THE DIM SIDE OF THE BRIGHT LINE: MINORITY VOTING OPPORTUNITY AFTER *BARTLETT V. STRICKLAND*

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When he left Congress in 1901, George White, an African American Republican from Tarboro, North Carolina, announced that it was "perhaps the Negro's temporary farewell to Congress."[1] Mr. White's premonition was right. Voters from North Carolina would not send another African American to Congress until 1992, nearly a century later, when Melvin Watt and Eva Clayton were elected from two majority-black districts.[2] Their elections were made possible by the Voting Rights Act ("VRA" or "the Act"),[3] which is widely regarded as the crowning achievement of the Civil Rights Movement, and has proven to be one of the most successful federal civil rights statutes, if not statutes of any kind, in American history.

But last term, the VRA came under attack on numerous fronts. Much attention[4] has been paid to *Northwest Austin Municipal Utility District Number One v. Holder* ("*NAMUDNO*"),[5] an unsuccessful challenge to the constitutionality of Section 5 of the Act.[6] However, with the spotlight focused so intently on *NAMUDNO*, a pivotal case arising from North Carolina concerning the reach of another crucial provision of the VRA, has not received sufficient attention.

In *Bartlett v. Strickland*,[7] a fractured Supreme Court narrowly construed the protections of Section 2 of the Act as imposing a bright-line rule regarding when parties can state a claim for minority vote dilution. Specifically, a minority group must be capable of constituting a numerical majority of the voting-age population in a geographically compact area before Section 2 requires the creation of an electoral district to prevent dilution of that group's votes.[8] With its ruling in *Bartlett*, the Court conclusively

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[1] THE ALMANAC OF AMERICAN POLITICS 2004, at 1225 (Michael Barone & Richard E. Cohen eds., 2003).

[2] *Id.*

[3] 42 U.S.C. § 1973 (2006).

[4] *See, e.g.*, Eric Etheridge, *Voting Rights Act: Section 5 Survives, for Now*, N.Y. TIMES, June 22, 2009, http://opinionator.blogs.nytimes.com/2009/06/22/voting-rights-act-section-5-survives-for-now (describing reactions to Northwest Austin Municipal Utility District No. One v. Holder).

[5] 129 S. Ct. 2504 (2009).

[6] In *NADMUDNO*, the Court declined to hold that Section 5 of VRA is unconstitutional. *See id.* at 2513.

[7] 129 S. Ct. 1231 (2009).

[8] *Id.* at 1241–49.

answered a question that it had avoided on four previous occasions.[9] In doing so, the Court prohibited North Carolina, a state that had previously gone nearly a century without an African American representative in Congress, from voluntarily preserving an election district that had reliably provided its African American residents with an opportunity to elect their candidate of choice.

This article will examine how the Court's decision in *Bartlett* — despite Justice Kennedy's professed awareness of the persistent need for race-conscious voter protection[10] — misconstrued clear statutory language in a way that narrowed the core protections of one of the most important voting rights laws in our history, rendering certain minority districts vulnerable. The Court thereby constricted Section 2's scope and compromised the statute's ability to accomplish its purpose, effectively impeding, rather than furthering, the development of cross-racial political cooperation. That said, the Court's ruling did not reach (1) intentional efforts to dismantle these now vulnerable districts; (2) opportunities for different minority populations to be aggregated for Section 2 purposes; or (3) the use of Section 5 of the Act as an independent means to prevent the dismantling of crossover districts in covered jurisdictions. Each of these issues will be explored more fully below.

Brief Background

Section 2 of the VRA[11] prohibits a state or a political subdivision of a state from using any "standard, practice, or procedure" that "results in denial or abridgement of the right of any citizen of the United States to vote on account of race or color" or membership in a protected language minority group.[12] In addition to prohibiting practices that directly deny the exercise of the right to vote, Section 2 prohibits vote dilution — the use of an electoral districting plan to "submerg[e]"[13] minority voters in a district controlled by the white majority, thus denying those minority voters an opportunity to elect a candidate of their choice.

The idea underpinning vote dilution liability is that where white voters, as a bloc, refuse to support the candidate of choice of minority voters, minority voters will effectively be shut out of the electoral process if they are submerged in an electoral district controlled by white voters. Section 2 therefore requires, under some circumstances, that election districts be drawn such that a geographically compact and politically cohesive group of minority voters will have opportunity to elect its candidate of choice.

The Supreme Court, in *Thornburg v. Gingles*,[14] identified three "necessary preconditions" for a claim that a districting plan amounts to actionable vote dilution

[9] *See infra* note 81.
[10] *See* 129 S. Ct. at 1249.
[11] 42 U.S.C. § 1973 (2006).
[12] 42 U.S.C. § 1973l(c)(3) defines "language minority group" as persons who are "American Indian, Asian American, Alaskan Natives or of Spanish heritage."
[13] 129 S. Ct. at 1241.
[14] Thornburg v. Gingles, 478 U.S. 30, 50–51 (1986).

under Section 2: (1) the minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district," (2) the minority group must be "politically cohesive," and (3) the majority must vote "sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate."[15] These three requirements are generally referred to as the "*Gingles* preconditions" or the "*Gingles* requirements."

The legal question in *Bartlett* — one confined to statutory rather than constitutional interpretation — was whether the first *Gingles* precondition can be satisfied where minority voters do not constitute a numerical majority of the population in a hypothetical election district. Put another way, the issue was whether Section 2 requires the creation of an election district in an area where members of a racial minority do not amount to a numerical majority, but do constitute a voting bloc large enough to elect candidates of their choice with the support of some crossover white voters.

Bartlett arose from a complicated fact pattern. In 2003, the North Carolina General Assembly redrew House District 18, a legislative district.[16] District 18 was a geographically compact majority-minority district when it was originally drawn in 1991. But by 2003 its African American voting-age population had fallen below 50%, and a new geographically compact majority-minority district could not be drawn.[17] In order to prevent the African American voting age population from dropping from 39.36% to only 35.33%,[18] the Assembly redrew District 18 across county lines, to include portions of four counties, among them, Pender County.

In doing so, the Assembly opted to contravene the North Carolina Constitution's "Whole County Provision," which prohibits dividing counties when drawing legislative districts.[19] State officials were concerned that keeping Pender County contained within one district in order to adhere to the Whole County Provision would result in illegal vote dilution under Section 2, because it would have a tangible negative effect on minority electoral chances. State officials reasoned that where the strict application of the Whole County Provision would result in the dilution of minority voting strength, Section 2 of the VRA trumped the state constitution.[20] Thus, state officials concluded that they were required to split Pender County, thereby giving African American voters in District 18, now 39.36% of the voting age population, the ability to join their votes with supportive majority voters to elect their candidate of choice.[21]

Pender County and the members of its Board of Commissioners filed suit in North Carolina state court, alleging that the redistricting plan violated the state's Whole County Provision.[22] As defendants, state officials raised Section 2 as a defense and argued that

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[15] *Id.* at 50–51.
[16] Pender County v. Bartlett, 649 S.E.2d 364, 366 (N.C. 2006), *cert. granted*, Bartlett v. Strickland, 128 S. Ct. 1648 (2008), *aff'd*, 129 S. Ct. 1231 (2009).
[17] Bartlett v. Strickland, 129 S. Ct. 1231, 1239 (2009).
[18] *Id.*
[19] N.C. CONST. art. II, §§ 3(3), 5(3).
[20] *Pender County*, 649 S.E.2d. at 367.
[21] *Id.*
[22] *Id.*

because racial minorities in District 18, although not a majority, could elect candidates of their choice with support from crossover majority voters, Section 2 required Pender County to be split and District 18 to be drawn to accommodate that potential.[23]

The trial court looked to the threshold requirements for Section 2 liability articulated by the Supreme Court in *Thornburg v. Gingles*.[24] Finding that the defendant state officials had satisfied the *Gingles* requirements (the plaintiffs conceded that the third requirement had been met), the trial court concluded that, although African Americans constituted only 39.36% of District 18's voting-age population, they were a "de facto" majority-minority because they could garner enough support from crossover majority voters to elect their preferred candidate.[25] Section 2, the court held, required that Pender County be split, leaving District 18's lines intact.[26]

Three Pender County Commissioners appealed the trial court's ruling that the defendants had satisfied the first *Gingles* prerequisite.[27] Reversing the trial court, the North Carolina Supreme Court held that a minority group must constitute a numerical majority of the voting-age population in an area before Section 2 requires the creation of a legislative district to prevent dilution of that group's votes.[28] Because African Americans were not a numerical majority in District 18, the General Assembly was ordered to redraw the district to comply with the Whole County Provision.[29] The defendant state officials petitioned the Supreme Court for certiorari.[30]

Supreme Court's Ruling

On appeal, the United States Supreme Court considered whether Section 2 required state officials to draw electoral district lines to allow a racial minority to join with other voters to elect the minority's candidate of choice where that racial minority constituted less than 50% of the voting age population in the district to be drawn.[31] In particular, the case turned on an issue that the Court had declined to decide in prior Section 2 voting rights cases:[32] whether the first *Gingles* precondition, which requires that a minority group be sufficiently large and geographically compact to constitute a majority in a single-member district, required a bright-line majority rule or could be satisfied when the minority group made up less than 50% of the voting age population in the potential election district.[33]

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[23] *Id.*
[24] *Id.* at 1240.
[25] *Bartlett*, 129 S. Ct. at 1240.
[26] *Id.*
[27] *Pender County*, 649 S.E.2d at 370.
[28] *Id.* at 374.
[29] *Id.* at 376.
[30] Petition for Writ of Certiorari, *Bartlett*, 129 S. Ct. 1231 (No. 07-689).
[31] *Bartlett*, 129 S. Ct. at 1238.
[32] See *infra* note 81.
[33] *Id.* at 1241.

Justice Anthony Kennedy, joined by Chief Justice John Roberts and Justice Samuel Alito, sided with the North Carolina Supreme Court, imposing the bright-line rule, thus narrowing the Act's protections.[34] Only when a geographically compact minority could form a numerical majority in a single-member district, the Supreme Court held, must a district be created as a remedy under Section 2.[35]

Justice Kennedy began the decision by noting that Section 2 can require the creation of a "majority-minority" district, a district in which a minority group constitutes a numerical majority of the voting age population, but not an "influence" district, in which a minority group, though not a numerical majority of the district, can nevertheless influence the outcome of an election even though it cannot elect its candidate of choice. [36]

The district at issue here was neither a minority-majority district nor an influence district, but an "intermediate type of district — a so-called crossover district."[37] In a crossover district, Justice Kennedy explained, a minority group makes up less than a numerical majority of the voting-age population, but is large enough to elect a candidate of its choice with help from majority voters who cross over to support the minority's preferred candidate.[38]

North Carolina state officials argued that, although crossover districts do not contain a numerical majority of minority voters, they nevertheless are "effective minority districts" that satisfy the first *Gingles* requirement.[39] Thus, they urged, Section 2 required them to draw District 18 as a crossover district, setting aside the state's Whole County Provision and splitting Pender County because doing so afforded African Americans an opportunity to elect a candidate of their choice.[40]

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[34] *Id.* at 1242–50.

[35] *Id.* at 1249. Justice Clarence Thomas, joined by Justice Antonin Scalia, concurred only in the judgment. Justice Thomas disagreed with the *Gingles* framework for analyzing vote dilution claims and argued that it had no basis in the VRA's language. Justice David Souter's dissent was joined by Justice John Paul Stevens, Justice Ruth Bader Ginsburg, and Justice Stephen Breyer. Justice Souter argued that a district may be redrawn under Section 2 so long as a cohesive minority population is large enough to elect its preferred candidate when combined with the support of majority crossover voters. Justice Ginsburg wrote a separate dissenting opinion, which encouraged Congress to remedy the majority's misinterpretation of the Act. Justice Breyer also wrote a separate dissenting opinion, which criticized the majority's adoption of a bright-line majority requirement as too simplistic a formula because it failed to account for the way in which people actually vote.

[36] *Id.* at 1242 (citing Voinovich v. Quilter, 507 U.S. 146, 154 (1993) and League of United Latin Am. Citizens v. Perry (*LULAC*), 548 U.S. 399, 445 (2006)).

[37] *Bartlett*, 129 S. Ct. at 1242. Although there is often some confusion between crossover districts, coalition districts, and influence districts, there is a shared understanding that influence districts do not provide any opportunity for minority voters to elect candidates of their choice when elections are racially polarized. For that reason, Congress in 2006 reversed the Court's ruling in Georgia v. Ashcroft, 539 U.S. 461, 482 (2003), which permitted a jurisdiction to trade opportunity districts, where minorities actually could elect candidates of their choice, for so-called influence districts, where they could only influence electoral outcomes.

[38] *Bartlett*, 129 S. Ct. at 1242.

[39] *Id.* at 1243.

[40] *Id.*

Rejecting that claim, the Court held that because African Americans did not compose a majority of the voting-age population in District 18, they had the same opportunity to elect a candidate of choice as any other group with the same relative voting strength.[41] Section 2, Justice Kennedy explained, does not afford "special protection" to minority voters who, without forming political coalitions, cannot elect candidates of their choice on the strength of their own political power alone.[42] In Kennedy's view, "Section 2 does not impose on those who draw election districts a duty to give minority voters the most potential, or best potential, to elect a candidate by attracting crossover voters."[43] Mandatory recognition of such claims, the Court continued, would both "create serious tension with the third *Gingles* requirement that the majority votes as a bloc to defeat minority-preferred candidates," and call into question the entire *Gingles* framework.[44]

Instead, Justice Kennedy favored a bright-line majority-minority requirement for the first *Gingles* precondition because, in his view, it provided "workable standards" and drew "clear lines for courts and legislatures alike."[45] Demonstrating his documented distaste for the use of racial classifications,[46] and his aspirations to move the government steadily away from race-based judgments, Justice Kennedy expressed concern that allowing a Section 2 claim to exist in the context of crossover districts "would place courts in the untenable position of predicting many political variables and tying them to race-based assumptions."[47] Doing so, he stated, would "raise[] serious constitutional questions."[48]

To avoid such questions, Justice Kennedy noted that any doubt as to whether Section 2 calls for a majority-minority rule was resolved by applying the canon of constitutional avoidance to "steer clear of serious constitutional concerns under the Equal Protection Clause."[49] He explained:

> Of course, the "moral imperative of racial neutrality is the driving force of the Equal Protection Clause," and racial classifications are permitted only "as a last resort." Richmond v. J. A. Croson Co., 488 U.S. 469, 518, 519 (1989) (Kennedy, J., concurring in part and concurring in judgment). "Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the

[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.* at 1244.
[45] *Id.*
[46] *See* Ricci v. DeStefano, 129 S. Ct. 2658, 2677 (2009); Georgia v. Ashcroft, 539 U.S. 461, 491–92 (2003) (Kennedy, J., concurring); Miller v. Johnson, 515 U.S. 900, 911–12 (1995).
[47] *Bartlett*, 129 S. Ct. at 1244.
[48] *Id.* at 1245.
[49] *Id.* at 1237 (citing Clark v. Martinez, 543 U.S. 371, 381–82 (2005)).

> Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire." Shaw v. Reno, 509 U.S. 630, 657 (1993). If § 2 were interpreted to require crossover districts throughout the Nation, "it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions." League of United Latin American Citizens v. Perry (*LULAC*), 548 U.S. 399, 446 (2006)] (opinion of Kennedy, J.).[50]

To bolster their argument that Section 2 does not require a bright-line majority-minority rule, North Carolina state officials pointed to the plain language of Section 2's guarantee that the political processes be '"equally open to participation' to protect minority voters' 'opportunity . . . to elect representatives of their choice.'"[51] Such opportunities, they urged, exist in crossover districts like District 18.[52]

Justice Kennedy, however, responded that the state officials emphasized "the word 'opportunity' at the expense of the word 'equally'" and that Section 2 does not protect every possible opportunity for minority voters to join their votes with other groups to elect their preferred candidate.[53] "[M]inority groups [in crossover districts] have the same opportunity to elect their candidate as any other political group with the same relative voting strength."[54]

Reiterating that Section 2 does not *require* crossover districts, Justice Kennedy concluded the ruling did not address the *permissibility* of crossover districts as a legislative choice.[55] Section 2 permits states to select their own method of complying with the VRA. As Justice Kennedy explained, that may include creating crossover districts.[56] Indeed, Justice Kennedy conceded, crossover districts may diminish the influence of race by encouraging minority and majority voters to work together toward a common purpose.[57] He continued:

> The option to draw such districts gives legislatures a choice that can lead to less racial isolation, not more. And as the Court has noted in the context of § 5 of the Voting Rights Act, "various studies have suggested that the most effective way to maximize minority voting strength may be to create more influence or [crossover]

[50] *Id.* at 1247; *but see* Pamela S. Karlan & Daryl J. Levinson, *Reshaping Remedial Measures: The Importance of Political Deliberation and Race-Conscious Redistricting: Why Voting is Different*, 84 CAL. L. REV. 1201 (1996) (distinguishing voting from other areas of Equal Protection analysis).
[51] *Bartlett*, 128 S. Ct. at 1246 (citing 42 U.S.C. §1973(b)).
[52] *Id.*
[53] *Id.* at 1246.
[54] *Id.* at 1246–47.
[55] *Id.* at 1248.
[56] *Id.*
[57] *Id.*

> districts." [Georgia v. Ashcroft, 539 U.S. 461, 482 (2003).] Much like § 5, § 2 allows States to choose their own method of complying with the Voting Rights Act, and we have said that may include drawing crossover districts. See *id.* at 480-83.[58]

At the same time, Justice Kennedy was clear that states should not interpret the Court's ruling to legislatively require majority-minority districts, as that too could raise constitutional concerns.[59] Such districts are only required if all three *Gingles* factors are met and if Section 2 applies based on the totality of the circumstances.[60]

Disappearing Districts: The Court's Ruling Unnecessarily Constricts Section 2's Scope, Compromising the VRA's Ability to Accomplish its Purpose

The Court's holding — that the only remedy available to minority voters lacking an opportunity to "elect representatives of their choice"[61] is the creation of a district in which they constitute a majority of the voting age population — appears in tension with the ordinary language of Section 2. In fact, minority voters in districts where they are not a numerical majority regularly "elect representatives of their choice." The Court's refusal to recognize this reality underscores the fact that its decision is at odds with the clear purpose of the Act.

Indeed, the spirit, purpose, and text of Section 2 plainly impose a functional, opportunity-to-elect standard, not a bright-line requirement that minorities must constitute a numerical majority to allege vote dilution. Nothing about Section 2 suggests that Congress's sole means to protect minority voters' opportunity to elect was through the creation of majority-minority districts.[62] Instead, Congress made clear that Section 2 "focuses exclusively on the consequences of apportionment"[63] when crafting the definitive functional approach: the totality of the circumstances test.[64] Under that test, plaintiffs establish a denial or abridgment of the right to vote if, "based on the totality of circumstances," they show that members of a racial minority "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[65]

Moreover, the Court's ruling in *Bartlett* departed from well-established jurisprudence. In *Gingles* itself, the Court required that Section 2 claims be assessed under "the totality of circumstances,"[66] which includes looking at "the facts of each case"[67] and conducting a

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[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] Bartlett, 129 S. Ct. at 1249.
[62] *See* Voinovich v. Quilter, 507 U.S. 146, 155 (1993) ("[Section 2] says nothing about majority-minority districts.").
[63] *Id.*
[64] *See* 42 U.S.C. §1973(b).
[65] *Id.*
[66] Thornburg v. Gingles, 478 U.S. 30, 79 (1986).

"searching practical evaluation of the past and present reality" with the relevant jurisdiction.[68] Notably, the *Gingles* Court *declined to adopt* the same bright-line rules for vote dilution claims that the *Bartlett* plurality ultimately adopted here.[69]

Similarly, the Court's decisions since *Gingles* have also either declined to adopt a bright-line test for proof of the first *Gingles* factor, or assumed that such tests were inapplicable.[70] In limiting the scope of Section 2's remedial power, the Court has apparently changed its reading of unchanged language and, under the guise of statutory interpretation, impeded the VRA's ability to protect minority voters' access to the democratic process.

The Court Departs from Section 2's Functional Standard: The Opportunity to Elect

In adopting a bright-line rule, the Court departs from its prior opportunity-to-elect standard. Rejecting the plurality adoption of a majority-minority requirement, Justice Souter argued in his dissenting opinion that "a functional analysis leaves no doubt that crossover districts vindicate the interest expressly protected by § 2: the opportunity to elect a desired representative."[71] Justice Souter continued: "It has been apparent from the moment the Court first took up § 2 that no reason exists in the statute to treat a crossover district as a less legitimate remedy for dilution than a majority-minority one (let alone to rule it out)."[72]

Justice Souter's faith in crossover districts appears well-placed. Empirical studies confirm that minority voters constituting less than a majority of the voting age population can have the opportunity to elect candidates of their choice with the help of modest

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[67] *Id.* (quoting Rogers v. Lodge, 458 U.S. 613, 621 (1982)).
[68] *See id.* at 79 (quoting S. REP. NO. 97-417, at 30 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 208).
[69] *Id.* at 46 n.12; *see also id.* at 90 n.1 (O'Connor, J., concurring in the judgment) (stating that "if a minority group that is not large enough to constitute a voting majority in a single-member district can show that white support would probably be forthcoming in some such district to an extent that would enable the election of the candidates its members prefer, that minority group would appear to have demonstrated that, at least under this measure of its voting strength, it would be able to elect some candidates of its choice").
[70] *See* Growe v. Emison, 507 U.S. 25, 41 n.5 (1993) (declining to adopt a bright-line test for geographic compactness); Voinovich, 507 U.S. at 158 (assuming that a group would state a claim under Section 2 if it were "a sufficiently large *minority* to elect their candidate of choice with the assistance of cross-over votes from the white majority") (emphasis in original); Johnson v. De Grandy, 512 U.S. 997, 1009 (1994) ("we will assume without deciding that even if Hispanics are not an absolute majority of the relevant population in the additional districts, the first *Gingles* condition has been satisfied"); *LULAC*, 548 U.S. at 443 ("we assume for purposes of this litigation that it is possible to state a § 2 claim for a racial group that makes up less than 50% of the population") (Kennedy, J., plurality opinion).
[71] *Bartlett*, 129 S. Ct. at 1253 (Souter, J., dissenting).
[72] *Id.* (citing *Gingles*, 478 U.S. at 90 n.1); *see also* Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1553 (2002) ("What should be so magical, then, about whether there are enough black voters to become a formal majority so that a conventional 'safe' district can be created? If a safe and a coalitional district have the same probability of electing a black candidate, are they not functionally identical, by definition, with respect to electing such candidates?").

crossover by white voters.[73] The North Carolina Supreme Court, for example, determined that voting districts with a black voting age population of as little as 38.37% have an opportunity to elect their candidates of choice.[74]

Electoral results in North Carolina support this factual finding.[75] Of the nine North Carolina House districts in which African Americans comprised more than 50% of the voting age population, seven of them elected a black representative in the 2004 election.[76] Moreover, eleven of the twelve additional House districts in which blacks comprised at least 39% of the voting age population elected an African American representative in the 2004 election.[77] Although they do not comprise a majority of the population in those eleven districts, African American voters there are clearly exercising their opportunity to "elect [the] representatives of their choice."[78] Justice Souter added:

> It is of course true that the threshold population sufficient to provide minority voters with an opportunity to elect their candidates of choice is elastic, and the proportions will likely shift in the future, as they have in the past. *See* Pildes 1527–32 (explaining that blacks in the 1980s required well over 50% of the population in a district to elect the candidates of their choice, but that this number has gradually fallen to well below 50%); *id.* at 1527, n.26 (stating that some courts went so far as to refer to 65% "as a 'rule of thumb' for the black population required to constitute a safe district").[79]

That said, the percentage of African Americans in crossover districts must be significant. It depends on a host of conditions, including the extent of racially polarized voting, past performance of the relevant African American community in electing its preferred candidate, and local history.[80] "No one, for example, would argue based on the record of experience in this case that a district with a 25% black population would meet the first *Gingles* condition. And the third *Gingles* requirement, majority-bloc voting, may well provide an analytical limit to claims based on crossover districts."[81] That is, at some point a district moves from providing a real opportunity to elect into the so-called influence district range, a designation that is nebulous both as to definition and value.

As Congress intended, Section 2 is flexible enough both to predict and to respond to voting realities, ranging from racially polarized voting to modest white crossover support for a minority community's candidate of choice. The Court's bright-line precondition

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[73] Pildes, *supra* note 83, at 1531–34.
[74] *Bartlett*, 129 S. Ct. at 1253–54 (citing Pender County v. Bartlett, 649 S.E.2d 364, 366-67 (N.C. 2007)).
[75] *Id.* at 1254.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *See* Bernard Grofman et al., *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. REV. 1383, 1392 (2001).
[81] *Bartlett*, 129 S. Ct. at 1254.

does not appreciate that, as a practical matter, minorities who comprise 39% of a crossover district, such as the one at issue in *Bartlett*, exercise as meaningful an opportunity to elect a candidate of choice as African Americans who comprise a numerical majority in another district.

Minimizing the Role of Race in American Politics?

Contrary to Justice Kennedy's suggestions, the use of crossover districts actually assists in the realization of the ultimate goal of the VRA: minimizing the role of race in American politics.[82] Among other things, crossover districts provide states with greater flexibility in drawing redistricting plans with a fair number of minority opportunity districts. "[T]his in turn allows for a beneficent reduction in the number of majority-minority districts with their 'quintessentially race-conscious calculus,' . . . thereby moderating reliance on race as an exclusive determinant in districting decisions"[83] Indeed, in Justice Souter's view, a crossover district "requires polarized factions to break out of the mold and form the coalitions that discourage racial divisions."[84] Indeed, Justice Kennedy's concern that racial classifications must not be unnecessarily injected into the redistricting process is more likely to materialize as a result of the Court's wooden majority-minority requirement, and not, as he feared, in the context of crossover districts.

In the absence of crossover districts as remedies for vote dilution, well-intentioned legislatures may seek to solve the problem of declining minority political strength by packing minority voters into districts in which they hold a clear majority. Of course, African American voters in these districts will prevail in electing candidates of their choice, but likely at the expense of exercising their real voting strength elsewhere in the state, as would be possible were they able to build coalitions with crossover voters.

Other legislatures might even engage in packing for less benign reasons. Under the Court's ruling, for example, there is a danger that a jurisdiction may attempt to pack as many minority voters as possible into districts that are already safe majority-minority districts as an intentional effort to dilute minority voting strength in neighboring crossover districts, and thereby prevent minority voters in those districts from electing their candidates of choice. Similarly, if a compact minority population is electing candidates of its choice in a crossover district, a jurisdiction may respond by fragmenting that minority population into multiple districts in which minority voters would have no

[82] *Ashcroft*, 539 U.S. at 490 ("The purpose of the Voting Rights Act is to prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race.").
[83] *Bartlett*, 129 S. Ct. at 1254 (Souter, J., dissenting) (citations omitted). *See also* Pildes, *supra* note 83, at 1547–48 ("In contrast to the Court's concerns with bizarrely designed safe districts, it is hard to see how coalitional districts could 'convey the message that political identity is, or should be, predominantly racial.' . . . Coalitional districts would seem to encourage and require a kind of integrative, cross-racial political alliance that might be thought consistent with, even the very ideal of, both the VRA and the U.S. Constitution" (quoting Bush v. Vera, 517 U.S. 952, 980 (1996))).
[84] *Bartlett*, 129 S. Ct. at 1255 (Souter, J., dissenting).

opportunity to elect their preferred candidates. Thus, as long as minority voters do not constitute a numerical majority in a particular district, Section 2 will not automatically prevent a jurisdiction from diluting what was previously an opportunity to elect candidates of their choice.[85]

Ironically, the Court in *Johnson v. De Grandy*[86] rejected proportionality as a complete defense to a Section 2 vote dilution claim because it would allow jurisdictions to engage in "blatant racial gerrymandering" to dilute minority voting strength.[87] The Court's ruling now encourages precisely that result. Justice Souter concluded: "The plurality has eliminated the protection of § 2 for the districts that best vindicate the goals of the statute, and has done all it can to force the States to perpetuate racially concentrated districts, the quintessential manifestations of race consciousness in American politics."[88]

Despite Persistence of Racially Polarized Voting, African Americans in North Carolina, and throughout the United States, Have Been Elected to Office from Districts that are Less Than 50% African American.

When Representative Mel Watt was elected in 1992 — ninety years after North Carolina was last represented by an African American in Congress — his 12th District was 57% black. It quickly became the object of several challenges by white voters, leading the Supreme Court to review the constitutionality of its boundaries at least four times.[89] District 12 was redrawn in response to litigation in 1997, not as a majority-black district, but as a district with a total black population of 47% and black voting age population of 43%. Blacks in District 12 constituted 46% of the registered voters.[90] Despite the sizable reduction in the black population of his district, Representative Watt continued to be elected on the strength of his incumbency and support of white crossover voters in his heavily urban district. Under the Court's construction of Section 2, however, the state is now permitted to dismantle Representative Watt's district at its discretion. More broadly, nineteen other members of the Congressional Black Caucus were also elected from districts in which the black voting age population is less than a majority. The Court's ruling in *Bartlett* puts their districts, like that of Representative Watt, at risk.

The Court's ruling could also have deeply troubling consequences at the level of the North Carolina State Legislature. Currently, nine members of the North Carolina Senate and twenty-one members of the North Carolina House of Representatives are African American.[91] While all of the senators represent districts with significant black populations, none of them come from districts with majority-black voting age

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[85] Of course, as discussed more fully below, in Section 5 covered jurisdictions this type of conduct would very likely draw an objection under the "ability to elect" standard.
[86] 512 U.S. 997 (1994).
[87] *Id.* at 1019–20.
[88] *Bartlett*, 129 S. Ct. at 1260 (Souter, J., dissenting).
[89] *See* Easley v. Cromartie, 532 U.S. 234 (2001); Hunt v. Cromartie, 526 U.S. 541 (1999); Shaw v. Hunt, 517 U.S. 899 (1996); Shaw v. Reno, 509 U.S. 630 (1993).
[90] *Hunt*, 526 U.S. at 544.
[91] N.C. LEGISLATIVE LIBRARY, NORTH CAROLINA AFRICAN-AMERICAN LEGISLATORS 1969-2009 (2009), http://www.ncleg.net/library/Documents/African-Americans.pdf.

populations.[92] Furthermore, thirteen of the twenty African American members of the House represent districts that range from 39.36 to 49.97% black voting age population.[93]

Moreover, *even with* (albeit modest) white crossover support in some districts, black voters have not achieved proportionality in North Carolina. While African Americans are nearly 20% of the population in the state, they are only able to elect candidates of their choice in 16% of North Carolina's Senate districts and 17% of its House districts.[94] To be sure, even this level of progress was only made possible because the state has drawn districts with significant black populations. Racially polarized voting prevents black voters in districts with smaller minority populations from electing their candidates of choice.

That said, it is likely that some of these districts will survive the next round of redistricting, despite the Court's imposition of the majority-minority requirement. Though the *Bartlett* ruling makes these districts vulnerable to dismantling, it is not certain that upcoming redistricting efforts will aim to achieve such a result. Other interests, such as a desire to protect incumbents, preserve communities of interest, and/or ensure partisan advantage might cause the General Assembly to maintain these districts, even absent legal requirements to do so.[95] However, the Court's ruling and the *Stephenson* line of cases, in which the North Carolina Supreme Court strictly construed the state constitution's Whole County Provisions, make virtually impossible the maintenance of at least some of those districts with black voting age populations below 50%.[96]

It remains to be seen which crossover districts, both in North Carolina and beyond, will survive the next round of redistricting. What is clear, however, is that Section 2 "does not mandate creating or preserving" them.[97]

Bartlett's Impact on the Future of Section 2 Litigation

Is Intentional Dismantling of Crossover Districts Actionable?

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[92] N.C. LEGISLATIVE LIBRARY, HOUSE REDISTRICTING PLAN—VOTING AGE POPULATION BY RACE AND ETHNICITY (2006), http://www.ncleg.net/GIS/RandR07/District_Plans/House/House_Redistricting_Plan/2003/Reports/StatewideByDistrict/rptVap.pdf; N.C. LEGISLATIVE LIBRARY, 2003 SENATE REDISTRICTING PLAN – VOTING AGE POPULATION BY RACE AND ETHNICITY (2006), http://www.ncleg.net/GIS/RandR07/District_Plans/Senate/2003_Senate_Redistricting_Plan/2003/Reports/StatewideByDistrict/rptVap.pdf.

[93] *See id.*

[94] *See* U.S. Census Bureau, North Carolina Quick Facts, http://quickfacts.census.gov/qfd/states/37000.html (last visited Oct. 5, 2009).

[95] *Cf. Easley*, 532 U.S. at 258 (holding that the predominant consideration in constructing a district that elected an African American to Congress was partisanship, not race).

[96] Stephenson v. Bartlett, 582 S.E.2d 247 (N.C. 2003); Stephenson v. Bartlett, 562 S.E.2d 377, 396–97 (N.C. 2002) ("[L]egislative districts required by the VRA shall be formed prior to creation of non-VRA districts.").

[97] *Bartlett*, 129 S. Ct. at 1248.

It remains to be seen whether and, if so, precisely how intentional discrimination in the context of crossover districts is actionable. The Court declares that its holding "does not apply to cases in which there is intentional discrimination against a racial minority."[98] But the Court's ruling — that Section 2 "does not mandate creating or preserving crossover districts,"[99] — leads to the conclusion that even *intentional fracturing* of crossover districts in order to harm minority voters might not amount to a claim under Section 2. If, as the Court held, the elimination of a crossover district can never deprive minority voters of the opportunity "to elect representatives of their choice," minorities in an intentionally eliminated district will have a steep climb in trying to show an injury under Section 2.[100]

That said, the Court noted that serious questions would be raised under both the Fourteenth and Fifteenth Amendments if "there were a showing that a [s]tate intentionally drew district lines in order to destroy otherwise effective crossover districts."[101] In addition to these constitutional concerns, Section 2 similarly prohibits intentional efforts to minimize the voting power of protected minorities.[102]

Coalition Districts

A more viable claim under Section 2 lies in the context of minority "coalition districts." Although the Court held that a claim for vote dilution cannot be brought with respect to crossover districts where minorities do not make up a numerical majority of the population, it expressly left open whether members of more than one minority group in coalition may be aggregated for the purpose of satisfying that 50% threshold. Specifically, the Court, recognizing that such districts raise different issues, held that "[w]e do not address that type of coalition district here."[103]

In coalition districts, different minority groups combined together constitute a numerical majority and vote cohesively, thereby possessing the ability to elect a candidate of their

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[98] *Id.* at 1246.
[99] *Id.* at 1248.
[100] *Id.* at 1259 n.5.
[101] *Id.* at 1249 (citing Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 481–82 (1997)).
[102] *See* Garza v. County of Los Angeles, 918 F.2d 763, 766 (9th Cir. 1990) ("To the extent that a redistricting plan deliberately minimizes minority political power, it may violate both the Voting Rights Act and the Equal Protection Clause of the fourteenth amendment.") (citing City of Mobile v. Bolden, 446 U.S. 55, 66–67 (1980)).
[103] *Bartlett*, 129 S. Ct. at 1242–43. The Court therefore left open a question that it first acknowledged in Growe v. Emison, 507 U.S. 25 (1993). There, the trial court adopted a redistricting plan that would have created an election district whose population would have been 43% black, but 60% minority, on the grounds that doing so was necessary to comply with Section 2's prohibition on minority vote dilution. *Id.* at 38. The Supreme Court, while ultimately holding that the district court's determination was in error, declined to rule on the precise issue of whether such a coalitional claim is cognizable under Section 2. The Court "[a]ssum[ed] (without deciding) that it was permissible for the District Court to combine distinct ethnic and language minority groups for purposes of assessing compliance with § 2," but concluded that even were such a claim possible, it could not be sustained here because there was no showing that the aggregated minority groups voted cohesively. *Id.* at 41.

choice, even though no single minority group possesses such power. These districts, unlike crossover districts, are likely cognizable under Section 2 for several reasons.

First, Section 2's prohibition against the dilution of minority votes where "members" of a protected class have less opportunity to elect candidates of their choice does not specify that such members must belong to a *single minority group*.[104] Thus, where a coalition of minorities can satisfy the second and third *Gingles* prerequisites (cohesiveness and majority bloc voting), as well as the totality of circumstances test, Section 2 appears to afford minority voters in such multi-racial and/or multi-ethnic geographic concentrations the same protections afforded to those who comprise a single majority. Given the spirit, purpose, and remedial nature of the VRA, it should be broadly construed to reach such districts.[105]

Second, refusing to aggregate racial and ethnic minority populations in a district would have consequences entirely inconsistent with the VRA's aims. Requiring each individual minority group in a district to constitute a numerical majority would effectively require the segregation of minority groups from each other in order to trigger Section 2's protection — a perverse result never intended by the Act.[106]

Third, aggregation of different minority groups under Section 2 would comport with the Court's jurisprudence in areas outside of the voting rights context. The Court's education jurisprudence, for example, has permitted the aggregation of different racial and ethnic minorities to determine levels of school segregation where such groups have encountered similar patterns of discrimination.[107] This principle — that racial and ethnic minorities who suffer common forms of discrimination can coalesce to protect their constitutionally guaranteed rights as one group — can and should also be applied in the voting rights context.

Finally, the aggregation of different minority groups in a district is consistent with the Court's ruling in *Bartlett*. The Court based its decision in *Bartlett* in part on its determination that minority voters in crossover districts, who rely on white support, could not satisfy *Gingles*' third prerequisite, namely, that the "majority votes as a bloc to defeat minority-preferred candidates."[108] This concern, however, does not arise in the context of

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[104] 42 U.S.C. § 1973(b).

[105] *See, e.g.*, Chisom v. Roemer, 501 U.S. 380, 403 (1991) (stating that "the Act should be interpreted in a manner that provides 'the broadest possible scope' in combating racial discrimination") (quoting Allen v. State Board of Elections, 393 U.S. 544, 567 (1969)).

[106] *See* Georgia v. Ashcroft, 539 U.S. 461, 490-91 (2003) (noting that "the Voting Rights Act, as properly interpreted, should encourage the transition to a society . . . where integration [is a] simple fact[] of life.").

[107] *See* Keyes v. School District No. 1, 413 U.S. 189, 197–98 (1973) (holding "that the District Court erred in separating Negroes and Hispanos for purposes of defining a 'segregated' school" and that "petitioners are entitled to have schools with a combined predominance of Negroes and Hispanos included in the category of 'segregated' schools").

[108] *Bartlett*, 129 S. Ct. at 1244. This was, of course, a dubious proposition. The second and third *Gingles* preconditions, which ask whether minority voters are politically cohesive but are frustrated by majority bloc voting, are concerned with the election district in question as *currently* drawn. The first *Gingles* precondition, however, which asks whether minority voters in a hypothetical district would be geographically compact and sufficiently large to elect their candidate of choice, is concerned with the

minority coalition districts. In those districts, members of different minority groups can vote together to elect candidates of their choice without support from white voters. Moreover, aggregating different minority groups satisfies the Court's new bright-line majority-minority requirement for the first *Gingles* prerequisite and, in so doing, addresses "the need for workable standards and sound judicial and legislative administration,"[109] by "rel[ying] on an objective, numerical test: Do minorities make up more than 50 percent of the voting-age population in the relevant geographic area?"[110] Given that Justice Kennedy raised the possibility that any application of Section 2 in the absence of such clear standards might be unconstitutional,[111] this particular aspect of minority coalition districts is appealing.

Nevertheless, bringing a Section 2 claim on behalf of a coalition of different minorities would be challenging. Apart from the difficulties inherent in satisfying the *Gingles* prerequisites, the Court appears hesitant to permit Section 2 claims made by voters from one minority group that are premised on cooperation with any other group.[112]

Moreover, some judges and commentators have argued against aggregation on the grounds that it treats different members of distinct racial and ethnic minorities as essentially fungible.[113] Such concerns are generally unfounded, however, because of the presence of the second *Gingles* prong — a minority group (or more accurately in this case, a group of minorities) cannot bring a successful claim unless the group as a whole is cohesive. Under *Gingles*, there is no presumption that members of even a single racial or ethnic minority will always vote cohesively; rather, plaintiffs bringing a Section 2 vote dilution claim must establish political cohesion.[114]

Permitting members of different racial or ethnic groups to be treated as a unit for the purposes of determining the applicability of Section 2 would be no different from the manner in which courts currently aggregate Latino voters of different national origin or Asian American voters who speak different languages.[115] Where different minority groups in fact have different interests that would render aggregation inappropriate, the

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proposed *remedial* district. In other words, whether the minority population in the proposed remedial district is sufficiently large to elect a candidate of its choice (precondition one) has nothing to do with whether the district *as currently drawn*, exhibits racially polarized voting (precondition three).

[109] *Id.*

[110] *Id.* at 1245.

[111] *Id.* at 1247.

[112] *Id.* at 1243 (Noting that the African American population in the proposed district "cannot . . . elect that candidate based on their own votes and without assistance from others. Recognizing a § 2 claim in this circumstance would grant minority voters 'a right to preserve their strength for the purposes of forging an advantageous political alliance' . . . . Nothing in § 2 grants special protection to a minority group's right to form political coalitions.") (quoting Hall v. Virginia, 385 F.3d 421, 431 (4th Cir. 2004)).

[113] *See, e.g.*, League of United Latin Am. Citizens v. Clements, 999 F.2d 831, 894–98 (5th Cir. 1993) (Jones, J., concurring); Katharine I. Butler & Richard Murray, *Minority Vote Dilution Suits and the Problem of Two Minority Groups: Can a "Rainbow Coalition" Claim the Protection of the Voting Rights Act?*, 21 PAC. L.J. 619 (1990).

[114] *See* Thornburg v. Gingles, 478 U.S. 30, 51 (1986).

[115] *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, 473 (1995).

political cohesion prerequisite should weed out such claims. But it seems unlikely that this will *always* be the case, especially given the fact that various studies have demonstrated political cohesion amongst groups of different racial and ethnic minorities under particular circumstances.[116] Thus, the validity of a coalition claim brought under Section 2, like any other vote dilution claim, should be determined on a case-by-case basis with attention paid to the local characteristics of the jurisdiction at issue.

Unfortunately, lacking guidance from the Supreme Court, the lower courts have treated this issue inconsistently. The Second[117] and Fifth[118] Circuits have held that such coalitional claims are permissible under Section 2. Similarly, while not expressly holding that such coalitional claims are possible, the First,[119] Ninth,[120] and Eleventh[121] Circuits,

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

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

[118] *See* Campos v. City of Baytown, 840 F.2d 1240, 1243–44 (5th Cir. 1988) (holding that the district court's finding that the first prong of *Gingles* could be satisfied by aggregating blacks and Hispanics to conclude that single-member districts with majority-minority populations were possible was not "clearly erroneous"); League of United Latin Am. Citizens v. Midland Indep. Sch. Dist., 812 F.2d 1494, 1500 (5th Cir. 1987) (affirming the district court's finding that the first prong of *Gingles* was satisfied by aggregating an election district's black and Hispanic populations). *See also* Brewer v. Ham, 876 F.2d 448, 451 (5th Cir. 1989) (affirming the dismissal of Section 2 claim brought by "a minority group including blacks, Hispanics, and Asians" on the grounds that plaintiffs had not established that the group could constitute a majority of a district's voting age population); Overton v. City of Austin, 871 F.2d 529, 536 (5th Cir. 1989) (affirming the district court's dismissal of Section 2 claim seeking creation of "a district in which Mexican-Americans, although not a majority, could be aggregated with blacks to achieve" a voting-age population majority, solely on the grounds that plaintiffs had failed to establish the third prong of *Gingles*, the presence of racially-polarized voting).

[119] *See* Latino Political Action Comm. v. City of Boston, 784 F.2d 409, 411, 414 (1st Cir. 1986) (analyzing a vote dilution suit brought by a group of black, Hispanic, and Asian voters who alleged that a districting plan "unlawfully 'packed' minorities into a few districts," but rejecting claim because plaintiffs had not demonstrated the presence of racially-polarized voting).

[120] *See, e.g.*, Debaca v. County of San Diego, No. 92-55661, 1993 U.S. App. LEXIS 25702, at *1, *4 (9th Cir. Sept. 27, 1993) (dismissing Section 2 claim brought "on behalf of all Hispanic, African American, and Asian citizens residing in the County of San Diego" only because "appellants made no showing of political cohesiveness among the multiethnic class as a whole"); Valladolid v. City of National City, 976 F.2d 1293, 1294, 1296 (9th Cir. 1992) (dismissing Section 2 claim brought on behalf of "all voting age Hispanic and Black citizens residing in National City" because plaintiffs failed to satisfy the third *Gingles* prong, namely, that a white bloc of voters would normally defeat the minority group's candidate of choice); Badillo v. City of Stockton, 956 F.2d 884, 886 (9th Cir. 1992) (affirming the district court's dismissal of plaintiffs' Section 2 claim, despite the fact that "plaintiffs' evidence clearly established that [H]ispanics and blacks together could form a majority in a single-member district," on the grounds that "the evidence failed to establish that such a combined group of blacks and [H]ispanics would vote in a politically cohesive manner").

[121] Concerned Citizens of Hardee County v. Hardee County Bd. of Comm'rs, 906 F.2d 524, 525, 526–27 (11th Cir. 1990) (affirming the dismissal of a Section 2 claim alleging that at-large districts in Hardee County "unlawfully dilute[d] the combined voting strength of blacks and [H]ispanics in violation of [S]ection 2" on the grounds that plaintiffs "failed to demonstrate that black and [H]ispanic voters in Hardee County are politically cohesive").

as well as several district courts,[122] have analyzed Section 2 claims brought by coalitions of minorities, seemingly assuming that such claims are cognizable under Section 2. Meanwhile, the Sixth[123] and Seventh[124] Circuits have expressly rejected the notion that coalitions of more than one racial or ethnic minority can bring a Section 2 claim.

In the end, where a circuit has not already rejected the possibility of such coalition claims, voting rights advocates should press vote dilution claims on behalf of minority voters in coalition districts. Indeed, such claims would be consistent with the Court's reasoning in in *Bartlett*.

Section 5 of the Voting Rights Act as an Independent Check on Vote Dilution

Notwithstanding the Court's ruling with respect to Section 2, the dismantling of a crossover district may be prevented by another part of the VRA: Section 5. Widely recognized as the heart of the VRA, Section 5 serves as the discrimination checkpoint for America's democracy. It prohibits all or part of sixteen states with the worst histories of voting discrimination (known as "covered jurisdictions"[125]) from implementing any voting changes without first obtaining the approval of the U.S. Department of Justice or the U.S. District Court for the District of Columbia — a process known as "preclearance." Section 5 prohibits:

> [a]ny voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) [42 U.S.C. § 1973b(f)(2)], to elect their preferred candidates of choice denies or abridges the right to vote . . . .[126]

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[122] *See, e.g.*, Knox v. Milwaukee County Bd. of Election Comm'rs, 607 F. Supp. 1112, 1126 (E.D. Wis. 1985) (holding that a vote dilution claim could be brought on behalf of a class of 150,000 black and 30,000 Hispanic residents of Milwaukee County); *see also* Terrazas v. Slagle, 821 F. Supp. 1162, 1170–71 (W.D. Tex. 1993) (dismissing plaintiffs' Section 2 claim featuring a proposed district in which blacks and Hispanics constituted a majority, solely on the grounds that plaintiffs had no demonstrated political cohesion between the groups).

[123] *See* Nixon v. Kent County, 76 F.3d 1381, 1390 (6th Cir. 1996) (holding that the text of the VRA and the legislative history of the 1982 amendments do not support the contention that Congress intended to permit different groups of minorities to aggregate for Section 2 purposes).

[124] *See* Frank v. Forest County, 336 F.3d 570, 575 (7th Cir. 2003) (rejecting a Section 2 claim brought by a coalition of Native American and black voters, while expressing skepticism towards the "problematic character" of such a coalition claim).

[125] Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia are covered by Section 5 in their entirety; California, Florida, New York, North Carolina, and South Dakota are covered in part. U.S. Dep't of Justice, Section 5 Covered Jurisdictions (July 25, 2008), http://www.usdoj.gov/crt/voting/sec_5/covered.php#counties.

[126] 42 U.S.C. § 1973c(b).

Section 5 ensures that no voting changes will be made that would be retrogressive to or would worsen the position of racial minorities with respect to their effective exercise of the vote in a covered jurisdiction.[127]

In measuring retrogression, the Court in *Georgia v. Ashcroft*[128] held that a redistricting plan that reduced the percentage of minority voters in a majority-minority district did not worsen the position of minorities in the district, because it preserved overall minority voting strength through the creation and maintenance of "influence districts."[129] In response to the Court's ruling, Congress in 2006 amended Section 5 to expressly protect the ability of minorities to *elect* candidates, not simply to influence electoral outcomes. Congress's amended Section 5 recognized as retrogressive any measure — either through vote dilution or outright vote denial — that undermined the "ability of such citizens to elect their preferred candidates of choice."[130] Like Section 2, the amended Section 5 prohibits the dilution of votes in majority-minority districts.

As the Court in *Bartlett* recognized, the inquiries under Section 5 and Section 2 are distinct,[131] with Section 5 prohibiting before it takes effect any voting measure that is retrogressive.[132] A Section 2 vote dilution claim, on the other hand, looks to the opportunity of members of a minority group to elect representatives of their choice, which according to *Bartlett* is only implicated in electoral districts where minority voters make up a numerical majority of the voting age population. Therefore, although a redistricting plan that dismantles a crossover district may not be actionable under Section 2, this might not be the case in the covered jurisdictions under Section 5, insofar as the dismantling of such a district would likely have a retrogressive effect on the position of minority voters throughout the jurisdiction.

The Court's ruling appears to confirm as much, noting that "the presence of influence districts is relevant for the § 5 retrogression analysis."[133] Indeed, the Supreme Court previously held that such districts are relevant in a Section 5 analysis of a redistricting plan, holding that "a court must examine whether a new plan adds or subtracts 'influence districts'—where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process."[134] Therefore, while Section 2 may not prohibit redistricting plans that dismantle crossover districts, Section 5 may serve as an independent checkpoint by recognizing such attempts as retrogressive and precluding them.

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[127] Georgia v. Ashcroft, 539 U.S. 461, 477 (2003).
[128] *Id.* at 482.
[129] As mentioned above, in "influence districts," minority voters constitute a large enough portion of the voting age population so as to wield substantial influence over electoral outcomes.
[130] 42 U.S.C. § 1973c(d).
[131] *See Ashcroft*, 539 U.S. at 478 ("We refuse to equate a § 2 vote dilution inquiry with the § 5 retrogression standard.").
[132] *See Bartlett*, 129 S. Ct. at 1249 ("The inquiries under §§ 2 and 5 are different. Section 2 concerns minority groups' opportunity 'to elect representatives of their choice,' . . . while the more stringent § 5 asks whether a change has the purpose or effect of 'denying or abridging the right to vote.'").
[133] *Id.* (observing that, although Section 2 may not require the creation of crossover districts, "Section 5 'leaves room' for States to employ crossover districts") (citing *Ashcroft*, 539 U.S. at 483).
[134] *Ashcroft*, 539 U.S. at 482.

Conclusion

Even as the Court announced a bright-line rule for all litigants in future Section 2 cases, Justice Kennedy recognized the considerable distance yet to be traveled in America's unsteady march toward eliminating entrenched voting discrimination. As he observed, "Racial discrimination and racially polarized voting are not ancient history. Much remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions, and [Section 2] must be interpreted to ensure that continued progress."[135]

The election results from the 2008 presidential election bear witness to this reality. Indeed, while President Obama's historic victory reflected that Americans came together in some important and unprecedented ways, a more detailed examination of election returns suggests that the election also illustrated the ongoing salience of race in American democracy.

Election returns in Alabama, Mississippi and Louisiana, for example, bring into sharp focus the decisive role that race played in voting choices in the 2008 presidential election. In these states, African American voters turned out in record numbers in support of Obama, with 98% of blacks in Alabama and Mississippi, and 94% in Louisiana, voting for him.[136] At the same time, however, Obama received *strikingly low* support from white voters, with only 10% of them pulling the lever for him in Alabama, 11% in Mississippi, and 14% in Louisiana.[137]

President Obama's victory represents notable racial progress at this juncture in American history. However, it neither diminishes the reality that race continues to play a role in American politics, nor extinguishes the ongoing need, in light of that reality, for the VRA's protection of meaningful minority engagement in the democratic process at every level of government.

While it is too soon to predict precisely how many African American and other minority crossover districts will be dismantled, there is no doubt that the future of at least some of them, both in state legislatures like North Carolina's and a sizable portion of the Congressional Black Caucus, are in peril. The Court's ruling in *Bartlett* represents a significant and most unfortunate narrowing of the VRA's protections, one that threatens to bring us closer to the very conditions that resulted in the passage of the Act.

It is the hope of this author that, like the years following the Court's decision in *Shaw v. Reno*,[138] most African American districts, particularly those now made vulnerable by the

[135] *Bartlett*, 129 S. Ct. at 1249.
[136] *See* Brief for Nathaniel Persily et al. as Amici Curiae on Behalf of Neither Party at 11, Northwest Austin Municipal Utility District No. One v. Holder, 129 S. Ct. 2504 (2009) (No. 08-322).
[137] *Id.*
[138] 509 U.S. 630 (1993).

Court's ruling here, will survive the quickly approaching round of redistricting that will follow the 2010 Census. We will know soon enough, after what looks to be another eventful round of redistricting litigation.