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The Noble Business of “Incumbantocracy:” A Response to *The Sordid Business Of Democracy*¹

CHRISTOPHER J. ROEDERER*

If democracy is a sordid business—a base, dirty, and ignoble business—then perhaps it is not too much of a stretch to say that there is something simple, clean, and noble about the business of “incumbantocracy.” This should ring a discordant note. “Incumbantocracy,” and not democracy, is the problem which calls for the courts to intervene. “Incumbantocracy” involves the sordid business of gerrymandering districts and fixing elections so that those in power stay in power, regardless of what the voters might wish or how they vote.² “Incumbantocracy” is dirty politics, and trying to eliminate this practice is, no doubt, a dirty and difficult job; but one should not confuse the problem with the solution. If democracy is, in fact, a sordid business, the alternatives are much worse. As Abraham Lincoln once said, democracy consists of a “government of the people, by the people, for the people.”³ Democracy is supposed to include the “continuing responsiveness of the

1. This essay is a response to Daniel Tokaji, *The Sordid Business of Democracy*, 34 Ohio N.U. L. Rev. 341 (2008). The term “incumbantocracy” appears to have been coined by Jamin B. Raskin in *The Supreme Court’s Double Standard*, where he argued that “voters don’t really pick public officials on Election Day because public officials pick voters on redistricting day.” THE NATION, Feb. 6, 1995, at 167-68.

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2. As Burt Neuborn states, “[t]he major party in this country is neither the Republicans nor the Democrats. It is the Incumbent party that runs the country. The incumbent party draws the district lines so that you simply cannot defeat an Incumbent.” Burt Neuborn, *Campaign Finance and Political Gerrymandering Decisions in the October 2005 Term*, 22 TOURO L. REV. 939, 944 (2007). It is important to note that while the House of Representative is an incumbantocracy, that form of government has not quite taken over the Senate or the Presidency. This is because Senate races are statewide and not based on gerrymandered districts and because in most states in the U.S. the Electoral College votes in block based on who wins a majority in the state (except in Maine and Nebraska). There is a recent disturbing trend underfoot to undermine the democratic process in the case of Presidential elections. The law firm for the California Republican Party has sponsored ballot Initiative No. 07-00032, *The Presidential Election Reform Act*, which is designed to allocate electoral votes by district instead of in block or winner take all. Hendrick Hertzberg, *Comment: Votescam*, *The New Yorker* (August 6, 2007). Note that the Democrats are proposing the same thing in North Carolina. *Id.*

3. Abraham Lincoln, 16th President of the United States of America (1861-65), *The Gettysburg Address* (Nov. 19, 1863). The U.S. State Department begins its discussion of the definition of “What is Democracy” with Lincoln’s definition. U.S. Department of State, *What is Democracy?* (1998) (quotation omitted), available at <http://usinfo.state.gov/products/pubs/whatsdem/whatdm2.htm>.

government to the preferences of its citizens, considered as political equals."⁴ The present state of "incumbantocracy" in the U.S. all but ensures that "representatives" do not, in fact, represent the people. They are not accountable or responsive because there is little to no political pressure to keep them accountable.

Professor Tokaji's illuminating article, *The Sordid Business of Democracy*, embraces the role of the courts in policing or superintending the "messy business of democracy."⁵ In this article, Professor Tokaji uses the lens of democratic values in order to bring clarity to the voting rights case, *League of United Latin American Citizens v. Perry* ("*LULAC*"),⁶ and to all voting rights cases in general.⁷ More importantly, he uses *LULAC* in an attempt to identify a role for the federal courts in securing the democratic process.

He examines the voting rights jurisprudence through the lens of the four "norms of democracy," which he believes are at stake in these cases.⁸ These norms include: 1) minority representation, 2) raceblindness, 3) anti-entrenchment, and 4) state sovereignty.⁹ These norms are overlapping and yet competing with one another, so that too much emphasis on one is said to detract from one or more of the others.¹⁰ He is largely successful in illustrating how the Supreme Court has taken a somewhat strong position on all four norms at different times, only to pull back, or retreat, to a more modest position on all four norms.¹¹ The pull of these competing norms, he explains, accounts for the seeming incoherence of the court's approach to this area of the law.¹² He claims that *LULAC* is somewhat unique in that it lies within the overlap of these often competing norms.¹³

More importantly, Professor Tokaji should be commended for attempting to identify a "seed of encouragement"¹⁴ in *LULAC* for those who believe, or perhaps hope, that the federal courts either have, or should have, an important

4. *Polyarchy: Participation and Opposition* 1 (1971).

5. Tokaji, *supra* note 1, at 341.

6. 126 S. Ct. 2594 (2006).

7. Tokaji, *supra* note 1, at 342.

8. *Id.*

9. *Id.*

10. Tokaji, *supra* note 1, at 349.

11. Tokaji, *supra* note 1, at 353. However, I believe that Professor Tokaji would admit that he is not successful in showing that the Court has ever taken a strong stance on the value of anti-entrenchment. Not only has the Court never found a redistricting plan to be partisan enough to violate the norm, the norm as stated by Professor Tokaji is very weak from the perspective of a thriving democracy, namely – "there ought to be some competition between the political parties, at least for some legislative seats." *Id.* at 350.

12. Tokaji, *supra* note 1, at 342-43.

13. Tokaji, *supra* note 1, at 353.

14. Tokaji, *supra* note 1, at 342.

role in helping American democracy function better.¹⁵ Most of the commentators on *LULAC* would identify a “seed of encouragement” in the fact that five out of the nine Justices still hold out hope of a justiciable, constitutional, equal protection claim in a future political gerrymandering case.¹⁶ Professor Tokaji writes almost apologetically concerning the majority’s decision to avoid the equal protection-based political gerrymandering claim, which it found to be nonjusticiable on the grounds that there was not a judicially manageable standard in front of the Court.¹⁷ He does not locate the glimmer of hope, or “seed of encouragement” here, but rather in the plurality’s decision to hold that the Tom Delay-backed Texas redistricting of District 23 violated section 2 of the Voting Rights Act.¹⁸ Professor Tokaji argues that the heart of the section 2 debate provides encouragement for those who believe that the federal courts have an important role to play in “making American democracy function better.”¹⁹ He posits that this is because the statutory interpretation, found here, borrows from a process-based approach to constitutional law, as found in *Carolene Products* footnote four²⁰ and the earlier works of the late John Hart Ely.²¹ This borrowing, he argues, furthers democratic values.²²

Although it is not my goal to destroy the seed of hope, I do not have the same rosy view of the current state of “American democracy,” and I am not sure that the “seed of encouragement” has much room to develop under *LULAC* or within our current electoral practices. My reasons for this somewhat less rosy view are that:

- (1) Our system is so far off the track of democracy²³ that it is incorrect to view federal courts’ interventions as interventions in the “messy business of democracy.” Rather, those

15. *Id.*

16. While two Justices (Justices Thomas and Scalia) do not believe such claims can ever be justiciable, and two others (Chief Justice Roberts and Alito) are agnostic or uncommitted on the issue, five Justices (Justices Bryer, Ginsburg, Stevens, Souter and Kennedy) are open to the possibility of a justiciable standard to resolve these cases. *See e.g.*, Bernard Grofman & Gary King, *The Future of Partisan Symmetry As A Judicial Test for Partisan Gerrymandering After LULAC v. Perry* 6 ELECTION L. J. 2, 34 (2007) (stating, in regard to the possibility of a justiciable standard for a constitutional equal protection claim in political gerrymandering cases: “In our view, if we look closely at the various opinions in *LULAC*, we can see that the Supreme Court has seeded the clouds after 20 years drought.”).

17. Tokaji, *supra* note 1, at 353.

18. Tokaji, *supra* note 1, at 342.

19. *Id.*

20. *United States v. Carolene Products*, 304 U.S. 144 (1938).

21. John Hart Ely, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

22. Tokaji, *supra* note 1, at 342.

23. For a full argument on this point, *see* Christopher J. Roederer, *Democracy and Tort Reform in America: The Counter-Revolution*, 110 W. VIRGINIA L. REV. 647 (2008).

interventions are interventions of a limited nature into the corrupt practices of “incumbantocracy.”

- (2) It was not the minority-protecting, democratic-process approach to interpretation, as found in footnote 4 of *Carolene Products*,²⁴ that drove the Court to its interpretation of the section 2 claim in the case of District 23,²⁵ but rather it was the Voting Rights Act that pulled the Court into making a decision that was consistent with a minority-protecting process view.
- (3) The success of the section 2 claim in the case of District 23²⁶ had more to do with Justice Kennedy’s animus towards the newly created minority-majority Latino District 25 than with protecting the democratic process.²⁷
- (4) If the minority-protecting, democratic-process approach to interpretation drove the Court’s decision in District 23’s section 2 claim, then one would expect the same values and the same approach to come to the forefront in the section 2 claim regarding District 24; but it did not, and that claim failed.²⁸
- (5) Although racial discrimination in voting is still an issue,²⁹ the overwhelming problem is with partisan gerrymandering. This practice receives little to no scrutiny under existing U.S. voting laws, and there is minimal hope for protection under *LULAC* in the future.

I. THE U.S. DOES NOT PRESENTLY HAVE A DEMOCRACY FOR THE COURTS TO SUPERINTEND.

Unfortunately, the problem is not one of hoping that the Courts will superintend the borders of a thriving democracy. The system is in such disrepair that there is very little of that “messy business of democracy” taking place. Rather, what is needed is for the courts to intervene in the corrupt practices of “incumbantocracy” in order to put the system back on the

24. *United States v. Carolene Products*, 304 U.S. 144 (1938).

25. Tokaji, *supra* note 1, at 356-57.

26. *Id.*

27. Tokaji, *supra* note 1, at 355. As Professor Tokaji notes, Richard H. Pildes made this argument in *The Decline in Legally Mandated Minority Representation*, 68 OHIO ST. L.J. 1139, 1144 (2007) (arguing that this view of the case squares Kennedy’s opinion with his hostility to the compelled creation of majority-minority districts, *e.g.*, in *Georgia v. Ashcroft* 539 U.S. 461 (2003) (Kennedy, J. concurring)).

28. *League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594, 2624-2626 (2006).

29. See *e.g.*, Michael J. Pitts, *Let’s Not Call the Whole Thing Off Just Yet: A Response to Samuel Issacharoff’s Suggestion to Scuttle Section 5 of the Voting Rights Act*, 84 NEB. L. REV. 605 (2005) (referring specifically to discriminatory voting practices in Georgia).

democratic track. As an historian of voting, Alexander Keyssar, states: "Although the formal right to vote is now nearly universal, few observers would characterize the United States as a vibrant democracy[.]"³⁰

In 2004, the American Political Science Association warned that American democracy was in peril. They delivered this warning with a press release³¹ and through a set of reports commissioned by the Association.³² Those reports located the cause of this demise in the widening gap between the rich and poor. As its authors stated, "[p]rogress toward realizing [the] American ideals of democracy may have stalled, and in some arenas reversed," due to the broadening gap in income and wealth in America.³³ The impact of the gap between the "haves" and "have-nots" on democracy is explored in detail in the American Political Science Association Task Force Reports on Inequality and American Democracy.³⁴ In describing the results of the report, two of its authors stated:

[The] privileged participate more than others and are increasingly well organized to press their demands on government. Public officials, in turn, are much more responsive to the privileged than to average citizens and the least affluent. Citizens with lower or moderate incomes speak with a whisper that is lost on the ears of inattentive government officials, while the advantaged roar with a clarity and consistency that policy-makers readily hear and routinely follow.³⁵

30. ALEXANDER KEYSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 4, 320 (2001). For the view that our democracy is crumbling based on current obstacles to voting, see SPENCER OVERTON, *STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION* (2006).

31. Press Release, American Political Science Association, *Leading Political Scientists Warn of Threat to American Democracy in Rare Nonpartisan Statement* (2004), <http://www.apsanet.org/imgtest/taskforcepress.pdf>.

32. The task force compiled a series of reports in 2004: *AMERICAN DEMOCRACY IN AN AGE OF RISING INEQUALITY*; *THREE CRITICAL ANALYSES ON ECONOMIC, GENDER, RACIAL, AND ETHNIC INEQUALITIES IN AMERICAN POLITICS*; and a set of teaching materials. The American Political Science Association, Task Force on Inequality and American Democracy, http://www.apsanet.org/section_256.cfm (last visited Nov. 5, 2007). These materials were edited into a book. *INEQUALITY AND AMERICAN DEMOCRACY: WHAT WE KNOW AND WHAT WE NEED TO LEARN* (Lawrence R. Jacobs & Theda Skocpol eds., 2005).

33. *TASK FORCE ON INEQUALITY & AM. DEMOCRACY, AM. POL. SCI. ASS'N, AMERICAN DEMOCRACY IN AN AGE OF RISING INEQUALITY 1* (2004), <http://www.apsanet.org/imgtest/taskforcereport.pdf>. This is not to say that healthy levels of economic inequality are antithetical to democracy. Certain levels and certain forms of economic inequality become problematic from the standpoint of democracy when they undermine either fair equality of opportunity or our civil and political liberties.

34. *TASK FORCE REPORTS*, *supra* note 33.

35. *INEQUALITY AND AMERICAN DEMOCRACY: WHAT WE KNOW AND WHAT WE NEED TO LEARN 27* (LAWRENCE R. JACOBS & THEDA SKOCPOL EDS., 2005). See also Kay Lehman Schlozman, *On Inequality and Political Voice: Response to Stephen Earl Bennett's Critique*, 39 *POL. SCI. & POL.* 55, 56

According to some studies, the poorest one-third of Americans have virtually no influence on national legislation and the bottom two-thirds have less than half the influence of the top one-third.³⁶

There can be little doubt that economic inequality has undermined American democracy, but how is this so? If American democratic processes were functioning correctly, economic inequality would not result in inequality of responsiveness and accountability. If the democratic process were working properly, then the poor person's vote would not count any less than that of the rich person's.³⁷ Politicians would need to listen, to be responsive to, and to be accountable to all of the electorate. "Incumbantocracy" short circuits these processes. If the incumbents are allowed to gerrymander districts in order to rig the outcome of the next election, then there is little need to listen to the voters, much less be responsive or accountable to them. This, in turn, leads to even lower voter turnout³⁸ and to further erosion of other forms of democratic participation.³⁹ Thus, we need the courts to intervene, not in order

(2006) (referring to KAY L. SCHLOZMAN ET AL., TASK FORCE ON INEQUALITY & AM. DEMOCRACY, INEQUALITIES OF POLITICAL VOICE, 30-33 (2004), available at <http://www.apsanet.org/imgtest/voicememo.pdf>).

36. Larry Bartels, *Is the Water Rising? Reflections on Inequality and American Democracy*, 39 POL. SCI. & POL. 39, 40 (2006); See also Stephen Macedo & Christopher Karpowitz, *The Local Roots of Inequality*, 39 POL. SCI. & POL. 59, 60 (2006); Larry M. Bartels, *Economic Inequality and Political Representation* (2005) (unpublished manuscript, on file with Princeton University), available at www.princeton.edu/~bartels/economic.pdf; Martin Gilens, *Public Opinion and Democratic Responsiveness: Who Gets What they Want from Government?* (2003), available at <http://www.princeton.edu/~csdp/events/pdfs/Gilens.pdf>. See also Martin Gilens, discussing *Public Opinion and Democratic Responsiveness: Who Gets What they Want from Government?* The Center for Study of Democratic Politics, Princeton University, conference on Global Inequality (Nov. 7-8, 2003).

37. Unquestionably, campaign finance law also contributes heavily to the current state of affairs. At the end of 2002, Congress increased hard money campaign contribution limits in the Bipartisan Campaign Reform Act (McCain-Feingold Bill), 2 U.S.C. § 441b(b)(2) (2000) (upheld in *McConnell v. FEC*, 540 U.S. 93 (2003)). This basically means that those with more money get more access. Although state based limits on campaign finance have generally been upheld, limits on campaign spending have not. See *Buckley v. Valeo*, 424 U.S. 1 (1976). This has created incredible pressure to find loopholes in the finance regulations so as to feed the demand. Although some of these holes were plugged through the McCain-Feingold Bill, many loopholes remain. Recently, the Court, for the first time, struck down a state's campaign finance restrictions. *Randall v. Sorrell*, 126 S. Ct. 2479 (2006) (striking down Vermont's campaign finance restrictions as being so low as to infringe the First Amendment).

38. See KEYSSAR *supra* note 30, at 320. According to the International Institute for Democratic and Electoral Assistance, the U.S. ranks 138th out of 169 countries in voter turnout. RAFAEL LÓPEZ PINTOR ET AL., VOTER TURNOUT RATES FROM A COMPARATIVE PERSPECTIVE 75, 83-84 (2002) (citing statistics of averages of voting age population ratios across 169 countries in parliamentary elections from 1945-2001, compiled by the International Institute for Democratic and Electoral Assistance).

39. KAY L. SCHLOZMAN ET AL., TASK FORCE ON INEQUALITY & AM. DEMOCRACY, INEQUALITIES OF POLITICAL VOICE 22, 38 (2004), <http://www.apsanet.org/imgtest/voicememo.pdf>.

to police the contours of a thriving democracy, but in order to restore the system to something that would be worthy of the name.

II. THE *LULAC* COURT DID NOT BRING A PROCESS APPROACH TO THE ACT FROM CONSTITUTIONAL INTERPRETATION. RATHER, THE VOTING RIGHTS ACT ITSELF EMBODIES DEMOCRATIC PROCESS VALUES, PARTICULARLY WITH REGARD TO THE PROTECTION OF MINORITIES.

As Professor Tokaji notes, the democratic process view, as found in footnote four to *United States v. Carolene Products*,⁴⁰ justifies the Court's practice of more carefully scrutinizing state legislation when "discrete and insular minorities" are involved⁴¹. This is because it cannot be assumed that normal democratic political processes will adequately represent or protect such minorities. This is particularly true given the form of this country's voting system, which does not provide proportional representation.⁴²

Although it is not entirely clear whether Professor Tokaji finds a glimmer of hope in the process-based view of constitutional interpretation or the democratic value of anti-entrenchment,⁴³ he argues that even though the Court has declined to protect the democratic process under the rubric of constitutional law, it does so when it interprets section 2 of the Voting Rights Act. He makes the rather remarkable claim that:

If this case is any indication, the Court will likely be reluctant to intervene on constitutional grounds, even in cases where there is arguably a breakdown of the democratic processes that can ordinarily be relied upon to protect minorities. On the other hand, it is possible that the Court will resort to statutory interpretation to achieve a similar end.⁴⁴

This raises the question as to why the Court would decline to protect the democratic process on constitutional grounds, yet be willing to protect it on statutory grounds. One answer that is consistent with Professor Tokaji's framework is that the constitutional equal protection claim only included the issue of discrimination based on political affiliation, not based on race or

40. 304 U.S. 144 n.4 (1938).

41. *Id.* Tokaji, *supra* note 1, at 357-58.

42. Pippa Norris, *Choosing Electoral Systems: Proportional, Majoritarian and Mixed Systems*, 18(3) INT'L POL. SCI. REV. 297-312 (1997) (SPECIAL ISSUE), available at <http://ksghome.harvard.edu/~pnorris/Acrobat/IPSR%20Choosing%20Electoral%20Systems.pdf>.

43. Tokaji, *supra* note 1, at 357. According to Professor Tokaji, the section 2 claim was not merely about racial vote dilution, but also about "curbing entrenchment by those in power," and therefore, he believes that this may be a signal that the Court will "more carefully scrutinize incumbent-protecting gerrymandering than it has in the past." It should be noted that illegitimate entrenchment is one result of a flawed political process.

44. *Id.* at 358.

minority status, while the section 2 claims also included a claim of discriminatory impact on a discrete and insular minority. Thus, the latter claims included another process factor—namely the discrete and insular minority factor. This is consistent with Tokaji's argument that the Court borrowed from the process approach to constitutional interpretation in order to arrive at a decision that would help democracy function better. Although it is not completely implausible to locate the seed of hope in the Court's approach to section 2, it is not the best explanation for the seed's origination.

The seed of hope for policing the democratic process is not located in the Court's approach to section 2, but rather, is located within section 2 and the Voting Rights Act itself. It is not as if the Court brought the values and tools of the process approach to bear on an otherwise neutral piece of legislation. This was not what Cass Sunstein would call "judicial maximalism."⁴⁵ The Court did not need to engage in a great deal of interpretive work on section 2, in order to bring it into conformity with democratic process values or the process approach. Section 2 of the Voting Rights Act embodies the process view, and the drafters specifically designed it to protect minorities within the electoral process. As the Court in *LULAC* stated:

A State violates § 2 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 racial group] 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.⁴⁶

The Court has not taken the process approach and used it to expansively interpret this language in order to police the democratic process, either in general or in the case of minority voting. The Court does not apply section 2 to cases of political gerrymandering or even to the dilution of minority population voting in general. Rather, the Court only entertains the merits of section 2 claims under carefully circumscribed conditions.

As Justice Kennedy noted in *LULAC*, the Court requires that three threshold conditions must be met in order to demonstrate a violation of section

45. Judicial maximalism involves the Court engaging in deep and broad theoretical reasoning in a given case. See e.g., CASS SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999) (contrasting minimalist and maximalist approaches to adjudication and arguing for a minimalist view in most cases, based on deliberative democratic grounds). See ch. 2 and 9. Note, however, that Sunstein acknowledges a need for deeper or more theoretically ambitious judicial decisions in cases where the democratic process can be shown to be "defective from the standpoint of the inner morality of the law." *Id.* at 245.

46. *League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594, 2613-2614 (2006) (quoting the Voting Rights Act of 1965, 42 U.S.C. § 1973(b) (2007)) (quotations omitted).

2(b) of the Voting Rights Act of 1965 pertaining to vote dilution.⁴⁷ Those conditions, which are known as the *Gingles* requirements, are: “(1) the racial group [must be] sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the racial group [must be] politically cohesive; and (3) the majority [must vote] sufficiently as a bloc to enable it . . . usually to defeat the minority’s preferred candidate.”⁴⁸

Section 2 claims are limited to districts in which the minority was a majority before the redistricting. One can only successfully invoke section 2 vote dilution within the context of a district in which a particular minority group not only constitutes the majority, but is also politically cohesive enough that it votes as a block to defeat the minority candidate. If these three conditions are met, then the Court will turn to a totality of the circumstances test to determine if “members of a racial group have less opportunity than do other members of the electorate.”⁴⁹

In *LULAC*, District 23 satisfied the three *Gingles* requirements.⁵⁰ These judicially-created requirements ensure that the broad protections of section 2 are reserved for a few clear, bright-line cases in which a minority should be able to elect the candidate of its choice. It excludes all other cases in which minorities represent the minority vote in their districts or when they would not be able to defeat the majority’s candidate. In such cases, the otherwise broad democratic process-protecting provisions of section 2 simply do not aid the minority voter.⁵¹

The Court is willing to approach section 2 from a process-based approach and is willing to superintend the democratic process, because Congress mandated it in the Voting Rights Act. The Act requires the Court to find a judicially manageable approach to section 2 claims, which as noted above, the

47. *LULAC*, 126 S. Ct. at 2614.

48. *Id.* at 2614 (quoting *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986)) (quotations omitted).

49. *LULAC*, 126 S. Ct. at 2614.

50. *Id.* at 2615-16.

51. *See e.g.*, *Thornburg v. Gingles*, 478 U.S. 30, 50 & n.17 (1986). Justice Brennan, writing for the majority in *Gingles* argued that there was no injury to the minority voter if they could not have elected the representative of their choice, but for the redistricting. *Cf.* 42 U.S.C. § 1973(b) (2007). Section 2 speaks of injuries to members of a minority group, while *Gingles* appears to require that the injury be to the whole group as a voting block. If the minority is not a majority and does not vote as a cohesive block, there can be no injury under *Gingles*. Nothing in the text of section 2 compels this narrow view of the injury. Section 2 focuses on “less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” *Id.* There is a very large range of injuries to individual members of a minority group, in terms of each one’s ability to elect representatives of his or her choice, in comparison to other members of the electorate, that fall short of the *Gingles* bar. The range can run from necessitating that one who is running for office receive the vast majority of the minority voters in order to get elected (and having to show that one will represent their interests) to not requiring any of their votes (and not having to represent any of their interests).

Court interprets narrowly. It is unwilling to cross the street and apply the same reasoning to constitutional claims, in large part because the Court lacks a consensus as to the appropriate remedy. The old adage from *Marbury v. Madison* was that the violation of a right required a remedy.⁵² The Court has flipped this addage, and since it cannot agree on a remedy, it will not recognize the violation of the right.⁵³

III. THE COURT'S DECISION REGARDING DISTRICT 23 WAS MORE INFLUENCED BY A NEGATIVE REACTION TO THE CREATION OF MINORITY-MAJORITY DISTRICTS, THAN BY A NEED TO PROTECT MINORITIES IN THE DEMOCRATIC PROCESS.

District 23 satisfied the three *Gingles* requirements because the redrawn district lines decreased the Latino voting share from 57.5% to 46%; this was in a district where it was clear that the vast majority of Latinos had voted against the incumbent.⁵⁴ Thus, the Court held that the Latinos in District 23 were denied an equal opportunity to successfully elect their preferred candidate.⁵⁵ This holding is rather unremarkable. Seven members of the Court would agree that the dilution of District 23 violated section 2;⁵⁶ only Justices Scalia and Thomas held otherwise.⁵⁷ The Chief Justice's dissent, joined by Justice Alito, was not based on the argument that the Latino vote was diluted

52. 5 U.S. 137, 163 (1803). Chief Justice Marshall quotes Blackstone for the proposition that "it is a general and indisputable rule that where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded." WILLIAM BLACKSTONE, 3 COMMENTARIES ON THE LAWS OF ENGLAND 23 (1765-1769).

53. This is consistent with the Supreme Court's attack on remedies since the time of the Rehnquist Court. See John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524 (2005); Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097 (2006); Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L. J. 223 (2003); Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097 (2006). Christopher J. Roederer, *Another Case in Lochner's Legacy, The Court's Assault on New Property*, 54 DRAKE L. REV. 321, 341-42, 342-351, 360 (2006); Roederer, *supra* note 23 at section V.B.1 "Constricting Remedies."

54. *League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594, 2613 (2006).

55. *Id.* at 2615-16.

56. *Id.*

57. *Id.* at 2663 (Scalia & Thomas, JJ., dissenting) (arguing that section 2 of the Voting rights Act does not allow for vote dilution claims at all). Justice Scalia stated that he "would dismiss appellants' vote-dilution claims premised on § 2 of the Voting Rights Act of 1965 for failure to state a claim, for the reasons set forth in Justice Thomas's opinion, which I joined, in *Holder v. Hall*." (citing *Holder*, 512 U.S. 874, 891-946 (1994)). In *Holder*, Justice Thomas argued that section 2 of the Voting Rights Act only applies to a "voting qualification or prerequisite to voting or standard, practice, or procedure" and that voter dilution claims are not captured by the terms "standard, practice, or procedure."

in District 23, but was based on the argument that the newly-created Latino District 25 compensated for the dilution in District 23.⁵⁸

Texas Republicans cleverly created a new Latino district—District 25—that combined geographically and politically-disparate Latinos. Although Latinos would, no doubt, have control over the district, they were not politically cohesive and, thus, were unlikely to vote as a block. Although the Chief Justice saw this gerrymandered, Latino-packed district as more than compensating for the loss of District 23,⁵⁹ Justice Kennedy and a majority of the Court did not agree.

Justice Kennedy, writing for the majority, based his decision on a number of points. First, the right to vote is an individual right secured for individual voters who meet the three *Gingles* requirements, and therefore, the violation of those rights cannot be repaired by giving another group of minority voters, in another location, more concentrated voting power.⁶⁰ Second, the creation of a non-compact district cannot compensate for the breaking up or cracking of a compact district.⁶¹ Third, if the Court allowed the non-compact district to remedy the break up of the existing compact district, it would be applying different standards to the State than those applied to the claimants. It would allow states to create non-compact districts to prevent claimants from demonstrating that their district is compact, in order to satisfy the *Gingles* requirements.⁶² This would allow states to break up compact districts and to create new minority districts, which do not satisfy the *Gingles* requirements; thus, minorities within such a district could not bring section 2 claims in the future. Fourth, the minorities combined into District 25 are not only geographically disparate but also constitute “‘disparate communities of interest’ with ‘differences in socio-economic status, education employment, health and other characteristics.’”⁶³ Finally, “[t]he purpose of the Voting Rights Act is to prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race.”⁶⁴

In its analysis of District 25, the Court focused little attention on process arguments or on arguments regarding the need to protect discrete and insular minorities. Rather, Justice Kennedy relied on individual rights and the pursuit of colorblindness in support of his opinion. The new district is a perfect example of why a court might be hostile to group rights or mandated minority-

58. *League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594, 2652-2663 (2006).

59. *Id.*

60. *Id.* at 2616.

61. *LULAC*, 126 S. Ct. at 2617.

62. *Id.* at 2617-18.

63. *League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594, 2617 (2006) (quoting the district court's findings).

64. *Id.* (quoting *Georgia v. Ashcroft* 539 U.S. 461, 490 (2003)).

majority districts; they tend to perpetuate a stereotype that everyone within a minority population is the same and that individual rights can be sacrificed for the sake of group rights.

This line of argument does not draw from the same well as *Carolene Products* footnote four, which calls for heightened scrutiny to protect discrete and insular minorities, who are in danger of being inadequately protected by the democratic process, since those groups, by definition, have minority representation in that process. Rather, this line of reasoning is more consistent with Justice Kennedy's hostility towards mandatory minority-majority districts. As Tokaji notes, the Justice Department was aggressive in compelling the creation of "safe minority districts" during the 1990s,⁶⁵ and the Court, since the 1990s, has wanted to curtail the creation of such safe districts.⁶⁶

Although Professor Tokaji is unclear as to why the Department of Justice created those safe districts in the first place, section 5 of the Voting Rights Act provides the authority for their creation. Section 5 applies to states and counties that were found to have a history of systematically discriminating against minority voters.⁶⁷ Section 5 covers eight states in totality (Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina and Texas),⁶⁸ and it applies to specific counties and townships in eight other States (Virginia, North Carolina, New York, California, Florida, South Dakota, Michigan and New Hampshire).⁶⁹ When these jurisdictions had a rampant history of discrimination, the Act set up a mechanism to insure that they did not slide back into racial gerrymandering.⁷⁰ This mechanism requires covered jurisdictions to get preclearance from either the Department of Justice or the United States District Court for the District of Columbia before they can make any changes to their voting practices or procedures (including changes to voting districts).⁷¹

The practice of creating minority-safe districts is a mechanism for insulating minorities from vote-dilution.⁷² While the packing or concentration

65. Daniel P. Tokaji, *If It's Broke, Fix It: Improving Voting Rights Act Preclearance*, 49 HOW. L.J. 785, 799-806 (2006).

66. *Id.*

67. Voting Rights Act of 1965, § 5, 79 Stat. 439 (1965) (codified as amended at 42 U.S.C. § 1973c (2007)).

68. U.S. Department of Justice, Civil Rights Division, Section 5 Covered Jurisdictions, http://www.usdoj.gov/crt/voting/sec_5/covered.htm (last visited Nov. 27, 2007).

69. *Id.* In fact, there are very few counties or townships that are covered in Florida, California, Michigan, South Dakota, New Hampshire and New York.

70. Laughlin McDonald, *The 1982 Extension of Section 5 of the Voting Rights Act of 1965: The Continued Need for Preclearance*, 51 TENN. L. REV. 1, 13, 26-27 (1983).

71. Voting Rights Act of 1965, § 5, 79 Stat. 439 (1965) (codified as amended at 42 U.S.C. § 1973c (2007)).

72. For a defense of majority-minority electoral districts, see Laughlin McDonald, *What Happened to the Voting Rights Act? Or Restoring the White Primary*, J. S. LEGAL HIST. 207-45 (1999).

of minorities within certain districts in the 1990s may have been done to “bleach” surrounding white areas and increase the number of Republicans in Congress,⁷³ it also had the effect of increasing minority representation.⁷⁴ From the perspective of protecting minority-voting rights, it also had the effect of maintaining the cohesiveness of minority-voting blocks, which preserved the ability of a given minority to meet the *Gingles* requirements in order bring section 2 claims in the future.⁷⁵

Professor Tokaji refers the reader to Richard Pildes’s forthcoming article, in which Pildes argues that Justice Kennedy’s decision in LULAC was primarily animated by his hostility towards legally-mandated safe minority districts and to the race essentialism that District 25 embodies.⁷⁶ Pildes goes further and raises concerns that Justice Kennedy’s decision might double-back and impact Shaw claims⁷⁷ and section 5 dismantling claims.⁷⁸ Although Justice Kennedy stopped short of holding that District 25 alone violated section 2 of the Act, Pildes fears that future Shaw-type claims, attacking race-based districting, will be able to draw on Justice Kennedy’s decision in order to challenge districts that are not “ideologically coherent.”⁷⁹ While Shaw merely required geographical coherence, Justice Kennedy believed this was

73. Tokaji, *If It's Broke, Fix It*, *supra* note 65, at 801.

74. *Id.* at 800. As Tokaji himself notes:

After the post-1990 redistricting, the number of African Americans elected to Southern state legislatures increased from 204 to 260, while the number of African Americans elected to Congress from the South increased more than fourfold, going from four to seventeen. Nationwide, the number of Blacks elected to the House went from twenty-one in the 98th Congress (1983-85) to thirty-nine in the 103rd Congress (1993-1995). The number of Latinos also increased, going from twelve to twenty in this period.

Id.

75. This assumes, of course, that the packing is not in the mold of District 25 in Texas, which packs minorities together from different regions, who are not politically cohesive, do not share interests, and are unlikely to vote as block.

76. Tokaji, *supra* note 1, at 356; Pildes, *supra* note 27, at 1146.

77. *Shaw v. Reno*, 509 U.S. 630 (2003), and its progeny represent a line of cases in which white voters have brought equal protection challenges to districts drawn on race-conscious grounds.

78. Pildes, *supra* note 27, at 1145, 1148. As Pildes states:

The *Shaw* cases had held that race-conscious districting had to be limited, for constitutional reasons, to districts that were reasonably compact geographically. LULAC now adds to this the constraint that such districts must be, not only geographically compact, but ideologically coherent—and, most importantly, coherent in a deeper or broader sense than that minority voters share a preference for minority candidates pitted against majority ones. That is, districts must be ‘culturally’ as well as geographically compact.

Id. at 1145.

79. *Id.* at 1145.

insufficient in the context of a section 2 claim.⁸⁰ Pildes's second worry is that districts lacking ideological compactness might not be covered by the stronger protection of section 5 of the Voting Rights Act, which prohibits "retrogression." He argues, "[i]f there were no legal obligation to create such a district in the first place, as the Court now understands the Act, then undoing such a district might not be retrogressive."⁸¹

While Professor Pildes's concerns might be slightly exaggerated, they make it clear that LULAC does not adopt a process view of section 2 claims as its goal. Protecting discrete and insular minorities in the political process is neither its primary aim, nor its probable effect.

IV. THE SEED OF HOPE, WHICH PROFESSOR TOKAJI CLAIMS CAN BE FOUND IN THE DISTRICT 23 CLAIM, DID NOT SURVIVE IN THE DISTRICT 24 CLAIM.

Unlike District 23, in which the three requirements above were met,⁸² the three requirements were not met in the case of District 24.⁸³ District 24 had two minority voting blocks—one black and one Latino—which consisted of approximately 26% and 21% of the voting population, respectively.⁸⁴ The Anglo voters constituted just under 50% of voters.⁸⁵ The black vote was considered a swing vote that, if cast in a block, would determine the outcome of the election (in fact, it had ensured that the Anglo incumbent, Martin Frost, was reelected every time since 1974).⁸⁶ District 24 argued that their vote would ensure the reelection of Frost and that by cracking the district and splitting the black vote, the Republicans had diluted their vote under section 2.⁸⁷

The Court noted that, even if one assumed that it might be possible for a racial group that did not make up the majority of voters within a district to get over the first prong of the three-part test, it would still need to show that it could elect a candidate of its choice.⁸⁸ Since the incumbent was an Anglo-Democrat who had never had any opposition in the primary, the Court held

80. *League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594, 2618 (2006). It should be noted that Justice Kennedy referenced the difference between *Shaw*-type equal rights claims and section 2 voting rights claims, noting that geographical compactness was at issue in the former type of case, while minority group compactness was at issue in the later type of case.

81. Pildes, *supra* note 27, at 1148.

82. *LULAC*, 126 S. Ct. at 2615-16.

83. *Id.* at 2624-26.

84. *Id.* at 2624.

85. *League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594, 2624 (2006).

86. *Id.*

87. *Id.*

88. *Id.*

that it was just as plausible that this was an Anglo-Democratic district.⁸⁹ Through somewhat strange logic, testimony that the Anglo incumbent might not have truly served the African-American community evinced that it was not clearly erroneous for the court below to hold that black voters could not elect their candidate of choice.⁹⁰

While they did not get their candidate of first choice, their block (no doubt) ensured that they did not end up with a candidate that was their last choice. In other words, while they lacked the power to put up their own candidate, who could effectively challenge the Democratic incumbent in the primary, they appeared to have the power to ensure that the Anglo-Democrat would be elected over the Republican opponent. The Court, by allowing for the Republicans to crack the black vote in this way, ensured that they would not have the power to keep their last choice out of office.

If the process-based approach of *Carolene Products* footnote four carried much weight, one would think that Justice Kennedy would agree with the dissenting opinions of Justice Stevens, joined by Justice Breyer,⁹¹ and Justice Souter, joined by Justice Ginsburg,⁹² who argued that the cracking of District 24 constituted a section 2 violation.⁹³ The Court's interpretation of section 2, which mandates that there is minority-voter dilution only when a minority group has obtained the status of a majority in any given district, is not a bold footnote 4 move. Rather, it is a bright-line standard that reserves section 2 claims for those clear cases where a minority that has become a majority is arbitrarily reduced to a minority again. The fact that the Court could not move away from this bright line and recognize that the cracking of District 24 was also a violation of section 2, indicates that the Court is not concerned with a breakdown of the democratic process.

Taking a minority block of voters and splitting them up to ensure that they have very little influence in the next election, falls squarely upon footnote four of *Carolene Products*. The black voters in District 24, a discrete and insular minority, had their vote diluted in a way that undermined their ability to be represented in their district. The redistricting had the effect of spreading the minority block in District 24 into five new districts—Districts 6, 12, 24,

89. *Id.* at 2624-25.

90. *League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594, 2625 (2006).

91. *Id.* at 2626, 2641-46.

92. *Id.* at 2647-2651.

93. One would think that Justice Kennedy would have been extra sensitive to power of a minority block that can act as a swing vote. In this case, as in many others over the last decade, he has taken on the role of the swing voter. This has given him considerable power, as one who can either join the proverbial left or the right of the Court on any given issue. What would happen to the power of his vote if they expanded the Court to eleven members and appointed two more Justices, either to his left, or to his right?

26, and 32.⁹⁴ This redistricting was not part of a democratic process, but its purpose and effect were to further distort democracy by entrenching the effective disenfranchisement of black minority voters. The Court responded by arguing that the acceptance of such claims would “unnecessarily infuse race into virtually every redistricting plan, raising serious constitutional questions.”⁹⁵ Here, the Court explicitly rejected the minority-protecting process view.

It is inconsistent with the spirit of *Carolene Products* footnote four to withdraw the protection of discrete and insular minorities, simply because they could not command a majority within a given district, particularly when it is clear that the minority block can exercise its voting power to form a coalition and eliminate a candidate that is its last choice. Since it is unclear whether the minority block could get its first choice, the Court is not going to protect the block’s ability to secure its second-best choice against its worst option. Thus, the Court abandons discrete and insular minorities, which remain on the verge of absolute dilution, unrepresented, and powerless to eliminate the candidate they prefer the least.⁹⁶

V. THE NEED FOR JUDICIAL INTERVENTION IS MORE WIDESPREAD AND PRESSING IN THE AREA OF PARTISAN GERRYMANDERING THAN IN SECTION 2 CLAIMS. YET NEITHER THE COURT’S DECISION IN *LULAC*, NOR JUSTICE KENNEDY’S OPINION, PROVIDE MUCH HOPE THAT THE COURT WILL ACT WITH VIGILANCE TO PROTECT THE PROCESS.

While Professor Tokaji should be commended for trying to find seeds of hope in hard to find places, if the analysis above is correct, there is little room under *LULAC* for those seeds to grow. If there is room for growth, political scientists, such as Grofman and King, are likely correct that the area of political gerrymandering has the most potential.⁹⁷ Although beyond the scope of Professor Tokaji’s article, partisan gerrymandering is briefly addressed here, in order to demonstrate that if the Court was concerned with safeguarding the democratic process, it could have, and should have, taken the opportunity to do so.

Rather than embracing a role for the courts to superintend the democratic process, Justice Kennedy appears to think that the Court’s involvement would

94. *LULAC*, 126 S. Ct. at 2647 (Souter, J., dissenting in part).

95. *LULAC*, 126 S. Ct. at 2625 (citing *Georgia v. Ashcroft*, 539 U.S. 461, 491 (2003) (Kennedy, J., concurring)).

96. Robert Dahl, in *DEMOCRACY AND ITS CRITICS* (1989), claimed that the ability to vote out an incumbent in the next election was a necessary condition for democracy.

97. Grofman and King, *supra* note 16.

be contrary to notions of the democratic process.⁹⁸ He begins with the premise that the legislature is best suited to draw congressional districts.⁹⁹ As he states, “drawing lines for congressional districts is one of the most significant acts a state can perform to ensure citizen participation in republican self-governance. That Congress is the federal body explicitly given constitutional power over elections is also a noteworthy statement of preference for the democratic process.”¹⁰⁰ He does not acknowledge or even appear to recognize that states have been drawing these lines so as to undermine citizen participation and republican self governance. As Burt Neuborn states:

In the 2006 campaign, out of the 435 available House seats, thirty-five are contestable seats. Four hundred of the seats have been so rigged and so gerrymandered that they are uncontestable. By using the criteria of the American Political Science Association, you know who is going to win before you cast your ballot. The election is a formality. The reality took place when the lines were drawn in the state legislature.¹⁰¹

Rather than taking action to safeguard the democratic process, the Court threw out some seeds for the legal community to ponder. As noted at the outset, a majority of the Court is open to the possibility of a justiciable standard for adjudicating such claims; Justice Kennedy, the key swing voter, is himself open to this possibility within narrowly circumscribed situations. However, in order to have the seeds planted, one must persuade the Court that a judicially manageable standard exists. While the Court may have “seeded the clouds” so to speak, one should not expect a downpour of justiciable claims in partisan gerrymandering cases; rather, as in the section 2 cases, there is potential for the Court to hear a few bright-line instances.

Political scientists Grofman and King, whose approach is widely used by experts and accepted by academics for determining partisan fairness in elections, have proposed the use of a partisan symmetry criterion for determining *prima facie* cases of political discrimination in gerrymandering.¹⁰² As they note, five members of the Court in *LULAC* indicated that the criterion could be used as one part of a multipart test in partisan gerrymandering

98. *League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594, 2608 (2006).

99. *Id.*

100. *Id.*

101. Neuborn, *supra* note 2, at 944-45.

102. Grofman and King, *supra* note 16, at 4, 6. As King and Browning note: “We are aware of no published disagreement or even clear misunderstanding in the scholarly community about partisan symmetry as a standard for partisan fairness in plurality-based American elections since the clarification and measures introduced by Gary King and Robert X. Browning in *Democratic Representation and Partisan Bias in Congressional Elections*.” 81 AM. POL. SCI. REV. 1251, 1267 (1987).

claims.¹⁰³ The partisan symmetry standard “requires that the electoral system treat similarly-situated parties equally, so that each receives the same fraction of legislative seats for a particular vote percentage as the other party would receive if it had received the same percentage [of the vote].”¹⁰⁴

Partisan symmetry itself will only reveal how symmetrical the vote inputs are, as compared to the vote outputs. One still needs to reach a threshold of sufficient dissymmetry, or in other words, to demonstrate a sufficient level of dissymmetry that would constitute unconstitutional gerrymandering. Grofman and King set out five different threshold tests, all of which are judicially manageable.¹⁰⁵ The thresholds range from requiring the plan to: (1) have as little bias as practicable;¹⁰⁶ (2) not be predicted to result in the unfair loss of a seat;¹⁰⁷ (3) not be predicted to be egregiously unfair in terms of a percentage amount of dissymmetry (*e.g.*, 1, 3, 5 or 10%);¹⁰⁸ (4) not be expected to result in a party receiving a minority of votes, yet receiving a majority of the seats;¹⁰⁹ or (5) not result in asymmetry that is both severe and worse than the previous plan.¹¹⁰

The threshold tests are listed according to the level of aggression; if one wanted to aggressively defend the democratic process, then option (1) is the strongest test. Of these five options, Justice Kennedy has only indicated some support for the latter two options, which are rather limited tests. While the technology and science of voting has reached a point where these test could be applied to accurately predict results,¹¹¹ Justice Kennedy stated in *LULAC* that the Court is “wary” of adopting a test that would apply to hypothetical election results in the future, as opposed to a test that was applied after an election has taken place.¹¹² Perhaps most importantly, Justice Kennedy distinguishes cases in which a majority further entrenches itself by giving itself more votes through gerrymandering from those cases in which a minority is able to gerrymander the majority into a minority of seats.¹¹³ As

103. *Id.*

104. *Id.* (quoting King et al., Amicus Brief in *LULAC v. Perry* (2006) Submitted on Behalf of Neither Party in the U.S. Supreme Court (No. 05-276) (2005)). Note that Grofman and King state in footnote 8 that the amicus was submitted in *Jackson v. Perry*, was consolidated into *LULAC*.

105. Grofman and King, *supra* note 16 at 21-25. As they note, under any of these thresholds, the determination of a violation would be straightforward, and any given state or line district line-drawer would know in advance whether a proposed plan would pass review. *Id.* at 25.

106. *Id.* at 21.

107. *Id.* at 21-22.

108. *Id.* at 22.

109. Grofman and King, *supra* note 16, at 22-24.

110. *Id.* at 24-25.

111. *Id.* at 21.

112. *League of United Latin American Citizens v. Perry*, 126 S. Ct. 2594, 2611 (2006).

113. *Id.* at 2610.

Grofman and King point out, this latter case is less likely to occur, since it is generally the majority that draws the lines to help consolidate its majority position.¹¹⁴

If Justice Kennedy, and thereby the Court, cannot be moved to adopt a less restrictive test, there is not a great deal of hope that the federal courts will play an active role in superintending the democratic process. Rather, they will continue to make the occasional incursion into policing a thriving American “incumbantocracy.”

114. Grofman and King, *supra* note 16, at 23. Of course, over time a party may find itself in such disfavor that it no longer gets a majority of votes and then its redrawing of the districts would fall into the latter category. As the authors note, this was the case of the 1991 pro-Democratic gerrymander in Texas. *Id.* at 23.

