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BARTLETT V. STRICKLAND: THE CROSSOVER OF RACE AND POLITICS

INTRODUCTION

Since the passage of Voting Rights Act of 1965,[1] the United States Supreme Court has addressed a variety of forms of racial discrimination in voter redistricting plans.[2] For cases brought under § 2 of the Act, the Court has developed specific standards to evaluate claims of vote dilution and political gerrymandering. In *Bartlett v. Strickland*,[3] the Court restricted dilution claims to instances where the racial minority would constitute more than fifty percent of the voting age population in the proposed district.[4] In doing so, the Court correctly upheld the rights created under the Voting Rights Act, maintained a workable solution for resolving § 2 claims, and reduced the role of race in election districting and American politics.

Part I of this Comment reviews the history of vote dilution and race, and pertinent case law. Part II summarizes the Court's decision in *Bartlett v. Strickland*, including the facts, procedural history, and opinions. Part III analyzes *Bartlett* and presents the negative consequences of expanding § 2 to crossover districts. The Comment concludes by arguing that the Court's holding in *Bartlett* properly reflects the shrinking role of race in American electoral politics.

I. BACKGROUND

A. Vote Dilution and § 2 of the Voting Rights Act

Although the Fourteenth and Fifteenth Amendments to the Constitution granted African-Americans the right to vote shortly after the Civil War,[5] Southern states instituted an array of measures to disenfranchise African-Americans and minimize their presence in the electoral process.[6] These tactics included literacy tests, poll taxes, and gerrymandering.[7]

1. 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006).

2. *See* Note, *The Implications of Coalitional and Influence Districts for Vote Dilution Litigation*, 117 HARV. L. REV. 2598, 2599 (2004).

3. 129 S. Ct. 1231 (2009).

4. *Id.* at 1249.

5. U.S. CONST. amends. XIV–XV.

6. GARRINE P. LANEY, THE VOTING RIGHTS ACT OF 1965: HISTORICAL BACKGROUND AND CURRENT ISSUES 3–6 (2003). For additional information on African-American disenfranchisement and the history of minority voting rights, see generally PATRICIA GURIN ET AL., HOPE AND INDEPENDENCE: BLACKS' RESPONSE TO ELECTORAL AND PARTY POLITICS (1989); ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES (2000); J. MORGAN KOUSSER, COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION (1999).

7. *See* LANEY, *supra* note 6, at 3–5.

Beginning in 1890, eight states enacted literacy tests specifically designed to prevent African-Americans from voting, based on the fact that more than two-thirds of the African-American population was illiterate.[8] Many states instituted poll taxes intended to prevent minorities from voting.[9] In Florida, African-Americans who were able to pay the poll tax often encountered technical problems, such as inaccurate voting certificates and address information, which disqualified them from voting.[10] Additionally, in 1882, South Carolina created one district out of seven with a majority of African-American voters, even though African-Americans outnumbered registered white voters by over 30,000 in all districts.[11] That district—pejoratively described as a "boa constrictor"—ran over 150 miles, split six counties, and extended into the Atlantic Ocean.[12]

To fight these thinly veiled attempts to disenfranchise minority voters, Congress passed the Voting Rights Act in 1965.[13] The Act addressed racial disenfranchisement in three ways.[14] First, it prohibited the use of literacy tests and other qualifications used to prevent minorities from voting.[15] Second, § 5 of the Act required certain Southern states to seek preapproval for any redistricting schemes from the Department of Justice.[16] Third, § 2 authorized minority voters to sue in federal courts for violation of their voting rights.[17]

In addition to the Voting Rights Act requirements, the Supreme Court held in 1964 that state legislative districts must have roughly equal voting populations throughout a state.[18] States have enacted similar standards to the Court's holding and require that their legislative districts have a roughly equal number of voters.[19] While the original Voting

8. South Carolina v. Katzenbach, 383 U.S. 301, 310–11 (1966).

9. J. Morgan Kousser, *The Undermining of the First Reconstruction: Lessons for the Second*, *in* MINORITY VOTE DILUTION 27, 30–31 (Chandler Davidson ed., 1984).

10. PAUL LEWINSON, RACE, CLASS, AND PARTY: A HISTORY OF NEGRO SUFFRAGE AND WHITE POLITICS IN THE SOUTH 119 (1963).

11. Donald Norton Brown, Southern Attitudes Toward Negro Voting in the Bourbon Period, 1877–1890, at 150–151 (1960) (unpublished Ph.D. dissertation, University of Oklahoma) (on file with Bizzell Library, University of Oklahoma).

12. Laughlin McDonald, *The Looming 2010 Census: A Proposed Judicially Manageable Standard and Other Reform Options for Partisan Gerrymandering*, 46 HARV. J. ON LEGIS. 243, 246 (2009) (citing Brown, *supra* note 11, at 150).

13. 42 U.S.C. § 1973 (2006).

14. *Id.* §§ 1973b–1973c.

15. *Id.* § 1973b.

16. *Id.* § 1973c.

17. *Id.* § 1973b.

18. Reynolds v. Sims, 377 U.S. 533, 568–69 (1964).

19. *See* NAT'L CONFERENCE ON STATE LEGISLATURES, REDISTRICTING LAW 2010, at 127 (2009) (surveying redistricting criteria for all fifty states). In California, for example, seven general criteria provide the basis for any redistricting plan:

> (1) The districts in each plan should be equal in population, with strict equality in the case of congressional districts and reasonable equality in the case of legislative districts. (2) The territory included within a district should be contiguous and compact. (3) Insofar as practical counties and cities should be maintained intact. (4) Insofar as possible the in-

Rights Act and state regulations on redistricting addressed overt attempts to disenfranchise minority voters, Southern states have employed more subtle means of keeping voting rights in white hands. Vote dilution is one such tactic.

Vote dilution occurs when an electoral districting body unlawfully weakens a minority group's ability to elect a chosen candidate by creating a large, majority-dominated district.[20] To remedy vote dilution, legislatures may create "majority–minority" districts, where the protected minority group constitutes a numerical majority of the population within the new district.[21] Initially, the Fifteenth Amendment served as the primary avenue for dilution claims.[22] In response to public outcry following two Supreme Court holdings that required intentional discrimination to prove a violation of the Fifteenth Amendment in voting dilution cases,[23] Congress amended § 2 in 1982 to remove any intent requirements.[24] In the amended version, a voting practice or procedure denies or abridges a group's right to vote if:

> [B]ased on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.[25]

The Senate also attached a report recommending that courts, in place of a need for intent, use a "totality of the circumstances" test included in the Act.[26] The "totality of the circumstances" test and the judi-

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> tegrity of the state's basic geographical regions should be preserved. (5) The community of interests of the population of an area should be considered in determining whether the area should be included within or excluded from a proposed district so that all of the citizens of the district may be represented reasonably, fairly and effectively. (6) State senatorial districts should be formed by combining adjacent assembly districts, and, to the degree practicable, assembly district boundaries should be used as congressional district boundaries. (7) The basis for reapportionment should be the . . . census, and in counties where census tracts exist, such tracts should be used as the basic unit for district formation.

Legislature of Cal. v. Reinecke, 516 P.2d 6, 10 (Cal. 1973).

20. Adam B. Cox & Tomas J. Miles, *Judicial Ideology and the Transformation of Voting Rights Jurisprudence*, 75 U. CHI. L. REV. 1493, 1498 (2008).

21. Chandler Davidson, *The Voting Rights Act: A Brief History*, *in* CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 7, 49 (Bernard Grofman & Chandler Davidson eds., 1992). See generally *id.* at 7–51, for a historical framework and comprehensive background of both the Voting Rights Act and minority vote dilution.

22. *See id.* at 30.

23. *See* Cox & Miles, *supra* note 20, at 1498 (citing City of Mobile, Ala. v. Bolden, 446 U.S. 55, 62 (1980) (plurality opinion)); Laughlin McDonald, *The 1982 Amendments of Section 2 and Minority Representation*, *in* CONTROVERSIES IN MINORITY VOTING, *supra* note 21, at 66, 67.

24. McDonald, *supra* note 23, at 67–69. See *id.* at 66–84, for additional discussion and analysis on the 1982 amendments to § 2.

25. 42 U.S.C. § 1973(b) (2006).

26. *See* S. REP. NO. 97-417, at 16, 21, 27 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 193, 199, 205.

cial standard created in *Thornburg v. Gingles*[27] serve as the two-pronged evaluation that courts currently use to determine vote dilution claims pursuant to § 2.

B. Thornburg v. Gingles

Decided in 1986, *Gingles* was the first major voting rights decision after Congress amended § 2, and remains the landmark case on vote dilution and the Voting Rights Act.[28] In *Gingles*, the Court held that certain multimember districts in the North Carolina Legislature illegally diluted African-American voting opportunities.[29]

Gingles established the doctrinal framework for vote dilution claims in multimember districts.[30] To prevail on a § 2 claim, the minority petitioner must meet three doctrinal requirements: (1) they must demonstrate that their minority group is large enough and compact enough to constitute a majority if they were placed in a single member district; (2) they must demonstrate that the minority group is politically cohesive; and (3) they must demonstrate that a white majority group votes together in enough numbers to defeat the minority's preferred candidate.[31] If those requirements are met, the Court will then examine the totality of the circumstances to determine if a violation occurred.[32] Although the two-step framework in *Gingles* initially applied only to multimember districts, subsequent decisions concluded that single-member districting schemes could be challenged as vote dilution.[33]

C. Voinovich v. Quilter[34]

In *Voinovich*, the Court held that the petitioners failed the *Gingles* test, and therefore could not establish a § 2 violation.[35] *Voinovich* involved influence dilution, where a minority group is not overwhelmed by whites within a district, but "packed" into super-majorities in fewer districts to dilute their overall influence across the state.[36] Since the petitioners conceded that Ohio did not experience a significant amount of racially polarized voting (where voters choose their candidates based on race), the Court found that the claim against the Ohio apportionment

27. 478 U.S. 30, 46 (1986).

28. Cox & Miles, *supra* note 20, at 1500.

29. *Gingles*, 478 U.S. at 80. See BERNARD GROFMAN ET AL., MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 47–60 (1992), for further background and analysis of the Court's decision in *Gingles*, and the implications of that decision.

30. Cox & Miles, *supra* note 20, at 1501.

31. *Gingles*, 478 U.S. at 50–52; *see also* GROFMAN ET AL., *supra* note 29, at 61–81 (discussing the three-pronged test).

32. *Gingles*, 478 U.S. at 46.

33. *E.g.*, Bartlett v. Strickland, 129 S. Ct. 1231, 1241 (2009) (plurality opinion); Growe v. Emison, 507 U.S. 25, 40–41 (1993).

34. 507 U.S. 146 (1993).

35. *Id.* at 158.

36. *Id.* at 149–51.

board failed to meet the third *Gingles* requirement.[37] The Court noted that the *Gingles* requirements must be tailored to the nature of each claim, and adjusted the *Gingles* framework accordingly.[38] The Court determined the first requirement—that a minority group constitute a majority in a single district—would need alteration or removal in influence dilution claims where the two other requirements are met.[39]

D. Johnson v. De Grandy[40]

In *Johnson v. De Grandy*, the Court addressed proportionality in vote dilution. The Court held that no violation of § 2 occurs when minority voters form effective voting majorities in a number of districts roughly proportional to their share of the voting age population.[41] The petitioners in *De Grandy* argued that the Florida House of Representatives' redistricting plan fragmented minorities into separate districts, which illegally diluted their voting power.[42] The Court found that their claim satisfied the *Gingles* requirements and determined, on the totality of the circumstances, that the Hispanic minority group constituted a majority in a number of districts proportional to their overall population percentage.[43]

Justice Souter, writing for the majority, reasoned that § 2 does not bestow on majorities the right to total maximization of their voting power.[44] In its discussion of crossover districts—where a minority group does not constitute a majority of the population in a district but is sufficiently large to form coalitions with majority members that "crossover" to elect their chosen candidate—the Court noted that "minority voters are not immune from the obligation to pull, haul, and trade to find common political ground."[45]

E. Georgia v. Ashcroft[46]

In *Ashcroft*, the Court authorized state districting bodies to create crossover districts to replace majority-minority districts under § 5 of the Voting Rights Act.[47] Although the violation in *Ashcroft* was based on a § 5 violation, which requires certain Southern states to pre-clear with a federal court any redistricting that may reestablish racial discrimination, the Court's discussion of § 2 and vote dilution in crossover districts is

37. *Id.* at 158.
38. *Id.*
39. *Id.*
40. 512 U.S. 997 (1994).
41. *Id.* at 1000.
42. *Id.* at 1002.
43. *Id.* at 1014–15.
44. *Id.* at 1016.
45. *Id.* at 1020.
46. 539 U.S. 461 (2003).
47. *Id.* at 480–82; Michael A. Carvin & Louis K. Fisher, *"A Legislative Task": Why Four Types of Redistricting Challenges Are Not, or Should Not Be, Recognized by Courts*, 4 ELECTION L.J. 2, 20 (2005).

particularly relevant to the analysis of *Bartlett*. In *Ashcroft*, the African-American minority group, which consistently voted Democrat by a large margin, supported the decision by the Democratic-controlled Georgia State Legislature to "unpack" districts with large African-American majorities to create more crossover districts.[48] This unpacking would not result in fewer majority–minority districts, but would lessen the relative majority of African-Americans in order to increase their influence in other districts.[49] By allowing crossover districts, the Court recognized that minority groups could also participate equally in elections in districts where they are not a majority of the population.[50] For claims brought under the Voting Rights Act, the Court held that any inquiry of districting violations must examine the districting plan across the entire state, not just selected districts, to determine whether a § 5 violation has occurred.[51]

F. League of United Latin American Citizens v. Perry ("LULAC")[52]

In *LULAC*, the Court held that a redistricting plan does not violate § 2 if the minority group involved could not elect a candidate of its choice without illegal vote dilution.[53] Among the multiple allegations put forth in *LULAC*, African-American petitioners claimed vote dilution in a district where they constituted twenty-five percent of the voting population, but sixty-four percent of those voting in Democratic primaries.[54] The Court found this percentage of voters would influence, but not control, the proposed district. Consequently, the Court held the petitioners did not satisfy the first *Gingles* requirement.[55]

The *LULAC* Court reasoned § 2 only provides minorities with the opportunity to elect their preferred candidates, which they cannot do if they merely exert minority influence in primary elections.[56] Minority groups would still need "crossover" support from non-minority voters to actually elect the preferred candidate.[57] Recognizing the petitioner's situation as a § 2 violation, the court reasoned, "would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions."[58]

The above cases demonstrate that parties claim § 2 violations in a wide variety of electoral circumstances. Before 2009, however, the Court

48. 539 U.S. at 470–71.
49. *Id.*
50. Carvin & Fisher, *supra* note 47, at 20.
51. 539 U.S. at 479.
52. 548 U.S. 399 (2006).
53. *Id.* at 445.
54. *Id.* at 443–44.
55. *Id.* at 443.
56. *Id.* at 445.
57. *See id.*
58. *Id.* at 446.

had not decided whether a state must redistrict an area where the minority group could not constitute a majority of voters, but could elect their preferred candidate with help of majority voters in a crossover district. In *Bartlett v. Strickland*, the Court addressed this issue.[59]

II. *BARTLETT V. STRICKLAND*

A. Facts

In 1991, to meet the Voting Rights Act requirements, the North Carolina General Assembly created District 18 by dividing portions of four counties, including Pender County.[60] At the time, the new District 18 would have had an African-American voting majority.[61] The North Carolina State Constitution, however, prohibited dividing whole counties when drawing legislative districts.[62] Consequently, the North Carolina Supreme Court twice used the state's "Whole County Provision" to reject the General Assembly's redistricting attempts to divide Pender County.[63] When the Assembly attempted to reapportion the region a third time, the proportion of voting age African-Americans in the potential district had fallen below fifty percent, and the Assembly could not create a district with a majority of African-American voters.[64] Specifically, thirty-five percent of the voters in the new district would have been African-American if Pender County was not split, but thirty-nine percent would be African-American if the Assembly divided the county.[65] The Assembly justified the split—and the violation of the state constitution—by arguing a failure to split would have "diluted the minority group's voting strength in violation of § 2."[66]

B. Procedural History

In 2004, Pender County and members of its Board of Commissioners filed suit against the Governor, the Director of the State Board of Elections, and other state officials in North Carolina state court, claiming that the Assembly violated the Whole County Provision by dividing Pender County.[67] The defendants answered by claiming § 2 required the division plan.[68] Unlike § 2 claims in the previous cases, where petitioners from minority groups claimed a violation of the Voting Rights against a districting body, in *Bartlett* the districting body raised a § 2 defense to its

59. Bartlett v. Strickland, 129 S. Ct. 1231, 1238 (2009) (plurality opinion).
60. *Id.* at 1239.
61. *Id.*
62. *Id.*
63. *Id.*; *see also* N.C. CONST. art. II, § 3; Stephenson v. Bartlett (*Stephenson I*), 562 S.E.2d 377, 381–395 (N.C. 2002) (discussing the Whole County Provision).
64. *Bartlett*, 129 S. Ct. at 1239 (plurality opinion).
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* at 1240.

own districting action.[69] As a result, the Assembly had to prove that a vote dilution violation would have occurred without the split county plan.[70]

Although the African-American minority could not constitute a numerical majority in the newly proposed district, thereby failing to meet the first *Gingles* requirement, the trial court concluded the minority voting bloc constituted a de facto majority because they would be able to elect candidates of their choice with some support from white "crossover" voters.[71] The court then concluded that the African-Americans in the district voted together with enough cohesiveness to meet the second *Gingles* requirement.[72] The petitioners did not have to prove the third *Gingles* requirement because the respondents had already conceded that it had been met.[73] With the *Gingles* framework satisfied, the trial court held that, under the totality of the circumstances, § 2 required a split of Pender County.[74]

On appeal, the Supreme Court of North Carolina reversed and found the state did not establish a § 2 violation.[75] The court based its reversal on the first *Gingles* element and ordered the General Assembly to redraw the boundaries and keep Pender County whole.[76] Because the African-American group did not constitute a numerical majority under the new boundaries of District 18, the court held that no vote dilution could have had occurred.[77]

C. Plurality Opinion

The United States Supreme Court granted certiorari to determine whether the first *Gingles* requirement can be satisfied in crossover districts where the minority group constitutes less than fifty percent of the voting-age population in the proposed district.[78] The plurality opinion, written by Justice Kennedy and joined by Chief Justice Roberts and Justice Alito, affirmed the North Carolina Supreme Court decision.[79]

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69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* at 1243. The Court, in affirming the Supreme Court of North Carolina's holding, elaborated on the first *Gingles* requirement—a numerical majority of minority voters—when it stated, "[b]ut because [African-Americans] form only 39 percent of the voting-age population in District 18, African-Americans standing alone have not better or worse opportunity to elect a candidate than does any other group of voters with the same relative voting strength."
77. *Id.* at 1240.
78. *Id.* at 1241.
79. *Id.* at 1238, 1250.

The Court reached two conclusions in holding that § 2 does not extend to crossover districts.[80] First, the Court held that § 2 only provides minority groups equal participation in elections, not the right to form coalitions with other crossover voters.[81] The Court determined that, in the absence of a majority–minority district, a minority group's ability to elect a preferred candidate is not inferior to white voters' ability.[82] The establishment of equal opportunity for minority groups under § 2 does not impose on districting bodies the duty to "give minority voters the most potential, or the best potential, to elect a candidate by attracting crossover voters."[83]

Second, the Court rejected the petitioner's claim that § 2 should extend to crossover districts. The Court reasoned that the petitioner's proposed result would create an unmanageable standard and infuse race into nearly every districting decision.[84] If § 2 were read to mandate crossover districts to correct vote dilution, courts would be forced to replace the fairly efficient standard for determining if the minority group would constitute a majority of the voting age population with a complex and predictive determination involving voter-turnouts, levels of proportionality, crossover likelihood, polling inquiries, and voter trends.[85] This new standard would apply to every redistricting jurisdiction nationwide, and would force courts to base every districting decision, at least partially, on racial classifications.[86]

Although the Court held that § 2 did not *require* states to protect crossover districts, the plurality nonetheless acknowledged that states were free to create crossover districts if the state did not violate other state prohibitions.[87] The plurality noted that crossover districts can foster cooperation between majority and minority groups and reduce the impact of racial polarization in elections.[88] Justice Kennedy also recognized that a districting body faced with defending a § 2 suit could point to crossover districting as evidence of attempts to provide minority groups with an equal voting opportunity, and lack of cohesion in the white majority voting group.[89]

D. Concurring Opinion

Justice Thomas, joined by Justice Scalia, argued that the Voting Rights Act does not authorize vote dilution claims in any circumstance,

80. *Id.* at 1243–49.
81. *Id.* at 1243.
82. *Id.* at 1244 (citing Thornburg v. Gingles, 478 U.S. 30, 49 n.15 (1986)).
83. *Id.* at 1243.
84. *Id.* at 1247.
85. *Id.* at 1244–45.
86. *Id.* at 1247.
87. *Id.* at 1248.
88. *Id.*
89. *Id.*

and that the *Gingles* framework was a "disastrous misadventure in judicial policymaking."[90] The concurring Justices argued that the Act only guarantees a right of access to the ballot,[91] and that claims of racial gerrymandering are non-justiciable because there are no judicially discernible and manageable standards to decide such claims.[92]

E. Dissent

Justice Souter—joined by Justices Stevens, Ginsburg, and Breyer—dissented, and argued restricting § 2 claims to majority–minority districts uses an arbitrary threshold to deny minorities in certain districts the opportunity to elect their chosen representatives.[93] In disputing the plurality's concerns over extending the role of race-based determinations in electoral politics, Justice Souter argued that crossover districts foster racial understanding and cooperation, and will actually serve to minimize racial polarization.[94] He also maintained that the plurality's workable standard argument is inexact and does not justify ignoring a § 2 claim, citing the already lengthy and racially-based analysis that courts must undertake to determine the *Gingles* requirements.[95]

Justice Ginsburg joined Justice Souter's dissent, and argued separately that Congress should clarify the debate regarding § 2's appropriate coverage in light of the plurality's decision.[96] In a separate dissent, Justice Breyer proposed extending § 2 claims to districts where the minority population and percentage of majority crossover equaled a two-to-one ratio.[97]

III. ANALYSIS

The plurality opinion in *Bartlett* properly limits claims of vote dilution to majority–minority districts. By narrowly interpreting the first *Gingles* requirement and not extending § 2 claims to crossover districts, the Court rightly refused to extend the Voting Rights Act's mandate of equal opportunity for minority voters into statutory permission for partisan preferences and minority spoils. Had the Court extended § 2 to mandate the creation of crossover districts, three damaging consequences would have resulted.

First, the Court would have created a new right for groups to form winning coalitions that only benefit protected minorities, which was not part of the Voting Rights Act's equal protection guarantee. Second, the

90. *Id.* at 1250 (Thomas, J., concurring) (internal quotation marks omitted) (quoting Holder v. Hall, 512 U.S. 874, 893 (1994).
91. *Id.* (citing *Holder*, 512 U.S. at 893).
92. Davis v. Bandemer, 478 U.S. 109, 123 (1986).
93. *Bartlett*, 129 S. Ct. at 1254 (Souter, J., dissenting).
94. *Id.* at 1255.
95. *Id.* at 1257.
96. *Id.* at 1260 (Ginsburg, J., dissenting).
97. *Id.* at 1261 (Breyer, J., dissenting).

Court would have broadened political gerrymandering by replacing a workable standard with a complex, racially-derived substitute. Third, the Court would have reversed the current trend away from identity politics and racial polarization by requiring racial inquiries in all districting questions and propagating a spoils system.

A. Expanding § 2 to Crossover Districts is Beyond the Scope of the Voting Rights Act

1. Equality or Opportunity?

The Voting Rights Act provides minority groups with a right to vote.[98] That right can be defined as the equal opportunity to participate in election voting; it is violated only if a member of a protected minority class has "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[99] Therefore, a § 2 violation has occurred only when a minority group's opportunity, or ability, to elect their chosen candidate has been denied or abridged by a redistricting plan.[100]

The first requirement in *Gingles* provides the necessary framework to allow courts to determine if there was a violation of § 2. Requiring a protected minority group to demonstrate a majority of voters in a new district is essential because, if that group could not constitute a majority in the new district, they do not possess the ability to elect their candidate. Therefore, without an ability to elect a preferred candidate through majority voting, there is no right or opportunity that a districting body could deny.[101] If a protected group is a proportional minority in a given district, their failure to elect a preferred candidate would lie in their already insufficient demographics, not in discriminatory districting. In crossover districts, dilution of minority voting power cannot occur because the minority group does not have any power that can be diluted. As the Court noted in *Gingles*, "Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice."[102]

The dissent contends that the plurality's narrow interpretation of *Gingles* is inconsistent with functionalist approaches in previous dilution cases.[103] But this interpretation seems misleading. In *Voinovich*, the Court stated the *Gingles* test "cannot be applied mechanically and without regard to the nature of the claim,"[104] but in that case the vote dilution

98. 42 U.S.C. § 1973(b) (2006).
99. *Id.*
100. *See id.*
101. *See* Carvin & Fisher, *supra* note 47, at 17–18.
102. Thornburg v. Gingles, 478 U.S. 30, 50 n.17 (1986).
103. *See* Bartlett v. Strickland, 129 S. Ct. 1231, 1255 (2009) (Souter, J., dissenting); *see also* Note, *supra* note 2, at 2608.
104. Voinovich v. Quilter, 507 U.S. 146, 158 (1993).

claims involved "packing," or reverse-dilution, of minorities into super-majorities.[105] In that situation, the Court would have correctly modified the first *Gingles* requirement because the petitioners sought to disperse their "super-majority" in a single district into sufficiently large numerical minorities across multiple districts.[106] Due to petitioners' unique circumstances—they sought to alleviate reverse-dilution through the creation of multiple new districts in which they would constitute a numerical minority of voters—the first *Gingles* requirement, which requires a numerical majority, would have been fatal to their claim.[107] Accordingly, the Supreme Court held that certain § 2 claims could necessitate modification or exclusion of the *Gingles* factors.[108] In *Bartlett*, however, no such situation existed, and the *Gingles* framework did not require adjustment. Therefore, it would be illogical for the Court to discard the first requirement by allowing crossover district claims.

2. A Right to Successful Coalitions?

Nowhere in the text of the Voting Rights Act is there a promise extending the right to form coalitions, crossover-voting factions, or other advantageous political alliances to elect minority-preferred candidates.[109] If a minority group cannot form a winning coalition, their ability to elect a candidate has not been denied—no group has a right to a winning coalition.[110] A group's inability to form coalitions is based on failures of persuasion and influence, not voter discrimination. Any special privilege to force district arrangements to benefit minority-led coalitions would grant minority groups special immunity to "pull, haul, and trade to find common political ground,"[111] a result the Court specifically rejected in *De Grandy*.

The Court's holding in *Bartlett* is consistent with previous cases on this issue,[112] and granting minorities the right to form winning coalitions would have presented significant problems. In *De Grandy*, Justice Souter wrote that minority groups had the same advantages and disadvantages with regard to forming voting coalitions.[113] Holding that § 2 did not define dilution as a failure to maximize a minority's political leverage, he

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105. *Id.* at 153.

106. *Id.* at 158 (holding that "[t]he first *Gingles* precondition, the requirement that the group be sufficiently large to constitute a majority in a single district, would have to modified or eliminated when analyzing the influence-dilution claim we assume, *arguendo*, to be actionable today . . . [t]complaint is not that black voters have been deprived of the ability to constitute a *majority*, but of the possibility of being a sufficiently large *minority* to elect their candidate of choice with the assistance of cross-over votes from the white majority").

107. *Id.*

108. *Id.*

109. *See* 42 U.S.C. § 1973 (2006).

110. *See* Johnson v. De Grandy, 512 U.S. 997, 1027 (1994).

111. *Id.* at 1020.

112. *See* Bartlett v. Strickland, 129 S. Ct. 1231, 1236 (2009) (plurality opinion).

113. *De Grandy*, 512 U.S. at 1017.

concluded that "one is not entitled to suspect (much less infer) dilution from mere failure to guarantee a political feast."[114]

In a § 2 crossover district claim, the group claiming denial or abridgement of voting rights is not a protected minority class, but a "coalition comprised of the protected class, *plus* an additional group of nonminority citizens, who happen to share the protected group's political preferences."[115] Section 2 does not extend special treatment to voting coalitions, whether led by minority groups or majority ones.[116] An extension of § 2 would give minority group-led coalitions preferential treatment and violate the "basic principles of judicial neutrality and political evenhandedness."[117]

B. Expanding § 2 Encourages Political Gerrymandering Under the Guise of Racial Equality

Legislative redistricting and the resulting challenges, while ostensibly motivated by racial inequalities, are commonly used for partisan political advantage.[118] The history of discrimination in election rights is long and undeniable, and a large number of decisions are based on good-faith efforts to remedy that past, but parties in vote dilution disputes are often separated by political party as well as by race.[119] In Southern states, political divides mirror racial ones, with African-Americans supporting Democrats by a wide margin.[120]

In *Voinovich*, *Ashcroft*, and *LULAC*, partisan goals took precedent over racial equality concerns.[121] In *Voinovich*, Republican members of the state apportionment board approved the redistricting plan, while local Democrats challenged it with support from party officials.[122] In *Ashcroft*, the Supreme Court found "[t]he goal of the Democratic leadership—black and white" was to increase minority influence in Georgia to maintain political power.[123] And in *LULAC*, Democrats implemented the redistricting plan by "carefully construct[ing] democratic districts with incredibly convoluted lines and pack[ing] heavily Republican suburban areas into just a few districts."[124] These cases demonstrate that both sides

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114. *Id.*

115. Carvin & Fisher, *supra* note 47, at 18.

116. *Id.*

117. *Id.*

118. *See* Note, *supra* note 2, at 2599.

119. *See* Carvin & Fisher, *supra* note 47, at 18; Kareem U. Crayton, *Beat 'Em or Join 'Em? White Voters and Black Candidates in Majority-Black Districts*, 58 SYRACUSE L. REV. 547, 554–55 (2008).

120. *See* Crayton, *supra* note 119, at 554–55.

121. League of United Latin Am. Citizens v. Perry (*LULAC*), 548 U.S. 399, 411 (2006); Georgia v. Ashcroft, 539 U.S. 461, 462 (2003); Voinovich v. Quilter, 507 U.S. 146, 155 (1993).

122. *Voinovich*, 507 U.S. at 149.

123. *Ashcroft*, 539 U.S. at 469.

124. *LULAC*, 548 U.S. at 411 (internal quotation marks omitted) (quoting Henderson v. Perry, 399 F. Supp. 2d 756, 767 n.47 (E.D. Tex. 2005)).

of the aisle use racial gerrymandering to achieve their political objectives.

Gerrymandering encompasses "any redistricting practice which maximizes the political advantage or votes of one group, and minimizes the political advantage or votes of another."[125] Typically, evidence of gerrymandering includes irregularities in the shape, size, number, and uniformity of electoral districts.[126] Although an irregularly shaped district has traditionally been a trademark of gerrymandering, recent studies have shown that it also occurs in regularly shaped districts whose boundaries are based on political divisions and traditional geographic barriers.[127]

Gerrymandering in American politics is both old and persistent. Patrick Henry is credited as the first gerrymanderer[128] in his attempt to hinder James Madison's election to Congress. As former Congressman and political scientist Robert Luce said, "gerrymandering has become so general and familiar a procedure that it may fairly be called a characteristic of American politics."[129]

In certain instances Democrats deplore redistricting as political gerrymandering, and Republicans defend it. In others, Republicans cry foul, while Democrats support it. Redistricting plans are either a deplorable political tool or a moral and legal imperative, depending on who stands to benefit. Expanding § 2 claims to include the mandatory creation of crossover districts would only increase this political manipulation and allow partisan political interests to further commandeer voting rights legislation.

Allowing crossover claims would expose legislative districts across the country to further gerrymandering and racially-based determinations.[130] If minorities were not required to constitute a numerical majority—or form a crossover coalition through political persuasion—then § 2 could be used to challenge virtually any redistricting plan with ease.[131] The number of potential crossover claims is staggering when one considers that "[a]ny district with a cognizable group of minorities which elects a white Democrat is, *ipso facto*, a 'coalition' district,"[132] meaning a minority group had formed a coalition with whites to elect the candidate.

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125. Frank R. Parker, *Racial Gerrymandering and Legislative Reapportionment*, *in* MINORITY VOTE DILUTION, *supra* note 9, at 85, 85.

126. *Id.* at 86–87.

127. ROBERT G. DIXON, JR., DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 460–62 (1968).

128. Parker, *supra* note 125, at 85.

129. ROBERT LUCE, LEGISLATIVE PRINCIPLES: THE HISTORY AND THEORY OF LAWMAKING BY REPRESENTATIVE GOVERNMENT 398 (2006).

130. *See, e.g.*, Bartlett v. Strickland, 129 S. Ct. 1231, 1244 (2009) (plurality opinion).

131. Note, *supra* note 2, at 2603.

132. Carvin & Fisher, *supra* note 47, at 24.

The *Bartlett* dissent's assertion that expanding § 2 to crossover districts would only conserve an "uncertain amount of judicial resources"[133] seems implausible. If the first *Gingles* principle acted as a flexible guideline, rather than a required precondition, courts would have to assess the validity of the other two *Gingles* factors and then engage in a totality-of-the-circumstances examination regarding crossover voters, racial voting bloc cohesion, and numerous other factors in non-majority districts. Even if Justice Souter is correct in stating that courts already do this under current § 2 standards, there is enormous potential for an increase in cognizable claims based on crossover districts.

The relative importance of judicial efficiency, workability, and consistency against allowing a new type of § 2 claim should be weighed carefully. On one hand, if the new standard results in an unmanageable number of cases, petitioners who have faced legitimate voting rights violations will have a smaller chance of receiving relief, and parties seeking political windfall may flood the courts. On the other hand, expanding § 2 claims may lead to the creation of new crossover districts and foster greater political cooperation between minorities and whites. While there is potential for progress by expanding § 2, the likely strains on the judicial system, in addition to problems of preferential treatment for minority coalitions and political gerrymandering, outweigh the dissent's expansive goal.

C. Away from Identity Politics: § 2 Should Not be Expanded to Include Crossover Districts

The election of President Obama shows that the role of race in American politics is changing. As courts continue to address racial redistricting and voter dilution claims in this new political landscape, they must balance the need to remedy past racial discrimination in voting rights with the current trend away from identity politics and towards a more race-neutral generation of voters. As Justice O'Connor noted in *Ashcroft*, "[t]he purpose of the Voting Rights Act is to . . . foster our transformation to a society that is no longer fixated on race."[134]

There are indications, in addition to President Obama's election, that racial polarization is abating in American electoral politics.[135] African-Americans and whites might still have largely different opinions about proper government priorities, pressing issues, and policy viewpoints,[136] but racial crossover voting is increasing and fewer Americans

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133. *Bartlett*, 129 S. Ct. at 1257 (Souter, J., dissenting).

134. Georgia v. Ashcroft, 539 U.S. 461, 490 (2003).

135. *See* Crayton, *supra* note 119, at 571–72 (discussing statistical results in North Carolina elections which indicate decreased racial polarization in newly created African-American majority districts).

136. *Id.* at 551.

are choosing candidates based on their skin color.[137] Although many scholars have tried to determine the state of racially polarized voting to predict future trends, they have reached different results.[138] Some scholars base their findings on complex statistical analysis of electoral districts in the South.[139] Others simply accept that racially polarized voting is either here to stay or near its end.[140] This disparity in results is due to the extremely large and volatile number of variables involved with analyzing electoral results, including: incumbency, registration figures, voter turnout, partisanship, national elections, and other political concerns.

There are, nonetheless, indications that voters' electoral choices are increasingly based less on the race of the candidates.[141] One empirical study analyzing election results in 2,400 different American cities at two separate periods found that African-American candidates do equally well in at-large districts as in African-American majority districts,[142] and that "the waning efficacy of district elections has been due to a general reduction in the racial polarization of voters."[143] Another study examined election returns in three Southern states to determine whether African-Americans needed majority districts to elect candidates of their choice.[144] In re-drawn districts where the majority of voters shifted from African-Americans to whites, no Georgia legislator lost to a white candidate in 1996 or 1998.[145] The overall findings of the study show that, although racial polarization is still evident in the South, white voter crossover has increased, and African-American candidates are attracting white voters in increasing numbers.[146] Indeed, studies show that white Democratic voters in the South vote for white and African-American Democratic

137. *See id.* at 572.

138. For articles supporting the decreasing polarization in American politics, see generally Debo P. Adegbile, *Voting Rights in Louisiana: 1982–2006*, 17 S. CAL. REV. L. & SOC. JUST. 413, 414 (2008); Charles S. Bullock, III & Richard E. Dunn, *The Demise of Racial Districting and the Future of Black Representation*, 48 EMORY L.J. 1209, 1253 (1999); Crayton, *supra* note 119, at 571; Laughlin McDonald, *A Challenge to the Constitutionality of Section 5 of the Voting Rights Act:* Northwest Austin Municipal Utility District Number One v. Mukasey, 3 CHARLESTON L. REV. 231, 262 (2009); 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, 1522 (2002); Tim R. Sass & Stephen L. Mehay, *The Voting Rights Act, District Elections, and the Success of Black Candidates in Municipal Elections*, 38 J.L. & ECON. 367, 389 (1995).

139. Bullock & Dunn, *supra* note 138, at 1213; Crayton, *supra* note 119, at 549–50; Sass & Mehay, *supra* note 138, at 370.

140. *Compare* john a. powell [sic], *Post-Racialism or Targeted Universalism?*, 86 DENV. U. L. REV. 785, 786–88 (2009) (arguing that racial polarization is still highly prevalent), *with* Note, *supra* note 2, at 2607 (arguing that racial polarization is waning).

141. Bullock & Dunn, *supra* note 138, at 1213; Crayton, *supra* note 119, at 549–50; Sass & Mehay, *supra* note 138, at 389.

142. Sass & Mehay, *supra* note 138, at 388.

143. *Id.* at 389.

144. Bullock & Dunn, *supra* note 138, at 1213.

145. *Id.* at 1251.

146. *Id.* at 1252–53.

candidates at nearly the same rate.[147] This research indicates that racial polarization continues to lose footing in our electoral process.[148]

If the Court extended § 2 to include crossover districts, it would unnecessarily involve race in election districting[149] even as elections become increasingly race-neutral. District planning committees would have to consider the racial proportionality of each new district to avoid liability from the influx of new § 2 claims brought by groups alleging denial of their right to form advantageous political coalitions. Similarly, courts would be forced to consider the proportions of minority groups, their voting cohesion, turnout percentages, and ability to attract white voters in every redistricting violation claim.[150] Rather than deemphasizing racial factors in election law cases, extending § 2 would require courts to make racially-based assumptions in nearly every decision.

The *Bartlett* dissent's argument that recognizing crossover districts would encourage states to create them—and in turn precipitate collaboration between minorities and whites—overlooks a major problem: granting the valuable right to form winning coalitions to only protected minorities would create a racial spoils system, and generate controversy and resentment among voters outside the coalition. A system that required districting bodies to create majority–minority districts, and mandated the maximization of minority group power to influence elections, would further entrench racial separation in the electoral process and inhibit crossover collaboration. Whereas the plurality allows districting bodies to create crossover districts[151] to encourage inter-racial coalitions, the dissent forces their creation without mention or consideration of the negative impact on inter-racial relations. This oversight would lead to greater racial polarization and away from the color-blind goals that Justice O'Connor mentioned in *Ashcroft*.[152]

CONCLUSION

The Supreme Court's decision in *Bartlett* benefits minority and white voters alike. By refusing to extend § 2 to crossover districts, the Court correctly limited the influence that race—and its stereotypes, connotations, and assumptions—will have in the American electoral process. Racial stereotypes continue to wane in the political sphere, and new generations, unencumbered by the prejudices of previous ones, are exercising their right to vote with an increasingly post-racial outlook. U.S. Con-

147. *Id.* at 1240-41 ("In general, we find that these [black congressional] incumbents attract about one-third of the white general election vote, a result that is in line with levels of white support for white Democratic candidates for other federal offices in the South.").
148. *See* Pildes, *supra* note 138, at 1529.
149. League of United Latin Am. Citizens v. Perry (*LULAC*), 548 U.S. 399, 446 (2006).
150. *See* Carvin & Fisher, *supra* note 47, at 25.
151. Bartlett v. Strickland, 129 S. Ct. 1231, 1248–49 (2009) (plurality opinion).
152. Georgia v. Ashcroft, 539 U.S. 461, 490–91 (2003).

gressman John Lewis—a leader of the Civil Rights Movement and one of the longest serving African-American members of Congress—said this of minority districting: "We have changed. We've come a great distance. It's not just in Georgia, but in the American South, I think people are preparing to lay down the burden of race."[153]

In this climate, the Court has attempted to keep racial polarization and identity politics off the ballot. While significant obstacles remain to achieve complete racial equality in our society and remedy previous discrimination, expanding a spoils system that mixes perverse political manipulation and gerrymandering with racial sensitivities is not the solution.

In *Bartlett*, the Court refused to extend a nonexistent right to form profitable political coalitions, maintained an effective standard for addressing vote dilution claims, and advanced the notion, to borrow from Chief Justice Roberts, that the most effective way to prevent discrimination on the basis of race is to stop propagating laws that discriminate on the basis of race.[154]

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153. Pildes, *supra* note 138, at 1538 (quoting Melanie Eversley, *Redistricting Map for Georgia Goes to Court in D.C.*, ATL. J. CONST., Feb. 4, 2002, at 1C).

154. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).

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