THE MURKY MISINTERPRETATION OF THE VOTING RIGHTS ACT: DIVINING SECTION TWO CLAIMS AFTER *BARTLETT V. STRICKLAND* AND THE 2010 CENSUS

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I. INTRODUCTION

For many Americans, voting is merely a civic duty. For others, it is a privilege won by decades of activism. For still others, it is an opportunity to sound their voices in the spirit of democracy. Yet, for all the passion that the vote generates, the intricacies of its processes are unfamiliar terrain to many Americans. Congress uses apportionment and redistricting to shape the way American votes play out in politics. Apportionment is the allocation of the 435 United States House of Representatives seats among the states by population, while redistricting is the delineation of the state districts according to each state's share of the 435 congressional seats.[1] The process is simple enough in theory, but several factors make the practical application of these processes difficult. The primary focus of this Article will be on the factors that have the potential to change the redistricting process, as well as the racial discrimination that can occur as a result of the current process.

The Voting Rights Act of 1965 ("VRA")[2] is one of the most important factors affecting redistricting. The VRA limits the manner in which legislatures may draw district lines so that districts do not splinter or dilute the minority vote. Since its enactment in 1965, Congress has amended the VRA four times, each time with the purpose of preventing racial discrimination in voting practices.[3] However, despite Congress's tinkering, the VRA has not always lived up to its purpose in practice. The language of the VRA remains ambiguous and subject to varying judicial interpretations. In fact, various Supreme Court decisions have partly stripped away the VRA's power to protect voting minorities by creating additional obstacles for minority plaintiffs to secure a remedy. The most recent of

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[1] 2 U.S.C. § 2a(a)-(c) (2006).

[2] Voting Rights Act of 1965, 42 U.S.C. §§ 1973(a)–(b) (2006); *see infra* Part II for an analysis of the VRA.

[3] Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973-1973c, 1973f, 1973h-1973, 1973n-1973q, 1973aa-1973-1973bb1 (2006)). Congress amended the VRA in 1970, 1975, 1982, and 2006. *See* 42 U.S.C. §§ 1973(a)–(b) (2006).

these decisions is *Bartlett v. Strickland*,[4] which has made it more difficult for affected minority plaintiffs to bring a claim or seek relief under the VRA.[5]

The second obstacle for VRA plaintiffs is the 2010 Census.[6] In 2010, the United States Census Bureau conducted its decennial population count, which determines the distribution of government funds, school district configuration, and most importantly, congressional districts for federal and state governments.[7] Although the 2010 Census continued to ask respondents to classify themselves by race, the Census Bureau determined that the short ten question form ("the short form") was sufficient to glean the relevant information and discontinued the longer, more in-depth survey ("the long form").[8]

The Census also failed to question recipients' citizenship or voting eligibility,[9] questions which have an important impact on the redistricting process. Viewed in light of the *Bartlett* decision, the 2010 Census makes it more difficult for VRA plaintiffs to bring claims because the Census requires courts to rely on unpredictable and incomplete data in assessing VRA claims and their potential remedies.[10]

This Article will address the current standard for plaintiffs bringing claims under the VRA, the *Bartlett* opinion and its reinterpretation of the VRA, and the effect that the 2010 Census will have on plaintiff's claims under Section Two ("Section 2") of the VRA. This Article suggests that in light of the recent changes to Section 2, the time has come to articulate a more workable standard for

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[4] Bartlett v. Strickland, 556 U.S. 1 (2009).

[5] *See infra* Part III, Section A.

[6] *See infra* Part III, Section B.

[7] United States Census Bureau, *An Introduction to the 2010 Census*, *available at* http://2010.census.gov/partners/pdf/overview_dropin.pdf.

[8] United States Census Bureau, *The 2010 Census and the American Community Survey*, *available at* http://2010.census.gov/partners/pdf/2010_acs_dropin.pdf. The American Community Survey ("ACS") is an annual survey of approximately 1 in 1,000 households. *See infra* notes 100-04 and accompanying text.

[9] *See infra* Part III, Section B.1 (the Census has never asked for an individual's voting eligibility or citizenship status); *see, e.g.*, *infra* note 104 and accompanying text.

[10] *See infra* Part III, Section B.2.

plaintiffs bringing Section 2 claims. Currently, state legislatures rely on Census data to reconfigure congressional districts. The Census data provides legislatures with both a total population and a voting age population ("VAP"), which is then used to proportion districts based on the number of individuals living in them.

This Article proposes that a more accurate method would be to utilize the citizen voting-eligible population ("CVEP") to construct districts within states.[11] CVEP would exclude all those persons within the district who could not vote in elections such as non-citizens and disenfranchised felons.[12] This method will benefit Section 2 plaintiffs in creating remedial districts under the VRA when legislatures must examine the minorities' opportunity to elect representatives of choice.

The substance of this Article will be divided into the following sections. Part II will provide a focused history of 42 U.S.C. § 1973 (the VRA), specifically, claims brought under Section 2 of the statute and their evolution since 1965. Part III will discuss the Supreme Court's decision in *Bartlett v. Strickland*, examine the role of the 2010 Census, and evaluate the impact both of these changes will have on Section 2 plaintiffs. Part IV notes the lack of a clear redistricting standard and argues that allowing plaintiffs to use their chosen population methods at each phase of Section 2 litigation will both benefit Section 2 plaintiffs and provide a more accurate count of citizens within district lines.

II. THE VOTING RIGHTS ACT OF 1965

A. A Brief History

Although this Article will not focus on every section of the VRA, a brief discussion of the Act's purpose and basic structure will help to clarify some of the problems currently afflicting the VRA's application. Congress passed the Voting Rights Act in 1965 with the purpose of enfranchising African-American voters after the 1957 and 1960 voting rights provisions and 1964 Civil Rights Acts failed

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[11] This concept is an adaptation of Dr. Michael McDonald's use of CVEP to provide a more accurate voter turnout percentage. *See generally* Dr. Michael McDonald, *United States Election Project*, http://elections.gmu.edu/index.html (last visited Oct. 24, 2011).

[12] *See infra* Part IV.

to provide a meaningful remedy.[13] The VRA prohibits states, counties, and municipalities from abridging or denying the right to vote, in purpose or effect, because of race or color.[14] Over the years, Congress has broadened the VRA to include protection for language minorities such as Asian Americans, Alaskan Natives, citizens of Spanish descent, and American Indians.[15] The VRA contains both permanent sections and sections that will lapse if not renewed by Congress periodically.[16] The section most relevant to this Article, Section 2, is a permanent provision of the VRA.[17]

B. Relevant Provisions of § 1973: Section 2 of the VRA

Section 2 provides that no state or local government may enact a "voting qualification or prerequisite" which effectively denies or abridges any citizen's right to vote because of their race, color, or language minority status.[18] A violation of Section 2 in the VRA is established if, under the "totality of the circumstances," those citizens protected under subsection (a) can show that they had "less opportunity than other members of the electorate" to exercise their

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[13] *See* JOSEPH G. COOK & JOHN L. SOBIESKI, JR., CIVIL RIGHTS ACTIONS 18.02 at 18-4, (2011). Congress has the authority to implement voting regulations under Article I § 4 of the Constitution and the Fourteenth and Fifteenth Amendments. *Id*.

[14] Allen v. State Bd. of Elections, 393 U.S. 544, 548–49 (1969).

[15] *See* Pub. L. No. 94-73, 89 Stat. 400 at 402 (codified as amended at 42 U.S.C. § 1973aa-1a(e) (2006)).

[16] *See* COOK & SOBIESKI, JR. *supra* note 13, at 18-5. For example, Congress must renew Section 4, which automatically covers all cities, counties, or states that implemented a voter qualification device and had a less than fifty percent of their voting population registered prior to November 1, 1964. *Id*. at 18-4. Congress must also periodically renew Section 5 ("preclearance"), which requires those automatically covered voting districts to obtain the approval of the Attorney General before making any changes to their voting schemes. *Id*. at 18-4, 18-5. The states covered under sections 4 and 5 are Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Virginia, Texas, and counties or townships of California, Florida, New Hampshire, New York, North Carolina, Michigan, and South Dakota. 28 C.F.R. § pt. 51 app. (2006). Sections 4 and 5 were both renewed under the Fannie Lou Hammer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006. *See* Pub. L. No. 109-246, 120 Stat. 577 (codified as amended in scattered sections of 42 U.S.C.).

[17] *See* COOK & SOBIESKI, JR. *supra* note 13, at 18-5.

[18] 42 U.S.C. § 1973(a) (2006).

voting rights.[19] In other words, the affected citizens must show that the voting practices diluted their voting strength. Vote dilution usually occurs in one of two ways -- legislatures either splinter the district and scatter minority voters throughout several districts to render their voting power inconsequential ("cracking"), or legislatures pack an excessive number of minority voters into a district to diminish their voting power in neighboring districts ("packing").[20] Section 2 aims to prevent the dilution of minority voters by requiring states to draw districts allowing minorities the opportunity to elect candidates of their choice. It is not required, however, that the ability to elect be in proportion to the minority population in the district.[21]

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[19] *Id.* §1973(b). The full text of § 2 reads:

> (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, or in contravention of the guarantees set forth in section § 1973b(f)(2) of this title, as provided in subsection(b).
> (b) A violation of subsection (a) 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 (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. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Id.

[20] Thornburg v. Gingles, 478 U.S. 30, 46 n.11 (1986); *see infra* Part II, Section B.1.

[21] *See* Johnson v. DeGrandy, 512 U.S. 997, 1014 n. 11 (1994) (". . . [T]he ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race").

In 1980, the Supreme Court interpreted Section 2 to require that plaintiffs show discriminatory intent in order to proceed with a claim under the VRA.[22] Congress responded by amending Section 2 in 1982 to explicitly remove the burden of proof requiring discriminatory intent.[23] This amendment created the "results test," wherein the focus of the inquiry is the actual result of the voting practice and not the motive behind it.[24] The tension between the Court's interpretation and Congress' intent in enacting the VRA manifests itself in the last forty years of back-and-forth between the Court's case law and Congress' amendments, culminating in the current standard for a Section 2 claim.

1. The Three-Prong "Gingles" Test

In conjunction with the 1982 amendment, the Senate Committee promulgated a non-exclusive list of factors that courts may rely on when examining a Section 2 claim.[25] However, it was not until 1986, when a challenge

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[22] *See* City of Mobile v. Bolden, 446 U.S. 55, 66 (1980) ("To prove such a purpose it is not enough to show that the group allegedly discriminated against has not elected representatives in proportion to its numbers.").

[23] 42 U.S.C. § 1973(b) (2006).

[24] *See Gingles*, 478 U.S. at 63 ("It is the *difference* between the choices made by blacks and whites—not the reasons for that difference—that results in blacks having less opportunity than whites to elect their preferred representatives. Consequently, we conclude that under the "results test" of § 2, only the correlation between race of voter and selection of certain candidates, not the causes of the correlation, matters.").

[25] *See* S. REP. NO. 97-417, at 28–29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 207 (listing seven factors courts may rely on in evaluating the validity of a § 2 claim):

> 1) the history voting-related discrimination in the state or district; 2) the extent of racially polarized voting in that area; 3) the extent to which the state or political subdivision has used discriminatory procedures in the past; 4) the exclusion of minorities from the candidate slating process; 5) the extent to which minority group members bear the effects of discrimination make it difficult to participate in the political process; 6) the use " racial appeals" in political campaigns; and 7) election of minority members in the past). Two additional factors are persuasive in plaintiff's evidence of vote dilution: Whether there is a "significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group," and "whether the policy underlying the state or political subdivision's use of such voting

under the amended Section 2 came before the Supreme Court, that the judiciary had its first opportunity to articulate a well-defined structure for Section 2 claims.[26] This structure has given some meaning to the ambiguity of Section 2. Under what is now known as the "*Gingles* test," the Court laid out three preconditions that minority plaintiffs must satisfy before a minority group can proceed with a claim under Section 2.

As a threshold inquiry, the minority group must demonstrate that it is "sufficiently large and geographically compact to constitute a majority in a single-member district,"[27] such that it would be practical to draw a district containing it ("*Gingles* I").[28] The group must also show its political cohesion, or, in other words, its propensity to vote for the same candidate ("*Gingles* II").[29] Lastly, the minority group must show that the majority group votes consistently in a bloc, enabling it to defeat the minority-preferred candidate absent special circumstances (*Gingles* III).[30] The premise of this analysis is that in a district where majority and minority voters consistently prefer different candidates, the majority vote will dilute the minority vote, resulting in unequal voting opportunities. Under the *Gingles* test, the Court will only proceed with the Section 2 analysis if a minority group can demonstrate all three preconditions.[31] Plaintiffs can, however, usually

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> qualification, prerequisite to voting, or standard, practice or procedure is tenuous."

Id.

[26] *See Gingles*, 478 U.S. at 34.

[27] *Id*. at 50. A single-member district is that in which a "a single representative is elected by the voters within that geographic area to represent that area." Steven J. Mulroy, *The Way Out: A Legal Standard for Imposing Alternative Electoral Systems as Voting Rights Remedies*, 33 HARV. C.R.-C.L. L. REV. 333, 334 at n.5 (1998). This differs from a multi-member district, which elects more than one official per district. *Id*.

[28] *Gingles*, 478 U.S. at 50.

[29] *Id.* at 51.

[30] *Id.*

[31] *Id.* at 79. Although *Gingles* only applied to at-large, multi-member districts, the Court has since extended this analysis to single-member districts also. *See* Growe v. Emison, 507 U.S. 25, 40–41 (1993). *Growe* also seemed to assume the legitimacy of coalition suits, although the Court did not address the issue directly. *Id.* at 41 n.5.

establish liability by presenting illustrative districts in which it is possible to satisfy all three preconditions.[32]

To establish liability under the first *Gingles* factor, in particular, minority group plaintiffs must present an illustrative district demonstrating that the minority group is "sufficiently large and geographically compact" to constitute a majority in the district.[33] Without evidence that such potential ever existed, claims that the legislature has diluted their voting strength hold little merit.[34] Once satisfied of the government's liability, the district court may then "exercise its traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens . . . to elect candidates of their choice."[35] As such, the kind of illustrative district on which the plaintiffs rely can be instrumental in the success or failure of their claim.

2. The Totality of the Circumstances

If a vote dilution claim satisfies the *Gingles* test, courts will then evaluate the claim using a "totality of the circumstances" analysis to determine whether legislatures have denied minorities equal access to the electoral process.[36] Pursuant to this test, the Supreme Court has instructed courts to use the seven factors dictated by the 1982 Senate Committee,[37] past evidence of a state's discrimination, the existence of racial tension, and any obstacles that may prevent minorities from voting or dilute their voting strength.[38] As the Senate factors are not dispositive of vote dilution, plaintiffs are also free to present additional factors

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[32] *See* Mulroy, *supra* note 27, at 364; *see also infra* text accompanying notes 154–61.

[33] *Gingles*, 478 U.S. at 50 n.17.

[34] *Id.*

[35] S. REP. NO. 97-417 at 31 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 208; *see infra* Part IV, Section A–B (arguing a broader population standard should be used for the liability phase, while a more narrow standard should be used at the remedy phase).

[36] 42 U.S.C. § 1973(b) (2006).

[37] *See supra* note 25 and accompanying text.

[38] *See id*.

that demonstrate race-based vote dilution.[39] Courts may also consider, for example, the ratio of minorities in the population of a district to the number of districts controlled by minorities, the ability of a minority to succeed in an election, as well as the state's interest in maintaining the challenged electoral plan.[40] The satisfaction of the three *Gingles* factors and demonstration of vote dilution under the totality of the circumstances inquiry establishes a plaintiff's prima facie case. Establishing such case, however, after the *Bartlett* decision is far more difficult than it appears.

III. CHANGING THE FACE OF SECTION 2 CLAIMS

A. Bartlett v. Strickland

In 2009, the Supreme Court's narrow 5-4 plurality opinion in *Bartlett v. Strickland* effectively changed the parameters of the *Gingles* test.[41] More specifically, *Bartlett* further expounded on the interpretation of *Gingles* I: whether the minority group is sufficiently large and geographically compact to constitute a majority in the district.[42] In *Bartlett*, North Carolina's assignment of several districts violated the state constitution's "whole county" provision, which bans the splitting of counties when drawing legislative districts.[43] The split counties, in turn, sued Dwight Strickland, the Director of the State Board of Elections, among others. In a unique turn of events, the defendants responded by invoking Section Two of the VRA as a defense, claiming that splitting the counties prevented dilution of the black voting population.[44] To succeed with this defense, the

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[39] Rodriguez v. Pataki, 308 F. Supp. 2d 346, 372–73 (S.D.N.Y. 2004), *aff'd*, 543 U.S. 997 (2004).

[40] *See* League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 426 (2006); *see also* JUSTIN LEVITT WITH BETHANY FOSTER, BRENNAN CENTER FOR JUSTICE, A CITIZEN'S GUIDE TO REDISTRICTING 45 (2008), http://brennan.3cdn.net/58180b7e66ce3d66bb_5sm6bvr97.pdf (discussing a summary of the factors courts examine in a vote-dilution claim).

[41] *Bartlett*, 556 U.S. 1.

[42] *Id.* at 12.

[43] *Id.* at 8.

[44] *Id.* Usually *minorities* invoke Section 2 as the basis for their claim. The African American voting-age population had fallen below 50% making it impossible for the legislature to draw a geographically compact majority-minority district. *Id.* In splitting Pender County, the African American voting-age population was 39.36% but if left whole, the African American voting-age

election board and its official had to demonstrate that not splitting the counties would result in a Section 2 violation.[45]

The trial court found that the African-American plantiffs satisfied all three *Gingles* preconditions, reasoning the minority group was sufficiently large and geographically compact when viewed with the support they could receive from "crossover" majority voters.[46] The Supreme Court of North Carolina, however, disagreed with this analysis.[47] On appeal, the North Carolina Supreme Court reversed, concluding that Section 2 of the VRA required that a minority group must comprise fifty percent of the voting-age population in a district before the minority group can raise a vote dilution claim.[48] Under this ruling, the North Carolina Supreme Court ordered the Pender County district redrawn because there had been no violation of Section 2.[49]

In its plurality opinion, the Supreme Court of the United States focused on the trial court's deliberation over the first *Gingles* factor — specifically, how the Court should interpret what qualifies a group as sufficiently large and geographically compact? *Bartlett* marks the first case in which the Supreme Court addressed the minimum size of minority groups necessary to satisfy the first *Gingles* requirement.[50]

To begin its analysis of this question, the Court looked to the remedial minority districts created under Section 2 in prior cases. Only by determining which remedies plaintiffs have been allowed in the past could the Court determine

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population would have been only 35.33%. *Id.*; *see also* Pender Cnty v. Bartlett, 649 S.E.2d 364, 366 (2007).

[45] *Bartlett*, 556 U.S. at 8.

[46] In this case, crossover majority voters are created when minority voters persuade some members of the majority to cross over and join their voting practices for a particular candidate. *See id.* at 9-14.

[47] *Id.* at 9.

[48] *Id.*

[49] *Id.*

[50] *Id.* at 9.

whether a minority under fifty percent could satisfy Section 2.[51] The most common remedy for vote dilution is a majority-minority district in which the minority group makes up a "working majority" of the voting-age population in a district.[52] Under a majority-minority district, the minority group has an almost undisputed ability to elect its preferred candidate.[53] In contrast, Section Two does not require the implementation of "influence districts" in which the minority groups merely influence the election outcome in the district but may not be able to secure the election of their preferred candidate.[54] The Court explained that the "crossover" or "coalitional" district, implicated in *Bartlett*, falls between the majority-minority district and an influence district.[55] In a crossover district, minority groups do not comprise fifty percent of the district, but may still be large enough to elect a candidate of their choice with the help of majority voters who support the minority candidate.[56] To decide whether such districts satisfied the first *Gingles* requirement, the Court had to resolve whether a crossover district could serve as a constitutional remedy under Section 2.[57]

The Court found that crossover districts were not necessary under Section 2 and in fact, would cause tension in the application of precedent.[58] Furthermore, the Court opined that determining whether potential districts could operate as crossover districts would require too much guesswork and too many variables for courts to consider.[59] The main thrust of the Court's reasoning was that the VRA does not guarantee minority voters *preference* in the electoral arena, only the

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[51] *See supra* text accompanying notes 38–40 (noting that the creation of an illustrative district is essential for Section 2 plaintiffs to show both vote dilution and that a remedy exists).

[52] *See, e.g.,*Voinovich v. Quilter, 507 U.S. 146, 154 (1993).

[53] *Id.*

[54] *See, e.g.*, *Perry*, 548 U.S. at 445 (2006) (stating minorities merely exerting an influence in the election is not enough to meet the threshold of "electing representatives of their choice").

[55] *Bartlett*, 556 U.S. at 13; *see e.g.*, Georgia v. Ashcroft, 539 U.S. 461, 483 (2003).

[56] *Id.*

[57] *Id.* at 1243.

[58] *Id.* at 1244.

[59] *Id.* at 1244–45.

potential to exercise their voting rights.[60] Although the Court recognized that the *Gingles* factors should not be applied mechanically, it favored the implementation of a bright-line fifty percent rule.[61] In essence, under the *Bartlett* holding, a minority plaintiff will only satisfy all three *Gingles* factors if it comprises a legitimate majority of citizen voting-age population in the district (fifty-one percent or more); otherwise, Section 2 will not provide protection for those minority groups under the VRA.

1. What Does Bartlett Mean for the Future of Section 2 Claims?

Although *Bartlett* provides courts with a bright-line rule, it also made it more difficult for Section 2 plaintiffs to bring claims. Instead of allowing the examination of the minority bloc for sufficient size and cohesiveness, the plurality opinion forecloses claims from minorities in influence or crossover districts. Although legislatures may draw crossover districts on their own, minority plaintiffs will not have a claim under the VRA if those crossover districts dilute the minority vote. Moreover, states may no longer invoke Section 2 to justify their altruism in favorable district drawing. The *Bartlett* holding states that minority voters who make up fifty percent or less of the voting-age population in a district do not have the requisite size to "elect representatives of their choice."[62]

The legislature's ability to address minority vote dilution has been limited to circumstances in which the minority constitutes a majority of the district. As a result, state legislatures, like North Carolina's, will have difficulty raising the VRA as preemptive remedy for minority vote dilution.[63] The *Bartlett* holding seemingly encourages states to "pack" minority voters into districts in the interest

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[60] *See* Johnson v. De Grandy, 512 U.S. 997, 1014 (1994) ("And the proviso also confirms what is otherwise clear from the text of the statute, namely, that the ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race").

[61] *Bartlett*, 556 U.S. at 19.

[62] *Bartlett*, 556 U.S. at 19 (Souter, J., dissenting).

[63] *See* Terry Smith, *Disappearing Districts: Minority Vote Dilution Doctrine as Politics*, 93 MINN. L. REV. 1680, 1681 (2009) (critiquing the North Carolina Supreme Court ruling by arguing that it is counter to the amended Section 2 because the ruling presents difficulties the 1982 amendment was meant to eradicate).

of reaching the fifty percent threshold, but with the unintended -- or possibly intended -- consequence of diluting their vote in other districts in the state.[64] Alternatively, legislatures can also dismantle districts with less than fifty percent minority voting-age populations without fear of Section 2 claims. As a result, the *Bartlett* decision increases vote dilution, while simultaneously decreasing the availability of remedies under the VRA.

2. Criticism of the Bartlett Holding

In light of *Bartlett* and the 2010 Census changes, the influence of Section 2 for minority voters trying to bring claims under the VRA is murky.[65] *Bartlett*'s greatest impact will be felt by the very minorities most often affected by vote dilution, African Americans and Hispanics. Although a voting minority of thirty-nine percent may be able to elect representatives by banding together with other minorities or whites in the district, the *Bartlett* plurality reasoned that such numbers alone are not enough to elect a preferred candidate.[66] Instead, the Court determined that approving coalition districts would give voting minorities of less than fifty percent undue assistance in electing their candidates; a result that Section 2 does not warrant.[67] This narrow ruling limits the districts that will be able to elect representatives of their choice.

The Court overlooked several important factors in deciding *Bartlett*, most notably, the potency of the coalition district and the rarity of majority-minority districts. Requiring fifty percent or more minorities will diminish minorities' ability to elect a representative of their choice with the help from crossover voters. In 2007, only twenty-one of the forty-two members of the Congressional Black Caucus were elected from a majority-minority district of fifty percent of greater.[68]

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[64] *Bartlett*, 556 U.S. at 19.

[65] *See infra* Part III, Section B. (discussing of the 2010 Census' impact on the VRA and Section 2 claims).

[66] *Id.*

[67] *Id.*

[68] Smith, *supra* note 63, at 1685 (construing the 2007 U.S. Census Bureau, American Community Service 110th Congressional District Summary File "District by Race for Persons 18 Years or

It is increasingly difficult for minorities, such as African Americans, to achieve a fifty percent majority when they are faced with vast population dispersal and a disproportionate number of individuals under the voting age.[69] Specifically, the 2000 Census reported that 31.4 percent of African Americans were under the age of eighteen,[70] compared to only 23.5 percent of Whites.[71] Further, African Americans living in majority-black congressional districts currently experience the greatest population decreases.[72] These two factors will make it much more difficult for African Americans to claim vote dilution under Section 2.[73]

Older" to infer that the remaining 21 representatives were elected with crossover support). This reliance on cross-over support is not a new phenomenon. *See* Carol M. Swain, *The Future of Black Representation*, THE AMERICAN PROSPECT, Sept. 21, 1995, at 1, *available at* http://www.prospect.org/cs/articles?article=the_future_of_black_representation ("Black Democrats Ronald Dellums, Alan Wheat, and Bill Clay and black Republicans Gary Franks and J.C. Watts have shown that white voters in congressional elections will support black candidates").

[69] *See* Smith, *supra* note 63, at 1685-86. ("Majority-black congressional districts were also among those losing the greatest overall population between 2000 and 2007. Of the twenty-five congressional districts experiencing the greatest population decreases during this period, nine are majority-black and thirteen are represented by blacks."); *see also* Swing State Project, Population Change by Congressional District, Sept. 3, 2008, http://swingstateproject.com/showDiary.do;jsessionid=0B6B8CFBE4FDC8C8F577068F42D5FF3F? diaryId=2952 (ranking the congressional districts with the greatest population losses between 2000 and 2007).

[70] U.S. Census Bureau, Black or African American Population, by Age and Sex for the United States: 2000, Feb. 25, 2002, http://www.census.gov/population/www/cen2000/briefs/phc-t8/tables/tab03.pdf.

[71] U.S. Census Bureau, White Population, by Age and Sex for the United States: 2000, Feb. 25, 2002, http://www.census.gov/population/www/cen2000/briefs/phc-t8/tables/tab02.pdf

[72] *See* Smith, *supra* note 63, at 1686. This trend in population dispersal will likely increase after the 2010 Census reports.

[73] This problem is not unique to the African American population. Hispanic voters also face population dispersal. *See* Roberto Suro and Sonya Tafoya, *Dispersal and Concentration: Patterns of Latino Residential Settlement*, PEW HISPANIC CENTER, Dec. 27, 2004, at 1, *available at* http://pewhispanic.org/reports/report.php?ReportID=36. The article provides:

> This Pew Hispanic Center report reveals that some 20 million Hispanics—57 percent of the total—live in neighborhoods mostly populated by non-Hispanics. Rather than clustering in ethnic enclaves, these Latinos, including large shares

Moreover, the *Bartlett* holding seems to be contrary to the congressional intent behind enacting Section 2 of the VRA -- allowing minority voting plaintiffs an opportunity to remedy vote dilution. The plurality holding in *Bartlett* favored a fifty percent threshold because it represented the lowest percentage that still afforded minority voters the opportunity to elect representatives of their choice.[74] However, the plain language of Section 2 gives no indication that Congress intended majority-minority districts to be the only available remedy to Section 2 plaintiffs or the only way to satisfy the first *Gingles* requirement.[75] Minority voter success in a district changes, and conditions may not be so clear-cut as to justify a bright-line fifty percent rule.

For example, historically, minority success in a district depended on crossover support even when the African-American citizen voting-age population constituted fifty-five percent.[76] Indeed, the North Carolina Supreme Court has already recognized that districts with an African American population of only

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> of the immigrant and low-income populations, are scattered in neighborhoods where on average only seven percent of the residents are Hispanics.
>
> In addition, Hispanic voters may appear to have a voting population higher that what actually exists due to non-voting immigrants being counted in the district totals.

Id.; see U.S. Census Bureau, *The Whole Story*, http://www.census.gov/population/apportionment/about/faq.html#Q8 (last visited Oct. 24, 2011) (stating the Census has never differentiated between citizens and non-citizens).

[74] *Bartlett*, 556 U.S, at 19 (Souter, J., dissenting).

[75] *Id.* Moreover, *Gingles* made it clear that the reasoning behind the first prong was to provide the potential to elect representatives of minority choice, not to apply a mechanical standard. *See* Thornburg v. Gingles, 478 U.S. 30, 50 n.17 (1986) ("[u]nless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice."); Mulroy, *supra* note 28 at 365 ("[The *Gingles*] language suggests that the nature of the 'challenged structure or practice' controls. Where the plaintiffs do not challenge the use of at-large elections per se, but instead some discrete feature of the particular at-large system being used, a different analysis obtains").

[76] *Id.* at 1256 (Souter, J., dissenting) (citing 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, 1527–28 (2002)).

38.37 percent had the opportunity to elect representatives of their choice.[77] The *Bartlett* plurality, however, concluded that there could be no clear-cut indication of what "magic number" percentage of minority voters is necessary. In fact, it is possible, and even probable, that minority voters can still have the realistic potential to elect representatives of their choice without a numerical majority. [78] Ultimately, the fifty percent threshold is arbitrary and limits the applicability of Section 2 as a remedy.[79]

Courts should, instead, evaluate vote dilution claims on a statewide basis, rather than examining the violating district alone.[80] Section 2 claims are supposed to examine a voting minorities' ability to elect a representative by ensuring a "roughly proportionate" percentage to their population in the state.[81] In other words, *Gingles* I requires courts to compare the statewide minority voting population to the number of districts in the state in which minority voters have the potential to elect a representative of their choice. Thus, if the state has a minority voting age population of fifty percent, but only three of the ten districts allow minorities the potential to elect their chosen representative, the districts are not proportionate. The number of districts with the potential to elect should be roughly proportionate to the minority population of the state.

Eliminating the availability of crossover districts as a remedy discounts two important judicial guidelines. First, it undermines the congressionally-dictated "results test," which emphasizes a focus on the result of the proposed district when looking statewide for roughly proportional voting power.[82] Second, it downplays the Court's holding in *Shaw v. Reno*, which prohibits legislatures from relying on race as an exclusive factor during redistricting.[83] Despite *Shaw*'s

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[77] *See Pender Cnty.*, 649 S.E.2d at 366–67 (2007) ("Past election results in North Carolina demonstrate that a legislative voting district with a total African-American population of at least 41.54 percent, or an African-American voting age population of at least 38.37 percent, creates an opportunity to elect African-American candidates.").

[78] *See infra* notes 87-93 and accompanying text.

[79] *See Pender Cnty*, 649 S.E.2d at 377 (Parker, J., dissenting).

[80] *Bartlett*, 556 U.S. at 30 (Souter, J., dissenting).

[81] *Id.* at 35 (Souter, J., dissenting); s*ee, e.g.*, *Gingles*, 478 U.S. at 63 (1986).

[82] *Id*. at 34 (Souter, J. dissenting).

[83] *Id.* at 34 (Souter, J. dissenting).

constrictions, the VRA's goal is still to allow minorities a fair opportunity to elect their chosen representatives. This further complicates states' attempts to create fair, reasonable, and constitutional districts.

In the post-*Bartlett* era, states must now focus more singularly on race to create viable districts to meet the Section 2 majority-minority obligation[84] and provide minority voters with roughly proportional electoral success. For example, in North Carolina, African Americans constitute fifty percent or more of the voting-age population in only nine districts, whereas there are twelve districts with thirty-nine to forty-nine percent of African American voters.[85] Under the *Bartlett* plurality's approach to Section 2 claims, only the nine majority-minority districts are capable of electing representatives of their choice, while the other twelve are not large enough to bring Section 2 claims or elect their chosen candidates. This unfortunate approach can reduce minority voting effectiveness by authorizing the creation of districts in which the minority comprises less than fifty percent of the population — sometimes as little as twenty percent—without legal consequences. This quandary has created obstacles for both minority plaintiffs and states attempting to create fair electoral districts for minorities. Minority plaintiffs may not bring claims if they constitute less than fifty percent, and legislatures will, in turn, create as many majority-minority districts as possible, eradicating potential crossover districts in the process.[86]

The *Bartlett* plurality placed a great deal of emphasis on the complications of predicting crossover districts and their success.[87] In reality, it is not so difficult to calculate the success of a crossover district. The success or failure of a crossover district depends on the correlation between minority population in a

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[84] *Id.* at 41. Legislatures may not rely on race as the primary factor in redistricting or reapportionment. *See* Shaw v. Reno, 509 U.S. 630, 647 (1993) ("A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid.").

[85] *Bartlett*, 556 U.S. at 42 (Souter, J., dissenting).

[86] *Id.* It is important to realize that crossover districts play an important role in unifying majority and minority voters. By disallowing the use of crossover districts to satisfy Section 2 claims the plurality is eliminating a fair remedy as well as requiring states to rely on race in violation of *Shaw v. Reno*. *See id.* at 33-34 (internal citation omitted).

[87] *Id.* at 17.

district, minority voter turnout, minority cohesion, and the white bloc voting percentage in the district.[88]

For instance, consider two hypothetical districts, each with a forty percent minority voting-age population. These districts may succeed or fail in an area depending on the aforementioned factors.[89] Assume that in district one, minority voters have a lower voter turnout rate (30%) and lower voter cohesion (that is, the minority voters do not have a history of voting for the same candidate) than White voters in the same district (70%). Also assume that district two has minority voter turnout equal to that of White voters and higher voter cohesion (90%).[90] Under

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[88] *See* Allan J. Lichtman & J. Gerald Hebert, *A General Theory of Vote Dilution*, 6 LA RAZA L.J. 1, 10 (1993) (quoting "As the proportion of minority population in a district, the level of minority turnout, and the degree of minority cohesion increase, the levels of white bloc voting needed to defeat minority preferred candidates also increase").

[89] *Id.* at 11.

[90] *See* Lichtman & Hebert, *supra* note 88, at 11 (1993). The table shows the exact calculation as such:

Projected Vote for Minority Candidate of Choice

Two Hypothetical Districts

District 1: Minority Voting
Age Population = 40%

(Minority Turnout = 30% and Anglo Turnout = 40%)

Percent Minority Among Voters = 40x.30/(40x.30+60x.40) = 33%

1. Minority Vote for Minority Candidate	=	.70 x 33%		=	23.1% [FNa1]
2. Anglo Vote for Minority Candidate	=	.20 x 67%		=	13.4% [FNaa1]
3. **Total Vote for Minority Candidate**	=	23.1% 13.4%	+	=	**36.5%**

District 2: Minority Voting
Age Population = 40%

these facts, the White bloc voters would be sufficient to defeat a minority-preferred candidate in district one, but not in district two where minority voter cohesion is much higher in district one.[91] Because crossover districts allow minorities amounting to a majority of the population a reasonable chance to elect representatives, these are consistent with the VRA, and therefore, would be an appropriate remedy for a VRA violation.[92] Crossover districts, unlike influence districts, satisfy Congress' intent that minorities must do more than merely have the opportunity to influence voting.[93]

Crossover districts may even provide a more desirable remedy for Section 2 violations than majority-minority districts, because crossover districts encourage majority and minority cooperation in the electoral process.[94] In order to prove a crossover district's success, plaintiffs need only show that "minority cohesion and turnout, as well as White 'crossover' voting, are sufficiently high enough to enable minorities to elect candidates of their choice."[95] Such an analysis is not an act of judicial divination; rather, it employs a mathematical calculation taken from verifiable percentages. In fact, because *Gingles* II (political cohesion) and III

(Minority Turnout = 30% and Anglo Turnout = 30%)

Percent Minority Voters = 40x.30/(40x.30+60x.30) = 40%

1. Minority Vote for Minority Candidate	=	.90 40%	x	=	36.0% [FNa1]	
2. Anglo Vote for Minority Candidate	=	.25 60%	x	=	15.0% [FNaa1]	
3. Total Vote for Minority Candidate	=	36.0% 15.0%	+	=	51.0%	

FNa1. The minority vote for the minority candidate is the product of minority cohesion (70% in District 1 and 90% in District 2) and the percent minority among voters. FNaa1. The white vote for the minority candidate is the product of white crossover voting (20% in District 1 and 25% in District 2) and the percent white among voters.

[91] *Id.*

[92] *Id.* at 17.

[93] *Id.*

[94] *Id.*

[95] *Id.*

(consistent proof of majority bloc voting) are pre-conditions, courts will already have the numbers necessary to calculate the minority cohesion and white crossover votes.

B. The United States Census

The Constitution mandates that a decennial population count be taken for the purpose of apportioning state delegates in the United States House of Representatives.[96] The process used to carry out this requirement is the United States Census. Apportionment is the use of the Census data to determine the number of representative seats that each state is entitled to hold in the House of Representatives.[97] Redistricting is the use of the decennial survey returns to determine which state representatives (city council members, school board members, and federal and state legislators) represent which districts of the state and who votes in those districts.[98] Redistricting based on the Census data determines where to draw the lines of those districts.[99]

Prior to 2010, the Census used two forms to estimate the population of the United States: the "short form" and the "long form."[100] Beginning in March of the census year, the Census Bureau would mail the short form to every home in the population.[101] This form would ask ten questions, such as the number of

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[96] U.S. CONST. art. I, § 2, cl. 3 ("Representatives . . . shall be apportioned among the several States . . . . The actual Enumeration shall be made within three Years after the first meeting of the Congress of the United States, and within every subsequent Term of ten Years in such Manner as they shall by Law direct.").

[97] *District Decisions*, UNITED STATES CENSUS BUREAU, (2010), *available at* http://www.census.gov/dmd/www/pdf/912ch4.pdf. States can gain or lose seats in the House depending on the fluctuation in their populations. *Id.*

[98] *Id.*

[99] Some states allow redistricting at any time, while others can only redraw district boundaries once every ten years, after the Census. *See id.*

[100] *United States Census 2000 Informational Copy*, UNITED STATES DEPARTMENT OF COMMERCE BUREAU OF THE CENSUS (2000), *available at* http://www.census.gov/dmd/www/pdf/d-61b.pdf.

[101] *See* UNITED STATES CENSUS 2010, http://2010.census.gov/2010census/ take10map/ (last visited Oct. 24, 2011). 72% of the Census forms sent through the mail were returned. *Id.* Census workers hand deliver approximately 9% of the census forms to areas without street numbers or extremely rural communities. *See also 120 Million Households to Begin Receiving 2010 Census Advance*

residents, length of residency, and ownership status of each home, as well as age, race, ethnicity, or gender.[102] The long form only went to approximately one in six households and asked more in-depth questions regarding social and economic characteristics, housing status, and citizenship status.[103] Essentially, the short form provided the population count, and the long form implicated the socio-economic make-up of the population. The short-form Census does not ask questions regarding citizenship, as it counts both citizens and non-citizens alike residing within the United States;[104] however, it still has a substantial effect on redistricting.

The described Census data is the pulse of the redistricting and apportionment process. Because a state's population can change drastically in ten years, the updated Census count provides legislatures an opportunity to manipulate district boundaries to their political advantage, a process called gerrymandering.[105] The release of the 2008 Census population report makes it clear that certain states will gain seats in the House of Representatives due to population increases; those states must, in turn, fill their new vacancies by voting for new representatives.[106] The political party that has a majority in the state will

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Letter, UNITED STATES CENSUS 2010, Mar. 8, 2010, http://2010.census.gov/news/releases/operations/120-million-households-to-receive-advance-letter.html. Census workers also personally visit trailer parks, homeless shelters, nursing homes, and prisons in order to get an accurate count of homeless, transient persons, and migrant workers. *See* UNITED STATES CENSUS 2010, http://2010.census.gov/2010census/take10map/ (last visited Oct. 24, 2011).

[102] *See* UNITED STATES CENSUS 2010, *2010 Census Constituent Facts* 1, 2, http://2010.census.gov/partners/pdf/ConstituentFAQ.pdf (last visited Oct. 24, 2011).

[103] *See* UNITED STATES DEPARTMENT OF COMMERCE BUREAU OF THE CENSUS, 2000 CENSUS FORM 1–40 (2000), http://www.census.gov/dmd/www/pdf/d02p.pdf. The long form asked questions regarding income, employment, migration to and from other states, house value or rent amount, place of birth, ancestry, house structure, veteran status, disabilities, marital status, and education. *Id*.

[104] UNITED STATES CENSUS 2010, *The Whole Story*, http://www.census.gov/population/apportionment/about/faq.html#Q8 (last visited Oct. 24, 2011) (stating that the Census does not differentiate between citizens and non-citizens).

[105] *See* Mulroy, *supra* note 27, at 338. This process is called "gerrymandering." *Id*.

[106] *See, e.g.*, ELECTION DATA SERVICES, *New Population Estimates Show Slight Changes For 2008 Congressional Apportionment, But Point to Major Changes for 2010* (2008),

often re-draw district lines to favor its own party so that it may fill the additional House seats. For example, if a state with a Republican majority gains seats in the House, the state's legislature will likely draw the new district lines in a manner favorable to Republican voters to ensure that the winner of the vacancy is a Republican.[107] This practice would also hold true in states that lose seats in the House of Representatives due to a population decrease.[108] In such a case, the Republican majority can draw districts that benefit its own political agenda. The VRA's primary purpose is to protect the minority vote when these districts are re-drawn, not to allow state legislatures to manipulate the drawing of districts for their own benefit.

1. Changes to the 2010 Census

The Census Bureau conducted the twenty-third Census in 2010 with several notable departures from the previous process. Although the Census Bureau continued to mail a short form to households and send Census workers to locations not accessible to the U.S. Postal Service, it discontinued the "long form" and instituted the American Community Survey ("ACS").[109] Unlike the decennial long form, the ACS is a continuous survey sent to approximately 250,000 households per month.[110] While the Census Bureau mailed the previous long form

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http://www.electiondataservices.com/images/File/NR_Appor08wTables.pdf (noting that Texas, Arizona, Florida, Georgia, Nevada, South Carolina, and Utah are likely to gain seats in the House, while Ohio, Illinois, Iowa, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, New York, and Pennsylvania are likely to lose seats in the House following the 2010 Census.).

[107] *See* Mulroy, *supra* note 27, at 338. This is similar to the situation that took place in California in 2000. California's population had increased so that it gained a seat in the House and Democrats, who maintained a majority in the state legislature, wanted to redraw district lines in their favor. *See also* LEVITT, *supra* note 40, at 10.

[108] *See* LEVITT, *supra* note 40, at 11. In 2000 New York Democrats redrew a district to prevent a Democrat from challenging the incumbent Democrat in the primary for the state legislative seat. *Id.*

[109] *See Census 2010 News*, UNITED STATES CENSUS 2010, http://2010.census.gov/news/press-kits/one-year-out/about-one-year-out/potential-stories.html (last visited Oct. 24, 2011) (stating the ACS was created in 2005 and provides current social and economic estimates for the population).

[110] *A Compass for Understanding and Using American Community Survey Data: What State and Local Governments Need to Know*, U.S. CENSUS BUREAU, 2 (2009), http://www.census.gov/acs/www/Downloads/handbooks/ACSstateLocal.pdf.

to approximately seventeen percent of the national population every ten years, it sends the new ACS to approximately 2.5 percent of the population annually.[111]

The ACS and the decennial long-form differ in both the amount and type of data available.[112] The ACS is not yet able to provide detailed annual information for less populated areas, particularly those under 20,000 people. The long-form, in contrast, was capable of producing this data.[113] The ACS tables also provide Margin of Error measures ("MOE"), which highlight the potential inaccuracy of the ACS's smaller sampling size.[114] Indeed, the Bureau has suppressed information for many less-densely populated areas of the country because of insufficient sample size.[115] On the other hand, the long form accessed and more accurately surveyed a much smaller sampling area.[116] The main benefit of the ACS is its more recent data for more populated areas, giving legislators and communities a current idea of socio-economic conditions. Thus, this aspect of the ACS may lead to more accurately drawn districts if legislatures use the proper redistricting standard.[117] However, because the ACS conforms to the Census Bureau's "official population estimates," it is likely that inaccurate estimates used

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[111] Glenn D. Magpantay & Nancy W. Yu, *Asian Americans and Reauthorization of the Voting Rights Act*, 19 NAT'L BLACK L.J. 1, 30 (2005). The ACS samples approximately 1 in 1,000 households. Benavidez v. City of Irving, 638 F. Supp. 2d 709, 715 (N.D. Tex. 2009).

[112] John Blodgett, *American Community Service vs. Decennial Census: Are We Better Off Now Than We Were a Decade Ago?*, OFFICE OF SOCIAL AND ECONOMIC DATA ANALYSIS (OSEDA), MO. CENSUS DATA CENTER (June 2009), http://mcdc2.missouri.edu/pub/data/acs/acsVScensus.shtml.

[113] *Id.* ("The single-year data are available for the 7,199 geographic areas with populations of at least 65,000 while the 3-year period estimates are available for about twice as many areas—those that meet the 20,000 population threshold").

[114] *Id.*

[115] *Id.* Data for these smaller areas should be available every five years, meaning it should be published in late 2010 or early 2011. *Id.* Although, many experts argue that the benefits of the ACS data far outweigh negative aspects, the long form was better suited to smaller populations whereas the ACS numbers for small areas will always be "fuzzy." *Id.*

[116] *Id.*

[117] *Id.*; *see infra* Part IV.

in the past will remain in the ACS data.[118] The ACS is a recent sampling method and it will take an adjustment period to see if it is a truly beneficial method for the Census Bureau.

2. What Do the Census Changes Mean For the Future of Section Two Claims?

Although the discontinuation of the long-form may not have a direct impact on redistricting and the VRA, it does have the potential to change the way Section 2 plaintiffs can bring their claims. Under the old system, legislatures used the short form for redistricting the population, and the long form provided detailed socio-economic data that was used to allocate resources to areas of low income or provide bilingual services to areas with a large language minority.[119]

The ACS's inability to generate an adequate sample size for less populated areas will minimize representation for less-heavily populated rural areas. Due to the long-form providing socio-economic data once every decade, the sample size was smaller, and the time between surveys provided an accurate "snap shot" of each area of the country that the ACS data will minimize.[120] Ultimately, determining whether minorities constitute fifty percent of the population in a district requires reliance on the most recent Census data, which is notorious for undercounting minority populations in its estimates.[121] The implementation of the ACS data coupled with *Bartlett*'s fifty percent standard "gives undue weight to Census results that are but a snapshot in time (invariably outdated by the time

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[118] Blodgett, *supra* note 112 (stating that the ACS form has not revamped the way the Census estimates populations and therefore it is probable that the old underestimates will be transferred to the ACS).

[119] Glenn D. Magpantay, *Asian American Voting Rights and Representation: A Perspective From the Northeast*, 28 FORDHAM URB. L.J. 739, 741 (2001).

[120] *See supra* notes 113–118 and accompanying text.

[121] *See* NATIONAL RESEARCH COUNCIL, MODERNIZING THE U.S. CENSUS 32, 33 (Barry Edmonston & Charles Schultze eds., 1995) (noting that the 1990 census failed to count 5.7% of blacks, while it missed only 1.3% of whites); Wisconsin v. City of New York, 517 U.S. 1, 5 (1996) ("There have been twenty decennial censuses in the history of the United States. Although each was designed with the goal of accomplishing an "actual Enumeration' of the population, no census is recognized as having been wholly successful in achieving that goal").

litigation is completed) and are infected by the now well-established undercounting of minority peoples."[122]

Another notable aspect of the 2010 Census is the continued use of racial self-classification category. In 2000, the Census short-form provided a multi-racial option, allowing individuals to check more than one race for the first time in census history.[123] Multiracial individuals may choose from 126 racial and ethnic combinations when self-classifying.[124] Respondents may also write in their own racial or ethnic classification, such as "South African," or "Muslim." The Office of Management and Budget ("OMB") and federal agencies use this data for civil rights enforcement.[125] Under these guidelines, the Bureau essentially re-classifies individuals that "self-classify" themselves as belonging to more than one race as consistently as possible for the purposes of the Census count.[126] Under these guidelines, an individual that, for example, checks both White and a

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[122] *See* Lichtman & Hebert, *supra* note 88, at 18–19. Relying on plaintiffs to prove the effectiveness of crossover districts will vary from district to district, but will not require the use of a threshold standard. *Id.*

[123] Nathaniel Persily, *Color by Numbers: Race, Redistricting, and the 2000 Census*, 85 MINN. L. REV. 899, 926–27 (2000). The 2010 Census allowed individuals to choose from 1) White, 2) Black, African-American or Negro, 3) American Indian or Alaska Native 4) Asian Indian, Japanese, Native Hawaiian, 5) Chinese, Korean, Guamanian or Chamorro, 6) Filipino, Vietnamese, or Samoan, or 7) some other race. *Id*.

[124] Manav Bhatnagar, *Identifying the Identified: The Census, Race, and the Myth of Self-Classification*, 13 TEX. J. C.L. & C.R. 85, 106 (2007).

[125] Persily, *supra* note 123, at 930 (explaining that the OMB analyzes the 2000 racial classification data according to the "one-drop rule". In other words, an individual that checks "White" and a minority race is allocated to the minority race); *see also* Bhatnagar, *supra* note 124, at 107 (stating that the OMB:

> [E]xplicitly requires respondents identifying as both white and a minority race to be allocated to the minority race category for tabulation purposes. Thus, an individual with one white and one black parent, who strongly identifies as either a mixed-race or white person, will be automatically tabulated and classified as black by federal agencies using that data.

Id.

[126] *See* Office of Mgmt. & Budget, Executive Office of the President, Bull. No. 00-02, Guidance on Aggregation and Allocation of Data on Race for Use in Civil Rights Monitoring and Enforcement, (2000), *available at* http://www.whitehouse.gov/omb/bulletins_b00-02.

minority race will be allocated to the minority race when the information is used by federal agencies, while an individual who selects two races, neither of which is white, will not be reassigned or tabulated as one race or another.[127] However, the OMB guidelines are silent as to how to classify responses with no clear racial meaning or those listing only an ethnicity.[128] The presumption is that, for these responses, the Census Bureau arbitrarily decides what category the respondent should be placed in, as it did prior to the 2000 Census.[129]

The reclassification may, however, prove inconsistent with individuals' desired identifications for districting purposes.[130] This process may undermine voter cohesion when, for example, minorities have checked more than one box and are allocated to the minority classification, but perhaps vote with white bloc voters at the polls. This inflates minority population numbers, but actually dilutes minority cohesion at the polls. Recall that Section 2 plaintiffs must demonstrate the *Gingles* factors using this Census race data, as well as election returns, to show that they have a valid claim for vote dilution.[131] More racial categories on the Census will decrease the minority percentage of the community, making it more difficult for plaintiffs to constitute a compact and cohesive fifty percent minority-majority voting population under *Bartlett*.[132] The separate race categories will also make it more difficult for Section 2 plaintiffs to prove racially polarized voting if they check multiple boxes due to the increase in racial categorization.[133]

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[127] *Id.*

[128] *See* Bhatnagar, *supra* note 124, at 107.

[129] *Id.* Additionally, many Census field workers may gather classification information from third-parties such as neighbors or hospital records, meaning the classification is not authorized by the individual being classified. *See* Bhatnagar, *supra* note 124, at 109 (summarizing the administrative limits on self-identification).

[130] *See generally* Bhatnagar, *supra* note 124.

[131] *See supra* Part II, Section B.

[132] *See* MIXED RACE IN AMERICA AND THE LAW: A READER 219 (Kevin R. Johnson ed., NYU Press 2003) ("[A] minority group would be left without a Section 2 claim unless the court agrees that the minority plus the multiracial group should be the relevant 'racial group' for bloc voting purposes (which would be the natural consequence of following the OMB guidelines)").

[133] Persily, *supra* note 123, at 936.

For example, imagine that the voting-age population in a district is composed of fifty percent Hispanic voters and fifty percent White voters. If ten percent of the Hispanic voters have also marked a second or third category for another race on their Census forms, do they constitute a majority-minority district under Section 2, or are they, in effect, a crossover district which does not have Section 2 protection? According to the OMB guidelines, the answer will depend on the nature of the enforcement agency analyzing the data. It appears that if an individual checks more than one minority race, a federal agency will likely allocate such minorities to the classification of the minority that brings a complaint or alleges discrimination before the federal agency.[134] However, this treatment is by no means a solidified rule as of yet. Those minorities hovering under the fifty percent threshold may find the multi-racial option to be another obstacle to reaching a majority. The *Bartlett* plurality holding only compounds these uncertainties by precluding crossover districts as remedies. In this case racial classification would be less important.

IV. IS IT TIME FOR A NEW REDISTRICTING STANDARD?

Redistricting is an important, and sometimes misleading aspect of the electoral process. Congress has enacted statutory limitations on redistricting power, such as the VRA, to ensure that legislatures are fair to minority groups that have historically been precluded from participating in the democratic process. The limitations Congress has dictated must be clear and applicable for minorities to have a remedy available when those in power infringe upon their rights. Unfortunately, the Supreme Court's recent interpretation of the VRA and the inconsistency of Census data have diminished minority voters' voices when the districts are redrawn. This section examines the varied standards for redistricting that currently exist, and suggests that utilizing an area's citizen voting-eligible population ("CVEP") is the best remedy for both legislatures and minorities.

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[134] *See* Office of Mgmt. & Budget, Executive Office of the President, Bull. No. 00-02, Guidance on Aggregation and Allocation of Data on Race for Use in Civil Rights Monitoring and Enforcement, (2000), *available at* http://www.whitehouse.gov/omb/bulletins_b00-02.

A. What is the Current Redistricting Standard?

The method of redistricting has enormous implications. The *Bartlett* Court created a bright-line numerosity requirement of fifty percent, but failed to articulate which portion of the population must be evaluated to find this percentage.[135] Currently figures used in apportionment include total population, voting-age population ("VAP"), and citizen voting-age population ("CVAP") numbers, but it is unclear as to which of these present the best option.[136] Total population is the most common redistricting formula and it incorporates all individuals in an area, including children, in a redistricting plan. Using CVAP, legislatures creating districts only count adult citizens of voting age according to the most recent population data (the ACS or the most recent Census).[137]

Although total population may be the most easily calculable statistic, the Supreme Court has at least acknowledged that other redistricting formulas may better benefit the entire state.[138] The Court indicated that voting-age population or eligible voter population might be a viable basis for apportionment and redistricting.[139] The Court has further confused the issue by denying that it ever

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[135] Luke P. McLoughlin, Note, *Gingles in Limbo: Coalitional Districts, Party Primaries and Manageable Vote Dilution Claims*, 80 N.Y.U. L. REV. 312, 323–24 (2005). *Bartlett v. Strickland* seems to suggest that VAP is the proper standard for a VRA claim, but this is not entirely clear. *See Bartlett*, 556 U.S. at 19.

[136] *See* Dennis J. Murphy, Comment, *Garza v. County of Los Angeles: The Dilemma over Using Elector Population as Opposed to Total Population in Legislative Apportionment*, 41 CASE W. RES. L. REV. 1013, 1013 (1991) (discussing the unresolved nature of the Supreme Court apportionment cases in determining which population count to use in the apportionment and redistricting process).

[137] *See generally* Leo F. Estrada, *Making the Voting Rights Act Relevant to the New Demographics of America: A Response to Farrell and Johnson*, 79 N.C. L. REV. 1283, 1292 (2001) (explaining the different population formulas and how they evaluate areas of the population for redistricting). The author also explains voting-age population (VAP) is less common but includes all adults (citizens and non-citizens) of voting age in the district. *Id.* *Bartlett v. Strickland* held that minorities must make up fifty percent or more of the voting-age population (VAP) in order to bring a Section 2 claim. *See Bartlett*, 556 U.S. at 19.

[138] *See* Burns v. Richardson, 384 U.S. 73, 91 (1966) (noting the Court does not require states to use total population as the method by which voting strength is measured).

[139] *See* Kirkpatrick v. Preisler, 394 U.S. 526, 530 (1969). Although the Court did not decide the issue of whether voting age or voting eligible population may be used instead of total population,

suggested that, "the States [must] include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime, in the apportionment base by which their legislators are distributed."[140]

The lower courts have adhered to this approach, and have already shown disagreement over which method to utilize. In *Garza v. County of Los Angeles*, the Ninth Circuit upheld the district court's utilization of the total population remedial criterion, but also recognized that it may not be the best method for areas that have a low number of voting age citizens because it is not an accurate gauge of voting strength in the district. [141]

The aforementioned methods are not without their respective problems and difficulties. VAP and CVAP may produce inaccurate measures of a district's voters and are, therefore, an improper basis for remedial districts. VAP does not differentiate between citizens and non-citizens and may inflate the population, whereas CVAP does differentiate between citizens and non-citizens, but may adversely affect non-citizen populations among Latinos and Asians.[142] CVAP is also problematically dependent on Census data, which neither differentiates between citizens and non-citizens[143] nor provides information for the years between the decennial count.[144] However, this may become less of a current

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it "assume[ed] without deciding that apportionment may be based on eligible voter population rather than total population." *Id*.

[140] *Burns*, 384 U.S. at 92.

[141] Garza v. County of Los Angeles, 918 F.2d 763, 773 (1990). In this case, the plaintiffs established liability but disagreed as to the remedial district and how to draw it. Murphy, *supra* note 136, at 1013. In order to establish liability in a Section 2 claim, plaintiffs must demonstrate liability in the "liability stage" and show that a remedy is available in the "remedy stage," and submit it to the district court to create a remedial plan. *See supra* Part II, Section B.

[142] *See* Estrada, *supra* note 137, at 1294. Estrada provides the method for calculating CVAP for Hispanic voters. *Id.* CVAP is calculated by dividing the number of eligible citizens into the number of Spanish surnamed voters. Spanish surnamed voters are determined by matching a list of the most common Spanish surnames against the voter registration list. Unlike the information on citizenship, Spanish surname voter registration can be updated during the decade. *Id.* at n.51.

[143] *Id.* at 1294.

[144] *Id.* at 1295.

concern because the annual ACS supplements the Census data for *most* districts nationwide.[145]

B. Citizen Voting Eligible Population ("CVEP")

Citizen voting-eligible population ("CVEP") is the best method district courts and Section 2 plaintiffs can use when creating remedial districts.[146] The CVEP is essentially an adjusted version of the CVAP. Utilized most often in voter-turnout calculations, CVEP includes all citizens of voting age in a district that are actually *eligible* to vote. CVEP therefore excludes non-citizens or disenfranchised felons, unlike other, inaccurate methods previously discussed.[147] To calculate and remove non-citizens, legislatures must use the most recent Census data, Current Population Survey ("CPS"),[148] and the ACS to adjust the VAP of an area.[149] The percentage of non-citizens derives from dividing the total number of non-citizens according to the CPS by the best VAP estimate.[150] The number of disenfranchised felons is then calculated according to Department of Justice Reports and applicable state law.[151] The Department of Justice Bureau,

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[145] *See supra* Part III, Section B.1 (asserting that ACS is not yet able to provide detailed annual information for less populated areas).

[146] The author has taken Dr. Michael McDonald's work using CVEP to calculate accurate voter turnout and will apply it to the redistricting process. *See generally* Dr. Michael McDonald, *The United States Election Project*, http://elections.gmu.edu/ (last visited Oct. 24, 2011).

[147] The disenfranchisement of felons and the mentally incompetent depends on state law. *See* Dr. Michael McDonald, *Voter Turnout Frequently Asked Questions*, http://elections.gmu.edu/FAQ.html#VEP? (last visited Oct. 24, 2009). Voter turnout includes eligible overseas voters for national votes (the presidential election), but it is not presently possible to allocate overseas voters to their particular states. *Id.*

[148] *Id.* CPS data is available on the Census Bureau website and includes the estimated number of non-citizens in different geographic areas. *Id.* The CPS non-citizen count is a non-institutional population count, meaning that non-citizens residing in nursing homes, prisons, dormitories, and the like are not counted in CPS. *Id.* However, Dr. McDonald explains that he uses a different method to count disenfranchised felons so the CVEP non-citizen estimate does not count non-citizen prisoners twice. *Id.*

[149] *Id.*

[150] *Id.*

[151] *Id.* Because the voting eligibility of felons depends on state law, McDonald must estimate state by state. *Id.* "Statistics drawn from various Department of Justice reports which detail the prison,

Office of Justice Statistics releases the estimated numbers of felons for each state from January 1st through December 31st each year.[152] Using the applicable state law, the CVEP formula estimates the number of felons who have been stripped of the right to vote and subtracts them from CVAP.[153] Without the excess padding provided by added felons and non-citizens, states can derive a far more accurate estimate of a minority group's opportunity to elect with CVEP.

C. Will CVEP Correct the Problem?

States need a standard that will count their voting populations accurately during the remedy phase. For redistricting purposes, it is a person's vote, rather than presence, that will make a difference in the electoral process. The national population standard is the broadest population count and the easiest for states to obtain; however, it overestimates the number of voters. VAP is similarly broad but excludes minors. CVAP eliminates non-citizens from the population count, but fails to eliminate disenfranchised felons. CVEP, therefore, is the narrowest and most accurate population count of eligible voters available. It would allow states to count only those residents within its borders that are both citizens of voting age and are eligible to vote. In *Burns v. Richardson*, the Supreme Court seemed to condone the use of CVEP in apportionment and redistricting, concluding that legislatures should not include aliens, transient residents, or disenfranchised felons in their redistricting formulas.[154]

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probation, and parole population of the United States are matched with these state laws to estimate the number of ineligible felons." *Id.*

[152] *Id.*

[153] *Id.* For the United States totals, individuals in the Federal Corrections System are also included. *Id.* While Dr. McDonald's formula is helpful in constructing the national numbers of those eligible to vote and a better CVEP for states, there is currently no available method to count which residents residing overseas vote from which states. *Id.*

[154] *Burns*, 384 U.S. at 92 (1966). The Court stated:

> Neither in *Reynolds* v. *Sims* nor in any other decision has this Court suggested that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime, in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured.

Id. (referring to Reynolds v. Sims, 377 U.S. 533 (1964).

The Census currently counts prisoners in the area where they are imprisoned and not the area they lived in prior to incarceration. This can inflate the population for districts containing a prison within its borders and makes it appear that the district has more voters than it actually does. CVEP data would eliminate the misleading information and provide legislatures with an accurate conception of minorities' opportunity to elect representatives of their choice.

While CVEP has a measurable effect on the creation of illustrative districts for Section 2 plaintiffs in the remedy phase, CVEP may not benefit plaintiffs in the liability phase because plaintiffs now must meet the numerosity requirement of *Bartlett*. Traditionally, illustrative districts must show that it was possible to draw a geographically compact district in which the minority group makes up a majority of the district in satisfaction of *Gingles* I and *Bartlett*.[155] An illustrative district plan must have districts of equal total population,[156] or if the area is a municipality, the population should not deviate from the other districts by more than ten percent.[157] The districts must also comply with the Equal Protection Clause and coincide with existing official political and informal geographic boundaries, such as city or county lines or around communities.[158]

These limits, coupled with *Bartlett*'s bright-line fifty-percent rule cause CVEP's celebrated precision to lose its luster. Minority plaintiffs seeking to prove that they can constitute fifty percent or more of an illustrative district may find it easier to use VAP, total population, or even CVAP to draw illustrative districts because these population counts provide numbers closer to fifty-percent in districts where CVEP may limit the pool of voting minorities.[159] However, broader population counts, such as total population, include minors and non-resident aliens even though they are not eligible to vote.[160]

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[155] *See, e.g.*, *Benavidez*, 638 F. Supp. 2d at 714 (N.D. Tex. 2009).

[156] *See* Chapman v. Meier, 420 U.S. 1, 24 (1976).

[157] *See* Brown v. Thomson, 462 U.S. 835, 842–43 (1983).

[158] *See* Miller v. Johnson, 515 U.S. 900, 916 (1995).

[159] *See supra* Part III, Section A.

[160] *See Garza*, 918 F.2d at 775 (1990). The court stated:

> Non-citizens are entitled to various federal and local benefits, such as emergency medical care and pregnancy-related care provided by Los Angeles

Ultimately, CVEP will benefit Section 2 plaintiffs at the remedy phase when the district court orders a new district drawn in response to Section 2 liability. After liability is established, the court wipes the legislature's slate clean and the legislature has an opportunity to remedy the vote dilution of its previously drawn district. The implementation of CVEP would be superior at the remedy phase for all parties involved. It will require states to create fair districts without superfluous voters, and it will provide an accurate count of minorities with one vote for every *eligible* person in the district rather than one vote for every *existing* person in the district.

V. CONCLUSION

The Voting Rights Act, arguably the most beneficial legislative action for minorities since the Fourteenth and Fifteenth Amendments, is still struggling to fulfill its purpose. The recent Supreme Court decision in *Bartlett v. Strickland* has reinterpreted Section 2 of the VRA to make it more difficult for minority plaintiffs to bring claims. This holding, combined with the changes to the 2010 Census, works against minority plaintiffs and causes confusion in the application of Section 2. Today, there are more questions than there are answers, and the VRA is in desperate need of Congressional clarification. Crossover districts should be allowed as a Section 2 remedy so that minority plaintiffs have a genuine chance for electoral success, even when they inhabit districts in smaller numbers. However, until crossover districts are allowed as a remedy, plaintiffs should be entitled to choose the most beneficial population count method to meet the *Gingles* requirements.

With the implementation of a bright-line fifty percent "numerosity" requirement, it has become even more important to apply a redistricting method that will fairly and adequately count minorities and allow those individuals a fair chance to exercise their voting rights. CVEP should be used as a proper redistricting method for calculating minority opportunity to elect. Total

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County. As such, they have a right to petition their government for services and to influence how their tax dollars are spent. In this case, basing districts on voting population rather than total population would disproportionately affect these rights for people living in the Hispanic district. Such a plan would dilute the access of voting age citizens in that district to their representative, and would similarly abridge the right of aliens and minors to petition that representative.

population, VAP, or CVAP, alternatively, could be implemented in the liability phase in order to reach the fifty percent threshold. Neither of these options, however, can occur until Congress clarifies the correct interpretation of Section 2 and provides courts and individuals with a flexible and workable standard for redistricting. As Justice Ginsburg stated in her dissent, the *Bartlett* decision "returns the ball to Congress' court" and challenges the Legislature "to clarify beyond debate the appropriate reading of § 2."[161] This article implores Congress to accept this challenge and bring its policies within the aims of the VRA.

[161] *Bartlett*, 556 U.S. at 44 (Ginsburg, J., dissenting).