

Two Fs for Formalism: Interpreting Section 2 of the Voting Rights Act in Light of Changing Demographics and Electoral Patterns

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INTRODUCTION

Communities of color in the United States are growing, dispersing, becoming more heterogeneous, and participating in elections at higher rates than ever before.¹ These developments raise a number of challenging questions about the proper interpretation of § 2 of the Voting Rights Act of 1965 (“§ 2”),² which prohibits voting practices that have discriminatory results,

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¹ See *infra* text accompanying notes 12–35.

² 42 U.S.C. §§ 1973–1973bb-1 (2012). Section 2 is codified at 42 U.S.C. § 1973 (2012).

including dilutive electoral arrangements under which minority voters have “less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”³ In particular, the growing diversity and apparent political power of communities of color may complicate the standard civil rights picture of “discrete and insular minorities”⁴ who require heightened protections in the political process. In response, pressure may grow to simplify the scope of § 2 through clear bright-line rules that limit or preclude § 2’s application in certain contexts.

This Article considers two attempts to limit § 2 in light of recent demographic changes and voting patterns, as illustrated in two recent district court decisions addressing relatively novel questions that are likely to recur in § 2 litigation in the coming years:

- (1) *Georgia State Conference of the NAACP v. Fayette County Board of Commissioners*⁵ (“*Fayette County*”), a case that considered whether, in light of growing minority political strength, majority-minority districts are the exclusive remedy to provide voters of color with an opportunity to elect their preferred candidates;
- (2) *Favors v. Cuomo*⁶ (“*Favors*”), which, among other things, considered whether, in light of growing heterogeneity within communities of color, members of different minority groups can collectively bring a claim for vote dilution under § 2.

In these cases, the defendant jurisdictions argued for restrictive interpretations of § 2, exemplifying what I describe as a “formalist”⁷ approach to statutory interpretation. Although the term “formalism” has been given many meanings, I use it here to signify a mode of statutory interpretation characterized by three qualities: (1) a form of reasoning that relies on *deduction* from presumably authoritative statutory text, structure, or intent (or

³ 42 U.S.C. § 1973(b) (2012).

⁴ See *United States v. Carolene Products Co.*, 304 U.S. 144, 152–53 n.4 (1938) (“[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”).

⁵ 950 F. Supp. 2d 1294 (N.D. Ga. 2013), *aff’d in part, vacated in part, and rev’d in part*, 775 F.3d 1336 (11th Cir. 2015). In the interest of disclosure, I acknowledge that I worked briefly on this case as part of the plaintiffs’ litigation team while serving as Assistant Counsel at the NAACP Legal Defense & Educational Fund.

⁶ No. 11-cv-5632, 2014 WL 2154871 (E.D.N.Y. May 22, 2014), *modified*, 2014 WL 3734378 (E.D.N.Y. July 28, 2014).

⁷ I acknowledge that this term is somewhat indeterminate, as “[o]ver the years,” the term “formalism” has “accreted so many meanings and valences” so as to devolve into “an all-purpose term both of approbation and of disapprobation.” Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 180 (1987). Here, however, I intend to use the term “formalism” not as a term of disfavor (or of approval), but rather as a description of the methodological approach employed by the defendants in these two cases.

some combination of the three), as opposed to induction from policy or practice over time; (2) an approach to legal standards that relies on *clear bright-line rules*, as opposed to more flexible balancing tests; and (3) a prioritization of transparency and efficiency over other values like efficacy or justice.⁸

In the Voting Rights Act (“VRA”) context, formalist rules would purportedly serve two policy goals. First, they would provide bright lines that are comparatively easier for courts and legislatures to administer when applying or seeking to comply with the statute. Second, they would limit the scope of liability under § 2, which has been criticized as increasingly unnecessary in a world of growing minority political strength, as well as constitutionally problematic insofar as it inevitably involves what Chief Justice Roberts derides as the “sordid business” of “divvying us up by race.”⁹

I do not attempt to evaluate the desirability of these objectives; nor to discuss the relative merits of formalism, or its counterpart, functionalism; nor to evaluate the interpretative validity of the particular readings of § 2 put forth by the defendant jurisdictions in the cases discussed here. These are all of course interesting issues, but in this Article, I am primarily interested in a narrower question: whether the formalist readings of § 2 championed by the defendants in *Fayette County* and *Favors* — and which I believe may reappear in response to the growing political influence and heterogeneity of communities of color — in fact serve their purported goals of increasing judicial efficiency and reducing race-consciousness.

I contend that they do not. In both *Fayette County* and *Favors*, the bright-line rules proposed by the defendants would do little, if anything, to simplify administration of the statute or to minimize race-conscious decisionmaking. To the contrary, the defendants’ position in *Fayette County* had the perverse consequence of encouraging litigation and requiring a remedy that was more race-conscious than what appeared to be necessary to cure the plaintiffs’ injury. While formal rules may sometimes be appropriate in the pleading context, a more functional approach that takes cognizance of actual voting patterns in a district may provide more effective remedies, and simultaneously ensure that redistricting is no more race-conscious than necessary to provide minority voters with an opportunity to elect their preferred candidates.

Meanwhile, in *Favors*, the defendants’ proposed rule would at best limit the reach of the statute, and thus marginally decrease the frequency that

⁸ See William N. Eskridge, *Relationships between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J. L. & PUB. POL’Y 21, 21–22 (1998). See also Posner, *supra* note 7, at 181 (acknowledging different definitions of formalism but defining it as “the use of deductive logic to derive the outcome of a case from premises accepted as authoritative”). As Eskridge notes, however, treating formalism and functionalism as antipodal modes of interpretation risks oversimplification and obscures the manner in which purportedly formalist and functionalist approaches often incorporate elements of each other. See Eskridge, *supra*, at 28–29.

⁹ League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 512 (2006) (Roberts, C.J., concurring in part and dissenting in part).

race-conscious remedies are imposed. On the remaining occasions when the statute would still apply, however, the *Favors* defendants' proposed rule would increase the *degree* to which courts and legislatures must consider race. It is not clear that this would be a preferable outcome for those who seek to minimize race-conscious decisionmaking. Moreover, given the arbitrariness of racial categories, a formalist approach to the question of what constitutes a protected class under the VRA risks reifying a monolithic vision of distinct homogeneous racial and ethnic groups. A functional understanding that instead recognizes minority communities based on actual political behavior would be more responsive to the antiessentialist concern animating some critics of the VRA — namely, that individuals who belong to the same racial or ethnic group should not be treated, with a broad brush, as alike on that basis.

In sum, the defendants' proposed rules offer little benefit. They do not reduce the role that race plays in the redistricting process. Moreover, the proposed rules will reduce the influence of minority voters in the political process, while reducing the incentive to build coalitions across racial and ethnic lines, which I suspect is their chief attraction for § 2 defendants. Ultimately, if we agree with the Supreme Court's statement in *Johnson v. De Grandy*¹⁰ — that the VRA should be interpreted in a manner that “hasten[s] the waning of racism in American politics”¹¹ — then a different approach, which employs case-by-case decisionmaking and a more functional method of interpreting § 2, is preferable.

I. DEMOGRAPHIC TRENDS, ELECTORAL PATTERNS, AND NEW QUESTIONS FOR SECTION 2 OF THE VOTING RIGHTS ACT

A. *Four Demographic and Electoral Trends*

There are at least four noteworthy trends that set the stage for this discussion: (1) the tremendous growth of minority communities; (2) increasing heterogeneity within those communities; (3) geographic dispersion of minorities, both across regions and within metropolitan areas; and (4) unprecedented levels of political participation by voters of color. I describe these in more detail below.

Growth. The minority population has grown substantially in both absolute and relative terms. In the 2010 U.S. Census, the number of people reporting their race and ethnicity as something other than exclusively non-Hispanic white increased from 86.9 million to 111.9 million, which constituted over one-third of the U.S. population.¹² The “vast majority” of U.S.

¹⁰ 512 U.S. 997 (1994).

¹¹ *Id.* at 1020.

¹² Press Release, U.S. Census Bureau, 2010 Census Shows America's Diversity, (March 24, 2011) [hereinafter Census Bureau Diversity Press Release], available at <https://www.cen->

population growth came from groups other than non-Hispanic whites,¹³ and more than half of U.S. population growth during that period came from Hispanics alone.¹⁴ Meanwhile, the nation's non-Hispanic white population grew by only 1.2% and declined as a share of the total population — from 69% to 64%.¹⁵

Heterogeneity. America's growing diversity has also been reflected *within* communities of color and even in the way that individuals describe themselves. While the African American population grew substantially between 2000 and 2012 — at a rate of 12.3%, reaching almost 40 million¹⁶ — its growth was outpaced by that of other minority groups. The Hispanic population grew substantially faster — at a rate of 43.0% — to reach over 50 million, making Hispanics the largest ethnic or racial minority group in the United States.¹⁷ Meanwhile, the Asian population grew the fastest, at a rate of 43.3% that surpassed 4 million.¹⁸

Thus, much of the population growth witnessed between 2000 and 2010 was within immigrant groups of different backgrounds and national origins. For example, among Hispanics, the fastest growth in recent decades has not been among the three largest Hispanic groups in the U.S. (Mexicans, Puerto Ricans, and Cubans), but among “New Latinos” from places such as the Dominican Republic and Central and South American nations.¹⁹ Even among Black populations, recent immigrants from Africa and the Caribbean are increasingly driving growth.²⁰ In some cases, increasing heterogeneity of national origin may translate into divergent political views.²¹

How we describe ourselves as individuals has changed dramatically as well; we increasingly embrace a pluralism that was unheard of just a few

sus.gov/newsroom/releases/archives/2010_census/cb11-cn125.html, archived at <http://perma.cc/J3QD-EG8Q>.

¹³ KAREN H. HUMES ET AL., U.S. CENSUS BUREAU, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010 at 3 (2011), available at <https://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf>, archived at <http://perma.cc/7BRS-SUED>.

¹⁴ *Id.*

¹⁵ *Id.* at 4 tbl.1.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See JOHN R. LOGAN, US2010 PROJECT, HISPANICS IN THE UNITED STATES: NOT ONLY MEXICANS 1 (2013), available at <http://www.s4.brown.edu/us2010/Data/Report/report03202013.pdf>, archived at <http://perma.cc/6VGG-7LXY>.

²⁰ Indeed, between 1990 and 2000, nearly 25% of the growth of the Black population in the U.S. was already the result of immigration from Africa and the Caribbean. Haya El Nasse, *Black America's New Diversity*, USA TODAY (Feb. 16, 2003), http://usatoday30.usatoday.com/news/nation/2003-02-16-black-america-diversity-usat_x.htm, archived at <http://perma.cc/NV7M-YDHD>.

²¹ Cuban Americans, for example, have long been more closely aligned with the Republican Party than have other Hispanics, although this may be changing as the proportion of Cuban Americans who are born in the United States increases. See Jens Manuel Krogstad, *After Decades of GOP Support, Cubans Shifting Toward the Democratic Party*, PEW RESEARCH CENTER (June 24, 2014), <http://www.pewresearch.org/fact-tank/2014/06/24/after-decades-of-gop-support-cubans-shifting-toward-the-democratic-party>, archived at <http://perma.cc/RL2J-PDGD>.

decades ago. As of 2000, the Census Bureau adopted a practice of permitting individuals to select more than one racial group on a Census form (for a total of up to fifty-seven different racial combinations, a figure that doubles once Hispanic ethnic origin is added to the mix).²² Since 2000, more and more Americans are taking advantage of these options, as the number of Census respondents describing themselves in multiracial terms has vastly outpaced overall population growth.²³

Location. There have been significant changes in the distribution of minority communities, both regionally and within metropolitan areas. With respect to regional change, between 2000 and 2010, states in the South and the West saw tremendous growth in minority populations,²⁴ while the post-industrial Midwest and Northeast continued to lose Black populations.²⁵ The state with the largest minority population growth rate was Nevada, which saw its minority population increase by 78% during the last decade.²⁶ The states with the highest growth rates among Hispanics were not in the Southwest, which traditionally has the largest Hispanic populations, but rather in the Deep South, where Hispanic populations doubled.²⁷ Overall, Asian American populations increased by 63% among sixteen Southern states and the District of Columbia; in some of those states, Asian-American populations nearly doubled.²⁸ Overall, 34% of the growth in the nation's minority population occurred in the South.²⁹

There have also been substantial changes in the distribution of minority populations at the metropolitan level, particularly in the form of increased suburbanization. Between 1960 and 2000, the number of African Americans

²² See HUMES ET AL., *supra* note 13, at 2.

²³ "People who reported a background of mixed race grew by 32% to 9 million between 2000 and 2010. In comparison, single-race population increased 9.2%." Moni Basu, *Census: More People Identify as Mixed Race*, CNN (Sept. 27, 2012, 2:35 PM), <http://inamerica.blogs.cnn.com/2012/09/27/census-more-people-identify-as-mixed-race>, archived at <http://perma.cc/3Z5A-59XN>. Subsequently, the number of Americans identifying as mixed race "jumped 6.6% between 2010 and 2012 — four times as fast as the national population." Emily Alpert, *More Americans Consider Themselves Multiracial*, L.A. TIMES (June 12, 2013), <http://articles.latimes.com/2013/jun/12/local/la-me-multiracial-growth-20130613>, archived at <http://perma.cc/CVE7-3SWP>.

²⁴ See Census Bureau Press Release, *supra* note 12.

²⁵ See, e.g., Press Release, U.S. Census Bureau, 2010 Census Shows Black Population has Highest Concentration in the South (Sept. 29, 2011), available at https://www.census.gov/newsroom/releases/archives/2010_census/cb11-cn185.html, archived at <https://perma.cc/W25K-EUBB>; Lynette Holloway, *Chicago's Shrinking Black Community*, THE ROOT (Aug. 23, 2011, 3:22 PM), http://www.theroot.com/articles/culture/2011/08/chicago_black_population_decline_is_it_irreversible.html, archived at <http://perma.cc/F64W-GVVV>.

²⁶ Census Bureau Press Release, *supra* note 12.

²⁷ See Jeffrey S. Passel et al., *Hispanics Account for More than Half of Nation's Growth in Past Decade*, PEW RESEARCH CENTER (Mar. 24, 2011), <http://www.pewhispanic.org/2011/03/24/hispanics-account-for-more-than-half-of-nations-growth-in-past-decade>, archived at <http://perma.cc/3XDE-4L3N>.

²⁸ See *The South's Demographic Shift as Asian-American Population Explodes*, NEWSOLA (Oct. 22, 2014), <https://newsela.com/articles/AsianAmericans-south/id/5524>, archived at <http://perma.cc/3B5X-VR7L>.

²⁹ See HUMES ET AL., *supra* note 13, at 17.

living in suburbs grew by 9 million; by 2000, almost 12 million African Americans lived in suburbs.³⁰ That pattern has continued,³¹ with about half of all African Americans now living in suburbs, an increase from about 43% in 2000.³² In all twenty of the nation's largest metropolitan areas, the proportion of the Black population living in the biggest city of each metro area declined during the 2000s.³³ Black-white residential segregation declined somewhat in sixty-one of the 100 largest U.S. metropolitan areas between the 2000 Census and the 2010 Census, including metropolitan areas around many major Southern cities such as Tampa, Atlanta, Orlando, Houston, and New Orleans.³⁴ Overall, suburbia in 2010 was about as diverse as cities were in 1980.³⁵

The picture is not entirely rosy: residential segregation remains a significant problem,³⁶ particularly for African Americans.³⁷ And while suburbs overall are increasingly diverse, minorities living in suburbs continue to live disproportionately in higher-poverty areas, even after controlling for income.³⁸ That is, even comparably well-off African Americans and Hispanics who have relocated to suburbia remain in relatively poorer neighborhoods,³⁹ indicating that it is not simply income that traps minority families in higher-

³⁰ See ANDREW WIESE, *PLACES OF THEIR OWN: AFRICAN AMERICAN SUBURBANIZATION IN THE TWENTIETH CENTURY I* (2005).

³¹ See Judy Keen, *Blacks' Exodus Reshapes Cities*, USA TODAY (May 19, 2011), http://usatoday30.usatoday.com/news/nation/census/2011-05-20-chicago-blacks-exodus_n.htm, archived at <http://perma.cc/4F24-52ZA>.

³² *The Changing Colour of Cities: Black Flight*, THE ECONOMIST, Apr. 2, 2011, at 44, available at <http://www.economist.com/node/18486343>, archived at <http://perma.cc/A86Q-79TW>.

³³ See John Sullivan, *Black America Is Moving South — and to the 'Burbs. What's It Mean?*, COLORLINES (Oct. 10, 2011, 9:40 AM), http://colorlines.com/archives/2011/10/2010_census_shows_black_population_has_highest_concentration_in_the_south.html, archived at <http://perma.cc/HD6B-VKXJ>.

³⁴ William H. Frey, *Census Data: Blacks and Hispanics Take Different Segregation Paths*, BROOKINGS INST. (Dec. 16, 2010), <http://www.brookings.edu/research/opinions/2010/12/16-census-frey>, archived at <http://perma.cc/3WAF-EHWM>.

³⁵ JOHN R. LOGAN, US2010 PROJECT, *SEPARATE AND UNEQUAL IN SUBURBIA I* (2014), available at <http://www.s4.brown.edu/us2010/Data/Report/report12012014.pdf>, archived at <http://perma.cc/4FXM-EYE2>.

³⁶ See, e.g., Michael B. de Leeuw et al., *The Current State of Residential Segregation and Housing Discrimination: The United States' Obligations Under the International Convention on the Elimination of All Forms of Racial Discrimination*, 13 MICH. J. RACE & L. 337, 354 (2008) ("Overall, although segregation declined somewhat between 1980 and 2000, it remains pervasive and significantly correlated with race, and not simply with income differences. For African Americans and Latinos, relatively high incomes are no protection against segregation . . ."); Frey, *supra* note 34 ("[T]he average white resident lives in a tract that is 79 percent white. The average black resident lives in a tract that is 46 percent black. And while Hispanics comprise only 15 percent of the population, fully 45 percent of their neighbors are also Hispanic.").

³⁷ See, e.g., Press Release, American Sociological Ass'n, *Study: Residential Segregation Still a Problem in U.S.* (May 29, 2012), available at http://www.asanet.org/press/residential_segregation_Still_Problem_in_US.cfm, archived at <http://perma.cc/3JSA-74AB>.

³⁸ See LOGAN, *supra* note 35, at 6–7.

³⁹ See *id.* at 10.

poverty residential areas. Nevertheless, even if the material conditions of communities of color have remained stubbornly resistant to improvement, the spatial configuration of those communities has changed dramatically in recent decades.

Electoral Participation. People of color are participating in elections — at least in presidential election years — at ever-increasing levels. Non-whites comprised more than a quarter of the eligible electorate for the first time in 2008, a figure that increased to just shy of 30% of the electorate in 2012.⁴⁰ Between 2004 and 2012, the number of African Americans who voted increased from 14.0 to 17.8 million (an increase of 27.1%); for Latinos, the increase was from 7.6 million to 11.2 million (an increase of 47.4%).⁴¹

But it is not simply that minorities are a larger share of the population than ever before. Electoral behavior itself is changing. Nationally, participation rates for minority voters are rising relative to whites.⁴² Even as overall participation levels for minority voters skyrocketed between 2004 and 2012, the total number of voting non-Hispanic whites *declined* from 99.5 million to 98.0 million.⁴³ In 2012, national Black turnout rates exceeded white turnout rates⁴⁴ (and revised estimates by Professor Michael McDonald suggest that this may have happened in 2008 as well⁴⁵).

Changes in voting behavior are the product of multiple factors. The legal regime plays a role, as increases in participation rates would not have been possible without robust enforcement of federal voting rights protections since 1965.⁴⁶ Moreover, the historic nature of the 2008 and 2012 elections as a motivating factor for minority voters cannot be ignored, and it remains to be seen whether those patterns will be repeated in future presidential elections.⁴⁷ Nevertheless, “the preponderance of data on demographics and turn-

⁴⁰ THOM FILE, U.S. CENSUS BUREAU, *THE DIVERSIFYING ELECTORATE — VOTING RATES BY RACE AND HISPANIC ORIGIN IN 2012 (and Other Recent Elections)* 5 tbl.3 (2013) [hereinafter *THE DIVERSIFYING ELECTORATE*], available at <http://www.census.gov/prod/2013pubs/p20-568.pdf>, archived at <http://perma.cc/V7TE-2ZSA>.

⁴¹ *Id.* at 2 tbl.2.

⁴² See Paul Taylor, *The Growing Electoral Clout of Blacks Is Driven by Turnout, Not Demographics*, PEW RESEARCH CENTER (Dec. 26, 2012), <http://www.pewsocialtrends.org/2012/12/26/the-growing-electoral-clout-of-blacks-is-driven-by-turnout-not-demographics>, archived at <http://perma.cc/VBH5-AAJZ>.

⁴³ U.S. CENSUS BUREAU, *THE DIVERSIFYING ELECTORATE*, *supra* note 40, at 2 tbl.2.

⁴⁴ *Id.* at 3 fig.1.

⁴⁵ See Michael O. McDonald, *2012 Turnout: Race, Ethnicity and the Youth Vote*, HUFFINGTON POST (May 8, 2013, 4:59 PM), http://www.huffingtonpost.com/michael-p-mcdonald/2012-turnout-race-ethnicity_b_3240179.html, archived at <http://perma.cc/EX9Y-UFRE>.

⁴⁶ See *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2626 (2013) (“There is no doubt that these improvements are in large part *because of* the Voting Rights Act. The Act has proved immensely successful at redressing racial discrimination and integrating the voting process.”); see also Gilda R. Daniels, *Racial Redistricting in a Post-Racial World*, 32 *CARDOZO L. REV.* 947, 962 (2011).

⁴⁷ See, e.g., Taylor, *supra* note 42; Husna Haq, *Black Voter Turnout Up, but Dems Can’t Take ‘Obama Effect’ for Granted*, *CHRISTIAN SCI. MONITOR* (Apr. 29, 2013), <http://www>

out suggests” that the electorate in future presidential elections “will be at least as diverse as [it was] in 2012.”⁴⁸

Racially polarized voting patterns have declined in some parts of the country, but they also remain persistent — and perhaps have intensified — in others.⁴⁹ Given disparate voting patterns between whites and persons of color, some commentators have argued that high levels of minority participation essentially determined the outcome of the 2008 and 2012 elections.⁵⁰ That is, the election and reelection of the nation’s first African American President may best be understood not as a product of, as some have suggested, a new “post-racial” era,⁵¹ but rather as evidence of the continuing salience of race as a driving force in American politics.

To be sure, the magnitude of these trends should not be exaggerated. Although minority voters are participating in record numbers in more regions of the country than ever before, national statistics obscure substantial variation in particular areas: for example, Black registration and turnout rates continued to lag significantly behind white rates in various states during the 2000s.⁵² Moreover, the picture is not uniform across minority groups. Nationally, Hispanic and Asian turnout rates continue to lag more than sixteen points behind white rates.⁵³ Those disparities, combined with the geographic self-sorting of ideologically like-minded voters,⁵⁴ may continue to limit the influence of minority voters — particularly in midterm elections, when minority participation typically declines significantly relative to that of white voters.⁵⁵ Indeed, one recent analysis concluded that

.csmonitor.com/USA/DC-Decoder/Decoder-Buzz/2013/0429/Black-voter-turnout-up-but-Dems-can-t-take-Obama-effect-for-granted, archived at <http://perma.cc/98BW-RKP9>.

⁴⁸ Nate Cohen, *Why the Voters of 2016 Are Likely to Be Younger and More Diverse*, N.Y. TIMES (Nov. 11, 2014), <http://www.nytimes.com/2014/11/12/upshot/why-the-voters-of-2016-are-likely-to-be-younger-and-more-diverse.html>, archived at <http://perma.cc/KWQ9-3AXF>.

⁴⁹ See *infra* text accompanying notes 77–80.

⁵⁰ See Dale Ho, *Minority Vote Dilution in the Age of Obama*, 47 U. RICH. L. REV. 1041, 1041–43 (2013); William H. Frey, *Minority Turnout Determined the 2012 Election*, BROOKINGS INST. (May 10, 2013), <http://www.brookings.edu/research/papers/2013/05/10-election-2012-minority-voter-turnout-frey>, archived at <http://perma.cc/U966-97FM>.

⁵¹ See, e.g., Shelby Steele, Opinion, *Obama’s Post-Racial Promise*, L.A. TIMES (Nov. 5, 2008), <http://www.latimes.com/news/opinion/opinionla/la-oe-steele5-2008nov05-story.html>, archived at <http://perma.cc/T5YE-TFZ6>.

⁵² For example, even after 2000, Black and white registration disparities of more than five percentage points persisted in Louisiana, Texas, and Virginia (where the disparity was 10.8 points), while Black turnout rates lagged behind white rates by more than ten points in Florida. See H.R. REP. NO. 109-478, at 25–31 (2006).

⁵³ See U.S. CENSUS BUREAU, THE DIVERSIFYING ELECTORATE, *supra* note 40, at 3 fig.1.

⁵⁴ See, e.g., Jowei Chen and Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 Q.J. POL. SCI. 239 (2013).

⁵⁵ ANDRA GILLESPIE & TYSON KING-MEADOWS, JOINT CTR. FOR POL. & ECON. STUDIES, BLACK TURNOUT & THE 2014 MIDTERMS 1 (2014), available at http://jointcenter.org/sites/default/files/Joint%20Center%202014%20Black%20Turnout%2010-29-14_0.pdf, archived at <http://perma.cc/8RFH-CQCQ> (“[T]he decline in voting among blacks between the 2008 presidential and 2010 midterm elections ranged from 10 to 29 percentage points.”). Notably, however, is that even with such declines in midterms elections, Black voters were predicted to be decisive in a number of close Senate and gubernatorial races in 2014. See *id.* at 2.

even if Republican congressional candidates had lost every Hispanic vote nationwide in 2014, the Republican Party still would have maintained its majority in the House.⁵⁶

The bottom line, however, is that communities of color are growing substantially and becoming more diverse; they are participating in record numbers in more areas of the country than ever before; and they will likely continue to grow as a proportion of the electorate at the national level.

B. *Two Questions Regarding Section 2 of the VRA*

These developments raise significant challenges for plaintiffs bringing vote dilution claims under § 2. But before turning to the two particular questions on which I will focus in this Article, some brief background on the doctrine of minority vote dilution is necessary. Minority vote dilution occurs when minority voters live in a jurisdiction or under an electoral arrangement in which they are “submerg[ed] . . . into the white majority, denying them an opportunity to elect a candidate of their choice.”⁵⁷ In contexts where voting patterns are polarized along racial lines, placing minority voters into an electoral arrangement where they are outnumbered by whites can prohibit them from electing their preferred candidates.⁵⁸

Claims of minority vote dilution are most frequently brought pursuant to § 2 of the VRA.⁵⁹ Under § 2, plaintiffs at the pleading stage must establish three conditions set forth by the Supreme Court in *Thornburg v. Gingles*⁶⁰ (commonly referred to as the “*Gingles* preconditions”): (1) that minority voters are, as a group, large enough to constitute a majority in a compact, single-member district; (2) that minority voters are politically cohesive; and (3) that white voters typically vote as a block to overwhelm minority voters’ preferences.⁶¹ If successful on the merits, the remedy for such a claim is most frequently the creation of a new district in which minority voters will be able to elect their preferred candidates.

⁵⁶ See Nate Cohn, *Why House Republicans Alienate Hispanics: They Don’t Need Them*, N.Y. TIMES (Oct. 21, 2014), <http://www.nytimes.com/2014/10/21/upshot/why-house-republicans-alienate-hispanics-they-dont-need-them.html>, archived at <http://perma.cc/XH4K-KWMD>. Indeed, although they are an increasingly important constituency, Hispanic voters remain a relatively small share of the electorate such that Republicans can still capture the White House without significantly improving their standing among them. See Nate Cohn, *Hispanic Voters Are Important for Republicans, but Not Indispensable*, N.Y. TIMES (Nov. 20, 2014), <http://www.nytimes.com/2014/11/21/upshot/hispanic-voters-are-important-for-republicans-but-not-indispensable.html>, archived at <http://perma.cc/QG7T-HKBB>.

⁵⁷ *Bartlett v. Strickland*, 556 U.S. 1, 11 (2009) (plurality opinion).

⁵⁸ See, e.g., Heather Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1671–72 (2001); Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1093–94 (1991).

⁵⁹ See SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY* 596 (3d ed. 2007).

⁶⁰ 478 U.S. 30 (1986).

⁶¹ *Bartlett*, 556 U.S. at 11 (plurality opinion) (citing *Gingles*, 478 U.S. at 50–51).

The touchstone of the vote dilution inquiry is racially polarized voting.⁶² If minority voters consistently prefer certain candidates, but are essentially locked out of elections by racially polarized voting patterns, then we might appropriately say that the minority community's voting strength has been diluted. Absent such conditions of polarization, it is impossible to say that there is in fact a cohesive minority community whose ability to elect its preferred candidates could be described as "abridged" in some sense.

The standard picture of a § 2 claim, then, is one in which voters of color are a *minority* of a jurisdiction; are properly described as part of a *single political community* that shares political preferences; are *locked out* of the political process by the existing electoral arrangement; but are *geographically concentrated* in a particular area of a jurisdiction, such that they could exercise effective control of a remedial district or districts. But this picture is complicated somewhat by the demographic and electoral developments described above. I will focus particularly on two distinct but related questions.

First, which remedies are permissible for § 2 vote dilution claims? This was a question posed in *Fayette County*: can § 2 remedies include the creation of a district in which minority voters are a significant share — but less than a majority — of a district?⁶³ Given that minorities are exercising greater political clout than ever before,⁶⁴ does § 2 continue to require the creation of majority-minority districts as the exclusive means of providing minority voters with equal opportunities to elect their preferred candidates? Or is it possible that, at least in some circumstances, some lesser remedies may be appropriate in light of the seemingly unprecedented political power of minority voters?

Second, does § 2 apply to a group of voters that consists of individuals from more than one minority group? This was one of the questions posed in *Favors*: if the purpose of vote dilution doctrine under § 2 is to provide a minority community with a voice in the political process, may the doctrine account for the increasing heterogeneity within minority populations, such that a coalition of more than one minority group can obtain protection against the dilution of their voting rights under § 2? Or are such protections only available to voters who are members of a single minority group? Section 2 has been interpreted by the Supreme Court not to recognize so-called "crossover districts," in which minority voters along with a small group of white voters form a functional majority to elect their preferred candidates.⁶⁵

⁶² See, e.g., Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1851 (1992); Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1740 (1993).

⁶³ See *Georgia State Conference of the NAACP v. Fayette Cnty. Bd. of Comm'rs*, 950 F. Supp. 2d 1294, 1303–04 (N.D. Ga. 2013).

⁶⁴ See *supra* text accompanying notes 40–48.

⁶⁵ See *infra* text accompanying notes 85–86.

Does that rule also prohibit claims where voters from multiple minority groups similarly band together in the formation of an electoral majority?

I address both of these questions in turn below.

II. *FAYETTE COUNTY* AND MAJORITY-MINORITY REMEDIES

The first question I address is whether the only permissible remedy for a § 2 vote dilution claim is the creation of a majority-minority district. In doctrinal terms, the question is essentially whether the bright-line pleading requirement established by the plurality holding in *Bartlett v. Strickland*⁶⁶ — that minority voters must constitute a majority of a proposed district in order to bring a § 2 vote dilution claim⁶⁷ — applies to the remedial stage of a case. Courts could adopt a remedial bright-line rule, exemplified in the reasoning of the district court in *Fayette County*, that adapts *Bartlett*'s pleading requirement to the remedial phase of a case. As I explain below, however, such a formalistic approach would have the perverse effect of requiring *more* rather than less race consciousness. Furthermore, it would decrease the overall political influence of minority voters in the jurisdiction outside of the remedial area.

A. *The Majority-Minority Rule and Acceptable Section 2 Remedies*

Majority-minority districts can be employed to remedy vote dilution in conditions of severe racial polarization, significant turnout disparities, or both. For example, if we imagine conditions of perfectly polarized voting, majority-minority districts would be the only remedy that could provide minority voters the opportunity to elect their preferred candidates (assuming that registration and turnout rates are on par across different racial groups). Of course, such extreme conditions very rarely, if ever, occur. Any reasonable analysis of voting patterns in a district must therefore consider how cohesively minorities vote together, as well as the percentage of white voters that may cross over to support minority-preferred candidates.⁶⁸ During the early years of VRA enforcement, vote dilution claims were generally brought in conditions of severe polarization and substantial disparities between white and Black turnout rates, in which Black voters could only have an opportunity to elect their preferred candidates through the creation of a majority-minority — or even supermajority-minority — district.⁶⁹ Even to-

⁶⁶ 556 U.S. 1 (2009).

⁶⁷ See *id.* at 12–15.

⁶⁸ See Bernard Grofman et al., *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. REV. 1383, 1408 (2001).

⁶⁹ See e.g., *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 164 (1977) (approving as “reasonable” the Attorney General’s judgment that effective nonwhite representation in several districts required at least 65% of total district population to be nonwhite); see generally Kimball Brace et al., *Minority Voting Equality: The 65 Percent Rule in Theory and Practice*, 10 LAW & POL’Y 43 (1988) (noting that the old rule of thumb for the level of minor-

day, comparatively lower citizenship rates among Latinos in some areas may require analogous calculations.⁷⁰

Changes in minority population distribution and racial voting patterns present challenges to the standard § 2 vote dilution playbook, at least in some areas. For one thing, as residential segregation has declined modestly and minority populations have become increasingly suburbanized, drawing compact districts in which minorities are a majority of a district's voting-age population may become more difficult.⁷¹ More importantly, declining racial polarization in some areas raises the question whether majority-minority districting remains necessary to provide minority voters an equal opportunity to elect their preferred candidates.⁷²

But those changes tell an incomplete story. Perhaps the chief insight of political science with respect to the VRA over the past twenty-five years is this: whether any particular district will in fact provide minority voters with an opportunity to elect their preferred candidates depends on a complex of different factors, including the relative turnout levels of different racial groups; the degree to which members of a racial group might cross over to support candidates preferred by the majority of voters of a different racial group; and whether the election is a two-stage process, with a primary preceding a general election.⁷³ Imagine, for example, a jurisdiction in which, consistent with the overall national trends described above, Black turnout exceeds white turnout. In such a district, Black voters might form a majority of the *electorate* even if they are not a majority of the voting-age *population*⁷⁴ and would be able to elect their preferred candidate from the district even if voting is 100% polarized.

The precise level of racial polarization functions similarly. Voting is rarely, if ever, completely polarized;⁷⁵ voters from different racial or ethnic

ity population necessary to give minority voters effective control of a district was 65 percent, but that the actual number varies across time and space).

⁷⁰ See, e.g., Grofman et al., *supra* note 68, at 1391 (In many places, "due primarily to lower citizen voting age eligibility rates among Hispanics, Hispanic population percentages well above 50% may be needed to provide Hispanic voters with an equal opportunity to elect candidates of choice.")

⁷¹ See Abigail Thernstrom, *Redistricting in Today's Shifting Racial Landscape*, 23 *STAN. L. & POL'Y REV.* 373, 382 (2012) ("African Americans have moved to the suburbs in very large numbers, and most have settled in racially mixed neighborhoods . . . Piecing together the ability to elect districts in which one group is a decisive majority will be a mapmaking challenge.")

⁷² See, e.g., Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 *N.C. L. REV.* 1517, 1537–38, 1553 (2002).

⁷³ See, e.g., Grofman et al., *supra* note 68, at 1385.

⁷⁴ For example, imagine a 100-person jurisdiction composed of forty Black voters and sixty white voters. If Black turnout is 100% (totaling forty voters), but white turnout is 50% (totaling thirty voters), then Black voters would still exercise functional control of the district, even in conditions of complete polarization.

⁷⁵ If 90% of voters of different races in the same district prefer different candidates, we could still safely say that voting is "polarized" in that jurisdiction. An exact cutoff point at which polarization no longer exists may be difficult to discern, but a requirement of total polarization is impractical because it would essentially preclude relief in any case.

groups within a district cross over to support the candidates preferred by the majority of another group in proportions that are rarely, if ever, perfectly symmetrical.⁷⁶

To be sure, I have argued elsewhere that the persistence of racial polarization in some areas means that majority-minority districting remains a vital tool to ensure equal opportunity in the political process.⁷⁷ Racially polarized voting has remained stubbornly persistent and may even be on the rise once again,⁷⁸ particularly in rural areas and parts of the South.⁷⁹ In such areas,

⁷⁶ See, e.g., Ho, *supra* note 50, at 1067–68 (listing Black and white support for Obama during the 2012 election by state, indicating patterns of polarization in many states, but asymmetry in levels of support).

⁷⁷ See *id.* at 1066–70.

⁷⁸ For example, before the 2014 general election, survey data from the Pew Research Center regarding likely voters indicated that, nationally, racial polarization in party preference appeared to have grown during the preceding eight years, with non-Hispanic whites intending to vote for Republican candidates by a margin of sixteen points (up from seven points in 2006), and minority voters intending to vote for Democratic candidates by a margin of sixty-two points (up from forty-seven points in 2006). PEW RESEARCH CTR., AS MIDTERMS NEAR, GOP LEADS ON KEY ISSUES, DEMOCRATS HAVE A MORE POSITIVE IMAGE 17 (2014), available at <http://www.people-press.org/files/2014/10/10-23-14-Political-release.pdf>, archived at <http://perma.cc/9RY9-CFS9>. Of course, one should be cautious in generalizing about polarization patterns based on party affiliation or on election results for particular offices. Polarization in presidential voting, for instance, may or may not reflect wider trends applicable to other elections like local contests, which may be affected by other factors. Courts analyzing polarization have therefore generally assigned more weight to polarization patterns in “endogenous” elections — i.e., elections of the same type that are the subject of a given lawsuit — than to “exogenous” elections, which are generally considered relevant, though less probative of polarization. See, e.g., *Johnson v. Hamrick*, 296 F.3d 1065, 1074–79 (11th Cir. 2002).

⁷⁹ Brian Amos and Professor Michael McDonald, for example, recently found substantial racial polarization in presidential candidate choice in rural and Southern areas. See generally Brian Amos & Michael P. McDonald, *Racially Polarized Voting and Roll Call Behavior in the U.S. House* (Midwest Political Sci. Ass’n 2015 Annual Conference Paper), available at <http://ssrn.com/abstract=2546384>, archived at <http://perma.cc/F6MY-TMK4>. At the statewide level, it is notable that in five states (Alabama, Arizona, Arkansas, Louisiana, and Mississippi), President Obama received less white support in 2008 than Senator Kerry did in 2004, despite the fact that 2008 was a year that heavily favored Democratic candidates nationally. See John M. Powers, *Statistical Evidence of Racially Polarized Voting in the Obama Elections, and Implications for Section 2 of the Voting Rights Act*, 102 GEO. L.J. 881, 896 (2014). In some states, Obama did worse than Kerry even among white Democrats, and conditions of polarization persisted even when controlling for various factors, such as party affiliation. See Stephen Ansolabehere et al., *Race, Region, and Vote Choice in the 2008 Election: Implications for the Future of the Voting Rights Act*, 123 HARV. L. REV. 1385, 1387, 1416–19 (2010); 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, 68–70 & tbl.1 (2009). Racial polarization in voting for the President persisted in many areas of the country in the 2012 election as well. See Charles Stewart III et al., *Regional Differences in Racial Polarization in the 2012 Presidential Election: Implications for the Constitutionality of Section 5 of the Voting Rights Act*, 126 HARV. L. REV. F. 205, 215–17 (2013). For example, 2012 exit polls in Mississippi indicated that almost 90% of whites voted for the Republican presidential ticket, while 96% of Blacks voted for the Democratic ticket. See *Races and Results, President: Mississippi*, CNN POLITICS (Dec. 10, 2012, 10:56 AM), <http://www2.cnn.com/election/2012/results/state/MS/president>, archived at <http://perma.cc/Y8WV-PJ9F>. These polarization trends in the South continued through the 2014 midterms. As one commentator predicted, in the context of “[t]his regional hyper-racialization,” presently there is not a single white Democrat in Congress representing the states of South Carolina, Georgia, Alabama, Mississippi, Louisiana, or

majority-minority districts will remain the only means of preventing minority vote dilution under § 2.⁸⁰ But even as racial polarization persists and increases in some places, it has declined in others, at least when compared to the early days of VRA enforcement. Indeed, since the 1990s, political scientists have observed that, in some areas, racially polarized voting has declined to such an extent that minority-preferred electoral outcomes can be achieved with something less than majority-minority districting.⁸¹ Where a small but significant number of white voters are willing to cross over to support minority-preferred candidates, minority voters need not constitute a majority of a district in order to elect their preferred candidates. They simply must be “large enough [as a group] to elect the candidate of [their] choice with help from voters who are members of the majority and who cross over to support the minority [voters’] preferred candidate.”⁸² Put another way, minority voters can be a “functional”⁸³ majority in some circumstances, even if they are not a strict numerical one.

The Supreme Court first confronted this state of affairs in 2009 in *Bartlett*, in which a plurality opinion by Justice Kennedy⁸⁴ held that plaintiffs may not bring a claim for minority vote dilution unless they can demonstrate that minority voters make up more than 50% of a hypothetical district.⁸⁵ In doctrinal terms, the plurality held that plaintiffs cannot satisfy the first *Gingles* precondition — that minority voters could constitute a majority in a hypothetical district — unless minority voters would be a numerical majority in that district.⁸⁶ In practical terms, this meant that § 2 does not require the creation or preservation of districts in which white voters cross over to support minority-preferred candidates, thus enabling minority voters to form a functional majority (“crossover districts”).

Bartlett displayed the hallmarks of formalism in statutory interpretation. It proceeded deductively from the plurality’s understanding of what the phrase “opportunity to elect” meant, rather than inductively from actual experience of how such an opportunity to elect had been afforded in practice. That is, rather than examining what percentage of minority concentrations were actually necessary to provide an opportunity to elect, it posited that as a

Arkansas. See Charles M. Blow, *The Solid South Will Rise Again*, N.Y. TIMES (Nov. 19, 2014), <http://www.nytimes.com/2014/11/20/opinion/charles-blow-the-solid-south-will-rise-again.html>, archived at <http://perma.cc/6SDE-LR8G>.

⁸⁰ See Ho, *supra* note 50, at 1069–70. Supermajorities may also be necessary to provide an opportunity to elect minority voters’ preferred candidates in areas where the citizenship rate among the voting-age population is substantially lower for minorities than it is for whites, as is often the case in regions with substantial Hispanic populations. See Grofman, *supra* note 68, at 1391.

⁸¹ See Charles S. Bullock, III & Richard E. Dunn, *The Demise of Racial Districting and the Future of Black Representation*, 48 EMORY L.J. 1209, 1240–41 (1999); Grofman et al., *supra* note 68, at 1391 n.32 (2001); Pildes, *supra* note 72, at 1537–38, 1553.

⁸² *Bartlett v. Strickland*, 556 U.S. 1, 13 (2009) (plurality opinion).

⁸³ See Grofman et al., *supra* note 68, at 1384.

⁸⁴ Justice Kennedy was joined by Chief Justice Roberts and Justice Alito.

⁸⁵ *Bartlett*, 556 U.S. at 12–17 (plurality opinion).

⁸⁶ See *id.* at 13–14.

matter of pure logic, an “opportunity . . . to elect” as that term is employed in the statute’s text⁸⁷ could exist only where voters of color outnumber white voters in a district. If minority voters are less than a majority, then a priori, “[they] have no better or worse opportunity to elect a candidate than does any other group of voters with the same relative voting strength.”⁸⁸ Thus, *Bartlett* created an objective bright-line pleading rule: if plaintiffs cannot demonstrate that minority voters comprise more than 50% of a hypothetical district, they cannot state a claim under § 2.⁸⁹ At the pleading stage, therefore, courts need not engage in a complex empirical analysis as to whether voting patterns in a particular area are such that minorities can exercise effective control of a district with less than 50% of the district’s voting-age population (“VAP”).

The *Bartlett* plurality’s rule ostensibly promotes two policy goals: First, it promotes transparency and predictability, as the 50% rule is purportedly easier to administer for courts and legislatures alike.⁹⁰ Second, it serves a gatekeeping function that narrows the number of cases in which § 2 is applicable. For those who believe that the race-consciousness required by § 2 remedies is constitutionally problematic, this is an intrinsic good. As Justice Kennedy’s plurality opinion noted, the absence of a clear bright-line rule to

⁸⁷ See 42 U.S.C. § 1973 (2012)

⁸⁸ *Bartlett*, 556 U.S. at 14 (plurality opinion).

⁸⁹ In theory, the fact that more and more people are self-identifying on the U.S. Census as being of more than one race could interact with this rule to make it even harder for plaintiffs to state a claim. If courts treat mixed-race individuals as a category unto themselves, rather than as members of the individual racial groups with which they identify, it would be harder for a single minority group to establish sufficient numbers to state a claim. For example, if courts hold that only individuals who identify as African American *alone* should be counted toward *Bartlett*’s 50% requirement, the fact that fewer people identify their race as African American alone will make it harder to find areas where African Americans constitute more than 50% of the voting-age population. For now, however, this is not an issue for plaintiffs bringing VRA claims. The Department of Justice guidelines for VRA enforcement indicate that, for purposes of VRA enforcement, individuals who identify as multiracial should be treated as members of the relevant minority group seeking VRA protection. That is, if a VRA claim is brought on behalf of African Americans, individuals who identify themselves as any part African American — rather than only those individuals who identify as African American alone — are treated as African Americans when calculating population numbers for purposes of VRA enforcement. See 76 Fed. Reg. 7470, 7472 (Feb. 9, 2011) (“[T]he total numbers for ‘Black/African American,’ ‘Asian,’ ‘American Indian/Alaska Native,’ ‘Native Hawaiian or Other Pacific Islander’ and ‘Some other race’ reflect the total of the single-race responses and the multiple responses in which an individual selected a minority race and white race.”); OFFICE OF MGMT. & BUDGET, OMB BULL. NO. 00–02, GUIDANCE ON AGGREGATION AND ALLOCATION OF DATA ON RACE FOR USE IN CIVIL RIGHTS MONITORING AND ENFORCEMENT (March 9, 2000), available at https://www.whitehouse.gov/omb/bulletins_b00-02, archived at <https://perma.cc/SNB9-ZVJA>.

⁹⁰ See *Bartlett*, 556 U.S. at 17 (plurality opinion) (“We find support for the majority-minority requirement in the need for workable standards and sound judicial and legislative administration. The rule draws clear lines for courts and legislatures alike.”); *id.* at 18 (“Unlike . . . crossover-district claims, the majority-minority rule relies on an objective, numerical test: Do minorities make up more than 50 percent of the voting-age population in the relevant geographic area? That rule provides straightforward guidance to courts and to those officials charged with drawing district lines . . .”).

limit § 2 claims could require legislatures and courts to evaluate the effect of *any* redistricting decision on minority voting power, thereby infusing the redistricting process with racial consideration to an extent that would, in his view, raise constitutional concerns.⁹¹ The Court has repeatedly cautioned that race-conscious redistricting may be in tension with constitutional imperatives of colorblindness⁹² and risks “balkaniz[ing] us into competing racial factions.”⁹³ Whatever one thinks of this view (which has been criticized extensively),⁹⁴ it seems apparent that from this perspective, limiting § 2 liability may be consistent with principles of constitutional avoidance. Finally, some have argued that a rule requiring the creation of crossover districts under § 2 would amount to granting federal statutory protection to Democratic-leaning districts,⁹⁵ thus replacing the remedial racial goals of the VRA with partisan ones, and raising further constitutional concerns.⁹⁶

B. *The Fayette County Remedial Rule*

But *Bartlett* leaves at least one question unanswered: namely, whether the 50% bright-line rule also applies at the *remedial* stage of a case. That is, given that *Bartlett* holds that a plaintiff can state a claim for vote dilution under § 2 only by showing that minority voters can constitute a majority of the voting-age population in a proposed district, does it then follow that a violation of § 2 can *only* be remedied with a majority-minority district?

Bartlett itself provides no direct answer, which leads to *Fayette County*.⁹⁷ *Fayette County* is in many ways a run-of-the-mill § 2 case. African Americans constituted about one-fifth of the county’s VAP, but due to racial polarization, they had never elected their preferred candidates to the school board or county commission, both of which were elected at-large. The plaintiffs’ complaint alleged that the county could instead be divided into five separate single-member districts, and that the first *Gingles* precon-

⁹¹ See *id.* at 21–22.

⁹² See, e.g., *Shaw v. Reno*, 509 U.S. 630, 657 (1993); *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

⁹³ *Shaw*, 509 U.S. at 657. See also *Bartlett*, 556 U.S. at 21 (plurality opinion) (quoting *Shaw*, 509 U.S. at 657).

⁹⁴ See, e.g., Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor’s Clothes*, 71 TEX. L. REV. 1589, 1593 (1993).

⁹⁵ See, e.g., Michael A. Carvin & Louis K. Fisher, “A Legislative Task”: *Why Four Types of Redistricting Challenges Are Not, or Should Not Be, Recognized by Courts*, 4 ELECTION L.J. 2, 13 (2005) (“Democratic strategists made it a priority to reduce the minority population in former majority-minority districts, often well below 50%, so as to make neighboring districts more competitive for Democratic — especially white Democratic — candidates.”).

⁹⁶ *Bartlett*, 556 U.S. at 22–23 (plurality opinion).

⁹⁷ See Georgia State Conference of the NAACP v. Fayette Cnty. Bd. of Comm’rs, 950 F. Supp. 2d 1294 (N.D. Ga. 2013), *aff’d in part, vacated in part, and rev’d in part*, 775 F.3d 1336 (11th Cir. 2015).

dition could be satisfied by drawing one of the districts with an African American majority population.⁹⁸

Initially, the plaintiffs and school board defendants sought to settle their dispute by agreeing to a district in which African American voters were a plurality (approximately 46.2%) of the voting-age population, but not a numerical majority.⁹⁹ In the plaintiffs' view, the settlement was sufficient because, although African Americans were not a majority of the voting-age population of the proposed district, voting patterns were such that African Americans would still be able to elect their preferred candidates in a district configured just shy of majority-minority status.¹⁰⁰

The County Commission, however, objected to the settlement between the plaintiffs and the school board, and the district court refused to approve it, on the grounds that it "was not a permissible remedy under § 2 [of the VRA] because it failed to create a majority-minority district."¹⁰¹ In the district court's view, "under *Bartlett*, any court-imposed remedy must include a majority-minority district."¹⁰² That reasoning extends the formalist logic of *Bartlett*. It employs a neat symmetry: if, under *Bartlett*, a § 2 violation occurs only where minority voters could, but are not permitted to, form a majority of the voting-age population in a proposed district, it would seem to follow that such a violation may be remedied only with a majority-minority district.¹⁰³ And it establishes a bright line that ostensibly furthers predictability: a § 2 violation will be met only with the creation of a majority-minority district, which reduces uncertainty about possible remedies.

With no settlement in hand, the case proceeded against both sets of defendants. After several months of litigation, the district court ultimately found in favor of the plaintiffs on summary judgment,¹⁰⁴ and, at the remedial stage, ordered the adoption of a new redistricting plan featuring a majority-minority district.¹⁰⁵

⁹⁸ *Fayette Cnty.*, 950 F. Supp. 2d at 1300; 775 F.3d at 1340–41.

⁹⁹ See Order Denying Plaintiffs' Motion to Certify Interlocutory Appeal at 3, *Fayette Cnty.*, 950 F. Supp. 2d 1294 (N.D. Ga. 2013) (No. 3:11-cv-123-TCB).

¹⁰⁰ See *id.* at 2, 11.

¹⁰¹ *Id.* at 2.

¹⁰² *Id.* at 7.

¹⁰³ Put differently, § 2 protects minority voters' ability to elect their preferred candidates. But if the "ability to elect" can only exist where minorities can "elect [their preferred] candidate based on their own votes and without assistance from others," *Bartlett v. Strickland*, 556 U.S. at 1, 14 (2009) (plurality opinion), then it would seem to follow that restoring such an ability would necessitate the creation of a majority-minority district.

¹⁰⁴ See 950 F. Supp. 2d at 1300, 1326; 952 F. Supp. 2d 1360, 1369 (N.D. Ga. 2013) (denying defendants' motion to certify for interlocutory appeal).

¹⁰⁵ See 996 F. Supp. 2d 1353, 1370 (N.D. Ga. 2014). The district court's ruling on summary judgment was recently reversed by the Eleventh Circuit, on the grounds that the district court engaged in factfinding that is inappropriate at the summary judgment stage. See *Georgia State Conference of the NAACP v. Fayette Cnty. Bd. of Comm'rs*, 775 F.3d 1336, 1347–49 (11th Cir. 2015). The matter is now set for trial. But the manner in which the case is ultimately disposed — summary judgment or trial — is irrelevant for the purposes of this discussion. What matters is the district court's ruling that in the event that plaintiffs establish liability, the only permissible remedy would be a majority-minority district.

C. Incentivizing Heightened Race-Consciousness Remedies

From the plaintiffs' perspectives, there was little to complain about at this point. They won their claims against both defendants, and obtained remedial districts for both the County Commission and the School Board, where African American voters would wield effective political power for the first time in Fayette County's history. Although the Eleventh Circuit subsequently reversed the entry of judgment for the plaintiffs, taking issue with the district court's apparent factfinding on summary judgment (but not casting doubt on the ultimate merits of the plaintiffs' case),¹⁰⁶ district-based elections have already been held, resulting in the election of the first African American to the County Commission.¹⁰⁷

Leaving aside the question of whether the *Fayette County* district court's remedial ruling was a proper extension of *Bartlett*,¹⁰⁸ there is something troubling about its rejection of the settlement agreement between the plaintiffs and the school board. Despite its tidy symmetry, the district court's reasoning in rejecting the settlement agreement in *Fayette County* does not advance the two policy goals animating *Bartlett*.

First, *Bartlett* proceeds from the premise that bright-line legal standards make for easier judicial administration. But extending a bright line rule from the pleading stage of a case to the remedial phase does not serve the same goal. At the pleading stage, bright lines may serve a gatekeeping function, signaling to courts and potential litigants when a claim might be viable, reducing unnecessary litigation, and giving clear signposts to policymakers. But the remedial stage is different. Constraining the range of permissible remedies in § 2 cases does not reduce the potential for litigation *ex ante*. Indeed, in *Fayette County*, the application of a bright-line rule to the remedial phase actually triggered costly and extensive litigation by eliminating the range of options over which the parties could negotiate,¹⁰⁹ and thus had the perverse effect of prolonging, rather than preventing, litigation.

¹⁰⁶ See 775 F.3d at 1348.

¹⁰⁷ See Jill Howard Church, *At Issue: Fayette County Debates District vs. At-Large Voting*, ATLANTA J. CONST. (Nov. 15, 2014), <http://www.ajc.com/news/news/local/at-issue-fayette-county-debates-district-vs-at-lar/nh7Mq>, archived at <http://perma.cc/CM9L-Q8ZL>.

¹⁰⁸ Purely as a matter of textual interpretation, it is not clear that extending *Bartlett*'s majority-minority pleading rule to the remedial phase of a case is a necessary consequence of the plurality opinion. It is one thing to hold, as the *Bartlett* plurality did, that the *creation* of such crossover districts is not required by the VRA, but quite another to say that the VRA *prohibits* such districts at the remedial phase of a case as a means of providing minority voters with an opportunity to elect their preferred candidates.

¹⁰⁹ Some observers have argued that, as a general matter, the predictability that accompanies bright-line rules is more important for substantive legal rules than it is for remedies. See, e.g., Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214, 1222 (2010); Andrei Marmor, *Should Like Cases Be Treated Alike?*, 11 LEGAL THEORY 27, 33–34 (2005). But see Samuel L. Bray, *Announcing Remedies*, 97 CORNELL L. REV. 753, 800 (2012) (acknowledging that, as a general matter, predictability in remedies may be less important "in criminal and quasi-criminal contexts," but not with

This leads to a second concern: while a bright-line 50% rule at the pleading stage might reduce race-conscious decisionmaking, such a rule in the remedial context may have the opposite effect. If turnout or polarization patterns are such that an opportunity to elect can be afforded through something less than a majority-minority district, should not a court take cognizance of this fact when fashioning a remedy? After all, in amending § 2 to incorporate a results standard, Congress specifically noted that courts applying the statute should engage in “a searching practical evaluation of the past and present reality, and on a functional view of the political process.”¹¹⁰ The standard practice in § 2 cases therefore has been to design remedies with an eye toward practical consequences.

Indeed, what is interesting about the problem here is that it is essentially the inverse of the turnout problem that confronted courts in the early decades of § 2 enforcement — a problem that courts sought to resolve through a functional approach. As noted, because voting was highly polarized and minority participation rates were often significantly lower than those of whites in the 1970s and 1980s, courts did not employ a bare majority-minority rule at the remedial phase of litigation, but instead frequently required that districts be drawn well above 50% minority to provide minority voters with a realistic opportunity to elect their preferred candidates.¹¹¹ That is, because remedies must actually cure a violation, courts hearing early § 2 cases did not employ bright lines at the remedial stage, but rather were sensitive to real-world conditions in a particular jurisdiction so as to ensure that remedies were effective.

At the same time, remedial orders generally should not go further than is necessary to cure an injury. Thus, in order to avoid overkill, courts today similarly must be attuned to actual conditions in a jurisdiction — including relative turnout rates and polarization patterns — that could make majority-minority districts an unnecessary remedy in certain contexts. Just as past circumstances have demanded a functional approach to § 2 that at times required supermajority-minority districting, today’s electoral and demographic environment may in some places require something less than majority-minority districting. Rather than focusing formalistically on arbitrary numerical thresholds, a proper assessment of whether a district will provide an effective remedy requires a more functional approach that attends to actual

respect to “ordinary civil violations, especially in situations where the harm to which the remedy corresponds is radically indeterminate”).

¹¹⁰ *Thornburg v. Gingles*, 478 U.S. 30, 45 (1986) (quoting S. REP. NO. 97-417, at 30, n.120 (1982)) (internal quotation marks omitted).

¹¹¹ See, e.g., Grofman et al., *supra* note 68, at 1390-91 (“In the South during the 1970s and 1980s[,] . . . conditions led some civil-rights advocates to argue that, in the South, districts with 65% black population were needed before African-American candidates could win.”). Imagine, for example, an area with 25% voter turnout for minorities and 50% for whites. In such a context, a district that is just over 50% minority voting-age population will not provide minority voters with an opportunity to elect their preferred candidates because minorities will not comprise a majority of the *electorate*. (In this example, they would be only about one-third of the electorate).

voting patterns in a district. Put another way, although pleading rules can be formal, designing remedies requires a degree of flexibility to accommodate the particular needs of different cases.¹¹²

Absent such flexibility, a bright-line majority-minority rule at the remedial stage would create a glaring irony. While *Bartlett*'s bright-line pleading rule for § 2 claims potentially reduces the frequency of race-conscious decisionmaking, placing restrictions on the sorts of remedies that can be ordered once a violation has been established does not. Rather, requiring line-drawers to draw majority-minority districts, even if unnecessary to provide minority voters with an opportunity to elect their preferred candidates,¹¹³ imposes more race-consciousness than necessary to cure or prevent a violation. *Fayette County* is an obvious case in point: the remedy granted on summary judgment was *more* race-conscious than the remedy in the proposed settlement.¹¹⁴

For those who believe that race-consciousness itself is in some sense problematic, this should raise substantial concerns.¹¹⁵ That is, if race-conscious redistricting itself raises policy concerns about "balkanization,"¹¹⁶ then the district court's interpretation of *Bartlett* in *Fayette County* appears to

¹¹² Cf. S. REP. NO. 97-417, at 31 (1982) (observing that § 2's results standard does not consist of "mechanistic rules for formulating remedies in cases which necessarily depend upon widely varied proof and local circumstances").

¹¹³ One could object that if it is possible to draw a district in which minority voters can elect their preferred candidate despite being less than 50% of the voting-age population, then perhaps § 2 relief is altogether unnecessary because voting is not truly racially polarized. That is perhaps what Justice Kennedy was suggesting in arguing that recognition of crossover districts would create some tension between the first and third *Gingles* prongs. See *Bartlett v. Strickland*, 556 U.S. 1, 16 (2009) (plurality opinion). But the fact remains that conditions of absolute polarization are rarely if ever observed, and such a requirement would render the statute unenforceable.

¹¹⁴ This is precisely the opposite of what Justice Thomas inveighed against when he famously argued in the school desegregation context that precise standards for remedies are desirable to cabin judicial discretion and ensure that remedies do not go beyond the injury found by a court. See *Missouri v. Jenkins*, 515 U.S. 70, 133 (1995) (Thomas, J., concurring) ("[W]e must impose more precise standards and guidelines on the federal equitable power, not only to restore predictability to the law and reduce judicial discretion, but also to ensure that constitutional remedies are actually targeted toward those who have been injured.").

¹¹⁵ See, e.g., *Prejean v. Foster*, 227 F.3d 504, 518 (5th Cir. 2000) ("Narrow tailoring demands . . . that the district chosen entails the least race-conscious measure needed to remedy a violation.").

¹¹⁶ See *Shaw v. Reno*, 509 U.S. 630, 657 (1993). In amending § 2 of the VRA in 1982 to incorporate a results standard, Congress made clear that the concern that vote dilution remedies might cause racial division was misplaced, because § 2's results standard applies only where voting is *already* racially polarized: "To suggest that it is the results test, carefully applied by the courts, which is responsible for those instances of intensive racial politics, is like saying that it is the doctor's thermometer which causes high fever." S. REP. NO. 97-417 at 34 (1982). I have made this point elsewhere. See Ho, *supra* note 50, at 1070 ("[S]tatutory claims for minority vote dilution can only be brought — and majority-minority districting can only be required — in contexts where racial polarization is *already present*."). Moreover, Congress concluded that, if anything, the results standard under § 2 may minimize these concerns as compared to an intent standard, which Congress has said "is unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities." S. REP. NO. 97-417 at 36 (1982).

magnify rather than address those concerns. As Professor Richard Pildes has noted, districts in which minority voters are less than a majority but work in “a kind of integrative, cross-racial political alliance” could be “thought [of as] consistent with, even the very ideal of, both the VRA and the U.S. Constitution.”¹¹⁷ Under appropriate circumstances, encouraging legislatures and courts to draw something less than majority-minority districts, so long as such districts preserve the minority community’s ability to elect candidates of its choice, is entirely consistent with the broader goal of making race less of a factor in American political life.

Unfortunately, both before and after *Bartlett*, lower courts have been confused on the issue of whether the creation of a majority-minority district is the exclusive remedy for vote dilution under § 2, and the Supreme Court may have to confront this issue at some point in the near future.¹¹⁸ But opting for a formalistic remedial rule would encourage unnecessary adversarial proceedings and would perversely transform the *Bartlett* pleading rule — which was intended to serve as a narrowing construction of the VRA’s reach — into a command that line-drawers and courts engage in greater race-consciousness than may be necessary to afford minority voters an opportunity to elect their preferred candidates.

D. Practical Consequences

For minority voting rights advocates, there is a lot at stake in the question of whether § 2 remedies are defined formalistically or functionally. Consider how states relied on a formalistic interpretation of § 5 of the VRA¹¹⁹ (“§ 5”) to defend redistricting decisions in the post-2010 round of redistricting. The “playbook” in some states was to use uniform demographic targets for majority-minority districts and thus “pack[] as many black voters into black districts so that the surrounding districts would be [more] white,”¹²⁰ in order to reduce the overall influence of Black voters while using § 5 compliance as a rationalization. For example, in Alabama,

¹¹⁷ Pildes, *supra* note 72, at 1548.

¹¹⁸ *Compare* Fairley v. Hattiesburg, 584 F.3d 660, 668 n.3 (5th Cir. 2009) (“[T]he VRA does not permit this court to mandate creation of swing wards, but only majority-minority ones.”), and *Nipper v. Smith*, 39 F.3d 1494, 1530–31 (11th Cir. 1994) (en banc) (“The inquiries into remedy and liability . . . cannot be separated: A district court must determine as part of the *Gingles* threshold inquiry whether it can fashion a permissible remedy in the particular context of the challenged system.”), with *Pope v. Cnty. of Albany*, 687 F.3d 565, 571–74 (2d Cir. 2012), and *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1019 (8th Cir. 2006) (reasoning that the “‘ultimate end’ of the first *Gingles* factor is simply ‘to prove that a solution is possible, and not necessarily to present the final solution to the problem’” (quoting *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986))).

¹¹⁹ 42 U.S.C. § 1973(c) (2012).

¹²⁰ Richard Wolfe, *Court to Weigh Use of Race in Drawing Political Lines*, USA TODAY (Sept. 1, 2014), <http://www.usatoday.com/story/news/politics/2014/09/01/supreme-court-redistricting-race-alabama/14628029>, archived at <http://perma.cc/M3K5-L5E9> (quoting David Bositis).

the legislature sought to “maintain the same relative percentages of black populations in the majority-black districts,”¹²¹ and actually increased those percentages in many districts,¹²² ostensibly to comply with § 5. Meanwhile, in Virginia, the legislature sought to draw the state’s Third Congressional District at 55% Black voting-age population (“BVAP”),¹²³ which the state had previously used as a floor for majority-Black districts in its state legislative redistricting plan. And in North Carolina, the state legislature drew twenty-six “Voting Rights Act districts” that each included a total BVAP of at least 50%.¹²⁴ In each state, the legislatures used arbitrary demographic targets without regard to whether the population percentages chosen were in fact necessary to afford Black voters an opportunity to elect their preferred candidates.

Alabama is a particularly interesting case study — it illustrates how demographic shifts set the stage for these disputes and how packing minority voters into districts at levels beyond what is necessary to afford them an opportunity to elect can be detrimental to minority interests. In Alabama, maintaining or increasing the BVAP in existing majority-Black districts was no easy task due to shifting residential patterns: “concentrations of the black population had declined in some areas and shifted in other areas, leaving all majority-black districts significantly underpopulated.”¹²⁵ That is, Alabama’s Black populations had dispersed somewhat over the previous ten years. But the state then lassoed them back to keep them in the same legislative districts, thus largely bleaching the surrounding districts. Prior to the 2012 redistricting plan, Alabama had eleven legislative districts in which Blacks were between 30% and 50% of the voting age-population; under the 2012 plan, eight of those districts would now fall below 30% BVAP (and six of those below 20% BVAP).¹²⁶

Courts heard racial gerrymandering challenges in Alabama, Virginia, and North Carolina, initially rejecting them in Alabama¹²⁷ and North Carolina,¹²⁸ but sustaining such a challenge in Virginia’s case.¹²⁹ In each of these cases, the state’s proffered justification was that maintaining a precise preex-

¹²¹ Alabama Legis. *Black Caucus v. Alabama*, 989 F. Supp. 2d 1227, 1297 (M.D. Ala. 2013), *vacated*, 135 S. Ct. 1257 (2015).

¹²² See Brief for Appellants at 8, *Alabama Legis. Black Caucus*, 989 F. Supp. 2d 1227 (No. 13-895).

¹²³ *Page v. Virginia Bd. of Elections*, No. 3:13-cv-678, 2014 WL 5019686, at *8 (E.D. Va. Oct. 7, 2014), *vacated and remanded sub nom. Cantor v. Personhuballah*, No. 14-518, 2015 WL 1400849 (U.S. Mar. 30, 2015).

¹²⁴ *Dickson v. Rucho*, 766 S.E.2d 238, 245–46 (N.C. 2014), *vacated*, No. 14-839, 2015 WL 223554 (U.S. Apr. 20, 2015).

¹²⁵ *Alabama Legis. Black Caucus*, 989 F. Supp. 2d at 1294.

¹²⁶ See Brief for Appellants, *supra* note 122, at 9.

¹²⁷ See *Alabama Legis. Black Caucus*, 989 F. Supp. 2d at 1292–1303.

¹²⁸ See *Rucho*, 766 S.E.2d at 254–55.

¹²⁹ *Page v. Virginia Bd. of Elections*, No. 3:13-cv-678, 2014 WL 5019686, at *1 (E.D. Va. Oct. 7, 2014), *vacated and remanded sub nom. Cantor v. Personhuballah*, No. 14-518, 2015 WL 1400849 (U.S. Mar. 30, 2015).

isting level of BVAP in majority-Black districts was necessary to comply with § 5. What is particularly interesting here is the formalist nature of that assertion: i.e., that any decrease in the BVAP of a majority-Black district will *by definition* put Black voters in a worse position and result in unlawful retrogression in violation of § 5,¹³⁰ regardless of whether, as a functional matter, Blacks will actually have a harder time electing their preferred candidates. As the district court noted in the Virginia case, the legislature targeted 55% BVAP for the Third Congressional District simply because state legislative districts had been drawn at that percentage in the past; but its decision was “not informed by an analysis of voter patterns,” or by “any empirical evidence whatsoever” that 55% BVAP was necessary to provide Black voters in the Third Congressional District an opportunity to elect their preferred candidates.¹³¹

Ultimately, the Alabama case reached the Supreme Court, which, in remanding to the district court for more detailed factual findings, rejected the state’s “mechanical interpretation of Section 5,” holding that “Section 5 does not require maintaining the same population percentages in majority-minority districts as in the prior [redistricting] plan,” but rather simply requires that “minority voters retain the ability to elect their preferred candidates.”¹³² As a consequence of that ruling, it is likely that the redistricting plans in Alabama, Virginia, and North Carolina will be reevaluated as well.

Nevertheless, one can easily imagine similar scenarios unfolding in the post-2020 Census round of redistricting, with analogous arguments being made under § 2. That is, given increased dispersal of minority communities, and new electoral patterns of decreased polarization, one can anticipate states arguing that § 2 compliance requires majority-minority districts, regardless of whether such districts are in fact necessary to provide minority voters an opportunity to elect their preferred candidates. As in the § 5 cases described above, adherence to such a bright-line rule without any consideration of practical realities could similarly result in more race-consciousness than necessary, while reducing minority influence in surrounding districts.

III. FAVORS AND MINORITY COALITION CLAIMS

The second question I address in this Article is whether § 2’s prohibition on vote dilution applies to a group of voters that consists of members from more than one minority group. In doctrinal terms, the issue is whether

¹³⁰ See, e.g., *Rucho*, 766 S.E.2d at 254–55; *Alabama Legis. Black Caucus*, 989 F. Supp. 2d at 1310 (“To comply with Section 5, the Alabama Legislature chose the only option available: to protect the voting strength of black voters by safeguarding the majority-black districts and not substantially reducing the percentages of black voters within those districts.”); *Page*, 2014 WL 5019686, at *7–8 (“[E]nsuring compliance with Section 5 was the legislature’s primary priority in drawing the 2012 Plan,” including “maintaining a 55% BVAP floor” in the Third District).

¹³¹ *Page*, 2014 WL 5019686, at *8.

¹³² *Alabama Legis. Black Caucus v. Alabama*, 135 S.Ct. 1257, 1273 (2015).

the logic of the *Bartlett* majority-minority rule also precludes claims where members of more than one minority group are *aggregated* to satisfy the 50% threshold under the first *Gingles* precondition. This is a question of growing importance given the rapid growth of non-Black minority populations as well as increasing heterogeneity within individual minority groups.

The defendants' arguments in a recent case concerning the redistricting of the New York State Senate illustrate one possible answer to this question. In *Favors*,¹³³ one of the various plaintiff groups brought a minority vote dilution claim challenging the failure of New York to draw a State Senate District in which African Americans and Hispanics would collectively form a majority.¹³⁴ The plaintiffs' experts opined that, in Long Island's Nassau County, Hispanics and African Americans live among one another in the same neighborhoods and vote cohesively,¹³⁵ and could together elect their preferred candidates as a majority in a hypothetical district.¹³⁶ There is a long history of claims related to minority coalitions in Nassau County,¹³⁷ an area with a fraught racial history around voting rights.¹³⁸ The State Senate majority, however, argued that *Bartlett's* requirement that minority voters constitute more than 50% of a proposed district should be extended to prohibit "coalition" districts.

As I hope to demonstrate below, extending the *Bartlett* rule to this context may again have the perverse effect of causing line-drawers and political actors to engage in more rather than less race-consciousness during the redistricting process. Undoubtedly, such a rule would decrease the number of

¹³³ *Favors v. Cuomo*, No. 11-cv-5632, 2014 WL 2154871 (E.D.N.Y. May 22), *modified*, 2014 WL 3734378 (E.D.N.Y. July 28, 2014).

¹³⁴ See Drayton Intervenors' Amended Complaint at ¶¶ 58, 64, *Favors*, 2014 WL 2154871 (E.D.N.Y. March 27, 2012), ECF No. 254.

¹³⁵ See Declaration of Andrew Beveridge at 2–3, *Favors*, 2014 WL 2154871 (E.D.N.Y. Apr. 27, 2012), ECF No. 331-1.

¹³⁶ See Memorandum of Law in Support of Senate Majority Defendants' Motion for Summary Judgment on Section 2 Claims at 10, *Favors*, 2014 WL 2154871 (E.D.N.Y. June 29, 2012), ECF No. 422-2.

¹³⁷ The post-2000 redistricting cycle similarly featured litigation with plaintiffs asserting a § 2 claim on behalf of a coalition of Hispanic and Black voters. See *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 359 (S.D.N.Y.), *aff'd*, 543 U.S. 997 (2004). The claim failed in *Rodriguez*, however, because although the court assumed that a coalition claim could be brought, Blacks and Hispanics could not together form a numerical majority of the citizen voting-age population of a proposed district at that time. See *id.* at 375. That situation had obviously changed ten years later, thanks to substantial minority population growth, by the time of the *Favors* litigation.

¹³⁸ For example, news reports have indicated that Nassau County has faced recent allegations of intimidation of minority voters. See Ashley Edwards & Narmeen Choudhury, *Were Minority Voters in Nassau County Discriminated Against?*, PIX11 (Nov. 7, 2013, 11:35 AM), <http://pix11.com/2013/11/07/were-minority-voters-in-nassau-county-discriminated-against>, archived at <http://perma.cc/DV5X-JYQD>. Additionally Nassau County has been accused of efforts to dilute minority voting power at the local level. See Aubrey Phillips & Juan Cartagena, Op-Ed., *Nassau County Redistricting Must Not Dilute Minority Voice*, NEWSDAY (Jan. 2, 2013), <http://www.newsday.com/opinion/oped/nassau-county-redistricting-must-not-dilute-minority-voice-aubrey-phillips-and-juan-cartagena-1.4399403>, archived at <http://perma.cc/6XEG-TURC>.

claims that can be brought, but it would not reduce the degree to which line-drawers must consider race, nor would it serve the broader purposes of the VRA.

A. *Crossover versus Coalition Districts*

The starting point for this discussion is once again *Bartlett*, where Justice Kennedy's plurality opinion distinguished between two types of districts where members of a single minority group do not constitute a numerical majority of a district, but still could be described as exercising functional control over the district's electoral outcome. The first type is a crossover district, which, as described above, is a district in which "the minority population, at least potentially, 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."¹³⁹ As explained above, claims regarding such districts are generally not cognizable under § 2.

A second and distinct type of this district is a "coalition[]district . . . in which two minority groups form a coalition to elect the candidate of the coalition's choice."¹⁴⁰ In such a district, minority voters aggregated from two or more groups can collectively elect a candidate of their choice, even if no single minority group has such power individually. This is frequently the case, for example, in districts where "black populations of even less than 50%" are able to elect their preferred candidates thanks to the support of "a substantial Hispanic [population within] the district."¹⁴¹ The *Bartlett* plurality expressly left open the question of whether coalition districts are cognizable under § 2.¹⁴²

B. *The Favors Defendants' Proposed Anti-Coalition Rule*

This question was (for a short time) squarely presented in *Favors*. There, the State Senate defendants argued that, under the formal majority-minority rule established in *Bartlett*, § 2 did not recognize claims unless members of a single minority group could constitute the majority of a district.¹⁴³ The defendants pointed to recent litigation over Texas's redistricting

¹³⁹ *Bartlett v. Strickland*, 556 U.S. 1, 13 (2009) (plurality opinion).

¹⁴⁰ *Id.* at 13. Justice Kennedy noted that this terminology creates some confusion, as prior Supreme Court opinions and academic scholarship sometimes use the terms "crossover" and "coalition" interchangeably. *See id.* at 13–14.

¹⁴¹ Grofman, *supra* note 68, at 1391.

¹⁴² *Bartlett*, 556 U.S. at 14 (plurality opinion); *see also* *Grove v. Emison*, 507 U.S. 25, 41 (1993) ("[a]ssuming (without deciding) that it was permissible for the District Court to combine distinct ethnic and language minority groups for purposes of assessing compliance with § 2," but rejecting § 2 claim in the absence of cohesion among minority voters).

¹⁴³ *See Favors v. Cuomo*, No. 11-cv-5632, 2014 WL 2154871, at *9–10 (E.D.N.Y. May 22), *modified*, 2014 WL 3734378 (E.D.N.Y. July 28, 2014).

plans in *Perry v. Perez*,¹⁴⁴ where the Supreme Court held that the district court, in drawing remedial redistricting plans, had failed to accord adequate deference to the state's plans and policy choices.¹⁴⁵ In so ruling, the Court briefly referenced one particular district, noting that it "may have [been] intentionally drawn . . . as a 'minority coalition opportunity district' in which the court expected two different minority groups to band together to form an electoral majority,"¹⁴⁶ and then, citing *Bartlett*, briefly noted that "[i]f the District Court did set out to create a minority coalition district . . . it had no basis for doing so."¹⁴⁷

It is difficult to discern precisely what the Court meant here, as the Court did not explain its reasoning. This sentence could be based on the assumption that coalition claims are not cognizable under any circumstances (which would be an unusual way to announce a new holding on a question that only recently had been expressly reserved). Or it could be based on the view that there was no evidence indicating that a coalition claim would be viable here (e.g., because there was no evidence of cohesion among members of different minority groups). In any event, reading the "tea leaves," at least one commentator has suggested that the current Supreme Court is unlikely to recognize coalition district claims.¹⁴⁸

Favors appeared to tee this issue up until the plaintiffs voluntarily withdrew their coalition district claim.¹⁴⁹ Meanwhile, other lower courts both before and after *Perez* have split on this issue. Two circuits — the Fifth¹⁵⁰ and Eleventh¹⁵¹ — have expressly held that coalitions of minority voters can aggregate their numbers to satisfy the first *Gingles* requirement, and three more circuits — the First,¹⁵² Second,¹⁵³ and Ninth¹⁵⁴ — along with some

¹⁴⁴ 132 S. Ct. 934 (2012) (per curiam).

¹⁴⁵ *Id.* at 943.

¹⁴⁶ *Id.* at 944.

¹⁴⁷ *Id.*

¹⁴⁸ See Lauren R. Weinberg, *Reading the Tea Leaves: The Supreme Court and the Future of Coalition Districts Under Section 2 of the Voting Rights Act*, 91 WASH. U. L. REV. 411, 428–29 (2013).

¹⁴⁹ See *Favors v. Cuomo*, No. 11-cv-5632, 2014 WL 2154871 at *8 n.10, (E.D.N.Y. May 22, 2014).

¹⁵⁰ See *Campos v. City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988), *cert. denied*, 492 U.S. 905 (1989); *League of United Latin Am. Citizens, Council No. 4386 v. Midland Indep. Sch. Dist.*, 812 F.2d 1494, 1500 (5th Cir. 1987). See also *Brewer v. Ham*, 876 F.2d 448, 451 (5th Cir. 1989); *Overton v. City of Austin*, 871 F.2d 529, 536 (5th Cir. 1989).

¹⁵¹ *Concerned Citizens of Hardee Cnty. v. Hardee Cnty. Bd. of Comm'rs*, 906 F.2d 524, 526 (11th Cir. 1990) ("Two minority groups (in this case Blacks and Hispanics) may be a single Section 2 minority if they can establish that they behave in a politically cohesive manner.").

¹⁵² See *Latino Political Action Comm. v. City of Boston*, 784 F.2d 409, 414 (1st Cir. 1986) (rejecting § 2 claim by a group of Black, Latino, and Asian voters, but only because plaintiffs did not establish racial polarization).

¹⁵³ See *Bridgeport Coal. for Fair Representation v. City of Bridgeport*, 26 F.3d 271, 275 (2d Cir. 1994), *rev'd on other grounds*, 512 U.S. 1283 (1994) (affirming district court's view that "[c]ombining minority groups to form [majority-minority] districts is a valid means of complying with § 2 if the combination is shown to be politically cohesive").

district courts,¹⁵⁵ have assumed that such claims may be brought without expressly holding that this is so. On the other hand, the Fourth,¹⁵⁶ Sixth,¹⁵⁷ and Seventh¹⁵⁸ Circuits have rejected or questioned the notion that coalitions of more than one racial or ethnic minority can bring a § 2 claim.

The view that § 2 does not permit coalition claims can be expressed through a formalist approach. Some courts and commentators have attempted to deduce the rule from the statute's text. For example, the Sixth Circuit held in *Nixon v. Kent County*¹⁵⁹ that § 2 is violated when "the political processes . . . are not equally open to participation by members of a class of citizens protected by [the Act]," as opposed to members of "the classes" protected by the Act.¹⁶⁰ Similarly, Michael Carvin (counsel for the State Senate defendants in *Favors*) had previously argued that § 2 only protects a minority group's "opportunity . . . to elect representatives of their choice,"¹⁶¹ but not to form political coalitions with other minority groups.¹⁶²

This approach produces a bright-line rule: minority voters must be members of a single racial or ethnic group in order to state a claim under

¹⁵⁴ See, e.g., *Badillo v. City of Stockton*, 956 F.2d 884, 886 (9th Cir. 1992) (affirming dismissal of § 2 claim brought by African Americans and Latinos only because of absence of evidence of political cohesion amongst minority voters); *Valladolid v. City of Nat'l City*, 976 F.2d 1293, 1296 (9th Cir. 1992) (same, where plaintiffs could not establish white block voting as required by the third *Gingles* precondition); *Debacka v. Cnty. of San Diego*, No. 92-55661, 1993 U.S. App. LEXIS 25702 at * 2 (9th Cir. Sept. 27, 1993) (dismissing claim where plaintiffs made "no showing of political cohesiveness among the multiethnic class as a whole").

¹⁵⁵ See, e.g., *Harris v. Arizona Indep. Redistricting Comm'n*, 993 F. Supp. 2d 1042, 1054 (D. Ariz. 2014) ("A district gives a minority group the opportunity to elect the candidate of its choice not only when the minority group makes up a majority of the district's population (a majority-minority district), but also when it can elect its preferred candidate with the help of another minority group (a coalition district."); *Pope v. Cnty. of Albany*, No. 1:11-cv-0736, 2014 WL 316703 at *6 (N.D.N.Y. Jan. 28, 2014) ("The Court finds that the plain text of the statute, its purpose, and the legislative history do not abridge the right of politically cohesive minority groups to aggregate."); *Knox v. Milwaukee Cnty. Bd. of Election Comm'rs*, 607 F. Supp. 1112, 1113 (E.D. Wis. 1985) (permitting vote dilution claim brought by African Americans and Hispanics to continue).

¹⁵⁶ See *Hall v. Virginia*, 385 F.3d 421, 431 (4th Cir. 2004) ("A redistricting plan that does not adversely affect a minority group's potential to form a majority in a district, but rather diminishes its ability to form a political coalition with other racial or ethnic groups, does not result in vote dilution 'on account of race' in violation of Section 2.").

¹⁵⁷ See *Nixon v. Kent Cnty.*, 76 F.3d 1381, 1392-93 (6th Cir. 1996) (en banc) (rejecting coalition claims and the reasoning of the Fifth Circuit).

¹⁵⁸ See *Frank v. Forest Cnty.*, 336 F.3d 570, 575 (7th Cir. 2003) (without categorically rejecting coalition claims, characterizing a vote dilution claim by a coalition of Native American and black voters as "problematic").

¹⁵⁹ 76 F.3d at 1381 (6th Cir. 1996) (en banc).

¹⁶⁰ *Id.* at 1386 (quoting 42 U.S.C. § 1973 (2012) (emphasis added)).

¹⁶¹ 42 U.S.C. § 1973 (2012) (emphasis added).

¹⁶² See Carvin & Fisher, *supra* note 95, at 17 ("Bi-racial coalitions are not defined by "race" and are not protected by the Voting Rights Act; racial groups are. Minorities are not provided with "less opportunity than other members of the electorate" if they are unable to form a winning coalition, because no racial group (or group defined by any other characteristic) has a right to form a winning coalition."). See also *Nixon*, 76 F.3d at 1392 ("Permitting such political coalitions the advantage of Voting Rights Act protection . . . risks wrenching the Act from its ideological and constitutional foundations. . . . Coalition suits provide minority groups with a political advantage not recognized by our form of government . . .").

§ 2. That bright line, in turn, could serve the two policy goals identified in *Bartlett*. Like all bright lines, it arguably enhances predictability for potential litigants. Absent this bright line, one can imagine messy scenarios. For example, imagine a situation involving two separate and relatively numerous minority groups, where districts could be drawn in two different ways: In one configuration, each group could be a majority in its own district. In another, two coalition districts could be drawn in which neither group is a majority.¹⁶³ A rule against coalition claims could provide clarity by dictating the proper outcome: draw the districts in which each minority group has its own individual district, eliminating any uncertainty that the jurisdiction could still be exposed to liability.

Furthermore, rejecting coalition districts could reduce race-consciousness in redistricting in at least two ways. As a quantitative matter, it would reduce the number of viable claims and thus limit the occasions on which race-conscious redistricting will be necessary. Qualitatively, it might avoid the assumption, which the Supreme Court has cautioned against, that minority voters “think alike, share the same political interests, and will prefer the same candidates at the polls.”¹⁶⁴ If the purpose of vote dilution doctrine is to protect the voting strength of a minority “community,” then perhaps aggregating voters from different minority groups treats different members of distinct racial and ethnic minorities as essentially fungible,¹⁶⁵ in a manner that is anathema to concerns about excessive race-consciousness in redistricting.¹⁶⁶

C. *The Sordid Business of Divvying Up Minority Voters by Race*

As with the above discussion of *Fayette County*, I will concentrate less on the textual validity of the *Favors* defendants’ interpretation of § 2,¹⁶⁷ and

¹⁶³ See, e.g., *Nixon*, 76 F.3d at 1390.

¹⁶⁴ *Shaw v. Reno*, 509 U.S. 630, 647 (1993).

¹⁶⁵ See, e.g., *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831, 893–98 (5th Cir. 1993) (Jones, J., concurring). See also Katharine 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, 620 (1989–1990); Thernstrom, *supra* note 71, at 402 (rejecting a presumption of cohesion among different minority groups as “a woefully out-of-date assumption” in “today’s multiethnic society”).

¹⁶⁶ See, e.g., *Nixon*, 76 F.3d at 1391.

¹⁶⁷ It is debatable at best whether § 2’s statutory language bars coalition claims. See, e.g., Ryan Haygood, *The Dim Side of the Bright Line: Minority Voting Opportunity after Bartlett v. Strickland* at 8, HARV. C.R.-C.L. L. REV. AMICUS (Feb. 25, 2010), available at <http://harvardcrcl.org/wp-content/uploads/2010/02/HaygoodFinalFINAL.pdf>, archived at <http://perma.cc/WU25-GTAC>. Section 2 prohibits the dilution of minority voting power, which is defined as a situation where “members” of a protected “class” “have less opportunity than other members of the electorate . . . to elect representatives of their choice.” 42 U.S.C. § 1973(b) (2012). Whether that statutory language applies to coalition district claims depends on how one defines “members” of a “class.” If those terms can encompass a group of voters who are racial or ethnic minorities generally, then it would seem not to matter if they had different racial or ethnic backgrounds. And § 2 itself does not expressly require that those “members” belong to a single racial or ethnic minority group, nor that a “class” may only constitute individuals from a single racial or ethnic groups. See *Nixon*, 76 F.3d at 1394 (Keith, J.,

more on whether or not that interpretation actually advances the goals it purports to serve.

First, the *Favors* defendants' rule is not easier to administer than one that embraces coalition districts. As an initial matter, a rule that recognizes coalition districts may also be adopted as a bright line, the simple test being: Do minority voters of the relevant groups constitute more than half of a hypothetical compact single-member district? Consistent with *Bartlett*, answering this question need not entail the kind of case-by-case assessment of turnout and polarization patterns that is necessary in the crossover district context. So long as minority voters of the various groups at issue constitute a numerical majority of a district's VAP, an opportunity to elect exists as that term is used in *Bartlett*. In most cases, recognizing coalition claims should present no greater difficulties in terms of judicial administration at the pleading stage than do ordinary § 2 claims.¹⁶⁸

Moreover, given the increasingly complex ways in which Americans self-identify by race and ethnicity, adopting the single racial or ethnic group definition of "class" begs a host of difficult questions which themselves would complicate administration of the statute. If we take seriously the view that § 2 prohibits grouping individuals from different minority groups together for districting purposes, what is the logical stopping point? Must Hispanics (who share an ethnicity) be of the same *race* in order to state a claim? Can Hispanics of different national origins be grouped together? What about Asians of different national origins who speak different languages? Are biracial or multiracial individuals members of "separate" groups? As Judge Keith put it in his *Nixon v. Kent* dissent, "[p]erhaps we will return to a time of classifying African-Americans as quadroons or octaroons for pur-

dissenting) ("On its face, the Voting Rights Act does not indicate whether a coalition of African-Americans and Hispanic-Americans may constitute a single *class* of citizens . . ."). One could therefore argue that failing to recognize vote dilution claims in this context would unnecessarily limit § 2's protections in a manner not dictated by the statutory text. If, in a context where all of the other elements for § 2 liability have been satisfied, and where different racial or ethnic groups constitute a substantial percentage of the voting-age population in a particular area, but are either too small individually or too integrated amongst each other to draw geographically compact districts where one is a majority, then applying a 50% threshold requirement for each minority group individually would inappropriately deny relief to minority voters who have been unlawfully locked out of the political process. See Aylon M. Schulte, *Minority Aggregation Under Section 2 of the Voting Rights Act: Toward Just Representation in Ethnically Diverse Communities*, 1995 U. ILL. L. REV. 441, 481 (1995). Where voters from different minority groups face similar patterns of political exclusion, relief could be available to those voters collectively, which is the case, for example, in the education context. See Haygood, *supra*, at 15 (citing *Keyes v. Denver School Dist. No. 1*, 413 U.S. 189, 197-98 (1973) (permitting the aggregation of Hispanics and African Americans to measure levels of school segregation, given similar patterns of exclusion faced by members of both groups)).

¹⁶⁸ One can posit odd hypotheticals of the sort I described above, in which a district could be configured either as a coalition district or as one in which members of a single racial or ethnic minority group form a numerical majority, but I am unaware of such a situation presenting itself in any case. That is perhaps because these coalition claims generally arise in situations where members of one minority group are much more numerous than members of other groups, and are close to the 50% threshold by themselves.

poses of racial classification.”¹⁶⁹ Can there ever be members of a single group, given the inherent arbitrariness¹⁷⁰ of our racial and ethnic categories? There are no obvious answers to these questions dictated by the statute itself, but they could be avoided altogether by embracing coalition claims and defining “members” of a “protected class” under the statute as encompassing all individuals from protected racial or ethnic minority groups.

Second, as a conceptual matter, coalition districts are not uniquely vulnerable to an essentialism critique. To be sure, uncritically aggregating voters of different minority groups without a careful analysis of whether those voters are acting as a unified political community would risk essentializing all nonwhites. But such concerns — if taken seriously — are also present in § 2 claims brought on behalf of voters from a single minority group. The increasing heterogeneity within single racial minority groups that we might classify¹⁷¹ as “Blacks,” “Hispanics,” or “Asians” means that those groups often consist of individuals with different linguistic, national origin, and cultural backgrounds.¹⁷²

But this problem is not really so vexing after all. Under § 2, the existence of a unified political community is not presumed. Rather, the second *Gingles* precondition prohibits unfounded assumptions about minority voters by requiring plaintiffs to establish that minority voters are politically cohesive in order to state a claim.¹⁷³ That is, even when brought by voters from a single minority group, § 2 vote dilution claims do not entail a presumption that minority voters are a single community that shares political preferences. Rather, plaintiffs must establish that factor in order to state a claim.¹⁷⁴ As Congress explained when it amended § 2 to include a results test:

[A vote dilution claim] *makes no assumptions one way or the other* about the role of racial political considerations in a particular community. If plaintiffs assert that they are denied fair access to the political process, in part, because of the racial bloc voting context within which the challenged election system works, they would have to prove it.¹⁷⁵

The key, therefore, is not whether the voters bringing a § 2 vote dilution claim can all be shoehorned within the same abstract racial or ethnic box. Rather, the question is whether, in practice, minority voters bringing a

¹⁶⁹ *Nixon*, 76 F.3d at 1401 (Keith, J., dissenting).

¹⁷⁰ See, e.g., Michael A. Omi, *The Changing Meaning of Race, in AMERICA BECOMING: RACIAL TRENDS AND THEIR CONSEQUENCES*, VOL. I, 243, 243 (Neil J. Smelser et al. eds., 2001). See also text accompanying *supra* notes 22–23.

¹⁷¹ See text accompanying *supra* notes 19–21.

¹⁷² See Schulte, *supra* note 167, at 473. Thus, all minority vote dilution claims have been criticized on this same basis, even where only a single minority group is involved. See Thernstrom, *supra* note 71, at 383.

¹⁷³ See *Thornburg v. Gingles*, 478 U.S. 30, 51 (1986).

¹⁷⁴ See *id.* at 50–51.

¹⁷⁵ S. REP. 97-417, at 34 (1982) (emphasis added).

claim are appropriately thought of as a single community for electoral purposes, which is demonstrated through political cohesion.¹⁷⁶ Section 2 has always been interpreted to require a functional approach to determining whether such cohesion exists. If it is absent, the second *Gingles* precondition will appropriately weed out claims where members of a minority group have different political interests.¹⁷⁷ This is precisely how courts have proceeded in analyzing coalition claims without particular difficulty, rejecting such claims where there is no political cohesion and recognizing them where there is.¹⁷⁸

In fact, a per se rule prohibiting coalition claims bluntly treats individual minority groups as discrete atomic units, and is itself subject to the same sort of essentialism concern described above. An un rebuttable presumption of difference is really the flipside of the fungibility problem. That is, instead of treating members of different minority groups as interchangeable because they are inherently different from whites, a rule prohibiting coalition districts treats minority groups as impermeably distinct. Those arguing in favor of such a rule are thus equally guilty of treating fundamentally arbitrary racial categories as the basis for finding immutable differences. If the VRA should be interpreted in a manner that reduces that kind of broad-brush race-conscious decisionmaking, then a bright-line rule precluding recognition of the fact that members of different minority groups may organize collaboratively is itself problematic.

This leads to two additional concerns. Although a rule prohibiting recognition of coalition claims would reduce the *frequency* of race-conscious decisionmaking under § 2, it would make those remaining occasions where the statute is invoked *qualitatively more* race-conscious, by making racial homogeneity — the division of racial and ethnic minorities into monoracial residential groups — a prerequisite for § 2 claims. Such a rule would, in essence, require line-drawers to “divvy up” members of different minority groups in order to comply with § 2. In other words, the rule will reduce the number of occasions of race-conscious redistricting, but will require increased racial separation of minority voters from each other when § 2 is successfully invoked. It is unclear why this should be a preferable outcome.

Finally, a rule against coalition districts would afford minority groups protection only when each group votes cohesively as an independent group, and would thereby disincentivize the formation of cross-racial coalitions that the VRA is supposed to encourage.¹⁷⁹ In that sense, extending the formal pleading rule of *Bartlett* to coalition districts may cause the very sort of “balkaniz[ation]” about which the Court has raised concerns.¹⁸⁰

¹⁷⁶ See, e.g., Angelo N. Ancheta & Kathryn Imahara, *Multi-Ethnic Voting Rights: Redefining Vote Dilution in Communities of Color*, 27 U.S.F. L. REV. 815, 832–34 (1993).

¹⁷⁷ See Haygood, *supra* note 167, at 16–17.

¹⁷⁸ See, e.g., cases cited *supra* note 154.

¹⁷⁹ See *supra* notes 116–117 and accompanying text.

¹⁸⁰ *Shaw v. Reno*, 509 U.S. 630, 657 (1993).

D. *Practical Consequences*

This is not an insignificant issue for civil rights advocates. A cursory look at the demographic statistics of congressional districts¹⁸¹ reveals that many minority members of Congress¹⁸² are elected from districts in which no single minority group constitutes a majority of voters. For example, there are currently forty-three Black Members of Congress. The majority (thirty-five) hails from majority-minority districts, but in over one-third of those districts (twelve) no single minority group constitutes a majority. Similarly, there are eleven Asian American Members of Congress, nine of whom are from majority-minority districts. But only one of those districts is majority Asian American; the other eight districts consist of a mix of minority populations that collectively form a numerical majority.

Obviously, these statistics are just raw population numbers. I have not performed the sort of in-depth analysis of voting patterns (i.e., cohesion among minorities and polarization vis-à-vis whites) that would be necessary to determine if any of these districts are properly described as coalition districts. But the fact remains that a substantial number of the districts that currently elect minority legislators are majority-minority districts in which no single minority group constitutes a majority. A rule prohibiting judicial recognition of coalition districts under § 2 would leave two unattractive options for minority voting rights advocates: either advocate that these relatively diverse districts become more racially and ethnically homogeneous, such that one minority group becomes a majority, so that the district can maintain protected status under the VRA; or, leave the districts as they are, in which case they may be fair game for hostile line-drawers in the next redistricting cycle.¹⁸³

¹⁸¹ All information in this paragraph concerning the number of minorities in Congress and the demographics of their districts comes from Wikipedia. For example, members of the Congressional Black Caucus and the districts that they represent may be found by clicking through the main entry for the Congressional Black Congress. See *Congressional Black Caucus*, WIKIPEDIA, http://en.wikipedia.org/wiki/Congressional_Black_Caucus (last visited Apr. 20, 2015 4:25 PM), archived at <http://perma.cc/LAS6-RNT6>.

¹⁸² Of course, “[u]nder § 2, it is the *status* of the candidate as the *chosen representative of a particular racial group*, not the race of the candidate, that is important.” *Thornburg v. Gingles*, 478 U.S. 30, 68 (1986). The candidates preferred by minority voters are not necessarily minority candidates, and vice versa. Nevertheless, “[b]ecause both minority and majority voters often select members of their own race as their preferred representatives, it will frequently be the case that a black candidate is the choice of blacks, while a white candidate is the choice of whites.” *Id.* Thus the Supreme Court has explained that, “as a matter of convenience, we and the District Court may refer to the preferred representative of black voters as the ‘black candidate’ and to the preferred representative of white voters as the ‘white candidate.’ Nonetheless, the fact that race of voter and race of candidate is often correlated is not directly pertinent to a § 2 inquiry.” *Id.* Following *Gingles* and for the sake of simplicity, therefore, I use minority legislators in this discussion as an admittedly imperfect shorthand for minority-preferred candidates.

¹⁸³ Perhaps such a forced choice could be avoided if *Bartlett*'s first prong is not extended to the remedial stage of cases, as I advocate in the previous section. If that is the case, then so long as it is *possible* to draw the district such that one minority group is a majority (thus

To take one example, Representative Alma Adams represents North Carolina's Twelfth Congressional District, which has more whites (47.2%) than Blacks (44.6%), but which also contains a substantial Hispanic population (7.1%), rendering it a majority-minority district. This district was the subject of the original *Shaw* racial gerrymandering litigation, and was originally constructed as a majority-Black district in order to overcome the effects of racial polarization in the area.¹⁸⁴ Imagine that the demographics of the district remain roughly the same through the 2020 U.S. Census, after which the state threatens to dismantle the district during the redistricting cycle. Minority voting-rights advocates seeking to maintain the district as a majority-opportunity district protected by § 2 would then be faced with two options. First, they could argue that the district is a minority coalition district. Assuming that the various requirements for § 2 liability could then be established (i.e., the *Gingles* preconditions and the totality of the circumstances), they could then argue — either in the legislature, or if necessary, in court — that dismantling the district would violate § 2. But, if § 2 does not recognize coalition districts, then in order to preserve the district, minority voting-rights advocates would likely be forced to advocate (either in the legislature or in court) that the Black VAP of this district be increased, possibly at the cost of fencing out some of the district's Hispanic residents. That seems unnecessary from a functional perspective, given that the district already appears to elect a minority-preferred candidate, and would disincentivize coalition-building between Black and Hispanic voters. But the alternative would be to leave the district as is, possibly rendering it vulnerable to a hostile state legislature that could dismantle it, unconstrained by § 2.

CONCLUSION

Changing demographics and voting patterns will continue to present opportunities for defendants in § 2 cases to propose formalist readings of the statute. As *Fayette County* and *Favors* demonstrate, however, simplicity is not necessarily a virtue in this context. Formalist interpretations of § 2 may not have their intended effect of easing administration of the statute or of decreasing the level of race-consciousness in which line-drawers must engage.

But if that is the case, then why put forth such rules? Two things are clear about both the majority-minority remedial rule from *Fayette County* and the anticoalition district rule put forth by the *Favors* defendants: both rules would make it harder for § 2 plaintiffs to obtain relief, and would limit the influence of minority voters. By taking lesser remedies off of the table,

satisfying the *Bartlett* pleading rule), these districts could theoretically remain as they are — where no minority group constitutes a majority of the district — as a remedy for a potential § 2 violation.

¹⁸⁴ See *Shaw*, 509 U.S. at 657.

the *Fayette County* rule makes it harder for parties to settle, and may also make courts more reluctant to order relief in close cases. In cases where relief is ordered, the *Fayette County* rule would also have the effect of limiting minority voters' influence in surrounding districts.

Meanwhile, the *Favors* defendants' proposed rule eliminates the possibility of liability in coalition settings, a demographic context that appears increasingly common in districts that currently elect minority legislators. And in cases where relief is possible, the rule demands that line-drawers separate minority voters along racial and ethnic lines, discouraging the formation of cross-racial and cross-ethnic coalitions, and promoting the notion that minority voters from different racial and ethnic groups have immutable differences that prevent them from forming a single political community.

Perhaps, then, these proposed rules — which would subtly increase the political salience of race — are not so much about sound judicial administration, but rather amount to an effort to frustrate § 2's purpose of empowering communities of color to elect their preferred candidates. If that is true, then the formalist interpretations of § 2 described above represent not a simple effort to update the statute in recognition of the growing political power of minority communities, but rather an effort to limit the statute's effectiveness in order to resist that rising tide.

