Bartlett v. Strickland: Is a Stopping Point Near for Race-Conscious Districting?

*By John J. Park, Jr.**

In *Bartlett v. Strickland*,[1] the U.S. Supreme Court found that there is a stopping point for the influence of race in redistricting. The Court's conclusion that Section 2 of the Voting Rights Act does not require a state to create a so-called "crossover" district in which the minority population is less than 50% of the district's population is, ironically, a victory for federalism. That victory, while substantial, may not be long-lived. In her dissenting opinion, Justice Ginsburg called on Congress "to clarify beyond debate the appropriate reading of Section 2."[2] Congress should decline that invitation because the Court's reading of Section 2 is constitutionally correct and practically sound.

The Court's decision is an ironic victory for federalism because it was a state that lost. That state, North Carolina, was, however, trying to solve a state law problem by arguing for an expansion of the reach of federal law. If the Court had agreed with North Carolina, federal law would have required a substantial, highly intrusive change in the configuration of voting districts throughout the country, at both state and local levels.

The Court's decision is not just a victory for federalism. It stops, for a time at least, the transformation of the Voting Rights Act (VRA). As enacted in 1965, the VRA included provisions that suspended the use of tests or devices as prerequisites for registering to vote in any election in certain jurisdictions and, by use of a formula, identified those jurisdictions.[3] In those jurisdictions, the percentage of African-Americans of voting age who had registered to vote dramatically lagged the percentage of white voters of voting age who were registered, and the difference was attributable to the discriminatory use of tests and devices. With the removal of artificial barriers to registration, the rate of African-American participation in voting has increased dramatically, to the point where, in some of the originally targeted jurisdictions, African-American voters participate at about the same rate as white voters.[4]

The Trajectory of Voting Rights Law

In its one-person, one vote decisions of the 1960's, which were handed down before and after the 1965 enactment of the VRA, the Supreme Court forced a substantial and continuing amount of reapportionment and redistricting. The decisions in *Baker v. Carr*[5] and *Reynolds v. Sims*[6] required the redrawing of legislative districts in Tennessee and Alabama, respectively, which had not been redrawn since 1901. In other decisions, the Court extended the one-person, one-vote principle to congressional districts and to local elected bodies.[7]

Over time,the one-person, one-vote decisions worked with the VRA's elimination of tests and devices to increase African-American participation in the voting process, and that participation led to increased African-American representation in elected bodies. In addition, though, the Court opened the door to further change by grounding the one-person, one-vote principle in the Equal Protection Clause. In *Reynolds*, the Court explained that all the citizens of a state have the right to "full and effective participation" in the state's political processes so that each citizen would have "an equally effective voice in the election of members of his state legislature."[8] "[F]ull and effective participation" has come to mean something different from the unrestricted right to cast a ballot and have it fairly counted. Where once the Act was designed to guarantee the right to vote, its focus has become the vindication of an "effective" vote, and the Act has been transformed from "a universally applicable nondiscrimination norm to a redistributionist program focused on alleviating the disadvantage of designated groups."[9]

Thornburg v. Gingles[10] represents a large step on the way toward the vindication of an "effective" vote. In 1982, Congress amended Section 2 to prohibit not only those voting practices that had been adopted or were maintained with a discriminatory prupose but also those that had a discriminatory result. In *Gingles*, the Supreme Court considered a claim of vote dilution, that is, a claim that the voting power of African-Americans had been diluted by submerging black voters in white majority districts, where they could not win, in the light of the 1982 amendments to Section 2. The Court held that, in order to establish a claim of vote dilution under Section 2, the following "necessary preconditions" had to be met: (1) the minority group has to be 'sufficiently large and geographically compact to constitute a majority in a single-member district;" (2) the minority group has to be "politically cohesive;" and (3) the majority must vote "sufficiently as a bloc to enable it... usually to defeat the minority's preferred candidate."[11]

The Court explained that it did not have to decide what to do when the minority group was "not sufficiently large and compact enough to constitute a majority in a single-member district."[12] It could not, however, escape that question because the trajectory and the associated litigation drove it that way. In the round of redistricting that followed the 1980 census, black majority districts were generally drawn with minority populations well over 50% because of a belief that African-American voters would be slow to participate in elections.[13] With time and increases in the registration and participation rates of African-American voters throughout the South, those "packed" districts could be "cracked" to the point that, while safe minority-majority districts remained, some minority voters, who could be counted on to vote for Democratic candidates, could be put into new districts to increase the chance that Democratic candidates might be elected. Subsequently, in several decisions that followed the post-1990 Census round of redistricting, the Court noted that it had not decided that question and again deferred its consideration.[14] *Bartlett*, thus, represents an end to almost twenty years of deferring the question.

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The Proceedings in North Carolina

Bartlett arose from North Carolina's attempt to redraw House District 18 and the rest of its legislative districts after the 2000 census. HD 18 had been a majority African-American district under the previous plan which was based on the 1990 census, but it could no longer be drawn as a Shaw-compliant geographically compact African-American majority district because of changes in the distribution of the population.[15] Moreover, two decisions of the North Carolina Supreme Court greatly restricted the state's ability to split counties when drawing its new plans. In those decisions, the court held that two sections of the North Carolina Constitution known as the "Whole County Provisions," which taken together provide that "[n]o county shall be divided in the formation" of a state senate or house of representatives district, had to be given effect unless superseded by federal law.[16]

The North Carolina General Assembly decided to split Pender County when it drew HD 18. By itself, Pender County was not populous enough to support its own House District, and neighboring Hanover County had more than enough residents to support two House districts. Rather than keeping Pender County whole, however, the General Assembly split it and combined part of it and part of Hanover County to form HD 18. The African-American voting-age population of the resulting district was 39.96% of the total population.[17]

So drawn, HD 18 is referred to as a "crossover district." Crossover districts fall between majority-minority districts and influence districts. A majority-minority district is, as it says, one in which the minority voting age population is a "numerical, working majority" of the total voting age population in the district.[18] In contrast, while the minority population in a crossover district is less than a majority, that minority population is, "at least potentially, ... large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate."[19] In practice, given that the African-American community votes overwhelmingly for Democratic candidates, this means adding enough white Democrats to the district to form a Democratic majority. Finally, the minority group in an influence district, even though it is smaller than in a crossover district, can "exert a significant—if not decisive—force in the election process."[20]

Dissatisfied by the results of the redistricting process, Pender County and its five county commissioners, both individually and in their official capacities, filed suit contending that the General Assembly had violated the Whole County Provision by splitting Pender County. In response to that contention, North Carolina's election officials argued that Section 2 of the Voting Rights Act required the creation of a crossover district. Using past election results, they asserted that, in order for there to be an opportunity to elect African-American candidates, the district had to have a total population that was at least 41.54% African-American or a voting age population that was at least 38.37% African-American.[21] With a voting-age population that was 39.96%, HD 18 served as an "effective black voting district."[22]

A three-judge trial court appointed pursuant to state law agreed with the state election officials defending the plan. The court held that the creation of a crossover district like HD 18 was required by Section 2 of the Voting Rights Act. The North Carolina Supreme Court disagreed and reversed the trial court. It relied on, among other things, the

> weight of persuasive authority from the federal circuits, the importance of imposing a practicable rule, the necessity for judicial economy, the redistricting responsibility of the General Assembly, and the inherent tension between the need for majority votes to support the crossover district and the need to find majority bloc voting to conclude that Section 2 does not require the creation of crossover districts.[23]

The Proceedings in the Supreme Court

By its terms, Section 2 prohibits the imposition or enforcement of any "qualification or prerequisite to voting or standard, practice, or procedure... 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...."[24] In order to establish a violation of § 1973(a), one must show, "based on the totality of circumstances," that the members of the protected class "have less opportunity than other members of the electorate to participate in the political processes and to elect representatives of their choice."[25]

Justice Kennedy, joined by Chief Justice Roberts and Justice Alito, concluded that, in order to maintain a claim of vote dilution, the minority group must make up more than 50% of the voting-age population in the proposed district. The notion that Section 2 requires the creation of "effective minority districts' is "contrary to the mandate of Section 2."[26] Justice Kennedy explained, "Section 2 does not impose on those who draw election districts a duty to give minority voters the most potential, or the best potential, to elect a candidate by attracting crossover voters."[27] The African-American voters of HD 18 would have to attract crossover voters because, with only 39.96% of the voting age population, they cannot elect a candidate with their own votes.

In addition, requiring the creation of crossover districts "would create serious tension" with the third *Gingles* criterion.[28] That factor requires a finding that the majority votes "sufficiently as a bloc to enable it... usually to defeat the minority's preferred candidate."[29] Justice Kennedy explained, "It is difficult to see how the majority-bloc-voting requirement could be met in a district where, by definition, white voters join in sufficient numbers with minority voters to elect the minority's preferred candidate."[30] The majority either votes as a bloc, or it does not, and one must presume that it does not when a crossover district is drawn.

Furthermore, requiring that the voting-age population of the minority group be greater than 50% provides benefits for both courts and legislators. The 50% rule provides clear, easily applicable guidance. In contrast, if the drawing of crossover districts were required, courts would be put in "the untenable position of predicting many political variables and tying them to race-based assumptions."[31] In Justice Kennedy's view, "Section 2 allows States to choose their own method of complying with the

Voting Rights Act, and… that may include drawing crossover districts."[32] He cautioned that Section 2 is "not concerned with maximizing minority voting strength...."[33] Accordingly, states can draw crossover districts so long as nothing, including state law, prohibits them and must draw minority-majority districts only when the *Gingles* criteria are met.

Justice Thomas, joined by Justice Scalia, concurred in the judgment. Justice Thomas reiterated his view that "[t]he text of Section 2 of the Voting Rights Act of 1965 does not authorize any vote dilution claim, regardless of the size of the minority population in a given district."[34]

Justice Souter wrote a dissenting opinion in which Justices Stevens, Ginsburg, and Breyer joined. Justices Ginsburg and Breyer also wrote their own dissenting opinions. As noted above, Justice Ginsburg wrote to encourage Congress to overturn the plurality's decision.

The dissenting opinions of Justices Souter and Breyer offer different standards for determining when the drawing of a crossover district would be required. Both base their opinions on the premise that crossover districts can be drawn because majority voters do, in fact, cross over. While Justice Souter disagrees with Justice Kennedy's reading of Section 2 and the Court's precedent, Justice Breyer writes to express his disagreement with the contention that the 50% threshold serves administrative interests. For both, though, the command of Section 2 seems to be that minority voting blocs are entitled, wherever possible, to elect their preferred candidate instead of a consensus candidate who draws support from both majority and minority voters. Section 2 does say "representatives of their choice," but that phrase follows and is, of necessity, limited by the phrase "less opportunity than other members of the electorate" in Section 2. As Justice Kennedy explained, "Section 2 does not guarantee minority voters an electoral advantage. Minority groups in crossover districts cannot form a majority without crossover voters. In those districts minority voters have the same opportunity to elect their candidate as any other political group with the same relative voting strength."[35]

Justice Souter views the question whether the minority population that is less than 50% of the total voting-age population in the district will be large enough to support a crossover district as "a question of fact with an obvious answer...."[36] He acknowledges, though, that "[i]t is of course true that the threshold population sufficient to provide minority voters with an opportunity to elect their candidate of choice is elastic…."[37] Elasticity, which equates to the absence of any clear standard, is not a good reason for "an arbitrary threshold," which might otherwise be called a bright-line rule. Some minority populations are too small to support a crossover district: "No one, for example, would argue based on the record of experience in this case that a district with a 25% black population would meet the first *Gingles* condition."[38] Accordingly, the minimum threshold percentage is a question of fact which, a least for now, would have to have an answer somewhere above 25%.

The elasticity of the required threshold showing does not appear to bother Justice Souter. He asserts that the threshold population needed to support a crossover district will "likely shift in the future" and points to the "packing" and "cracking" of black majority districts.[39] Thus, "racial polarization has declined, and if it continues downward the first *Gingles* condition will get easier to satisfy."[40] While Justice Souter puts a bottom limit to the threshold population, there is plenty of room between his 25% floor and the 39.96% at issue with HD 18 for the required drawing of crossover districts. Furthermore, given the trajectory of redistricting and the related litigation since *Gingles*, including the push for crossover districts, and judiciary's confidence in its ability to resolve the difficult questions presented in the drawing of crossover districts, a holding that Section 2 requires the drawing of crossover districts might well have led, with time, to the mandated drawing of influence districts.[41]

For his part, Justice Breyer suggests that "a reasonably administrable mathematical formula more directly tied to the factors in question" can be found.[42] As an example, he suggests "a numerical ratio that requires the minority voting age population to be twice as large as the majority crossover votes needed to elect the minority's preferred candidate."[43] While Justice Breyer's 2:1 ratio appears to set a floor at about 34% (leaving aside questions about how cohesive the minority community is), Justice Breyer asserts that "most districts where the minority population is below 40% will almost never satisfy the 2:1 rule."[44] He does not claim his 2:1 rule is "perfect," it is just "better" than the alternative: "After all, unlike 50%, a 2:1 ratio (of voting age minority population to necessary non-minority crossover votes) focuses directly upon the problem at hand, better reflects voting realities, and consequently far better separates at the gateway likely sheep from likely goats."[45]

Judicial Rationalism and its Consequences

The dissenting opinions of Justices Souter and Breyer rest on a belief in judicial competence. They are confident that, with the help of litigants and their experts, courts can draw these crossover districts even if they must resolve such issues as the falloff rate of minority voters, the rate and durability of majority crossover voting, the degree to which crossover voting is affected by the identity of the candidates, and other such inherently political issues.[46] That confidence is an example of what Anthony Peacock calls "judicial rationalism." Drawing on the work of Friedrich Hayek, who critiqued the notion that government agencies possess the "moral, social, or political knowledge necessary to regulate social and economic life," Peacock asserts that "what Hayek said about the political branches of government is equally true of the judicial branch."[47]

The dissenters' view, which is yet another iteration of "judicial rationalism," conflicts with the courts' understanding of the role in the redistricting process. In 1975, the Supreme Court reiterated "what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislative or other body, rather than of a federal court."[48] The lower courts implicitly recognize this; as Justice Kennedy pointed out, none of the courts of appeals had held that Section 2 requires the creation of crossover districts.[49] The lower courts see that they are being asked to do political work that they, almost uniformly, have no desire to do.

The Court's conclusion, which is that Section 2 permits, but does not require, the drawing of crossover districts, favors the work of legislators. That is appropriate given that it is their job to do the political work of redistricting, and they are competent to do it. The plans they enact are frequently attacked by litigants who want something else, and the conclusion that Section 2 requires the creation of crossover districts would give potential litigants another tool to use when attacking a redistricting plan. In 1973, the Court warned that "the goal of fair and effective representation" would not be "furthered' by replacing legislators with "federal courts which themselves must make the political decisions necessary to formulate a plan or accept those made by reapportionment plaintiffs who may have wholly different goals from those embodied in the official plan."[50] The plurality wisely decided not to make a process that is already marked by litigation more so.

Furthermore, the Court's decision marks a stopping point for the consideration of race in redistricting. As Justice Kennedy wrote, a holding that Section 2 requires the creation of crossover districts "would result in a substantial increase in the number of districts drawn with race as 'the predominant factor motivating the legislature's decision.'"[51] Justice Souter disagrees, contending that legislators are likely to draw only majority minority districts unless someone like a court prompted by a litigant can make them draw a crossover district. In his view, crossover districts, which entail the consideration of race, are needed to help states meet their Section 2 obligations "without any reference to race."[52]

That stopping point may not be permanent. Congress is free to follow Justice Ginsburg's suggestion to amend the VRA to require the creation of crossover districts. To do so now would be tone deaf: Section 5 of the VRA just survived a serious constitutional challenge. More important, in 2008, the United States elected Barack Obama President. The time for considering race in election law in the hope that it will become irrelevant may be over. Congress should recognize change when it comes.

Endnotes

1 556 U.S. __, 129 S. Ct. 1231 (2009).

2 129 S. Ct. at 1260 (Ginsburg, J., dissenting). In her view, the "appropriate reading" of Section 2 is that it requires the creation of crossover districts.

3 *See* 42 U.S.C. § 1973b(a). The use of tests or devices was suspended in any jurisdiction that used them and in which less than 50% of the residents of voting age were registered to vote.

4 For example, in Mississippi, the registration rate for African-American voters increased from 6.7% in 1965 to 76.2% in 2004. Furthermore, while the black registration rate trailed the white registration rate by 63.2% in 1964, it exceeded the white registration rate in 2004. The statistics for Alabama and Georgia are similar.

5 369 U.S. 186, 82 S. Ct. 691 (1962).

6 377 U.S. 533, 84 S. Ct. 1362 (1964).

7 In *Wesberry v. Sanders,* 376 U.S. 1, 84 S. Ct. 526 (1964), the Court held that, with respect to congressional districting plans, equal representation meant that districts had to be equally apportioned "as nearly as is practical." Subsequently, in *Karcher v. Daggett,* 462 U.S. 725, 103 S. Ct. 2563 (1983), the Court rejected the notion that, with respect to congressional plans, a de minimis deviation from absolute equality is permitted. As a result, congressional plans are drawn to extraordinarily tight standards.

In *Avery v. Midland County, Tex.,* 390 U.S. 474, 88 S. Ct 1114 (1986), the Court held that one-person, one-vote standards apply to the districts of local governmental bodies. Unlike with congressional redistricting, though, State and local government bodies have some leeway to draw districts that are not equally populated.

8 Reynolds v. Sims, 377 U.S. at 565, 84 S. Ct at 1383.

9 Anthony A. Peacock, Deconstructing the Republic (2008); *see also* George F. Will, *Voting Rights Gone Wrong*, Wash. Post (Mar. 15, 2009), A-19 ("Because of judicial interpretations and legislative amendments, [the Voting Rights Act] now *requires* racial discrimination in the name of *guaranteeing* effective voting by certain preferred minorities (blacks and Hispanics).")(emphasis in original).

10 478 U.S. 30, 106 S. Ct. 2752 (1986).

11 *Id.*, 478 U.S. at 50-51, 106 S. Ct. at 2766-67.

12 *Id.* 478 U.S. at 46, n. 12, 106 S. Ct. at 2764, n. 12.

13 *See, e.g.,* 129 S. Ct. at 1254 (Souter, J., dissenting)(citing Richard Pildes, *Is Voting Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C.L. Rev. 1512, 1527-32 (2002)).

14 *See* Johnson v. De Grandy, 512 U.S. 997, 1008-09, 114 S. Ct. 2647, 2656 (1994); Voinovich v. Quilter, 507 U.S. 146. 154, 113 S. Ct. 1149, 1155 (1993); Growe v. Emison, 507 U.S. 25, 40, n. 5, 113 S. Ct. 1075, 1984, n.5 (1993).

15 In *Shaw v. Reno,* 509 U.S. 630, 113 S. Ct. 2816 (1993), and its progeny, the Supreme Court concluded that the drawing of bizarrely configured districts in order to create black majority districts constituted unconstitutional racial gerrymandering.

16 *See* Stephenson v. Bartlett, 3N.C. 354, 562 S.E.2d 2002); Stephenson v. Bartlett, 357 N.C. 301, 582 S.E.2d 247 (2003).

17 In the plurality opinion, Justice Kennedy notes that, if the North Carolina General Assembly had not split Pender County, the African-American voting-age population of the resulting district would have been 35.3% of the total voting-age population. 129 S. Ct. at 1239.

18 129 S. Ct. at 1242.

19 *Id.*

20 Georgia v. Ashcroft, 530 U.S. 461, 470, 123 S .Ct. 2498, 2506 (2003); *see also* 556 U.S. at ___, 129 S. Ct. at 1242 (In an influence district, the minority population can "influence the outcome of an election even if its preferred candidate cannot be elected.").

21 Pender County v. Bartlett, 649 S.E.2d 364, 367 (2007).

22 *Id.*

23 *Id.* at 506.

24 42 U.S.C. § 1973(a).

25 42 U.S.C. § 1973(b)

26 129 S. Ct. at 1243.

27 *Id.*

28 *Id.* at 1244.

29 Thornburg v. Gingles, 478 U.S. at 51, 106 S. Ct. at 2766-67.

30 129 S. Ct. at 1244.

31 *Id.*

32 *Id.* at 1248.

33 *Id.*

34 *Id.* at 1250. Justice Thomas first expressed that view in his concurring opinion in *Holder v. Hall,* 512 U.S. 874, 891, 114 S. Ct. 2581 (1994)(Thomas, J., concurring).

35 129 S. Ct. at 1246-47.

36 *Id*. at 1250 (Souter, J., dissenting).

37 *Id*. at 1253 (Souter, J., dissenting).

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

39 *Id*.

40 *Id*.

41 *But cf.* 129 S. Ct. at 1242 ("The Court has held that §2 does not require the creation of influence districts, [League of United Latin American Citizens v. Perry, 548 U.S. 399, 445-46, 126 S. Ct. 2594, 2525-26 (2006)(Opinion of Kennedy, J.").

42 129 S. Ct. at 1261 (Breyer, J., dissenting).

43 *Id*.

44 *Id*. at 1262.

45 *Id*.

46 *See* 129 S. Ct. at 1244-45 (Justice Kennedy notes that, if courts had to decide when crossover districts are required, they would be placed in the "untenable position of predicting many political variables and tying them to race-based assumptions.").

47 Peacock, *supra* note 9, at 2-3.

48 Chapman v. Meier, 420 U.S.1, 27, 95 S. Ct. 751, 766 (1975); *see also* Gaffney v. Cummings, 412 U.S. 735, 749, 93 S. Ct 2321, 2329 (1973) ("From the very outset, we recognized that the apportionment task... is primarily apolitical and legislative process.").

49 556 U.S at ___, 129 S. Ct. at 1246 (citing cases).

50 Gaffney v. Cummings, 412 U.S. at 749, 93 S. Ct. at 2329.

51 129 S. Ct. at 1247 (quoting Miller v. Johnson, 515 U.S. 900, 916, 115 S. Ct. 2475 (1995).

52 129 S. Ct. at 1258 (Souter, J., dissenting).