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STRICT IN THEORY, LOOPY IN FACT

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Most Supreme Court-watchers find the decision in *LULAC v. Perry* notable for the ground it breaks concerning Section 2 of the Voting Rights Act and the ground it refuses to break on the topic of partisan gerrymandering. I tend to think the Court's patchwork application of Section 2 to strike down a district on vote dilution grounds is not all that dramatic, nor is its resolution of the partisan gerrymandering claims all that surprising. The truly unprecedented development in the case for me was Justice Scalia's vote to uphold what he considered a racial classification under the Equal Protection Clause, but one that survived strict scrutiny. This essay tries to explain why his opinion is important, both in its own right and with respect to its implications for how he might consider the upcoming challenges to the newly reauthorized Voting Rights Act.

As an initial matter, though, it should be clear that Scalia's opinion represents a milestone for him. Never before has he concluded that a law otherwise violates the Equal Protection Clause, but nevertheless survives because it is narrowly tailored to achieve a compelling state interest. Previously, in *City of Richmond v. Croson*, he had suggested that "[a]t least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb—for example, a prison race riot, requiring temporary segregation of inmates—can justify an exception to the principle embodied in the Fourteenth Amendment that '[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens.'" Indeed, even in the one case he has considered involving segregation of prisoners for their own safety, *Johnson v. California*, he joined Justice Thomas's opinion, which applied a lower standard of review to uphold the practice given the deference ordinarily due prison officials.

To appreciate the significance of the move in his thinking it is important to understand the nature of the constitutional challenge Justice Scalia rejects. The plaintiffs launched an equal protection challenge to Texas Congressional District 25, which strung together counties from Austin to the Mexico border and grouped what Justice Kennedy later determined to be two "far-flung" culturally distinct Hispanic communities. The plaintiffs' claim drew on the rule established in *Shaw v. Reno* and its progeny, in which the Court made clear that a district that was "unexplainable on grounds other than race" or "predominantly based on race" triggered strict scrutiny under the Equal Protection Clause and would ordinarily fail. In some of

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those cases, however, the Court (which usually meant Justice O'Connor or Justice Kennedy) had left open the possibility that a racially predominant district could pass strict scrutiny if it was narrowly tailored to avoid a Voting Rights Act violation. The Court has never issued an opinion finding a district that would pass this test, although in *King v. State Board of Elections* it summarily affirmed a lower court decision upholding the infamous Chicago ear-muff district as narrowly tailored to avoid a Section 2 violation.

In creating District 25 the legislature attempted to further the partisan goals of the gerrymander while avoiding a violation of the Voting Rights Act. Because the plan removed 100,000 Hispanics from District 23 in order to shore up the seat for Republican Congressman Henry Bonilla, it therefore increased the number of Hispanics in District 25 (Lloyd Doggett's district) to keep the number of majority-minority districts constant in the plan and avoid a voting rights violation. (To be precise, Bonilla's district was majority-minority, just not when evaluated according to citizen voting age population.) The district court found that the creation of District 25 offset any potential voting rights liability created by District 23, and in any event, the predominant motive of the legislature in creating the district was partisan, not racial. Chief Justice Roberts's cogent separate opinion in *LULAC* explains why the district court was right.

Although the State's principal argument in the Supreme Court was that District 25 was drawn for partisan reasons, Justice Scalia nevertheless found the district triggered strict scrutiny. In his mind, "when a legislature intentionally creates a majority-minority district, race is necessarily its predominant motivation and strict scrutiny is therefore triggered." Unlike any other district Justice Scalia had previously considered, though, this district passed strict scrutiny because it was necessary to avoid liability under Section 5. His opinion raises two big questions: (1) why does Justice Scalia think compliance with Section 5 represents a compelling state interest, and (2) why was District 25 narrowly tailored to serve that interest?

There are three reasons, it seems, why Justice Scalia believes compliance with Section 5 is a compelling state interest. First, he relies on precedent, echoing his opinion in *Tennessee v. Lane*, in which he suggested that for the sake of *stare decisis* he would relax his review of the strictures of congressional power when race was involved. He cites the Court's decision in *South Carolina v. Katzenbach*, emphasizing that "[w]e long ago upheld the constitutionality of § 5." Second, although he admits in a footnote that no party in these cases raised an as-applied constitutional challenge to Section 5 and he assumes its constitutionality, he describes Section 5 in almost glowing terms as legislation that uses race "to remedy identified past discrimination" and "applies only to jurisdictions with a history of official discrimination." Besides the race riot examples, Justice Scalia had always clung to the view that narrow race-conscious remedies for individual victims of discrimination could be constitutional. Third, he argues that Section 5 must be a compelling state interest because, if it were not, "then a State could be placed in the impossible position of having to

choose between compliance with § 5 and compliance with the Equal Protection Clause.”

Justice Scalia’s emphasis on the precedential importance of the Court’s decisions in upholding Section 5 and the historic justification for the statute is relevant for how he might consider constitutional challenges to the newly reauthorized Voting Rights Act. Although the rationale for continuing coverage only of the particular jurisdictions captured by Section 5 is weaker today than it was in 1965, perhaps Justice Scalia’s opinion here suggests he will look the other way and not apply the kind of strict interpretation suggested by his other opinions considering the scope of Congress’s power under the Enforcement Clause of the Fourteenth Amendment. Of course, given changes to the law made in this reauthorization (*e.g.*, overturning *Georgia v. Ashcroft* and *Reno v. Bossier Parish II*) he probably will find Congress went too far this time or that the coverage formula is no longer congruent to the class of jurisdictions with a history of official discrimination. That being said, his effusive description of Section 5’s purposes and precedent is quite remarkable.

His argument about the forced choice jurisdictions would face if Section 5 were not a compelling interest, however, goes strongly against the grain of his prior opinions. The idea that mere compliance with a federal statute somehow immunizes otherwise unconstitutional state action seems a strange move for Scalia to make (to put it mildly). Surely, the state’s defense that “it was only following orders” or that the “devil (*i.e.*, federal government) made me do it” would not allow the state, for instance, to segregate schools or ban interracial marriage. Either the antidiscrimination and remedial justifications for the state’s construction of this district are compelling or they are not, but the federal government’s coercion of the state should not factor into the calculus. Suppose Congress used its Enforcement Clause power to require states to set aside ten percent of the spaces in its public universities for minority applicants or give preferences for minority contractors—would an otherwise unconstitutional quota or preference enforced by the state now be constitutional? The implication here is that the presence of a federal law cures the constitutional defect in the district, and conversely, if the law were to expire, such a district would then be unconstitutional.

The problems with the analysis are compounded by the evaluation of whether the district was narrowly tailored to avoid retrogression under Section 5. Drawing on the Court’s decision in the later *Shaw* cases, Justice Scalia suggests the Court ought to ask whether there was a “strong basis in evidence” for the state to believe the construction of such a district was “reasonably necessary” under the Act. He notes that a state has great flexibility to comply with the Act, per *Ashcroft*, which allows states to choose the proper balance of influence districts and majority-minority districts. Because he reads the appellants as conceding that the creation of another majority-minority district was necessary to avoid Section 5 liability, he decides the racially discriminatory district is narrowly tailored.

From reading this opinion one would think that the State struggled to find a way out of the dilemma between a voting rights or constitutional

violation and that the contours of District 25 were therefore a necessary evil. In fact, the State placed itself in that bind when it decided to improve the reelection prospects of a Republican Congressman (Bonilla) instead of keeping the district as the federal court had drawn it in 2001. The alleged “need” to offset the decline in the Hispanic population of District 23 by creating a new majority-minority district arose simply because the State was unwilling to keep the current lines in place and risk losing a Republican seat. District 25 is only “necessary” once the decision is made to protect Bonilla’s district; it is only “narrowly tailored” if the State has a compelling interest to avoid Section 5 liability while also shoring up an incumbent’s electoral prospects.

Contrast this approach with the stand taken in Justice Thomas’s dissent (joined by Scalia) and voiced by Justice Scalia in the oral argument in the Michigan Law School affirmative action case, *Grutter v. Bollinger*. There the State made the argument that it had a compelling interest in achieving a racially diverse student body while also maintaining an elite and selective law school. Affirmative action was necessary under this view, because the school could not otherwise maintain its high admission standards and achieve a racially diverse student body. As Justice Thomas described the goals of the law school’s affirmative action program, “[t]he interest in remaining elite and exclusive that the majority thinks so obviously critical requires the use of admissions ‘standards’ that, in turn, create the Law School’s ‘need’ to discriminate on the basis of race.” He concludes, however, that “[u]nless each constituent part of this state interest is of pressing public necessity, the Law School’s use of race is unconstitutional,” and “the Law School should be forced to choose between its classroom aesthetic and its exclusionary admissions system—it cannot have it both ways.”

The situation in *LULAC* is parallel, but even less justifiable. Whereas the decision to have an elite law school required the use of a racial classification to achieve racial diversity simultaneously, here the decision to protect an incumbent forces the state to impose a racial classification to comply with the Voting Rights Act. Even assuming incumbent protection is an interest comparable to having an elite law school, leaving the districts as they were and risking Bonilla’s seat obviously would have been a more narrowly tailored way of achieving compliance with the Act.

Furthermore, even if the State wanted to fulfill both goals—incumbent protection and Voting Rights Act compliance—it had a multitude of options before it that did not give rise to the same *Shaw*-related concerns present in District 25. As Justice Scalia references in his invocation of *Ashcroft*, the State did not need to create an additional majority-minority district to comply with Section 5. After subtracting the 100,000 Hispanics from Henry Bonilla’s district, it could have created other more compact influence districts, probably without even *intentionally* doing so on the basis of race. He takes shelter under the appellants’ self-serving concession that an additional effective Latino district was necessary to comply with Section 5, but we know Justice Scalia disagrees with that concession given his position in *Ashcroft*.

None of this critique of Justice Scalia's opinion should be taken as criticizing the ultimate destination he reaches, namely the upholding of the Texas gerrymander. Indeed, Chief Justice Roberts explains why that might be the correct result and reasonable people can disagree about the various claims of partisan gerrymandering and voting rights violations. What Scalia's resolution of *LULAC* shows is that even the most ardent advocate of a color-blindness approach to equal protection must bend his principles when it comes to redistricting. Racial considerations inevitably play a role in the redistricting process, whether or not the Voting Rights Act forces the construction of districts of particular racial percentages and whether or not the census building blocks of redistricting plans continue to come primarily with racial data attached. With the move of each piece of geography from one district to another, linedrawers are aware of the race-based implications of their decisions. Each move represents the expression of a confluence of intentions, decisions, and constraints, one of which is almost always the eventual racial composition of districts. The goals of the redistricting process are properly the subject of policy, and constitutional, debate. Yet, as Justice Scalia's opinion in *LULAC* confirms, rigid presumptions against race-based intentions derived from other areas of the law will often give way to the practical realities of this special type of state action where racial considerations always lurk in the background.