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THE MINORITY COALITION'S BURDEN OF PROOF UNDER SECTION 2 OF THE VOTING RIGHTS ACT

Chelsea J. Hopkins*

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INTRODUCTION

Recent population data suggests that the United States' racial and ethnic composition is rapidly changing. Recently, the Hispanic community eclipsed the African American community as the most prevalent minority group in the

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United States, comprising an estimated 16.3% of the population in 2010.¹ Additionally, the population of Asian-Pacific Americans has increased to 4.8% of the total population.² While those numbers indicate a significant change in the composition of the United States generally, the population concentrations in specific states reveal more drastic growth rates.³ Specifically, ten states including Arizona, California, Florida, Hawaii, Illinois, Texas, New Jersey, New Mexico, Nevada, and New York indicate numbers grossly inconsistent with the national standards.⁴ The 2010 Census indicated that the Asian-Pacific American population in California had increased by 31.47% statewide.⁵ Some cities, such as San Francisco, now have Asian-Pacific American populations of over 30%.⁶ Moreover, Latin Americans comprise more than 37% of the California and Texas populations, and almost 30% of the Arizona population according to 2010 census.⁷ Given these numbers, one would expect significant minority representation in elected office. However, most minority groups only win elections by “narrow margins” and lack true political power.⁸

Minority groups frustrated by a lack of representation turn to other remedies to ensure that their votes carry equal strength, but often find that the current analytical approach

1. *State and County QuickFacts: USA*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/00000.html> (last visited Dec. 16, 2010).

2. *Id.*

3. John O. Calmore, *Race-Conscious Voting Rights and the New Demography in a Multiracing America*, 79 N.C. L. REV. 1253, 1262 (2001).

4. *Id.*

5. *See Profile of General Demographic Characteristics: 2000*, U.S. CENSUS BUREAU, 1, <http://censtats.census.gov/data/CA/04006.pdf> (last visited Nov. 13, 2011) (4,861,007–3,697,513/3,697,513 = 0.31467 * 100 = 31.467%); *2010 Census Interactive Population Search*, U.S. CENSUS BUREAU, <http://2010.census.gov/2010census/popmap/ipmtext.php?fl=06> (last visited Nov. 13, 2011).

6. Kathay Feng, Keith Aoki & Bryan Ikegami, *Voting Matters: AIPAs, Latinas/os and Post-2000 Redistricting in California*, 81 OR. L. REV. 849, 885 (2002).

7. *State and County QuickFacts: California*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/06000.html> (last visited Dec. 16, 2010); *State and County QuickFacts: Texas*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/48000.html> (last visited Dec. 16, 2010); *State and County QuickFacts: Arizona*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/04000.html> (last visited Dec. 16, 2010).

8. Quyen L. Ta, Comment, *Vietnamese Americans, the Voting Rights Act, and Electoral Power: Challenges to Being Counted*, 10 UCLA ASIAN PAC. AM. L.J. 88, 97 (2005).

adopted by the Supreme Court for section 2 of the Voting Rights Act (VRA) prohibits redress through its strict size and dispersion requirements.⁹ To meet the requirements, several minority groups have attempted to aggregate for the purposes of filing a section 2 claim, but courts have expressed resistance to granting relief without a heightened showing of group cohesion.¹⁰ Scholars argue that the under-inclusive nature of the *Thornburg v. Gingles*¹¹ approach, combined with the increasingly diverse ethnical composition of the United States, fails to address true instances of vote dilution and requires reexamination by the Supreme Court.¹²

This Comment begins by exploring the history of the VRA, the current standards applied to minority groups filing section 2 challenges, and the methods employed by minority groups to gain protection under the VRA, specifically minority aggregation. Part I of this Comment discusses the history of the VRA, beginning with the general reasoning behind the legislation and the history of its current standards—including the currently applicable *Thornburg v. Gingles* analytical standard—and culminates with a discussion of the diverging views expressed by the federal circuit courts regarding minority aggregation.¹³ Next, Part II identifies problems created by the conflicting views of minority aggregation, and the lack of a clearly defined standard of review for aggregated section 2 claims.¹⁴ Part III discusses the current proposals for assessing section 2 claims by aggregated minorities, ranging from imposing a completely new standard, to requiring a heightened showing of cohesion between both groups.¹⁵ Finally, Part IV suggests an improved standard for the aggregation of minority groups, taking into account the diverging perspectives.¹⁶

9. *Id.* at 101–02.

10. Angelo N. Ancheta & Kathryn K. Imahara, *Multi-Ethnic Voting Rights: Redefining Vote Dilution in Communities of Color*, 27 U.S.F. L. REV. 815, 845 (1993).

11. *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986).

12. See Ancheta & Imahara, *supra* note 10, at 845–48.

13. See *infra* Part I.

14. See *infra* Part II.

15. See *infra* Part III.

16. See *infra* Part IV.

I. BACKGROUND

A. *The Voting Rights Act Generally*

The protection of voting rights for minority groups in the United States began with the passage of the Fifteenth Amendment, which states that “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”¹⁷ However, as the legislature began to protect the voting rights of ethnic minorities, new ways to disenfranchise these groups evolved.¹⁸ The new disenfranchisement methods encouraged further legislative efforts to increase voting rights protections, resulting in the 1965 enactment of the VRA.¹⁹ Originally, the VRA protections largely centered on the constitutional guarantees offered by the Fifteenth Amendment, and consisted of two basic sections.²⁰ Section 2 sought to codify generally the Fifteenth Amendment’s protection by stating that “[n]o 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 that results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color.”²¹ Despite the prohibitions of section 2, Congress determined that the VRA needed the additional power of section 5.²² Section 5 applies only to specific jurisdictions with a high incidence of, or potential for, minority disenfranchisement.²³ Section 5 requires that the

17. U.S. CONST. amend. XV, § 1.

18. The new methods of vote dilution included the use of multi-member districts and strategies, which over-concentrated a minority into a single district or dispersed minority groups so widely amongst the majority group in several districts to limit their political influence. See Feng, Aoki & Ikegami, *supra* note 6, at 863–66.

19. *Id.* at 863.

20. *The Voting Rights Act of 1965*, U.S. DEPT JUST., http://www.justice.gov/crt/about/vot/intro/intro_b.php (last visited Dec. 16, 2010).

21. 42 U.S.C. § 1973(a) (2006).

22. See Joaquin G. Avila, Eugene Lee & Terry M. Ao, *Voting Rights in California: 1982–2006*, 17 S. CAL. REV. L. & SOC. JUST. 131, 137 (2007).

23. Section 5 of the Voting Rights Act applies to any jurisdiction that maintains “a ‘test or device,’ restricting the opportunity to register and vote” based on ethnic or language minority status. *About Section 5 of the Voting Rights Act*, U.S. DEPT JUST., http://www.justice.gov/crt/about/vot/sec_5/

federal government receive preclearance for any voting changes in the state from the U.S. Attorney General or the U.S. District Court for the District of Columbia.²⁴ In its current form, the VRA prohibits restrictions that prevent ethnic or language minorities from having an equal opportunity to elect their chosen representatives.²⁵ Upon finding that these protections are a continuing necessity, Congress passed extensions of the VRA several times over twenty-five years, most recently in 2006.²⁶

B. The History of Section 2 Vote Dilution Claims

Section 2 applies broadly to all U.S. jurisdictions.²⁷ It bars states from imposing requirements that negatively affect a minority's right to participate equally in the political process.²⁸ With such a wide scope, it applies to most types of minority disenfranchisement based on race,²⁹ allowing minorities to bring claims for vote dilution suits.³⁰ Vote dilution is understood as the "second generation" of U.S. voting rights law.³¹ Allowing vote dilution claims ensures

about.php (last visited Oct. 11, 2011). If a jurisdiction maintained such a device, then it became "covered" by section 5, and any "change with respect to voting in a covered jurisdiction . . . cannot legally be enforced unless and until the jurisdiction" first receives approval from the U.S. District Court for the District of Columbia or the Attorney General. *Id.*

24. *Id.*

25. Sebastian Geraci, Comment, *The Case Against Allowing Multiracial Coalitions to File Section 2 Dilution Claims*, 1995 U. CHI. LEGAL F. 389, 391 (1995).

26. *Bush Signs Voting Rights Act Extension*, MSNBC.COM, <http://www.msnbc.msn.com/id/14059113/#.TujqDIZ9J90> (last visited Feb. 2, 2012).

27. Feng, Aoki & Ikegami, *supra* note 6, at 864.

28. *Id.*

29. "The Act originally protected only black voters. When it was amended in 1975 to reach language minorities, the Act then identified four new covered groups: persons of Spanish heritage; all American Indians; 'Asian Americans' including Chinese, Japanese, Korean and Filipino Americans; and Alaskan natives." League of United Latin Am. Citizens, Council No. 4434 v. Clements, 999 F.2d 831, 894 (5th Cir. 1993) (Jones, J., concurring) (quoting 42 U.S.C. § 1973(b)(f)(1) (1988)).

30. 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, 445 (1995).

31. The first-generation of voting rights suits "largely sought to vindicate classic examples of individual rights" by focusing on "individual citizens casting individual ballots." Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1671 (2001). However, the second-

that racial minorities have an equal opportunity to elect their representatives.³² These claims require a level of racial polarization, where “white and racial minorities consistently prefer different candidates.”³³ Vote dilution can occur through two schemes, they are typically known as “cracking” and “packing.”³⁴

Historically, vote dilution claims developed in response to the states’ use of at-large voting methods.³⁵ The Supreme Court sought to solve the problem of vote dilution in at-large districts through invalidation and replacement with single-member districts.³⁶ However, through creative redistricting plans, states still retained the power to dilute the votes of racial minorities by drawing districts in which white residents consistently formed a majority.³⁷ Responding to these methods required clearer standards for bringing section 2 claims.³⁸

Claims pertaining to vote dilution under the VRA have been subject to varying proof requirements throughout their history.³⁹ At the VRA’s inception the courts interpreted its standards to require proof only of discriminatory effects.⁴⁰ This general consensus lasted from the VRA’s inception through 1980.⁴¹ However, in *Mobile v. Bolden*⁴² the Supreme

generation challenges include the rights of a racial group. *Id.*

32. *Id.*

33. *Id.*

34. Feng describes packing as “the overconcentration of minority group populations into one or two districts for the purpose of minimizing their sphere of legislative influence” and cracking as dispersing “minorities . . . among different districts so no one district has enough minorities to influence the political process.” Feng, Aoki & Ikegami, *supra* note 6, at 864.

35. Gerken, *supra* note 31, at 1672. The first vote dilution suits focused on individual rights. However, the suits evolved and began to focus on the rights of an entire racial group. *Id.* Additionally, “at-large voting methods” refers to “statewide races” where “more than one representative is elected from a single district.” *Id.*

36. *Id.* at 1673.

37. *See id.* at 1675.

38. *See* Rick G. Strange, *Application of Voting Rights Act to Communities Containing Two or More Minority Groups—When is the Whole Greater than the Sum of the Parts?*, 20 TEX. TECH L. REV. 95, 107–08 (1989).

39. *Id.* at 100–11.

40. *See id.* at 100.

41. Feng, Aoki & Ikegami, *supra* note 6, at 864.

42. *City of Mobile v. Bolden*, 446 U.S. 55 (1980), *superseded by statute*, Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 134, *as recognized in* *Thornburg v. Gingles*, 478 U.S. 30 (1986).

Court held that section 2 “was intended to have an effect no different from that of the Fifteenth Amendment itself.”⁴³ This holding altered the standard that had been in place for the first fifteen years of the VRA’s enforcement and imposed a new requirement of discriminatory intent.⁴⁴ The new requirement made it nearly impossible to bring claims under section 2 and ceased voting rights challenges almost entirely.⁴⁵ However in 1982, Congress intervened and codified the discriminatory effects standard, indicating that the Supreme Court’s interpretation of the standard of proof did not comply with Congress’ intent.⁴⁶ The new discriminatory effects standard required a multi-factor analysis of the Senate Report Factors, which included: the extent of the history of official voting discrimination; the existence of racially polarized voting; election practices that enhanced the opportunity for discrimination against the minority group; denial of access to minority groups in the candidate slating process; the extent to which minority groups bore the effects of discrimination in such areas as education and employment, which hindered their ability to participate in politics; racial campaign appeals; the electoral success of minorities; whether elected officials significantly failed to respond to minority groups needs; and whether the policy underlying the state or political subdivision’s use of such voting qualification, prerequisite to voting, or standard, practice or procedure was tenuous.⁴⁷ These factors elucidated the variety of ways minority voting rights may be diluted, although Congress clearly asserted that the adoption of this standard does not grant minorities a right of proportional representation.⁴⁸

C. *Analysis of Thornburg v. Gingles*

While the Supreme Court and Congress dealt with the overarching burden of proof, plaintiffs still required guidance

43. *Id.* at 61.

44. Strange, *supra* note 38, at 101.

45. Schulte, *supra* note 30, at 447.

46. *Id.*

47. S. REP. NO. 97-417, at 28–29 (1982), *quoted in* Ancheta & Imahara, *supra* note 10, at 837–38.

48. Schulte, *supra* note 30, at 448.

on the scope of section 2's protection for vote dilution claims.⁴⁹ In the landmark case of *Thornburg v. Gingles*, the Supreme Court outlined three requirements for bringing section 2 vote dilution claims in a multi-member district.⁵⁰ First, the minority group must "demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district."⁵¹ The Supreme Court required this showing to demonstrate that the voting system or voting practices are responsible for the minority's inability to elect a candidate of their choosing.⁵² Second, "the minority group must be able to show that it is politically cohesive."⁵³ The political cohesion requirement was also directed towards proving that the multi-member structure consistently defeats the minority's interests.⁵⁴ Additionally, the first two requirements spoke to the minority's ability to elect a single candidate of its choosing.⁵⁵ Third, the Supreme Court required that the minority group show that "the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, . . . to defeat the minority's preferred candidate."⁵⁶ Essentially, requiring minorities to prove that their inclusion in a "white multimember district" diminished their ability to select their representatives.⁵⁷

The Supreme Court added to these requirements in *Johnson v. De Grandy*,⁵⁸ by holding that if a plaintiff meets all three requirements, then the court must determine whether "under the 'totality of the circumstances,' the minority group has less opportunity than other members of the electorate to participate in the electoral process and to elect representatives of their choice."⁵⁹ The Supreme Court

49. See *Strange*, *supra* note 38, at 106–07.

50. *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986).

51. *Id.* at 50.

52. *Id.*

53. *Id.* at 51.

54. *Id.*

55. *Campos v. City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988).

56. *Gingles*, 478 U.S. at 51. The term "white voting bloc" refers to the similarity of the majority's voting pattern. By demonstrating that the majority group voted in a cohesive manner, the minority group showed how "a white multi-member district impeded its ability to elect its chosen representatives." *Id.*

57. *Id.*

58. *Johnson v. De Grandy*, 512 U.S. 997 (1994).

59. *Feng, Aoki & Ikegami*, *supra* note 6, at 866. The court utilized the

later applied this analytical approach to single-member districts in *Grove v. Emison*.⁶⁰ As a direct result of the Supreme Court's enumeration of these factors, the vote dilution cases became the work of various experts.⁶¹ Plaintiffs required a certain amount of qualitative data to satisfy the burden of proof imposed solely by the first three factors.⁶² However, the imposition of the clear elemental approach only led to more questions about section 2 claims.⁶³

D. Minority Aggregation

After the Supreme Court's enumeration of the *Gingles* factors for section 2 dilution claims, some minorities felt compelled to aggregate in order to meet the *Gingles* requirements.⁶⁴ Despite the amount of Congressional and Supreme Court involvement with the VRA, both bodies remained silent on the aggregation of minorities for the purposes of bringing a section 2 claim.⁶⁵ However, in *Emison*, the Supreme Court acknowledged that while it would not directly decide whether aggregated minorities could bring section 2 vote dilution claims, if an aggregated minority attempted to do so, all three *Gingles* preconditions must be met.⁶⁶ Therefore, courts have fallen into one of three categories in deciding aggregated minority vote dilution suits. Either, (1) expressly accepting a minority's right to aggregate; (2) implicitly accepting the right to aggregate by applying the *Gingles* factors to aggregated minorities, without addressing directly if a right to aggregate exists; or (3) expressly rejecting the right to aggregate.⁶⁷

1. Express Acceptance of the Right to Aggregate

The Fifth Circuit has emerged as the leader of the first group by expressly allowing minority aggregation in several

Senate Report Factors to complete the totality of the circumstances analysis. *Id.* at 866 n.67.

60. *Grove v. Emison*, 507 U.S. 25, 40–41 (1993).

61. Gerken, *supra* note 31, at 1674.

62. *Id.*

63. *Id.* at 1675.

64. Strange, *supra* note 38, at 115.

65. Schulte, *supra* note 30, at 442.

66. *See Grove v. Emison*, 507 U.S. 25, 40–42 (1993).

67. *See Schulte*, *supra* note 30, at 454.

cases.⁶⁸ In 1988, the Fifth Circuit expressly validated the practice of minority aggregation in *Campos v. City of Baytown*.⁶⁹ The plaintiffs, an aggregated group of African American and Hispanic American voters, filed a section 2 vote dilution suit challenging the City of Baytown's at-large election method.⁷⁰ The District Court for the Southern District of Texas ruled in favor of the aggregated minority.⁷¹ On appeal, the City of Baytown challenged the district court's decision, arguing that the claim did not sufficiently meet all three of the *Gingles* factors.⁷² By affirming the decision of the district court, the Fifth Circuit expressly accepted the practice of aggregating minorities for section 2 claims but also suggested a standard for handling aggregated claims by applying the *Gingles* analysis.⁷³

First, by finding that the African American and Hispanic American populations constituted a "sufficiently large and geographically compact"⁷⁴ group to comprise a majority in a single-member district, the Fifth Circuit strictly construed the *Gingles* standard and stated that the existence of minority group members outside the potential minority district does not affect the groups' ability to meet the first requirement.⁷⁵

As to the second *Gingles* requirement, the City of Baytown posed two challenges: whether the plaintiffs focused on the correct elections to demonstrate cohesion and whether the evidence itself demonstrated cohesion.⁷⁶ In response to the first challenge, that the plaintiffs did not study a sufficient number of elections nor the correct elections, the Fifth Circuit echoed the Supreme Court's determination that the number of and which elections the plaintiff must study varies by case.⁷⁷ More specifically, the Fifth Circuit accepted the Supreme Court's suggestion that "the number of elections in which the minority group has sponsored candidates"

68. Geraci, *supra* note 25, at 395-97.

69. *Campos v. City of Baytown*, 840 F.2d 1240, 1241 (5th Cir. 1988).

70. *Id.* at 1242.

71. *Id.*

72. *Id.* at 1244, 1246.

73. *Id.* at 1244.

74. *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986).

75. *Campos*, 840 F.2d at 1244.

76. *Id.* at 1244-47.

77. *Id.* at 1245.

constitutes an important circumstance.⁷⁸ By applying both Supreme Court suggestions, the Fifth Circuit determined that the plaintiffs correctly assessed only the races in which either minority group had a member running.⁷⁹ As to the greater challenge of demonstrating cohesion, the Fifth Circuit affirmed the finding of cohesion based upon the plaintiff's statistical evidence produced at trial.⁸⁰ In response to the City of Baytown's assertion that insufficient evidence existed to support a finding of racially polarized voting, the Fifth Circuit held that "*Gingles* does not require total white bloc voting" but simply the existence of enough white bloc votes to "usually defeat the minority's preferred candidate."⁸¹ Finally, during its application of the Senate Report Factors, to complete the totality of the circumstances analysis, the Fifth Circuit specifically noted the importance of the minority groups' shared history of discrimination.⁸² Through the *Campos* holding, the Fifth Circuit expressly accepted the practice of aggregating racial minorities to bring a section 2 claim, by simply meeting the *Gingles* requirements.⁸³

The Fifth Circuit furthered its acceptance of minority vote aggregation in *League of United Latin American Citizens v. Clements (LULAC I)*.⁸⁴ The challenge in *LULAC I* also

78. *Id.* The *Gingles* court stated that:

[I]n a district where elections are shown usually to be polarized, the fact that racially polarized voting is not present in one or a few individual elections does not necessarily negate the conclusion that the district experiences legally significant bloc voting. Furthermore, the success of a minority candidate in a particular election does not necessarily prove that the district did not experience polarized voting in that election; special circumstances, such as the absence of an opponent, incumbency, or the utilization of bullet voting, may explain minority electoral success in a polarized contest.

Gingles, 478 U.S. at 57.

79. *Campos*, 840 F.2d at 1245.

80. In *Campos*, the City of Baytown attempted to argue for the inclusion of Precinct 248 in the cohesion correlation calculation. *Id.* at 1247. However, the majority explicitly affirmed the lower court's refusal to include this particular district, despite the fact that Precinct 248 "is overwhelmingly Black" because the evidence indicated individual political control by a single individual, and lack of overall Black representativeness since it contained "less than 13% of the Black population." *Id.* at 1247-48.

81. *Id.* at 1249 (quoting *Gingles*, 478 U.S. at 51).

82. *Id.*

83. *Id.*

84. See *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 864 (5th Cir. 1993).

involved the aggregation of African Americans and Hispanic Americans, and alleged that an at-large voting system functioned to dilute the votes of racial minorities in school board elections.⁸⁵ While the Fifth Circuit ultimately denied the claim, the majority opinion reaffirmed the court's express acceptance of minority aggregation by stating that the Fifth Circuit has "allow[ed] [the] aggregation of different minority groups where the evidence suggests that they are politically cohesive."⁸⁶ This express affirmation indicates the continuation of the Fifth Circuit's stance on aggregation for the purposes of filing a section 2 claim.⁸⁷ Additionally, the Fifth Circuit continued this trend by acknowledging the vote dilution claim of African Americans and Hispanic Americans in *Latin American Citizens v. Midland Independent School District*.⁸⁸ Therefore, while the Fifth Circuit did not find vote dilution in every case, it did allow the minority groups to assert the claim in every case, and held them to the same standard that applies to single minorities' section 2 claims.⁸⁹

The Eleventh Circuit also expressly accepted vote dilution claims filed by aggregated minorities.⁹⁰ In *Concerned Citizens of Hardee County v. Hardee County Board of Commissioners*,⁹¹ the Eleventh Circuit heard the appeal of an aggregated minority group consisting of African American and Hispanic American residents challenging the multi-member voting system used to elect the Hardee County School Board.⁹² The Eleventh Circuit expressly held that "[t]wo minority groups . . . may be a single Section 2 minority if they can establish that they behave in a politically cohesive manner."⁹³ In making this express determination that minority groups can aggregate, the opinion cited all of the Fifth Circuit cases, but provided no further justification.⁹⁴ The Eleventh Circuit ultimately determined that the

85. Geraci, *supra* note 25, at 396.

86. *Clements*, 999 F.2d at 864.

87. *See id.*

88. *League of United Latin Am. Citizens, Council No. 4386 v. Midland Indep. Sch. Dist.*, 829 F.2d 546 (5th Cir. 1987).

89. *See Geraci, supra* note 25, at 397.

90. *Id.*

91. *Concerned Citizens of Hardee Cnty. v. Hardee Cnty. Bd. of Comm'rs*, 906 F.2d 524 (11th Cir. 1990).

92. *Id.* at 525.

93. *Id.* at 526.

94. *Id.*

aggregated minorities did not have sufficient evidence of cohesion to prove their claim, and that the proposed “functional majority” approach to satisfying the first *Gingles* requirement was unpersuasive.⁹⁵ However, the most important aspect of the holding was the court’s overall agreement with the Fifth Circuit regarding its global stance on minority aggregation.⁹⁶

2. *Implicit Acceptance of Minority Aggregation*

Conversely, the Ninth Circuit has distinctly avoided making a determination as to whether minorities have the right to aggregate for the purposes of bringing a section 2 vote dilution claim under the VRA, thereby falling into the second category.⁹⁷ In the Ninth Circuit’s first examination of this issue, *Romero v. City of Pomona*,⁹⁸ an aggregated group of African American and Hispanic American voters jointly appealed the District Court for the Central District of California’s involuntary dismissal of the group’s section 2 claim challenging the city’s at-large voting system.⁹⁹ The Ninth Circuit denied the plaintiffs’ appeal to re-open the case based upon the minority groups’ inability to prove that the percent of the minority population eligible to vote could constitute a majority in a single-member district, and that the two minorities formed a politically cohesive voting group.¹⁰⁰ However, the Ninth Circuit did not dismiss the claim based on the minorities’ attempt to aggregate, but instead dismissed due to their inability to meet the *Gingles* requirements.¹⁰¹ By applying the *Gingles* test to the case, rather than simply dismissing it outright, the Ninth Circuit implicitly suggested that it accepted a minority’s right to aggregate to bring a

95. The plaintiffs in *Hardee* attempted to satisfy the first *Gingles* requirement by arguing that the African American group, which numerically comprised only 36% of the population, represented a “functional majority” because, at that number, given the “average white cross-over vote,” they could elect a “candidate of their choice.” *Id.* at 527. However, while the Eleventh Circuit did not expressly invalidate this theory, they found its application here unpersuasive. *Id.*

96. See Geraci, *supra* note 25, at 397.

97. *Id.*

98. *Romero v. City of Pomona*, 883 F.2d 1418 (9th Cir. 1989), *abrogated by* *Townsend v. Holman Consulting Corp.*, 914 F.2d 1136 (9th Cir. 1990).

99. *Id.* at 1420–21.

100. *Id.* at 1425, 1426–27.

101. *Id.* at 1427.

claim under section 2.¹⁰²

The Ninth Circuit continued to avoid expressing a direct decision pertaining to minority aggregation in *Badillo v. City of Stockton*.¹⁰³ The Ninth Circuit determined that the aggregated minority group, comprised of African Americans and Hispanic Americans, did not meet their burden of proof regarding a section 2 vote dilution claim.¹⁰⁴ Yet, the court once again applied the *Gingles* factors to the aggregated minority group.¹⁰⁵ By continually applying the *Gingles* factors, rather than dispensing with the appeal altogether, the Ninth Circuit repeatedly and implicitly indicated its acceptance of aggregated minority groups for section 2 purposes.¹⁰⁶

3. *Express Rejection of Minority Aggregation*

While all of the cases discussed thus far have either expressly or implicitly accepted minority aggregation for section 2 vote dilution claims, several circuit courts have implicitly or expressly rejected these cases. In *Latino Political Action Committee, Inc. v. City of Boston*¹⁰⁷ (L.P.A.C.), the plaintiffs—an aggregated group of African American, Asian American, and Hispanic American voters—appealed the decision of the District Court of Massachusetts.¹⁰⁸ The groups jointly and separately alleged that the district configuration unnecessarily packed the minorities into three districts for City Council and School Committee elections, thereby violating section 2.¹⁰⁹ In making its determination, the First Circuit only briefly mentioned that members from three minority groups joined in the challenge, and then proceeded to analyze the aggregated groups' claims separately.¹¹⁰ By completely avoiding the combined claim, the First Circuit implicitly prohibited the aggregation of

102. Geraci, *supra* note 25, at 398.

103. *Badillo v. City of Stockton*, 956 F.2d 884 (9th Cir. 1992).

104. *Id.* at 886.

105. *Id.* at 890.

106. Geraci, *supra* note 25, at 398.

107. *Latino Political Action Comm., Inc. v. City of Bos.*, 784 F.2d 409 (1st Cir. 1986).

108. *Id.* at 409–10.

109. *Id.* at 410–11.

110. *See* Schulte, *supra* note 30, at 452.

minorities for section 2 vote dilution claims.¹¹¹ However, *L.P.A.C.* preceded the Fifth Circuit's cases that expressly affirmed minorities' right to aggregate, which could diminish the application of the decision.

The Sixth Circuit explicitly forbade the practice of minority aggregation for the purposes of section 2 vote dilution claims in *Nixon v. Kent County*.¹¹² An aggregated minority of African American and Hispanic American voters appealed their unsuccessful challenge of the district composition for the election of the Board of County Commissioners.¹¹³ The minority alleged that the defendants "pack[ed]" the district with "an excessive percentage of minority voters" and split "the remaining minority voters among districts dominated by large white majorities."¹¹⁴ The majority of the Sixth Circuit concluded, through the application of principles of statutory construction, that the statutory language of the VRA barred aggregated claims by using singular pronouns.¹¹⁵ However, the opinion foreclosed the possibility of minority aggregation under additional theories,¹¹⁶ including a lack of legislative history,¹¹⁷ broadened scope,¹¹⁸ and policy concerns regarding "coalition lawsuits."¹¹⁹ The opinion directly echoed the minority opinions from previous circuit court decisions, most notably from the Fifth Circuit, as discussed below.¹²⁰ Ultimately, this case stands apart, not only because it expressly rejected minority aggregation, but also because it did so despite substantial case history that either expressly or implicitly suggested that

111. *See id.*

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

113. *Id.* at 1384.

114. *Id.*

115. *Id.* at 1386–87.

116. *Id.* at 1387–91.

117. The Sixth Circuit supported its decision denying aggregation by highlighting the lack of ambiguity in the Voting Rights Act, and the complete lack of legislative history supporting the right to aggregate. *Id.* at 1387.

118. In response to the plaintiffs' argument that section 2 should be applied with the "broadest possible scope," the Sixth Circuit distinguished cases by highlighting an express Congressional acceptance of the practice in each case. *Nixon v. Kent Cnty.*, 76 F.3d 1389 (6th Cir. 1996).

119. *Id.* at 1390. The Sixth Circuit also highlighted the distinction between a minority group identified by section 2 and a coalition. *Id.* at 1390–91 (determining that a "specific finding of discrimination" functioned as the distinguishing factor).

120. *Id.* at 1388.

minority aggregation is acceptable.¹²¹

While the Fifth Circuit emerged as the first circuit court to accept minority aggregation for section 2 claims, the decisions were not all unanimous.¹²² Fifth Circuit justices critical of minority aggregation support their rejection of the practice on a variety of grounds, including: a perceived lack of Congressional approval, an avoidance of proportional representation, a perceived misuse of the VRA to protect political interest groups, dilution of individual minority concerns, and an avoidance of negative policy implications for minority voters.¹²³ Judges arguing against Congressional authorization most frequently utilize statutory interpretation arguments to demonstrate a lack of Congressional intent.¹²⁴ In *LULAC I*, Judge Jones' concurring opinion argued for bringing an end to the theory of minority aggregation for vote dilution claims.¹²⁵ Her support for the request stemmed directly from her assessment of the legislative intent.¹²⁶ By highlighting word choices in the singular rather than plural form, Judge Jones asserted that Congress consciously and affirmatively excluded the option of minority aggregation for section 2 vote dilution claims.¹²⁷ Judge Jones argued that

121. See generally *League of United Latin Am. Citizens Council, No. 4434 v. Clements*, 999 F.2d 831 (5th Cir. 1993) (affirming the Fifth Circuit's favorable stance on minority aggregation, but refusing to grant relief to the plaintiffs based on a lack of cohesion and evidence of white bloc voting); *Concerned Citizens of Hardee Cnty. v. Hardee Cnty. Bd. of Comm'rs*, 906 F.2d 524 (11th Cir. 1990) (adopting the Fifth Circuit's acceptance of minority aggregation, but finding that the particular facts of the case failed to meet the standard for cohesion); *Campos v. City of Baytown*, 840 F.2d 1240 (5th Cir. 1988) (accepting minority aggregation, and granting the aggregated minority relief under section 2 of the VRA); *League of United Latin Am. Citizens, Council No. 4386 v. Midland Indep. Sch. Dist.*, 829 F.2d 546 (5th Cir. 1987) (affirming the Fifth Circuit's overall approval of minority aggregation, but finding that the cohesion element was not sufficiently met in this case), *vacated on other grounds*, 829 F.2d 546 (5th Cir. 1987).

122. E.g., *Clements*, 999 F.2d at 894–99 (Jones, J., concurring) (opposing the use of aggregated minorities to file section 2 vote dilution claims); *Midland Indep. Sch. Dist.*, 812 F.2d at 1504 (Higginbotham, J., dissenting) (opposing the Fifth Circuit's extension of the VRA to cover aggregated minorities for the purposes of a section 2 vote dilution claim).

123. *Clements*, 999 F.2d at 894–99 (Jones, J., concurring).

124. Schulte, *supra* note 30, at 468.

125. *Clements*, 999 F.2d at 894–95 (Jones, J., concurring).

126. *Id.*

127. Judge Jones stated in her concurrence that:

The 1982 amendment to Section 2, which codified the “results” test, likewise offers no textual support for a minority aggregation theory. It

Congressional approval, as opposed to a lack of Congressional prohibition, is the key component in a statutory assessment, thereby providing a basis to declare minority aggregation statutorily unlawful.¹²⁸

Judges also challenge minority aggregation based on concerns that changes to the current analytical structure could cause the VRA to evolve unintentionally into a vehicle to enact a proportional representation system.¹²⁹ Arguments regarding this theory typically rely on Congressional intent.¹³⁰ In *LULAC I* the concurrence by Judge Jones asserted that Congress purposely avoided creating the VRA in a manner that enacted a proportional representation system by specifically including a functional requirement that the minority group be large enough to “constitute a majority in a single-member district.”¹³¹ Judge Jones’ concurrence suggests that minority aggregation could allow aggregated minority groups to easily override the built-in mechanism against proportional representation, creating an opportunity for the VRA to evolve unintentionally into a proportional representation statute.¹³²

Critics of minority aggregation address their concern regarding the VRA evolving into a means to support political interest groups by employing statutory language arguments.¹³³ In her concurrence in *LULAC I*, Judge Jones argued that the significance of listing each minority

speaks only of a “class of citizens” and “a protected class.” Had Congress chosen explicitly to protect minority coalitions it could have done so by defining the “results” test in terms of protected *classes* of citizens. It did not.

Id. at 894 (citations omitted) (quoting 42 U.S.C. § 1973(b) (1988)).

128. Judge Jones stated in her concurrence that:

One may be uncertain what Congress might think about permitting minority coalitions to assert vote dilution claims, but Congress clearly walked a fine line in amending Section 2 to codify the results test for vote dilution claims while expressly prohibiting proportional representation for minority groups. The results test of vote dilution inherently recognizes that a minority group will sometimes fail to merit a single-member district solely because they lack the population to “constitute a majority in a single-member district.”

Id. at 895 (quoting *Thornburg v. Gingles*, 478 U.S. 30, 50, 50 n.17 (1986)).

129. Schulte, *supra* note 30, at 470.

130. *Id.* at 455.

131. *Clements*, 999 F.2d at 895 (Jones, J., concurring).

132. *Id.* at 895–97.

133. *Id.* at 894.

separately within the statutory language of section 2 warrants separate treatment and protection for different minorities, thereby distinguishing between racial minorities and language minorities.¹³⁴ While Judge Jones acknowledged that both types of groups enjoy individual protection, she argued that allowing them to aggregate based on a showing of cohesion under the *Gingles* factors simply protects a group that votes in a politically cohesive manner.¹³⁵ This line of argument contends that separate listings correspond to individual selection based on specific and distinct qualities shared by the minority.¹³⁶ Allowing minorities to file a claim, absent the shared quality, allows the group to gain protection under section 2 of the VRA based on similar political ideologies, and does not serve the VRA's ultimate goals.¹³⁷ Similarly, in *League of United Latin American Citizens v. Midland Independent School District*, Judge Higginbotham's dissent suggested that allowing aggregation for section 2 claims could encourage minorities to unite over an issue or political agenda, unrelated to discriminatory voting practices.¹³⁸ This practice would similarly encourage the formation of interest groups rather than ensure that minority votes are equally as powerful as white votes.¹³⁹

Similarly, judges opposed to minority aggregation argue that allowing minorities to aggregate for section 2 purposes could dilute the claims of each individual minority group or cause racial friction.¹⁴⁰ Allowing aggregation could encourage each minority to strive towards unnatural homogeneity with another minority group solely for the purposes of filing a section 2 claim, encouraging false cohesion, and a general societal assumption of minority homogeneity.¹⁴¹

Ultimately, the majority of courts have allowed aggregation either by expressly or implicitly accepting the practice, although the courts appear unlikely to find in favor

134. *See id.*

135. *Id.*

136. *See* Schulte, *supra* note 30, at 455–56.

137. *See Clements*, 999 F.2d at 894 (Jones, J., concurring).

138. *League of United Latin Am. Citizens, Council No. 4386 v. Midland Indep. Sch. Dist.*, 812 F.2d 1494, 1504 (5th Cir. 1987) (Higginbotham, J., dissenting), *vacated on other grounds*, 829 F.2d 546 (5th Cir. 1987).

139. *Id.*

140. *Clements*, 999 F.2d at 897–98 (Jones, J., concurring).

141. *See* Geraci, *supra* note 25, at 401.

of the aggregated minority without a strong showing of cohesion.¹⁴² However, the arguments presented indicate that minority aggregation claims have not received consistent treatment in the federal courts.¹⁴³ This inconsistency appears to stem not simply from the disagreement over the validity of minority aggregation, but also due to the lack of guidance regarding what an aggregated group must prove for the purpose of a section 2 claim.¹⁴⁴ By eliminating the ambiguity the entire discussion surrounding minority aggregation could be resolved.¹⁴⁵

II. IDENTIFICATION OF THE PROBLEM

Despite the effect of the VRA and other methods meant to protect racial minorities' voting equality, disenfranchisement issues still exist. Critics of aggregation take issue with the application of the *Gingles* test to minority groups attempting to aggregate for section 2 purposes.¹⁴⁶ Minorities that seek protection under section 2 of the VRA challenge the effectiveness of the *Gingles* test by arguing that a vote dilution claim could still exist even if the *Gingles* factors are not satisfied.¹⁴⁷ Due to those competing interests, many scholars view the strict requirements of *Gingles* as a bar to the expansion of voting rights jurisprudence.¹⁴⁸ However, the United States is rapidly increasing in the diversity of its population.¹⁴⁹ Large minority groups that have recently emigrated or established themselves in the United States have an increasing interest in protecting the effectiveness of their vote.¹⁵⁰ Moreover, some argue that when Congress drafted the VRA, and the Supreme Court formulated the *Gingles* requirements, neither Congress nor the Supreme Court could foresee the future minority diversity increase in the United States.¹⁵¹ While the language of the VRA extends to large groups of minorities, the factors

142. Ancheta & Imahara, *supra* note 10, at 845.

143. Schulte, *supra* note 30, at 454.

144. *See id.* at 452.

145. *See id.*

146. *Id.* at 468–76.

147. *See* Ancheta & Imahara, *supra* note 10, at 847–48.

148. *See id.* at 845–48.

149. *State and County QuickFacts: USA*, *supra* note 1.

150. *See* Ta, *supra* note 8, at 92–95.

151. *Id.* at 110–11.

outlined in *Gingles* pose inherent limitations upon smaller racial groups attempting to bring section 2 claims.¹⁵² Since the analysis focuses on the geographic isolation of large populations, scholars suggest that other factors could more appropriately assess the dilution of a minority's vote.¹⁵³ Additionally, scholars and racial minorities argue that the rigidity of this elemental analysis, combined with the requirements, only has the capacity to protect disenfranchised African Americans, and therefore requires a revisitation.¹⁵⁴ This commentary creates two issues: the first is a need for clarity regarding what minorities must prove under the *Gingles* test, and the second is the need for a reexamination of the *Gingles* test to assess if it accurately addresses minority vote dilution claims.

III. ANALYSIS

A. *The Gingles Standard as Applied to Aggregated Minorities*

While neither Congress nor the Supreme Court has expressly adopted minority aggregation, its general treatment, as discussed previously, suggests general viability.¹⁵⁵ The next logical question is what standards apply to a section 2 claim brought by aggregated minorities? The Supreme Court partially addressed this issue in *Grove v. Emison*, stating that "to establish a vote-dilution claim . . . a plaintiff must prove three threshold conditions."¹⁵⁶ However, the opinion did not merely stop at the *Gingles* requirements, but subtly suggested that minorities may have to meet the requirements at a higher level.¹⁵⁷ By discussing the "higher-than-usual need for the second of the *Gingles* showings," the Supreme Court suggested a heightened standard with regard to the cohesion of aggregated groups.¹⁵⁸ Further, the opinion makes reference to statistical evidence to prove the second and third *Gingles* factors pertaining to cohesion and majority

152. Ancheta & Imahara, *supra* note 10, at 845–48.

153. Ta, *supra* note 8, at 110–11.

154. *Id.*

155. Geraci, *supra* note 25, at 394–95.

156. *Grove v. Emison*, 507 U.S. 25, 39–40 (1993).

157. *Id.* at 41.

158. *Id.*

bloc voting.¹⁵⁹ These suggestions appear to require more from minorities seeking to aggregate, than from single minorities without articulating specifically defined boundaries in non-*Gingles* terms. However, two scholarly perspectives have developed. The first perspective offered by critics of minority aggregation supports a higher standard for cohesion in aggregated minorities for section 2 claims.¹⁶⁰ Conversely, the second perspective argues for a new set of requirements that takes into account the ethnic diversity of the United States, and draws support from the fact that smaller minority groups normally cannot meet the size requirements to singularly assert a section 2 claim.¹⁶¹ This perspective argues that a lower threshold could ensure broader coverage and potentially eliminate the need to aggregate.¹⁶² Both perspectives acknowledge the concerns surrounding aggregation, but reach conflicting solutions.

B. Proffered Improvements and Alternative Systems

In contrast to the suggestions posed by various minority groups seeking changes to the *Gingles* framework, several scholars support retention of at least some semblance of the *Gingles* analysis but would require stronger showings for aggregated minorities. Specifically, the scholars suggest more stringent tests regarding the cohesion of the aggregated groups.¹⁶³ All of the tests primarily draw upon the arguments made by Judges Higginbotham and Jones of the Fifth Circuit Court of Appeals in his *Midland Independent School District* dissent and her *LULAC I* concurrence, respectively.¹⁶⁴ Two of them are discussed below.

The test proffered by the Honorable Rick G. Strange of the Eleventh Circuit Court of Appeals suggests that courts should apply a threshold determination to aggregated groups before completing a *Gingles* analysis.¹⁶⁵ Strange's test examines "whether the members of the aggregated groups have similar socio-economic backgrounds," "whether

159. *Id.*

160. *See generally* Strange, *supra* note 38, at 113.

161. *See generally* Ta, *supra* note 8, at 90–91.

162. *See id.* at 101.

163. *See* Schulte, *supra* note 30, at 457–59.

164. *Id.* at 458.

165. *Id.* at 457.

[they] have similar attitudes toward significant issues affecting the challenged entity,” and “whether [they] have consistently voted for the same candidates.”¹⁶⁶ Particularly, Strange’s approach accepts aggregation as “theoretically permissible” if the discrimination has a collective effect on different minority groups.¹⁶⁷ In Strange’s estimation, these factors more accurately determines if the minorities are properly aggregated based on similar political causes and concerns, since aggregated minorities do not share common ground based on race or national origin, their cohesion relies solely upon shared values.¹⁶⁸ Therefore, requiring this threshold analysis properly addresses whether their level of political concern and similarity qualifies as a sufficient finding of cohesion.¹⁶⁹

The Strange approach draws upon several social science studies, which indicate that America’s racial minority groups expressly exhibit “political heterogeneity.”¹⁷⁰ Examples of this racial divergence occur in several states with diverse minority populations, such as Florida and California.¹⁷¹ This divergence not only makes it highly unlikely that minorities can demonstrate the proper level of cohesion in order to aggregate, but also leads critics to highlight the potential for inter-minority violence, increased racial hostility and animosity-based on a correlation between the political success of a distinct minority group, or groups, and inter-minority

166. Strange, *supra* note 38, at 129.

167. *Id.* at 127.

168. *See id.* at 112, 134–36.

169. *See, e.g., id.* at 130.

170. The study in the Geraci article refers to a national survey, which tested attitudes toward specific political parties, policy decisions, and overall country goals. Geraci, *supra* note 25, at 401. The results indicated a nineteen-point difference in the Republican Party’s approval ratings between African Americans and Asian Americans, and a twenty-nine percent difference in approval of Ronald Reagan and President Bush’s economic policies between African Americans and “Southeast-Asians, Indians, and Afghanis.” *Id.* Finally, the study indicated that while African Americans viewed “giving people more say in important political decisions” as the most important national issue, Asian Americans and Hispanic Americans “felt that maintaining order was paramount.” *Id.*

171. In Florida, the Cuban and African American minorities have an intense rivalry and deep resentment for one another, complete with riot attempts and economic boycotts of businesses run by the other minority. *Id.* at 402–03. In California, racial tensions exist between African American and Hispanic American minorities. *Id.* at 403–05. This tension involves police brutality and a deep-seeded lack of political support between the two minorities. *Id.*

conflict.¹⁷² Therefore, encouraging aggregation as a remedy to vote dilution could unintentionally cause general minority identity dilution, a homogenous societal attitude toward minorities, and increased minority hostility.¹⁷³ This model could eliminate concerns regarding the dilution of individual minorities' interests and the support of special-interest coalitions as opposed to disenfranchised minorities by making a detailed assessment of the groups' shared values.¹⁷⁴

Additionally, Strange suggests that this approach more accurately reflects and protects the Congressional intent of preventing discrimination while preserving the republican form of government, since there is a fundamental difference between a minority losing an election for lack of political support and losing due to racial or ethnic discrimination.¹⁷⁵ Such a test also restrains judicial review and involvement in reapportionment, a traditionally legislative responsibility, by requiring the minority group to meet a threshold level of cohesion to file the claim, thereby lessening the number of judicially created districts.¹⁷⁶ The goals of this approach attempt to make aggregation work within the current framework of *Gingles* by merely adding a threshold test requiring a heightened showing of cohesion for aggregated groups to file section 2 claims.¹⁷⁷

Another test, known as the "minority-groups-as-one test,"¹⁷⁸ suggested by Professors Katharine Butler and Richard Murray, proposes an assessment of "whether the two groups consider themselves one under circumstances in which each group can benefit separately," requiring a finding that the minority groups are "indeed one" and "shared a discriminatory treatment at the hands of the majority."¹⁷⁹ By focusing on the level of cohesion, this standard furthers Butler and Murray's view that minorities are not simply fungible entities and, that by treating them as such, the true purpose of the VRA is not served.¹⁸⁰ Most importantly,

172. See, e.g., *id.* at 404–05.

173. *Id.* at 398–406.

174. See Strange, *supra* note 38, at 154.

175. See *id.* at 113.

176. *Id.*

177. *Id.* at 128–29.

178. Schulte, *supra* note 30, at 464.

179. *Id.* at 458.

180. *Id.*

they believe that minorities are protected based on their particular experiences with discrimination, and their defining differences inherently lack cohesion.¹⁸¹ For example, discrimination against African Americans began with slavery, while Hispanic discrimination began with cultural and linguistic differences, and Japanese discrimination began during World War II.¹⁸² Further, Butler and Murray's test particularly prizes social science data that is skeptical of true minority cohesion, and therefore aggregation generally.¹⁸³ Ultimately, the proposal seeks to heighten the cohesion element of the *Gingles* test, and alter the focus to more stringently assess the level of cohesion between the minorities, thereby requiring a heightened standard for aggregated section 2 claims.

C. *Issues Within the Current Thornburg v. Gingles Framework*

As discussed above, scholars and an increasing number of minority groups in the United States have identified that Congress passed the VRA primarily to stop African American disenfranchisement, and to ensure the group's equal voting strength.¹⁸⁴ To that end, critics of the *Gingles* framework, and minority aggregation in general, agree that the current system does not adequately protect the Congressional intent behind the VRA or provide protection for the diverse minority populations.¹⁸⁵ While the primary concerns of minority aggregation critics were previously discussed, minorities seeking protection under the VRA raise additional issues with regard to each individual prong of the *Gingles* analysis.¹⁸⁶

First, several minority groups challenge both requirements of the first *Gingles* prong¹⁸⁷ by suggesting that the Supreme Court intended a less stringent requirement

181. *Id.* at 464.

182. *Id.* at 458, 464.

183. *Id.* at 465.

184. *Id.* at 442.

185. Ta, *supra* note 8, at 101.

186. *Id.* at 101, 103–04, 107.

187. The first *Gingles* prong requires a minority group to demonstrate that it is "sufficiently large and geographically compact to constitute a majority in single-member district." *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986).

regarding the minority's population size.¹⁸⁸ Primarily, they suggest that *Gingles* did not require the ability to comprise a majority in a single-member district, and that the current requirement is a fiction created by the lower courts.¹⁸⁹ This fiction creates a barrier preventing minority groups that represent as much as fifty percent of the population from filing a section 2 claim.¹⁹⁰ In this sense, the *Gingles* standard eliminates an entire portion of the minority population from seeking protection for vote dilution, based simply on a requirement promulgated by the lower courts.¹⁹¹ Requiring this minority population showing firmly limits the scope of the VRA against the specific legislative authorization to protect these smaller minority groups.¹⁹²

Critics also challenge the first prong's requirement of compactness by arguing that the compactness requirement merely serves as a strict functional requirement, not applicable to all minority groups.¹⁹³ Minority groups utilizing this line of reasoning suggest that the compactness requirement reflects how the VRA's history is deeply rooted in an African American model of disenfranchisement.¹⁹⁴ While it may have been common for African American minority groups to live in a concentrated setting at the adoption of the VRA, social scientists suggest that the living situations of other minority communities, such as Asians and Hispanics, do not fit into a compact model, and therefore would necessarily fail this required *Gingles* element.¹⁹⁵

Next, the second *Gingles* prong requires political cohesion amongst the minority groups bringing a section 2 vote dilution claim.¹⁹⁶ Within the Asian American community this requirement has garnered criticism based on the

188. Ta, *supra* note 8, at 101.

189. *Id.*

190. Ancheta & Imahara, *supra* note 10, at 846.

191. *Id.*

192. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006)).

193. Ta, *supra* note 8, at 101-03.

194. *Id.*

195. "Scholars have repeatedly pointed out that the Supreme Court's requirement of 'geographically compactness' is not applicable to APIs and Latinos because both groups live in less compact areas and are more dispersed than African Americans." *Id.* at 103.

196. *Id.*

diversity of Asian groups present in the United States.¹⁹⁷ Asian American groups filing a section 2 claim as a group of Asian Americans may only meet the cohesiveness requirement for Asian candidates.¹⁹⁸ Given the group's diversity regarding a variety of factors, such as length of time they have lived in the United States, age, and cultural differences, their politics may diverge in the absence of an Asian American candidate.¹⁹⁹ Further, the Asian American population specifically appears to be in a state of political transition based on the length of time spent in the United States and the growing population of young first generation American-born children.²⁰⁰ While this argument directly contrasts with criticism of minority aggregation regarding the formation of interest groups, it poses a real difficulty for minority groups that seek and feel that they require protection under the VRA, but are comprised of multiple smaller, specific populations.²⁰¹ Additionally, if the smaller fractional groups attempted to bring a section 2 claim, they would have difficulty meeting the first *Gingles* requirement.²⁰²

Finally, as to the third prong,²⁰³ minorities seeking protection under the VRA argue that the assessment of a white voting bloc poses challenges based on the increasing difficulty of distinguishing such a voting bloc.²⁰⁴ Additionally, requiring the white voting bloc provides an opportunity for smaller portions of a fragmented minority group to become subsumed within the larger umbrella minority category, allowing for an entirely new form of dilution.²⁰⁵ Further, the Supreme Court has specifically stated that “[u]nless [the *Gingles* preconditions] are established, there neither has been

197. *Id.* at 103–05.

198. *See id.* at 105–06.

199. *See id.*

200. *See id.*

201. *Id.* at 106–07.

202. *Id.* at 102.

203. The third *Gingles* prong requires a minority group to prove that “the white majority votes sufficiently as a bloc to enable it . . . to defeat the minority’s preferred candidate.” *Thornburg v. Gingles*, 478 U.S. 30, 51 (1986).

204. *Ta*, *supra* note 8, at 107–08.

205. *Ta* suggests that in a state such as California, which has a minority majority, the *Gingles* test can be ineffective in instances where the votes of combined separate minority groups outnumber those of an opposing white voting bloc. *Id.* at 107.

a wrong nor can be a remedy,” indicating that courts cannot simply presume white bloc voting.²⁰⁶ Instead the plaintiffs must prove it, along with the other preconditions.²⁰⁷ These concerns regarding the *Gingles* standard indicate that the approach creates several issues and barriers regarding the protection of other minority groups beyond the white majority/African American minority model, and definitely amongst groups attempting to aggregate.²⁰⁸

These concerns led scholars with a more favorable outlook on minority aggregation to focus on different alterations to the *Gingles* standard, especially in cases concerning multi-ethnic communities.²⁰⁹ Professors Angelo N. Ancheta and Kathryn K. Imahara pose two contrasting theoretical outlooks on minority aggregation.²¹⁰ The first proposes that minority groups are drawn together and vote based on discrimination that they have jointly suffered, suggesting the possibility of successful minority aggregation for the purposes of section 2 claims.²¹¹ However, the second theory states that the differences inherent in minority groups, based on their varying history and culture, draws them apart, making minority aggregation impossible.²¹² The resulting divergence of these theories requires a case-by-case analysis of whether any group of minorities can aggregate based on the specific factual underpinnings of their section 2 claim.²¹³ Ancheta and Imahara suggest that a case-by-case analysis of the potential for minority aggregation will be driven by how large the minority communities are in relation to the white majority, whether the minority communities share common problems, and whether the minority populations share important social and economic concerns.²¹⁴ In suggesting the potential for aggregation, Ancheta and Imahara draw upon favorable social science studies finding evidence of minority cohesion when shared interests are

206. *Grove v. Emison*, 507 U.S. 25, 40–41 (1993).

207. *Id.*

208. *Ta*, *supra* note 8, at 101–09.

209. Ancheta & Imahara, *supra* note 10, at 835–40.

210. *Id.* at 830–32.

211. *Id.* at 830–31.

212. *Id.* at 831–32.

213. *Id.* at 832–33.

214. *Id.* at 833.

involved.²¹⁵ The scholars suggest that minorities found to be cohesive—and thus truly able to aggregate—will be small in comparison to the white majority population, will share common problems, and will share important social and economic concerns.²¹⁶

However, Ancheta and Imahara also acknowledge the under-inclusive nature of *Gingles* in multi-ethnic communities—specifically regarding situations when the totality of the circumstances indicates vote dilution—by meeting all of the Senate Report Factors, but failing to satisfy the functional *Gingles* requirement for size and dispersion.²¹⁷ This critique suggests revisiting the *Gingles* factors to craft a standard that protects the groups requiring protection under section 2 of the VRA.²¹⁸

All of these concerns suggest the need for system-wide change to create a standard that allows all minorities affected by vote dilution to bring claims under section 2.²¹⁹ These challenges begin to suggest that alteration of the *Gingles* standards could eliminate the debate regarding minority aggregation because each individual minority could file its own claim in the absence of stringent numerical requirements.

IV. PROPOSAL

This Comment proposes a solution that attempts to address minority aggregation in two ways. First, by reconstructing the analytical system for the VRA and thereby decreasing the need for minority aggregation, Congress grants section 2 the broad reach intended at its inception. Second, by specifically outlining an analytical approach and standards for section 2 claims, Congress ensures uniform treatment to aggregated minorities. This approach begins by first assessing if the claim of the minority groups pertains to a community with a high level of multi-ethnic diversity. This diversity assessment will be based on the population

215. “A number of studies have found that minorities can form coalitions and support candidates when the issues at stake are of common interest.” *Id.* at 832.

216. *Id.* at 833–34.

217. *Id.* at 839.

218. *See id.* at 845–47.

219. *See id.*

percentages of each voting age eligible minority population. If several groups of minorities each compose a statistically significant amount of the population, approximately ten percent or more, then claims of single or aggregated minorities in that community will be assessed using a modified *Gingles* analysis. However, communities with a single distinctive minority group will continue to be assessed under the current *Gingles* standards.

A. *Modified Gingles Analysis*

The modified *Gingles* standard could apply to minority groups representing less than ten percent of the district's total population and will retain the same factors for assessing section 2 claims, but require a lesser showing of certain elements. First, by encouraging a less strict requirement regarding size and compactness, requiring that the groups only prove that they are reasonably large and geographically compact. To meet the modified size and dispersion requirements the group would only have to prove that it has the ability to effect the outcome of an election in a statistically significant way. Currently, the lower courts interpret the "sufficiently large" and "geographically compact" *Gingles* requirement as requiring the minority group to prove that it could constitute a majority in a single-member district.²²⁰ However, this standard definitively eliminates vote dilution claims by minority populations comprising as much as fifty percent of the population within a district.²²¹ Moreover, studies indicate that not all minority groups live in the condensed community setting required by *Gingles*.²²² Precedent for this change exists in voting acts created within individual states. California's Voting Rights Act states that "[t]he fact that members of a protected class are not geographically compact or concentrated may not preclude a finding of racially polarized voting, or a violation of Section 14027."²²³ Minimizing the burden of meeting this *Gingles* requirement and applying the reasonableness showing on a case-by-case basis, achieves both of the proposals goals, by allowing smaller minorities to file a section 2 claim alone,

220. *Campos v. City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988).

221. *Ancheta & Imahara*, *supra* note 10, at 845–46.

222. *Ta*, *supra* note 8, at 103.

223. California Voting Rights Act, CAL. ELEC. CODE § 14028(c) (West 2010).

lessening the need to aggregate, and simultaneously outlining the standard of review for an aggregated minority group. Additionally, while this change appears to contrast with the Supreme Court's recent decision regarding an "intermediate 'crossover' district" in *Bartlett v. Strickland*,²²⁴ this change appears to be the most feasible way to cover the effected minority groups.

Analyzing the cohesion of the minority groups according to the non-heightened standard outlined by the *Campos* court should also be encouraged to promote aggregation amongst minority groups comprising less than ten percent of their district's population. In *Campos* the majority stated that the proper standard of minority cohesion under *Gingles* was simply "whether the minority group together votes in a cohesive manner for the minority candidate."²²⁵ In assessing this standard, the court should focus specifically on elections involving a minority candidate and look at the statistical patterns of the entire group regarding support for a candidate of either minority.²²⁶ Successful claims will demonstrate that the group votes for the minority candidate to an acceptable level of statistical significance. In making this assessment the court can take into account the factors, such as those enumerated by *Strange*—including whether aggregated groups have similar socio-economic backgrounds or attitudes toward overarching community issues—but the court should primarily base its decision on the statistical evidence.²²⁷ Ultimately, this cohesion analysis supports both of the proposal's goals of broad application by lessening the need to aggregate and outlining specific standards for aggregated minorities.

Finally, retaining the third *Gingles* factor ensures that government intervention only assists groups if their lack of representation corresponds to discriminatory behavior. Traditionally, this final *Gingles* requirement served to protect

224. *Bartlett v. Strickland*, 129 S. Ct. 1231, 1236–41 (2009) (affirming the decision of the Supreme Court of North Carolina and holding that section 2 relief requires proof that a minority constitutes more than 50% of the district's population, as opposed to a mere influence district). The Supreme Court described influence districts as a district in which "a minority group composes a numerical working majority of the voting-age population." *Id.* at 1236.

225. *Campos*, 840 F.2d at 1245.

226. *See id.*

227. *Strange*, *supra* note 38, at 129.

the legislative intent behind the VRA by requiring that the lack of minority representation correspond to racial polarization or a discriminatory practice, rather than a simple lack of political support.²²⁸ By continuing to require an adequate showing of racial polarization and vote dilution at the forefront of the analysis, this final requirement guards against concerns expressed by critics of minority aggregation—regarding proportional representation and the promotion of political interest groups—allowing the element to retain its protective function over the VRA’s express purpose.

CONCLUSION

America’s turbulent history regarding minority groups makes voting rights issues sensitive and contentious.²²⁹ While the United States expands and develops, the legal remedies for minority disenfranchisement must evolve to meet the country’s changing needs.²³⁰ Scholarship and state enactments of voting rights legislation indicates that the *Gingles* factors prevent Section 2 of the VRA from adequately protecting minorities from vote dilution.²³¹ However, drastic and unwarranted change could inadvertently alter our republican form of government.²³² Congress respected that foundation when it developed and enacted the VRA to protect the political interests of America’s minorities.²³³ However, the interest in preserving the foundation elements of the VRA and the U.S. voting system in general do not completely bar evolution of the requirements to bring a section 2 challenge. Historically, the VRA formed around the African American minority and was based upon the traditional patterns representative of that minority group.²³⁴ Current minority

228. See Ta, *supra* note 8, at 107.

229. See *supra* Introduction.

230. See Ta, *supra* note 8, at 101.

231. See California Voting Rights Act, CAL. ELEC. CODE § 14028(c) (West 2010); Ancheta & Imahara, *supra* note 10, at 845–47.

232. See Schulte, *supra* note 30, at 470.

233. Judge Jones’ concurrence suggests that the VRA does not apply to coalitions because “Congress did not authorize the pursuit of Section 2 vote dilution claims by coalitions of distinct ethnic and language minorities.” League of United Latin Am. Citizens, Council No. 4434 v. Clements, 999 F.2d 831, 894 (5th Cir. 1993) (Jones, J., concurring).

234. See Ta, *supra* note 8, at 103.

populations diverge from that model in both subtle and drastic ways.²³⁵ Therefore, an updated test with broader coverage, accounting for the competing interests of minority groups and incorporating standards that acknowledge the different characteristics of the growing minority populations in the United States, is necessary to acknowledge and protect the increasingly diverse population. However, structuring the test to protect the form of representation present in the United States, could solve the contentious aggregation discussion while protecting the diverse ethnic communities.

235. *See id.*