cir.), *vacated and remanded on other grounds*, 512 U.S. 1283 (1994) (applying *Gingles* preconditions to a claim without directly deciding the propriety of aggregated claims); *Badillo v. City of Stockton*, 956 F.2d 884, 886 (9th Cir. 1992) (same); *see also* *Pope v. County of Albany*, 687 F.3d 565, 572 n.5 (2d Cir. 2012) (dismissing on other grounds, likely meaning *Bridgeport Coalition* is still good law).

The First and Seventh Circuits avoided the question. *See* *Frank v. Forest Cnty.*, 336 F.3d 570, 575 (7th Cir. 2003) (calling aggregation “problematic”); *Latino Pol. Action Comm., Inc. v. City of Boston*, 784 F.2d 409, 414 (1st Cir. 1986) (dismissing the plaintiffs’ claim because they failed to establish racial polarization). This allowed district courts in those circuits to address the question, and the District of Massachusetts held that aggregated claims could survive summary judgment. *Huot v. City of Lowell*, 280 F. Supp. 3d 228, 235–37 (D. Mass. 2017); *see also* *Baldus v. Members of Wis. Gov’t Accountability Bd.*, 849 F. Supp. 2d 840, 857 (E.D. Wis. 2012) (addressing

courts saw Section 2's text as sufficiently plain to prohibit aggregated claims—or implied as much, though some dissents argued that the combination of textual ambiguity and the VRA's open-ended and broad remedial nature should control interpretation.²³⁷

The first circuit to consider aggregation—the Fifth Circuit in *Campos v. City of Baytown*²³⁸—exemplified the early remedial approach. The Fifth Circuit held that nothing in Section 2 prevented aggregation, and that aggregation was supported by the congressional attempts to remedy discrimination facing both groups that was “pervasive and national in scope.”²³⁹ Further, the VRA protects both language and racial minorities, and thus these voters could be considered collectively if they “cross the *Gingles* threshold as potentially disadvantaged voters” and “actually vote together.”²⁴⁰ In the claim, the Black and Hispanic populations in Baytown, Texas challenged the at-large election system for the city's six council members.²⁴¹ The district court found that the aggregated community was geographically compact enough to constitute a majority within a redrawn district, the community was politically cohesive, and the majority voting bloc consistently voted against minority candidates.²⁴² The district court then determined that the totality of the

a potential aggregated claim and noting that evidence of a successful minority coalition would support finding “no Section 2 violation”). The *Huot* court held that the First Circuit's pre-*Gingles* case denied an aggregated claim because of a lack of cohesion, and thus was not controlling as to whether aggregation was permissible. *Huot*, 280 F. Supp. 3d at 236.

237. The Sixth Circuit explicitly prohibits such claims. *Nixon v. Kent Cnty.*, 76 F.3d 1381, 1392 (6th Cir. 1996) (en banc). The Fourth Circuit called aggregated claims into serious question. *See Hall v. Virginia*, 385 F.3d 421, 430–31 (4th Cir. 2004) (disallowing crossover claim by stating that minorities should not be able to numerically join with “other members of the electorate” under Section 2).

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

239. *Id.* at 1244.

240. *Id.*

241. *Id.* at 1241–42. Together, those communities constituted 25.4 percent of the city. *Id.* at 1241.

242. *Id.* at 1242; *see also id.* at 1248–49 (describing the elections that demonstrated a White voting bloc). Political cohesion was demonstrated at the district court level through regression analysis of statistically significant data drawn from five elections and presented at trial, which showed that voting was racially polarized. *See id.* at 1245–47 (rejecting the use of Precinct 248 and finding that “Blacks and Hispanics as one minority were politically cohesive” based on statistical evidence). For instance, candidate Mario Delgado received 83 percent of the minority votes, while receiving 37 percent of the White vote, and candidate Tony Campos received 63 percent of the minority vote, while receiving 29 percent of the White vote. *Id.* at 1249. Both lost their races for City Council Position 1, Delgado in 1986 and Campos in 1984. *Id.*

circumstances established a valid claim of vote dilution, based on racially polarized voting, “lingering socio-economic effects of past official discrimination,” and that no minority group member had been elected to city council.²⁴³ The Fifth Circuit affirmed a violation but vacated and remanded the judgment.²⁴⁴

Soon thereafter, the debate shifted to a largely textual battle: whether the broad remedial purpose of the VRA or a rigid plain meaning should control its interpretation.²⁴⁵ This move to the latter interpretation is best demonstrated by *Nixon v. Kent County*,²⁴⁶ which disallowed aggregated claims under Section 2 based on its plain meaning.²⁴⁷ First, the Sixth Circuit sitting en banc stated that Section 2 never expressly or implicitly mentions coalitions.²⁴⁸ Second, Section 2 uses many singular terms. For example, Section 2 protects an “individual’s” right to be free from discrimination,²⁴⁹ and the standard of proof refers to “a class of citizens.”²⁵⁰ Ostensibly, the court reasoned, if Section 2 allowed aggregation, it would say “classes of citizens” and refer to “*their* members,” not “*its* members.”²⁵¹ Further, the committee reports from the 1975 and 1982 amendments never address aggregation.²⁵² Finally, protected minorities, like all other groups, “join forces . . . to further their mutual political goals,” implying that these

243. *Id.* at 1249. The court ordered redistricting based on the City’s proposed plan, which created five single-member districts, one having a 65.9 percent minority population (44.6 percent Hispanic, 21.3 percent Black), and three council members elected at large. *Id.* at 1244.

244. *Id.* at 1250. The Fifth Circuit rejected the defendant’s argument that both groups must be cohesive individually *and* cohesive as one community. It required only the latter. *Id.* at 1245.

245. *E.g.*, *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831, 894–98 (5th Cir. 1993) (en banc) (Jones, J., concurring).

246. *Nixon v. Kent Cnty.*, 76 F.3d 1381 (6th Cir. 1996) (en banc).

247. *Id.* at 1386.

248. *Id.*

249. *Id.* (emphasis omitted); *see also* 52 U.S.C. § 10301(a) (2018) (protecting “the right of any citizen of the United States to vote on account of race or color”).

250. *Nixon*, 76 F.3d at 1386 (quoting 52 U.S.C. § 10301(b)); *see* § 10301(b) (declaring the statute has been violated when “political processes . . . are not equally open to participation by members of a *class of citizens* . . . in that *its members* have less opportunity than other members of the electorate to participate in the political process” (emphasis added)).

251. *Nixon*, 76 F.3d at 1386 (emphasis omitted). As noted, this Note argues that this text is implicitly there under the singular–plural canon of interpretation, codified at 1 U.S.C. § 1. *See* 1 U.S.C. § 1 (2018) (explaining, absent “context indicat[ing] otherwise,” statutory interpretation requires that “words importing the singular include and apply to several persons, parties, or things [and] words importing the plural include the singular”); *infra* Part III.B.

252. *Nixon*, 76 F.3d at 1387.

aggregated claims were nothing more than political maneuvering, which is not protected by Section 2.²⁵³

In his dissent, Judge Damon Keith wrote that Section 2 should be interpreted as a whole.²⁵⁴ First, the phrase “a class of citizens” is ambiguous because Section 2 protects multiple minorities, and it is not clear that a “class” must consist of only one group.²⁵⁵ Facially, differences in the class’s composition are irrelevant to Section 2. Claimants must simply meet the totality-of-the-circumstances test.²⁵⁶ And interpreting “class” as a limitation on claimants’ rights is inconsistent with the broadening purpose of the 1982 amendment.²⁵⁷

Further, Judge Keith relied extensively on *Chisom v. Roemer*,²⁵⁸ where the Supreme Court held that the VRA should be given “the broadest possible scope.”²⁵⁹ In *Chisom*, the Court defined “representative” in Section 2 to include elected state judges, thus bringing state judicial elections within its ambit.²⁶⁰ The Court did so in part, because no one disputed “that [Section 2] applied to judicial elections prior to the 1982 amendment,”²⁶¹ and if the 1982 amendment expanded liability, the *Chisom* Court reasoned that contracting Section 2’s effect, so that it did not reach judicial elections, would be anomalous without an explicit indication from Congress.²⁶² Using this presumption of the broadest scope possible, Judge Keith relied on two types of evidence of textual meaning to find that aggregated claims were allowed. First, the term “language minorities” was added in 1975 before the allegedly limiting language of a “class” was added in 1982.²⁶³

253. *Id.* at 1391–92.

254. *Id.* at 1393 (Keith, J., dissenting).

255. *Id.* at 1394, 1398.

256. *Id.* at 1398–99. Judge Keith also argued that this reading was compelled by the fact that the attorney general had supported such claims, such as by filing an amicus brief in a failed appeal to the Supreme Court in the *Campos* litigation. *Id.* at 1397. Quite uniquely, the Court has often given the views of the attorney general on the VRA considerable deference and weight. *See Presley v. Etowah Cnty. Comm’n*, 502 U.S. 491, 508–09 (1992) (comparing this deference to *Chevron* deference).

257. *Nixon*, 76 F.3d at 1399 (Keith, J., dissenting).

258. *Chisom v. Roemer*, 501 U.S. 380 (1991).

259. *Id.* at 403 (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 567 (1969)); *Nixon*, 76 F.3d at 1398 (Keith, J., dissenting).

260. *Chisom*, 501 U.S. at 399.

261. *Id.* at 390.

262. *Id.* at 402.

263. *Nixon*, 76 F.3d at 1394, 1398 (Keith, J., dissenting).

Judge Keith concluded that the addition of “language minorities” gave these minorities full voting rights protection in 1975, which included the possibility of aggregated claims brought by racial and ethnic minorities.²⁶⁴ Thus, similar to *Chisom*, where no language or legislative history had shown an intent to contract the prior protection of the VRA over judicial elections, the same was true of protections to racial and language minorities.²⁶⁵ This view, that the term “language minorities” condoned aggregation, was partially driven by the second type of evidence. On that front, Judge Keith claimed that Congress was aware of aggregated (or, in Judge Keith’s words, joint or coalition) claims when it amended the VRA in 1975 and 1982.²⁶⁶ Thus, without further indication, Congress would not limit aggregation through the addition of “class” in 1982 in an amendment that broadened the scope of the VRA.²⁶⁷

Finally, Judge Keith argued that the majority’s result created the same evils that the VRA was meant to end.²⁶⁸ The majority’s logic presupposed racial and ethnic homogeneity and “assume[d] automatic homogeneity of interest within and automatic divergence of interests between racial groups.”²⁶⁹ By doing so, the majority simply writes off the possibility of shared political goals because of a common history of

264. *Id.* at 1398.

265. *See id.* at 1399 (“Just as *Chisom v. Roemer* and *Mallory* refused to limit ‘representatives’ to legislators, we should refuse to limit ‘protected class’ to a single ethnic group protected under Section 2.”).

266. Namely, Judge Keith cited *Wright v. Rockefeller*, 376 U.S. 52 (1964), where Black and Puerto Rican voters in New York brought a joint claim. *Nixon*, 76 F.2d at 1395 (Keith, J., dissenting) (citing *Wright v. Rockefeller*, 376 U.S. 52, 52 (1964)). Congress considered *Wright* at least at some point during the hearings for the VRA extensions in 1975. *Extension of the Voting Rights Act of 1965: Hearing on S. 407, S. 903, S. 1297, S. 1409 and S. 1443 Before the Subcomm. on Const. Rts. of the S. Comm. on the Judiciary*, 94th Cong. 965 (1975) [hereinafter *Extension of the Voting Rights Act Hearing*]. It also seems that there was another potential aggregated claim before Congress. *See Sette, supra* note 29, at 2707 & n.124, 2729 & n.382 (noting that *Wright* was a constitutional claim, but that the Senate Report mentioned *another* aggregated claim); *infra* note 313. The majority simply rejected this inference wholesale without much discussion because, in its view, Section 2 had never applied to aggregated claims, and so no inference from history could be made. *Nixon*, 76 F.3d at 1389.

267. *See Nixon*, 76 F.3d at 1395 (Keith, J., dissenting) (“If Congress was thus aware that more than one minority group could be considered to constitute one plaintiff class in determining the availability of Voting Rights Act protection, certainly the absence of an explicit prohibition of minority coalition claims compels a construction of Section 2 which allows them.”).

268. *Id.* at 1400–02. Judge Keith also noted that courts do not conduct purity tests to see if the majority bloc is of “Italian, German or Yugoslavian descent.” *Id.* at 1402.

269. *Id.* at 1400.

discrimination.²⁷⁰ This assumption, which segregates and classifies minority groups, runs counter to the Constitution and purposes of the VRA, because these classifications will deny rights (and the subsequent remedies) under the VRA solely on the basis of race or ethnicity.²⁷¹

As a result of the competing remedial and textual approaches, there is uncertainty as to whether aggregation could be recognized under Section 2. Further uncertainty results from the fact that *Bartlett's* impact on this divide remains unclear. Despite a somewhat lively scholarly debate surrounding the import of *Bartlett*, courts still recognize aggregated claims in jurisdictions that already allowed aggregated claims.²⁷² The dearth of circuit court decisions addressing *Bartlett* likely stems from courts not being precluded from hearing aggregation claims. Further, the rationales for distinguishing crossover claims from aggregated claims undermine the arguments advanced by the circuits disallowing aggregation. First, with regard to the risk of interest group politics, the line drawing between single-minority group claims and aggregated claims is dubious at best.²⁷³ The fact that a community has a common goal should not bar representation that it is entitled to obtain via Section 2.²⁷⁴ Section 2 claims go far beyond common politics, requiring that claimants meet the *Gingles* preconditions and the totality-of-the-circumstances test.²⁷⁵ Second, although the VRA and its legislative history never explicitly mention aggregated districts as a remedy, the same is true for single-minority

270. *Id.* at 1401.

271. *Id.* at 1399–1400.

272. *E.g.*, *Huot v. City of Lowell*, 280 F. Supp. 3d 228, 235–37 (D. Mass. 2017); *Perez v. Abbott*, 250 F. Supp. 3d 123, 143 (W.D. Tex. 2017); *Ga. State Conf. of the NAACP v. Gwinnett Cnty. Bd. of Registrations & Elections*, No. 1:16-cv-2852-AT, 2017 WL 4250535, at *1–2 (N.D. Ga. May 12, 2017); *Ala. Legis. Black Caucus v. Alabama*, 231 F. Supp. 3d 1026, 1048 (M.D. Ala. 2017); *Pope v. County of Albany*, No. 1:11-cv-0736 (LEK/CFH), 2014 WL 316703, at *1, *6 (N.D.N.Y. Jan. 28, 2014); *Broward Citizens for Fair Dists. v. Broward Cnty.*, No. 12–60317–CIV, 2012 WL 1110053, at *1, *6 (S.D. Fla. Apr. 3, 2012); *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 405 (S.D.N.Y. 2004); *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, No. 03-CV-502, 2003 WL 21524820, at *5 (N.D.N.Y. July 7, 2003); *Memorandum of Law of Plaintiffs at 5, Hardial v. Town Council of the Town of Hempstead*, No. CV-13 2452 (E.D.N.Y. Apr. 23, 2013), 2013 WL 10230644.

273. *See supra* note 253 and accompanying text.

274. *See Thornburg v. Gingles*, 478 U.S. 30, 51 (1986) (requiring political cohesion under Section 2).

275. *See supra* notes 188–89 and accompanying text.

group districts.²⁷⁶ Third, the Sixth Circuit and others rely on the text, particularly the singular nature of “class.”²⁷⁷ However, Judge Keith is likely right that “class” can include aggregated communities, because the VRA never defines “class.”²⁷⁸ These arguments are supported by the broad remedial nature of the VRA and by the fact that the evil solved by aggregated claims is the same as by single-minority group claims.²⁷⁹

B. Novel Textual Arguments in Favor of Aggregated Claims

Even assuming courts do not agree with Judge Keith’s interpretation that the singular “class” allows for aggregation, the opposition’s textual argument is undermined by the singular–plural canon of interpretation.²⁸⁰ Codified by Congress, this canon instructs that singular terms in statutes also include the plural form unless context shows otherwise.²⁸¹ For example, if a statute proscribes the firing of “a rocket,” firing multiple rockets is also proscribed.²⁸² The rocket statute would ban the simultaneous firing of multiple rockets taped together. Likewise, simultaneous discrimination against multiple protected groups is banned under Section 2. Thus, aggregated claims are still permissible under Section 2.

Importantly, this interpretation does no violence to the text and helps ground the scope of Section 2. Again, Section 2 reads:

276. *See* *Bartlett v. Strickland*, 556 U.S. 1, 31 (2009) (Souter, J., dissenting) (“There is nothing in the statutory text to suggest that Congress meant to protect minority opportunity to elect solely by the creation of majority-minority districts.”).

277. *E.g.*, *Nixon v. Kent Cnty.*, 76 F.3d 1381, 1386–87 (6th Cir. 1996) (en banc). The Fourth Circuit relied upon Section 2’s language that members of a class have “less opportunity than other members of the electorate.” *Hall v. Virginia*, 385 F.3d 421, 425 n.5, 430 (4th Cir. 2004) (quoting 42 U.S.C. § 1973(b) (2000) (recodified at 52 U.S.C. § 10301 (2018))).

278. *Nixon*, 76 F.3d at 1394, 1403 (Keith, J., dissenting).

279. *Id.* at 1394, 1402.

280. *See* 1 U.S.C. § 1 (2018) (“[U]nless the context indicates otherwise—words importing the singular include and apply to several persons, parties, or things”); SCALIA & GARNER, *supra* note 32, at 130 (referring to the singular–plural canon as “simply a matter of common sense and everyday linguistic experience”). This is also recognized in many states. *See, e.g.*, MICH. CODE ANN. § 125.402 (2019) (“[T]he singular number includes the plural and the plural the singular”). Admittedly, no one else advances the singular–plural argument for Section 2, this Note found, but others have made it for other sections of the VRA. *See* Travis Crum, Note, *The Voting Rights Act’s Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1992, 2007 n.88 (2010) (using this argument in the context of Section 3 of the VRA).

281. 1 U.S.C. § 1.

282. SCALIA & GARNER, *supra* note 32, at 130.

if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.²⁸³

Applying the singular–plural canon, absent some indication that Congress did not want aggregated claims, this can also be logically read as allowing claims when “members of *classes* of citizens” are not equally allowed to participate, “in that *their* members have less opportunity . . . to participate.” Thus, the singular form encapsulates a single-minority group’s claims, alleging discrimination against “a class.” The natural way to make sense of “classes” then is that claimants can assert discriminatory effects befalling more than one minority group simultaneously.

Several pieces of textual evidence confirm this interpretation. First, Congress codified this canon through the Dictionary Act, essentially telling readers that, “unless the context indicates otherwise,”²⁸⁴ the term “a class” imports the term “classes.” This reading is supported by the drafting manuals in the House and Senate, which apply the same presumption of singularity unless Congress intends to deviate.²⁸⁵ And the context of Section 2 does not justify a

283. 52 U.S.C. § 10301(b) (2018).

284. 1 U.S.C. § 1; *see* FDIC v. RBS Sec., Inc., 798 F.3d 244, 258 (5th Cir. 2015) (acknowledging the authority of the Dictionary Act as the “default rule that the singular includes the plural”); 2A NORMAN SINGER & SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47:34 (7th ed.), Westlaw (database updated Nov. 2020) (“These rules reflect the common understanding that the English language does not always carefully differentiate between singular and plural word forms . . .”). *But see* United States v. Hayes, 555 U.S. 415, 422 n.5 (2009) (stating in dicta that the Court traditionally applied the Dictionary Act’s singular–plural rule when “necessary to carry out the evident intent of the statute” (quoting First Nat’l Bank v. Missouri, 263 U.S. 640, 657 (1924))); *id.* at 432 (Roberts, C.J., dissenting) (arguing that the majority’s characterization of the singular–plural canon is “contrary” to the text of the Dictionary Act). Not only has *Hayes* not been generative, but the Court has also not applied this narrow construction of the Dictionary Act consistently. *Cf., e.g.,* Return Mail, Inc. v. U.S. Postal Serv., 139 S. Ct. 1853, 1857 (2019) (noting that the Dictionary Act’s canon that the term “person” includes the federal government is “an express directive from Congress”); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 707–08 (2014) (relying on the Dictionary Act canon that “person” includes a corporation); *Carr v. United States*, 560 U.S. 438, 448 (2010) (describing the canon that the present tense includes the present and future tense as a presumption created by the Dictionary Act).

285. *See* OFF. OF THE LEGIS. COUNS., U.S. SENATE, LEGISLATIVE DRAFTING MANUAL 5 (1997), https://law.yale.edu/sites/default/files/documents/pdf/Faculty/SenateOfficeoftheLegislativeCounsel_LegislativeDraftingManual%281997%29.pdf [<https://perma.cc/DT2N-7EZ5>] (“The singular includes

deviation from this presumption because of the consistent use of the singular form when referring to “class” throughout Section 2.

Congress’s unwavering usage of the singular form of “class” throughout Section 2 and the rest of the VRA suggests a consistent stylistic or grammatical choice, rather than an intent to exclude the plural.²⁸⁶ Not once in the whole of Title 52 of the U.S. Code did Congress use the term “classes.”²⁸⁷ And the singular form of class is reserved almost exclusively in the VRA for Section 2, which is consistent with (if not implying) a unique meaning for groups who can bring claims under Section 2.²⁸⁸ When referencing those entitled to protections, the rest of the statute refers to them as “language minorities,” “language minority groups,” “minority persons,” “minority group[s],” or as “minority group citizens.”²⁸⁹ The 1982 amendments thus have a virtual monopoly on the term, and the linguistic distance between class and the panoply of other terms used to reference minority groups likely means that the former is not totally coextensive with the latter. Or at the very least, the former under the singular–plural canon can support a broader meaning than the latter.

the plural . . .”); OFF. OF THE LEGIS. COUNS., U.S. HOUSE OF REPRESENTATIVES, HOUSE LEGISLATIVE COUNSEL’S MANUAL ON DRAFTING STYLE 60 (1995), <https://legcounsel.house.gov/sites/legcounsel.house.gov/files/documents/draftstyle.pdf> [<https://perma.cc/XZ4D-VKWW>] (instructing legislators to “[a]void plurals”); see also FREDERICK REED DICKERSON, LEGISLATIVE DRAFTING 67 (1954) (“To the extent your meaning allows, use the singular instead of the plural.”); FREDERICK REED DICKERSON, THE FUNDAMENTALS OF LEGAL DRAFTING 124–25 (1965) (same). Three Justices indicated that drafting manuals can be a source of statutory interpretation in *Carr*. See *Carr*, 560 U.S. at 459, 463 (Alito, J., dissenting, joined by Thomas, J. & Ginsburg, J.) (applying a rule of construction drawn from legislative drafting manuals).

286. 52 U.S.C. § 10301(b).

287. This was confirmed through the following Westlaw search: limited to results within Title 52 of the United States Code Annotated: “adv.: class!” and then sifting through the minimal references for both the plural and singular terms.

288. In the VRA, the term “class” is used outside of Section 2 only in 52 U.S.C. §§ 10501(b), 10303(c). It was first included in the original act in 1965, but only once, when referring to a prohibited test or device used to “prove [the voter’s] qualifications by the voucher of registered voters or members of any other class.” It was not used in the 1975, 1992, or 2006 amendments. See generally Pub. L. No. 94-73, Title I, § 102, 89 Stat. 400 (1975); Pub. L. No. 102-344, 106 Stat. 921 (1992); Pub. L. No. 109-246, 120 Stat. 577 (2006). And, while the 1970 amendments used the term once, it was only in the context of moving the test or device text of the 1965 Act verbatim. See generally Pub. L. No. 91-285, Title II, 84 Stat. 314, 315 (1970).

289. See 52 U.S.C. §§ 10303(a)(1)(F)(iii), (a)(2), 10310(c)(3), 10503(a). And in its 2006 reauthorization factual findings, Congress called these individuals “racial and language minority voters” or “racial and language minority citizens,” never referring to either individually as composing or being part of a “class.” 120 Stat. 577, 578.

Moreover, Congress already approved of aggregation in the context of language minorities. Language minority groups explicitly include multiethnic, multicultural, and most importantly multilingual groups.²⁹⁰ Asians could have diverse lingual and cultural ties—and yet still get the protection of Section 2, even collectively. Chinese and Thai communities could qualify as individual classes or form an aggregate Asian class under Section 2. Further, Hispanic groups can be composed of members with ethnic ties to Spain, Peru, and Mexico, all while meeting the statutory definition of being “of Spanish heritage.”²⁹¹ All of these demonstrate that plurality is not inconsistent with the statute and is in fact *more* consistent with the statute than rigidly imposing singularity. From this point of view, the *Nixon* majority started with the wrong presumption from consistent singularity. Instead of presuming the text as encompassing “class” and “classes,” as Congress instructed, the *Nixon* court presumed that the text excluded the plural.

Further evidence of context shows that the term “class” is generally uninformative to readers because of how disconnected it is from other sections of the statute defining language minorities.²⁹² The statute refers to citizens of a “language minority group,” or “language minorities,” and never directly refers to them as classes—and Section 2 indirectly considers them part of the term protected class.²⁹³ And Congress ostensibly knows how to clarify whether it meant only one protected group of citizens. For example, in § 10303, Congress outlawed certain English-only ballots if more than 5 percent of voting-age citizens were from “a single language minority.”²⁹⁴ Likewise, if Congress really wanted to be clear, it could have said “a single group” or “a single class.” Still, at worst, this type of evidence reinforces the ambiguity here. After all, the reason why this circuit split is tough to resolve is specifically because Congress uses language inconsistently, with little clarity and precision. But the whole purpose of textual canons of construction is to break ties when there is ambiguity. Thus,

290. See Sette, *supra* note 29, at 2728 (noting the inherent coalitional aspect of language minorities).

291. 52 U.S.C. § 10310(c)(3).

292. See, e.g., 52 U.S.C. § 10301(b) (using “class” without any definition of language minorities); *id.* § 10503(c) (referencing “the language of the applicable minority group”); *id.* § 10503(e) (“[T]he term ‘language minorities’ or ‘language minority group’ means persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage.”).

293. *Id.* § 10503(c).

294. *Id.* § 10303(f)(3).

courts should defer to Congress's judgment, and not their own, on which types of claims should be allowed.²⁹⁵

Additionally, the other phrasing of Section 2 does not foreclose the use of this canon. Although the VRA refers to “members of a class of citizens,” this phrasing is simply the most natural way to discuss individuals in a group—since a group will be bringing the claim.²⁹⁶ And while at least one court reasoned that “other members of the electorate” precludes coalitional claims, at least in the crossover context, because it is totally exclusionary of any other group, this view simply fails to contemplate the possibility of aggregation and community-building.²⁹⁷ Read plainly, the term “other” is made in reference to groups that have more opportunity “to participate in the political process.”²⁹⁸ At least in the context of a single-minority group community's claim, which asserts that it has “less opportunity,” “other members” refers to those who are not members of that community. When two or more minority communities assert a claim in the aggregate, the “other members of the electorate” are those who are not members of any one of those communities asserting the claim.

Admittedly, the article (“a”) that precedes “class” could indicate that the word “classes” was not intended. However, “a” is an indefinite article, and courts generally treat indefinite articles as allowing both singular and plural terms.²⁹⁹ By contrast, definite articles, like “the,” are more likely to lock in a selected form.³⁰⁰ For example, Congress

295. Although Congress could then amend Section 2 if it did not like these claims, this argument suffers from a “dog that didn't bark” critique. This reasoning may be stronger from the fact that Congress *specifically* amended the VRA after *Campos* and *Hardee County Board* allowed such claims and again in 2006 after this circuit split arose. See discussion *supra* notes 236–36 and accompanying text.

296. 52 U.S.C. § 10301(b) (emphasis added).

297. This is more or less the argument made in *Hall v. Virginia*, 385 F.3d 421, 430 (4th Cir. 2004).

298. *Id.*

299. See 2A DALLAS SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 47:34 (4th ed. 1972) (“It is most often ruled that a term introduced by ‘a’ or ‘an’ applies to multiple subjects or objects unless there is a reason to find that singular application was intended or is reasonably understood.”); see, e.g., *United States v. Pendergrass*, No. 1:17-CR-315-LMM-JKL, 2019 WL 1376745, at *2 (N.D. Ga. Mar. 27, 2019) (applying the Dictionary Act's singular–plural interpretation); *In re Cell Tower Recs.* Under 18 U.S.C. § 2703(D), 90 F. Supp. 3d 673, 676–77 (S.D. Tex. 2015) (same). This is also the rule in patent law. E.g., *Baldwin Graphic Sys., Inc. v. Siebert, Inc.*, 512 F.3d 1338, 1342–43 (Fed. Cir. 2008).

300. E.g., *Nat'l Credit Union Admin. Bd. v. Nomura Home Equity Loan, Inc.*, 764 F.3d 1199, 1227 (10th Cir. 2014); *Frazier v. Pioneer Ams. LLC*, 455 F.3d 542, 546 (5th Cir. 2006); *Lunsford v. Mills*, 766 S.E.2d 297, 302 (N.C. 2014).

could have written “the class” or “said class.” And the rule regarding indefinite articles makes grammatical sense because Congress would never write “members of class of citizens.” Congress’s choice to make the singular noun grammatically correct should not exclude the plural. Such an interpretation would undermine the very reason for the singular–plural canon.³⁰¹

Further, presuming “classes” from the text is consistent with the context of the VRA because Congress added subsection (b), which contains the term “class,” in the 1982 amendment, and significantly expanded the scope of Section 2—and especially because language minorities already have access to aggregation.³⁰² It would be incongruent to interpret subsection (b) as a severe limitation on the rights of claimants.³⁰³

Even the *Nixon* court admitted that the statutory inclusion of “classes” would permit aggregation.³⁰⁴ However, the word class necessarily implies the existence of multiple classes, and the existence of “classes” in Section 2 is more consistent with the presumptions set up by the Dictionary Act and the singular–plural canon.

Finally, although opponents state that Congress never meant to validate aggregated claims with the VRA,³⁰⁵ “prohibitions often go beyond the principal evil to cover reasonably comparable evils.”³⁰⁶ Nowhere more pertinent is this philosophy than in the context of the VRA, which was meant to “overcome systematic and ingenious discrimination,” and “ensure the right to vote when local officials are determined to deny it.”³⁰⁷ Congress in 1965 stressed “both the variety

301. Proving that “a” precedes singular nouns does not counter this argument. No one would argue that “a class” is plural. Instead, the context of the statute does not undermine the importation of “classes” mandated by the Dictionary Act. At best, “a” is ambiguous, and a single word should not be the reason for the disallowance of aggregation. *See* *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001) (“[Congress] does not, one might say, hide elephants in mouseholes.”).

302. *See* *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986) (describing Congress’s intent when amending Section 2).

303. The apparent limitations on the 1982 amendment seem to be explicitly enumerated in the Senate Report, and none of them mention aggregation. *See id.* at 46 (describing the limitations in the Senate Report); *see* discussion *supra* note 104.

304. *Nixon v. Kent Cnty.*, 76 F.3d 1381, 1386 (6th Cir. 1996) (en banc).

305. *See id.* at 1390 (concluding that neither the original statute nor the subsequent amendments “reflect a broad and boundless ‘trend’ to expand the Act . . . to protect combinations of classes not described in the Act, including coalition minorities”).

306. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

307. *Johnson*, *supra* note 59.

of means used” as well as “the durability” of the attacks on voting rights.³⁰⁸ Consistently, Congress has expanded the VRA, rejecting multiple attempts by the courts to limit its reach. Now the VRA is given the “broadest possible scope,”³⁰⁹ to eliminate the “broad array of dilution schemes . . . employed to cancel the impact” of minority votes.³¹⁰ That is because both the VRA and Section 2 reflect a goal, a standard to be reached, not a formalistic rule. That standard is to reach equal opportunity in electoral politics, a desire in tension with the existence of myriad schemes of discrimination that constantly contort into new forms, the ingenuity of which “seems endless.”³¹¹

Aggregation targets the same evil—racial and ethnic discrimination in voting—as single minority group claims. The Senate Report for the 1975 VRA amendments—that added language minority protection—confirms as much.³¹² The Senate noted how language minorities were treated “like [B]lacks throughout the South,” and how Mexican Americans in Texas, who exemplified language minority treatment, *together* with Black Texans faced a long history of mistreatment “similar to the myriad forms of discrimination practiced against [B]lacks in the South.”³¹³ Disallowing aggregation is to say that

308. H.R. REP. NO. 89-439, at 8 (1965).

309. *Chisom v. Roemer*, 501 U.S. 380, 403 (1991).

310. S. REP. NO. 97-417, at 6 (1982); *see also* *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966) (stating that the VRA’s purpose is to fight the “insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance”).

311. S. REP. NO. 97-417, at 6.

312. S. REP. NO. 94-295, at 25–28 (1975).

313. *Id.* at 25. There were at least two cases in which joint or proto-aggregated claims were considered by courts and by the Senate in 1975. First, *Wright v. Rockefeller* was referred to several times in a Senate hearing and involved a form of joint (albeit a constitutional and not statutory) claim brought by Puerto Rican and Black New Yorkers. *Extension of the Voting Rights Act Hearing*, *supra* note 266, at 249, 965; *Wright v. Rockefeller*, 376 U.S. 52, 56 (1964); *Nixon v. Kent Cnty.*, 76 F.3d 1381, 1395 (6th Cir. 1996) (Keith, J., dissenting) (citing *Wright*); Sette, *supra* note 29, at 2707 n.124 (noting that *Wright* was a constitutional and not a statutory claim). Second, the Senate Report refers to a 1972 Texas court case brought by Mexican American and Black voters that was partially affirmed by the Supreme Court. S. REP. NO. 94-295, at 25; *Graves v. Barnes (Graves I)*, 343 F. Supp. 704 (W.D. Tex. 1972), *aff’d in part* *White v. Regester (White I)*, 412 U.S. 755 (1973). While the initial order of the district court in 1972, affirmed by the Supreme Court, seems to have only dealt with separate claims by Black voters for Dallas County and Mexican American voters for Bexar County because of time constraints, later opinions addressed proto-aggregated claims and required the drawing of single-member districts based on *combined* Mexican American and Black populations with histories of discrimination. *Graves v. Barnes (Graves II)*, 378 F. Supp. 640, 644–62 (W.D. Tex. 1974), *vacated by* *White v. Regester (White II)*, 422 U.S. 935, 935–36 (1975) (*per curiam*) (vacating the case, “[r]ather than render an unnecessary judgment on the validity of the constitutional views expressed by the District Court,” for the

discrimination is fine so long as it affects two minority groups instead of one. The gap between traditional and aggregated claims is a difference in degree, not form.

CONCLUSION

Bartlett represented a significant shift in voting rights but not one that precludes aggregation. The end of crossover claims does not mean the end of aggregated claims because aggregated claims meet the same objectives of the VRA as with single-minority group claims. More broadly, aggregated claims align with the spirit of the Fifteenth Amendment, which was “not designed to punish for the past” but “to ensure a better future.”³¹⁴ From the standpoint of electoral representation and voting rights, this country has come a long way. But to appreciate the past is hardly to observe the realities of the present. Representation at all levels of government, while it is not the be-all and end-all, is a critical value in a diverse society. And aggregated claims can help communities increase representation they deserve. At the end of the day, that representation is a proxy, but a useful one, for whether minority groups have equal opportunity in the electoral process. The VRA played a large role in ensuring a better future for Americans of all backgrounds, so that they can not only vote but also know that their vote means something. And the VRA’s promise should apply no less when discrimination occurs against multiple groups because racism should not thrive by targeting two and not one.

district court to consider recent apportionment legislation enacted in Texas). While the 1974 decision was not directly addressed in the Senate Report, the developments of this case were addressed in a hearing that was cited in the same discussion of the Senate Report. *Extension of the Voting Rights Act*, *supra* note 266, at 490 (referring implicitly to the 1974 *Graves II* case by citing to *White v. Regester*—the 1973 case in which the Supreme Court partially affirmed the district court in *Graves I*—and referencing the 1974 developments of *Graves I* in which the Texas court “ruled the use of the at-large scheme to be unconstitutional”); S. REP. NO. 94-295, at 27 (citing page 490 of the hearings); *see also Extension of the Voting Rights Act*, *supra* note 266, at 476 (citing explicitly *Graves II*).

314. *Shelby Cnty. v. Holder*, 570 U.S. 529, 553 (2013).