

Michigan Law Review First Impressions

Volume 105

2006

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Recommended Citation

Adam B. Cox, *Self-Defeating Minimalism*, 105 MICH. L. REV. FIRST IMPRESSIONS 53 (2006).

Available at: http://repository.law.umich.edu/mlr_fi/vol105/iss1/18

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SELF-DEFEATING MINIMALISM

Adam B. Cox* †

Everyone wants a piece of Tom DeLay. The former majority leader is under investigation and indictment, and even the Supreme Court threatened last Term to undo one of his signal achievements. In 2003, DeLay orchestrated a highly unusual mid-decade revision of Texas's congressional map. The revised map was a boon to Republicans, shifting the Texas congressional delegation from 15 Republicans and 17 Democrats to 21 Republicans and 11 Democrats. The map was attacked as an unconstitutional partisan gerrymander and a violation of the Voting Rights Act. When the Supreme Court agreed to hear those challenges in *LULAC v. Perry*, many commentators thought the Court's action signaled that it was finally prepared to strike down a redistricting plan as an unconstitutional partisan gerrymander—something it had never done.

The case did not turn out to be quite the watershed in partisan gerrymandering jurisprudence that some had predicted. The Supreme Court saved a piece of DeLay's legacy by rejecting the plaintiffs' partisan gerrymandering claims. The Court did intervene in a limited way, however, concluding that District 23 in the new congressional plan violated Section 2 of the Voting Rights Act by diluting the votes of Latino voters. At the center of the six fractured opinions that produced this outcome was Justice Kennedy, who delivered the judgment of the Court and authored its central opinion.

The early commentary on *LULAC* and Justice Kennedy's role has highlighted two central points. First, everyone agrees that stasis prevailed in partisan gerrymandering jurisprudence; Kennedy continued to sit on the fence, and consequently *LULAC* marks no jurisprudential shift on this front. Second, some have been pleasantly surprised by the Voting Rights Act holding, noting that Justice Kennedy—not always the biggest fan of the Act—cast the deciding vote to invalidate the changes to District 23 on vote dilution grounds.

While these two holdings are separately interesting, the more important question I want to pursue is what Kennedy's twin holdings, *taken together*, mean for the future of voting rights jurisprudence. On this score, we might initially be inclined to applaud Justice Kennedy. His opinion appears to embody a laudably minimalist approach to redistricting jurisprudence. Kennedy shied away from a constitutional ruling, instead finding a statutory footing for the Court's intervention: he cobbled together an overlapping consensus that Section 2 of the Voting Rights Act was violated in order to invalidate a part of Texas's troubling mid-decade redistricting plan, without

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† Suggested citation: Adam B. Cox, *Self-Defeating Minimalism*, 105 MICH. L. REV. FIRST IMPRESSIONS 53 (2006), <http://students.law.umich.edu/mlr/firstimpressions/vol105/cox.pdf>.

having to take the unprecedented step of striking down a redistricting plan as an unconstitutional partisan gerrymander.

The problem is that Justice Kennedy's approach exacerbates an existing tension in voting rights jurisprudence in a way that is counterproductive and potentially self-defeating. The tension is embodied in Kennedy's deeply inconsistent treatment of the role of legislative primacy in the redistricting process. In *LULAC*, Kennedy noisily touted legislative primacy in his partisan gerrymandering discussion while quietly shaping Voting Rights Act doctrine in ways that undermine that very primacy. He gives legislatures nearly boundless authority to redraw district lines in ways that have a devastating effect on the fortunes of a political party, while placing strict limits on the power of legislatures to redistrict in a way that has an effect on minority voters—even if the redistricting might, on balance, enhance the power of the minority group as a whole.

Justice Kennedy began his opinion with a celebration of legislative primacy, using his rejection of the plaintiffs' partisan gerrymandering claims as a vehicle for reaffirming the central role of legislatures in the congressional redistricting process. As the font of this primacy Kennedy drew on the Elections Clause of the Constitution. That clause provides that the "Times, Places, and Manner of holding Elections . . . shall be prescribed in each State by the Legislature thereof," reserving to Congress the power to "at any time by law make or alter such Regulations." Echoing Justice Scalia's interpretation of the clause in previous partisan gerrymandering litigation, Kennedy concluded that this language embodies a commitment to legislative primacy in election regulation and, as a result, severely circumscribes the role that courts can undertake to police the redistricting process. He relied on this commitment to reject the plaintiffs' proposed presumption that unnecessary mid-decade redistrictings be constitutionally suspect. And more generally, the rhetoric of legislative supremacy suffused his rejection of the plaintiffs' partisan gerrymandering claims.

Despite the pervasiveness of Kennedy's rhetoric about legislative primacy, he applied Section 2 of the Voting Rights Act in a way that systematically undermines the very primacy he purports to protect. His approach introduces a surprising path dependency into the redistricting process that makes it more difficult for legislatures to alter previously agreed upon district lines. To be sure, Justice Kennedy claimed to do just the opposite—rejecting the plaintiffs' partisan gerrymandering claim on the ground that Texas should be free to revise its existing lines whenever it chooses. But the status quo bias that he rejected forcefully in the partisan gerrymandering context snuck back into the opinion when he evaluated the plaintiffs' Voting Rights Act claims.

Kennedy undermines legislative primacy in part by adopting a very individualistic conception of minority voting rights. One of the central questions raised in *LULAC* was whether Texas violated Section 2 when it dismantled the 23rd congressional district. That district previously had a thin majority of Latino citizens, but those citizens had never constituted a majority of voters and the district had previously elected Henry Bonilla, who was not the

candidate of choice of the Latino voters. Still, Latinos had come close to knocking off Bonilla in the 2002 election. So Texas Republicans used the mid-decade remap to shore up Bonilla's district, removing a substantial number of Latino voters. At the same time, however, the Republicans created a new District 25 that was majority Latino and that available statistical evidence suggested would elect a Latino candidate of choice.

Kennedy's individualistic conception of voting rights contributed to his conclusion that District 25 could not compensate for the loss of District 23. On his conception, the state's swap involved an impermissible trade-off between the rights of minority voters. Regardless of the voting power conferred on Latino voters in District 25, Latino voters in District 23 had been stripped of political power they once wielded. Of course, conceptualizing the right to vote as an individual entitlement in this fashion undermines legislative discretion by building a status quo bias into the system. Once the legislature creates a majority-minority district, any attempt to move that district elsewhere in the state will look like a deprivation of the rights of voters in the initial district.

Kennedy also undermines legislative primacy through his evidentiary approach to the plaintiffs' Voting Rights Act claims. To conclude that District 25 was not a sufficient substitute for District 23, Kennedy held that District 23 was an "opportunity district" under the Voting Rights Act, but that District 25 was not. This conclusion was far from obvious. For one thing, Latino voters had never actually elected a candidate of their choice in District 23. While they had come close to knocking off Bonilla in the previous election, they had failed. Moreover, the new District 25 contained a clear Latino majority, and the available statistical evidence that Latino voters in District 25 consistently voted as a bloc in favor of Latino candidates suggested that District 25 might well provide Latino voters with more power than District 23.

Justice Kennedy rejected as misleading this statistical evidence of Latino electoral strength in District 25. He concluded that the district actually contained two distinct groups of Latino voters with divergent interests, which would prevent the district from providing the opportunities for both groups that Section two required. As a conceptual matter, Kennedy's focus on the way in which statistical measures of voting power might mask important fissures among voters in a district is entirely unobjectionable. The problem is that Kennedy's conclusion about the lack of cohesion in District 25 seems largely ad hoc. First, he doesn't seem to identify any other measures that better reflect the sort of cohesion he is trying to identify. He hints at the importance of "the enormous geographical distance separating" the two parts of District 25, but then makes clear that this spatial separation is neither necessary nor sufficient to his conclusion. Second, the evidence of bloc voting behavior that Justice Kennedy considers irrelevant as a measure of cohesion for District 25 is *precisely the same evidence* that he cites approvingly when he concludes that the now-dismantled District 23 had been cohesive.

Kennedy's ad hoc approach and his disparate treatment of the same sort of evidence is initially perplexing. On closer examination, however, it appears to hinge on an implicit status quo bias. Justice Kennedy's reasoning reflects considerable confidence in his ability to read from historical evidence the reality of the present political landscape, and deep distrust in the statistical tools used to predict political consequences of alternative district arrangements. He clearly thought that the past voting behavior of Latinos in the old District 23 was strong evidence that they had forged common political ground. But because District 25 had not existed for several election cycles as District 23 had, Kennedy refused to conclude that Latino voters in that district could forge similar common ground. In other words, the fact that voters in old District 23 had already demonstrated cohesion was a strong reason for him to prefer this district to a new district in which, hypothetically, Latino voters might develop the same sort of cohesion.

This approach, which favors existing districts, introduces a status quo bias that locks in choices legislatures make about how to comply with the Voting Rights Act. Had neither District 23 nor 25 previously existed, it seems unlikely that Kennedy would have rejected a legislative decision to draw District 25 rather than 23. But once the legislature created District 23 in a previous plan, Justice Kennedy's approach sapped the legislature's discretion to swap that district for District 25 at a later date.

In short, Kennedy's approach creates substantial tension between partisan gerrymandering jurisprudence and Voting Rights Act jurisprudence. To be sure, there are potential theoretical justifications for preserving legislative primacy much more steadfastly in the former area than the latter. The legal claims are technically quite different: one is constitutional, the other statutory; one about politics, the other about race. We might conclude, for example, that it makes good sense to build a status quo bias into Voting Rights Act jurisprudence. Interpreting the Act to prefer existing districts to new ones would help insulate minority voters from the obligation of forming new political coalitions. And protecting the already-established coalitions of minority voters might make it easier for those voters to consistently exert political power. Of course, it might not. Voting rights theorists often disagree about whether minority voters are better served in the long run by rules that insulate them from political competition, or instead by rules that force them to develop the organizational techniques necessary for ordinary politics. Still, it is possible to construct a theoretical defense of Kennedy's approach—albeit not one advanced by the Justice himself.

The difficulty with Kennedy's opinion is that—as the *LULAC* litigation itself reveals—it is nearly impossible to enforce such a strong distinction between partisan gerrymandering and Voting Rights Act claims. Race is often strongly correlated with partisanship in America. Accordingly, redistricters know that the most effective way to accomplish partisan ends is often to manipulate the distribution of minority voters among districts. This political reality makes any effort to enforce a hard doctrinal wall between partisan gerrymandering and racial vote dilution claims unlikely to succeed. Such doctrinal walls create incentives for parties to re-cast their claims in

whatever doctrinal form seems most likely to succeed. In *LULAC*, this may have led the litigants to emphasize the racial dimensions of their claims. And, of course, this temptation can also afflict judges, creating the risk that they will use minority vote dilution doctrine to intervene in cases where they are disturbed by the partisan undercurrents of a redistricting plan.

The possibility of strategic behavior by litigants and judges threatens to make self-defeating Kennedy's attempt to preserve legislative primacy with respect to partisan gerrymandering claims. And to the extent that his approach still cuts into legislative discretion, it may do so in a counter-productive fashion. Certain kinds of path dependency can be beneficial in the redistricting process. As I have argued elsewhere, forcing legislators to stick with their redistricting choices for some time can improve the redistricting process, creating a partial temporal veil of ignorance that curbs egregious gerrymanders and improves the motives of legislators engaged in redistricting. But the limited, district-specific path dependency imposed by Justice Kennedy's reading of the Voting Rights Act is unlikely to bring any of these benefits. In the end, the superficial attractiveness of Kennedy's approach masks a deep incoherence that threatens to further undermine voting rights jurisprudence.