

# ***Rashomon* and the Roberts Court**

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## I. INTRODUCTION

As the opening quip of Pam Karlan’s article suggests,<sup>1</sup> it is difficult to make sensible predictions about the future of the Roberts Court’s election law jurisprudence based upon the two cases decided during its first year. Even law professors are cautious about drawing inferences from two data points. And given the many opinions rendered in *Randall v. Sorrell*<sup>2</sup> and *League of United Latin American Citizens v. Perry (LULAC)*,<sup>3</sup> such an exercise is more likely to involve chaos theory than geometry.

A few years ago, I argued that the Supreme Court was in the midst of a doctrinal interregnum.<sup>4</sup> During those last years of the Rehnquist Court, the Court was aware that a new, cohesive majority would emerge at some point in the future. Due to the vagaries of politics and the timing of retirement decisions, however, no one knew precisely who would be in that majority. For this reason, the Court was trapped in a holding pattern: aware of “the imminence of a paradigm shift, but . . . not sure where the next analytic road [would] lead[,] . . . [it was] content with going through the motions, patching the holes in the existing foundation, holding the doctrinal edifice together a little while longer.”<sup>5</sup>

The doctrinal interregnum continues. We are still at least one presidential election away from knowing which coalition will choose the path the Court will take as it wends its way through the political thicket.

The highly fractured decisions rendered by the Roberts Court last Term provide further proof of the interregnum. Not only do these decisions do little to advance the doctrine in any area, they suggest that the Justices cannot even be bothered to forge broad agreement among themselves. Once they have cobbled together enough votes, the Justices feel free to pursue their own idiosyncratic views in separate opinions. Indeed, even the Justices writing for

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<sup>1</sup> See Pamela S. Karlan, *New Beginnings and Dead Ends in the Law of Democracy*, 68 OHIO ST. L.J. 743, 743 (2007) (“Asked about the significance of the French Revolution for western civilization, Chou En-Lai is reported to have said that it was too soon to tell. When it comes to the Roberts Court and the law of democracy, the early returns are similarly provisional.”).

<sup>2</sup> 126 S. Ct. 2479 (2006).

<sup>3</sup> 126 S. Ct. 2594 (2006) [hereinafter *LULAC*].

<sup>4</sup> See Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503 (2004).

<sup>5</sup> *Id.* at 516–17.

the Court are writing idiosyncratically. One could eliminate every reference to the authors of *Randall* and *LULAC* and still know that Justice Breyer and Justice Kennedy drafted those opinions. All this, of course, is just what one would expect from a Court going through the motions. A Court that thinks it is forging doctrine for the long haul would be more disciplined.

Further evidence that the doctrinal interregnum continues is provided by the four articles devoted to the Court's ruling on the Voting Rights Act (VRA) claims in *LULAC*.<sup>6</sup> The authors' interpretations of *LULAC* are so different that at times one wonders whether they were reading the same opinion. This *Rashomon* effect is, again, just what one would expect from a Court in an inchoate state.<sup>7</sup>

One might be tempted to argue that authors are just reading what they want into the messy, often opaque set of opinions issued by the Court in *LULAC*. But that would be unfair both to the authors and to the Court.<sup>8</sup> The authors are uncovering incipient doctrinal categories and embryonic principles—the kinds of things that lawyers and scholars would have seen in *Baker v. Carr*,<sup>9</sup> the Court's first one person, one vote case, or in *White v. Regester*<sup>10</sup> and *Whitcomb v. Chavis*,<sup>11</sup> the Court's early decisions on vote dilution.<sup>12</sup> Given the Court's uncertain state, it is not surprising that the authors have identified so many potentially new jurisprudential paths. The goal of this commentary is to pull together these varied interpretations in

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<sup>6</sup> Guy-Uriel E. Charles, *Race, Redistricting, and Representation*, 68 OHIO ST. L.J. 1185 (2007); Karlan, *supra* note 1; Ellen D. Katz, *Reviving the Right to Vote*, 68 OHIO ST. L.J. 1163 (2007); Richard H. Pildes, *The Decline of Legally Mandated Minority Representation*, 68 OHIO ST. L.J. 1139 (2007).

<sup>7</sup> Rick Hasen argues that we saw a similar effect in the lower courts after *Bush v. Gore*, 531 U.S. 98 (2000), another decision rendered by a fractured Court that seemed unable to foresee where things would go from there. See Richard L. Hasen, *Beyond the Margin of Litigation: U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 945 (2005).

<sup>8</sup> Further, it would hardly be fair for me to accuse the authors of reading their own views into these decisions given my own claim that these decisions are simply further evidence of an interregnum.

<sup>9</sup> 369 U.S. 186 (1962).

<sup>10</sup> 422 U.S. 935 (1975).

<sup>11</sup> 415 U.S. 972 (1974).

<sup>12</sup> The same was true of *Shaw v. Reno*, 509 U.S. 630 (1993). See, e.g., T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588 (1994); Pamela S. Karlan, *All Over the Map, The Supreme Court's Voting Rights Trilogy*, 1993 SUP. CT. REV. 245; Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483 (1994).

order to provide at least a partial mapping of the Court's possible destinations once a workable majority is formed. I hope here to give both a microscopic and a telescopic view of the articles,<sup>13</sup> exploring the details of their disagreement about how subsidiary pieces of the Court's decision fit together and sketching the broader themes undergirding each author's interpretation.

Part II.A describes and evaluates each author's take on *LULAC*'s subsidiary holdings. Part II.B compares the authors' visions of the opinion's larger themes and briefly sketches my own view of the opinion. This Article concludes by reflecting on what strategies academics and practitioners ought to pursue where, as here, the Supreme Court is in the midst of a doctrinal interregnum.

## II. WHAT DOES *LULAC* MEAN?

Before turning to the disagreements among the authors, it is worth noting the limited issues on which they agree. No one in the group thinks that *LULAC* is a wholesale victory for civil-rights plaintiffs. Indeed, all the authors read *LULAC* as effectively establishing a floor and a ceiling for Section 2 claims, though they differ as to how low the floor and how high the ceiling. Further, none of the authors thinks that *LULAC* allows one to make a strong prediction about how the Court will rule on the constitutionality of the recent Section 5 amendments (though, here again, the authors differ as to whether they think supporters of the amendments should view the glass as half full or half empty). Further, all of the authors are old academic hands, so their arguments are peppered with appropriately modest caveats and cautionary notes.

Despite these basic similarities, the pieces differ dramatically, both in analyzing the minutiae of the opinion and in sketching the case's larger themes. First, if one focuses on the details, the authors disagree as to how the disparate parts of the Court's opinions fit together. The Court ruled on the legality of three different districts in its opinion, and the authors differ as to how those three rulings fit together. Second, the articles have distinct overarching narratives. Some tell a story about race; others about partisanship. Some tell a story that should prove heartening to supporters of the VRA; others offer a gloss of the case that should give civil-rights advocates pause. Each of those articles not only tells us something different about where the Court is going, but what fate holds for the pending constitutional challenge to Section 5 of the VRA.

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<sup>13</sup> I borrow this metaphor from Chief Justice Hughes, who once said that Brandeis was "master . . . of both microscope and telescope." ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 237 (1st ed. 1962).

### A. *Connecting the Dots: Making Sense of LULAC's Subsidiary Holdings*

Anyone writing about *LULAC* must deal with some concrete problems. First, how does one reconcile the Court's holding that Texas violated Section 2 of the VRA by dismantling the old District 23, the sprawling Latino-majority district that had elected Latino Republican Henry Bonilla, with its finding that the Act did not authorize the creation of the new District 25, a sprawling Latino-majority district located elsewhere in the state? Once one answers that question, one must explain why the Court cared about the dismantling of District 23, which contained a Latino majority under the new census, but not about the destruction of District 24, which contained a sizeable African-American population. The Court, of course, offered its own explanations for these subsidiary holdings. But those explanations were highly fact-dependent, and nothing about those fact patterns clearly dictated the ultimate result, as is evidenced by the fact that no one in the field accurately predicted the outcome of this case.

Simple explanations for *LULAC*'s rulings on this trio of districts also fall short. For instance, if the Court is simply hostile to all uses of race in redistricting (something that would explain its decision to question the state's creation of new District 25), why did it rule in favor of the civil-rights plaintiffs challenging the dismantling of the old District 23 under Section 2 of the VRA? Why does Justice Kennedy, in particular, join the opinion given that he has never voted to uphold a Section 2 claim and has previously expressed doubts about that provision's constitutionality?<sup>14</sup> Conversely, if the Court has suddenly become a friend of the VRA (something that would explain its ruling on the destruction of old District 23), why did the Court rebuke Texas for creating the new District 25 using the language of *Shaw v. Reno*, a case long thought to be inimical to the Act?<sup>15</sup> Further, why did it allow the state to eliminate the old District 24, the coalition district<sup>16</sup> where an interracial coalition had repeatedly sent Martin Frost to Washington? Ellen Katz frames this puzzle most succinctly. To understand *LULAC*'s rulings, she argues, we have to answer two questions: "What's wrong with Henry Bonilla?," the representative of the dismantled District 23, and

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<sup>14</sup> See, e.g., *Georgia v. Ashcroft*, 539 U.S. 461, 491–92 (2003) (Kennedy, J., concurring); *Miller v. Johnson*, 515 U.S. 900, 926–27 (1995); *Johnson v. De Grandy*, 512 U.S. 997, 1028–29 (1994) (Kennedy, J., concurring in part and concurring in the judgment).

<sup>15</sup> See, e.g., Pildes & Niemi, *supra* note 12, at 483.

<sup>16</sup> For a concise definition of coalition districts and their relevance to the VRA, see Pildes, *supra* note 6, at 1150.

“What’s wrong with Martin Frost?”<sup>17</sup> who represented the dismantled District 24. Each of the authors offers a different take on these questions.

### 1. *Pildes and Occam’s Razor*

Richard Pildes, who believes that civil rights groups have precious little to be happy about in *LULAC*, offers an explanation that simultaneously satisfies and violates the rule we call Occam’s Razor: to choose the simplest theory that fits the facts. Pildes’ broader narrative—the Court’s relentless resistance of what it perceives to be the excessive use of race in redistricting—is wholly consistent with the Court’s prior precedent and thus seems like the most sensible explanation for what occurred in *LULAC*. As Pildes notes, “[t]he Court has never extended *Gingles* [the case articulating Section 2’s framework] or expanded on it. Instead, it has cut back on the implications of *Gingles* at every opportunity.”<sup>18</sup> Pildes thus argues that *LULAC* is merely the latest evidence of “a Court increasingly troubled by—indeed, more and more resistant to—the very concept of minority vote dilution,” and represents “an accentuation of principles that have been gathering force over the last fifteen years.”<sup>19</sup> In making this claim, Pildes emphasizes *LULAC*’s apparent importation of *Shaw*’s limits on racial districting into Section 2’s trigger formula and notes the Court’s worry that granting plaintiffs’ challenge to the dismantling of Frost’s coalition district would “unnecessarily infuse race into virtually every redistricting.”<sup>20</sup> All of this, Pildes argues, shows that “*LULAC* has more in common with *Shaw v. Reno* and *Georgia v. Ashcroft*.”<sup>21</sup>

Pildes, however, must also explain why the Court concluded that Texas violated Section 2 when it dismantled District 23, and it is here that his read of *LULAC* seems to transgress the principle of Occam’s Razor. After all, the Court’s holding—that Texas violated the VRA by dismantling a district with a burgeoning Latino majority—is at least superficially in tension with Pildes’ overarching narrative. Why would a Court so hostile to race-conscious districting ever find that a violation of Section 2 had occurred?

Pildes offers a counterintuitive argument about District 23 that is based on Kennedy’s prior jurisprudence, questions the Justice asked at oral argument, and some educated guesses about the Court’s internal workings. Specifically, Pildes argues that the Court invalidated District 23 in order to eliminate District 25: “[t]he immediate and most visible effect of *LULAC*

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<sup>17</sup> Katz, *supra* note 6, at 1167, 1174.

<sup>18</sup> Pildes, *supra* note 6, at 1159.

<sup>19</sup> *Id.* at 1140.

<sup>20</sup> *Id.* at 1145, 1152 (quoting *LULAC v. Perry*, 126 S. Ct. 2594, 2625 (2006)).

<sup>21</sup> *Id.* at 1159.

was to preserve one Hispanic majority district; but the short-term, *obviously intended*, secondary effect was to lead lower courts to dismantle another Hispanic majority district that the DeLay gerrymander had created.”<sup>22</sup> “Justice Kennedy’s discomfort with . . . District 25,” Pildes argues, “was the driving force behind the entire VRA thrust of the *LULAC* decision.”<sup>23</sup> He writes:

The Texas legislature had believed it necessary to create [District 25]—or some other district like it—to offset its prior decision to carve up the previously Hispanic-majority District 23 . . . . If carving up such districts generated an imperative to create districts as offensive as District 25, Justice Kennedy seemed to believe, then the VRA regime had to be construed to cut off this pressure at its source. Holding the re-design of District 23 to violate the VRA was a means of doing exactly that.<sup>24</sup>

A skeptic might worry that the argument has a Rube Goldberg quality to it. After all, if Justice Kennedy is really concerned with District 25, why not simply grant the appellant’s *Shaw* challenge to District 25?<sup>25</sup> *Shaw*, after all, is a doctrine ready-made for invalidating a district like 25. Anticipating this response, Pildes argues that “the *Shaw* cases had held that race-conscious districting had to be limited, for constitutional reasons, to districts that were reasonably compact geographically” and thus could not be used to invalidate a district that was “culturally” non-compact.<sup>26</sup>

I agree that the best way to make sense of *Shaw* is that it involves a “district appearance claim” premised on an “expressive harm,” as Pildes has argued in his seminal work on the subject.<sup>27</sup> But that is not how the Court itself has articulated the cause of action in the wake of the first *Shaw* opinion. Instead—with the exception of a plurality authored by Justice O’Connor that garnered only two other votes<sup>28</sup>—it has consistently defined the harm as one

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<sup>22</sup> Pildes, *supra* note 6, at 1141 (emphasis added).

<sup>23</sup> *Id.* at 1143.

<sup>24</sup> *Id.*

<sup>25</sup> Brief for Appellants at \*43, *Jackson v. Perry*, No. 05-276, 2006 WL 62062 (2006).

<sup>26</sup> Pildes, *supra* note 6, at 1145 (crediting Dan Ortiz for the term “culturally compact”; see Daniel R. Ortiz, *Cultural Compactness*, 105 MICH. L. REV. FIRST IMPRESSIONS 48 (2006), <http://students.law.umich.edu/mlr/firstimpressions/vol105/ortiz.pdf>).

<sup>27</sup> Pildes & Niemi, *supra* note 12, at 484, 506–07.

<sup>28</sup> *Bush v. Vera*, 517 U.S. 952, 984 (1996) (plurality opinion of O’Connor, J., joined by Rehnquist, C.J., and Kennedy, J.).

involving intent,<sup>29</sup> not compactness, and adopted a test for *Shaw* claims (the predominant factor test) that is conventionally associated with motive-based equal protection analysis.<sup>30</sup> Indeed, Justice Kennedy's description of District 25's shortcomings—the way it grouped together “far-flung” Latinos from disparate socio-economic backgrounds—could have been lifted directly out of his *Shaw* opinion in *Miller v. Johnson*.<sup>31</sup>

To be fair to Pildes, while the Court has not explicitly articulated the *Shaw* injury as a district appearance claim, Pildes' theory has predicted the *results* in the *Shaw* cases with great accuracy. But even if we focus on a district shape in *LULAC*, one could easily imagine *Shaw* being used to invalidate District 25. Indeed, the district sprawls across the state, and Justice Kennedy himself emphasized that District 25 pulled together Latino voters who lived “hundreds of miles apart.”<sup>32</sup>

The invalidation of District 25 under *Shaw* is, in short, the most straightforward strategy for addressing the concerns Justice Kennedy had about District 25. Why would Justice Kennedy resort to the indirect method Pildes suggests, especially when it involved finding a violation of the VRA, whose underlying premises are deeply in tension with the anti-essentialist underpinnings of *Shaw* and whose constitutionality Kennedy had repeatedly questioned?

Further, if, as Pildes claims, the Court really wants to “cut off this pressure [to create District 25] at its source,”<sup>33</sup> there was similarly a more direct strategy for doing so. As Symposium contributor Guy Charles points out, the Court could have used the *Shaw* line not only to invalidate District 25, but to reason that “District 23 was not protected under Section 2” in the

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<sup>29</sup> See, e.g., *Hunt v. Cromartie*, 526 U.S. 541, 546–47 (1999); *Shaw v. Hunt*, 517 U.S. 899, 904–05, 907–08 (1996); *Miller v. Johnson*, 515 U.S. 900, 904–05, 911–14 (1995). For a more detailed treatment of this question, see Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1665, 1692–94 (2001).

<sup>30</sup> *Miller*, 515 U.S. at 913, 916.

<sup>31</sup> Compare *Miller*, 515 U.S. at 908 (invalidating a congressional district because it linked “the black neighborhoods of metropolitan Atlanta and the poor black populace of coastal Chatham County,” which were “260 miles apart in distance and worlds apart in culture”) and *id.* (noting that the “social, political, and economic makeup” of the district told “a tale of disparity, not community”) with *LULAC v. Perry*, 126 S. Ct. 2594, 2618 (2006) (quoting the district court's finding that “Latinos in the Rio Grande Valley and those in Central Texas . . . are ‘disparate communities of interest,’ with differences in socio-economic status, education, employment, health, and other characteristics”) and *LULAC*, 126 S. Ct. at 2619 (finding District 25 to be “not reasonably compact” because of the “enormous geographical distance separating the Austin and Mexican-border communities, coupled with the disparate needs and interests of these populations”).

<sup>32</sup> *LULAC*, 126 S. Ct. at 2623.

<sup>33</sup> Pildes, *supra* note 6, at 1143.

first place.<sup>34</sup> As Charles and Chief Justice Roberts have both observed, for *Shaw* purposes “there are very few differences between Districts 23 and 25.”<sup>35</sup>

Pildes would presumably have several responses to the skeptic’s concerns. First, Pildes argues that the Court found that the dismantling of District 23 violated the VRA because Kennedy believed Texas had engaged in intentional discrimination. Picking up on language in the opinion that suggests Kennedy’s worry was really about destroying a “naturally arising minority political community,”<sup>36</sup> Pildes speculates that the Court might even “be moving toward ‘embracing’ Section 2 by effectively limiting its reach to cases tantamount to intentional discrimination.”<sup>37</sup> Second, Pildes might argue that Justice Kennedy will have more success taming the VRA by importing a “cultural compactness” requirement into the first prong of the *Gingles* framework, the test that triggers the state’s duty to draw a majority-minority district, than by striking down such a district, once drawn, under *Shaw* (though, here again, the skeptic might wonder whether much is at stake in shifting the *Shaw* limits from remedy to right<sup>38</sup>). Third, Pildes would play his evidentiary trump card: the odd fact that Justice Souter’s concurring opinion, joined by Justice Ginsburg, initially stated that Justice Kennedy’s opinion invalidated District 25. In Pildes’ view, this “Freudian slip” may signal that these Justices “rightly heard the music being played in Justice Kennedy’s opinion. Even if that opinion did not strike the note that would hold District 25 to violate the VRA, everything about Justice Kennedy’s opinion sounds that tune.”<sup>39</sup>

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<sup>34</sup> Charles, *supra* note 6, at 1206.

<sup>35</sup> *Id.* at 1205 (citing *LULAC*, 126 S. Ct. at 2661 (Roberts, C.J., dissenting)).

<sup>36</sup> Pildes, *supra* note 6, at 1153.

<sup>37</sup> *Id.* at 1154.

<sup>38</sup> See generally Daryl Levinson, *Rights Essentialism and Remedial Equilibration*, COLUM. L. REV. 857 (1999). At present, *Shaw* doctrine limits the remedies a state may adopt in addressing a potential violation of the VRA. Specifically, *Shaw v. Hunt*, among other decisions, prevents the state from drawing a majority-minority district that departs substantially from the hypothetical compact majority-minority district that plaintiffs must identify to trigger Section 2 liability under *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986). See *Shaw v. Hunt*, 517 U.S. 899, 917 (1996) (holding that a bizarrely shaped district “somewhere else in the State” does not remedy the vote dilution suffered by residents of the *Gingles* district). Further, given that plaintiffs must already prove geographic compactness to establish a Section 2 violation under *Gingles*, one might think that proving “cultural compactness” would not be that difficult given our long history of associating geography with community. For a contrary view, see generally Ortiz, *supra* note 26.

<sup>39</sup> Pildes, *supra* note 6, at 1146.



## 2. *Karlan and Hanlon's Razor*

Pam Karlan's take on these cases is quite different from her casebook co-author's. While Pildes argues that Justice Kennedy's dissatisfaction with District 25 resulted in the invalidation of District 23, Karlan argues that the causal arrow runs the other way. While Pildes believes that hostility to the use of race in districting animates the Court's opinion, Karlan paints a sunnier picture for civil-rights plaintiffs, arguing that *LULAC* reflects Justice Kennedy's sympathy for the "representational rights" of Latino voters. Indeed, Kennedy's notion of "representational rights" provides the overarching theme of Karlan's disquisition on partisan and racial districting.

Karlan's read of *LULAC* begins with its refusal to accept any of the parties' proposed standards for evaluating partisan gerrymandering claims. What is remarkable about *LULAC*, argues Karlan, is that "Justice Kennedy performed, under the umbrella of the Voting Rights Act, essentially the same inquiry that he had fretted could not be done in political gerrymandering cases—namely, determining whether a challenged plan impermissibly 'burden[s] representational rights.'"<sup>40</sup> She argues that "the animating force behind" the Court's Section 2 ruling "was the way in which the redrawn lines undercut the 'representational rights' of Latino voters."<sup>41</sup> It was not Justice Kennedy's concerns with District 25 that led to the invalidation of District 23, as Pildes argues, but his concern for Latinos' representational rights in District 23 that resulted in Kennedy's dismissal of District 25 as an appropriate offset:

The same concern with the newfound concept of "representational rights" may also have informed Justice Kennedy's explanation of why the newly created District 25 . . . could not compensate for the destruction of District 23. According to Justice Kennedy, the yoking together of "distant, disparate communities," even if they shared an ethnicity, would make it more difficult for candidates "to provide adequate and responsive representation once elected."<sup>42</sup>

Karlan—correctly, in my view<sup>43</sup>—thus reads the *Shaw*-like language of *LULAC* not as an attempt to cabin race-conscious districting, but as an effort to ensure that districts drawn to empower racial minorities actually work in practice. Thus, unlike Pildes, Karlan does not see hostility to the VRA as a

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<sup>40</sup> Karlan, *supra* note 1, at 758 (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 307 (2004) (Kennedy, J., concurring in the judgment)).

<sup>41</sup> Karlan, *supra* note 1, at 759.

<sup>42</sup> *Id.* at 760 (quoting *LULAC v. Perry*, 126 S. Ct. 2594, 2619 (2006)).

<sup>43</sup> Heather K. Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. (forthcoming 2007).

motivating force behind the opinion. In her view, “if Justice Kennedy wants to protect voters like the Latinos of Laredo, *and he does*, section 2 of the Voting Rights Act provides the best doctrinal handle.”<sup>44</sup>

Karlan does not try to identify or resolve all of the potential inconsistencies in the Court’s treatment of Districts 23, 24, and 25. Her main quarrel with the Court’s opinion is its failure to realize that the tools it was using to police the state’s treatment of minority voters could equally be deployed in the partisan gerrymandering context. Karlan thus implicitly endorses an optimistic vision of the case, at least from the perspective of a reformer. She sees a Court willing to prevent vote dilution and wishing to prevent partisan gerrymanders. The only problem, she suggests, is a lack of vision, a failure to see how the first relates to the second. Karlan’s understanding of the case, in other words, invokes a gentle variant of Hanlon’s Razor rather than Occam’s: “Never attribute to malice that which can be adequately explained by stupidity.”<sup>45</sup>

As with Pildes’ piece, we can imagine grounds for skepticism here. Unlike Pildes, Charles, or Katz, Karlan does not discuss how her theory would apply to the Court’s treatment of Martin Frost’s district. If she is right about the Court’s willingness to protect racial minorities, why didn’t that solicitude extend to the African-Americans in Martin Frost’s district? After all, one might think that the Court would be more enamored of the coalitional politics that put Martin Frost into office than of the highly polarized voting that existed in District 23. If Justice Kennedy is interested in developing a notion of representational rights under the VRA, as Karlan claims, why does he dismiss plaintiffs’ challenge to the dismantling of Frost’s district on the ground that it would “unnecessarily infuse race into virtually every redistricting”?<sup>46</sup>

To be fair to Karlan, she does not purport to offer an in-depth treatment of *LULAC* (most of the piece is devoted to other questions). And even if she had nothing to say about District 24, I am not sure that a failure to account for the treatment of District 24 necessarily undermines her theory of the case. The Court’s treatment of District 24—with its fact-specific holding and circuitous reasoning—looks to me like a judicial punt. Nor should we be surprised that the Court was inclined to punt on the plaintiffs’ coalition district claim. In the doctrinal world that existed prior to *Georgia v. Ashcroft*,<sup>47</sup> where the only tool used to empower racial minorities was

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<sup>44</sup> Karlan, *supra* note 1, at 761 (emphasis added).

<sup>45</sup> WEBSTER’S ONLINE DICTIONARY, <http://www.websters-online-dictionary.org> (use search terms “Hanlon’s Razor”) (last visited Oct. 12, 2007).

<sup>46</sup> Pildes, *supra* note 6, at 1152 (quoting *LULAC v. Perry*, 126 S. Ct. 2594, 2625 (2006)).

<sup>47</sup> 539 U.S. 461 (2003).

majority-minority districting, it was easy to identify a sensible baseline for measuring fairness. The test courts used was whether the number of majority-minority districts was “roughly proportional” to the minority group’s share of the underlying population.<sup>48</sup> When one folds influence districts and coalition districts into the mix, as *Georgia v. Ashcroft* would seem to require, it is much harder to figure out whether a districting plan is “fair” because it is not clear how each type of district should count in the fairness equation.<sup>49</sup> Even if the Court could figure out how to count a coalition district in the fairness equation, it must still decide whether minority voters can sue the state for *not* creating one. One can easily imagine that the Court might be tempted to put off these difficult questions for another day.

Even setting aside the Court’s treatment of District 24, however, we might still harbor doubts about Karlan’s central claim—that the Court should extend the idea of “representational rights” to partisan gerrymandering claims generally. At the very least, Karlan would need to put some more meat on the doctrinal bone to show that Kennedy’s vision of the harm in District 23 naturally lends itself to a solution in the partisan gerrymandering context. Perhaps Karlan means only to suggest that we can understand partisan gerrymandering claims as a form of vote dilution. While this would represent a perfectly sensible description of the injury in partisan gerrymandering cases, it remains difficult to identify a suitable baseline for measuring fairness. What Sandy Levinson terms the “brooding omnipresence”<sup>50</sup> of proportional representation comports with our intuitive sense of fairness but is far afield from what the Court has been willing to adopt for dilution claims that involve parties rather than racial minorities.

Moreover, like Guy Charles and Rick Pildes,<sup>51</sup> I harbor some doubts as to whether the story of District 23 in *LULAC* is really a conventional story about vote dilution. As Charles and Pildes point out, what really seemed to be driving Kennedy’s analysis is the sense that Texas was trying to short-circuit the political process. What Kennedy saw in District 23 was a burgeoning Latino majority, on the cusp of achieving its electoral goals, prevented from voting out an incumbent. On that view, Kennedy’s vision of

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<sup>48</sup> *Johnson v. DeGrandy*, 512 U.S. 997, 1017 (1994). For a more detailed treatment of this issue, see Gerken, *supra* note 29, at 1675–76.

<sup>49</sup> See *Georgia v. Ashcroft*, 539 U.S. 461, 484 (Souter, J., dissenting); Note, *The Implications of Coalitional and Influence Districts for Vote Dilution Litigation*, 117 HARV. L. REV. 2598, 2599 (2004).

<sup>50</sup> Sanford Levinson, *Gerrymandering and the Brooding Omnipresence of Proportional Representation: Why Won’t It Go Away?*, 33 UCLA L. REV. 257 (1985).

<sup>51</sup> Charles, *supra* note 6, at 1207–11; Pildes, *supra* note 6, at 1152–1155.

a representational right looks more like a prohibition against interfering with the “natural” results of the political process—a “do no harm” principle.<sup>52</sup>

How a “do no harm” principle would translate when one moves from the micro-level to the macro-level—from the treatment of individual populations and particular districts to the statewide distribution of power—is not clear. While it may be possible to tell a “do no harm” story about specific groups already ensconced in particular districts, it is hard to imagine doing so with regard to districting at the state level (unless one merely wants to force states to adhere to what districters call a “least change” plan). Thus, whether one can derive a baseline for evaluating a statewide partisan gerrymander from Justice Kennedy’s notion of “representational rights” remains to be seen.

### 3. *Katz’s Interpretive Project*

Ellen Katz’s explanation of the seemingly inconsistent rulings in the *LULAC* opinion prove, once again, that she is one of the field’s most elegant doctrinalists. She offers neither the elaborate narrative account of Pildes nor the straightforwardly critical assessment of Karlan. Instead, she deftly weaves the threads of Justice Kennedy’s analysis into an argument about the value of competition in elections. Hers is an interpretive project, offering a coherent read of the Court’s opinion that is grounded within her own normative framework.

The magic of Katz’s argument is that it provides a story that makes sense of all of the subsidiary pieces of the Court’s decision. In her view, the Court’s overriding interest was not protecting the right of minority voters to participate in elections, but protecting their “right to participate in a *competitive* political environment.”<sup>53</sup> In explaining “[w]hat’s wrong with Henry Bonilla?” and “[w]hat’s wrong with Martin Frost?,”<sup>54</sup> Katz argues that in each case the Court was “redefining” what constitutes “racial vote dilution”<sup>55</sup> to apply only to competitive districts. According to Katz, the Court found Henry Bonilla’s District 23 to be a district worth preserving precisely because it was becoming competitive. The Court was unwilling to prevent the destruction of Martin Frost’s District 24 because it was a district drawn solely to put him back in Washington. “In this sense, Martin Frost was the Democratic Henry Bonilla, . . . the product of the same form of incumbency protection that Justice Kennedy found to be problematic” in District 23’s dismantling.<sup>56</sup>

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<sup>52</sup> See Gerken, *supra* note 43 (forthcoming 2007).

<sup>53</sup> Katz, *supra* note 6, at 1164 (emphasis added).

<sup>54</sup> *Id.* at 1167–74, 1174–81.

<sup>55</sup> *Id.* at 1121–35.

<sup>56</sup> *Id.* at 1177.

Katz thus sees an intimate connection between the two basic claims in *LULAC*: partisan gerrymandering and racial vote dilution. Katz does not claim that the Section 2 ruling was simply a covert strategy for policing Texas's partisan gerrymander. Her argument is more subtle: "the Court's concern about partisan gerrymandering and, in particular, the relentless pursuit of incumbency protection, both propelled and shaped the race-based injury the Justices identified."<sup>57</sup>

Katz admits that such an interpretation, if carried to its logical end, would "launch[] a fundamentally new approach to minority political participation. The present focus on electoral outcomes will be replaced with an inquiry more concerned with the process that produces those outcomes."<sup>58</sup> Katz also offers a normative defense of such a development. She notes that "[a] competitive process vests in every voter the potential to be the coveted swing voter" and argues that "minority voters might just be best served by a political arena in which politicians actually vie for their votes."<sup>59</sup> Indeed, at the end of the piece Katz offers a brief sketch as to how these arguments might apply to partisan gerrymandering generally.<sup>60</sup>

One cannot help but admire Katz's ability to take this seemingly inconsistent set of holdings and make them cohere, much less cohere in such an elegant fashion. Her doctrinal synthesis is nominally the kind of things lawyers do all the time—piece together a set of data points with an overarching normative story. And yet it has generated one of the most interesting academic pieces in the symposium.

Nonetheless, let me raise two questions about the paper. First, if *LULAC* is really about competition, why does the opinion mention competition only once, but use the word "opportunity" fifty-two times?<sup>61</sup> Katz uses the phrase "opportunity to compete" in describing *LULAC*'s holding,<sup>62</sup> but I wonder whether that really captures what Kennedy was describing here. As noted above,<sup>63</sup> Justice Kennedy's opinion has an element of a "do no harm" principle to it. Perhaps his definition of harm was inspired at least in part by the competitive race that would have occurred in District 23 had it not been

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<sup>57</sup> *Id.* at 1164.

<sup>58</sup> *Id.* at 1178.

<sup>59</sup> Katz, *supra* note 6, at 1166.

<sup>60</sup> *Id.* at 1183–84.

<sup>61</sup> This observation is not my own. It was made by one of my students in a paper she wrote analyzing Katz's piece in my Advanced Election Law class. See Giulia G. Stefani, *Response to "Reviving the Right to Vote"* (Feb. 19, 2007) (on file with the author).

<sup>62</sup> Katz, *supra* note 6, at 1183.

<sup>63</sup> See *supra* text accompanying notes 51–52.

dismantled.<sup>64</sup> But I suspect that Justice Kennedy would have found something in District 23 worth protecting even if the Latino majority had grown to overwhelming proportions in the last few years, even if the race would have been a rout. What really seems to bother him, as both Karlan and Charles point out,<sup>65</sup> was the fact that Texas took away the power of District 23's Latinos to "vote the bum out," to use a common phrase in electoral circles. In my view, Katz gets closer to the nub of Kennedy's concerns at the end of the paper, where she ruminates on the application of Kennedy's vision to partisan gerrymandering claims and describes it as a "distinction between good and bad forms of incumbency protection."<sup>66</sup> This critique, of course, does nothing to make her normative claims less provocative.

Second, turning to Katz's normative claims, Katz ends the paper speculating that the VRA might be read to focus on process and not outcomes, so that minority voters in the future could claim "an entitlement not to a particular electoral outcome, but instead to a particular sort of electoral process, one that allowed them a fair opportunity to compete."<sup>67</sup> I think Katz is right to think that the Supreme Court is more comfortable policing the electoral process than assessing the amount of political power to which groups are entitled.<sup>68</sup> But I am less sanguine than she is about the notion that competitiveness is the correct standard for evaluating the electoral process. There has been an extensive debate on this subject in the literature which I will not rehash here.<sup>69</sup> Let me offer just one practical worry about

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<sup>64</sup> A competitive race did take place after District 23 was reinstated, with Democrat *Ciro Rodriguez* defeating *Bonilla*. *Ralph Blumenthal, Democrat Wins G.O.P. Seat in Texas Runoff*, N.Y. TIMES, Dec. 13, 2006, at A24.

<sup>65</sup> Karlan, *supra* note 1, at 759; Charles, *supra* note 6, at 1194.

<sup>66</sup> Katz, *supra* note 6, at 1184.

<sup>67</sup> *Id.* at 1183.

<sup>68</sup> *Id.* I outline the reasons for my agreement in Heather K. Gerken, *A Third Way for the Voting Rights Act: Section 5 and the Opt-In Approach*, 106 COLUM. L. REV. 708, 737–42 (2006).

<sup>69</sup> Although there has long been a merry war among political theorists on this topic, the debate in election law circles was ignited by Sam Issacharoff and Rick Pildes' seminal piece in the *Stanford Law Review*, Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998), and has raged on for the last decade. For a sampling, see Daniel H. Lowenstein, *The Supreme Court Has No Theory of Politics—and Be Thankful for Small Favors*, in THE U.S. SUPREME COURT AND THE ELECTORAL PROCESS 283 (David K. Ryden ed., 2d ed. 2002); Bruce E. Cain, *Garrett's Temptation*, 85 VA. L. REV. 1589 (1999); Richard L. Hasen, *The "Political Market" Metaphor and Election Law: A Comment On Issacharoff and Pildes*, 50 STAN. L. REV. 719 (1998); Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002); Pamela S. Karlan, *Politics by Other Means*, 85 VA. L. REV. 1697 (1999); Daryl J. Levinson, *Market Failures and Failures of Markets*, 85 VA. L. REV. 1745 (1999); Nathaniel Persily, *In Defense of Foxes Guarding*

Katz's strategy. By now the classic move in response to a competition argument is to talk about where, precisely, the competition takes place (at the primary, during the general election, or at the legislative level).<sup>70</sup> Katz talks about competition in the general election here and has discussed competition at the primary level elsewhere.<sup>71</sup> But if we worry most about "competition" taking place between groups at the legislative level—the VRA, after all, was designed to help racial minorities elect candidates to the legislature—it is not entirely clear to me that Latinos will have a "fair opportunity to compete" if their candidates, unlike the candidates elected in majority-white districts, are repeatedly subjected to competitive elections. Such competition, of course, would likely mean that Latinos would be represented by incumbents with less seniority (and possibly weaker ties to their constituents). Katz, to be sure, anticipates some of these concerns,<sup>72</sup> but she does not fully answer them in the limited space she has here.

#### 4. *Charles and Policing Through Indirection*

As with Pildes, Karlan, and Katz, Guy Charles offers a distinctive read of *LULAC*. He provocatively argues that, despite all appearances, "it would be inaccurate to say that *LULAC* is only or even primarily a racial gerrymandering case."<sup>73</sup> The arguments in Charles' wide-ranging article fall into two main categories. First, Charles offers his own gloss on the case,

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*Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649 (2002); Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605 (1999); David Schleicher, "Politics as Markets" Reconsidered: *Natural Monopolies, Competitive Democratic Philosophy, and Primary Ballot Access in American Elections*, 14 SUP. CT. ECON. REV. 163 (2006).

<sup>70</sup> For a good example of this move, see Persily, *supra* note 69. Michael Kang argues that commentators have failed to recognize that these various accounts of competition are merely different manifestations of a deeper form of competition, which he terms "democratic contestation":

Of course, many commentators have debated the merits of different forms of electoral competition in various settings, whether it is at the primary or general election, intradistrict or interdistrict, or within or across institutions like parties and branches of government. However, these debates so far fail to connect those different forms of electoral competition to the deeper goals and form of political competition—represented by democratic contestation—that they all should seek to promote.

Michael Kang, *Race and Democratic Contestation 4* (unpublished draft, on file with the author).

<sup>71</sup> See generally Ellen D. Katz, *Resurrecting the White Primary*, 153 U. PA. L. REV. 325 (2004).

<sup>72</sup> Katz, *supra* note 6, at 1173–74.

<sup>73</sup> Charles, *supra* note 6, at 1187.

suggesting that it is either about racial representation or, more likely, representation itself. In exploring these claims, he quite explicitly challenges Pildes' read of *LULAC*, rejecting the notion that it represents a continuation of the Court's anti-essentialist opinions.<sup>74</sup> Even if *LULAC* were understood as a race case, Charles argues, it "was defending a nuanced concept of anti-essentialism that focuses on the authenticity of racial representation."<sup>75</sup> Second, Charles devotes a portion of the piece to the related claim that "politics, not race, is the majority's concern in *LULAC*."<sup>76</sup>

Like Katz and Pildes, Charles folds the three pieces of the Court's ruling into a single story. He uses the Court's analysis of Districts 23 and 25 as bookends for his analysis. Charles argues that Justice Kennedy saw two different visions of representation in these two districts: the "token racial representation" offered by the newly drawn District 25 and the "authentic racial representation" that existed in District 23 before its dismantling.<sup>77</sup> Whereas Pildes argues that the Court's decision to sanction Texas for eliminating District 23 was merely a means to get rid of District 25, Charles argues that Kennedy was angered both by the destruction of an authentically representative district *and* by the creation of an inauthentic one. Indeed, Charles suggests that Pildes misreads Kennedy's use of the language of *Shaw* in describing the inadequacies of District 25. He writes that this language was deployed not against race consciousness generally, as it had been in *Shaw*, but against the "cynical use of race for strictly partisan purposes [in District 25] at the expense of authentic racial representation" that existed in District 23.<sup>78</sup>

Charles then moves from the Court's views on racial representation to its views on representation itself. Keying his analysis to the Court's language indicating that incumbency protection is not an excuse for "undermin[ing] the accountability function of elections,"<sup>79</sup> Charles connects the Court's treatment of Districts 23 and 25 to its holding on District 24. In Charles' view, "[t]he 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."<sup>80</sup> For this reason, he claims, the Court was unmoved by the destruction of Martin Frost's district: "[t]o restore Martin Frost to this district would be to undermine the principle against state assignment of

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<sup>74</sup> *Id.* at 1192–93.

<sup>75</sup> *Id.* at 1188.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 1193.

<sup>78</sup> *Id.* at 1196.

<sup>79</sup> Charles, *supra* note 6, at 1197.

<sup>80</sup> *Id.*



representation, a principle that Justice Kennedy defended in safeguarding the representational rights of voters of District 23.”<sup>81</sup>

In his analysis of “representational rights” writ large, Charles also parts company with Katz (and, in my view, comes closer to capturing Kennedy’s intuitions about what went wrong with District 23). He writes that “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.”<sup>82</sup>

By examining the case through the lens of representation and electoral accountability, Charles is able to give an account of *LULAC* that most closely matches both the text and the atmospherics of Justice Kennedy’s opinion. Charles’s interpretation not only makes sense of each part of the Court’s holding, but fits the story Kennedy tells in explaining his decision.

Now to my quarrel. I am quite persuaded by Charles’s effort to read this case as one about representation, not race. I am less convinced by Charles’s less developed claims—that Kennedy is using the VRA “instrumentally” to police excessive partisan gerrymandering, or that this strategy has “content.”<sup>83</sup> Nor am I confident that these claims follow neatly from Charles’ first line of argument regarding race and representation (though this may be the fault of the Court, not Charles). Take Charles’s claim about indirection—that Kennedy is using dilution doctrine to police partisan gerrymandering. It is not clear why Justice Kennedy would have an impulse to do so. As Charles himself observes, Justice Kennedy was not particularly bothered by the results of the Texas gerrymander because its division of congressional seats more closely matched the division of political power within the state than the prior plan.<sup>84</sup> Or take the connection Charles draws between his theories about representation and partisan motives. Charles argues that *LULAC* represents “a perfect application of the constitutional law theory of exclusionary reasons”; it stands for the proposition that the state could not burden the “representational rights” of Latinos in order to protect an incumbent.<sup>85</sup> I suspect, however, that Kennedy would have cared about the state’s decision to dismantle District 23 just as Latinos were on the verge of electing their preferred candidate even if the state’s motives had been pure. Finally, for the reasons outlined above, I am less confident than Charles is that the “accountability function of elections” is a theory with meaningful

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<sup>81</sup> *Id.* at 1199.

<sup>82</sup> *Id.* at 1199 n.53.

<sup>83</sup> *Id.* at 1192 n.32, 1196–1202, 1202.

<sup>84</sup> *Id.* at 1189.

<sup>85</sup> Charles, *supra* note 6, at 1201.

“content” or that it will get us very far down the analytic road, though Charles and I may be in agreement on the latter point.<sup>86</sup>

*B. The Bigger Story and Its Implications for the Constitutionality of Section 5*

Continuing with the *Rashomon* theme, the four authors disagree not only as to what occurred at the microscopic level (the Court’s subsidiary holdings) but at the telescopic level. The authors have quite different views of the larger themes of the case and what they portend for the case challenging Section 5’s constitutionality that will reach the Court sometime soon.

Interestingly enough, the authors disagree even as to the subject matter of the opinion. Pildes thinks *LULAC* is a straightforward race case, yet another iteration of the Court’s anti-essentialist approach. Charles and Karlan see it as an opinion about partisan politics dressed in the guise of a race case.<sup>87</sup> And Katz sees it as a hybrid of the two, with an idea from the domain of partisan politics—competition—seeping into voting-rights doctrine.<sup>88</sup> Further, while Karlan<sup>89</sup> is unenthusiastic about the ways in which partisan claims have been repackaged as racial ones, Charles<sup>90</sup> and Katz<sup>91</sup> are more optimistic about this trend. Perhaps for this reason, Karlan sees intellectual dead-ends and doctrinal confusion in the opinion, whereas Katz sees the

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<sup>86</sup> *Id.* at 1197.

<sup>87</sup> *Id.* at 1187–88 (arguing that *LULAC* was not about racial gerrymandering or racial vote dilution and reading the case as one about racial representation or, more likely “representation itself”); Karlan, *supra* note 1, at 758 (noting *LULAC* bears the “hallmarks of judicial review of redistricting over the past several decades: the repackaging of claims to fit the available doctrinal pigeonholes”).

<sup>88</sup> Katz, *supra* note 6, at 1164 (“[T]he Court’s concern about partisan gerrymandering and, in particular, the relentless pursuit of incumbency protection, both propelled and shaped the race-based injury the Justices identified.”).

<sup>89</sup> Karlan, *supra* note 1, at 758 (arguing that the Court’s use of voting-rights doctrine to police partisan gerrymanders allows it to “strike down a number of overtly partisan gerrymanders without developing a comprehensive theory of impermissible linedrawing”).

<sup>90</sup> Charles, *supra* note 6, at 1210–11.

<sup>91</sup> Katz, *supra* note 6, at 1163 (“Many election law scholars worry about these lawsuits, claiming that they needlessly ‘racialize’ fundamentally political disputes, distort important legal doctrines designed for other purposes, and provide an inadequate remedy for a fundamentally distinct electoral problem. I am not convinced.”).

potential emergence of a powerful new vision of the VRA<sup>92</sup> and Charles sees a strategy for using race to police partisanship that “may actually work.”<sup>93</sup>

Even when one focuses solely on the equal protection dimensions of the opinion, the authors cannot agree as to whether *LULAC* represents a continuation of prior trends or a shift in Justice Kennedy’s views. As noted above,<sup>94</sup> Pildes sees *LULAC* as yet another development in a long-running story. Indeed, he adheres to the strongest version of this claim: “Every aspect of Justice Kennedy’s controlling vote is consistent with his general, long-standing resistance to what he views as the excessive racialization of politics.”<sup>95</sup> Karlan,<sup>96</sup> Katz,<sup>97</sup> and Charles,<sup>98</sup> in contrast, believe that *LULAC* departs from the Court’s anti-essentialist approach and represents a surprising and unusually generous take on the VRA.

Indeed, perhaps because the usually circumspect Pildes states his claims in such strong terms, Katz and Charles offer a detailed defense of their views. Katz, whose seminal study<sup>99</sup> on Section 2 cases has made her intimately familiar with the ways in which Section 2 doctrine can be construed, emphasizes that “Justice Kennedy analyzed each [of the relevant Section 2] factors in a markedly pro-plaintiff manner.”<sup>100</sup> Specifically, Katz points out, Kennedy credited evidence of historic discrimination and its continuing effects, accepted evidence of racial polarization without quibble, and found Bonilla unresponsive to Latinos simply on the basis of voting patterns—all departures from the crabbed reading of the VRA that many lower courts have offered.<sup>101</sup> She also rejects Pildes’ effort to read the case as one about intent: “Justice Kennedy explicitly wrote that ‘the State must be held accountable for the effect of [its districting] choices in denying equal opportunity to Latino voters.’”<sup>102</sup> Further, Katz sees in the Court’s opinion a new vision of

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<sup>92</sup> *Id.* at 1164 (noting that *LULAC* embodies a “new approach to minority voting rights” that “repudiates traditional efforts to insulate cohesive minority groups from political competition”).

<sup>93</sup> Charles, *supra* note 6, at 1211.

<sup>94</sup> See *supra* text accompanying notes 22–39.

<sup>95</sup> Pildes, *supra* note 6, at 1154 (emphasis added).

<sup>96</sup> See Karlan, *supra* note 1, at 761.

<sup>97</sup> See Katz, *supra* note 6, at 1170.

<sup>98</sup> See Charles, *supra* note 6, at 1203.

<sup>99</sup> Ellen D. Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643 (2006).

<sup>100</sup> Katz, *supra* note 6, at 1168.

<sup>101</sup> *Id.* at 1167–70.

<sup>102</sup> *Id.* at 1171 (quoting *LULAC v. Perry*, 126 S. Ct. 2594, 2623 (2006)) (emphasis by Katz).

race. She writes, “the Court necessarily acknowledged that race need not be a problem to overcome but can be a trait that unites people in positive ways and gives rise to communities of value.”<sup>103</sup>

Charles shares Katz’s view that Justice Kennedy’s vision of race changed in *LULAC*. To begin, Charles points out that the mere fact that the Court held that “the concept of racial representation is not ipso facto unconstitutional . . . is deeply inconsistent with the view that *LULAC* is unqualifiedly antagonistic to the concept of racial representation.”<sup>104</sup> Charles also emphasizes the language and arguments in the opinion that seem inconsistent with Pildes’ view. He notes, for instance, that Kennedy “seemed at ease commenting on the extent of racially-polarized voting in the area around District 23” and noted his opinion was “[u]nlike the *Shaw* line of cases or the nose-holding tiptoeing-through-the-muck image conjured up by the Chief Justice’s ‘sordid business . . . divvying us up by race’ *obiter*.”<sup>105</sup> He further emphasizes the “non-awkward references to ‘Latino voting power,’ ‘Latino political power,’ and ‘Latino voters,’ . . . all references that rest uncomfortably with a strictly-construed prohibition on racial essentialism.”<sup>106</sup> Indeed, Charles goes so far as to claim that Kennedy “arguably faulted Black voters for not having demonstrably distinctive political interests from white voters in the district.”<sup>107</sup> “This was a far cry from the halcyon days of *Shaw v. Reno*,” writes Charles,<sup>108</sup> and the “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.”<sup>109</sup>

Consistent with these markedly different visions of *LULAC*’s overriding themes, the authors offer quite different predictions about the fate of the newly authorized Section 5 when a constitutional challenge reaches the Court. Though Pildes is careful to cloak his predictions in appropriate caveats, he suggests that the Court will continue to “unwind[] the regime *Gingles* created,”<sup>110</sup> either by continuing to narrow the Act’s reach or perhaps even by finding Section 5 itself unconstitutional.<sup>111</sup> Quite intriguingly, however, he does not predict the concomitant demise of majority-minority districts. Pildes notes that despite the Court’s repeated

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<sup>103</sup> *Id.* at 1165.

<sup>104</sup> Charles, *supra* note 6, at 1203.

<sup>105</sup> *Id.* at 1186 (emphasis added).

<sup>106</sup> *Id.* at 1186–87.

<sup>107</sup> *Id.* at 1186.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 1194.

<sup>110</sup> Pildes, *supra* note 6, at 1142.

<sup>111</sup> *Id.* at 1039–40.

efforts to restrict race-conscious districting, majority-minority districts “have generated and will continue to generate powerful interests and constituencies that support [their] maintenance.”<sup>112</sup> Pildes thus offers a striking coda to his article: “the politics of safe districting now has a life and dynamic of its own, one the Court is likely to affect, if at all, only at the distant margins. If so, it will not be the first time a revolution has consumed its creators.”<sup>113</sup>

In sharp contrast to Pildes, Karlan argues that *LULAC* makes it harder for the Court to find Section 5 unconstitutional: “if the Voting Rights Act provided a compelling basis for Texas to take race into account in drawing congressional districts in 2003, it is hard to see how section 5 should lose its *raison d’être* immediately.”<sup>114</sup> Charles does not directly address this question, though he explicitly challenges the grounds for Pildes’ assessment of the Act’s future: if the Court were “as troubled by racial vote dilution as Professor Pildes portrays,” writes Charles, it “would have taken the ready opportunity to emphatically add another stake through the heart of the Act.”<sup>115</sup> Instead, Charles argues, the Court “extend[ed] the life of the Act” and thereby “reduc[ed] doubts about its most critical provision.”<sup>116</sup> Katz does not address the issue at all, though one might infer grounds for optimism about Section 5’s survival from her conclusion that Kennedy read Section 2 doctrine in a “markedly pro-plaintiff manner.”<sup>117</sup>

My own views of the broader themes of *LULAC* and the fate of Section 5 fall somewhere between those of Pildes, on the one hand, and Charles/Katz/Karlan on the other. As I detail in a forthcoming comment in the *Harvard Law Review*,<sup>118</sup> I disagree with Pildes that *LULAC* represents yet another rendition of the Court’s anti-essentialist approach. I think Pildes is probably right that the initial impulse behind Justice Kennedy’s decision was distaste for District 25. In contrast to Pildes, however, I believe that as Justice Kennedy trolled for a majority and dug deeper into the reasons that the offset district was needed in the first place, he discovered a story he found equally if not more compelling—Texas’s decision to dismantle a district just at the moment that Latinos had gained enough political power to elect their candidate of choice. Justice Kennedy may well have stumbled across the story of District 23 in trying to piece together a majority, but the language of the opinion suggests he was convinced by it.

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<sup>112</sup> *Id.* at 1161.

<sup>113</sup> *Id.*

<sup>114</sup> Karlan, *supra* note 1, at 763.

<sup>115</sup> Charles, *supra* note 6, at 1206.

<sup>116</sup> *Id.*

<sup>117</sup> Katz, *supra* note 6, at 1168.

<sup>118</sup> Gerken, *supra* note 43. Much of what follows in this section is drawn from that essay.

Indeed, like Karlan, Katz, and Charles, I think the story told in *LULAC* was importantly different from his prior opinions. Justice Kennedy's prior jurisprudence has been premised on the notion that racial identity is, at best, an artificial construct imposed by the state (and at worst a divisive, destabilizing force). And yet in *LULAC* he comes to the view—indeed, celebrates the fact—that the “Latinos in District 23 had found an efficacious political identity.”<sup>119</sup>

Further, like Karlan and Charles, I read the anti-essentialist language in the opinion—the passages dealing with District 25—differently than Pildes. It is significant, in my view, that in describing District 25 in the language of *Shaw*, Justice Kennedy goes on to say something quite different from what he has said in every *Shaw* opinion he has authored. Specifically, Justice Kennedy links the *Shaw* concern with cultural compactness to a worry about political efficacy. He states that “there is no basis to believe a district that combines two far-flung segments of a racial group with disparate interests provides the opportunity that § 2 requires . . . . The practical consequence of drawing a district to cover two distant, disparate communities is that one or both groups will be unable to achieve their political goals.”<sup>120</sup> In essence, Justice Kennedy concluded that District 25 was a *forum non conveniens* for Latinos seeking an “efficacious political identity.”

While I am in agreement with Karlan, Katz, and Charles that *LULAC* represents something new, I am less confident about whether it signals a permanent shift in Justice Kennedy's jurisprudence. My guess is that Kennedy was able to tell a new story about race in *LULAC* because the story of District 23 had strong First Amendment dimensions, Justice Kennedy is widely known for his penchant for that constitutional provision, and the First Amendment often pops up when Kennedy writes about race. And with or without the overlay of race, the mobilization efforts of Latinos in District 23 were easily recognizable as cherished First Amendment activities. We could substitute other adjectives—religious, political, sexual—for the term “racial” and the story would still cohere.

Thus, while Katz sees the idea of competition seeping into the story of District 23, I see ideas about political efficacy and expression inflecting Kennedy's tale. By telling a story in *LULAC* that was more about electoral politics than race, more about the First Amendment than equal protection, Justice Kennedy was able to see something different about race. Justice Kennedy has long recognized that the political sphere involves robust associational and expressive dimensions, but *LULAC* helped him see how those values connect to racial politics. At least in this case, he was able to discern an “efficacious political identity” that is also a racial one.

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<sup>119</sup> *LULAC v. Perry*, 126 S. Ct. 2594, 2619 (2006).

<sup>120</sup> *Id.* at 2618–19.

I am less confident, however, that *LULAC* necessarily bodes well for future civil-rights plaintiffs or the defenders of Section 5. The fact that Justice Kennedy feels most comfortable talking about race indirectly, that he prefers a First Amendment story about the Latinos in District 23 to an equal protection one, signals that Kennedy may still be uncomfortable with the notion of racial identity. Put more sharply, the story of *LULAC* may be nothing more than that—a story, told once and not to be repeated. At the very least, much will depend on how the constitutional challenge to Section 5 is framed when it is presented to the Court.

### III. CONCLUSION

Returning to the opening observation of this commentary, these four pieces provide a frustrating reminder that we remain in the midst of a doctrinal interregnum. These are four of the field's finest members, all at the top of their game. And yet they cannot agree on the major themes of the *LULAC* opinion, let alone its subsidiary holdings. What, precisely, are academics and practitioners supposed to do with the Court's recent decisions? One might naively have imagined that a conference on the early election law decisions of the Roberts Court would have been devoted to identifying *LULAC*'s underlying principles and figuring out where the Court will go from here. Yet the submissions to this conference have largely been devoted to disputes about the basic meaning of the opinion. It is difficult to have a shared conversation about the Roberts Court when one cannot even agree on where that discussion should start.

A second reason for pessimism about the future of the Roberts Court is that these commentaries suggest just how manipulable voting rights doctrine has become.<sup>121</sup> Pildes and Charles read *LULAC* as importing *Shaw* doctrine directly into the Court's construction of Section 2; previously, these lines of decision had been in tension, but at least understood to involve distinct doctrinal categories. Katz argues that the Court may be rewriting Section 2 to import a theory of electoral competition, a goal that is presumably far afield from what Congress contemplated in passing the VRA. Karlan and Charles both argue that Section 2's protections against racial vote dilution are being used to police partisan gerrymandering. All of these observations suggest that election law's doctrinal categories are breaking down and can no longer constrain—or even guide—the Court's exercise of its discretion.

The question for academics and practitioners is what to do with the messy and inchoate opinions generated by a Court during a doctrinal interregnum. If we cannot agree as to the basic meaning of its opinions, if we

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<sup>121</sup> Karlan makes a similar observation based on *LULAC* itself. Karlan, *supra* note 1, at 763 (terming the Court's doctrine "elastic").

think that doctrinal categories have lost their ability to constrain the Court, how do we write about what the Court is doing or predict where it is going to go?

Returning to the metaphor of the microscope and telescope, it seems to me that there are three choices available to academics and practitioners during a doctrinal interregnum like this one. First, academics and practitioners might focus on the granular view—on the story being told in each case. In *LULAC*, for instance, the story of the Latinos in District 23 was obviously a compelling narrative, one able to capture Justice Kennedy's imagination despite his predispositions on questions of race and redistricting. Guy Charles' contribution to this symposium gets a good deal of traction on *LULAC* because he digs into the story and tries to figure out what bothered Justice Kennedy about District 23. Similarly, Ellen Katz, in trying to craft a coherent tale about the Court's seemingly disparate treatment of the three districts at issue, comes up with both an elegant narrative and an interesting idea to boot.

Second, academics and practitioners might focus on the telescopic view, trying to figure out the broader intuitions and impulses that run across cases. Linda Greenhouse's comments during the Saturday morning session<sup>122</sup> fit this description, as do the articles authored by Karlan and Pildes.

One might worry that both of these suggested strategies deal largely with the atmospherics of these cases—figuring out what motivates the Justices—rather than with legal doctrine. But that seems perfectly appropriate during a doctrinal interregnum, especially this one. As noted above, when the doctrine ceases to shape and direct the Court's path, one has little more than atmospherics with which to work.

That leads me to the third strategy, an alternative to both the microscope and the telescope: we could stop looking at the Court through either instrument. As I have noted elsewhere, election law scholarship has recently taken an institutional turn. Scholars have begun to turn away from the courts, looking to other administrative mechanisms for improving our electoral system. Chris Elmendorf, for instance, has written at length about advisory electoral reform commissions.<sup>123</sup> Michael Kang has explored the ways in which direct democracy might be harnessed to mitigate the problems

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<sup>122</sup> Linda Greenhouse, Remarks at the Ohio State Law Journal and Election Law @ Moritz Symposium: Election Law and the Roberts Court (Sept. 30, 2006), available at <http://moritzlaw.osu.edu/lawjournal/symposium/2006-07/index.php> (follow "View Archived Webcast: 'Saturday Morning,'" remarks begin at approximately the 43-minute mark).

<sup>123</sup> Christopher Elmendorf, *Representation Reinforcement Through Advisory Commissions: The Case of Election Law*, 80 N.Y.U. L. REV. 1366 (2005).



endemic to our districting process.<sup>124</sup> I have written on citizen commissions<sup>125</sup> and using the tools of administrative law to police voting rights.<sup>126</sup> These and other contributions to the academic debate move us away from a court-centered approach and may suggest more interesting paths for us to follow going forward.

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<sup>124</sup> Michael S. Kang, *De-Rigging Elections: Direct Democracy and the Future of Redistricting Reform*, 84 WASH. U. L. REV. 667 (2006).

<sup>125</sup> Heather K. Gerken, *The Double-Edged Sword of Independence: Inoculating Electoral Reform Commissions Against Everyday Politics*, 6 ELECTION L.J. 184 (2007).

<sup>126</sup> See Gerken, *supra* note 68.