

# Race, Redistricting, and Representation

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## I. INTRODUCTION

In a futile quest to bring some coherence to its political gerrymandering jurisprudence, the United States Supreme Court has insisted on either aping the approach of its racial vote dilution jurisprudence or using race to regulate politics. The fact that this quest has been remarkably unsuccessful has, thus far, scarcely proven incapable of deterring the Court from its pursuit. As a consequence of this ineffectual exercise, the Court finds itself in a bind: a majority of the Court is deeply troubled by partisan excesses in legislative line-drawing, but is without an approach for bridling such excesses.

Judging from the early returns in the form of *League of United Latin American Citizens v. Perry* (*LULAC*),<sup>1</sup> the Roberts Court appears similarly ensnared and seems unlikely to develop anytime soon a resolution that will untie this wickedly tangled knot. In *LULAC*, various plaintiffs alleged that Texas' 2003 congressional redistricting constituted an unconstitutional racial and partisan gerrymander in violation of the First and Fourteenth Amendments and the Voting Rights Act (VRA). Justice Kennedy wrote an opinion announcing the judgment of the Court, parts of which were joined by six other Justices. In a part of the opinion in which no other Justice agreed to join him, Justice Kennedy decided that the congressional redistricting plan at issue was not an unconstitutional political gerrymander because the plaintiffs did not present an administrable standard.<sup>2</sup> Though it is clear from *LULAC* that political gerrymandering claims remain justiciable—an issue that was somewhat ambiguous in *Vieth*<sup>3</sup>—it is also clear that the Court is no closer to an agreement on an administrable standard.<sup>4</sup> Thus, *LULAC* offers nothing new on the issue of administrability and was in that sense a disappointment.<sup>5</sup>

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<sup>1</sup> 126 S. Ct. 2594 (2006) [hereinafter *LULAC*].

<sup>2</sup> *Id.* at 2609–11.

<sup>3</sup> *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

<sup>4</sup> Chief Justice Roberts and Justice Alito agreed with Justice Kennedy's conclusion that the plaintiffs did not present an administrable standard. *LULAC*, 126 S. Ct. at 2652 (Roberts, C.J., joined by Alito, J., concurring in part and dissenting in part). They purported to offer no opinion on the issue of the justiciability of political gerrymanders. *Id.* Justices Scalia and Thomas continue to adhere to their positions that political gerrymandering claims are not justiciable. *Id.* at 2663 (Scalia, J., joined by Thomas, J.,

That the Court failed to deliver on the implied promise of developing an administrable standard for adjudicating political gerrymander claims does not mean that it has given up on the near-term possibility of limiting the propensity of legislative actors to engage in extreme partisan line-drawing. Indeed, as I shall argue in this Article, the Court's decision in *LULAC* may be precisely such an attempt.

One way to read *LULAC* is to regard Justice Kennedy's conclusion that the State violated Section 2 in redrawing the boundaries of District 23 as a triumph for the concept of racial representation. In Part III of the opinion, which was joined by Justices Stevens, Breyer, Ginsburg, and Souter, Justice Kennedy concluded that the State violated Section 2 of the VRA by redrawing a majority-Latino district, District 23, and reducing the number of Latino voters in that district. The Court also concluded that the State could not cure the Section 2 violation by offsetting the loss of District 23 with the creation of a different majority-Latino district, District 25, because District 25 was not required by Section 2—a necessary requirement, from the majority's perspective, for justifying an offset. There is a certain amount of nuance or sophistication in Justice Kennedy's vote dilution discussion. Unlike the *Shaw* line of cases or the nose-holding, tiptoeing-through-the-muck image conjured by the Chief Justice's "sordid business . . . divvying us up by race"<sup>6</sup> obiter in *LULAC*, Justice Kennedy's opinion reflected a certain level of comfort with the concept of racial representation. Justice Kennedy seemed at ease commenting on the extent of racially-polarized voting in the area around District 23. Though Justice Kennedy expressed some concern with race essentialism, his observation that the State should not treat all Latino voters alike simply because they are Latino is not deployed to undermine the concept of racial representation—as in the *Shaw* cases—but to buttress the Court's argument that the State should not have diluted Latino voting power in District 23.<sup>7</sup> Note for example the non-awkward references to "Latino voting power," "Latino political power," and "Latino voters."

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dissenting). Justices Souter and Ginsburg would dismiss the gerrymandering question as improvidently considered on the ground that the Court remains deeply fractured on the issue. *Id.* at 2647. Justices Stevens and Breyer would find a constitutional violation. *Id.* at 2635.

<sup>5</sup> Compare *id.* at 2607 ("We do not revisit the justiciability holding but do proceed to examine whether appellants' claims offer the Court a manageable, reliable measure of fairness for determining whether a partisan gerrymander violates the Constitution."), with *id.* at 2612 ("We conclude that appellants have established no legally impermissible use of political classifications. For this reason, they state no claim on which relief may be granted for their statewide challenge.").

<sup>6</sup> *LULAC*, 126 S. Ct. at 2663 (Roberts, C.J., joined by Alito, J., concurring in part and dissenting in part).

<sup>7</sup> See *infra* Part III.

These are all references that rest uncomfortably with a strictly-construed prohibition on racial essentialism.<sup>8</sup> Moreover, in declining to find that African-American voters suffered vote dilution as a consequence of the dismantling of District 24, Justice Kennedy arguably faulted black voters for not having demonstrably distinctive political interests from white voters in the district and for not providing a primary challenge to the white incumbent, Martin Frost. Lastly, in *LULAC* plaintiffs of color (at least some of them) finally prevailed in a vote dilution lawsuit at the Supreme Court, and all this by the pen of Justice Kennedy. This was a far cry from the halcyon days of *Shaw v. Reno*, *Miller v. Johnson*, and their progeny.

Yet, upon closer inspection of the facts of the case and the Court's reasoning, it would be inaccurate to say that *LULAC* is only or even primarily a racial gerrymandering case. By most accounts, the overriding purpose of the 2003 congressional redistricting plan was to maximize the number of Republican congressional seats and to minimize the number of Democratic congressional seats.<sup>9</sup> The plan targeted all ten white incumbent Democrat congressmen for defeat and none of the Democratic representatives of color.<sup>10</sup> The Republican strategy was to draw a neat line between race and politics and to pursue as radical a partisan agenda as possible.<sup>11</sup>

This is not to say that voters of color were not adversely impacted by the redistricting plan. Given the relationship between voters of color and the Democratic Party, especially in Texas where most citizens of color vote for the Democratic Party, a redistricting plan that adversely affects the Democratic Party is sure to have a negative impact on voters of color as Democrats.<sup>12</sup> As between a racial vote dilution claim and a partisan gerrymandering claim, the partisan gerrymandering claim is best supported by the facts of the case.

Moreover, it is hard to reconcile the fact that Justice Kennedy stretches existing doctrine to find racial vote dilution in District 23, yet goes out of his way not to find racial vote dilution in District 24. As the Chief Justice rightly stated, “[w]hatever the majority believes it is fighting with its holding, it is

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<sup>8</sup> While we are at it, notice also the use of the appellation “Latino” as opposed to “Hispanic.”

<sup>9</sup> See, e.g., STEVE BICKERSTAFF, *LINES IN THE SAND: CONGRESSIONAL REDISTRICTING IN TEXAS AND THE DOWNFALL OF TOM DELAY* 214 (2007) (noting that the purpose of the 2003 redistricting was to “maximize Republican voting strength while minimizing Democratic voting strength”).

<sup>10</sup> *Id.* at 98.

<sup>11</sup> *Id.* at 108 (“The final [redistricting] plan was as partisan as the Republicans thought the law would allow.”).

<sup>12</sup> *Id.* at 214.

not vote dilution on the basis of race . . . .”<sup>13</sup> To find sufficient facts from *LULAC* to support a racial vote dilution claim but not a partisan gerrymandering claim is puzzling.

So what then are Justice Kennedy and the majority fighting with their holding if not racial discrimination? In this Article I shall explain two ways of reading *LULAC*: first as a case that vindicates the value of *racial* representation, second as a case concerned about representation itself. Part II describes why *LULAC* failed as a straightforward partisan gerrymandering case. Part III explores *LULAC* as a race case. Part III also argues that if *LULAC* is to be understood as a race case, it will be because Justice Kennedy was defending a nuanced concept of anti-essentialism that focuses on the authenticity of racial representation. Part IV argues that politics, not race, is the majority’s concern in *LULAC* and that the case is the first application of Justice Kennedy’s nascent “representation rights” concept first introduced in *Vieth*. Part V considers the meaning of *LULAC* and examines whether *LULAC* signals doom for the VRA, as at least one prominent commentator has argued. I reject that argument and propose that *LULAC* is the Court’s attempt to constrain excessive partisan gerrymandering by using race. I then explore the benefits and limits of that strategy. Part V also argues that *LULAC* has introduced a radically new equal protection right that could potentially destabilize election law and the Court’s larger antidiscrimination jurisprudence. I conclude with a cursory evaluation of the impact of *LULAC* on voting rights doctrine.

## II. A POLITICAL GERRYMANDERING CASE THAT WASN’T

The underlying facts of *LULAC* must have seemed so promising to the Court when it first agreed to hear the case. In the shadow of the severely fractured *Vieth* opinion, the Court expected to resolve a highly visible, mid-decade, extremely partisan, Tom Delay redistricting plan. With the Democratic state legislators fleeing the state to prevent a legislative quorum, there was high drama in Texas and the arcana of redistricting was finally starring on the public stage. The Court was poised to say something important on one of the least likely issues to capture the public’s imagination.

Unfortunately, the facts did not quite cooperate. The case was not as straightforward as it first appeared. As a point of departure, the Republican gerrymander was an unabashed attempt to undo the effects of previous pro-Democratic gerrymanders. As Justice Stevens noted, Texas had long been a one-party state. Since the Civil war, the “Democrats maintained their political power by excluding black voters from participating in primary

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<sup>13</sup> *LULAC*, 126 S. Ct. 2594, 2663 (2006) (Roberts, C.J., joined by Alito, J., concurring in part and dissenting in part).

elections, by the artful management of multimember electoral schemes, and, most recently, by outrageously partisan gerrymandering.”<sup>14</sup> Though the 2003 Republican redistricting plan was clearly a pro-Republican gerrymander, it was as clearly the Republicans’ attempt to undo past Democratic gerrymanders. Indeed, from Justice Kennedy’s perspective, the swing Justice on these issues, the Republican plan was an obvious improvement over the previous Democratic gerrymanders. Writing only for himself, he described the plan as “fairer” than the previous plans because the plan “can be seen as making the party balance more congruent to statewide party power.”<sup>15</sup> Thus, what at first blush appeared to be an easy case of overreaching by the Republican Party, upon closer examination became less certain; neither party could claim that it had acted with clean hands in the process.

Second, even the mid-decade re-redistricting aspect of the case, which gave it a particularly sordid partisan flavor and was thought to provide the Supreme Court a narrow basis for reversing the three-judge panel below,<sup>16</sup> seemed less objectionable upon closer look. The Republicans argued that this was not a re-redistricting as the first redistricting was a court-drawn plan. Justice Kennedy largely agreed. The Constitution, Justice Kennedy noted, delegates redistricting to the elected branches: Congress and the state legislatures.<sup>17</sup> Because redistricting is quintessentially a legislative function and is most legitimate when performed by a legislature,<sup>18</sup> “if a legislature acts to replace a court-drawn plan with one of its own design, no presumption of impropriety should attach to the legislative decision . . . .”<sup>19</sup>

Moreover, as Justice Kennedy intimated, it is not clear that there is anything particularly tawdry with mid-decade re-redistricting per se—even assuming that the previous redistricting was performed by the legislature. A re-redistricting can improve upon a previous redistricting by more accurately reflecting the preferences of the relevant electorate, especially where there are significant mid-decade population shifts. Unless one is willing to adopt a per se rule against mid-decade redistricting and forgo the potential of its salutary effects, one has to examine “the content of the legislation enacted.”<sup>20</sup>

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<sup>14</sup> *Id.* at 2627 (Stevens, J., dissenting) (citations omitted).

<sup>15</sup> *Id.* at 2610 (opinion of Kennedy, J.).

<sup>16</sup> *See id.* at 2632 (Stevens, J., dissenting) (contrasting “the narrow question presented” by *LULAC* with the question presented in *Vieth*).

<sup>17</sup> *Id.* at 2607–08.

<sup>18</sup> *See id.* at 2608–09 (noting that “to prefer a court-drawn plan to a legislature’s replacement would be contrary to the ordinary and proper operation of the political process”).

<sup>19</sup> *LULAC*, 126 S. Ct. at 2608.

<sup>20</sup> *Id.* at 2610.

Fundamentally, the Court in *LULAC* was left in the same place as it found itself in *Vieth*—troubled by political gerrymandering but without a standard for identifying unconstitutional political gerrymanders. Having concluded that the Republican gerrymander was fairer than the previous court-drawn plan and the previous Democratic gerrymanders, and having concluded that the mid-decade character of the case was a red herring, the matter appeared to be at an end.

### III. *LULAC* AS VINDICATING RACIAL REPRESENTATION

The Court then turned its attention to deciding whether the State violated the rights of voters of color in enacting the redistricting plan. Justice Kennedy, this time joined by Justices Stevens, Breyer, Souter, and Ginsburg, concluded that Texas violated Section 2 of the VRA when the State removed approximately 100,000 mainly Latino—and almost by description Democratic—voters from District 23 in order to protect Republican incumbent Representative Henry Bonilla.

With one stroke of the pen, Justice Kennedy (with the helpful acquiescence of four other Justices) transformed a dispute over partisan gerrymandering into an improbable and conflicted one about race. Given that *LULAC* came two terms after *Vieth*, it was not surprising that the Court did not have much new to say on the standards for resolving partisan gerrymandering claims. Though we learned from *LULAC* that a majority of the Court believes that partisan gerrymandering claims remain justiciable, we did not even learn whether the Chief Justice and Justice Alito are part of that majority. What is surprising about *LULAC* is the critical role that race played in the case. And, as I shall argue later, what is interesting and unique about *LULAC* is the manner in which race was deployed to limit politics.

This Part explores a characterization of *LULAC* as a guarded vindication for the concept of racial representation. The argument here is that to the extent *LULAC* is a race case, the concern is with the authenticity of racial representation. To appreciate this point one must first come to grips with the manner in which Justice Kennedy attempted to overcome two substantial hurdles in order to conclude that the State violated the VRA in altering the population of District 23.

The first hurdle is the trial court's unequivocal factual determinations. The trial court found as a matter of fact that the State was motivated by two related reasons for modifying District 23. The trial court stated, "The record presents undisputed evidence that the Legislature desired to increase the number of Republican votes cast in Congressional District 23 to shore up Bonilla's base and assist in his reelection."<sup>21</sup> The trial court subsequently

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<sup>21</sup> *Session v. Perry*, 298 F. Supp. 2d 451, 488 (E.D. Tex. 2004).

noted, “It is undisputed that Plan 1374C eliminated Congressional District 23 as a district with a Latino majority citizen voting age population for the political purpose of increasing Republican voters in the district and shoring up the reelection chances of the Republican incumbent.”<sup>22</sup> The trial court also concluded that “[t]here is little question but that the single-minded purpose of the Texas Legislature in enacting Plan 1374C was to gain partisan advantage.”<sup>23</sup> Thus, from the trial court’s unambiguous and insistently emphatic determinations, the only reasons for the alteration of District 23 were for the sometimes complementary purposes of partisan and incumbency protection. The trial court’s opinion virtually screams: this case is about politics, it has nothing to do with race.<sup>24</sup>

The second hurdle is the creation of District 25. As a factual matter, District 25 is relevant because its existence buttressed further the trial court’s finding that the State did not intend to violate the Section 2 rights of Latino voters and did not do so in effect. It is hard to argue that there was intent to discriminate or discriminatory effect when the Legislature, in order to offset the loss of District 23, created a substitute majority-Latino district, which, as the Chief Justice argued, was more effective than District 23 as a Latino opportunity district. Notwithstanding the strength of this point, the hurdle here is not factual but doctrinal.

As a doctrinal matter, states have been given wide latitude in determining where to draw Section 2 districts. This latitude is thought to be necessary because there are often many goals that the state is trying to maximize in the redistricting process. These goals include satisfying the one person one vote principle, respecting relevant geographical boundaries, satisfying the VRA, and maximizing political opportunities. Consequently, as the Court maintained in *Shaw v. Hunt (Shaw II)*, even where a plaintiff has conclusively demonstrated that her vote has been diluted under Section 2, “[t]his does not mean that a § 2 plaintiff has the right to be placed in a majority-minority district once a violation of the statute is shown. States retain broad discretion in drawing districts to comply with the mandate of § 2.”<sup>25</sup>

When one combines the trial court’s findings of fact and *Shaw II*’s doctrinal point, *LULAC* was an unlikely race case. In order to reject the trial court’s findings of fact, the Court had to conclude that the trial court’s findings of fact were clearly erroneous. That is, Justice Kennedy had to determine not only that there were facts in the record that proved racial intent or effect, but that the facts were so overwhelming that the trial court’s findings went against the great weight of the evidence. Given the record, this

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<sup>22</sup> *Id.* at 496.

<sup>23</sup> *Id.* at 470.

<sup>24</sup> *See id.* at 472 (noting again that “politics, not race, drove Plan 1374C”).

<sup>25</sup> *Shaw v. Hunt*, 517 U.S. 899, 917 n.9 (1996).

was a formidable hurdle. Despite this hurdle, Justice Kennedy did not simply conclude that the trial court was wrong on the Section 2 point, but he went as far as to note that the State's action might even support a finding of intentional discrimination under the Equal Protection Clause.<sup>26</sup>

Justice Kennedy acknowledged that a state has wide discretion of where to draw a Section 2 district. However, he maintained, the state's discretion "has limits."<sup>27</sup> He went on to note that a proposed Section 2 offset district is only consistent with Section 2 where the "racial group[s] in each area had a § 2 right and both could not be accommodated."<sup>28</sup> A racial group does not have a Section 2 right if the group's population is non-compact or dispersed.<sup>29</sup> Justice Kennedy concluded, "since there is no § 2 right to a district that is not reasonably compact, the creation of a noncompact district does not compensate for the dismantling of a compact opportunity district."<sup>30</sup> Therefore, Justice Kennedy reasoned, the creation of District 25 did not suffice as a substitute district because District 25 was not sufficiently compact.<sup>31</sup>

To the extent that *LULAC* says something about racial representation,<sup>32</sup> the case is a surprising absolution for the concept of racial representation. Admittedly, it is tempting to read *LULAC* as an anti-racial essentialism case. It is true that Justice Kennedy's opinion seems to pay homage to the principle of anti-racial essentialism. Specifically, in his discussion of District 25, Justice Kennedy explains that the fundamental problem with District 25 is its combination of "two far-flung segments of a racial group with disparate interests."<sup>33</sup> Quoting the Court's earlier decisions in *Shaw I* and *Miller v. Johnson*, Justice Kennedy further noted that when "the only common index is race,"<sup>34</sup> the State is operating upon the impermissible assumption that racial identity dictates political identity.<sup>35</sup> "[B]y failing to account for the differences between people of the same race," Justice Kennedy warned, we

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<sup>26</sup> *LULAC*, 126 S. Ct. 2594, 2622 (2006) (noting that the alteration of District 23 "bears the mark of intentional discrimination that could give rise to an equal protection violation").

<sup>27</sup> *Id.* at 2616 ("The Court has rejected the premise that a State can always make up for less-than-equal opportunity of some individuals by providing greater opportunity to others.").

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 2617.

<sup>30</sup> *Id.* (citation omitted).

<sup>31</sup> *Id.* at 2616–17.

<sup>32</sup> I shall argue shortly that *LULAC* uses race instrumentally to curb politics.

<sup>33</sup> *LULAC*, 126 S. Ct. at 2618.

<sup>34</sup> *Id.* at 2619.

<sup>35</sup> *Id.* at 2618 (quoting *Miller v. Johnson*, 515 U.S. 900 (1995)).



do “a disservice” to the twin goals of eliminating racial discrimination and creating a society where race is no longer relevant.<sup>36</sup>

At a very superficial level, Justice Kennedy’s worry about race essentialism harkens back to the strong anti-essentialism strain identified with the quintessential anti-essentialism case, *Shaw I*, and its progeny. Indeed, as I note above, Justice Kennedy explicitly relied upon *Shaw I* and *Miller*. However, Justice Kennedy’s relatively weak gesture in the direction of anti-essentialism is deployed for a very different reason than the anti-essentialism argument of the Court in the *Shaw* line of cases.

In the *Shaw* line of cases, the anti-essentialism argument was deployed to remonstrate against race-consciousness in the line-drawing process. The central question that was presented in the *Shaw* cases was the extent to which the State could depart from the ideal of colorblindness in order to provide representation from voters of color. The Court was deciding between a modicum of race-blindness and race-consciousness. The clear import of the Court’s holding in *Shaw* and its progeny was that the State should always strive to be raceblind; racial districting, “even for remedial purposes” can be essentialist.<sup>37</sup> Thus, the State is justified in using race in the redistricting process where it uses race sparingly and where it has a compelling justification for doing so.

By contrast, in *LULAC*, Justice Kennedy is not deciding between race-consciousness and race-blindness; rather, the choice is between token racial representation and authentic racial representation. For the purpose of this analysis, an authentic representative is one that is substantially the choice of the relevant electorate with minimal interference by the State. A token representative is one that is primarily assigned by the State with minimal input by the relevant electorate. Authentic representation attempts to maximize the autonomy and agency of voters.<sup>38</sup> Justice Kennedy’s anti-essentialism argument is not an argument against race-consciousness and racial representation. It is about the need to protect the autonomy of these Latino voters to choose their representative against interference by the State, which would prefer a different choice.

Justice Kennedy’s primary task is to explain why the dismantling of a “Latino opportunity district” is inconsistent with Section 2 of the VRA. Unlike the Court’s task in the *Shaw* line of cases, Justice Kennedy’s purpose in *LULAC* relies upon the necessary assumption, which Justice Kennedy engages in repeatedly throughout the opinion, that one can coherently refer to Latinos in District 23 not just as a racial group but as a racial group that

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<sup>36</sup> *Id.* at 2618.

<sup>37</sup> *See, e.g., Shaw v. Reno*, 509 U.S. 630, 657 (1993).

<sup>38</sup> I describe this distinction in more detail *infra* Part III.

shares a distinctive political identity.<sup>39</sup> Put differently, the framework of the Section 2 inquiry not only assumes but requires explicitly a political cohesiveness for which race is “the only common index.”<sup>40</sup> The whole enterprise is otherwise incoherent. Unlike the *Shaw* line of cases, which seemed to question the constitutional viability of that assumption, Justice Kennedy explicitly deploys that assumption to address what he understands as the problem with the revised District 23.

From Justice Kennedy’s opinion, there are at least two problems with the modification of District 23. First, by modifying the lines of District 23, the State impeded Latinos in District 23 from choosing a representative of their choice. As Justice Kennedy explains, at the very moment that Latinos were about to choose their own representative and dispose of the representative that was unresponsive to their interests, “[t]he State . . . made fruitless the Latinos’ mobilization efforts.”<sup>41</sup>

This assumption—that there is a critical link between racial and political identity—is fundamentally inconsistent with the strong anti-essentialism bent of the *Shaw* cases. Recall that in *Shaw*, there was no reason to believe that the district in question, North Carolina’s congressional District 12, aggregated voters on the basis of race without regard to either political identity. In fact, the Court seemed reluctant to explore any possible linkages between racial and political identity. To explore such a linkage would itself give credence to an assumption that the Court viewed as essentialist and therefore constitutionally suspect. Not so with *LULAC*.

Justice Kennedy’s second problem is the fact that the State used race cynically to create the impression of authentic representation. According to Justice Kennedy’s analysis, Latino voters were entitled to one additional representative in south and west Texas. Moreover, Latino voters in District 23 were about to select a representative of their own choosing. Instead of respecting that choice, Texas assigned Latino voters a “Latino” representative.

Consider three possible fictional candidates for the title of authentic Latino representative. Candidate number one is a Latino Republican candidate from District 23; we will call him Henry Bonilla. Candidate number two is the representative from District 25. He is an Anglo Democrat from central Texas; we will call him Lloyd Doggett. Candidate number three is the Latino representative that Latino voters from District 23 would have chosen in the absence of interference by the State—*i.e.*, if the State had not

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<sup>39</sup> See, e.g., *LULAC*, 126 S. Ct. at 2619 (“The Latinos in District 23 had found an efficacious political identity.”); see also Ellen Katz, *Reviving the Right to Vote*, 68 OHIO ST. L.J. 1163, 1174 (2007).

<sup>40</sup> *LULAC*, 126 S. Ct. at 2619.

<sup>41</sup> *Id.* at 2622.

moved 100,000 Latino voters out of District 23. We will call this would be representative *Ciro Rodriguez*. Among those three, which candidate has the weakest claim to authenticity, and which has the strongest claim to authenticity?

Quite clearly *Henry Bonilla* is the least authentic Latino representative. *Henry Bonilla* has two facts that cut in his favor. First, he is Latino. Superficially, one can describe him as a Latino Republican elected in a district with a majority of Latino voters. But this fact is irrelevant as it is simply an unvarnished version of the old debate between descriptive and substantive representation. No serious thinker today believes in such a narrow conception of descriptive representation. Thus, the fact that *Bonilla* is Latino is of no moment. This is a fairly prosaic point.

Moreover, the fact that he was elected in a district where the majority of the individuals of voting age were Latinos is less significant than it might otherwise be. The redistricting plan reduced the number of Latinos in District 23 just enough to assure the election of a Latino Republican incumbent and maintain sufficient number of Latinos in the district so that the voting age population of the district—though not the citizenship population—was majority Latino. Justice Kennedy found this devious practice particularly irksome. As he stated, the manner in which the state redrew District 23 “becomes even more suspect when considered in light of evidence suggesting that the State intentionally drew District 23 to have a nominal Latino voting-age majority (without a citizen voting-age majority) for political reasons.”<sup>42</sup>

What matters is that *Bonilla* is demonstrably ideologically opposed to the ideological preferences of Latino voters in the region and that they have repeatedly repudiated him in very clear terms. So, we can confidently and easily conclude that *Bonilla* is not an authentic representative of the Latino community in District 23. With similar confidence, we can maintain that *Ciro Rodriguez* is an authentic Latino representative because he is the candidate that Latino voters would have chosen for themselves in the absence of strong interference by the State. Thus, as between these two representatives, the choice is clear.

The complication of course is District 25. The issue that plagued Justice Kennedy in *LULAC* is whether one should consider District 25's representative authentic or not. The complication here is two-fold because the question cannot be answered totally in the abstract. It is not sufficient to ask whether *Lloyd Doggett*, the wealthy white representative from central Texas, is an authentic representative; one must also ask whether he is an adequate substitute for the Mexican-born *Ciro Rodriguez*.

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<sup>42</sup> *Id.* 126 S. Ct. at 2623.

When the State altered District 23 to protect Bonilla and created District 25, it thereby made a choice in favor of Doggett at the expense of Rodriguez. More importantly, it did so with a marked cynical insouciance for the varied Latino communities which were impacted by its redistricting plan. It had no respect for the different Latino communities in the area.<sup>43</sup> The State broke apart one community and tied together two other communities not because the State decided that this was the best way to represent the Latino communities in the area, but because the State wanted to promote its political agenda while paying lip service to the idea of Latino representation.<sup>44</sup> It is this move by the State that troubled Justice Kennedy.

To the extent that *LULAC* is a race case, Justice Kennedy's opinion is a nuanced—and dare I say progressive—defense of the relationship between racial identity and political identity. The essentialism that Justice Kennedy finds troubling is this cynical use of race for strictly partisan purposes at the expense of authentic racial representation. It is the fundamental assumption of the swap of District 25 for District 23—that one Latino community and therefore one Latino representative is just as good as another—that prompts the concern with racial essentialism. Justice Kennedy's complaint is not that the State has privileged a race-conscious process at the expense of a race-blind one, but that the State has privileged, without sufficient justification, an inauthentic conception of racial representation at the expense of an authentic conception without sufficient justification. Viewed in these terms, Justice Kennedy is articulating a rather sophisticated defense of racial representation. The objection to this type of essentialism—that the State is indifferent to the racial authenticity of representation—is quite different from the objection that animated the *Shaw* cases—that the very idea of racial representation is itself essentialist.

#### IV. *LULAC* AS VINDICATING REPRESENTATIONAL RIGHTS

But this is not the only way to understand *LULAC*. The racial representation reading of *LULAC* is based upon the premise that race was at

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<sup>43</sup> See *id.* at 2618.

<sup>44</sup> Justice Kennedy stated:

The State chose to break apart a Latino opportunity district to protect the incumbent congressman from the growing dissatisfaction of the cohesive and politically active Latino community in the district. The State then purported to compensate for this harm by creating an entirely new district that combined two groups of Latinos, hundreds of miles apart, that represent different communities of interest. Under § 2, the State must be held accountable for the effect of these choices in denying equal opportunity to Latino voters.

*Id.* at 2623.

the center of the Court's concern. It implies that *LULAC* is primarily about race and the meaning of the VRA. But consider a different reading of *LULAC* where politics returns to the center of Justice Kennedy's concern.

In this Part, I shall argue for an alternative and perhaps more persuasive reading of *LULAC* where the concern is not with race itself but the fact that the State supplanted the very purpose of elections by assigning representation and did so precisely to undermine the accountability function of elections. This way of understanding *LULAC* gets us closer to Justice Kennedy's concern about "representational rights" in the political gerrymandering context.

The key to understanding *LULAC* and its meaning is to resolve why Justice Kennedy preferred District 23 to Districts 24 and 25. The critical datum in the construction of District 23 is the fact that the District was constructed to protect Henry Bonilla. This was an incumbent protection gerrymander with side benefits for the Republican Party. The State of Texas removed from Bonilla's district the voters who were most dissatisfied with his representation and were most likely to vote against him.

Notwithstanding all of the noises that the Court makes about race, Justice Kennedy acknowledged this key fact. He remarked, "the reason for taking Latinos out of District 23, according to the District Court, was to protect Congressman Bonilla from a constituency that was increasingly voting against him."<sup>45</sup> The fact that those votes were voters of color was fortuitous. It served to underscore the problem; it provided the Court a statutory and doctrinal hook for articulating its concerns; and it shielded the Court from accusations that it was further enmeshing itself into the political thicket. Though once again we are blinded by race, one should not get away from the underlying political facts of the case: District 23 was altered for political as opposed to racial reasons.

One must also acknowledge how the Court comes to grips with the politics of the case. The problem with District 23 is that Texas decided that Bonilla was going to be the representative of District 23 irrespective of the preferences of the voters. This assignment of representation is inconsistent with the central mechanism of democracy for attaining representation, which is an election.<sup>46</sup> As Justice Kennedy noted, Latino voters were mobilizing and were on the cusp of realizing a fuller extent of their political power at the ballot box.<sup>47</sup> As he remarked, it is precisely because Latino voters were about to exercise their political power and were about to do so in a manner that was inconsistent with the preferences of the State, that the State removed them

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<sup>45</sup> *LULAC*, 126 S. Ct. at 2622.

<sup>46</sup> The theoretical ideas that underlie this part are fully fleshed out in Guy-Uriel E. Charles, *Democracy and Distortion*, 92 CORNELL L. REV. 601 (2007).

<sup>47</sup> *LULAC*, 126 S. Ct. at 2622.

from the district.<sup>48</sup> The question for the Court's gerrymandering jurisprudence is whether there are limitations on a State's ability to alter electoral structures when voter preferences are inimical to the state's preferences.<sup>49</sup> What is the purpose of elections if the State will repeatedly seek to impose its preferences on the electoral process?

Relatedly, as the Court recognized, the assignment of representation undermines the accountability function of elections. Justice Kennedy noted:

[Though] incumbency protection can be a legitimate factor in districting . . . experience teaches that incumbency protection can take various forms, not all of them in the interests of the constituents. If the justification for incumbency protection is to keep the constituency intact so the officeholder is accountable for promises made or broken, then the protection seems to accord with concern for the voters. If, on the other hand, incumbency protection means excluding some voters from the district simply because they are likely to vote against the officeholder, the change is to benefit the officeholder, not the voters. By purposely redrawing lines around those who opposed Bonilla, the state legislature took the latter course.<sup>50</sup>

Thus, Justice Kennedy's primary concern with District 23 is the assignment of representation by the State.

One cannot gainsay the fact that the accountability function of elections is rendered ineffective if redistricters prior to the election can remove from the district the individuals most likely to vote against the representative. As the quote above demonstrates, this observation did not escape the Court's attention.

It is this accountability function that makes for effective representation. Though a representative can be motivated to be responsive to her constituents by a sense of obligation or by the fortuitous congruence of preferences, we rely upon elections as the primary mechanism to ensure responsiveness and effective motivation. If we are to maximize the possibility for effective representation, there must be a robust mechanism by which a representative is held accountable by her constituents.

This account also best explains why Justice Kennedy was unsympathetic to the plaintiffs in District 24. African-American voters in District 24 argued that changes to the district diluted their votes in violation of Section 2. Though African Americans did not constitute a majority of voters in the district—they constituted 26% of the citizen-age voting population—they argued that they effectively controlled the district because they constituted

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<sup>48</sup> *Id.*

<sup>49</sup> Or perhaps more precisely, the question is whether there are non-race-based limitations on such state action.

<sup>50</sup> *LULAC*, 126 S. Ct. at 2622–23 (citation omitted).

the majority of voters in the Democratic primary of a Democratic district. Using the district court's finding that African-American voters could not elect their candidate of choice in the primary, Justice Kennedy rejected the Section 2 claim. Justice Kennedy argued:

[Absent] any contested Democratic primary in District 24 over the last 20 years, no obvious benchmark exists for deciding whether African-Americans could elect their candidate of choice. The fact that African-Americans voted for Frost—in the primary and general elections—could signify he is their candidate of choice. Without a contested primary, however, it could also be interpreted to show (assuming racial bloc voting) that Anglos and Latinos would vote in the Democratic primary in greater numbers if an African-American candidate of choice were to run, especially given Texas' open primary system.<sup>51</sup>

The challenge for the plaintiffs challenging the dismantling of District 24 is that they are asking the Court to restore an incumbent-protection gerrymander without sufficient justification. As Justice Kennedy remarked, this district was created by Democrat Martin Frost for Martin Frost when the Democrats last controlled the redistricting process. To restore Martin Frost to this district would be to undermine the principle against state assignment of representation, a principle that Justice Kennedy defended in safeguarding the representational rights of voters of District 23. It would also be to reward the partisan gerrymandering of the Democrats against the partisan gerrymandering of the Republicans, which Justice Kennedy refused to do when addressing the partisan gerrymandering claim.<sup>52</sup>

Moreover, as Justice Kennedy pointed out, when the State assigns representation, it is difficult to determine who is an authentic representative. Authentic representation is determined by a process in which the electoral outcome is contestable.<sup>53</sup> The problem here is that there were not genuine opportunities for true contestation. As did the district court, Justice Kennedy seems to credit the trial court testimony that the district was not contestable

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<sup>51</sup> *LULAC*, 126 S. Ct. at 2624.

<sup>52</sup> *Id.* at 2610.

<sup>53</sup> Note that my argument is not that the election has to be contested, but that it has to be contestable. Or more precisely, if the election is not contested, it is not because of artificial interference by the state. When the state assigns representation, the state limits, if not eliminates, opportunities for genuine contestation. So the problem is not contestation or competition, the problem is the artificial interference by the State to eliminate contestation or competition where it might otherwise exist. Thus, the evil to be avoided is not a lack of competition or contestation, but undue interference by the State. This is why I part company with Professor Katz's thoughtful and provocative contribution to this symposium. See Katz, *supra* note 39.

because African-Americans could not elect their preferred candidates.<sup>54</sup> Thus, when the plaintiffs in District 24 come to the Court to complain that their representative was unfairly taken away, Justice Kennedy justly expressed skepticism: how are we to know that he was truly your representative without elections that are not capable of being contested?<sup>55</sup> The truth is we do not. State assignment of representation undermines the accountability function of elections and makes it difficult to determine authentic representation.

Perhaps more importantly, this articulation of the harm provides some insight into Justice Kennedy's inchoate representational rights concept, first explored in *Vieth*.<sup>56</sup> Justice Kennedy opened his opinion in *Vieth* by noting that "A decision ordering the correction of all election district lines drawn for partisan reasons would commit federal and state courts to unprecedented intervention in the American political process."<sup>57</sup> He then went on, as many commentators have remarked, to note that "while understanding that great caution is necessary when approaching" the issue of gerrymandering, he "would not foreclose all possibility of relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases."<sup>58</sup> He then cautioned that this principle "must rest on something more than the conclusion that political classifications were applied. It must rest instead on a conclusion that the classifications, though generally permissible, were applied in an invidious manner or in a way unrelated to any legitimate objective."<sup>59</sup>

The oddity of Justice Kennedy's opinion is the introduction of this new concept of representational rights. Justice Kennedy referenced the concept throughout the opinion as if we all ought to know what representational rights are,<sup>60</sup> yet he never defined it. So we are all left to guess. However, from his opinion in *Vieth* one can cull some basic parameters. First, the ostensible purpose of the "limited and precise rationale," the constitutional principle, would be to protect representational rights. Second, representational rights belong to both voters and parties.<sup>61</sup> Third, representational rights are not really rights in the traditional sense of the term

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<sup>54</sup> *LULAC*, 126 S. Ct. at 2625.

<sup>55</sup> Or perhaps, more precisely, elections that were designed to be uncontestable.

<sup>56</sup> *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

<sup>57</sup> *Id.* 541 U.S. at 306 (Kennedy, J., concurring in the judgment).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 307.

<sup>60</sup> *See id.* ("At first it might seem that courts could determine, by the exercise of their own judgment, whether political classifications are related to this object or instead burden representational rights.").

<sup>61</sup> *Id.* at 313.



but more structural devices for limiting official overreaching in the design of electoral structures.<sup>62</sup> Fourth and more substantively, representational rights are implicated when the government targets and burdens a group of voters simply because of the voters' political identity.<sup>63</sup>

*LULAC* is useful because it confirms this substantive principle and starts to map out its contours. Recall that Justice Kennedy's task was to find a limited and precise rationale that would distinguish between permissible political classifications and impermissible political classifications. As Justice Kennedy stated in *Vieth* in discussing the relevance of the First Amendment in the political gerrymandering context, "the inquiry is not whether political classifications were used. The inquiry instead is whether political classifications were used to burden a group's representational rights."<sup>64</sup> In contrasting the advantages of a First Amendment analysis to an Equal Protection Clause analysis, he maintained:

The equal protection analysis puts its emphasis on the permissibility of an enactment's classifications. This works where race is involved since classifying by race is almost never permissible. It presents a more complicated question when the inquiry is whether a generally permissible classification has been used for an impermissible purpose. That question can only be answered in the affirmative by the subsidiary showing that the classification as applied imposes unlawful burdens.<sup>65</sup>

*LULAC* adds an additional element into the inquiry: the justification for the classification. The inquiry is not only whether a permissible political classification was used that burdened a group of voters; the inquiry also includes whether the State had an impermissible reason for imposing this burden. In constitutional law there are types of State justifications that cannot justify certain types of burdens upon groups or individuals; these impermissible justifications are sometimes referred to as exclusionary reasons.<sup>66</sup>

Justice Kennedy's incumbency protection analysis in *LULAC* is a perfect application of the constitutional law theory of exclusionary reasons. Incumbency protection is a permissible political classification. It implicates "representational rights" when it burdens a group of voters. It violates their representational rights when the State is motivated by an impermissible

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<sup>62</sup> See Charles, *supra* note 46.

<sup>63</sup> Guy-Uriel E. Charles, *Judging the Law of Politics*, 103 MICH. L. REV. 1099, 1135-36 (2005).

<sup>64</sup> *Vieth*, 541 U.S. at 315 (Kennedy, J., concurring in judgment).

<sup>65</sup> *Id.*

<sup>66</sup> See Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711, 712 (1994).

justification. In adjudicating a representational right, the permissibility of the State justification is paramount.

Though the Court needs to continue to map out the margins of this new concept, we can see that it has content. It does real work in *LULAC*. The core substantive component is that, where the State's design of electoral structures imposes burdens upon a group of voters, the State implicates the voters' representational rights. Now it is true that all districting imposes a burden upon a certain group of voters. Whether redistricting violates a group of voters' representational rights depends upon the permissibility of the State justification. The State is not justified when it burdens representational rights because those rights were about to be exercised (or were in fact exercised) in a manner that was inconsistent with the State's preferences. Such a justification is an exclusionary reason.

The assignment of representation in Districts 23 and 25 violated the representational rights of Latino voters who were poised to choose their representatives. The State burdened their representational rights by assigning them a representative based upon an impermissible purpose and deprived them of their ability to reap the reward of their political mobilization. The Court simply objected to this unjustifiable assignment of representation. This, I think, is the best explanation for the outcome in *LULAC*.

What emerges from *LULAC* is the possibility that the Court will examine carefully incumbent protection gerrymanders—even those that do not have any racial implications. There does not seem to be a principle that would protect voters from incumbent protection gerrymanders when they are voters of color but would not protect them when they are white. Part of the question is how seriously the Court is willing to take this new representational right.

## V. NAVEL GAZING: ON THE MEANING OF *LULAC*

To return to the theme of this Symposium, it is hard to predict what *LULAC* portends for the Roberts Court's voting rights jurisprudence. From this temporal vantage point, *LULAC* appears to be hugely significant. For the first time in the modern voting rights era a majority on the Supreme Court found a violation of Section 2 of the VRA and concluded that a State was required to draw a majority-minority district. The opinion might reinvigorate the moribund concept of racial representation, which seemed out of favor in the wake of the *Shaw* cases. However, no less of an authority than Richard Pildes, one of the most perceptive students of the Court, is predicting doom for those concerned about the future of the VRA. In this Part, I explore the meaning of *LULAC* and its potential impact on the VRA. Part V.A explores the argument that *LULAC* signals the end for the VRA and concludes differently. Part V.B argues that *LULAC* is best understood as a case in which the Court is using race to limit the excesses of partisan line-drawing.

### A. *Why LULAC Does Not Spell the End for the VRA*

In his thoughtful and provocative contribution to this Symposium Professor Pildes remarks that “[f]ar from a ringing endorsement of the law of minority vote dilution, *LULAC* reveals a Court increasingly troubled by—indeed, more and more resistant to—the very concept of minority vote dilution and the accompanying legal requirement of ‘safe minority districting.’”<sup>67</sup> Professor Pildes reads *LULAC* as a strongly anti-essentialist opinion. Professor Pildes may turn out to be right about how *LULAC* is ultimately interpreted in future voting rights cases. However, the evidence of that projection is not contained in the only critical datum that we have currently on this score: *LULAC* itself. The fact that the Court found a Section 2 violation is singularly significant in light of the Court’s previous voting rights cases that have taken a crabbed view of the voting rights of people of color.<sup>68</sup> For the past decade and a half, the Court has sowed the seeds for the eventual holding that majority-minority districts, even where justified under the VRA, are inconsistent with the Constitution. Yet in *LULAC* we find Justice Kennedy no less speaking for at least four other members of the Court, eloquently advocating in favor of a majority-minority district. In light of the previous trend line—*Shaw I*, *Miller v. Johnson*, *Bush v. Vera*, *Shaw II*, *Georgia v. Ashcroft*, etc.—the fact that there is a strong majority on the Court that believes that the concept of racial representation is not ipso facto unconstitutional is critical to the immediate future of the VRA and is deeply inconsistent with the view that *LULAC* is unqualifiedly antagonistic to the concept of racial representation.

When one examines *LULAC* carefully, it is apparent that the Court was presented with numerous opportunities to interpret the Act narrowly. Not only did the Court pass upon those opportunities to narrow the Act, in many cases, the Court actually broadened the scope of the Act. I will examine three such instances: (a) the Court’s analysis of the compactness requirement; (b) the Court’s reliance upon the theretofore constitutionally-suspect results test; and (c) the Court’s embryonic articulation of a more robust concept of discrimination in the political process. As I will show in this subpart, if a majority of the Court intended on sending a message about the decline of legally mandated racial districting, the message is not very clear.

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<sup>67</sup> Richard H. Pildes, *The Decline of Legally Mandated Minority Representation*, 68 OHIO ST. L.J. 1139, 1140 (2007).

<sup>68</sup> See generally Terry Smith, *Autonomy Versus Equality: Voting Rights Rediscovered*, 57 ALA. L. REV. 261 (2005).

### 1. *Redefinition of the Compactness Requirement*

In previous cases, the Court had stated that where voters of color are dispersed, the State does not have an obligation under Section 2 to draw majority-minority districts. Specifically, in *Bush v. Vera*, the Court penned, “[i]f, because of the dispersion of the minority population, a reasonably compact majority-minority district cannot be created, § 2 does not require a majority-minority district . . . .”<sup>69</sup> *LULAC* presented an opportune moment to apply, if not narrow, the compactness requirement. Instead, the Court noticeably eroded this compactness requirement and may have laid the groundwork for its potential evisceration as a practical constraint under Section 2.<sup>70</sup>

In *LULAC*, Justice Kennedy found fault with District 25 because the district was not sufficiently compact to serve as a Section 2 off-set district. Justice Kennedy’s compactness analysis prompted a sharp response from Chief Justice Roberts that compactness is not a requirement when the State draws a majority-minority district; it is only an element of a plaintiff’s Section 2 claim. Chief Justice Roberts is correct that, prior to *LULAC*, compactness was not recognized as an element of the State’s defense of a Section 2 district. Thus, he is right that Justice Kennedy introduced a heretofore new constraint on the State’s discretion when the State seeks to draw a Section 2 district.

On the face of it, it seems that Justice Kennedy narrowed the reach of Section 2 by imposing a compactness requirement that did not exist prior to *LULAC*. That is one way to read Justice Kennedy’s compactness analysis, but I think that would be the wrong reading. Justice Kennedy’s point is that there must be symmetry between the plaintiff’s claim and the State’s defense when the plaintiff is bringing a Section 2 claim and the State is defending a Section 2 district. As I will argue here, this compactness requirement is not very significant, and, because of the symmetry requirement, it lowers the compactness standard for Section 2 plaintiffs.

What is compactness? Compactness is not necessarily geography, though geography is relevant. “While no precise rule has emerged governing § 2 compactness,” the majority maintained in *LULAC*, the “inquiry should take into account ‘traditional districting principles such as maintaining communities of interest and traditional boundaries.’”<sup>71</sup> Compactness does not disregard “[l]egitimate yet differing communities of interest . . . in the

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<sup>69</sup> *Bush v. Vera*, 517 U.S. 952, 979 (1996).

<sup>70</sup> Dan Ortiz concludes similarly. See Daniel R. Ortiz, *Cultural Compactness*, 105 MICH. L. REV. FIRST IMPRESSIONS 48, 50–51 (2006), <http://students.law.umich.edu/mlr/firstimpressions/vol105/Ortiz.pdf>.

<sup>71</sup> *LULAC*, 126 S. Ct. 2594, 2618 (2006) (citation omitted).

interest of race.”<sup>72</sup> However, race is not irrelevant. As the majority noted, “in some cases members of a racial group in different areas—for example, rural and urban communities—could share similar interests and therefore form a compact district if the areas are reasonably close in proximity.”<sup>73</sup> Nevertheless, the Court stated that neither geography nor interest alone is sufficient to make a district non-compact.<sup>74</sup> A district is non-compact only when it combines racial communities separated by both “enormous geographical distance . . . [and] disparate needs and interests . . . .”<sup>75</sup>

The problem for Justice Kennedy is that he is committed to preserving District 23 as a Section 2 district but not District 25, and he is equally committed to a symmetry criterion of compactness. Under his symmetry condition for compactness, whatever standard he sets for the State when it is defending a Section 2 district is the same standard that will apply to plaintiffs when they are alleging vote dilution under Section 2. This means whatever standard of compactness Justice Kennedy applies to District 25 is the same standard of compactness that he will have to apply to District 23. To complicate matters for Justice Kennedy, as the Chief Justice explained, there are very few differences between Districts 23 and 25.<sup>76</sup> Moreover, as Justice Scalia noted, the new District 23 is more compact than the old District 23,<sup>77</sup> which Justice Kennedy is trying to revive. Both districts are race-conscious, and the Latino populations in both districts are similarly dispersed.

Consider this issue from the vantage point of a Court hostile to Section 2 of the VRA. Such a Court easily could have used *Vera* (among other cases) to conclude that, because of population dispersion, Latino voters in District 23 were not entitled to protection under Section 2. This would have been a perfectly reasonable application of the current caselaw. Indeed, if the Court were applying the current caselaw, this should have been the definition of compactness: a non-compact district is one in which voters of color are

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<sup>72</sup> *LULAC*, 126 S. Ct. at 2619.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> Chief Justice Roberts argued:

The majority’s squeamishness about the supposed challenge facing a Latino-preferred candidate in District 25—having to appeal to Latino voters near the Rio Grande and those near Austin—is not unlike challenges candidates face around the country all the time, as part of a healthy political process. It is in particular not unlike the challenge faced by a Latino-preferred candidate in the district favored by the majority, former District 23, who must appeal to Latino voters both in San Antonio and El Paso, 540 miles away.

*Id.* at 2661 (Roberts, C.J., joined by Alito, J., concurring in part and dissenting in part).

<sup>77</sup> *Id.* at 2666 (Scalia, J., joined by Thomas, J., dissenting).

geographically dispersed. The Court could have then reasoned that District 23 was not protected under Section 2. If District 23 was not protected under Section 2, then District 25 was not required by the VRA as an offset district. Consequently, there would have been no compelling state interest under the Fourteenth Amendment. This would have been a straightforward analysis of the Court's *Shaw* jurisprudence. Thus, a Court hostile to the VRA could have struck down both districts in one fell swoop by a casual application of standard doctrine. Say what you will, it is remarkable that *this* Court did not take this path to resolving *LULAC*. In any event, the strong essentialism interpretation of *LULAC* is hard to square with the facts of the case.

## 2. *Reliance Upon the Results Test*

The Court had yet another opportunity to narrow the application of the Act by raising further doubts about the constitutionality of the results test of Section 2, the central provision of that section. Justice Kennedy's conclusion that Texas diluted the votes of Latino voters in District 23 depended completely upon the results test. Though the Court intimated strongly that the plaintiffs could make out a claim of discriminatory intent,<sup>78</sup> a point to which I shall shortly return, the Court was ultimately convinced that notwithstanding the State's reason for redrawing District 23, the State "cannot justify the effect on Latino voters."<sup>79</sup>

Relying upon the results test to invalidate the redistricting plan is remarkable in view of the fact that the effects prong had long been constitutionally suspect and has up to now been viewed as one of the most vulnerable parts of the Act. Prior to *LULAC*, the Court had repeatedly called into question the constitutionality of Section 2's results test by "assum[ing] without deciding that compliance with the results test . . . can be a compelling state interest."<sup>80</sup> A Court as troubled by racial vote dilution as Professor Pildes portrays the Court in *LULAC* would have taken the ready opportunity to emphatically add another stake through the heart of the Act. Instead, the Court chose to extend the life of the Act by reducing doubts about its most critical provision.

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<sup>78</sup> *LULAC*, 126 S. Ct. at 2622.

<sup>79</sup> *Id.* at 2623; *see also id.* at 2615 (noting that "the concomitant rise in Latino voting power in each successive election, the near-victory of the Latino candidate of choice in 2002, and the resulting threat to the Bonilla incumbency, were the very reasons that led the State to redraw the district lines").

<sup>80</sup> *Bush v. Vera*, 517 U.S. 952, 977 (1996) (citation omitted); *see, e.g.*, Stephen E. Gottlieb, *Tears for Tiers on the Rehnquist Court*, 4 U. PA. J. CONST. L. 350 (2002) (stating that the Court is close to finding the results test unconstitutional).

### 3. Redefining the Meaning of Discrimination

Perhaps the most radical possibility in the opinion centers around the intriguing comments by Justice Kennedy that the redesign of District 23, which “took away the Latinos’ opportunity because Latinos were about to exercise it . . . bears the mark of intentional discrimination that could give rise to an equal protection violation.”<sup>81</sup> This comment is intriguing because it is not clear what it means. As some commentators have noted, if all Justice Kennedy means to say is that intentional discrimination in the design of electoral structures is unconstitutional, this is hardly earth-shattering.<sup>82</sup> However, if Justice Kennedy means to equate a Section 2 violation with intentional discrimination, Justice Kennedy would have severely limited the reach and effectiveness of Section 2.<sup>83</sup>

But consider a third alternative. Consistent with the argument advanced in Part III, Justice Kennedy’s point may be the simple, but doctrinally radical, idea that the State intentionally discriminates against voters (of color?) where the State intentionally deprives them of an electoral benefit to which they would otherwise be entitled for reasons that are not constitutionally permissible. Importantly, the intentional discrimination that concerns Justice Kennedy is not racial intent. That is, the Court is not making an argument that Latinos were targeted because they were Latinos. In fact, the Court stated, “[e]ven if we accept the District Court’s finding that the State’s action was taken primarily for political, not racial reasons,” that does not change the constitutional analysis.<sup>84</sup>

The surprise here is that this is the one argument that Texas should have been able to make. The State’s argument is that, to the extent redistricting affected the voting power of voters in District 23, the voters they were after were not Latinos but Democrats. Under the prior caselaw, Texas had every reason to believe that it could get away with this distinction between race and politics. This is simply the application of *Whitcomb v. Chavis*<sup>85</sup> and *White v. Regester*.<sup>86</sup> *Whitcomb* stands for the proposition that a racial group that aligns itself primarily with a political party is not buffeted by the vagaries of the political process where its disadvantages are the results of politics.<sup>87</sup> *White* stands for the complementary proposition that racial groups are

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<sup>81</sup> *LULAC*, 126 S. Ct. at 2622.

<sup>82</sup> See, e.g., Katz, *supra* note 39, at 1171.

<sup>83</sup> See, e.g., Pildes, *supra* note 66.

<sup>84</sup> *LULAC*, 126 S. Ct. at 2622.

<sup>85</sup> 403 U.S. 124 (1971).

<sup>86</sup> 412 U.S. 755 (1973).

<sup>87</sup> *Whitcomb*, 403 U.S. at 153–55.

protected from political disadvantages where those disadvantages are visited upon them because of (as opposed to in spite of) their race.

A Court hostile to racial representation could have applied that principle with a vengeance. Yet, the Court refused to take that easy option. In fact, the Court went on to strongly imply that even if it is true that the State did not target Latinos because they are Latinos, the State may have intentionally discriminated in a way that is constitutionally actionable because it intended to deprive the group of an electoral opportunity. The intent that matters is the intent to cause a particular effect: the intent to burden.

This is a significantly new development, and it has the potential of radically transforming voting rights and antidiscrimination doctrine. The majority created a constitutional standard of voting discrimination that essentially mirrors the Section 2 effects standard. This development was sufficiently worrisome to Justice Scalia that he devoted a few paragraphs reviewing first-year constitutional law doctrine on the meaning of discriminatory purpose.<sup>88</sup>

What is the meaning of this development? How are we to understand this new equal protection standard?

I think there are two ways to understand this equal protection right. One explanation is that this equal protection right is another way of articulating the representational rights that are thought to be protected by the Constitution. Think of this right as similar to free speech doctrine: just as the government regulation that burdens speech is constitutionally actionable, government regulation that burdens an electoral right is also constitutionally actionable. In this construction, the right is an electoral right having nothing to do with race. Where the State burdens an electoral right, the Constitution is implicated.<sup>89</sup>

A different and even more radical explanation is that this equal protection right is a redefinition of the meaning of intentional racial discrimination in the voting rights context (and maybe even antidiscrimination law itself). This right is different from the traditional discriminatory intent standard in that it does not require intent to target the racial group. However, it applies only when the voting rights of a racial group are intentionally burdened by the State.

To concretize the point, recall here *McCleskey v. Kemp*, where plaintiffs argued that Georgia's application of the death penalty was discriminatory because of the racial disparity in the imposition of the death penalty. The Court's argument in *McCleskey* was a classic equal protection argument. The Court argued that the plaintiff could not prevail because he could not show

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<sup>88</sup> *LULAC*, 126 S. Ct. at 2667 (Scalia, J., joined by Thomas, J., dissenting).

<sup>89</sup> Note that the point is not that the Constitution is violated, but that the plaintiff has a potential claim.



that the State implemented the death penalty because of (as opposed to in spite of) its racially discriminatory effects upon African Americans. For his claim to prevail, “McCleskey would have to prove that the Georgia Legislature enacted or maintained the death penalty statute *because of* an anticipated racially discriminatory effect.”<sup>90</sup> This is a standard application of equal protection doctrine.

Contrast *McCleskey* with *LULAC*. In *LULAC*, Justice Kennedy seemed to say that even if Texas adopted its course of action because of an anticipated political effect, the Constitution could still be violated. It is the effect of the State’s action that matters and not its intent. If the Court is serious about this move, it is hugely significant.

If this articulation of the racial electoral equality right seems far-fetched, consider *LULAC* from the perspective of a redistricter. If you are redistricting post-*LULAC* and you wish to comply with statutory and constitutional commands, or you wish to avoid litigation, what do you do with *LULAC*? Note how far the facts of *LULAC* are from the prototypical racial vote discrimination case. The Act was originally conceived to address discrimination that would be conceived as discriminatory animus against African-Americans, in particular, that could not be regulated within the extant constitutional framework because of structural and evidentiary reasons. The VRA was adopted in a context in which black voters were intentionally discriminated against by both the State and white voters. In the classic vote dilution cases, the State would crack and pack voters of color because it wanted to preclude them from participating in the political process. White voters would not vote for any candidates of color not because they disagreed with the politics of candidates of color, but because they were colored.

*LULAC* bears none of the markers of the classic vote dilution cases. Though white and Latino voters in District 23 prefer different candidates at the polls, by voting repeatedly for Bonilla, white voters have demonstrated their commitment to voting for a candidate of color provided that the candidate shares their political ideology. Moreover, there is no evidence at all of racial animus from the State.<sup>91</sup> There is every reason to believe that if Latino voters were more supportive of Bonilla, Texas Republicans would have protected their district as opposed to trying to weaken it. Moreover, by all accounts, the State attempted to mitigate for its modification of District 23 by providing an alternative district.<sup>92</sup>

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<sup>90</sup> *McCleskey v. Kemp*, 481 U.S. 279, 298 (1987).

<sup>91</sup> This is not to deny that there is racial discrimination in Texas. The point here is simply that there is absolutely no evidence of racial animus in this case.

<sup>92</sup> As recounted by Steve Bickerstaff, the Republicans strategy on race was three-fold. First, they attempted to co-opt leaders and organizations of color to join them

If on the basis of those facts the Supreme Court not only found a violation of Section 2 of the VRA, but also concluded that those facts amounted to intentional discrimination, if you are redistricting, do you dare weaken any majority-minority districts? If you would like to comply with constitutional norms or you want to minimize the risk of litigation, you will not take any action that can be interpreted as undermining the voting power of voters of color. If the Court takes *LULAC* seriously, majority-minority districts post-*LULAC* are sacrosanct.

### B. *Using Race to Check Politics*

All the same, I agree with Professor Pildes to the extent that his argument is that *LULAC* was not intended as a victory for the VRA.<sup>93</sup> *LULAC* is not primarily about race. While the view of *LULAC* as a race case has merit as an explanatory variable, it may not suffice to explain many moves in the opinion. First, as Professor Pildes notes, *LULAC* would be a strong VRA case if it had not resulted in an effective swap of District 25 for District 23.<sup>94</sup> As a practical matter, Latino voters did not gain much following *LULAC*. Had Justice Kennedy permitted Latino voters to hold on to District 25 as a majority-Latino district and add District 23 as a majority-Latino district, then *LULAC* could be understood as an unqualified endorsement of racial representation. Given the Court's holding and the result of the Court's holding, such a conclusion is unwarranted. Second, the explanation of *LULAC* as a strong vindication of the VRA is even less persuasive in view of the fact that Justice Kennedy chose to protect Latino voters in District 23, but not African-American voters in District 24.

*LULAC* is best understood as a case that uses race to limit politics. *LULAC* reflects the Court's medium-term strategy for containing the excesses of partisan gerrymandering. This is the best way to make sense of the case. Justice Kennedy attacked one of the devices that the State used to facilitate its partisan gerrymander. If you can prevent the redistricters from moving voters of color around, you are imposing yet another additional constraint on their ability to maximize partisan gerrymandering.<sup>95</sup> The Court's strategy is to identify effective structural constraints that limit the

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against the white Democrats. BICKERSTAFF, *supra* note 9, at 275–76. Second, they sought to portray their plan as being beneficial to voters of color. *Id.* at 264–65. Third, whenever their partisan agenda conflicted with the interests of voters of color, partisanship trumped. *Id.* at 265.

<sup>93</sup> I think the effect of the opinion, as I have argued in this Essay, is to, at least in the short-term, expand the reach of Section 2.

<sup>94</sup> Pildes, *supra* note 66.

<sup>95</sup> See Ortiz, *supra* note 70.

discretion of the State when it is engaged in line-drawing. This is not a bad strategy and may actually work.<sup>96</sup>

The Court has long, and somewhat ineffectively, used its jurisprudence on racial vote dilution to help guide its thinking about political vote dilution.<sup>97</sup> Though the racial vote dilution caselaw has long provided an incentive for litigants to frame their partisan claims in racial terms, those cases have been almost exclusively concerned about race and not politics.<sup>98</sup> What is different about the Court's move in *LULAC* is the attempt to check politics by using race. Thus, the "politics not race" argument that emerged from the tail-end of the *Shaw* lines of cases and upon which the district court in *LULAC* relied is no longer the ironclad defense it was perceived to be.

## VI. CONCLUSION

Though I think the Court's strategy might work to limit the excesses of politics, I worry about what the strategy will do to voting rights doctrine and to the electoral prospects of voters of color. On doctrinal grounds, while the strategy might be useful in the short-term, it is ultimately flawed because it papers over important doctrinal tensions, some more evident than others, that are created or exacerbated by the manner in which the majority in *LULAC* attempts to check politics by limiting what the State can do with race. The best evidence of this tension is the dispute between Justice Kennedy and the Chief Justice with respect to whether compactness is an element of the State's defense when the State draws a Section 2 district. Other more pressing tensions include the need to reconcile the various doctrinal approaches among the Court's decisions in *LULAC*, *Thornburg v. Gingles*, *Johnson v. De Grandy*, *Georgia v. Ashcroft*, and the *Shaw* cases.

For example it is not clear to me that the *Gingles* factors are doing much work any more. Or perhaps more accurately, the *Gingles* factors appear to serve as threshold factors and do not seem determinative. Instead the totality of circumstances approach appears to be doing most of the work. The difficulty is that the totality of circumstances approach is more indeterminate and seems *ad hoc*. Part of the problem is that as racial bloc voting decreases and as voters of color become more dispersed, *Gingles* will be harder and harder to apply. In *LULAC*, *Gingles* served as a pro forma hurdle that the

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<sup>96</sup> On the importance of constraints in the redistricting process, see Andrew Gelman & Gary King, *Enhancing Democracy Through Legislative Redistricting*, 88 AM. POL. SCI. REV. 541, 542 (1994).

<sup>97</sup> Charles, *supra* note 46.

<sup>98</sup> See Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 632 (2002).

Court easily skipped over. Thus, one remaining question is how long the Court will continue to pay lip service to *Gingles*.

One must also be sensitive to the doctrinal strain between Sections 2 and 5 of the VRA as highlighted by Justice Scalia's dissenting opinion. Texas created an off-set majority-minority district in order to comply with Section 5. It remains unclear after *LULAC* whether Texas could have created a coalition or influence district, which would have enabled Texas to comply with Section 5 but would not have been dilutive under Section 2. *Georgia v. Ashcroft* allows the State to be more flexible in the design of electoral structures when the State is complying with Section 5. But *LULAC* does not seem to permit the same flexibility with respect to Section 2.

Further, it is also not clear how States should navigate between *LULAC* and *Shaw*. *Shaw* comes into play when the State is too race-conscious. *LULAC* comes into play when the State is not sufficiently race-conscious. Not only should you pay attention to voters of color, but you have to make sure that they are the right kind. Are you mixing urban dwellers with suburban dwellers? Are you mixing recent immigrants with native-born citizens? Are you mixing rural residents with urban residents? Are you mixing rich with poor? *LULAC* calls for a heightened sense of race-consciousness that opens up the State to liability under *Shaw*. This heightened sense of race-consciousness may further racialize redistricting disputes and lead to the type of boomerang effect that resulted in the *Shaw* line of cases.

Finally, as a practical matter, it remains unclear whether voters of color are better off under Justice Kennedy's rules-bound and racially-instrumental doctrinal approach than under the Chief Justice's doctrinal *olla podrida*. The Chief Justice's approach seemed motivated by the recognition that politics can be a dirty process; this recognition is accompanied by a reluctance to sully the Court by deeply enmeshing it into that process. Consequently, it seems as if Chief Justice Roberts was sympathetic to an anything-goes approach—presumably complemented by a generous interpretation of applicable constitutional and statutory constraints. My sense is that this framework would not be particularly solicitous of the political needs of voters of color, but it would also allow them to keep hard-fought race-conscious political gains. By contrast, Justice Kennedy's approach might be more solicitous of the needs of voters of color—by strictly enforcing a floor below which the State may not go to deprive voters of color of representation. But Justice Kennedy's approach would also come with a low ceiling that would preclude the State from being race-conscious where the State could not justify its actions on the basis of a narrowly-construed constitutional or statutory mandate. Thus, Professor Pildes might be right that *LULAC* may eventually become an unwelcome development for those who value the concept of racial representation.