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# The Racist Assumptions of Section 2 Dilution Claims and Aggregation of Minority Groups

WILLIAM SANDERS*

ABSTRACT

This paper is unique in its analysis of federal circuit cases that have dealt with the issue of aggregation of minority groups with regard to dilution claims under section 2 of the federal Voting Rights Act ("the Act"). When first enacted, section 2 was successful in helping to eradicate racial discrimination concerning the right to vote. However, subsequent judicial interpretation of that section gave rise to voter dilution claims, which enabled racial discrimination in contravention of both the Act and the Fifteenth Amendment. Aggregation of racial groups—i.e., alleging that a group composed of more than one race has been discriminated against as a whole—has arisen as a method of satisfying the requirement for bringing a dilution claim that a group be politically cohesive. The Supreme Court of the United States has not yet determined whether such aggregation is permissible. This paper first details the history of the Act and the racist assumptions inherent in the Court's interpretation of section 2 of the Act. Then, through analysis of cases, this paper shows how aggregation violates the Fifteenth Amendment and goes against the purpose of the Act itself.

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## I. INTRODUCTION

Before 1965, those in Louisiana who could not prove that they had at least a fifth-grade education were required to take a "literacy" test before they could vote.[1] The first task on one such test was as follows: "Draw a line around the number or letter of this sentence."[2] Despite this perplexing instruction, the test-taker would not dare spend too much time trying to figure out what exactly he was supposed to do since the exam had a time limit of ten minutes and a total of thirty questions.[3] Here are some of the other questions the prospective voter faced: "Spell backwards, forwards;" "Print the word 'vote' upside down but in correct order;" and "Draw five circles that have one common interlocking part."[4] These were designed to be confusing and to make it so there was not a single, definitively correct answer.[5] The reason for this was so the Registrar of Voters—on whose whim a pass or fail was granted—could prevent black[6] people from voting.[7] In reality, white people rarely had to take this exam even if they could not produce evidence that they had passed the fifth grade, whereas black people had to take the test even if they had college diplomas.[8]

Though the Fifteenth Amendment[9] was ratified in 1870 to give black people the right to vote,[10] those who sought to deny them this right did so through literacy tests, poll taxes, intimidation, violence, and other means.[11]

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1. *Louisiana Voter Literacy Test*, CIVIL RIGHTS MOVEMENT VETERANS, http://www.crmvet.org/info/la-test.htm (last visited Mar. 17, 2013).

2. *State of Louisiana Literacy Test*, CIVIL RIGHTS MOVEMENT VETERANS, *available at* http://www.crmvet.org/info/la-littest.pdf.littest.orig (last visited Feb. 20, 2014).

3. The instructions on the top of the test were as follows: "Do what you are told to do in each statement, nothing more, nothing less. Be careful, as one wrong answer denotes failure of the test. You have ten (10) minutes to complete the test." *Id*.

4. *State of Louisiana Literacy Test*, *supra* note 2. The errors of grammar and punctuation are in the original.

5. *Louisiana Voter Literacy Test*, *supra* note 1.

6. The word "black" is used throughout this paper where "African-American" might commonly be substituted. The reason for this is that dilution claims concern black people, not African people. Most of the black people to whom this paper refers and to whom the Act applies have never even been to Africa, and many Africans are not black.

7. *See Louisiana Voter Literacy Test*, *supra* note 1.

8. *See id.*

9. U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

10. *See* Earl Maltz, *Suffrage—Race*, *in* THE HERITAGE GUIDE TO THE CONSTITUTION 409 (Edwin Meese III et al., eds., 2005).

11. *See* Thornburg v. Gingles, 478 U.S. 30, 38-39 (1986) (citing the district court's findings of poll taxes, literacy tests, and other means of preventing black people from voting); *see also* RONALD W. WALTERS, FREEDOM IS NOT ENOUGH 7 (2005); J. MORGAN KOUSSER, COLORBLIND INJUSTICE 25-26 (1999) (listing the following tactics of southern white Democrats to prevent black people from voting: racial gerrymandering, at-large elections, high bonds for officeholders and authorities arbitrarily refusing to accept bonds, consolidating polling places to make a trip to the polls intolerably long, refusing to open

In the mid-1950s and onward, an era sometimes referred to as the "Second Reconstruction,"[12] steps were taken to stop race-based disenfranchisement.[13] Blacks in Tennessee formed leagues for the purpose of registering to vote, enduring the retaliations of whites who would refuse to sell goods and services to them, evict them in the winter, terminate their employment, or worse.[14] Attorney General Robert Kennedy encouraged the civil rights movement to focus its energy on voting rights.[15] In a culmination of these and other efforts, President Lyndon Johnson signed the Voting Rights Act into law on August 6, 1965.[16]

The Act successfully removed barriers to black people registering to vote.[17] Absurd literacy tests and other blatantly racist tactics are now a thing of history.[18] However, courts have interpreted section 2 of the Act[19] to permit protected minorities, namely blacks, Latinos, and Hispanics, to bring suit to force legislatures to alter voting districts as long as there is evidence of possible dilution of the voting power of minorities.[20] Evidence of intent to discriminate based on race is unnecessary.[21] This is known as a dilution claim, whereby it is alleged, for example, that the voting districts as drawn dilute the voting power of minorities by making it difficult for minority

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polls, impeach or displace elected officials, dispense with local elections, and vest power in the legislature or governor rather than in voters).

12. KOUSSER, *supra* note 11, at 14 (stating that scholar C. Vann Woodward invented the term "Second Reconstruction" for the period since 1954).

13. *See*, *e.g.*, WALTERS, *supra* note 11, at 7.

14. *See id.* at 7-8. For example, one black man's house was firebombed after he registered to vote. Maltz, *supra* note 10, at 13.

15. *See* Maltz, *supra* note 10, at 10.

16. *See* Bartlett v. Strickland, 556 U.S. 1, 10 (2009) ("Passage of the Voting Rights Act of 1965 was an important step in the struggle to end discriminatory treatment of minorities who seek to exercise one of the most fundamental rights of our citizens: the right to vote."); *see also* Aylon M. Schulte, Note, *Minority Aggregation Under Section 2 of the Voting Rights Act: Toward Just Representation in Ethnically Diverse Communities*, 1995 U. ILL. L. REV. 441, 442 (1995); *President Johnson Speech at Voting Rights Act Passage*, THE LEADERSHIP CONFERENCE, http://www.civilrights.org/voting-rights/vra/johnson-speech.html (last visited Feb. 22, 2014).

17. *See, e.g.*, Holder v. Hall, 512 U.S. 874, 895 (1994) (Thomas, J., concurring) (listing examples of the success of the Voting Rights Act, e.g.: black registration in Mississippi rose from 6.7% to 59.8% in two years; in Alabama it went from 19.3% to 51.6% in two years (citing BERNARD GROFMAN ET AL., MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 23 (1992))).

18. *See, e.g.*, Benjamin Highton, *Voter Registration and Turnout in the United States*, 2 AM. POL. SCI. ASS'N. 507, 511 (2004).

19. This paper deals only with section 2. Though section 5 is at least as important, it is only discussed in this paper insofar as it relates to section 2. *See* Allen v. State Bd. of Election, 393 U.S. 544, 569 (1969).

20. *See infra* Part II.A; *see also Allen*, 393 U.S. at 569 ("The right to vote can be affected by a dilution of voting power"); "[G]errymandering . . . dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition's voting strength." BLACK'S LAW DICTIONARY 756 (9th ed. 2009) [hereinafter BLACK'S].

21. *See* Lane v. Wilson, 307 U.S. 268, 275-77 (1939); *see also* discussion *infra* notes 85-92 and accompanying text.

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groups to elect their preferred candidates.[22] Such claims are not contemplated in the text of the Act and adjudication of them forces courts to make political decisions traditionally outside the purview of the judiciary.[23] Additionally, there is a circuit split on whether different racial groups may aggregate to bring a dilution claim.[24] Most troublesome is the fact that racist assumptions underlie all section 2 dilution claims and the theory of aggregation, and such assumptions contravene the purpose of the Act and the Fifteenth Amendment.[25]

Part I of this paper describes voting districts and the judiciary's increasingly active role in determining their parameters.[26] Part II examines dilution claims under section 2 of the Voting Rights Act, and the racist assumptions inherent in such claims, with a specific focus on Justice Thomas's concurrence in *Holder v. Hall*.[27] Part III explains aggregation, the arguments for and against it, and how it relates to the problems with dilution claims.[28] This paper concludes with the argument that allowing aggregation of racial groups only intensifies the problems of dilution claims and the racist assumptions upon which such claims are based.[29]

## II. VOTING DISTRICTS AND THEIR LEGAL PARAMETERS

Every state in the Union is geographically divided into both state legislative and congressional districts.[30] State legislative districts are created to elect state legislative representatives,[31] and congressional districts are created to elect members of the U.S. House of Representatives.[32] For example, New Hampshire's House of Representatives consists of 400 members and 204 districts,[33] and its Senate has twenty-four members from twenty-four districts.[34] These are examples of state legislative districts.

22. Challenges to redistricting plans are also called "vote fragmentation" claims. *See* Growe v. Emison, 507 U.S. 25, 40 (1993) (quoting *Gingles*, 478 U.S. at 46-47 n.2). But not all dilution claims allege invalid redistricting. Many involve at-large districts or other claims. *See, e.g.*, *infra* notes 59, 81.

23. *See infra* Part II.A-B.

24. *See* discussion *infra* notes 167-174 and accompanying text.

25. *See* U.S. CONST. amend. XV, § 1.

26. *See infra* Part I.

27. *See infra* Part II; 512 U.S. at 891-946 (Thomas, J., concurring).

28. *See infra* Part III.

29. *See infra* pp. 25-26.

30. U.S. CONST. amend. XIV, § 2. Unless a state's population is so small that it only has one representative in the U.S. House, in which case it would not be divided into congressional districts because one representative would represent the entire state.

31. *See* BLACK'S, *supra* note 20, at 544.

32. *See id.*

33. *NH House of Representatives*, LIVE FREE OR DIE ALLIANCE, http://www.livefreeordiealliance.org/ElectionCentral/StateHouseofRepresentativesv2/tabid/1320/Default.aspx (last visited Mar. 18, 2013).

34. *NH State Senate*, LIVE FREE OR DIE ALLIANCE, http://www.livefreeordiealliance.org/ElectionCentral/StateSenate/

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New Hampshire also has two congressional districts.[35] (See Figure 1.) In addition to state legislative and congressional districts, voting districts exist on more local levels as well.[36]

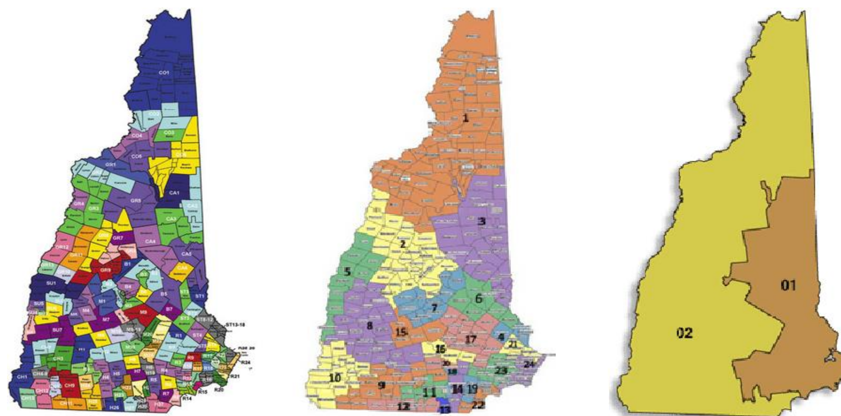


**Figure 1**. The picture on the left depicts New Hampshire's 204 House of Representative districts. The one in the middle is of the State's twenty-four Senate districts, and the one on the right shows its two congressional districts.[37]

Multi-member districts have more than one representative.[38] Many of New Hampshire's House districts are examples of these since there are more representatives than there are districts.[39] New Hampshire's Senate districts are single-member districts.[40] Since 1842, every state's

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tabid/1316/Default.aspx (last visited Mar. 18, 2013). Combined, the New Hampshire legislative branch is known as the General Court and is the fourth-largest legislature in the world, following the U.S. Congress and the English and Indian Parliaments. *See State Government Overview*, NEW HAMPSHIRE ALMANAC, http://www.nh.gov/nhinfo/
stgovt.html (last visited Mar. 31, 2013).

35. *New Hampshire Congressional Districts*, N.H. OFFICE OF ENERGY & PLANNING, http://www.nh.gov/oep/planning/services/gis/documents/congress-11x17.pdf (last visited Feb. 25, 2014).

36. For example, counties may be divided into voting districts, and these are subject to the same constitutional and statutory parameters as legislative and congressional districts. *See, e.g.*, *Allen*, 393 U.S. at 569.

37. These images were obtained with permission from LIVE FREE OR DIE ALLIANCE, http://www.livefreeordiealliance.org/ (last visited Mar. 18, 2013). The Live Free or Die Alliance provides New Hampshire citizens objective, nonpartisan information on New Hampshire issues, elected officials, and elections, and promotes civil discourse among New Hampshire citizens and their elected representatives. *See generally id.*

38. *See, e.g.*, *NH House of Representatives*, *supra* note 33; *NH State Senate*, *supra* note 34. Combined, the New Hampshire legislative branch is known as the General Court and is the fourth-largest legislature in the world, following the U.S. Congress and the English and Indian Parliaments. *See State Government Overview*, *supra* note 34.

39. *NH House of Representatives*, *supra* note 33.

40. *NH State Senate*, *supra* note 34.

congressional districts have been single-member.[41] The states themselves historically determined the boundaries and other aspects of voting districts[42]—these were traditionally political matters outside the realm of the judiciary.[43] However, this changed in 1962 when Justice Brennan, in *Baker v. Carr*,[44] devised a six-factor test to determine the existence of a political question,[45] and used these factors to conclude that Tennessee's allegedly unconstitutional apportionment of representatives was a justiciable issue.[46] This was the path along which courts wandered into the "political thicket" of voting districts.[47]

Though the Constitution does not mention proportionality with regard to the population of voting districts, in 1963, Justice Douglas said in *Gray v. Sanders*[48] that "th[is] conception of political equality" demanded "one person, one vote"—meaning that each person's vote must carry equal weight.[49] Using this principle, the Court in *Gray* concluded that the district court was right in enjoining Georgia's unit-voting system, which created situations, for instance, where a unit vote in one county represented 938 residents, while a unit vote in another county represented 92,721 residents.[50] The Court applied the precedent from *Gray* the following year in *Wesberry v. Sanders*[51] to hold that congressional districts should be drawn with the goal of "equal representation for equal numbers of people."[52] In *Reynolds v. Sims*,[53] Chief Justice Warren declared that the Equal Protection Clause

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41. Though there used to be multi-member congressional districts in the U.S., this changed with the 1842 Apportionment Act. *See* Emanuel Celler, *Congressional Apportionment—Past, Present, and Future*, 17 LAW & CONTEMP. PROBS. 268, 273 (1952) (citing 5 Stat. 491 (1842)). The distinction between single- and multi-member districts is relevant for dilution claims under section 2 of the Voting Rights Act because multi-member districts are often held to violate section 2. *See Gingles*, 478 U.S. at 69-70.

42. *See* NAT'L CONFERENCE OF STATE LEGISLATURES, REDISTRICTING LAW 2010 1 (2009).

43. *See, e.g.*, Colegrove v. Green, 328 U.S. 549, 556 (1946), *overruled by* Baker v. Carr, 369 U.S. 186 (1962) (refusing to halt Illinois elections for plaintiffs who complained of invalid districting, Justice Frankfurter saying for the majority that "[c]ourts ought not to enter this political thicket.").

44. 369 U.S. 186.

45. "[P]olitical-question doctrine. The judicial principle that a court should refuse to decide an issue involving the exercise of discretionary power by the executive or legislative branch of government." BLACK'S, *supra* note 20, at 1277.

46. *See Baker*, 369 U.S. at 217, 226.

47. *See Colegrove*, 328 U.S. at 556.

48. 372 U.S. 368 (1963).

49. *See id.* at 381.

50. *Id.* at 371, 381. The unit system worked like this: counties with populations of 0-15,000 were allotted two units; another unit was allotted for the next 5,000 people; another for the next 10,000; another for each of the next two groups of 15,000; and then two units for each increase of 30,000. *Id.* at 372. The complaint alleged that this procedure meant that "the vote of each citizen counts for less and less as the population of the county of his residence increases." *Id.* at 372-73 (quoting Sanders v. Gray, 203 F.Supp. 158, 170 n.10 (N.D. Ga. 1962)).

51. 376 U.S. 1 (1964).

52. *Id.* at 18.

53. 377 U.S. 533 (1964).

required legislative districts to be drawn so that there is "substantial equality of population among" them.[54] Through time and experience, the Court established that this "substantial equality" could be met as long as populations among legislative districts did not deviate from each other by more than ten percent,[55] though the standard for congressional districts tends to be stricter.[56]

As shown, the nature of voting districts was once considered a political issue—not a legal one—and therefore a matter for legislatures rather than courts.[57] But the federal courts became increasingly involved in voting districts throughout the twentieth century.[58] The Voting Rights Act engendered further judicial meddling.[59] Though the Supreme Court has claimed to be following the statute, its construction of the Act has created, not interpreted, law.[60]

## III. SECTION 2 OF THE VOTING RIGHTS ACT

The Voting Rights Act was passed with good intentions, and was initially successful in achieving its purpose, but decades of judicial interpretation and legislative amendment loaded the Act with a heap of factors and unanswered questions. In permitting dilution claims, the Act's application came to be much broader than its text.[61] Most commentators and judges seem reluctant to criticize this state of affairs, but Justice Thomas is not one of them.[62] His concurrence in *Hall* is a fearless statement of clarity and truth.

### A. *Judicial Interpretation and Legislative Amendment of Section 2*

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54. *Id.* at 579.

55. *See, e.g.*, Brown v. Thomson, 462 U.S. 835, 842 (1983) (citing Connor v. Finch, 431 U.S. 407, 418 (1977)). However, a state may exceed this ten-percent standard if it can show that it must do so in order to implement a "rational state policy." Reynolds v. Sims, 377 U.S. at 579.

56. *Reynolds* held that "mathematical nicety is not a constitutional requisite" with regard to the population of legislative districts. *Reynolds*, 377 U.S. at 579. This differs slightly from the requirement for congressional districts to be equal in population, a requirement derived from Article I, section 2 of the U.S. Constitution rather than from the Equal Protection Clause. *See Wesberry*, 376 U.S. at 7-8. The Supreme Court has held that reapportionment of congressional seats are held to a stricter standard. *See* White v. Regester, 412 U.S. 755, 763 (1973) (citing Mahan v. Howell, 410 U.S. 315 (1973)), *vacated*, White v. Regester, 422 U.S. 935 (1975).

57. *See supra* notes 42-47 and accompanying text.

58. *See supra* notes 48-56 and accompanying text.

59. *See infra* Part II.A; *see also* Kristen Clarke, *The Obama Factor: The Impact of the 2008 Presidential Election on Future Voting Rights Act Litigation*, 3 HARV. L. & POL'Y REV. 59, 62 (2009) ("[T]he vast majority of Section 2 claims involve challenges to multi-member governmental bodies.").

60. *See Gingles*, 478 U.S. at 69-70.

61. *See Holder*, 512 U.S. at 959 (Blackmun, J., concurring).

62. *Id.* at 892 (Thomas, J., concurring).

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The purpose of the Voting Rights Act was to eradicate racial discrimination in voting.[63] But why was this Act necessary when the Fifteenth Amendment already prohibited abridging, based on race, the right of citizens to vote?[64] It was not as though there had not been litigation regarding violations of the Fifteenth Amendment.[65] Several cases had come before the Supreme Court under that Amendment and many discriminatory practices were held unconstitutional, including grandfather clauses,[66] overtly discriminatory registration requirements,[67] white-only primary elections,[68] racial gerrymandering (see Figure 2),[69] and literacy tests applied to prevent black people from voting.[70] In addition to the Fifteenth Amendment, Congress passed the Civil Rights

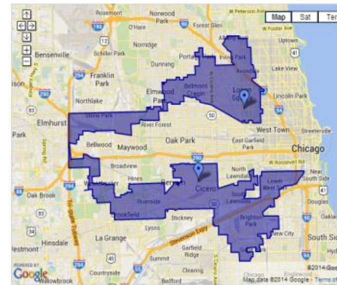

**Figure 2**. This is an example of a gerrymandered district, Illinois's Fourth Congressional District.

63. *See* South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966).

64. *See* U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

65. *See*, *e.g.*, Smith v. Allwright, 321 U.S. 649, 662, 664-65 (1944) (holding that even though the exclusion of black people was a rule of the Democratic party (and not of the government), it qualified as state action and violated the 15th Amendment).

66. An example of such an unconstitutional grandfather clause was Oklahoma's law that required voters to take literacy tests, but did not require those tests of people and their descendants who had had the right to vote before January 1, 1866, thus effectively applying the tests predominantly to black people, not whites. *See* Guinn v. United States, 238 U.S. 347, 365 (1915); *but see id.* at 366 (stating that though the discriminatory aspect of the law violated the Fifteenth Amendment, the requirement of literacy testing itself was within the state's power and not subject to Court supervision).

67. *See* Lane v. Wilson, 307 U.S. 268, 275-77 (1939). The case of *Lane v. Wilson* arose from Oklahoma's response to the Court's holding in *Guinn*, which was to enact a law requiring voters to register between April 30 and May 11, 1916, unless they were already registered under the law that was held unconstitutional in *Guinn*. This registration requirement was also held to violate the Fifteenth Amendment. *Id.* at 277.

68. *See Smith*, 321 U.S. at 662, 664-65 (holding that even though the exclusion of black people was a rule of the Democratic party (and not of the government), it qualified as state action and violated the Fifteenth Amendment).

69. *See* Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960). The appellants in *Gomillion* argued that an Alabama statute that turned the City of Tuskegee from a square into "an uncouth twenty-eight-sided figure" violated the Fourteenth and Fifteenth Amendments. *Id.* at 340. The respondents cited *Colegrove* to support their contention that the appellants failed to state a justiciable claim. *Id.* at 346. The Court distinguished *Gomillion* from *Colegrove* because *Gomillion* involved alleged racial discrimination—a potential Fifteenth Amendment violation. *Id.* at 346-47. Figure 2 (above) is an illustration of congressional district four in Illinois, an extreme example of racial gerrymandering. *See* OFFICIAL WEBSITE OF CONGRESSMAN LUIS GUTIERREZ, *Map of the District*, http://gutierrez.house.gov/our-district/map-district (last visited Apr. 4, 2014). It was drawn with the purpose of creating a Hispanic-majority district; the top and bottom halves connected by the median strip of Interstate 294. *See The Top Ten Most Gerrymandered Congressional Districts in the United States*,

https://digitalcommons.onu.edu/onu_law_review/vol40/iss2/10

Act of 1957, which empowered the Attorney General to seek injunctions against racial discrimination in voting, and which was later amended to provide further protective measures.[71]

By the 1960s, in spite of everything the federal government had done to stop such discrimination, it was still practiced throughout the country, particularly in the South.[72] Reasons for the failure to eliminate racist abridgment of voting rights included the difficulty of bringing suit, slowness of litigation, and speed with which the states were able to enact new laws and tests after previous ones were invalidated.[73] To fix this problem, the Voting Rights Act proposed "stringent remedies" for racial discrimination in voting.[74] After nine days of hearings, testimony from sixty-seven witnesses, and twenty-six days of debate in the Senate, the bill passed with huge majorities in both the House and Senate.[75] Congress derived the authority to enact this legislation from the Fifteenth Amendment.[76]

The text of section 2 of the Voting Rights Act was originally almost the same as that of the Fifteenth Amendment, except that section 2 explicitly prohibited any "standard, practice, or procedure" that abridged a citizen's right to vote on account of race.[77] In *Allen v. State Board of Elections*,[78] one of the Supreme Court's first interpretations of the Act, the Court said that the inclusion of that language, in conjunction with analysis of legislative history, indicated that Congress intended "to give the Act the broadest possible scope."[79] Mindful of this broad scope, the Court held that the following state actions were encompassed by the "'standard, practice, or

PJ MEDIA, http://pjmedia.com/zombie/2010/11/11/the-top-ten-most-gerrymandered-congressional-districts-in-the-united-states/?singlepage=true (last visited Feb. 20, 2014).

70. *See* Louisiana v. United States, 380 U.S. 145, 153 (1965) (holding that Louisiana's law violated the Fifteenth Amendment by giving registrars arbitrary power to declare black people as having failed the required test, thus preventing them from voting).

71. *See Katzenbach*, 383 U.S. at 313.

72. *See id.*

73. *See id.* at 314.

74. *Id.* at 315.

75. The House approved the Act by three hundred twenty-eight to seventy-four; the Senate by seventy-nine to eighteen. *Id.* at 308-09.

76. *See Katzenbach*, 383 U.S. at 308 (citing U.S. CONST. AMEND. XV, § 2 ("The Congress shall have power to enforce this article by appropriate legislation.")).

77. *See* Schulte, *supra* 16, at 447 ("[T]he language of section 2 [in 1965] almost mirrored that of the Fifteenth Amendment."). The text of section 2 in 1965 reads "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." *See Transcript of Voting Rights Act (1965)*, OUR DOCUMENTS, http://www.ourdocuments.gov/doc.php?flash=true&doc=100&page=transcript (last visited Mar. 22, 2013). Compare this with the text of the Fifteenth Amendment. U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

78. 393 U.S. 544.

79. *See id.* at 566-67.

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procedure with respect to voting'" language:[80] changing from district to at-large voting;[81] changing an important public office from elective to appointive;[82] and enacting a law prohibiting those who had voted in a primary election from thereafter being placed on a ballot as an independent candidate.[83]

In *Mobile v. Bolden*,[84] the Court held that to sustain a section 2 claim, a plaintiff must show that the defendant had intent to discriminate based on race—mere effect of possible discrimination was insufficient.[85] The Court's reasoning was based on the premise that section 2 was nothing more than an elaboration on the Fifteenth Amendment.[86] From there, the Court analyzed past Fifteenth Amendment claims.[87] This analysis led the Court to conclude that the Amendment prohibits only intentional discriminatory abridgment of the right to vote.[88] And because the Fifteenth Amendment required intent, so did a successful claim under section 2.[89]

In response to *Bolden*'s requirement that intentional discrimination was necessary for a section 2 claim, Congress amended the Act in 1982 to allow such claims to be based on "discriminatory effect alone."[90] According to

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80. *Id.* at 569. The Court was talking about section 5 rather than section 2 when making this statement; however, since the same language appears in section 2, the Court has said that "the coverage of §§ 2 and 5 is presumed to be the same" although this presumption is rebuttable. *See Hall*, 512 U.S. at 882-83 (citing Chisom v. Roemer, 501 U.S. 380, 401-02 (1991)).

81. *Allen*, 393 U.S. at 569. To illustrate: it had been that certain Mississippi counties were divided into five districts with each district electing one member of the board of supervisors. *Id.* at 550. Then the state made it so that the board could order its members be elected "at large" by all voters in the county. *Id.* The Court said such an at-large voting system could hurt minority voters because when the districts each elected their own member, minorities of the county had a greater chance of getting their preferred candidate elected, whereas under an at-large system the minority's choice would be overcome by the majority's. *Id.* at 569.

82. *Id.* at 569-70 (holding that since this change affected the power of the voters, the Act encompassed this change).

83. *Id.* at 570-71 (holding that the Act contemplated such a rule because the rule could increase the difficulty for an independent candidate to get on the ballot and "undermine the effectiveness of voters" who want to elect independents).

84. 446 U.S. 55 (1980).

85. *See id.* at 74.

86. *Id.* at 60-61 ("[I]t is apparent that the language of § 2 no more than elaborates upon that of the Fifteenth Amendment, and the sparse legislative history of § 2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment.").

87. *See id.* at 61-65.

88. *Id.* at 65.

89. Mobile v. Bolden, 446 U.S. at 61 (stating that appellee's § 2 claims "adds nothing" to their Fifteenth Amendment claim).

90. *Gingles*, 478 U.S. at 35. The amendment kept the original language of section 2. *See* Schulte, *supra* note 16, at 447. However, the amendment added the following:

> A violation . . . is [also] established if, based on the totality of the 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 [protected] citizens . . . in that its members have less opportunity than other members of the electorate to

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the Senate Report that accompanied the bill amending the Act, there were three reasons why Congress eradicated a plaintiff's requirement to prove intent: (1) charges of intentional racial discrimination were "'unnecessarily divisive;'" (2) such a burden was too difficult for plaintiffs; and (3) "'it asks the wrong question.'"[91] As to the right question, the Report clarified that it was whether "'as a result of the challenged practice . . . plaintiffs do not have an equal opportunity to participate in the political process and to elect candidates of their choice.'"[92]

The Court first examined the amended statute in 1986 in *Thornburg v. Gingles*,[93] where black plaintiffs challenged North Carolina's multi-member districting scheme.[94] Since intent to discriminate was no longer necessary, the Court needed other criteria to determine when section 2 is violated.[95] Citing the Senate Report, the Court listed several factors that might indicate a violation: the extent of official discrimination, polarized elections, and procedures that allow for discrimination; whether minorities have been denied access to candidate slating;[96] the extent of discrimination against minorities in areas of education and employment; the use of racial appeals in political campaigns; the extent to which minorities have been elected to office; the lack of elected officials' responsiveness to the needs of minority groups; and whether the policy underlying voter-qualification requirements is questionable.[97] However, while all these factors may be relevant, the Court held that section 2 is not violated unless the minority group can first prove the following three things:[98] "[f]irst, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district;"[99] second, it must be

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> participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973(b) (2006).

91. *Gingles*, 478 U.S. at 44 (citing S. REP. NO. 97-417, at 36 (1982)).

92. *Id.* (citing S. REP. NO. 97-417, at 28).

93. 478 U.S. 30.

94. *Id.* at 34 ("This case requires that we construe for the first time § 2 . . . as amended June 29, 1982.").

95. *See id.* at 35.

96. "[S]late[:] A list of candidates, esp. for political office . . . that usu. includes as many candidates for election as there are representatives being elected." BLACK'S, *supra* note 20, at 1515.

97. *Gingles*, 478 U.S. at 36-37 (citing S. REP. NO. 97-417, at 28-29). The Senate Report derived its factors from *Regester*, 412 U.S. at 779-81. *See Gingles*, 478 U.S. at 36 n.4.

98. *Gingles*, 478 U.S. at 48-50.

99. If not, the Court explained, it would be the minority's insufficient population, not the structure of the districts, which would be the cause of the minority voters' inability to elect their preferred candidate. *Id.* at 50.

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"politically cohesive;"[100] and third, the white majority must vote sufficiently as a bloc so as to defeat the group's preferred candidate.[101] Later, the Court declared in *Growe v. Emison*,[102] that these three *Gingles* factors must be met for challenges to redistricting, as well as to multi-member districts.[103]

In sum, after the 1982 amendment, to establish a section 2 violation with regard to dilution, a plaintiff has to prove the above three *Gingles* factors and then, using the criteria enumerated in the Senate Report, demonstrate that "based on the totality of circumstances" the minority group has "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[104] With so many factors in the analysis and so little guidance as to how they are to be used, it is no wonder that legislatures and judges have been puzzled as to what exactly constitutes a violation of section 2.[105] Applying *Gingles* to multi-member districts had been easy enough since such districts by their nature reward majorities—often making dilution the same as complete exclusion—but its application to redistricting schemes created the difficulty of determining a standard by which to measure dilution, thus plunging the courts even deeper into politics.[106]

Not long after *Growe*, the Court heard *Hall* in which the respondents challenged a single-commissioner system in a Georgia county, alleging that the commission must have six members and form single-member districts, one of which would be composed of a majority of black people, thereby allowing the county's black citizens to have a representative on the commission.[107] The Court rejected this claim because, in addition to satisfying the three *Gingles* factors and the "totality of the circumstances" test, there must also be "a reasonable alternative practice as a benchmark

100. If not, the Court explained, then it is not the structure of the districts that causes the minority group's inability to elect its preferred candidate, but rather the fact that the group has no preferred candidate since the minorities within the group tend to vote for different candidate, i.e., the group is not "politically cohesive." *Id.* at 51.

101. Except in special circumstances, such as when the minority candidate runs unopposed. *Id.*

102. 507 U.S. 25.

103. *Id.* at 40 ("It would be peculiar to conclude that a vote-dilution challenge to the (more dangerous) multimember district requires a higher threshold showing than a vote-fragmentation challenge to a single-member district. Certainly the reasons for the three *Gingles* prerequisites continue to apply.").

104. *Gingles*, 478 U.S. at 50-51; *see also* 42 U.S.C. § 1973(b).

105. *See, e.g.*, *Strickland*, 556 U.S. at 6-7; Barnett v. Daley, 32 F.3d 1196, 1201-02 (7th Cir. 1994) (Posner, C.J.) ("We wish we knew exactly what a plaintiff must prove in order to prevail under the Voting Rights Act. . . . the judicial glosses on th[e] vague phrase ['the totality of the circumstances'] do not provide clear guidance.").

106. *See* Samuel Issacharoff, *Groups and the Right to Vote*, 44 EMORY L.J. 869, 879-81 (1995) ("In the redistricting context . . . the issue inherited from *Gingles* - whether a superior arrangement could have been selected - does not answer the question of whether it should have been selected.").

107. *Hall*, 512 U.S. at 878-79.

against which to measure the existing voting practice."[108] In other words, how can the Court know if the minority's voting power is being diluted if there is no way to know what the minority's voting power should be?[109]

In *Johnson v. De Grandy*,[110] the Court was faced with the issue of whether there was a section 2 violation where a greater number of majority-minority districts[111] could have been drawn, but the number of such districts that did exist meant that the minority group's voting power was proportional to the population of minority voters.[112] The Court said that section 2 does not require the number of majority-minority districts to be maximized.[113] But the Court rejected the State's argument that there cannot possibly be dilution where the percentage of majority-minority, single-member districts is proportional to the minority's percentage of the total population.[114] The Court's reasoning for rejecting the State's proposed "safe harbor" rule was that it contravened the text of section 2, which requires a violation to be based on the totality of the circumstances.[115] However, the Court's determination that the challenged districting scheme was valid was based on the fact that the districts gave the minority group voting strength proportional to its population.[116]

To square its rejection of the safe harbor rule based on proportionality with its holding—which is based on proportionality—the Court said the "totality of the circumstances" test was designed to prevent "sophisticated" methods of dilution, such as discretionary registration and property requirements, which could occur even if the minority's voting strength was proportional to its population.[117] However, the Court did not say how

108. *Id.* at 880.

109. *See id.* (quoting *Gingles*, 478 U.S. at 88) (O'Connor, J., concurring) ("[I]n order to decide whether an electoral system has made it harder for minority voters to elect the candidates they prefer, a court must have an idea in mind of how hard it should be for minority voters to elect their preferred candidates under an acceptable system.").

110. 512 U.S. 997 (1994).

111. A majority-minority district is a district in which a minority group, such as blacks, Latinos, or Hispanics, comprises a majority of the population. *See* BLACK'S, *supra* note 20, at 545.

112. Johnson v. De Grandy, 512 U.S. at 1007-08.

113. *Id.* at 1016-17.

114. *Id.* at 1017-18.

115. *Id.* (quoting 42 U.S.C. § 1973(b)). The Court added that determining such proportionality would be difficult anyway since it is disputed what relevant figure is the minority's share of the population: i.e., is it all members of the minority group, only those registered to vote, or only those eligible to vote? *Id.* at 1017 n.14.

116. *Id.* at 1014 ("[W]e do not see how these district lines, apparently providing political effectiveness in proportion to voting-age numbers, deny equal political opportunity."). *See* Matthew W. Dietz, Comment, *Equal Electoral Opportunity: The Supreme Court Reevaluates the Use of Race in Redistricting in* Johnson v. De Grandy, 3 J.L. & POL'Y 497, 521 (1995) (citing *De Grandy*, 512 U.S. at 1012) ("Even though the Court maintained that proportionality will not create a 'safe harbor' for states, the Court based its decision on proportionality and has not announced a different standard to determine whether equal political opportunity exists.").

117. *De Grandy*, 512 U.S. at 1018-19.

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dilution could be determined where such methods exist along with proportionality, and without proof of intent to discriminate.[118] Causing further confusion, the Court said it disapproved the idea of maximizing majority-minority districts since "minority voters are not immune from the obligation" to try to form political coalitions with voters of other races.[119] But, following the logic behind the Court's holding, minority voters are immune from this obligation up to the point of them having majority-minority districts in proportion to their populations, thereby implying that proportionality is the standard by which dilution is measured.[120] *De Grandy* illustrates not the difficulty, but rather the impossibility, of devising such a standard without proportionality.[121] When redistricting was purely a political issue, there was no need for courts, except in cases of intentional discrimination,[122] to wrestle with dilution.[123] *De Grandy* shows that it would be wise to treat the issue of redistricting as a political one once again.[124]

The latest case to come before the Court regarding section 2 was *Bartlett v. Strickland*,[125] which discussed whether section 2 required districts to be drawn so that minorities, comprising less than fifty percent of a district's population, could join with non-minorities to elect the minority's preferred candidate.[126] This case was unusual because the State invoked section 2 as a defense to its districting scheme, alleging that it created cross-over districts[127] in an effort to comply with the statute.[128] The Court said that the law did not mandate cross-over districts since forcing officials to determine whether potential districts could be cross-over districts would oblige courts to make "race-based assumptions."[129]

118. *See id.*
119. *Id.* at 1020.
120. *See id.* at 1020-21.
121. *See id.*
122. *See, e.g.*, *Gomillion*, 364 U.S. at 341-46.
123. *See supra* notes 49-59 and accompanying text.
124. *See De Grandy*, 512 U.S. at 1014-15.
125. 556 U.S. 1.
126. *Id.* at 6-7. In other words, this challenged district, called a "cross-over district," would be composed of a group of minorities comprising less than 50% of the district's population, but the minority group "is large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate." *Id.* at 13.
127. For an explanation of "cross-over" districts, *see id.*
128. *Id.* at 6-7. The claim itself was brought by Pender County, North Carolina, alleging the General Assembly had violated the state constitution by dividing Pender. *Id.* at 6-8 (citing N.C. CONST. art. II, §§ 3, 5). The General Assembly argued that it had to divide the County to comply with section 2, and so used section 2 as a defense. *Id.* at 8. This illustrates the dilemma that dilution claims may present for governments regarding districting—the General Assembly thought it would be unable to comply with section 2 if it did not redraw the districts, but ended up failing to comply precisely because it did.
129. *Id.* at 17.

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However, all section 2 dilution claims are rooted in at least one race-based assumption: if blacks, Latinos, or Hispanics are not elected to office in proportion to the population of those races, then this must be the result of racial discrimination.[130] That is essentially what the "results test" of *Gingles* and the proportionality rationale of *De Grandy* require.[131] After all, the "results test" looks for results of racial discrimination against minorities by white people, and if it finds evidence that could be considered to have resulted from such discrimination—such as lack of proportionality—it assumes such discrimination existed.[132] So if the Court dislikes making "race-based assumptions," it ought to do away with section 2 dilution claims altogether.[133] At least one justice on the Court agrees.[134]

### *B. Justice Thomas's Concurrence in Holder v. Hall*

Judge Edith H. Jones of the United States Court of Appeals for the Fifth Circuit called Justice Thomas's concurrence in *Hall* "a tribute to candor, clarity, and courageous independent legal thinking."[135] While Justice Thomas agreed with the judgment in *Hall* that section 2 does not allow an attack on the size of a governing body,[136] he went further and said that section 2 does not permit any dilution challenge at all.[137] Rather, the statute is limited to state laws affecting "'citizens' access to the ballot or the processes for counting a ballot.'"[138] To reach this conclusion, Justice Thomas examined the text of the statute, finding that the words "standard, practice, or procedure" have no specific legal definition, are not defined in the Act itself, and that their plain meanings in the context of the statute do not indicate that they include the size of a governing body or how districts are drawn.[139] He said that when Congress enacted the law, it was concerned with procedures, such as literacy tests and poll taxes, that affected access to the ballot.[140] The words "standard, practice, or procedure" were put into the

130. *See De Grandy*, 512 U.S. at 1007; *Gingles*, 478 U.S. at 46-47.

131. The "results test" is the name of the test for dilution explained in *Gingles* after the 1982 amendments to section 2, which removed the requirement to show intentional discrimination. *See, e.g.*, *Gingles*, 478 U.S. at 84 (O'Connor, J., concurring) ("[U]nder the results test, 'plaintiffs may choose to establish discriminatory results without proving any kind of discriminatory purpose.'"); *see also* Schulte, *supra* note 16, at 447.

132. *See* Mark E. Haddad, Note, *Getting Results Under Section 5 of the Voting Rights Act*, 94 YALE L.J. 139, 143 (1984); *contra Gingles*, 478 U.S. at 48-51.

133. *See Hall*, 512 U.S. at 943-45 (Thomas, J., concurring).

134. Actually, two justices agree: Justice Scalia joined Thomas's concurrence in *Hall*. *Id.* at 891.

135. Edith H. Jones, *A Tribute to Justice Clarence Thomas: Justice Thomas and the Voting Rights Act*, 12 REGENT U. L. REV. 333, 333 (2000).

136. *Hall*, 512 U.S. at 891 (Thomas, J., concurring); *see also id.* at 880 (majority opinion).

137. *Id.* at 892 (Thomas, J., concurring).

138. *Id.* at 945.

139. *Id.* at 914-16.

140. *See id.* at 894.

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law as a "catchall provision" intended to prevent states from using any tactic to abridge a minority's right to vote.[141] Other terms in the section, such as "'voting qualification[s]'" and "'prerequisite[s] to voting,'" indicate that the law concerns procedures that regulate access to the ballot, and that the more general terms in the statute should be understood to refer to the same class of items that the more specific terms define.[142] Furthermore, the section refers to the right of "'any citizen'" to vote—this singular noun does not support the existence of the group right of a dilution claim.[143] The text of the statute simply does not refer to the "weight" or "influence" of a vote, though these factors are precisely the concern of a dilution claim.[144]

Justice Thomas explained that when the *Gingles* Court interpreted section 2 as encompassing a dilution claim, it relied not on the text of the law, but rather on legislative history.[145] However, he rejects the use of legislative history in interpreting statutes, stating that the "'authoritative source' for legislative intent" is the text of the statute itself, since it is that text, and not the legislative history, which passed both Houses of Congress and that the President signed.[146] Professor Lani Guinier criticized Justice Thomas's reliance on the text of the law for interpretation, arguing that his "reconstruction" of the Act is unconventional and even "radical."[147] But Professor Guinier is exactly wrong.

The truth is that from the time of America's founding, courts have used the textual method of statutory construction and disregarded legislative history.[148] The writings of William Blackstone and James Kent from the eighteenth and nineteenth centuries show that courts did not consult legislative history when interpreting the law.[149] As the Court began to

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141. *Hall*, 512 U.S. at 917 & n.19 (Thomas, J., concurring) (citing *Katzenbach*, 383 U.S. at 335). Justice Thomas's narrow interpretation of this language is in glaring contrast to the Court's previous interpretation. *See supra* notes 80-82 and accompanying text.

142. *Hall*, 512 U.S. at 917-18 (Thomas, J., concurring). Here Justice Thomas cited the canon of statutory construction known as *ejusdem generis*, which holds "that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed." BLACK'S, *supra* note 20, at 594.

143. *Hall*, 512 U.S. at 918 (Thomas, J., concurring).

144. *See id.* at 918-19.

145. *Id.* at 932 (quoting *Gingles*, 478 U.S. at 43 n. 7) ("[T]he authoritative source for legislative intent lies in the Committee Reports on the bill.").

146. *Id.* at 933.

147. Lani Guinier, Comment, *(E) Racing Democracy: The Voting Rights Cases*, 108 HARV. L. REV. 109, 118 (1994).

148. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 369 (2012) (explaining the traditional notion that "no recourse may be had to legislative history").

149. *Id.* at 369 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 59 (4th ed. 1770); 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW *560 (Charles M. Barnes ed., 13th ed. 1884)).

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retreat from this principle in the early twentieth century,[150] the dangers of using legislative history grew because legislators create such "history" for the express purpose of influencing courts with the expectation that courts may use it in interpreting the law.[151] Conversely, courts can often use legislative history to support whatever outcome the judges happen to prefer since the history tends to support multiple interpretations of the law.[152]

By wrongly deriving dilution claims from section 2, Justice Thomas says the Court has forced the judicial branch to make political decisions about which districting scheme or electoral system provides the most effective vote to minorities.[153] But, he asks, how can courts make such decisions when there is no standard by which courts can measure dilution?[154] Though the Court in *Gingles* purportedly established a test for dilution claims, Justice Thomas sees it as nothing more than an "assumption that racial groups can be conceived of largely as political interest groups."[155] This assumption has led courts to segregate races and create a "system of 'political apartheid,'" which is contrary to the ideal of racial equality in the Constitution and in the Voting Rights Act itself.[156]

Professor Andrea Bierstein criticized Justice Thomas's treatment of dilution claims as political questions, arguing that "[i]t never seemed to occur to Thomas that the Constitution and the Voting Rights Act represent political theory choices, which it is then the Court's obligation to interpret and enforce."[157] Professor Bierstein's argument illustrates a truth that escapes too many in the modern legal profession: the branches of

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150. *Id.* at 372 (citing Standard Oil Co. v. United States, 221 U.S. 1, 50 (1911) (stating that the Court began to use legislative history in its first opinion interpreting the Sherman Act)). It is not surprising that the Court resorted to legislative history in interpreting the Sherman Act. The Act states: "Every contract . . . in restraint of trade or commerce . . . is declared to be illegal." 15 U.S.C. § 1 (2012). Taken literally, this would mean that every contract is illegal. Given such an absurd statute, the Court, perhaps understandably, sought meaning beyond the text.

151. *See, e.g.*, SCALIA & GARNER, *supra* note 148, at 377 (citing R.W.M. DIAS, JURISPRUDENCE 237 (4th ed. 1976)).

152. *See id.*

153. *Hall*, 512 U.S. at 896, 902-03 (Thomas, J., concurring).

154. *Id.* at 896 (quoting *Baker*, 369 U.S. at 300 (Frankfurter, J., dissenting) ("Talk of 'debasement' or 'dilution' is circular talk. One cannot speak of 'debasement' or 'dilution' of the value of a vote until there is first defined a standard of reference as to what a vote should be worth.")). *See also id.* at 880 (majority opinion).

155. *Id.* at 905 (Thomas, J., concurring). "[T]he factors listed in *Gingles* . . . are nothing but puffery used to fill out an impressive verbal formulation and to create the impression that the outcome in a vote dilution case rests upon a reasoned evaluation of a variety of relevant circumstances." *Id.* at 939.

156. *Id.* at 905-06 ("The assumptions upon which our vote dilution decisions have been based should be repugnant to any nation that strives for the ideal of a color-blind Constitution."). *See* Jones, *supra* note 135, at 345 ("The courts' arrogation of political power from the people and their representatives saps the creativity of our political process and, more ominously, has placed serious obstacles in the path of our becoming a color-blind society.").

157. Andrea Bierstein, *Millennium Approaches: The Future of the Voting Rights Act after* Shaw, De Grandy, *and* Holder, 46 HASTINGS L.J. 1457, 1519 (1995).

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government have separate powers, courts have the power to interpret law, and interpreting law is not the same as making it.[158] Professor Guinier accused Justice Thomas of departing from precedent for political reasons.[159] But Justice Thomas was doing just the opposite.[160] He was showing that it was precedent that was based on politics—his departure from precedent was not a political decision, but rather a decision to abandon politics.[161]

In a bit of psychoanalysis, Professor Bierstein tries to pinpoint the source of Justice Thomas's disdain for dilution claims.[162] She figures that since he is a "conservative Republican African-American, [he] may feel quite strongly that being grouped with other African-Americans will not cause him to be better represented . . . ."[163] Aside from the fact that, with a Supreme Court Justice's salary,[164] Justice Thomas could probably afford to move to a voting district that suits his politics, Professor Bierstein's assumption is unnecessary anyway given the clarity, common sense, and centuries of history that support Justice Thomas's arguments—he has said exactly why he does not like dilution claims, so no assumptions regarding his motives are necessary.[165] However, as shown, such racist assumptions are commonplace among those who advocate section 2 dilution claims.[166] The assumption underlying the "results test" is that situations which could conceivably have resulted from racial discrimination are assumed to have resulted from racial discrimination;[167] the assumption that lies beneath the whole reason for section 2 dilution claims is that minority groups are nothing more than political interest groups.[168] Aggregation of minority groups in dilution claims evokes another racist assumption; and is, therefore, another reason why section 2 dilution claims should not exist.[169]

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158. *See, e.g.*, U.S. CONST. art. I, § 1 ("All *legislative Powers* herein granted shall be vested in a Congress.") (emphasis added); U.S. CONST. art. II, § 1 ("The *executive Power* shall be vested in a President.") (emphasis added); U.S. CONST. art. III, § 1 ("The *judicial Power* of the United States, shall be vested in one supreme Court.") (emphasis added).

159. Gunier, *supra* note 147, at 120 n.80 (citing *Hall*, 512 U.S. at 893 (Thomas, J., concurring) ("[I]t is only a resort to political theory that can enable a court to determine which electoral systems provide the 'fairest' levels of representation or the most 'effective' or 'undiluted' votes to minorities.")).

160. *See Hall*, 512 U.S. at 901-02 (Thomas, J., concurring).

161. *See id.*

162. *See* Bierstein, *supra* note 157, at 521.

163. *Id.*

164. As of 2009, associate justices of the United States Supreme Court made an average of $213,900 per year. *See* David Searls, *Annual Salary of Associate Justices of the Supreme Court*, CHRON, http://work.chron.com/annual-salary-associate-justices-supreme-court-2713.html (last visited Mar. 26, 2013).

165. *See Hall*, 512 U.S. at 892-93 (Thomas, J., concurring).

166. *See, e.g.*, Bierstein, *supra* note 157, at 521.

167. *See supra* p. 17.

168. *See supra* pp. 19-20.

169. *See infra* Part III.

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## IV. AGGREGATION

As noted above, the first requirement under *Gingles* for a section 2 dilution claim is that the minority group be large and geographically compact enough to constitute a majority in a single district.[170] However, this says nothing about whether that group needs to consist of a single minority, or whether it can be a combination of minorities, i.e., whether different minorities can aggregate to bring a dilution claim.[171] The Supreme Court has not ruled on whether aggregation is permitted, though in *Growe v. Emison*[172] it hinted that aggregation would be permissible as long as the group could show that it was politically cohesive (cohesion being the second *Gingles* factor).[173] Lower courts are split on the issue.[174]

In *Campos v. City of Baytown*,[175] a Fifth Circuit case, blacks, Latinos, and Hispanics together alleged that the city's at-large election system violated section 2 by preventing blacks, Latinos, and Hispanics from being elected to the city council.[176] The city argued that to determine a group's preferred candidate and satisfy the second *Gingles* factor, the court need only look to see which candidate got the majority of the minority's vote.[177] The Fifth Circuit disagreed, saying that only elections with a minority-race candidate may be examined.[178] The plaintiffs then presented expert testimony regarding five previous elections in the city as evidence that when either a black or a Hispanic candidate ran, the black and Hispanic voters together voted for the minority over the white candidates.[179] One blatant flaw with this evidence, which the court failed to mention, is the fact that

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170. *See supra* note 99 and accompanying text.

171. *See generally Gingles*, 478 U.S. 30.

172. 507 U.S. 25.

173. *Id.* at 41 ("Assuming (without deciding) that [aggregation is] permissible . . . when dilution of the power of such an agglomerated political bloc is the basis for an alleged violation, proof of minority political cohesion is all the more essential.").

174. *See, e.g.*, Pope v. Cnty. of Albany, 687 F.3d 565, 572 & n.5 (2d Cir. 2012) ("The circuits are split as to whether different minority groups may be aggregated to establish a Section 2 claim."); *compare* Concerned Citizens of Hardee Cnty. v. Hardee Cnty. Bd. of Comm'rs., 906 F.2d 524, 526 (11th Cir. 1990) (allowing aggregation), *and* Campos v. Baytown, Texas, 840 F.2d 1240, 1244 (5th Cir. 1988) (same), *and* Wilson v. Eu, 823 P.2d 545, 549-50 (Cal. 1992) (same), *with* Nixon v. Kent Cnty., 76 F.3d 1381, 1392 (6th Cir. 1996) (prohibiting aggregation).

175. 840 F.2d 1240.

176. *Id.* at 1241-42.

177. *Id.* at 1245.

178. *Id.* The court reasoned that, though only four members of the Court agreed with Justice Brennan in *Gingles* that the race of the candidate is not important, *Gingles* itself looked only at elections where black candidates were running, and that there was no evidence that any white candidate in Baytown offered the choice of a "'viable minority candidate.'" *Id.* (citing *Gingles*, 478 U.S. at 82-83) (White, J., concurring).

179. *Id.* at 1245-47.

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none of the elections pitted a black candidate against a Hispanic.[180] So while the elections did show that the blacks, Latinos, and Hispanics voted cohesively for either minority over any white candidate, there was no showing that the blacks, Latinos, and Hispanics would be politically cohesive in the case of a black versus a Hispanic candidate or vice versa.[181] This means the court tested for political cohesion only insofar as the minorities voted together against white candidates, not whether they voted together for candidates of one minority race against another minority race.[182] This contradicts the court's justification for excluding evidence of elections without any minority candidate—after all, why would an election of a black person versus a white person be any more evidence of a Hispanic's preferred candidate than an election between two white people? The court here is simply making a racist assumption that minorities prefer any candidate that is not white over one that is. Based on this assumption, the court found the second *Gingles* factor satisfied via aggregation.[183]

In *Nixon v. Kent County*,[184] the plaintiffs alleged the county's redistricting scheme, which reduced the amount of districts, packed[185] one district with too many minorities and split minorities in two other districts, thereby diluting the minority vote.[186] As a remedy, the plaintiffs proposed a majority-minority district including blacks, Latinos, and Hispanics.[187] The Sixth Circuit, however, did not allow such aggregation.[188] In much the same manner as Justice Thomas in *Hall*, the court analyzed the text of section 2 and found no mention of racial coalitions.[189] Finding the text clear, the court reasoned that there was no need to analyze legislative history.[190] The court also considered the potential harm to minorities if aggregation were allowed—defendants could draw districts so as to "submerg[e] the distinct interests of the two groups" and argue they were merely aggregating the groups' cohesive interests.[191] Thus, the Sixth

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180. Two of the elections put a Hispanic against a white, and the other three put black people against whites. *Campos*, 840 F.2d at 1245-46.

181. *See id.* at 1242.

182. *See id.* at 1244.

183. *Id.* at 1248 ("The standing evidence showed that Blacks, Hispanics, and Latinos, as one minority, were politically cohesive.").

184. 76 F.3d 1381.

185. "Packing" is "[a] gerrymandering technique in which a dominant political or racial group minimizes minority representation by concentrating the minority into as few districts as possible." BLACK'S, *supra* note 20, at 1217.

186. *Nixon*, 76 F.3d at 1384.

187. *Id.*

188. *Id.* at 1386-87.

189. *Id.* The court says that if Congress had intended to allow aggregation, the statute would not say "class" in the singular, nor would it have "its members" rather than "their members." *Id.*

190. *Id.* at 1387.

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

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Circuit avoided the race-based assumption that the Fifth Circuit made in *Campos*.[192]

Some commentators agree with the Sixth Circuit's determination that aggregation should not be permitted under section 2.[193] Others criticize the refusal of courts to allow aggregation, arguing that this unfairly limits the ability of minorities to bring dilution claims.[194] Though Justice Thomas has not made his opinion public on the issue of aggregation, it is probably safe to assume that he would not like it.[195] Because Justice Thomas is a textualist,[196] and aggregation is not found in the plain text of the statute, he likely would not find that the legislature intended it.[197] Moreover, aggregation exacerbates the problem with "'political apartheid,'" which he believes dilution claims already create[198]—aggregation erases distinctions among minority groups by assuming that the preferred candidate for all of them is merely one that is not white.[199]

## V. CONCLUSION

The racist assumptions inherent in section 2 dilution claims and aggregation show that such claims contravene the purpose of the Voting Rights Act—to eradicate racial discrimination in voting[200]—by allowing courts to discriminate based on race when determining the validity of voting districts.[201] They also offend the purpose of the Fifteenth Amendment—to

192. *See id.*

193. *See, e.g.*, Christopher E. Skinnell, Comment, *Why Courts Should Forbid "Minority Coalition" Plaintiffs Under Section 2 of the Voting Rights Act Absent Clear Congressional Authorization*, 2002 U. CHI. LEGAL F. 363, 364, 374 (2002) (arguing that the statute does not address aggregation and it is not the courts' job to expand the statute); *see* Sebastian Geraci, Comment, *The Case Against Allowing Multicultural Coalitions to File Section 2 Dilution Claims*, 1995 U. CHI. LEGAL F. 389, 392-93 (1995) (arguing neither the text of the statute nor its legislative history supports aggregation).

194. *See, e.g.*, Chelsea J. Hopkins, Comment, *The Minority Coalition's Burden of Proof Under Section 2 of the Voting Rights Act*, 52 SANTA CLARA L. REV. 623, 641 (2012) ("[M]any scholars view the strict requirements of *Gingles* as a bar to the expansion of voting rights jurisprudence."); Schulte, *supra* note 16, at 480 ("It is counterintuitive to say that section 2 will remedy a situation in which one protected minority group's votes are being diluted, but not if two or more protected groups' votes are being diluted."); Angelo N. Ancheta & Kathryn K. Imhara, *Multi-Ethnic Voting Rights: Redefining Vote Dilution in Communities of Color*, 27 U.S.F. L. REV. 815, 822 (1993) ("Combining Latinos and African-Americans would seem to be a logical choice, since both groups suffer from discrimination, are under-represented in government and are protected under the Voting Rights Act.").

195. *See Hall*, 512 U.S. at 891-92 (Thomas, J., concurring).

196. *See id.* at 914-16.

197. *See* H. Brent McKnight, *The Emerging Contours of Justice Thomas's Textualism*, 12 REGENT U. L. REV. 365, 365 (2000); *see* 42 U.S.C. § 1973(b).

198. *See supra* note 156 and accompanying text.

199. *See Hall*, 512 U.S. at 907-08 (Thomas, J., concurring).

200. *See Katzenbach*, 383 U.S. at 308.

201. *See supra* Part III.

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protect citizens' rights to vote from abridgement on account of race[202]—by forcibly combining potentially divergent interests solely on the basis of race.[203] As Justice Thomas said, such assumptions are "repugnant to any nation that strives for the ideal of a color-blind Constitution."[204] There is yet another racist assumption that goes a long way toward explaining the fundamental drive for dilution claims: minorities vote for Democrats and for government welfare.[205] Even if this assumption is correct, it should be in the open and subject to political debate, not cloaked under the guise of equality and used to put political decisions in the hands of judges.

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202. *See* U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

203. *See e.g.*, *supra* Part III.

204. *Hall*, 512 U.S. at 905-06 (Thomas, J., concurring).

205. *See, e.g.*, *Gingles*, 478 U.S. at 59 (Brennan, J.) (giving example of black support for black Democratic candidate, not mentioning a possible black candidate of another party); M. Nycole Hearon, Comment, *"We Got Next": Will Texas Redistricting Dictate a Definitive Answer by the Supreme Court on Minority Aggregation Under Section 2 of the Voting Rights Act?*, 7 SCHOLAR 71, 92 (2004) (listing the following as mattering "immensely" to minority communities: "allocation of governmental benefits, affirmative action, and federal contracting rules.") (quoting *Symposium: Multicultural Empowerment: It's Not Just Black and White Anymore*, 41 STAN. L. REV. 957, 960 (1995))); Dietz, *supra* note 116, at 531-32 ("[T]he creation of African American majority-minority districts concentrates Democratic votes in a few districts, while allowing Republicans to gain a majority in more districts."); Ancheta & Imhara, *supra* note 194, at 854 (advocating influence claims because "[c]rossover votes from white Democrats" could help elect a preferred minority candidate).

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