Disentangling "Cohesiveness": The Misapplication of § 2 in Vote Dilution Cases

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Disentangling “Cohesiveness”: The Misapplication of § 2 in Vote Dilution Cases

In Thornburg v. Gingles, the Supreme Court ruled that a state’s refusal to create a proposed majority-minority voting district could in some circumstances violate § 2 of the Voting Rights Act. A proponent of the proposed district must show that the minority population of the proposed district is “politically cohesive” and would constitute a majority of the proposed district’s voting-age population, and that the non-minority (Caucasian) population of the challenged district traditionally votes as a bloc such that it is usually able to elect a candidate not preferred by the minority population. This Article proposes that a proper reading of § 2 requires considering only the truly politically cohesive segment of the minority when calculating whether a minority population would constitute a majority in a proposed district. The traditional conception of political cohesiveness includes in a supposedly politically cohesive minority all members of the minority population when calculating whether the politically cohesive minority group constitutes a majority in a proposed district, regardless of the percentage of that population that actually prefers a given party. In other words, a traditional Gingles analysis treats many minority Republicans as if they were Democrats (or vice versa, where applicable) for the purposes of legislative apportionment, based purely on their race. This treatment is both inconsistent with § 2 and the Equal Protection Clause of the Fourteenth Amendment.

I. Introduction

In America today there are many thousands (and potentially millions) of racial minorities doomed to live in electoral districts where they are unlikely ever to be represented by candidates of their preferred political party. Ironically, this is a result not of malicious Jim Crow laws or even indifferent neglect but rather of a well intentioned but crude judicial interpretation of
otherwise desirable federal legislation designed to ensure the ability of racial minorities fully to participate in the electoral process. How can this be? Let me explain.

Imagine you are one of 2000 minority persons of voting age in a county having 10,000 persons of voting age, and that you and 399 of the other minority persons of voting age in the county prefer the Republican Party to the Democratic Party.¹ Now imagine that the county is divided into ten equally populated, single-member electoral districts for the election of school board members. Only one of the ten districts (not yours) has a majority of voting-age residents who are minority persons, despite the fact that two of every ten voting-age persons in the county is a racial minority. Under case law interpreting a statute that exists to ensure that electoral mechanisms do not result in minority persons having an unequal ability to vote and elect candidates of their choice, a plaintiff in your county can force the creation of a second district having a majority of minority persons of voting age (a “majority-minority district”) if he can show, among other things, that a majority of the voting-age population in his proposed district will consist of minority persons. You live in the plaintiff’s proposed district along with 199 other minority Republicans, 400 minority Democrats, and 400 Caucasians of equally divided political preference. You have been able to elect candidates of your choice (Republicans) consistently in the past, because your current district is 70% Republican. But one morning you wake up to find that the proposed district has been adopted. A federal judge has determined that most of the minority persons in the proposed district consistently vote for Democrats, and so long as he counts you and 199 of your fellow minority Republicans as if you were an indistinguishable part of this group of 600 minority persons, which includes only 400 Democrats, the new district will

¹ Whenever I employ numerical examples in this Article, I will represent the majority of minority persons as preferring the Democratic Party because this has generally been the case in America since the latter half of the Twentieth Century, although I recognize that the Republican Party was the party of choice for most minority persons in America from the Civil War through World War II, and that it is still the party of choice in some minority communities.
be comprised of a “politically cohesive” group of minority persons constituting a majority of the voting-age population of the new district. In other words, in the name of removing barriers to the ability of minority persons to elect candidates of their choice, you and 199 other minority persons have been counted as being allied with a political party you in fact disfavor, based purely on your race, and then placed into an electoral district where candidates of the party you disfavor are, by design, likely to represent you for the foreseeable future.

In Part II of this Article, I will briefly recount the history of minority vote suppression in America and summarize the relevant case law concerning the application of § 2 of the Voting Rights Act of 1965 (“VRA”)\(^2\) to legislative apportionment cases. In Part III, I will argue that the traditional conception of political cohesiveness used in § 2 apportionment cases is based on an improper interpretation of § 2 and inconsistent with the Equal Protection Clause of the Fourteenth Amendment. I will also argue that recent § 2 case law, particularly *Bartlett v. Strickland*,\(^3\) supports the application of *Gingles* using the conception of political cohesiveness I proffer in this Article, and that the traditional conception of political cohesiveness is inconsistent with the mandates of the Equal Protection Clause even if § 2 mandated such a conception. I will briefly conclude in Part IV by noting that in light of the growing number of minority persons identifying with the Republican Party, the philosophically and statutorily unsound traditional conception of political cohesiveness is bound to lead to challenges by aggrieved minority Republicans.

II. The Voting Rights Act of 1965

A. The Genesis of the Voting Rights Act

\(^3\) 556 U.S. 1, 129 S. Ct. 1231 (2009).
The Fifteenth Amendment, ratified in 1870, prevented the denial of the right to vote based on “race, color, or previous condition of servitude.”

Congress’ first attempt to enforce the Fifteenth Amendment was doomed to failure, because it included an “otherwise qualified to vote by [local] law” safe-harbor provision. In the 1950s, Congress again attempted to enforce the Fifteenth Amendment, but this new legislation simply outlawed direct intimidation and coercion in connection with federal elections. During the civil rights movement of the 1960s, Congress passed and President Johnson signed several more pieces of legislation to enforce the Fifteenth Amendment, most importantly the VRA. In spite of the Fifteenth Amendment and all previous enforcement legislation passed prior to the VRA, many states and municipalities, particularly in the American South, had continued to deny African-Americans the right to vote, either through intimidation or unfair or unequally applied voter qualifications such as “literacy tests, poll taxes, and white primaries . . . .”

Section 2 of the VRA as originally adopted read: “No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.”

B. Minority “Vote Dilution” Under § 2 of the Voting Rights Act

Although the legislation was directed against invidious discrimination through literacy tests, poll taxes, and the like, several commentators soon suggested that § 2 should be read to prevent at-large or multi-member electoral districts under certain circumstances. These commentators argued that where a racial minority population in a multi-member electoral district

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4 U.S. CONST. amend. XV.
was geographically compact, “politically cohesive,” large enough to constitute a majority of the population of one or more proposed single-member districts of roughly equal size within the current multi-member district, and where the non-minority population voted consistently as a bloc such that the candidates preferred by the minority population as a whole consistently lost, a plaintiff should be able to invoke § 2 to force the splitting of the multi-member district into single-member districts, including the proposed majority-minority district(s). This has come to be known as the “vote dilution” theory.

In 1973, the Supreme Court held in White v. Regester that under the Equal Protection Clause, a plaintiff could force the creation of single-member districts from multi-member districts if he could show that “multimember districts are being used invidiously to cancel out or minimize the voting strength of racial groups.” The White Court considered no § 2 challenge, but relied on the Fourteenth Amendment’s requirement of “invidious” discrimination. In 1980, the Supreme Court noted in City of Mobile, Ala. v. Bolden that the Fourteenth and the Fifteenth Amendments prevented only purposeful discrimination, not discriminatory effects, that § 2 of the VRA passed pursuant to the Fifteenth Amendment had no broader reach than the Fifteenth Amendment itself in this regard, and that the vote dilution theory therefore was only viable where a plaintiff could show that a governmental entity established or maintained an at-large voting system for the purpose of suppressing the ability of racial minorities to elect candidates of

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11 See id. at 48–51 & nn. 15–17.
12 See id. at 49.
13 U.S. CONST. amend XIV, § 1.
15 See generally id.
16 See id. at 765–66.
their choice. In response to *Bolden*, Congress amended § 2 to “reestablish” what it viewed as the “results test” of *White*. Section 2 reads today as it read after amendment in 1982:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

The Court has read the first sentence of the amended § 2(b) to permit “vote dilution” challenges to proposed apportionment or redistricting plans where a plaintiff can show that “a bloc voting majority [is] usually . . . able to defeat candidates supported by a politically cohesive, geographically insular minority group.” The *Gingles* Court noted that some “typical factors” to be considered when determining whether a proposed apportionment gave “less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice” were provided in the majority report of the Senate Judiciary Committee:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

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18 See id. at 60–67.
21 Gingles, 478 U.S. at 49.
22 § 1973(b).
3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

8. whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

9. whether the policy underlying the state or political subdivision’s use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.23

The Court noted that these factors need not be considered in every case and in every context, and that other factors could be considered.24 The Court then compiled the three-part Gingles test for challenges to multi-member districts:

First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. If it is not, as would be the case in a substantially integrated district, the multi-member form of the district cannot be responsible for minority voters’ inability to elect its candidates. Second, the minority group must be able to show that it is politically cohesive.25 If the minority group is not politically cohesive, it cannot

25 The error in the analysis comes in applying the second factor to treat each person of a minority race as if he is nothing more than a proportionate part of an undifferentiated, homogenous whole called “the minority group.” See Part III.A., infra. This theory of group rights, under which a person’s true interests and desires may be assumed—or worse, affirmatively falsely reckoned—to be identical to the interests of his neighbors based purely on his racial
be said that the selection of a multimember electoral structure thwarts distinctive minority group interests. Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority’s preferred candidate.\

The *Gingles* test is a *precondition* to the application of the totality-of-the-circumstances test under § 2. The analysis of a § 2 vote-dilution challenge is therefore a two-step process: (1) the plaintiff must show that the three *Gingles* prerequisites are satisfied; and (2) the plaintiff must then show that under the totality of the circumstances, the adoption of the challenged electoral district(s) or the refusal to adopt the proffered electoral district(s) results in an electoral structure that gives minority persons “less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice” by “impermissibly impair[ing] the ability of the minority group to elect their preferred representatives.”

In 1993, the Court held in *Growe v. Emison* that a plaintiff could invoke § 2 to challenge single-member districts, as well, but in 1994 the Court also held in *Johnson v. DeGrandy* that in such cases a court must consider the critical additional factor of “proportionality” under the totality-of-the-circumstances test, meaning that “in spite of continuing discrimination and racial bloc voting, minority voters form effective voting majorities in a number of districts roughly proportional to the minority voters’ respective shares in the voting-age population.” In *DeGrandy*, the Court found no § 2 violation in a county with a 50% Hispanic voting-age population and nine Hispanic-majority districts out of eighteen, despite the satisfaction of the

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26 Id. at 50–51 (citations and footnotes omitted).
27 See id.
29 See, e.g., Ruiz v. City of Santa Maria, 160 F.3d 543, 550 (9th Cir. 1998).
31 See 512 U.S. 997, 1000 (1994). Two justices dissented because in their view legislative reapportionment was simply not a “standard, practice, or procedure” as defined under § 2. See id. at 1031–32 (Thomas, J., dissenting) (citing *Holder v. Hall*, 512 U.S. 874 (1994) (Thomas, J., concurring in the judgment)).
Gingles preconditions and the geographical and mathematical ability to increase the number of Hispanic-majority districts to eleven. The Court instituted the proportionality factor in single-member-district § 2 challenges because:

[Re]ading § 2 to define dilution as any failure to maximize tends to obscure the very object of the statute and to run counter to its textually stated purpose. One may suspect vote dilution from political famine, but one is not entitled to suspect (much less infer) dilution from mere failure to guarantee a political feast. . . . Failure to maximize cannot be the measure of § 2.33

III. Counting Republicans as Democrats (or Vice Versa) Based on Race

A. The Traditional Definition of “Political Cohesiveness”

When performing a Gingles analysis, courts uniformly assume without discussion that every person of a minority race in a proposed district also necessarily belongs to a “politically cohesive” minority group that as a collective prefers the political party that the majority of persons of that minority race in the proposed district prefer.34 It is difficult to attack the case law on this point because the courts to apply Gingles have been so ubiquitously oblivious to the not-so-striking possibility that a person of a minority race who prefers the Republican Party might not in fact under a proper interpretation of the phrase “politically cohesive” be considered as comprising a part of a group whose members prefer the Democratic Party. Courts have unfortunately applied the over-broad conception of “politically cohesive” when calculating majorities without proper examination of just what it is the majority consists. In philosophical terms, this line of thinking is an example of the “fallacy of division.”35

B. A Proper Definition of “Political Cohesiveness”

32 See id. at 1014–17.
33 Id. at 1016–17.
34 See, e.g., Old Person v. Cooney, 230 F.3d 1113, 1121 (9th Cir. 2000).
35 That is, it is an incorrect assumption that each separable part of a whole has the same attributes as the whole itself. See Eliot M. Held & Reid Griffith Fontaine, On the Boundaries of Culture as an Affirmative Defense, 51 Ariz. L. Rev. 237, 241 & n.20 (2009).
“The union of all members of a minority race in a given geographic area, the majority of whom consistently favor a given political party,” is a singularly poor definition for a “politically cohesive minority group.” A “politically cohesive group” consists of all persons, of any race, who prefer the same party, candidates, or policies. A “racially cohesive group” consists of persons of similar race, no matter their political preferences. But a “politically cohesive minority group” consists of all persons of similar race who also prefer the same party, candidates, or policies. A minority community that as a whole consistently votes for candidates of one party over another 80% to 20% may be consistent, but it is consistently politically fractured. To be sure, there is some political cohesiveness within this community, but the precise nature of the cohesion is more nuanced than is typically recognized. There does not exist a single, undifferentiated, politically cohesive group simply because the minority community consistently gives a majority of its votes to the candidates of the same political party, as the case law tends to suggest. On the contrary, there are two distinct politically cohesive groups within such a minority community: one that prefers Democrats and one that prefers Republicans. Treating all members of a minority community as belonging to whichever of these two groups is larger regardless of each person’s true political preference when drawing electoral boundaries is both inconsistent with the language and purpose of § 2, and violative of the Equal Protection Clause. The Court should adopt a conception of political cohesiveness for application in Gingles cases that

36 See Smith v. Brunswick Cnty., 984 F.2d 1393, 1400 (4th Cir. 1989) (refusing to count the percentage of minority persons who preferred the same political candidates as the non-minority persons as a part of the non-minority group for the purposes of the third Gingles prerequisite in what might be called an “inverse crossover theory” because it would result in dilution of the votes of those minority persons who coalesced politically with non-minority persons in favor of those minority persons who did not) (“The Act recognizes that representation is determined by the will of the voters which may, or may not, reflect the group’s race, color, or language. If we were to attempt to assure that the 80% bloc of black voters could elect blacks, we would have to dilute the remaining 20% of the black voter group as well as the white voter group, effecting the very discrimination that the Act intended to prohibit.”) (citation omitted)).

considers only that segment of the voting-age minority population that truly coheres in favor of a
given party when calculating whether the minority comprises a majority in a proposed district.

The purpose of § 2 is to remove the historical disability of persons of minority races fully
to enjoy the right of suffrage. That right consists not merely of the right to hand over a ballot and
have it counted, but also to choose whom one will associate oneself with through the act of
voting. A fundamental aspect of the right to equal suffrage is the right to have one’s preferences
counted accurately when such preferences are applicable to the reapportionment of voting
districts, and not to have one’s preferences ignored, much less purposely countermanded, based
purely on one’s racial similarities to his neighbors. A person of a minority race can of course
never dissociate himself from the pure historical facts of his ancestry. But suffrage is a matter of
personal conscience, and every person is free to associate himself with the political views,
candidates, and party of his choice regardless of the circumstances of unchangeable history. How
can it possibly further the goal of ensuring that a person of a minority race can elect the
representative of his choice by purposely counting him as a supporter of a political party that he
does not in fact support and then, based on that improper reckoning, placing him in a voting
district where the opposition party is likely to win elections? These persons—who are no less
racial minorities than are those who prefer the candidate that the majority of the minority
prefers—will have been placed into a district where they will by design “have less opportunity
than other members of the electorate to . . . elect representatives of their choice,”38 and all in the
name of assisting them in electing their favored candidates. What cruel irony. Moreover, the fact
that this intentional result is based on such a person’s race makes the traditional application of
Gingles particularly suspect under the Equal Protection Clause.39 The mandate that a person of a

minority race must be counted along with every other member of his race when assessing political party preference regardless of his personal preferences reflects a viewpoint that fails fully to appreciate and honor the primacy of man’s conscience over the circumstances of his birth in a liberal constitutional republic. Assuming for the sake of argument that § 2 may properly be invoked to raise vote dilution challenges at all, the courts should reject the current all-or-nothing approach used to determine “political cohesiveness” in the Gingles line of cases in favor of an approach that uses an actual, direct measure of political cohesiveness and prevents the painting of all minority persons in a proposed district with a brush of the same political color based on the preference of the majority of the minority.

C. Precedential Support for a Cohesiveness Challenge in the Roberts Court

Since taking its current ideological composition, the Supreme Court has already rejected two related theories in § 2 cases, both of which attempted to invoke § 2 to mandate the creation of districts without a majority population of voting-age minorities: the “influence district” theory and the “crossover district” theory. The Courts of Appeals are split on a third theory, the “coalition district” theory. When finally scrutinized, the traditional conception of “political cohesiveness” under the Gingles line of cases should be rejected for the same reason the influence and crossover theories have been rejected: it is inconsistent with § 2’s mandate of a showing that minorities have “less opportunity than other members of the electorate . . . to elect representatives of their choice.”

1. Influence Districts

Since the Court decided the first case discussed in this Part, Justices Souter and Stevens have been replaced by Justices Sotomayor and Kagan.

42 Compare Nixon v. Kent County, 76 F.3d 1381 (6th Cir. 1996) (en banc) (rejecting the theory), with Campos v. City of Baytown, 840 F.2d 1240 (5th Cir. 1988) (accepting the theory).
44 See § 1973(b) (emphasis added).
In 2006, the Supreme Court rejected the “influence district” theory, under which a plaintiff attempts to force the creation of a sub-majority-minority district under § 2 by showing that even though there will not be not enough voting-age minority persons in the proposed district to constitute a majority of the voting-age population, the minority population would be able to influence the outcome of elections in the proposed district. The Court rejected this theory because:

[t]he opportunity “to elect representatives of their choice,” 42 U.S.C. § 1973(b), requires more than the ability to influence the outcome between some candidates, none of whom is their candidate of choice. . . . If § 2 were interpreted to protect this kind of influence, it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions.

2. Crossover Districts

In 2009, the Supreme Court noted its previous rejection of the “influence district” theory with approval and went on to reject the “crossover district” theory, under which a plaintiff attempts to force the creation of a sub-majority-minority district under § 2 by showing that even though there will not be enough voting-age minorities in the proposed district to constitute a majority of the voting-age population, when the voting preferences of the non-minority population are considered, the candidate preferred by a majority of the minority will usually win election. The following passage from Bartlett is critical to the present discussion, because it indicates that the Court recognized that § 2 is concerned first and foremost with the ability of a politically cohesive group of minority persons to elect the candidate of their choice without aid from any other group:

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45 See Perry, 548 U.S. at 445.
46 Id. at 445–46.
47 See Bartlett, 129 S. Ct. at 1242.
48 See id. at 1243 (holding that because § 2 could not be invoked to create crossover districts, the supposed requirement to create such districts under § 2 could not be used in conjunction with the Supremacy Clause to avoid state-law reapportionment requirements).
[t]he petitioners’ theory is contrary to the mandate of § 2. The statute requires a showing that minorities “have less opportunity than other members of the electorate to . . . elect representatives of their choice.” But because they form only 39 percent of the voting-age population in District 18, African-Americans standing alone have no better or worse opportunity to elect a candidate than does any other group of voters with the same relative voting strength. That is, African-Americans in District 18 have the opportunity to join other voters—including other racial minorities, or whites, or both—to reach a majority and elect their preferred candidate. They cannot, however, elect that candidate based on their own votes and without assistance from others. Recognizing a § 2 claim in this circumstance would grant minority voters “a right to preserve their strength for the purposes of forging an advantageous political alliance.” Nothing in § 2 grants special protection to a minority group’s right to form political coalitions. “[M]inority voters are not immune from the obligation to pull, haul, and trade to find common political ground.”

This passage goes to the core of what § 2 does and does not require, and because it was written by Justice Kennedy, it may predict the outcome of a putative challenge to the traditional definition of “political cohesiveness” under § 2. After all, there is no better reason to include in a “politically cohesive” group under the second Gingles prerequisite those minority persons who support a different candidate than does the majority of the minority community than there is to include non-minorities who support the same candidate as the majority of the minority community. Using the facts in Bartlett as an example, if § 2 does not require the creation of a proposed district where the minority would consist only of 39% of the voting-age population, and hence would not be able to elect candidates of its choice without help from others, then why should § 2 require the creation of a proposed district where the needed additional 12% of the voting-age population consists of members of the same minority race as the first 39% but who prefer a different party? A group of racial minorities that is 100% politically cohesive in support of a given candidate but which itself constitutes only 39% of the voting-age population of a proposed district still requires “assistance from others,” even if those “others” are members of

49 Id. (citations omitted).
50 See id.
the same race who account for an additional 12% of the voting-age population but who prefer a different party.\textsuperscript{51} The 39\% still has the opportunity to convince members of the 12\% to change their party preference, just as it has the opportunity to convince non-minorities or members of other minority groups.\textsuperscript{52}

When calculating minority majorities, Gingles as currently applied allows for the crossover of minority persons who are not even in fact political allies of the majority of the minority.\textsuperscript{53} By assuming that “dissenting” minority persons within the minority community should be counted as a part of the politically cohesive minority when calculating whether the minority group is large enough to constitute a majority in a single-member district, the Gingles Court in essence adopted an implicit crossover theory. In rejecting the explicit crossover theory, the Bartlett Court implied the invalidity of the conception of political cohesiveness that it had applied since Gingles. The implicit Gingles crossover theory is even more problematic than the explicit Bartlett crossover theory, because the former allows a plaintiff to rely not only on non-minority persons who prefer the same party as the majority of minority persons in the proposed district do, but on minority persons in the proposed district who in fact prefer a different party, a result that is directly contrary to the mandate of § 2.\textsuperscript{54} Now that the Court has rejected the explicit crossover theory, this issue is ripe for determination. This conception of political cohesiveness under the Gingles line of cases cannot stand under a proper interpretation of § 2, much less under the Equal Protection Clause.

One might argue that all minorities in a district should be considered to be a part of the “politically cohesive” group, because a certain percentage of the minority population might

\textsuperscript{51} See id.
\textsuperscript{52} See id.
\textsuperscript{53} See Gingles, 478 U.S. at 50–51.
\textsuperscript{54} 42 U.S.C. § 1973(b).
change their minds in the future and join the majority of the minority. But the same argument can be made with respect to that percentage of the minority population who may change their minds and leave the majority of the minority.\textsuperscript{55} We can recognize without controversy that there is fluctuation in both individual preference and the population of a given district itself between legislative reapportionments, and that the fact that the percentage of a minority population preferring a particular party remains consistent over time does not mean that the exact same members of the minority community comprise that percentage in each and every election. A § 2 plaintiff must prove the state of affairs as they exist at the time of the challenge.\textsuperscript{56}

Some courts have noted that having a bare majority of the population comprised of minority persons is not enough if it does not result in the practical ability to elect candidates of the minority group’s choice because of low registration, low turnout, or the inclusion in the calculation of persons below the voting age.\textsuperscript{57} In such cases, it may be presumed that a minority population of 65% is required to satisfy § 2, adding 5% for each of the factors identified, \textit{supra}.\textsuperscript{58} If only voting-age persons are used in the calculation, the requirement drops to 60%.\textsuperscript{59} This practice at least recognizes the core principle that a bare majority of minority persons in a proposed district is not enough to satisfy § 2, but it neglects the most important factor when determining the ability to elect candidates of one’s choice: actual political cohesiveness. Also, although the voting-age factor is important, it is not clear if the use of turnout and registration factors are appropriate in a § 2 analysis, which is supposed to be focused on the ability to elect chosen candidates, not a guarantee that they will be elected. Even if not strictly true, it should probably be assumed that registration and turnout will be equal across racial lines for the

\begin{footnotesize}
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\item \textsuperscript{55} Incidentally, the latter phenomenon is likely to be the trend as minority groups gain economic parity.
\item \textsuperscript{56} \textit{See} Gingles, 478 U.S. at 48–51.
\item \textsuperscript{57} \textit{See}, e.g., African American Voting Rights Legal Defense Fund v. Villa, 54 F.3d 1345, 1348 n.4 (8th Cir. 1995).
\item \textsuperscript{58} \textit{See id.}
\item \textsuperscript{59} \textit{See id.}
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purposes of a § 2 analysis. After all, discouragement resulting from a history of disproportionately low political influence, which is what the vote dilution theory is designed to remedy, may account for historical low registration and turnout in minority communities.

3. Coalition Districts

The two Courts of Appeals to decide the question are split on the viability of the “coalition district” theory, under which a plaintiff attempts under § 2 to force the creation of a district where there will not be enough voting-age minority persons of any single minority race to constitute a majority of the voting-age population, but where there will be enough voting-age minority persons of more than one minority race to constitute a majority of the voting-age population when grouped together, and the members of the relevant minority races are politically cohesive. Regardless of whether the Supreme Court ultimately accepts or rejects the “coalition district” theory—and though I will not elaborate in this Article, I believe the coalition theory is legitimate under proper contours, assuming the vote dilution theory is legitimate at all under § 2—the definition of political cohesiveness proposed in this Article is consistent with either outcome. It would be entirely consistent for a court to accept that members of more than one minority race may form a politically cohesive majority in a proposed district, while also discounting those members of all minority races who in fact prefer a different party. Consider a proposed district where the voting-age population consists of 300 Caucasians, 300 Democratic Hispanics, 50 Republican Hispanics, 300 Democratic African-Americans, and 50 Republican

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60 The Supreme Court noted in Bartlett that the terms “coalition” or “coalitional” had been used in the past to mean what it has now decided to label a “crossover district”; in the § 2 context, it is now clear that “coalition” means the union of racially or ethnically distinct but politically cohesive minorities, and “crossover” means the union of politically cohesive non-minorities and minorities. See 129 S. Ct. at 1242–43 (citing Georgia v. Ashcroft, 539 U.S. 461, 483 (2003)).

61 Compare Nixon, 76 F.3d at 1386–87 (rejecting the theory), with Campos, 840 F.2d at 1244 (accepting the theory). In an en banc case, several judges of the Fifth Circuit later suggested rejecting the theory. See LULAC v. Clements, 999 F.2d 831, 894–98 (5th Cir. 1993) (en banc) (Jones, J., concurring).

62 See Campos, 840 F.2d 1244–47.
African-Americans. Assuming the 600 Democratic minority persons are politically cohesive, a § 2 case should be viable consistent with both Campos and the definition of political cohesiveness that this Article argues is required by § 2 and the Equal Protection Clause. In this case, there is a majority of minority persons in the proposed district (600 of 1000) who prefer the Democratic Party. But now imagine that 100 Democratic Hispanics and 100 Democratic African-Americans in the district become Republicans. There is still a majority of minority persons (700 of 1000) in the proposed district, and a majority of the minority persons (400 of 700) still prefer the Democratic Party. However, only a minority of persons in the proposed district (400 of 1000) are minority persons who prefer the Democratic Party, and this is how the second Gingles prerequisite must be applied under a proper reading of § 2, because the 300 minority persons in the district who prefer the Republican Party are only politically cohesive amongst themselves, as are the 400 minority persons who prefer the Democratic Party, but there is no group of 501 politically cohesive minority persons within the district even when persons of all minority races are considered together under the “coalition” theory.

The Court has recently indicated its distaste for standards requiring intense statistical examinations of racial voting patterns;63 however, the standards proffered in this Article would not require any statistical investigation beyond what is already permitted and in fact required.64 The Court has only expressed an aversion to complex statistical investigations into the voting patterns of non-minorities in the context of evaluating the third Gingles prerequisite.65 The percentage of minorities in a proposed district consistently preferring a given party, however, is already one of the most important factors in determining political cohesiveness under the second

63 See Bartlett, 129 S. Ct. at 1244 (noting that adoption of the explicit crossover theory would “place courts in the untenable position of predicting many political variables and tying them to race-based assumptions”).
64 See Gingles, 478 U.S. at 56 (“A showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness necessary to a vote dilution claim, and, consequently, establishes minority bloc voting within the context of § 2.” (citation omitted)).
65 See Bartlett, 129 S. Ct. at 1244.
In fact, that statistical investigation is central to the Gingles framework of a vote-dilution claim under § 2, and is a necessary element of a vote-dilution plaintiff’s proof. 67 Under a proper standard of political cohesiveness, the selfsame statistical investigation would be required, but the percentage of minority persons who are not in fact a part of the politically cohesive segment of the voting-age minority population in the proposed district would be discounted in determining whether the politically cohesive minority group were large enough to constitute a majority in the proposed district. These “dissenting” minority persons would not be not lumped in with the majority of the minority voters in the proposed district as if race were a superior consideration to actual political preference, which method of calculation seems impermissible in implementing a statute focused on ensuring “choice.” 68

4. Political Cohesiveness and DeGrandy Proportionality

Adoption of the conception of political cohesiveness put forth in this Article will affect not only the application of the second Gingles prerequisite, but also the DeGrandy proportionality factor under § 2(b)’s totality-of-the-circumstances test even after all three of the Gingles prerequisites are satisfied. For it makes little sense to exclude during the Gingles step of a § 2 analysis those minority persons who prefer a different party than the majority of the minority does, only to lump those persons back in under the totality-of-the-circumstances prong when comparing the percentage of majority-minority districts to the percentage of minority persons in the voting-age population of all districts. The proper comparison to make is the percentage of majority-minority districts to the percentage of minority persons in all districts who prefer the party that the politically cohesive minority group in the proposed district prefers.

Consider a county divided into 10 electoral districts of 100 voting-age persons apiece. The

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66 See, e.g., Perry, 548 U.S. at 427.
67 See Gingles, 478 U.S. at 56.
voting-age population consists of 700 Caucasians and 300 Hispanics, with the Hispanics dispersed such that it is geographically feasible to increase the number of Hispanic-majority districts from two to three. Assume that Gingles as traditionally applied is satisfied, but that 120 of the 300 Hispanic persons in the county prefer the Republican Party. Under the traditional conception of political cohesiveness, the proportionality factor would mitigate in favor of creating the third Hispanic-majority district, because it would increase the percentage of Hispanic-majority districts in the county from 20% to 30%, bringing it in line with the percentage of voting-age Hispanic persons in the county. But does § 2 truly mandate that 30% of the electoral districts in the county be controlled by Hispanic Democrats when only 18% of the county’s voting-age population consists of Hispanic Democrats? Under a proper conception of political cohesiveness, the existing Hispanic Democrat control of 20% of the electoral districts in this county of 18% Hispanic Democrats is sufficient under § 2. To conclude otherwise would be to allow the creation of a third Democratic district based purely on the racial similarities of 120 Hispanic Republicans to 180 Hispanic Democrats, while purposely ignoring these groups’ political dissimilarities.

D. A Final Note on Equal Protection

In the context of an equal protection challenge to the denial of the right to sit on a jury, Justice Kennedy has explicitly noted that the Equal Protection Clause protects the rights of “person[s],” not groups, and that although individual rights may be vindicated or violated wholesale, the individual is the entity to which rights attach.69 “The injury is to personal dignity

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69 See J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 152–53 (1994) (Kennedy, J., concurring in the judgment) (quoting U.S CONST. amend. XIV); U.S CONST. amend. XIV (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” (emphasis added)). This point cannot be stressed enough. A group necessarily consists of individuals, and a group’s collective will, i.e., the collection of the group’s individual members’ rights, can never supersede the rights of the group’s dissenting members. Such a theory is flatly contrary to the concept of constitutional democracy. Rights are those freedoms that the majority may not take away from the minority no matter the count of the vote.
and to the individual’s right to participate in the political process.”70 “[A] juror sits not as a representative of a racial or sexual group but as an individual citizen.”71 Why should this principle apply differently when counting persons for the purposes of legislative apportionment in the voting-rights context? Minority persons’ rights are individual when they are part of a venire, and they are no less individual when they are part of a legislative-apportionment calculation. This bedrock principal of equal protection is flouted when a court applies § 2 to mandate the creation of a majority–minority district by counting some minority persons who favor a given party as if they favor a different party, based purely on their race, and then places them into the new district where they will by design be represented by candidates they in fact disfavor.72 As the Court has stated, whether motivated by § 2 or otherwise, when “race rather than politics predominantly explains” a legislative apportionment scheme, it is unconstitutional under the Equal Protection Clause.73 This is precisely the case with the implicit crossover theory under the conception of political cohesiveness currently in use in Gingles cases.

IV. Conclusion

So why have the courts uniformly applied Gingles using a statutorily, philosophically, and constitutionally problematic conception of political cohesiveness? The simple answer is that it appears no litigant has yet pressed the arguments laid out in this Article, and the courts cannot be faulted for having failed to raise the issue sua sponte. But as the percentage of minorities identifying with the Republican Party increases, the day is fast approaching when some minority litigant will stand up and challenge his state’s or county’s ability purposely to place him into an

70 Id. at 153 (citing Powers v. Ohio, 499 U.S. 400, 410 (1991)).
71 Id. at 153–54.
72 A minority person ending up in a new majority-minority district would perhaps have no standing to make such a challenge when there were in fact enough politically cohesive minority persons in the new district to constitute a majority. Such a person stands in a position similar to non-minorities in the new district. He has been put into a new district where he is unlikely to be represented by candidates he prefers, but the placement has not been because of his race any more than non-minorities have been put into the new district because of their race.
73 Easley, 532 U.S. at 243.
electoral district where he is likely to be represented by a candidate of a party he does not support based purely on the false assumption that he is politically associated with those of his neighbors who share his racial background. An interpretation of § 2 permitting such a result cannot be squared with the statutory language or the Equal Protection Clause. State attorneys general and civil rights attorneys on both sides of the issue should prepare themselves for the debate.