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Equal Opportunities Do Not Always Equate to Equal Representation: How Bartlett v. Strickland is a Regression in the Face of the Ongoing Civil Rights Movement

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EQUAL OPPORTUNITIES DO NOT ALWAYS EQUATE TO EQUAL REPRESENTATION: HOW *BARTLETT V. STRICKLAND* IS A REGRESSION IN THE FACE OF THE ONGOING CIVIL RIGHTS MOVEMENT

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INTRODUCTION

The Voting Rights Act of 1965[1] ("V.R.A.") was established in an effort to guarantee minorities their right to have adequate representation in government.[2] The Constitution guarantees a republican form of government. However, equal representation and the right to vote are not always synonymous.[3] The United States Supreme Court's ("Supreme Court") recent decision in *Bartlett v. Strickland* changes the prior interpretation of § 2 of the V.R.A., by clarifying and limiting the threshold test previously established in *Gingles v. Thornburg*.[4] Prior to this decision, the Supreme Court had not applied *Gingles* to mechanically foreclose § 2 protection to minority crossover and influence districts who asserted claims of dilution.[5] The *Bartlett* decision changes the law in two ways.[6] First, it interpreted and established a rigid 50% population threshold test for minority communities who seek to bring a claim of vote dilution under § 2 of the V.R.A.[7] Second, since the state-official defendants used § 2 as a defense, the holding effectively changes North Carolina ("N.C.") law.[8] The holding prohibits the N.C. legislature from drawing districts in a manner that

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1. Voting Rights Act of 1965, 42 U.S.C. § 1973 (2000).

2. Voting Rights Act of 1965, Pub. L. No. 109-246, § 2, 120 Stat. 577, 577 (2006).

3. *See* U.S. CONST. art. IV, § 4; *see also* Bartlett v. Strickland, 129 S. Ct. 1231 (2009) (limiting protection to minorities in certain voting districts).

4. Bartlett, 129 S. Ct. 1231; *see* Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986).

5. *See* Voinovich v. Quilter, 507 U.S. 146 (1993) (where the Court refused to dismiss a § 2 case, acknowledging that impermissible vote dilution could occur in a voting district where the minority population was not the majority).

6. Bartlett, 129 S. Ct. 1231.

7. *Id.* at 1246.

8. *Id.* at 1231.

would allow minorities from surrounding district areas to collectively vote to elect a candidate of their choice.[9]

In effect, the *Bartlett* decision means that minorities in voting districts, where their prospective population constitutes less than 50% of the total population, are not entitled to protection under the V.R.A. as a minority opportunity district.[10] The Supreme Court also affirmed that the V.R.A. does not require states to create or maintain non majority-minority crossover or influence districts when drawing voting districts.[11] Prior to this case, the N.C. General Assembly ("Assembly") had drawn House District 18 in a manner which incorporated minority populations from the surrounding area.[12] This redistricting was done in an effort to protect minorities' potential to elect a candidate of their choice.[13]

This note focuses on the practical effect the holding of *Bartlett* will have with regard to three main topics. First, it examines the Supreme Court's interpretation of *Thornburg v. Gingles* and § 2, which requires a rigid 50% minority threshold test before a minority populations' dilution claim will be heard.[14] The 50% rule is controversial because it limits the protections afforded to minority populations that constitute less than 50% of their respective districts.[15] Second, this note discusses the effect of the court's holding, that § 2 does not require the creation or protection of minority crossover and influence districts.[16] Third, this note hypothesizes the specific implications that this decision may have with regard to N.C. law.[17] The decision in *Bartlett* inhibits the protections granted to minorities by the Constitution and the V.R.A.[18] The Court should have modified the *Gingles* threshold requirements and interpreted § 2 to protect minority voting strength in crossover and influence districts.[19]

THE CASE

In 1991, the Assembly drew House District 18 to include segments of four surrounding counties.[20] The Assembly drew House District 18

9. *Id.* at 1240.
10. *Id.* at 1246-47.
11. *Id.* at 1248.
12. *Id.* at 1239.
13. *Id.*
14. *Id.* at 1246. *See* Thornburg v. Gingles, 478 U.S. 30 (1986).
15. *See* Bartlett, 129 S. Ct. at 1250-53.
16. Bartlett, 129 S. Ct. at 1249-50.
17. *See generally* Bartlett, 129 S. Ct. at 1253-62 (explicating implications of the ruling in *Bartlett).*
18. *See* Bartlett, 129 S. Ct. at 1249-50.
19. *Id.* at 1249.
20. *Id.* at 1239.

with the purpose of creating a district with a majority African American voting age population to satisfy the requirements of § 2.[21] This multi-county district plan was thought to be mandated by § 2, because at the time, African Americans constituted more than 50% of the population in the district.[22] In 2003, the Assembly created a new districting plan,[23] a point when the African American voting age population in House District 18 had fallen below 50%.[24]

Faced with an inability to draw a geographically compact majority-minority district, the Assembly decided to split up portions of Pender and New Hanover counties and join them in House District 18.[25] The result was that House District 18 had a minority voting age population of 39.36%.[26] The Assembly stated that it drew House District 18 in an effort to allow the minority population voters to have the potential to elect a candidate of their choice.[27] The Assembly asserted that had they not violated the N.C. Constitution and drawn a district that incorporated areas from outside counties, they would have been in violation of § 2, having diluted the minority group's voting strength.[28]

In May 2004, Pender County and the five members of its Board of Commissioners filed suit in state court.[29] They claimed that the 2003 redistricting of Pender County into two separate house districts violated the "whole county provision" of the N.C. Constitution.[30] The state-official defendants asserted § 2 of the V.R.A. as a defense, claiming that they were required to create House District 18 as a crossover district.[31] Pursuant to using § 2 as a defense, the state-official defendants had the burden of proving that a § 2 violation would have occurred absent the construction of House District 18.[32]

The trial court concluded that House District 18 constituted a "de facto" majority-minority district, even though the minority population did not constitute a majority of the voting age population in the area.[33] This was due to the fact that African American voters could get enough crossover white majority votes to elect the African Americans' preferred candidate.[34] The trial court also held that the African

21. *Id.*
22. *See id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* at 1240.
32. *Id.*
33. *Id.*
34. *Id.*

American population in House District 18 satisfied *Gingles'* politically cohesive requirement.[35] The plaintiffs stipulated that the white majority in the area votes sufficiently as a bloc to enable them to usually defeat the minority's preferred candidate.[36] The court then determined, that based on the totality of the circumstances, the three *Gingles'* threshold requirements had been established and that the state officials were justified in splitting Pender County into two separate house districts.[37]

On appeal, the N.C. Supreme Court reversed, holding that a minority group must constitute a numerical majority of the voting age population before § 2 can be said to have required the creation of a majority-minority district.[38] The Supreme Court granted certiorari and affirmed the N.C. Supreme Court's decision.[39] The Supreme Court ruled that in order for a minority population to assert a § 2 claim, the minority population must constitute a numerical 50% majority of the voting district.[40] The Supreme Court also found that § 2 does not require the creation of crossover districts to protect minority influence in districts where the minority accounts for less than 50% of the voting age population.[41] The Supreme Court's rationale expressed a deference to ideals of equality, a desire to adhere to precedent, and the need for workable standards in hearing § 2 dilution claims.[42]

BACKGROUND

The V.R.A. was passed by Congress in an effort to protect minority voting rights under the U.S. Constitution.[43] The primary issue in *Bartlett* is the Supreme Court's interpretation of § 2 of the V.R.A. of 1965.[44] The Supreme Court first interpreted the application of § 2 in *Thornburg v. Gingles*.[45] In *Gingles*, the plaintiffs were African American voters in N.C. who asserted a voting strength dilution claim under § 2.[46] The nature of their claim was that the legislature had drawn the voting district in a manner that artificially diluted their voting strength by splitting up a geographically concentrated area of African Ameri-

35. *Id.*
36. Bartlett, 129 S. Ct. at 1240 (the third *Gingles* requirement illustrates "[t]hat the white majority votes sufficiently as a bloc to allow the white majority votes usually to defeat the minority's preferred candidate." (quoting Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986))).
37. *Id.*
38. *See* Pender County v. Bartlett, 361 N.C. 491, 649 S.E.2d 364 (2007).
39. Bartlett, 129 S. Ct. at 1240.
40. *Id.* at 1245.
41. *Id.* at 1248.
42. *See id.* (Souter, J., dissenting).
43. *See* Voting Rights Act of 1965, Pub. L. No. 109-246, § 2, 120 Stat. 577 (2006).
44. *See* Bartlett, 129 S. Ct. 1231.
45. Thornburg v. Gingles, 478 U.S. 30, 34 (1986).
46. *Id.* at 35-38.

can voters into surrounding white majority districts.[47] The Supreme Court held that in order for a minority population to assert a § 2 claim for voting strength dilution, the claimant had to meet three threshold requirements:

> 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 . . . to defeat the minority's preferred candidate.[48]

Only the first *Gingles* requirement is at issue in this case.[49]

The Supreme Court affirmed the necessity of meeting the *Gingles* requirements in *Johnson v. Degandy*, where the court ruled that all three *Gingles* requirements must be satisfied before they will consider whether a V.R.A. violation has occurred.[50] Nonetheless, the Supreme Court reserved the possibility that the *Gingles* majority-minority precondition could be interpreted to include situations where the minority population was not a numerical majority, but had predictable crossover support that made them influential in the district.[51]

Prior to the *Bartlett* decision, the Supreme Court had not established what would constitute a sufficiently large majority.[52] In *Growe v. Emison*, the Supreme Court left open the possibility that vote dilution could be proven by a reduction in the minority population's influence, as opposed to their ability to elect the candidate of their choice.[53] The Supreme Court stated that, "when a plaintiff alleges that a voting practice or procedure impairs a minority's ability to influence, rather than alter, election results, a showing of geographical compactness of a minority group not sufficiently large to constitute a majority will suffice."[54]

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47. *Id.* at 46.

48. *Id.* at 50-51.

49. Bartlett v. Strickland, 129 S. Ct. 1231, 1241-42 (2009).

50. Johnson v. Degandy, 512 U.S. 997, 1013-14 (1994) (explaining that all three *Gingles* requirements must be satisfied before the proportionality inquiry or the "totality of the circumstances test" will be applied, however suggesting that the "totality of the circumstances test" could be used to supersede the *Gingles* requirements, which are not to be applied in a rigid fashion that ignores the nature of the injury).

51. *Id.* at 1008-09.

52. *See id.*; *see also* Growe v. Emison, 507 U.S. 25 (1993) (allowing a § 2 claim to go forward when the minority population asserting the claim did not exceed 50 percent of the voting age population).

53. Growe, 507 U.S. at 41.

54. *Id.* (citing Gingles v. Thornburg, 478 U.S. 30, 47-48 n.12 (1986)).

Previous cases also shed light on what types of districts will be protected and the nature of protection guaranteed by § 2.[55] In *Voinovich v. Quilter*, the Court held that § 2 can require states to create majority-minority districts, where the minority population would otherwise be large enough to ensure that they will be able to elect a candidate of their choice.[56] Notwithstanding *Voinovich*, in *League of United Latin American Citizens v. Perry*, the Supreme Court held that minority influence districts were not required to be created by § 2.[57] The purpose of creating crossover and influence districts is to protect minority voting influence in areas where the minority population is substantial, yet not enough to elect a candidate without votes from the white majority population.[58]

Bartlett is noteworthy not only because of the decisions' impact with regard to national election law, but also because of its interaction with the N.C. Constitution. In relevant part, the N.C. Constitution provides: "No county shall be divided in the formation of a senate district."[59] Summarily, the N.C. Constitution requires that when voting districts are drawn, counties are not divided, meaning that each county must be divided in to voting districts where each district is entirely contained within that county's boarders.[60]

ANALYSIS

The practical effect of the *Bartlett* decision is to remove a layer of protection that minority populations once had, which made it more difficult for racially biased voting district schemes to be used.[61] *Bartlett* interprets the first *Gingles* requirement to mean that in order for a minority population to assert a claim based on a § 2 violation of vote dilution, they must constitute a numerical majority of the voting age population by 50 % or more.[62] In doing so, the Supreme Court has essentially created a new threshold requirement that is "ill suited to its own administrative ends."[63]

In reaching its conclusion, the Supreme Court felt that it needed to create a bright line rule that would allow them to weed out frivolous

55. Voinovich v. Quilter, 507 U.S. 146 (1993), League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006).

56. Vonovioch, 507 U.S. at 154.

57. Perry, 548 U.S. at 443 (allowing a §2 claim to proceed, even though the Latino population did not exceed 50 percent, and holding that under a totality of the circumstances, voting strength dilution had occurred).

58. Perry, 548 U.S. 399, 485.

59. N.C. CONST. art. II § 3, cl. 3.

60. *Id.*

61. Pender County v. Bartlett, 361 N.C. 491, 493, 649 S.E.2d 364, 366 (2007).

62. Bartlett v. Strickland, 129 S. Ct. 1231, 1242 (2009).

63. *Id.* at 1262 (Breyer J., dissenting).

claims.[64] The 50 % rule is efficient for this task, but it seems to place an insurmountable burden on a large segment of the minority population.[65] Almost by definition of being a minority, there will be few areas in which a minority segment of a predominantly white population will constitute a numerical majority of the voting age population in a district.[66]

The Court's enforcement of a rigid 50% threshold will mean that minorities in existing influence and crossover districts "will have no right to claim relief under § 2 from a statewide districting scheme that dilutes minority voting rights," an effect that is "flatly at odds with the obvious purpose of the Act."[67] The inability of these populations to bring claims may in turn have the effect of emboldening state legislatures to be careless in their compliance with the V.R.A. when drawing voting districts. As a result, many minority citizens may go effectively unrepresented. If the Court's re-interpretation of § 2 and the *Gingles* requirements were analyzed under the guise of § 5,[68] we would clearly see that this decision is a retrogression and conflicts with the purpose of the Act.

The Supreme Court's determination that 50% of the voting age population must be a minority is a too high of a standard. Better threshold tests are available. *Johnson* held that all that is needed is a majority-minority based on "the minority's rough proportion of the relevant population."[69] The Supreme Court could possibly still adhere to the *Gingles* framework if the "relevant population" was interpreted to mean those who are likely to vote, not the total population.[70] Also, the Supreme Court could look to the historical demographic data of voter turn-out in the area, just as the Supreme Court does for finding majority bloc voting, and create a more realistic assessment of when the minority voting population would constitute a working majority.[71]

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64. *Id.* at 1237.

65. *Id.* at 1248.

66. *Id.* at 1240.

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

68. 42 U.S.C. 1973(c) (2006) (section 5 applies to certain states where proposed changes in the election laws must be submitted for review and approved to ensure compliance with the Voting Rights Act. The proposed voting practice is measured against the existing voting practice to determine whether retrogression would result from the proposed change); *see also* Holder v. Hall, 512 U.S. 874, 883-4 (1994) (finding that unlike a § 5 inquiry retrogression is not the inquiry in § 2 dilution cases; there is no benchmark to determine if an existing voting practice is dilutive under § 2).

69. De Grandy v. Johnson, 512 U.S. 997, 1027-1028 (1994).

70. *Id.* at 1008.

71. *See e.g.*, Thornburg v. Gingles 478 U.S. 30, 55-56 (1986), League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006), *Johnson* 512 U.S. 997 (the court applies the factors for determining majority bloc voting, to reach the holding in each of these cases).

At the heart of the matter is the Supreme Court's disregard for the protection of minority influence in the electoral process. The *Bartlett* holding does not further Congress's goal in enacting the V.R.A.[72] The Supreme Court should have used *Bartlett* to clarify and modify *Gingles*, by holding § 2 to require the creation and protection of minority crossover and influence districts.[73] Certainly, the V.R.A. should not be interpreted to guarantee outcomes. Minority populations should not be given more influence than their representative population would otherwise call for. However, the one person one vote and equal voting opportunity arguments enunciated in *Bartlett* do not take into consideration equal representation on a societal scale.[74] The *Bartlett* court noted that "[t]reating dilution as a remediable harm recognizes that § 2 protects not merely the right of minority voters to put ballots in a box, but to claim a fair number of districts in which their votes can be effective."[75] The V.R.A. should be interpreted to accomplish its underlying purpose, which is to protect minority influence in voting districts.[76] By protecting minority influence we ensure that minorities are sufficiently represented in government, regardless of which candidate wins the election.

In its rationale the Supreme Court suggests that all minority populations are adequately protected because their decision does not apply to situations where the dilution is intentional.[77] While this is easily accomplished in a hypothetical, the realities of proving such an occurrence are much more difficult. The law needs to take a proactive stance, where legislatures must realize in advance the potential repercussions of their decisions.[78] The intentional dilution catch all, does not address the fact that the *Bartlett* decision removes protection for existing influence and crossover districts.[79] In order for government to be conducted race neutrally, we must constantly in fuse race awareness in such decisions to ensure equality and fairness.

The trial court understood the spirit of the V.R.A. and the importance of protecting a working majority when it ruled that House District 18 was a "de facto majority-minority" district.[80] Protecting

72. Voting Rights Act of 1965, Pub. L. No. 109-246, §2, 120 Stat. at 577 (codified as amended in 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006)).

73. Bartlett, 129 S. Ct. at 1248.

74. *Id.* at 1240-45.

75. *Id.* at 1251 (Souter J., dissenting, articulating that the protections afforded by § 2 are to not only ensure the right to vote, but to ensure the vote is effective, reiterating concerns articulated in Gingles, 478 U.S. 30, 47).

76. *Id.*

77. *Id.* at 1237.

78. Voting Rights Act of 1965, Pub. L. No. 109-246, §2, 120 Stat. at 577.

79. Bartlett, 129 S. Ct. at 1253 (Souter J., dissenting).

80. Bartlett, 129 S. Ct. at 1235.

crossover and influence districts, accomplishes the goal of the V.R.A. by facilitating interracial co-operation in voting.[81] However, contrary to ideology of the V.R.A., the Supreme Court held that § 2 does not require states to create crossover or influence districts.[82] By foreclosing on the possibility that a crossover or influence district falls under the protection of § 2, the Supreme Court has limited the ability of a minority population to assert a claim, even when there has been a clear incidence of voting strength dilution. The Supreme Court should have interpreted § 2 to require both the creation and protection of crossover districts, to ensure that minority interests in the community are represented through their ability to influence elections. The 50% threshold requirement will have the practical effect of denying minority populations protection from voting strength dilution only when there is a blatant and intentional violation of the V.R.A.

In *Bartlett*, the Supreme Court's interpretation of § 2 takes on unique significance due to the fact that the defendants asserted § 2 as a defense; claiming that it required them to create a crossover district to protect minority voting influence from dilution.[83] As a result of this ruling, states will no longer have to be mindful of the implications of the districts that they draw, except where minorities currently constitute a majority of the population. This ruling could undermine the purpose of the V.R.A. all together and leave the vast majority of minorities in districts where they will have insignificant influence and no means to reach a remedy.

The holding of this case has a unique interaction with N.C. law because of the "whole county provision."[84] The Supreme Court's interpretation of § 2, coupled with the "whole county provision" now effectively prevents the state legislature from exercising its discretion to create crossover and influence districts.[85] Part of the reasoning behind the Supreme Court's rationale was that their interpretation of § 2 allowed states to comply with the V.R.A. in their own way and did not require or prohibit them from drawing influence or crossover districts.[86]

81. Voting Rights Act of 1965, Pub. L. No. 109-246, § 2, 120 Stat. 577 (2006).
82. Bartlett, 129 S. Ct. at 1249.
83. *Id.* at 1239.
84. NC. CONST. art. II § 3 cl. 3.
85. Bartlett, 129 S. Ct. at 1248.
86. *Id.*; *see* Georgia v. Ashcroft, 539 U.S.480-483 (explaining that "§2 allows States to choose their own method of complying with the Voting Rights Act, and we have said that may include drawing crossover districts"). *Cf.* Ashcroft, 539 U.S. at 480 (in explaining how states may comport with the requirements of §2 and maximize a minority population's electoral success, when appropriate, "a State may choose to create either a certain number of "safe" districts in which it is highly likely that minority voters will be able to elect the candidate of their choice or a greater number of districts in which it is likely, although perhaps not quite as likely as under the benchmark plan, that minority voters will be able to elect their candidates.").

However, as a result of *Bartlett*, the state legislature cannot claim that § 2 requires the creation of crossover districts and therefore, can no longer use Federal law and the Supremacy Clause to supersede the "whole county provision."[87] The inability of the state legislature to draw districts based on the geographical location and concentration of minorities could have a devastating effect on adequate representation for minorities in N.C. government. As such, the Assembly should take the initiative in amending the N.C. Constitution and continue its practice of drawing districts in a manner that adequately protects and apportions minority influence.

The written guarantee of the V.R.A.[88] and the Fourteenth[89] and Fifteenth[90] amendments is the right to vote, however this is only the modus operandi of achieving the underlying guarantee of the Constitution, which is the right to representation in government.[91] The Supreme Court does not seem to address the fact that influence is just as important to true representation as the ability to elect one's candidate of choice. In determining compliance with the V.R.A. the *Georgia v. Ashcroft* court noted the importance of determining:

> the extent to which a new plan changes the minority group's opportunity to participate in the political process a court must examine whether the plan adds or subtracts "influence districts" where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role.[92]

In other words, if a representative is elected, and has no need to be attentive to the needs of an entire segment of their constituency, then the effect is as if that segment had not been allowed to vote at all. In short, the Supreme Court's opinion seems to be narrowly set in an outcome determinative viewpoint, when it is the protection of the political process that is at issue.

CONCLUSION

The *Bartlett* decision is a retrogression in the face of the civil rights movement and should not be followed in N.C. The current rationale behind the interpretation of § 2 and the *Gingles* requirements fail to take into consideration the various and complex situations in which voting strength dilution may occur. The Supreme Court's decision has

87. *Id.* at 1239; *see also* Reynolds v. Sims, 377 U.S. 533 (1964) (explaining that "[i]t is common ground that state election-law requirements like the Whole County Provision may be superseded by federal law").

88. 42 U.S.C. § 1973 (2000).

89. U.S. CONST. amend. XIV.

90. U.S. CONST. amend. XV.

91. U.S. CONST. art. IV § 4 cl. 1.

92. Ashcroft, 539 U.S. 463.

an effect that is at odds with the goals of the legislation that it interprets. By not protecting crossover and influence districts, this decision allows for the possibility that minority voting influence may be disproportionately diluted, with no available recourse. In reaching its decision, the Supreme Court should have interpreted § 2 to protect proportionate minority influence, in accordance with the spirit of the Constitution and the legislative intent of the V.R.A.