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How the Supreme Court Advanced Federalism While Speaking to Race's Role in Electoral Districting: *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009)

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How the Supreme Court Advanced Federalism While Speaking to Race’s Role in Electoral Districting: *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009)

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I. INTRODUCTION

Voting is one of America's most cherished rights.¹ America's constitutional system maintains a connection between the right to vote and political reality by requiring that every ten years, after the federal census has been taken, seats in the House of Representatives be divided among the states according to population.² Each state is divided into Congressional districts by that state's legislature, subject to the requirements of federal law,³ requirements the Supreme Court's decision in *Bartlett v. Strickland*⁴ loosened.

Though *Bartlett* loosened congressional districting mandates on state legislatures, state power was not the foremost concern in the Justices' minds. Rather, the Court devoted more attention to an issue that has plagued America for centuries: race. In *Bartlett*, the role of race in the electoral process came before the Court through a debate on crossover districts and their role under the Voting Rights Act. A crossover district is "one in which minority voters make up less than a majority of the voting-age population," yet "at least potentially, [are numerous] enough to elect the candidate of [their] choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate."⁵

Given that the Supreme Court has claimed America desires to become a color blind society,⁶ it should not be surprising that American

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1. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society . . .").
 2. U.S. CONST. art. I, § 2, cl. 3. The process of "[r]ealign[ing] . . . a legislative district's boundaries to reflect changes in population and ensure proportional representation by elected officials" is known as "reapportionment" or "redistricting." BLACK'S LAW DICTIONARY 1379 (9th ed. 2009).
 3. Brief for the States of Illinois et al. as Amici Curiae in Support of Petitioners at 1, *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009) (No. 07-689) [hereinafter *States' Brief*] ("Every ten years, based on the results of the decennial census, state and local legislatures redraw district lines to comply with the Equal Protection Clause and § 2's prohibition against vote dilution. Whether § 2 permits, or requires, less-than-50% minority, coalition districts has a significant impact on how legislatures draw district lines.")
 4. 129 S. Ct. 1231 (2009).
 5. *Id.* at 1242 (plurality opinion) (citation omitted). The Court sometimes calls these "coalitional districts." *Id.* (citing *Pender County v. Bartlett*, 649 S.E.2d 364, 371 (N.C. 2007), *aff'd sub nom.* *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009)). The term "coalitional district," however, can also refer to a district where two minority groups vote together to elect a candidate. *Id.* at 1242 (citing *Nixon v. Kent County*, 76 F.3d 1381, 1393 (6th Cir. 1996) (en banc)). The decision in *Bartlett* is limited to claims involving a single minority population; that is, the decision is limited to crossover districts. *Id.* at 1242-43. This Note will use the term "crossover district," even if the sources cited use the term "coalitional district" to describe the same concept.
 6. *Shaw v. Reno*, 509 U.S. 630, 657 (1993). In *Shaw*, the Court reasoned:
Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our his-

law would be concerned about the role that race plays in the electoral process.⁷ The Voting Rights Act (VRA) is a congressional response that shows that concern,⁸ and the Act is no stranger to the Supreme Court.⁹ Yet the Court had previously declined to answer an important question: could minority voters sue to invalidate an apportionment plan because it kept them from influencing elections through cross-over districts?¹⁰

The Court's answer to that question in *Bartlett* failed to remove racial considerations from the districting process. Race would have affected the states' districting process no matter which way the Court ruled. *Bartlett's* main contribution to addressing race in redistricting is its treatment of intentional racial discrimination in the redistricting process. The Court acted to limit the ability of minorities to use race to their advantage in the redistricting process while preventing states from using race against minorities in the redistricting process. In taking that approach, however, the Court gave the states increased freedom from federal law.

This Note will explore how *Bartlett* affects race and federalism in districting decisions. Specifically, it will argue that while the Court did not remove race from the redistricting process, it did address intentional racial discrimination in that process, and it did so in a way that increased state independence from the federal government. Part II of this Note provides a background discussion of vote dilution claims and shows how previous Supreme Court precedent left an important question unanswered. Part II then provides a summary of how the Supreme Court answered that question in *Bartlett v. Strickland*. Part III analyzes the *Bartlett* decision and explains why, while the Court did not remove race from the districting process, it did attempt to address intentional discrimination in the districting process. Part III also shows how the decision advanced federalism by granting the states greater freedom from congressional control.

tory, that individuals should be judged by the color of their skin. 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 Fourteenth and Fifteenth Amendments embody, and to which the nation continues to aspire. It is for these reasons that race-based districting by our state legislatures demands close judicial scrutiny.

Id.

7. *Id.*

8. Brief for the Petitioners at 37, *Bartlett*, 129 S. Ct. 1231 (No. 07-689) [hereinafter Petitioners' Brief] ("The ultimate goal of the Voting Rights Act is to minimize the role of race in American politics." (citations omitted)).

9. See *infra* notes 30–70 and accompanying text.

10. Note, *The Future of Majority–Minority Districts in Light of Declining Racially Polarized Voting*, 116 HARV. L. REV. 2208, 2217 n.51 (2003).

II. BACKGROUND

A. The Supreme Court Had Left Unanswered Whether a Minority Population that Could Not Form a Majority-Minority District Had a Vote Dilution Claim Under Section 2 of the Voting Rights Act

When the Voting Rights Act was passed in 1965, Section 2 of the Act stated in its entirety: “No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.”¹¹

At the time Section 2 was enacted, it was not controversial.¹² What proved more controversial than the statute was the Court’s interpretation of the statute. The Court determined that Section 2 said nothing about voting rights that the Fifteenth Amendment¹³ had not already said.¹⁴ Under the Court’s Fifteenth Amendment jurisprudence, state action “racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose.”¹⁵ This meant that Section 2 only limited state action in cases of intentional discrimination. Congress overturned the intentional discrimination requirement in 1982 by amending the Act to establish an effects test, so that a defendant was liable, regardless of intent, if his actions had a discriminatory impact.¹⁶ Not only did the amendment define violations in terms of discriminatory effects, but it provided the standard by which those effects are judged.¹⁷ The current version of the statute states:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any state or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection

11. Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (codified as amended at 42 U.S.C. § 1973 (2006)).

12. *Bartlett*, 129 S. Ct. at 1240 (plurality opinion).

13. The Fifteenth Amendment states: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude. The Congress shall have power to enforce this article by appropriate legislation.” U.S. CONST. amend. XV.

14. *City of Mobile v. Bolden*, 446 U.S. 55, 60–61 (1980).

15. *Id.* at 62.

16. *Bartlett*, 129 S. Ct. at 1240–41 (quoting Voting Rights Act Amendments of 1982, Pub. L. 97-205, § 3, 96 Stat. 131, 134 (codified as amended at 42 U.S.C. § 1973 (2000))).

17. *Id.* at 1241 (quoting the Voting Rights Act of 1965 § 2, 42 U.S.C. § 1973 (2000)).

(a) of this section 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. . . . [N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.¹⁸

If this section is violated by a districting plan, at least one court has said the original drafters of the plan should be given an opportunity to correct their error,¹⁹ and if such a correction is not made, courts may fashion relief.²⁰ The plaintiff can propose exactly what form that relief should take,²¹ but a court considering the plaintiff's plan should weigh the plaintiff's interest in its own remedy with the state's interest in running its own elections.²²

According to the Supreme Court, the 1982 changes to the VRA²³ banned "dilution²⁴ of a minority group's voting strength, regardless of the [state] legislature's intent."²⁵ In order to find a violation under Section 2, a court has to decide if the totality of the circumstances show there has been a violation.²⁶ If the vote dilution claim is successful, the government drawing the electoral map can be forced to draw a majority-minority district,²⁷ which is a district where "a minority group composes a numerical, working majority of the voting-age population."²⁸ Before a court considers if Section 2 has been vio-

18. Voting Rights Act of 1965 § 2, 42 U.S.C. § 1973(a)-(b) (2006).

19. *Harper v. City of Chicago Heights*, 223 F.3d 593, 599-600 (7th Cir. 2000) (quoting *Dickinson v. Ind. State Election Bd.*, 933 F.2d 497, 501 n.5 (7th Cir. 1991)).

20. *Id.*

21. *Johnson v. De Grandy*, 512 U.S. 997, 1002 (1994) ("[The District Court] imposed a remedial plan offered by the De Grandy plaintiffs . . .").

22. *Davis v. Chiles*, 139 F.3d 1414, 1419-20 (11th Cir. 1998) (citing *Houston Lawyers' Ass'n v. Attorney Gen. of Tex.*, 501 U.S. 419, 426 (1991)).

23. These changes were first applied to districting after the 1990 census. 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, 1523 (2002). Overall, Section 2 has had an impact on local elections; some judges are elected in single-member districts in part because of litigation under Section 2. Thomas R. Phillips, *The Merits of Merit Selection*, 32 HARV. J.L. & PUB. POL'Y 67, 78-79 (2009).

24. "Dilution" is "distributing politically cohesive minority voters through voting districts in ways that reduce their potential strength." *Bartlett v. Strickland*, 129 S. Ct. 1231, 1251 (2009) (Souter, J., dissenting) (citation omitted). It is "the effects of districting decisions not on an individual's political power viewed in isolation, but on the political power of a group." *Shaw v. Reno*, 509 U.S. 630, 682 (1993) (Souter, J., dissenting) (citation omitted). It "may be caused either by the dispersal of [minorities] into districts in which they constitute an ineffective minority of voters or from the concentration of [minorities] into districts where they constitute an excessive majority." *Voinovich v. Quilter*, 507 U.S. 146, 154 (1993) (citation omitted) (internal quotation marks omitted).

25. *Shaw*, 509 U.S. at 641 (citations omitted).

26. *Bartlett*, 129 S. Ct. at 1241 (plurality opinion).

27. *Id.* at 1242 ("Under present doctrine, § 2 can require the creation of these districts.").

28. *Id.* at 1242.

lated based on the totality of the circumstances, however, a plaintiff must meet the requirements the Supreme Court enunciated in *Thornburg v. Gingles*.²⁹

*Thornburg v. Gingles*³⁰ was the first time the Court had addressed a Section 2 challenge since Congress declared that Section 2 was violated by “discriminatory effect alone” rather than intent to discriminate.³¹ The issue in the case was whether multimember³² state legislative districts violated Section 2 “by impairing the opportunity of black voters to participate in the political process and to elect representatives of their choice.”³³ The Court relied heavily on a Senate report on the 1982 amendments which listed numerous factors to take into consideration when deciding if a violation had occurred,³⁴ and the Court ultimately determined that, though a multimember district does not always violate Section 2,³⁵ the North Carolina scheme at issue did.³⁶

In reaching that determination, the Court enunciated the “*Gingles* factors,” which would dominate future Section 2 vote dilution cases.³⁷ Under the *Gingles* framework, a minority population’s claim is not even considered under the totality of the circumstances test unless three conditions are met:

First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . . Second, the minority group must be able to show that it is politically cohesive. . . . Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances . . . usually to defeat the minority’s preferred candidate.³⁸

Regarding the first requirement, which was the only requirement at issue in *Bartlett*,³⁹ the Court reasoned that no minority population could win a Section 2 case without showing that the electoral system itself was keeping them from political success.⁴⁰ The smallest electoral unit possible is a single-member district.⁴¹ If a minority popula-

29. *Id.* at 1241.

30. 478 U.S. 30 (1986).

31. *Id.* at 35.

32. Multimember districts are those that elect more than one representative to the relevant governing body. *Id.* at 35 n.2. The multimember districts discussed in *Gingles* were represented by between three and eight members. *Id.*

33. *Id.* at 34 (quoting the Voting Rights Act of 1965 § 2(b), 42 U.S.C. § 1973 (1982)).

34. See *Thornburg*, 478 U.S. at 43–46, 69–73, 75–76.

35. *Id.* at 48 (“Multimember districts and at-large election schemes, however, are not *per se* violative of minority voters’ rights.”) (citations omitted).

36. *Id.* at 80. The Supreme Court upheld the judgment below in one respect, *id.*, but that is not relevant to this Note.

37. See *infra* notes 44–70 and accompanying text.

38. *Thornburg*, 478 U.S. at 50–51 (citations omitted).

39. *Bartlett v. Strickland*, 129 S. Ct. 1231, 1241–42 (2009) (plurality opinion).

40. *Thornburg*, 478 U.S. at 50 & n.2.

41. *Id.* at 50 n.2.

tion was too small to achieve electoral success in such a district, the minority's preferred candidates were not being denied office by the electoral system itself.⁴² The Court specifically did *not* say how to address claims by voters who could not meet the first requirement, but still claimed their power to influence elections had been hindered.⁴³

The framework established by *Gingles* would be further developed in subsequent cases. In *Grove v. Emison*,⁴⁴ a case from Minnesota, the Court ruled that the *Gingles* factors apply to single member districts.⁴⁵ As it had done in *Gingles*, the Court refused to decide if a minority population had to be able to comprise a majority in a geographically compact district to bring a Section 2 claim.⁴⁶

In *Voinovich v. Quilter*,⁴⁷ a case from Ohio, the Court addressed allegations that minority voters had been placed into districts where they formed a majority, which kept them from being an "influential minority" in other districts.⁴⁸ The Court assumed that such districts could state a Section 2 claim, even though it never decided if they could meet the first *Gingles* requirement.⁴⁹ However, because "racially polarized voting"⁵⁰ did not affect Ohio, it was impossible to meet the third *Gingles* factor: the racial majority votes as a group so that the minority candidate loses most of the time.⁵¹ Providing freedom, and possibly guidance, for legislators, the Court also made clear that "Section 2 contains no *per se* prohibitions against particular types of districts."⁵²

In *Johnson v. De Grandy*,⁵³ two separate minority groups challenged Florida's districting plan for the state legislature.⁵⁴ The dis-

42. *Id.*

43. *Id.* at 46 n.12.

44. 507 U.S. 25 (1993).

45. *Id.* at 40–41; *Voinovich v. Quilter*, 507 U.S. 146, 157–58 (1993). Also in *Grove*, which was mostly concerned with whether a federal or state court would redistrict Minnesota's state legislature and Congressional seats, 507 U.S. at 27–31, the Supreme Court affirmed its "adherence to . . . the recognition that the Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts." *Id.* at 34 (citation omitted).

46. *Grove*, 507 U.S. at 41 n.5.

47. 507 U.S. 146 (1993).

48. *Id.* at 154–55 (emphasis removed).

49. *Id.* at 154 (citing *Grove*, 507 U.S. at 41 n.5; *Thornburg v. Gingles*, 478 U.S. 30, 46–47 nn.11–12 (1986)). An "influence district" exists if "a minority group can influence the outcome of an election even if its preferred candidate cannot be elected." *Bartlett v. Strickland*, 129 S. Ct. 1231, 1242 (2009) (plurality opinion). Under current jurisprudence, Section 2 does not force the creation of influence districts. *Id.*

50. *Id.* at 158 (citation omitted).

51. *Id.*; *Thornburg*, 478 U.S. at 50–51 (1986).

52. *Voinovich*, 507 U.S. at 155.

53. 512 U.S. 997 (1994).

54. *Id.* at 1000–02.

strict court found that giving one minority population more majority–minority districts would mean another minority’s number of majority–minority districts would have to be decreased.⁵⁵ Upon review, the Supreme Court again assumed the first *Gingles* factor had been met.⁵⁶ That was not the end of the case, for a state is not liable under Section 2 just because all the *Gingles* factors are satisfied.⁵⁷ In fact, the Court went on to disagree with the judgment below.⁵⁸ Because minorities held a share of legislative seats about equal to their share of the voting age population, the state was not liable under Section 2.⁵⁹ The fact that a state could have given minorities more legislative seats is not enough for Section 2 liability when the share of minority representatives is about the same as the share of minority voters.⁶⁰ However, Justice O’Connor’s concurrence declared that “[p]roportionality is not a safe harbor” that takes a state’s plan outside the purview of Section 2.⁶¹

The same day that *De Grandy* was decided, the Court decided *Holder v. Hall*.⁶² In that dispute from Georgia, the Court declared that Section 2 cannot be used to challenge the number of representative seats in a legislative body.⁶³

55. *Id.* at 1003–04.

56. *Id.* at 1008–09.

57. *Id.* at 1011–12. Indeed, the *Gingles* factors had been satisfied in cases before *De Grandy* without resulting in liability. *Id.* at 1012 n.10 (discussing *Baird v. Indianapolis*, 976 F.2d 357 (1992)).

58. *De Grandy*, 512 U.S. at 1009.

59. *Id.* at 1000.

60. *Id.* at 1015–16.

61. *Id.* at 1026 (O’Connor, J., concurring). The Court distinguished the proportionality it used to uphold Florida’s plan under Section 2 with the proportional representation that subsection 2(b) of the Act specifically disavowed by saying that proportionality in the statute referred to electoral “success” while the proportionality that validated the plan referred to “electoral power.” *Id.* at 1014 n.11 (majority opinion).

62. 512 U.S. 874 (1994).

63. *Id.* at 885. *Holder v. Hall* is also notable because in that case Justice Thomas wrote an extensive concurrence in which he laid out his view of Section 2. *Id.* at 891 (Thomas, J., concurring in the judgment). This concurrence provides an alternative view of Section 2 that has great implications for racial considerations under Section 2, but the concurrence is beyond the scope of this Note. Justice Thomas has been consistent in holding to this view in subsequent Section 2 cases. See *Bartlett v. Strickland*, 129 S. Ct. 1231, 1250 (2009) (Thomas, J., concurring in the judgment); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511–12 (2006) (Scalia, J., concurring in the judgment in part and dissenting in part) (Justice Thomas joining opinion, Part II of which reiterates reasons for dismissing Section 2 vote dilution claims as set out in Thomas’ concurring opinion in *Holder*); *Georgia v. Ashcroft*, 539 U.S. 461, 492 (2003) (Thomas, J., concurring); *De Grandy*, 512 U.S. at 1031 (Thomas, J., dissenting).

In *League of United Latin American Citizens v. Perry*,⁶⁴ a case involving a Texas districting plan, the Court declared that a state has discretion to decide where to draw district lines if it must choose between two minority groups that both have a valid Section 2 claim.⁶⁵ However, a state cannot violate Section 2 when it draws one district in the state and correct the wrong by drawing a minority district elsewhere in the state if that second district is not geographically compact.⁶⁶ Justice Kennedy made clear that placing voters from the Austin area in the same district with voters near the U.S.–Mexico border did not form a compact district if the two populations had different interests.⁶⁷ One of Texas’ districts was invalidated under Section 2 for denying minorities electoral opportunity because it seemed designed to keep an up-and-coming minority population from voting out the incumbent congressman.⁶⁸ Justice Kennedy declined to decide if a minority population that could not form a majority in a single-member district could state a Section 2 claim.⁶⁹ Justice Souter thought that even though such districts might be subject to different requirements than majority–minority districts, the Court should address the issue.⁷⁰ The Court finally addressed that issue in *Bartlett v. Strickland*.

B. In *Bartlett v. Strickland* the Supreme Court Answered the Question: No

Bartlett v. Strickland revolved around a single state legislative district: North Carolina House of Representatives District 18.⁷¹ The district was drawn so that it would comply with the Voting Rights Act.⁷² It was located in the Southeastern portion of the state, and the boundaries were drawn in 1991 with the intent that the district would have

64. 548 U.S. 399 (2006).

65. *Id.* at 429–30.

66. *Id.* at 430.

67. *Id.* at 435.

68. *Id.* at 428–29.

69. *Id.* at 443 (opinion of Kennedy, J.).

70. *Id.* at 484–85 (Souter, J., concurring in part and dissenting in part). *Perry* contained some other interesting statements from various Justices. Justice Kennedy stated that influence districts are not protected under Section 2, *Id.* at 445–46 (2006) (opinion of Kennedy, J.), and proportional political representation is not constitutionally mandated. *Id.* at 419 (opinion of Kennedy, J.). Chief Justice Roberts recognized that meeting the *Gingles* factors did not automatically satisfy a Section 2 claim. *Id.* at 508 (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part). Justice Scalia stated his belief that intentional drawing of a majority–minority district is presumptively motivated by race and subject to strict scrutiny. *Id.* at 517 (Scalia, J., concurring in the judgment in part and dissenting in part) (“In my view, however, when a legislature intentionally creates a majority–minority district, race is necessarily its predominant motivation.”).

71. *Bartlett v. Strickland*, 129 S. Ct. 1231, 1239 (2009) (plurality opinion).

72. *Id.*

an African-American voting-age majority.⁷³ However, North Carolina's state constitution, in what is known as the Whole County Provision, does not allow House districts to divide counties.⁷⁴ As a result of this requirement, North Carolina's first two attempts to redistrict following the 2000 census were invalidated by the North Carolina Supreme Court.⁷⁵ The version of District 18 considered by the North Carolina Supreme Court in *Bartlett* was drawn in 2003, when North Carolina's legislature⁷⁶ could not create a "geographically compact majority-minority district" in the area of District 18 due to population changes.⁷⁷ North Carolina's legislature drew District 18 to contain portions of Pender and New Hanover counties, thinking that minority voters and majority voters would vote together to elect the minority's preferred candidate.⁷⁸ In other words, the legislature meant to create a crossover district.

District 18 had an African-American voting age population of 39.36%, just 4.03% above the 35.33% the district would have had if Pender County had not been divided.⁷⁹ Pender County and its Board of Commissioners then sued, claiming a violation of the Whole County Provision.⁸⁰ In response, the defendant government officials argued that the Whole County Provision and Section 2 were incompatible as applied to District 18.⁸¹ The trial court decided that District 18 was effectively a majority-minority district since African-Americans could obtain enough votes from the white majority to elect their candidate; in other words, District 18 was a crossover district.⁸² Under the totality of the circumstances, Pender County had to be divided.⁸³ The North Carolina Supreme Court reversed, determining that Section 2

73. *Id.*

74. *Id.* at 1239 (citing *Pender County v. Bartlett*, 649 S.E.2d 364, 366 (N.C. 2007), *aff'd sub nom.* *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009)). The "Whole County Provision" says that "[n]o county shall be divided in the formation of a representative district." *Pender County v. Bartlett*, 649 S.E.2d 364, 366 (N.C. 2007) (citing N.C. CONST. art. II, § 5(3)), *aff'd sub nom.* *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009).

75. *Bartlett*, 129 S. Ct. at 1239 (plurality opinion) (citing *Stephenson v. Bartlett*, 582 S.E.2d 247, 254 (N.C. 2003); *Stephenson v. Bartlett*, 562 S.E.2d 377, 392 (N.C. 2002), *stay denied*, 535 U.S. 1301 (2002) (Rehnquist, C.J., in chambers)).

76. North Carolina's state legislature is known as the "General Assembly" and contains a House of Representatives and a Senate. See *Bartlett*, 129 S. Ct. at 1239. The House of Representatives has more members than the Senate. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 1239–40. That meant that, atypically, the defendant had to establish that the *Gingles* factors were satisfied. *Id.*

81. *Id.* at 1239.

82. *Id.* at 1240.

83. *Id.*

would not force a division of Pender County unless African-Americans formed a numerical majority of District 18's voting age citizens.⁸⁴

Therefore, the main question in the case was the question the Court had refused to answer in previous cases: “[w]hat size minority group is sufficient to satisfy the first *Gingles* requirement.”⁸⁵

The plurality opinion, written by Justice Kennedy,⁸⁶ rejected the notion that District 18 was protected by Section 2.⁸⁷ The Voting Rights Act language itself supported a requirement that to have a Section 2 claim, a minority population possibly could be placed in a district where it constitutes over 50% of the population.⁸⁸ In short, the Court adopted a 50% rule.⁸⁹ Without an ability to elect a candidate on their own votes, a minority group is comparable to other groups of the same population in the district.⁹⁰ If crossover districts were allowed, they would give “minority voters a right to preserve their strength for the purpose of forging an advantageous political alliance,” a right not granted by Section 2.⁹¹ There is a difference between the choice made by a racial minority and the choice made by a combination of a racial minority and some majority voters.⁹² Allowing claims from the latter combination would lead to a reworking of *Gingles*.⁹³ The plurality described a conflict between the first and third *Gingles* factors—a large number of crossover voters would make it unlikely that the majority would vote cohesively enough to meet the third *Gingles* requirement.⁹⁴

Additionally, “workable standards” were needed.⁹⁵ Without them, courts would end up making decisions about political contests based on race.⁹⁶ Section 2 applies to all the states,⁹⁷ and forcing courts na-

84. *Id.*

85. *Id.* at 1242.

86. Justices Thomas and Scalia were essential to upholding the North Carolina Supreme Court's decision since only three Justices joined the plurality opinion. *Id.* at 1238. Justices Scalia and Thomas continued to support the view, expressed some fifteen years earlier in *Holder v. Hall*, 512 U.S. 874, 891 (1994) (Thomas, J., concurring in the judgment), that Section 2 does not permit a vote dilution claim in any circumstance. *Bartlett*, 129 S. Ct. at 1250 (Thomas, J., concurring in the judgment).

87. *Bartlett*, 129 S. Ct. at 1243 (plurality opinion).

88. *Id.* The Supreme Court in *Bartlett* took the position that the relevant population was the citizen voting-age population, or CVAP. *Id.* at 1250 (Souter, J., dissenting).

89. *Id.*

90. *Id.* at 1243 (plurality opinion).

91. *Id.* (citations omitted) (internal quotation marks omitted).

92. *Id.* at 1243–44.

93. *Id.* at 1244 (citing *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993)).

94. *Id.* at 1244.

95. *Id.*

96. *Id.* at 1244–45.

97. *Id.* at 1245.

tionwide to focus on race in reaching their decisions is not to be done lightly because race-based decision making is fraught with constitutional concerns.⁹⁸ Federal circuit court law was clearly on the side of a numerical 50% requirement, and the plurality opinion was happy to leave that law undisturbed.⁹⁹

The plurality opinion attempted to ward off attacks against the Court's decision. To say that crossover districts are protected under Section 2 because they provide minority populations electoral opportunity required too broad a reading of the statute.¹⁰⁰ "Section 2 does not guarantee minority voters an electoral advantage."¹⁰¹ Rather, crossover district minority voters have as much opportunity as any other group with the same number of voters.¹⁰² Concerns about the inconsistency between a 50% numerical requirement and application of the "totality of the circumstances" requirement were misplaced—there is no conflict because the *Gingles* factors are gate keepers for the totality of the circumstances test.¹⁰³ Furthermore, Equal Protection Clause violations might occur without a majority–minority requirement.¹⁰⁴

The plurality opinion also contains several statements that demonstrate the latitude the states have under the ruling.¹⁰⁵ Legislatures have the freedom to create crossover districts; the decision does not mandate majority–minority districts.¹⁰⁶ Section 2 does not even force a state to keep a crossover district, though purposely drawing district lines to destroy an "effective crossover district[] . . . would raise serious questions under both the Fourteenth and Fifteenth Amendments."¹⁰⁷ Indeed, since no intentional wrongdoing was alleged in the case, the "holding does not apply to cases in which there is intentional discrimination against a racial minority."¹⁰⁸ In the cases where *Bartlett* does apply, Section 2 does not force states to draw crossover dis-

98. *Id.*

99. *Id.* at 1246. Those federal courts of appeals that have been confronted with the issue have interpreted the first *Gingles* factor to require a majority–minority standard. *Id.*

100. *Id.* at 1246–47.

101. *Id.* at 1246.

102. *Id.* at 1246–47.

103. *Id.* at 1247.

104. *Id.* It has also been argued that crossover districts could be a way to follow the Voting Rights Act without violating the Equal Protection Clause. *The Future of Majority–Minority Districts in Light of Declining Racially Polarized Voting*, *supra* note 10, at 2215.

105. The view of Justices Thomas and Scalia, which would construe Section 2 as not encompassing a vote dilution claim at all, *Bartlett*, 129 S. Ct. at 1238 (Thomas, J., concurring in the judgment); *Holder v. Hall*, 512 U.S. 874, 891 (1994) (Thomas, J., concurring in the judgment), would allow the states greater freedom still.

106. *Bartlett*, 129 S. Ct. at 1248 (plurality opinion).

107. *Id.* at 1248–49 (citation omitted).

108. *Id.* at 1246.

tricts.¹⁰⁹ Section 2 only forces states to draw majority–minority districts “if all three *Gingles* factors are met and if § 2 applies based on a totality of the circumstances.”¹¹⁰ Crossover districts have not been entirely removed from Section 2 jurisprudence, however, because states can use crossover districts in defending against Section 2 claims.¹¹¹ Though America has not reached a time of equal opportunity for all races, Section 2 should neither “entrench racial differences” nor should it force on society the interracial cooperation it is already attaining voluntarily.¹¹² In the end, the Court held that “[o]nly when a geographically compact group of minority voters could form a majority in a single-member district has the first *Gingles* requirement been met.”¹¹³

Justice Souter, on the other hand, would have held “a district may be a minority–opportunity district so long as a cohesive minority population is large enough to elect its chosen candidate when combined with a reliable number of crossover voters from an otherwise polarized majority.”¹¹⁴ According to Justice Souter, the Court’s holding will entrench race in politics by entrenching majority–minority districts.¹¹⁵

Souter’s dissent also argued that Congress has not indicated that majority–minority districts are the only way to safeguard minority electoral opportunity under Section 2.¹¹⁶ Crossover districts help meet Section 2’s goals, and Section 2’s legislative history does not contain a basis for thinking crossover districts are a less legitimate means of addressing vote dilution than majority–minority districts.¹¹⁷ Crossover districts, in fact, are superior to majority–minority districts be-

109. *Id.* at 1248–49 (“[Section] 2 can[not] require the creation of crossover districts in the first instance.”).

110. *Id.* at 1248.

111. *Id.* at 1249 (“States can—and in proper cases should—defend against alleged § 2 violations by pointing to crossover voting patterns and to effective crossover districts.”).

112. *Id.*

113. *Id.* Without limiting districts to those that are geographically compact, states could draw contorted districts combining different minority populations from around the state to create a majority–minority district, tending toward “a scheme under which members of different racial groups are divided into separate electoral registers and allocated a proportion of political power on the basis of race.” *Holder v. Hall*, 512 U.S. 874, 906 (1994) (Thomas, J., concurring in the judgment) (citation omitted). It would also lead to serious constitutional concerns. *Shaw v. Reno*, 509 U.S. 630, 658 (1993) (finding a valid claim under the Equal Protection Clause where appellants alleged the state legislature “adopted a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race, and that the separation lacks sufficient justification”).

114. *Bartlett*, 129 S. Ct. at 1250 (Souter, J., dissenting). In other words, according to Justice Souter, crossover districts are protected by Section 2.

115. *Id.*

116. *Id.* at 1253.

117. *Id.*

cause they reduce racial considerations and make people of different races work together.¹¹⁸ No fixed, definite population is necessary to state a claim under Section 2, but if racial voting polarization declines it will become easier to satisfy the first *Gingles* factor.¹¹⁹ There is some limit,¹²⁰ but that limit did not need to be determined in *Bartlett*.¹²¹

Justice Souter took issue with several points of the plurality opinion. He discussed how a minority group comprising less than 50% of the overall population does not automatically have as much electoral opportunity as any other group of the same population—that might or might not be the case.¹²² According to Justice Souter, the plurality did not recognize that the entire state districting plan has to be examined as a whole to see if minority opportunity is close to proportionate.¹²³ The requirement that a minority group have the potential to elect a candidate of its choice does not necessarily counsel a 50% requirement—there is no guarantee that a minority population above 50% in a district will have the potential to elect the candidate of its choice.¹²⁴ Justice Souter also described how the first and third *Gingles* factors are not in tension; both could be met in the same case.¹²⁵

In addition, the 50% rule, which seems easy to administer, might not be so simple to follow—courts will still face the challenge of evaluating whether a districting plan passes the totality of the circumstances test.¹²⁶ Saving judicial resources, Justice Souter opined, comes at the cost of barring relief to claims that should be protected by Section 2.¹²⁷

In Justice Souter's estimation, the best way the states can avoid litigation under the plurality opinion is by drawing majority-minority

118. *Id.* at 1254–55.

119. *Id.* at 1254.

120. Justice Souter suggests this might be defined by the cohesive racial majority voting requirement, the final factor of the *Gingles* trio. *Id.*

121. *Id.*

122. *Id.* at 1255.

123. *Id.*

124. *Id.* at 1255–56.

125. *Id.* at 1257 (Souter, J., dissenting). Justice Souter reasoned:

If a minority population with 49% of the CVAP can elect the candidate of its choice with crossover by 2% of white voters, the minority “by definition” relies on white support to elect its preferred candidate. But this fact alone would raise no doubt, as a matter of definition or otherwise, that the majority-bloc-voting requirement could be met, since as much as 98% of the majority may have voted against the minority’s candidate of choice.

Id.; see also Petitioners’ Brief, *supra* note 8, at 44–45 (suggesting a hypothetical leading to a similar conclusion).

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

127. *Id.*

districts.¹²⁸ Since majority–minority districts are the only way to correct a Section 2 violation, crossover districts will likely die out.¹²⁹ Crossover districts can be used as a defense to a Section 2 claim under the plurality opinion, but not as a remedy.¹³⁰ If states can comply with Section 2 by drawing a crossover district, then it must be possible to force a state to draw a crossover district under Section 2, and there is the potential that eliminating a crossover district will violate Section 2.¹³¹ If that potential violation of Section 2 is realized, a lawsuit should be available to remedy that violation.¹³²

III. ANALYSIS

The Supreme Court’s decision in *Bartlett v. Strickland* does not herald an end to race’s role in American elections. Race would have remained a consideration in districting decisions regardless of the Court’s ruling. What the Court did do was interpret Section 2 and *Gingles* in a way that addresses intentional discrimination in districting decisions. In doing so, however, the Court gave the states greater freedom from federal law as they perform their traditional districting role.

A. Race Would Be Considered in Districting Decisions Regardless of the Court’s Ruling in *Bartlett v. Strickland*

The plurality opinion in *Bartlett v. Strickland* stated that crossover districts could reduce the impact of race as voters unite across racial lines to work toward a common goal,¹³³ going so far as to state crossover districts could be “the most effective way to maximize minority voting strength.”¹³⁴ Justice Souter’s dissent declared that a crossover district is better than a majority–minority district, which focuses on race.¹³⁵ The divide in *Bartlett v. Strickland* was not over the benefits of crossover districts, but over whether Section 2 forced those benefits upon the states.

One of the motivations behind the Court’s decision was a desire to keep Section 2 from “entrench[ing] racial differences by expanding a statute meant to hasten the waning of racism in American politics.”¹³⁶

128. *Id.* at 1259.

129. *Id.*

130. *Id.*

131. *Id.* at 1259–60.

132. *Id.* at 1260.

133. *Id.* at 1248 (plurality opinion).

134. *Id.* at 1248 (quoting *Georgia v. Ashcroft*, 539 U.S. 461, 482 (2003)).

135. *Id.* at 1254 (Souter, J., dissenting) (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994)).

136. *Id.* at 1249 (plurality opinion) (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994) (internal quotation marks omitted)).

Examining arguments for and against the 50% rule, however, indicates that racial differences will still play a role in districting decisions.

Allowing crossover district claims would not eliminate race from districting decisions. Supporters of the 50% rule claim requiring crossover districts under Section 2 would transform the Voting Rights Act from a “shield . . . from unequal treatment” into a sword of “special treatment denied to citizens of other races.”¹³⁷ In this case, because of the relevant provisions of North Carolina’s state constitution, the Act would do so at the expense of a districting criterion enshrined in state law—keeping political units such as counties in the same district.¹³⁸ There is no doubt that districting by political units is permissible.¹³⁹ Indeed, one amicus brief reflected fear that the lack of a 50% rule would lead to racial divisions and politicians insensitive to those who did not share the politician’s race.¹⁴⁰

Proponents argued that without a 50% rule, disaster would ensue. Section 2 would become a weapon which minorities could use to gain disproportional electoral success.¹⁴¹ Indeed, the Voting Rights Act can be a weapon to wield for political advantage.¹⁴² The sword of Voting Rights Act litigation would be pointed at all fifty states as even small populations of racial minorities could allege violations.¹⁴³ Allowing claims from a minority population which constitutes less than 50% of the voting age population would create the potential to maximize minority voting power, which goes beyond the bounds of the Voting Rights Act.¹⁴⁴

These arguments, however, are not without counterarguments. There are limits to the ability of a minority population to use Section 2 as a weapon. Eventually the number of crossover votes needed to win an election becomes so large that the third *Gingles* requirement—that

137. Brief for the Respondents at 51, *Bartlett*, 129 S. Ct. 1231 (No. 07-689) [hereinafter Respondents’ Brief].

138. *Id.*

139. *Id.*

140. Brief Amicus Curiae of Pacific Legal Foundation et al. in Support of Respondents at 32, *Bartlett*, 129 S. Ct. 1231 (No. 07-689).

141. Respondents’ Brief, *supra* note 137, at 13. The United States was also concerned about minority populations obtaining an advantage over other populations under Section 2. Brief for the United States as Amicus Curiae Supporting Affirmance at 19, *Bartlett*, 129 S. Ct. 1231 (No. 07-689) [hereinafter United States Brief].

142. Pildes, *supra* note 23, at 1552 (discussing Professor Samuel Issacharoff’s observations on how the courts’ approach to gerrymandering cases allows legal precedent on race to be used for political ends).

143. Respondents’ Brief, *supra* note 137, at 28 (citing *Pender County v. Bartlett*, 649 S.E.2d 364, 373 (N.C. 2007), *aff’d sub nom.* *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009)).

144. *See id.* at 31–35. Maximizing minority representation approximates the proportional representation expressly disavowed in subsection 2(b). *Id.* at 32.

the majority vote as a united bloc against the minority candidate—is not met, and there is no claim.¹⁴⁵ “[F]unctional majority claims are inherently self-limiting.”¹⁴⁶ Indeed, the “tension” between the first and third *Gingles* prongs that helped induce the Court to establish the 50% rule¹⁴⁷ need not be seen as a reason to establish the rule, but rather as the mechanism that limits the population needed to establish a Section 2 claim in the absence of such a rule.¹⁴⁸ Additionally, the difficulty in bringing a Section 2 claim places limits on Section 2 suits.¹⁴⁹

The Court, of course, did not settle for such limitations. Rather than accepting a Section 2 sword dulled by a third *Gingles* factor limitation on crossover district claims, it broke the sword by holding that crossover districts do not have Section 2 protection.¹⁵⁰

Naturally, the interplay between race and the districting process was a reason to deny Section 2 protection to crossover districts. The United States government was concerned that requiring crossover districts would increase race’s role in districting.¹⁵¹ Justice Kennedy was concerned that allowing crossover district claims under Section 2 “would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions.”¹⁵² The number of districts drawn mainly because of race would go up, not down, if crossover district claims were allowed.¹⁵³ Allowing crossover districts would fuse party and race,¹⁵⁴ making it even harder to district in non-political, race neutral ways.¹⁵⁵ Thus, allowing crossover districts would “extend[] racial considerations even further into the districting process,”

145. *Bartlett*, 129 S. Ct. at 1254 (Souter, J., dissenting); see also Brief of the Lawyers’ Committee for Civil Rights Under Law et al. as Amici Curiae in Support of Petitioners at 13–14, *Bartlett*, 129 S. Ct. 1231 (No. 07–689) [hereinafter Lawyers’ Brief] (arguing that higher crossover voting rates make suits more likely to fail because of the third *Gingles* factor).

146. Lawyers’ Brief, *supra* note 145, at 13.

147. *Bartlett*, 129 S. Ct. at 1244 (plurality opinion).

148. *Id.* at 1254 (Souter, J., dissenting).

149. States’ Brief, *supra* note 3, at 29–30; Reply Brief for the Petitioners at 12–13, *Bartlett*, 129 S. Ct. 1231 (No. 07–689) (suggesting that New Jersey’s experience indicates allowing crossover claims would not create flood of litigation); Lawyers’ Brief, *supra* note 145, at 5, 12 (discussing the difficulty of winning a Section 2 lawsuit).

150. *Bartlett*, 129 S. Ct. at 1248–49 (plurality opinion).

151. United States Brief, *supra* note 141, at 21–22.

152. *Bartlett*, 129 S. Ct. at 1247 (opinion of Kennedy, J.) (internal quotation marks omitted) (quoting League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 446 (2006)).

153. *Id.* at 1247 (plurality opinion).

154. *Id.* at 1247–48. This requires that race and voting remain correlated for a substantial period of time. *Id.* at 1248.

155. *Id.* at 1248.

with results so harmful that “[the Court] must not interpret § 2 to require crossover districts.”¹⁵⁶

Allowing crossover district claims under Section 2 would send a message that there are situations where a districting legislature may consider race, since Section 2’s purpose, as construed by the Court, is to secure minority electoral opportunity by protecting minorities’ ability to “elect representatives of their choice.”¹⁵⁷ Indeed, section 2 *forces* states to consider race when districting in order to avoid denying minority populations electoral opportunity.¹⁵⁸ Furthermore, race will be the primary goal for some crossover districts if states draw them specifically to meet the racial considerations imposed by Section 2.¹⁵⁹ Thus, allowing crossover districts would not expunge race from America’s districting process.

However, the 50% rule also faces several charges, including that it “perpetuates racial balkanization.”¹⁶⁰ The NAACP argued that without crossover districts, minority members of the North Carolina General Assembly would effectively vanish,¹⁶¹ since successful crossover districts that cannot qualify as majority–minority districts can be lost in the redistricting process without Section 2 protection.¹⁶²

Justice Souter foresaw an increase in majority–minority districts, which would impede the development of biracial coalitions.¹⁶³ This would amount to legal support of “racial blocs, and the role of race in districting decisions as a proxy for political identification [would] be heightened by any measure.”¹⁶⁴ A legislature would naturally create some crossover districts as it draws district lines; if states could count

156. *Id.*

157. Voting Rights Act of 1965 § 2, 42 U.S.C. § 1973(b) (2006).

158. *See id.* § 1973(a)–(b); Thornburg v. Gingles, 478 U.S. 30, 68 (1986).

159. States’ Brief, *supra* note 3, at 34–35; *Bartlett*, 129 S. Ct. at 1258 (Souter, J., dissenting).

160. States’ Brief, *supra* note 3, at 1.

161. Motion for Leave to File Brief of Amici Curiae National Association for the Advancement of Colored People, Cindy Moore, Milford Farrior, Mary Jordan, and the American Civil Liberties Union Out of Time and Brief Amici Curiae in Support of Petitioners at 5, *Bartlett*, 129 S. Ct. 1231 (No. 07-689) [hereinafter NAACP Brief].

162. *Id.* at 17–18. This has the appearance of being particularly invidious since Pender and New Hanover counties were originally drawn to dilute the minority vote. *Id.* at 19. However, states need to avoid intentional racial discrimination whichever route they take; *Bartlett* “does not apply to cases in which there is intentional discrimination against a racial minority.” *Bartlett*, 129 S. Ct. at 1246 (plurality opinion). This comports with the United States’ contention that if intentional discrimination is present, the majority–minority requirement should be inapplicable. United States Brief, *supra* note 141, at 13–14 (citing *Garza v. County of L.A.*, 918 F.2d 763, 770–71 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991)).

163. *Bartlett*, 129 S. Ct. at 1250 (Souter, J., dissenting).

164. *Id.*

these districts towards their Section 2 requirements, less of the state's districting decision would be controlled by Section 2.¹⁶⁵ Instead, Justice Souter argued states will forego crossover districts to create majority–minority districts and avoid Section 2 liability.¹⁶⁶

The concern about the effects of a 50% rule on state legislatures is an important consideration. States may draw majority–minority districts because they desire to avoid litigation and are unwilling to take the risk of creating crossover districts. They may also draw such districts because they desire to district minorities into as few districts as possible and will use *Bartlett* as a legal basis for doing so. Note, however, that in this latter case, if the legislature's motivation is a desire to district a racial minority because of race, then *Bartlett* does not offer protection since it does not protect against intentional racial discrimination.¹⁶⁷ However, it is quite likely that such districting practices will be based on party affiliation rather than race,¹⁶⁸ or at least that will be the excuse. Whether race is being considered for its own sake or as a proxy for a political party, race is still playing a role in the districting process.

Therefore, with or without a 50% rule, race will play a role in the districting process. The *Bartlett* Court should not be faulted for this, for this result is inherent in Section 2 as interpreted by the *Gingles* framework. Indeed, even the *Gingles* Court acknowledged the connection between race and the framework it established: “Clearly, only the race of the voter, not the race of the candidate, is relevant to vote dilution analysis.”¹⁶⁹ Any successful claim will force a state to redistrict based on racial considerations in order to protect minority opportunity.¹⁷⁰ This is not “a political system in which race no longer matters.”¹⁷¹

Without an overhaul of Section 2 jurisprudence, the *Bartlett* Court could not remove all consideration of race from the districting process. What it did do, however, was address *intentional* discrimination in the districting process.

165. *Id.* at 1258.

166. *Id.* at 1259.

167. *Id.* at 1246 (plurality opinion).

168. Race and political party are significantly connected. Charles S. Bullock, III & Richard E. Dunn, *The Demise of Racial Districting and the Future of Black Representation*, 48 EMORY L.J. 1209, 1214 (1999) (“[T]he [minority] vote constitutes a greater share of the vote in a Democratic primary than in a general election, so prospects for electing [minority candidates] rise when the determination is made in the primary.”).

169. *Thornburg v. Gingles*, 478 U.S. 30, 68 (1986) (citations omitted).

170. “A violation of subsection (a) of this section is established if . . . members of a class of citizens protected by subsection (a) . . . have less opportunity than other members of the electorate . . . to elect representatives of their choice.” Voting Rights Act of 1965 § 2, 42 U.S.C. § 1973(b) (2006).

171. *Shaw v. Reno*, 509 U.S. 630, 657 (1993).

B. *Bartlett* Speaks to Intentional Discrimination in the Districting Process

Bartlett limits Section 2 by saying no Section 2 claim exists unless it is possible to create a majority–minority district, effectively meaning that Section 2 does not even apply unless it is possible to draw a majority–minority district.¹⁷² Because *Bartlett* declared crossover districts outside the purview of Section 2, minority groups that cannot form a compact majority–minority district cannot use Section 2 to have district lines drawn in a way favorable to them because of their race. This prevents them from using intentional discrimination to their advantage.

The plurality opinion goes even further. It encourages states to assert crossover districts as a defense in Section 2 litigation. Indeed, even if a Section 2 claim survives the gate-keeping *Gingles* requirements, a crossover district could be held valid under the totality of the circumstances test.¹⁷³ The Court did not apply the totality of the circumstances test to District 18.¹⁷⁴ It did not need to, because it is impossible to pass the first *Gingles* condition without the possibility of drawing a “geographically compact” majority–minority “single-member district.”¹⁷⁵

Meeting the *Gingles* factors does not prove the whole case.¹⁷⁶ “Proof of the *Gingles* preconditions is not alone sufficient to establish a claim of vote dilution under Section 2.”¹⁷⁷ Regardless of what actually occurs in practice, *Bartlett* creates the possibility that a crossover district could satisfy the *Gingles* requirements and state a claim, yet nevertheless fail to succeed on that claim under the totality of the circumstances test. Allowing the possibility of a defense even though the *Gingles* factors are satisfied¹⁷⁸ is consistent with the freedom states have in complying with Section 2.¹⁷⁹

The Court’s holding limited minorities’ ability to force states to discriminate in their favor in the districting process. This leads to an-

172. See *Bartlett*, 129 S. Ct. at 1260 (Souter, J., dissenting) (“In short, to the extent the plurality’s holding is taken to control future results, the plurality has eliminated the protection of § 2 for [crossover] districts . . .”).

173. *Id.* at 1249 (plurality opinion). Justice Souter did not see this as a logical possibility. He reasoned that if crossover districts are not protected, they cannot offer electoral opportunity, so a state cannot assert them as a defense alleging they provide electoral opportunity. *Id.* at 1259–60 (Souter, J., dissenting).

174. *Id.* at 1240–49 (plurality opinion).

175. *Id.* at 1249.

176. Brief of the Florida House of Representatives, as Amicus Curiae in Support of Respondents at 8, *Bartlett*, 129 S. Ct. 1231 (No. 07-689) [hereinafter Florida House Brief].

177. *Hall v. Virginia*, 385 F.3d 421, 426 (4th Cir. 2004).

178. *Bartlett*, 129 S. Ct. at 1249 (plurality opinion).

179. States’ freedom under *Bartlett* is discussed later in this Note. See *infra* notes 183–227 and accompanying text.

other question: Does that mean the Court also limited minorities' ability to counter attempts to discriminate against them?

The Court tried to address that concern. A "blatant racial gerrymander[]"¹⁸⁰ would not be protected by the Court, which limited its holding to cases of non-intentional racial discrimination.¹⁸¹ Theoretically, then, *Bartlett* does not remove the protection of federal law against intentional, racially motivated discrimination. Practically, of course, the story could be quite different. In the modern political era, at least among minority voters, race and party are correlated.¹⁸² District lines could be drawn out of political rather than racial discrimination, and the Court has not embraced political discrimination.¹⁸³ Intentional racial discrimination could be difficult to detect where it does exist. Not only is there a correlation between race and political affiliation,¹⁸⁴ but since elected officials can face severe political repercussions if they admit to discriminating on the basis of race, the political environment provides an incentive to conceal intentional racial discrimination.¹⁸⁵

Whatever the practical outcome, however, *Bartlett* is a balancing act of two concepts, limiting the ability of racial minorities to force states to intentionally discriminate in their favor, while also limiting the ability of the legislature to intentionally discriminate against those same minority populations when drawing district lines.

180. *Johnson v. De Grandy*, 512 U.S. 997, 1019 (1994).

181. *Bartlett*, 129 S. Ct. at 1246 (plurality opinion).

182. *Bullock & Dunn*, *supra* note 168, at 1214 ("[T]he [minority] vote constitutes a greater share of the vote in a Democratic primary than in a general election, so prospects for electing [minority candidates] rise when the determination is made in the primary.").

183. *Bartlett*, 129 S. Ct. at 1248 (plurality opinion) (citations omitted).

184. *See Bullock & Dunn*, *supra* note 168, at 1240 (noting that "if blacks continue to win near universal support among black voters and African-American turnout stays at reasonable levels, blacks can win in districts less than fifty percent black if they get about a third of the white vote," which is not unusual for Democratic candidates in the South); *Pildes*, *supra* note 23, at 1534 ("The rise of two-party competition in the 1990s ironically contributes significantly to explaining the greater success minority candidates are now projected to have in the South. As white voters have moved to the Republican Party in the South, black voters have become increasingly powerful in Democratic Party primaries.").

185. In 2002, Senator Trent Lott commented at Senator Strom Thurmond's 100th birthday party that the nation would have benefitted if Thurmond had won the presidency in 1948. Thurmond ran on a segregationist ticket. Senator Lott, following the furor over his comment, resigned his position as leader of the Republicans in the Senate. Carl Hulse, *Lott Fails to Quell Furor and Quits Top Senate Post; Frist Emerges as Successor*, N.Y. TIMES, Dec. 21, 2002, at A1. Senator Lott did not mention race in his comment. *Id.* In such a political environment, at least for some politicians, to actually admit to discriminating on the basis of race could be political suicide.

C. *Bartlett* Advanced Federalism by Reducing Congressional Control Over the States' Redistricting Processes

Many states believed that allowing crossover district claims under Section 2 would give them increased freedom, since they could meet their Section 2 obligations while focusing on non-racial criteria.¹⁸⁶ What *Bartlett* gave them, however, is complete freedom from Section 2 unless a reasonably compact majority-minority district can be created.¹⁸⁷ “[Section] 2 does not mandate creating or preserving crossover districts. . . . Majority-minority districts are only required if all three *Gingles* factors are met and if § 2 applies based on a totality of the circumstances.”¹⁸⁸

If it is impossible to create a reasonably compact majority-minority district anywhere in the state, Section 2 does not apply to the state at all. If it is possible for the state to draw a majority-minority district, the state still has the freedom to draw crossover districts instead and defend the plan under the totality of the circumstances test, since crossover districts can be used to satisfy the requirements of Section 2.¹⁸⁹

Barlett thus speaks to concerns about the states' ability to control their own districting processes. Even the federal government was concerned about the states' ability to perform their redistricting task if Section 2 was interpreted to require crossover districts, foreseeing that state districting flexibility would decrease in that instance.¹⁹⁰

In addition to flexibility, the 50% rule gives the states direction. The Florida House of Representatives supported the 50% rule because it wanted to have the standards it needed to redistrict according to the law,¹⁹¹ and it feared an increased potential for litigation if crossover districts were protected under Section 2.¹⁹² The Florida House of Representatives offered additional arguments in favor of a 50% rule. If Section 2 covered crossover districts, the courts would be required to decide when a minority population was entitled to a representative, intruding on the Florida Legislature's role in the redistricting pro-

186. States' Brief, *supra* note 3, at 34–35.

187. The ultimate result of *Bartlett* was, perhaps, suggested as early as 2002. See Pildes, *supra* note 23, at 1570–71.

188. *Bartlett*, 129 S. Ct. at 1248 (plurality opinion).

189. *Id.* at 1248–49.

190. United States Brief, *supra* note 141, at 22–25. Of course, states would still be free to create crossover districts if they so desire. *Id.* at 27–28.

191. Florida House Brief, *supra* note 175, at 1. It is interesting to note that Florida's state legislature, which actually has to do the work of redistricting, wanted a 50% rule, while the brief for the states that opposed the 50% rule was signed by those states' attorneys general. States' Brief, *supra* note 3, at 36–38.

192. Florida House Brief, *supra* note 176, at 1.

cess.¹⁹³ In contrast, a 50% requirement would reduce the judicial role in districting.¹⁹⁴ Additionally, without a standard, the courts would have a mess of litigation, and adding to that mess would be multiple minority groups vying for the same representative seat.¹⁹⁵ It is inherently difficult for a court to decide if a group could have a Section 2 claim without a 50% rule.¹⁹⁶

In addition to its effect on the state legislatures, a 50% rule also benefits the courts. Most courts have used the 50% rule in crossover district cases.¹⁹⁷ This keeps them from guessing the outcome of political alliances¹⁹⁸ and trying to figure out how large a minority population has to be to state a Section 2 claim.¹⁹⁹

The 50% rule also has implications for the states' role in redistricting. Various states argued that if the 50% rule was adopted by the Court, "state legislatures will need to adopt a formalistic approach to redistricting that ignores political realities."²⁰⁰ Not only that, but constitutional equal protection issues would arise if the states drew majority–minority districts in response to the ruling.²⁰¹ In contrast, covering crossover districts under Section 2 would send a message to state legislatures to limit the number of majority–minority districts they draw, which would follow "the equal protection prohibition on the use of race as the dominant consideration in redistricting decisions."²⁰² Because crossover districts are based "heavily" on things other than race, race will not be the main consideration in drawing crossover districts,²⁰³ and such districts will not suggest "that political identity is, or should be, predominantly racial."²⁰⁴ Crossover districts combine voters by politics, not race, and force politicians to represent their entire electorate instead of a single race.²⁰⁵

This interracial cooperation in crossover districts is due a second look. Section 2 jurisprudence secures minority electoral opportunity by protecting minorities' ability to "elect representatives of their choice."²⁰⁶ A politician aware that he holds office because he is the minority's choice will have a tendency "to represent the [minority] in-

193. *Id.*

194. *Id.* at 5.

195. *Id.* at 3.

196. *Id.* at 8.

197. Respondents' Brief, *supra* note 137, at 20–25.

198. *Id.* at 15.

199. *Id.* at 28 (citing *Pender County v. Bartlett*, 649 S.E.2d 364, 373 (N.C. 2007), *aff'd sub nom.* *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009)).

200. States' Brief, *supra* note 3, at 1.

201. *Id.* at 31.

202. *Id.* at 8.

203. *Id.* at 31–32.

204. *Id.* at 32 (quoting Pildes, *supra* note 23, at 1547).

205. *Id.* at 32–33.

206. Voting Rights Act of 1965 § 2, 42 U.S.C. § 1973(b) (2006).

terest.”²⁰⁷ Indeed, if his district is created to give minorities political power, how could such a representative *not* “represent the [minority] interest?”²⁰⁸ Crossover districts are no guarantee against the racial balkanization the Supreme Court fears.²⁰⁹

Bartlett, of course, did not remove the states from the control of the Voting Rights Act completely. The freedom given the states under *Bartlett* does not include the freedom to intentionally discriminate based on race.²¹⁰ States can district as they like, without fear that Section 2 will be used against them in court, under two conditions. First, there must be no possibility of drawing a reasonably compact majority–minority district, and thus the *Gingles* requirements, as interpreted by *Bartlett*, cannot be satisfied; second, the state may not intentionally discriminate against racial minorities when drawing district lines. If they do, *Bartlett*’s exception for intentional discrimination is triggered. This breathing room from Section 2’s control limits the federal restraints on the states’ redistricting efforts. This enhances federalism’s division of power between the state and federal governments. *Bartlett* therefore deserves to be called “a victory for federalism.”²¹¹

Redistricting is not often considered a check on the power of Congress, but redistricting is a check, and one that should be preserved. Congress can, and has, passed significant regulation regarding voting.²¹² Congress can prescribe how senatorial and congressional elections will be held.²¹³ Congress determines whether its members have satisfied the constitutional prerequisites to serve.²¹⁴ But Congress does not draw the actual congressional district lines; that task primarily falls to the states²¹⁵ and, if need be, the courts.²¹⁶ Congress his-

207. *Holder v. Hall*, 512 U.S. 874, 907 (1994) (Thomas, J., concurring in the judgment) (citation omitted) (internal quotation marks omitted).

208. *Id.*

209. *Shaw v. Reno*, 509 U.S. 630, 657 (1993).

210. *Bartlett v. Strickland*, 129 S. Ct. 1231, 1246 (2009) (plurality opinion) (“Our holding does not apply to cases in which there is intentional discrimination against a racial minority.”); *id.* at 1249 (“[I]f there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments.”) (citations omitted).

211. John J. Park, Jr., *Bartlett v. Strickland: Is a Stopping Point Near for Race-Conscious Districting?*, ENGAGE, July 16, 2009, at 48, available at http://www.fed-soc.org/doclib/20090720_ParkEngage102.pdf.

212. See Voting Rights Act of 1965 § 2, 42 U.S.C. § 1973 (2006); Help America Vote Act of 2002 § 302, 42 U.S.C. § 15482 (2006).

213. U.S. CONST. art. I, § 4, cl. 1. Congress cannot, however, dictate where senatorial elections take place. *Id.*

214. U.S. CONST. art. I, § 5, cl. 1.

215. “[T]he Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts.” *Grove v. Emison*, 507 U.S. 25, 34 (1993) (citing U.S. CONST. art. I, § 2).

torically has had little to do with the districting process—indeed, Section 2’s coverage of vote dilution claims depends on a judicial interpretation of Section 2.²¹⁷

Ever since Governor Gerry districted Massachusetts to benefit his party in 1812,²¹⁸ districting has been used for political purposes. If Congress were allowed to draw Congressional district lines, it could attempt to entrench its current membership for life. Congress should not be allowed to draw its own districts any more than a fox should be allowed to guard a hen house. The more federal regulation governs redistricting, the closer Congress comes to drawing the district lines itself. Federalism’s division between the states and the federal government supports Congressional restraint in imposing regulations on the states’ districting processes.

In the modern scheme of political reality, however, political parties would seem to form the missing link between Congress and the states that would make state districting less relevant. Consider this argument: the real political power in America today is not really wielded by Congress or the state legislatures. Instead, political parties wield power by operating through Congress and the state legislatures. If one party controls both Congress and the state legislatures, the division between congressional power and power to district Congress means less.

The check in this case is partly derived from the two-party system. When one party controls Congress and another controls the districting process in a local legislature, the state legislature can conduct its districting task to maximize the number of seats won by the party in the congressional minority, helping establish a political check on Congress.²¹⁹

Even with the influence of political parties, interfering with the separation between state redistricting and congressional power can be dangerous. Part of the genius of House Majority Whip Tom DeLay was his recognition of the connection between power in the state capitol and power on Capitol Hill. The Texas representative sought to gain control of the Texas Legislature in order to redraw the congressional map and thereby increase the Republican congressional delegation.²²⁰ DeLay’s funding efforts for Texas state legislative campaigns

216. *Id.* at 27.

217. *Holder v. Hall*, 512 U.S. 874, 892 (Thomas, J., concurring in the judgment).

218. Money in Politics, What is Gerrymandering?, <http://www.ohiocitizen.org/money/redistrict/gerrymandering.html> (last visited May 12, 2010) (“The original gerrymander was created in 1812 by Massachusetts governor Elbridge Gerry, who crafted a district for political purposes that looked like a salamander.”).

219. See *supra* notes 212–14 and accompanying text.

220. Glen Justice & Sheryl Gay Stolberg, *3 DeLay Aides Facing Charges In Fund-Raising*, N.Y. TIMES, Sept. 22, 2004, at A1.

ultimately led to an indictment²²¹ and contributed to his eventual downfall.²²² Thus the state power of redistricting served to check the power of one of the most powerful congressmen in recent memory.²²³ If politics will play a powerful role in districting, and the federal government is going to wield power in districting, that power should be shared with the states to provide a check on the federal government.²²⁴

The check that districting provides on Congress also has a local connection. A congressman might speak on a national stage, but the district that sent him there was drawn by local politicians. This provides another link, though an imperfect one,²²⁵ between the congressman and his state.

221. *The Fall of the Hammer*, N.Y. TIMES, Apr. 5, 2006, at A22.

222. Philip Shenon & Carl Hulse, *Delay Is Indicted in Texas Case and Forfeits G.O.P. House Post*, N.Y. TIMES, Sept. 29, 2005, at A1.

223. *Id.* DeLay's nickname was "the Hammer." See, e.g., Ralph Blumenthal, *Primary for DeLay's Seat Is Shaping Up as Referendum on the Incumbent*, N.Y. TIMES, Mar. 6, 2006, at A14. The ultimate success of Texas' plan, however, is worth noting. Even though the Texas congressional map was redrawn in the middle of an election cycle, the Supreme Court upheld the validity of the redistricting, despite that some editing was required. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 447 (2006). Though DeLay was a powerful force behind the facts of the case, his name never appeared in the opinion.

224. THE FEDERALIST NO. 10, at 50 (James Madison) (Ian Shapiro ed., 2009).

When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed. . . . By what means is this object attainable? Evidently by one of two only. Either the existence of the same passion or interest in a majority at the same time must be prevented, or the majority, having such coexistent passion or interest, must be rendered, by their number and local situation, unable to concert and carry into effect schemes of oppression.

Id. Power should be split between the states and federal government on this issue to:

[e]xtend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.

Id. at 52.

225. National political machines can be involved in local politics. Republican National Committee Chairman Michael Steele recently said of a victorious mayoral candidate, "Candidates like [him] . . . are the future of the Republican Party and I look forward to helping them all toward victory." Matthew Reichbach, *ABQ Election: RNC congratulates Berry on winning non-partisan race*, THE NEW MEXICO INDEPENDENT, October 6, 2009, <http://newmexicoindependent.com/38638/abq-election-rnc-congratulates-berry-on-winning-non-partisan-race>. Democrats proclaim, "The Democratic Party is committed to winning elections at every level in every region of the country, and we're getting started right now with a massive effort to

Not only does the districting function provide a check on Congress, but it provides a role for the states in the national government. Allowing the states a role in national government increases the number of actors involved in exercising national power, which makes it more difficult to turn national power against the people.²²⁶

Though states must follow the constitutional dictates of the federal government,²²⁷ state influence over the federal government has eroded over the years. The states have lost their direct representation in the Senate as a result of the direct election of Senators,²²⁸ but they still have some influence over the House of Representatives through the districting power.²²⁹ How the district lines are drawn affects many political fortunes, even though the districting power is normally exercised only once every ten years.²³⁰ With the check on Congress that districting provides, it is better for the districting power to remain with the states than for Congress to take that power unto itself through regulation. *Bartlett* supports keeping the districting power with the states by declaring the states free from Section 2, unless it is possible to draw a majority–minority district.

IV. CONCLUSION

Bartlett did not expunge race from the electoral process. Because of the requirements of Section 2 jurisprudence itself, states and judges will still be forced to think about the race of the voters they district. Essentially, the Court eliminated a situation in which minorities could attempt to gain favorable discrimination, while limiting its holding so that intentional discrimination on the basis of race in the districting process was not protected. Racial minorities cannot use Section 2 for favorable discrimination unless they can form a majority–minority district in reasonable geographic bounds, and the states cannot intentionally discriminate in districting without losing the protection of *Bartlett*. The Court has interpreted Section 2 in a way that limits the situations where Section 2 applies to the states. This supports the separation between the power of Congress and the power to

fund organizers on the ground in every state.” The Democratic Party, A 50 State Strategy, http://www.democrats.org/a/party/a_50_state_strategy/ (last visited May 12, 2010).

226. See *supra* note 224.

227. U.S. CONST. art. VI, cl. 2.

228. U.S. CONST. amend. XVII.

229. States’ Brief, *supra* note 3, at 1.

230. See U.S. CONST. art. I, § 2, cl. 3. *Perry* makes clear that a state can redistrict between the two censuses. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 446 (2006).

district Congress. The decision was a win for the states, even though the “sordid business, this divvying us up by race,”²³¹ will continue.

231. *Perry*, 548 U.S. at 511 (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part).