



third majority black VAP districts in both of the Fannie Lou Hamer PAC plans were not compact, and that the second Fannie Lou Hamer PAC plan (also called Pipkin plan) created a district that sprawled over three separate sections of Maryland for predominantly racial reasons, connecting two disparate African-American areas. The same characterization applies to an additional plan introduced subsequently by Antonio Campbell although it was not submitted in a form that allowed me to check the validity of its statistics.

3. The Plaintiffs and their experts agree with my assessment that African-Americans are politically cohesive. However, Plaintiffs maintain that “there were at least two plans made public prior to the enactment of SB1 which demonstrate that compact majority-minority districts can be drawn,” and they allude to Professor Gaddie’s testimony as evidence. But computer generated compactness scores and a simple perusal of the maps suggest otherwise: no version of the third majority-African-American district in any of the plans meets the first Gingles prong. The reason for this is quite simple: the underlying African-American population is not sufficiently compact, because it consists of residual parts of two geographically disparate African-American communities. Secondly, the Plaintiffs’ experts agree that African-Americans are 28% of the State’s VAP and 25% of the Congressional districts are majority African-American VAP, but Plaintiffs now argue that the appropriate standard should be the “minority community as a whole.” They acknowledge that under the Gingles standard they must establish that Maryland’s minority groups do indeed act cohesively. However, they do not even attempt to address this question directly, and my evidence suggests that Maryland’s other minorities are not cohesive with African-Americans. Lastly, Plaintiffs do not deny that Non-Hispanic White support varies in Democratic primaries or that Non-Hispanic White Democrats and Republicans support their own party’s black candidates at high levels when they are on the November ballot. Rather, they assert that there are “very few cases of whites and blacks acting cohesively” and that most African-American successes occur in majority African-American VAP districts. But “*acting cohesively*” is different from “*polarized voting*”: non-Hispanic Whites do not vote as a unified bloc in favor of or opposed to African-American candidates. Their support varies with the specific candidates in Democratic primaries and by party in November elections. Each of these points is addressed in detail below.
4. The first prong of the Gingles test requires that a minority group constitute the VAP majority of an ideal district population size in a reasonably compact area. Plaintiffs maintain that both of the Fannie Lou Hamer PAC plans contain a third *compact* majority African-American VAP district. The implication is that the State, by ignoring these options, fractured some compact, natural African-American community in the interest of White incumbents. This is

- demonstrably false. The first plan, Fannie Lou Hamer PAC Plan 1, is contained in Exhibit A of their initial complaint. A simple perusal of the map shows that District 6 connects the African-American communities in Prince George's County in the DC suburbs with Baltimore to the north by means of the narrowest possible corridor through the intervening predominantly non-Hispanic White areas in Howard County. It is reminiscent of the I-85 district found unconstitutional in *Shaw v Reno*, 509 U.S. 630 (1993). By my calculation, it has a Roeck score (which measures dispersion and elongation) of .21 and a Polsby-Popper score (which measures the jaggedness of the perimeter) of .06, far below the other two majority African-American seats, District 4 (.35, .23) and District 7 (.61, .56).
5. The second Fannie Lou Hamer PAC plan (introduced by Senator Pipkin) cleans up the jagged edges of the third majority African-American seat but at the cost of elongating it by moving into a third area of Maryland (Southern Maryland). In my previous declaration, I correctly noted that the Plaintiffs provided the wrong compactness scores, but mistakenly reported the correct scores for District 6 rather than those for District 5 (forgetting that third majority African-American VAP district is District 6 in the first plan and District 5 in the second). My compactness numbers and Professor Gaddie's now agree. The Roeck score for District 5 in Fannie Lou Hamer Plan 2 as compared to District 6 in Fannie Lou Hamer Plan 1 drops to .20 and the Polsby-Popper score rises to .17. The Fannie Lou Hamer PAC Plan 2 third majority African-American district scores are also lower than the scores of the other two majority African-American seats (District 4 is .35 and .20; District 7 is .64, and .47). In addition to not being compact on the Roeck elongation dimension, the Fannie Lou Hamer PAC Plan 2 third majority African-American district now violates another neutral redistricting criterion, respect for regional communities of interest, for predominantly racial reasons.
  6. The Plaintiffs did not provide compactness scores for Fannie Lou Hamer's first plan, and their experts do not even discuss, let alone defend, that plan in their declarations. In short, they offer no evidence whatsoever for their claim that the third majority VAP African-American district (i.e. District 6) in the first Fannie Lou Hamer PAC Plan is "compact." With respect to the second Fannie Lou Hamer PAC plan, Professor Gaddie's explanation confuses the issue. When referring to the Roeck elongation scores, Professor Gaddie averages the three majority African-American VAP districts in the Fannie Lou Hamer PAC Plan 2, which only disguises the problem with District 5 by blending it with the two natural African-American seats. The State's contention is simple. The new District 5 is an elongated seat that traverses three distinct regional areas in order to link two disparate surplus African-American populations. Nothing in Professor Gaddie's declaration refutes this.

7. There appears to be a third plan although it was not submitted prior to the adoption of the State's plan and is not in a form that allows for verification. This third plan, introduced in the Declaration by Antonio Wade Campbell, is yet another variation on the same theme. He creates a third majority African-American district that also connects the Baltimore and Prince George's African American areas. His reported Roeck elongation score (.17) and Polsby-Popper jaggedness score (.14) are similar to but slightly below the Fannie Lou Hamer PAC Plan 2 scores. It also most heavily segregates voters by race, creating three majority African-American VAP and five 60% plus Non-Hispanic White VAP districts.
8. All three plans confront the same problem: there is no single African-American concentration in a reasonably compact area sufficiently large enough to create a third majority African-American seat. Therefore, the only way to construct such a district is to link two disparate African-American populations. The districts cannot be compact because there is no underlying reasonably compact African-American community to build the district on. Moreover, the construction of these third non-compact majority African-American districts is clearly along predominantly racial lines and has the effect of segregating Non-Hispanic White from African-American voters in almost all (FLHPAC Plans 1 and 2) or all of the seats (Campbell).
9. The second prong of the Gingles test relates to the purported cohesion of Maryland's minority population. Although Plaintiffs' response suggests that the standard of proportionality should be the "minority community as a whole," they barely acknowledge, let alone discuss, Maryland's Asian American population even though Asian-Americans are a fast growing minority, constituting 5.5% of the Maryland's total population and 14.1% of the VAP population in Montgomery County (an area that features prominently in the Plaintiffs' Complaint). Professor Gaddi labels Asians only as "Others" in his Ecological Regressions. Moreover, in his Ei analysis, he combines Asians/others with Latinos and non-Hispanic Whites, which suggests that they are more cohesive with non-Hispanic Whites than African-Americans. Both the Todd Eberly and Peter Morrison declarations focus exclusively on similarities between the socio-economic situation of African-Americans and Latinos, ignoring the fast growing Asian population as well. It is not clear whether the Plaintiffs include Asians in their definition of "minority community as a whole."
10. Because there is no direct discussion of cohesion as normally assessed in a Section 2 case, I have to infer Plaintiffs' argument from other statements. The Eberly and Morrison declarations refer to similarities in socio-economic disadvantage between African-Americans and Latinos. But they ignore

- differences in religion (Latinos are predominantly Catholic), language, culture and race (many Latinos consider themselves White which is why the Census Bureau creates the Non-Hispanic White category). In states further along the racial diversity curve than Maryland (such as California), Latino VRA claims have conflicted with African-American VRA claims. Most importantly, I provided evidence in my first declaration of many instances in which Latinos did not vote cohesively with African-Americans for African-American candidates. Like Non-Hispanic White voters, Latinos are neither polarized against African-Americans nor cohesively linked: their support for African-American candidates varies with the particular candidates and contests.
11. Professor Gaddie's declaration only provides evidence about Latino voting behavior in his section on Ecological Regression, and even then, declares the estimates to be "highly unrealistic" in almost every case. In five of the contests he examines, he declares the numbers to be "unrealistic." In one (Senate District 41 in 2002), he finds the Hispanic vote to be "fragmented." And in another (Senate District 27 in 2002), he finds that Hispanics supported the Non-Hispanic White candidate. I cannot ascertain why Professor Gaddie had such trouble with the Hispanic estimates, especially for the 2008 Presidential race when lots of other organizations have been successful. The Pew Hispanic Center, for instance, finds that Hispanics voted 55% for Hilary Clinton and 45% for Barack Obama in Maryland, which is in line with my Ecological Regression estimate of 46% for Obama. The Pew numbers also indicate that Hispanics preferred Clinton to Obama in the Democratic 2008 Presidential primary in 11 out of the 14 states for which there was data.
  12. Professor Gaddie dismisses the Obama 2008 Democratic Primary victory in Maryland and Obama's success with non-African-American voters as a product of "unprecedented fund-raising and organizing of the Obama campaign." Leaving aside the fact that Hilary Clinton was a strong candidate, his assertion raises serious questions about the meaning of polarization: are Non-Hispanic Whites really polarized and motivated by racial animus when their support varies with the funding and organization of the African-American candidates? And by his own logic, given that Obama was well organized and well funded, why did Hispanics support the White candidate Clinton rather than the well funded and well organized African-American candidate when they are supposed to be cohesive with African-Americans?
  13. Returning for the moment to my own estimates, I looked at cohesion by separating out non-Hispanic White, non-Hispanic black, Hispanic and Asian/other estimates, as I explained in my previous declaration. Asians and Latinos are primarily concentrated in Prince George's and Montgomery County. There were three statewide races featuring African-American and

Non-Hispanic White candidates. In all three races I was able to get statistically significant estimates of Hispanic and Asian voting patterns. In all three races, Hispanics voted for the African-American candidates at significantly lower rates than African-Americans: in the 2008 Democratic Presidential Primary Hispanics 46% for Obama versus African-Americans 90%; in the 2006 Democratic AG Primary, 0% support for Simms versus 74% for African Americans (possibly accounted for by the fact that Simms was less well known in Montgomery County than the White candidate); and Hispanics 35% for Mfume versus African-American 84% in the 2006 Democratic US Senate Democratic Primary. There is only a slightly different story for Asian/others: they supported Obama at an estimated rate of 80%, but Simms at 11% and Mfume at 32%.

14. Below the state level, the best chance for getting reliable Latino and Asian numbers is Montgomery County which has a Non-Hispanic White VAP population of 51.7%, a Hispanic VAP of 15.7% and an African-American VAP of 16%. Because the contest was county wide, I got reliable estimates for Asians and Latinos in the 2006 Democratic Primary for the Montgomery County Executive, indicating that African American support for the African-American candidate Leggett at 81% but Asian support at 25% and Hispanic at 47% (both less than the Non-Hispanic White support of 65%). I tried with more sporadic success to get reliable estimates of Asian and Hispanic support for African-American candidates in a number of state legislative and local races. In many cases, the estimates had large standard errors and low statistical reliability. In a few cases, I was successful. I found significant and large differences between African-American and Latinos in a Montgomery 2006 County Council race for District 5 and the Montgomery portion of the 2004 Congressional District 4 race. Notably when Latino candidates are on the ballot, Latino support is significantly higher than black support for those candidates. In the 2006 District 17 contest, the Hispanic candidate Simmons got 4% African-American and 27 % Hispanic support. In a 2010 District 18 Delegate race, the Hispanic candidate Gutierrez got 15% of the African-American and 29% of the Hispanic VAP. This is important because cohesion should be a two way street with African-Americans supporting Latino and Asian-American candidates at cohesive levels as well as vice versa. In sum, I found evidence of substantial differences between Asian, Latino and African-American voters when African-American and other minority candidates are on the ballot. Thus it is my conclusion that minorities as a whole are not a cohesive bloc.
15. The last Gingles prong is the racial polarization test. None of the Plaintiffs' experts contested my earlier finding that Non-Hispanic White voters in both parties have supported their own party's African-American candidates at very

- high levels in November elections. Moreover, Professor Gaddie's estimate of Non-Hispanic White support in the three statewide Democratic Primary races (2006 AG, 2006 US Senate, 2008 Democratic primary) using homogeneous precinct analysis and Ecological Regression also confirm that Non-Hispanic White support has varied from 9%-15% for Mfume on the one hand to 36%-39% for Obama with Simms in the middle (31-36%). This is similar to my findings.
16. Professor Gaddie additionally produces regression estimates of three races from almost a decade ago—State Senate Districts 23, 27 and 41—that purportedly show low Non-Hispanic White support for African-American candidates. I was unable to procure the data for these races, but I was able to look at a number of more recent contests. As with the statewide races, I found considerable variation in Non-Hispanic White voting behavior when African-Americans were on the ballot at the state legislative and local levels. The State Senate 23 races in 2006 and 2010 in Prince George's and Anne Arundel counties fall at the low end, revealing little or no support from non-Hispanic whites for the black candidate Henry. But, they also revealed little Hispanic and Asian support as well. I found very high Non-Hispanic White support (72%) for the black candidates in the Montgomery portion of the 4<sup>th</sup> Congressional district and the 2006 County Executive contests (65%).
  17. The latter provides a very nice natural experiment: if we compare the Non-Hispanic White support in Montgomery County for Simms with their support for Leggett in the County Executive race, we see that Non-Hispanic Whites gave Leggett 65% and Simms 25% support. In other words, faced with two African-American candidates, Non-Hispanic Whites voted completely differently in the same primary election. If Non-Hispanic White voters were highly polarized and motivated by racial animus, we would not observe this kind of behavior. In between the highs and lows, I found contests with non-Hispanic white support for African-American candidates ranging from 1/2 (2010 Legislative Delegate District 14) to 1/3 the African-American levels (2010 State Senate District 18 Primary).
  18. The Plaintiffs' experts do not dispute that non-Hispanic White support varies with the contest and candidates. Rather they dismiss the good cases as caused by money and organization and dwell on the bad cases, ignoring the examples in the middle (e.g. Simms). Todd Eberly argues that keeping the disparate black communities in Baltimore, the DC suburbs and Southern Maryland in separate districts amounts to gerrymandering by "cracking." He omits that black influence can also be lessened by "packing" black voters into highly concentrated districts and reducing their influence in other seats. Moreover, he implies that African-Americans were singled out and fractured to create

Democratic leaning seats but the State clearly also moved large numbers of Asians, liberal Whites, and Latinos as well as African-Americans in its new Congressional design, and was not focused predominantly on race as opposed to party, incumbency and other considerations.

19. The Plaintiffs cite statistics that show that most, but not all, African-Americans have been elected in majority black VAP seats. They dismiss the examples of those who have been elected in majority Non-Hispanic White seats and dispute the contention that coalitional seats provide real opportunities. With regard to the latter, the Plaintiffs seem to lump all coalitional seats together rather than distinguishing those that are nearly majority minority from those that are not. Yet Professor Gaddie states that three Hispanics and one South Asian candidate had success in districts that were 40% minority (p10 of his declaration). Clearly, nearly majority minority coalitional seats provide better opportunities for other minorities than the highly racially segregated seats the Plaintiff propose.
20. As I pointed out previously, the State has provided two coalitional seats that are over 40% minority in addition to the two majority African-American VAP districts. They do not dispute my calculus that African-Americans can win in either of those seats, and their own expert admits that minorities generally have a better prospect in 40% plus minority coalition seats. Given that the Plaintiffs now urge an “all minority focus” in calculating electoral fairness, the enhanced prospects for other minority candidates should count in the State’s favor as well.
21. In sum, the question Maryland faced in this round of Congressional redistricting is this: what is the legal obligation under Section 2 of the VRA with respect to its African-American population? Interpreting the legislative intent of the Congress, the Supreme Court in *Thornburg v Gingles*, 478 U.S. 30 (1986) developed a three prong test for political jurisdictions to use in determining their obligations with respect to creating majority-minority remedy seats. Prior to the *Shaw* line of cases, political jurisdictions were being pushed to maximize the number of majority minority seats regardless of the consequences for traditional redistricting criteria and the bizarreness of the proposed remedy. In *Shaw v Reno* 509 U.S. 630 (1993) and subsequent cases, the Supreme Court reminded us that classifications based solely on race are “odious to a free people whose institutions are founded upon the doctrine of equality” and that racially drawn districts could encourage stigmatization and racial hostility. The redistricting manuals produced by organizations such as the Brennan Center and trainings led by organizations like the National Conference of State Legislatures warn experts in the redistricting community against extreme district remedies based predominantly on race.

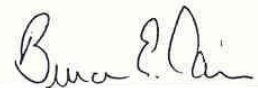


22. Mindful of these warnings and looking carefully at the data, I concluded and advised that the State had to maintain two majority African-American VAP districts. By retaining those seats, the State ensured that African-Americans would have an equal opportunity to elect a candidate of choice to a very nearly proportional level.
23. The question then is what is the obligation to create a third majority VAP African American district? Looking to the guidelines of the Gingles test, I came to the following conclusions. African-Americans are a cohesive group. Although the evidence is more scant and confined primarily to the state legislative level, Latinos are also likely a cohesive group. I was not able to determine whether Asian-Americans as pan-ethnic category are a politically cohesive group. However, the three groups together are not cohesive, the level of support that they give each other varying with the specific campaign and circumstances (as it is with Non-Hispanic Whites). The Plaintiffs do not address the minority cohesion question directly, but the evidence from Professor Gaddie's declaration is either inconclusive or supportive of my conclusions with respect to Hispanics.
24. Another Gingles test is the degree of White racial polarization: as White polarization becomes more severe, the need for remedy becomes more urgent. I ascertained that the Non-Hispanic White vote for African-American candidates varied enormously and included extremely high levels of support for African-American candidates in such contests as the 2008 Democratic Presidential Primary, the 2006 Montgomery County Executive Democratic Primary, and the 2004 Congressional District 4 Democratic Primary. There were also examples of low support such as the 2006 US Senate Democratic Primary and the Senate District 23 Democratic Primaries in 2006 and 2010. And then there are many examples in the middle. The Plaintiffs dismiss the high support examples as caused by well organized, well funded campaigns or by incumbency. But if we take this line of argument seriously, the polarization concept is completely blurred. The fairest evaluation is to say that White voting for African-American candidates varies with the location and quality of a given campaign.
25. Given that Non-Hispanic White support for African-Americans is variable and not consistently polarized, is Maryland obliged under Section 2 of the VRA to adopt a third remedy district drawn predominantly on the basis of race, giving African-Americans 37% of the Congressional districts with 28% of the State's VAP? I advised that it was not. Both of the Fannie Lou Hamer PAC plans not only create 3 majority African-American seats but also 4 seats that are between 67% and 86% Non-Hispanic White VAP. The Campbell plan is even more segregated, creating three majority African-American plus five 60% plus

White VAP seats. This seemed to be moving in the direction of the segregated harmsthe Court warned against in the Shaw line of cases. There was no need for such an extreme remedy given the variability of the Maryland non-Hispanic White vote in Democratic primaries when African-Americans are on the ballot. Ironically, although the Plaintiffs speak of the minority community as a whole, their alternative redistricting plans divide Congressional districts into majority African-American VAP andsuper-majority Non-Hispanic White seats.

26. As their own expert points out, Asian and Hispanic candidates have succeeded when seats are in the area of 40% plus majority minority. Professor Eberly sees only partisan malice in coalition seats, ignoring what it means for Latinos and Asians as their population shares continue to grow. Coalitional seats will look more Democratic because Maryland's Democratic Party is much more diverse that the Republican Party (which by exit poll evidence is 90% Non-Hispanic White). Maryland has chosen to bet on a racial coalition future while guaranteeing that African-Americans retain their historical footholds in Baltimore and Prince George's County. In my opinion and based the data I reviewed, that judgment was consistent with the standards of Section 2.
27. I declare under the penalty of perjury that the forgoing is true and correct.

Executed on December 13<sup>th</sup> , 2011



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Bruce E. Cain