Is This the End of the Second Reconstruction?

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Luis Fuentes-Rohwer*

The biggest jurisprudential question of our generation has thus far received scant attention by scholars and the mass media alike. Will the Roberts Court finally put an end to the Second Reconstruction? Signals from the conservative wing on the Court make clear that the question is on the justices’ minds. To ask this question is to focus needed attention on Justice Kennedy, the Court’s resident “super-median.” This Essay examines the recent turn in Justice Kennedy’s race jurisprudence, from a narrow and uncompromising approach to the use of race by state actors to a more nuanced and contextual understanding of the role that race plays in American society. This is no small change, best explained by Justice Kennedy’s “super-median” status. This is a position of power and influence, as any majority coalition must count on Justice Kennedy’s vote; but more importantly, it is also a position of true independence. Justice Kennedy entertains his idiosyncratic and very personal views on the questions of the day because he can. He can even contradict himself.

Far more important than pinpointing the reasons for Justice Kennedy’s newfound jurisprudential awareness are the implications of this shift. This Essay examines three implications. First, litigators must learn Kennedy-speak and whatever issues occupy the justice’s attention. Second, a constitutional world where one justice single-handedly controls constitutional doctrine places grave stress on the moral legitimacy of judicial review. This is the counter-majoritarian difficulty on steroids. Finally, the implications for constitutional law are severe. In particular, this Essay argues that the fate of the Second Reconstruction hinges on the idealism of Justice Kennedy. Reflecting on the Court’s 2010 October Term, this Essay concludes that the Second Reconstruction – and particularly the Voting Rights Act, the crown jewel of the civil rights movement – appears safe for now.

It’s Justice Anthony Kennedy’s country – the rest of us just live in it.1

And section 5 applies only to -- to some States and not others. Texas is at a tremendous disadvantage here in defending the section 2 suit and in drawing - - and in having -- and the judiciary is at a disadvantage in -- in framing a remedy for a likely -- a likely section 2 violation in some of the districts.2

The inevitable reconsideration of the Second Reconstruction is finally upon us. The signals from the conservative wing on the Supreme Court are clear. In his concurring opinion in Ricci v. DeStefano,3 for

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example, Justice Scalia warned that the Court’s resolution in *Ricci* “merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution’s guarantee of equal protection?” To his mind, “the war between disparate impact and equal protection will be waged sooner or later, and it behooves us to begin thinking about how—and on what terms—to make peace between them.” He underscored that this was not an easy question. Similarly, in his concurring opinion in *Georgia v. Ashcroft*, Justice Kennedy warned that “considerations of race that would doom a redistricting plan under the Fourteenth Amendment or §2 [of the Voting Rights Act] seem to be what save it under § 5 [of the Act].” This was a “fundamental flaw” in the Court’s jurisprudence that the Court could not avoid much longer. Justice Thomas was more explicit with his critique, writing in *Namudno v. Holder* that Section 5 of the Voting Rights Act is unconstitutional. In oral arguments and written opinions alike, Chief Justice Roberts and Justice Alito have also expressed grave doubts about the wisdom – and one presumes the constitutionality – of the Act.

The fate of the Second Reconstruction is undoubtedly one of the most important constitutional questions of our generation. And yet it is a question that has received scant attention from scholars and commentators alike. For example, Linda Greenhouse asked whether “anyone [is] watching?” as the future of both the Voting Rights Act and Title VII of the Civil Rights Act of 1964 hangs in the balance. “While no one is watching,” she concluded, “time may be running out.” Critics of these Acts are pressing their case directly and forcefully, in case after case, from the recent denial of preclearance by the Justice Department in the South Carolina voter identification case to the Texas redistricting cases. The time when these questions finally reach the Supreme Court is near. And once they do, this Essay explains that Justice Kennedy’s vote, as the Court’s resident “super-median,” will be crucial. The future of the Second Reconstruction rests in his hands.

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4 Id. (Scalia, J., concurring).
5 Id.
7 Id. at 491 (Kennedy, J., concurring).
11 Id.
12 See Motion for Declaratory Judgment, South Carolina v. Holder, at 2 (D.C.D.Ct. 2012) (“To deny preclearance or to apply Section 5 of the VRA in the demanding manner in which the United States applied it in denying administrative preclearance would bring into serious question the constitutionality of Section 5 of the VRA.”), found in http://www.scag.gov/wp-content/uploads/2012/02/2012-02-07-Complaint-Voter-ID.pdf (last visited February 15, 2012).
13 See Perry v. Perez, No. 11–713 et al., slip op. at 7 (Jan. 20, 212) (“This Court recently noted the “serious constitutional questions” raised by §5’s intrusion on state sovereignty. Those concerns would only be exacerbated if §5 required a district court to wholly ignore the State’s policies in drawing maps that will govern a State’s elections, without any reason to believe those state policies are unlawful.”).
This might be unwelcomed news to those familiar with Kennedy’s old race jurisprudence. In his concurring opinion in City of Richmond v. Croson, In his concurring opinion in City of Richmond v. Croson, for example, Justice Kennedy wrote that “[t]he moral imperative of racial neutrality is the driving force of the Equal Protection Clause.” In saying this, he counseled that the use of race by the state must only be “a last resort.” Similarly, in his dissenting opinion in Grutter v. Bollinger, he referred to the use of race by the state as a “corrosive category” and argued that “[p]referment by race, when resorted to by the State, can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and in the idea of equality. The majority today refuses to be faithful to the settled principle of strict review designed to reflect these concerns.” These are hardly isolated instances. Over the course of his long tenure on the bench, Justice Kennedy has demonstrated time and again that his approach to the use of race by the state is narrow, formalistic, and one that ultimately renders the state action at issue unconstitutional.

More recent cases, however, suggest that Justice Kennedy’s views are evolving. Consider in this vein the recent Parents Involved v. Seattle School District No. 1. In an opinion authored by Chief Justice Roberts, the Court struck down two voluntary racial integration plans for public schools in Louisville and Seattle. But only a plurality of justices would go as far as to prohibit any use of race in student assignments. Justice Kennedy provided the fifth vote yet refused to go quite that far. In a separate concurrence, he left open some room for school boards to consider the use of race in student assignments while pursuing the goal of integration. This is the aspect of Kennedy’s opinion that strikes a familiar chord. He is comfortably in the middle, wielding inordinate power and control as the Court’s “super median.” This is also where the familiarities end.

To read Justice Kennedy’s opinion in Parents Involved is to see a side of the Justice we have not seen before. This is true from the first paragraph of his opinion:

The Nation’s schools strive to teach that our strength comes from people of different races, creeds and cultures uniting in commitment to the freedom of all. In these cases two school districts in different parts of the country seek to teach that principle by having classrooms that reflect the racial makeup of the surrounding community. That the school districts consider these plans to be necessary should remind us our highest aspirations are yet unfulfilled.

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16 Id. at 518 (Kennedy, J., concurring in part and concurring in the judgment).
17 Id. at 519.
19 Id. at 394.
20 Id. at 388 (Kennedy, J., dissenting).
23 See id. at 725-33, 745-48.
24 See id. at 787-90.
25 Parents Involved, 551 U.S. at 782.
This opening salvo highlights Justice Kennedy’s posture in his concurrence. The framing is inescapable. Take, for example, his view later in the opinion that “[t]he enduring hope is that race should not matter; the reality is that too often it does.” In direct response to the plurality’s pithy phrase that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race,” Kennedy argues that “[f]ifty years of experience since Brown v. Board of Education . . . should teach us that the problem before us defies so easy a solution.” Kennedy even takes on Justice Harlan’s dissent in Plessy and the view that “[o]ur Constitution is color-blind.” This statement often stands at the heart of conservative attacks on race conscious measures. Yet Kennedy argues that while justified in the racialized context of the late-nineteenth century, it is not justified today as anything more than an aspiration. “In the real world, it is regrettable to say, it cannot be a universal constitutional principle.”

The contrast between these two judicial approaches to the use of race by the state is palpable. But it is more than just the explicit words that Justice Kennedy uses to express his views; it is the spirit in which he writes them and the tenor of his opinions. To read his early opinions on race is to see an unyielding skepticism about the use of race by the state. This is true across contexts, whether college admissions, employment, set-asides, or redistricting. But his more recent opinions – of which Parents Involved is an example – cannot be similarly catalogued. The racial skepticism remains, to be sure, but it is a skepticism now tempered by a far different view of the world and of the role that race plays within it, both as historical artifact and social reality. Even as he joined the judgment of the Court in Parents Involved, for example, Justice Kennedy wrote that “[t]he Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children.” And in LULAC v. Perry, a case that examined the notorious mid-census political gerrymander in Texas, Justice Kennedy concluded that the decision to dismantle a district where Latino voters would soon achieve majority status violated the Voting Rights Act. This was a remarkable departure for Justice Kennedy, not the least of which because this was the first time during his tenure on the Court when he voted to find a statutory violation under the Act. What makes his LULAC opinion “striking” is the reason he offered for his conclusion: that the state had only decided to break up the

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26 Id. at 787.
27 Id. at 748.
28 Id. at 788.
29 Id.
old District 23 when Latinos within it “had found an efficacious political identity.” This is a remarkable position for a justice who held a strong anti-essentialist view on questions of race as late as 2001.

The obvious question is whether these disparate jurisprudential accounts can be reconciled. Commentators have offered two explanations. The first explanation focuses on Justice Kennedy’s status as swing voter. This is a powerful argument. With Justice O’Connor safely occupying the swing chair, the argument goes, Justice Kennedy could vote his true preferences because his vote was not determinative to the final outcome in cases that mattered. It is only upon O’Connor’s retirement that Justice Kennedy’s views begin to shift. In fact, consider what Adam Cohen wrote at the end of the Court’s 2006 Term:

Perhaps most important, it is not yet clear how Justice Kennedy will be changed by his vastly expanded influence. Justice O’Connor was very aware of her position as the swing justice, and it made her deeply aware of the impact her votes had on real people's lives. Justice Kennedy may inherit that mantle of concern. It is one thing to argue in dissent that campaign finance laws violate the First Amendment. It is quite another to cast the vote that prevents a nation weary of lobbying scandals from trying to clean up its elections.

This same argument may be applied to Justice Kennedy’s equal protection jurisprudence. Once he came to the middle, and the outcome of some of the most hotly contested policy questions hinged on his vote, the stakes changed.

This is a persuasive explanation, but only to a point. Swing justices are often pragmatists, putting together opinions that will satisfy a majority of five. This is one way to explain Justice O’Connor’s opinion in Grutter, for example, or Justice Powell’s opinion in Bakke, as triumphs in pragmatism. But Justice Kennedy is hardly a pragmatist but an idealist, and his opinions in LULAC and Parents Involved clearly suggest as much. Justice Kennedy is not looking for the lowest common denominator among the justices but is instead able to reach for the stars and write exactly the opinion he wishes to write unencumbered by the noise from neighboring chambers. Thus the question remains: how to explain his changing views?

A second explanation argues that Kennedy’s clear shift is not about race but about the particular “constitutional domains” where the cases arose. On this view, LULAC was not a case about Latinos and their nascent political power but, rather, about the First Amendment, political agency and expression.

38 LULAC, 548 U.S. at 435.
41 See Gerken, supra note 37, at 105.
42 See id.
Similarly, *Parents Involved* was less about race than about the role that public schools should play in democratic society. This is an intriguing answer, but it also falls short. To be sure, this is not the first time that Justice Kennedy has deployed a “domain” analysis. In the peremptory challenge cases, for example, he writes of jury service as “an exercise of responsible citizenship by all members of the community, including those who otherwise might not have the opportunity to contribute to our civic life.”\(^{43}\) Even when peremptory challenges are used by private litigants, Justice Kennedy argues that, though protecting a private interest, “the objective of jury selection proceedings is to determine representation on a governmental body.”\(^{44}\) And in *Lee v. Weisman*,\(^{45}\) which involved the deliverance by a rabbi of prayer during a high school graduation ceremony, he described the event as follows:

> Graduation is a time for family and those closest to the student to celebrate success and express mutual wishes of gratitude and respect, all to the end of impressing upon the young person the role that it is his or her right and duty to assume in the community and all of its diverse parts.\(^{46}\)

To the answer that a student is always free to miss the graduation ceremony, and so no coercion is involved by the state, Justice Kennedy responded as follows: “law reaches past formalism. And to say a teenage student has a real chance not to attend her high school graduation is formalistic in the extreme. . . . Everyone knows that in our society and in our culture high school graduation is one of life’s most significant occasions.”\(^{47}\) The similarity in the analysis to *Parents Involved* and *LULAC* is unmistakable.

The constitutionality of the Second Reconstruction thus hinges on this seemingly simple question: how to explain Justice Kennedy’s recent shift on race questions? In his early days on the Court, Justice Kennedy followed a narrow and formalistic colorblind path when interpreting the Fourteenth Amendment.\(^{48}\) He continued with this approach up to 2003, as seen in his dissent in *Grutter v. Bollinger*.\(^{49}\) Even if we assume that the justice is now aware of these constitutional domains in ways he was not aware before, so that he no longer sees race the way he did, the obvious question is, why is he shifting now? Why are domains now relevant in race cases?

The answer lies somewhere in between. The fact that Kennedy is now a super-median matters a great deal. It is hardly a coincidence that his newfound voice on questions of race began the term after Justice O’Connor’s retirement. But that is precisely why the question of domains has any bite at all. Once Justice Kennedy achieved super median status, he could let his aspirations and idealism run free, untethered by the preferences and idealism of others. In other words, Kennedy’s opinions are not those of a pragmatist because they do not have to be. This is attitudinalism with a vengeance.


\(^{46}\) Id. at 595.

\(^{47}\) Id.


Far more important than pinpointing the reasons for Kennedy’s newfound jurisprudential awareness are the implications of this shift. This Essay discusses three such implications. First, Kennedy’s shift has direct implications for constitutional litigation and the civil rights bar. Litigators must learn to speak in the language that now occupies Justice Kennedy’s attention. Second, the shift has important implications for constitutional theory. The moral case against judicial review is powerful enough in the abstract. The charge becomes almost unanswerable under a prism where a singular justice is able to single-handedly influence the future of the most pressing policy questions of our generation in accordance to his particular views and aspirations. This is a very serious charge against the institution of judicial review, a charge that demands an answer. Finally, and in line with the previous critique, Kennedy’s shift has direct implications for constitutional law. This is because the end of the Second Reconstruction essentially hinges on the idealism of Justice Kennedy. This final section parses through Justice Kennedy’s jurisprudence for clues on his thinking about this particular domain.

Part I explains Justice Kennedy’s position on the Court as a super-median. Part II examines the evolving jurisprudence of Justice Kennedy on questions of race as a reflection of his status as super-median. Finally, Part III discusses the three leading implications of this argument.

I. Kennedy in the Middle: The Face of a Super-Median

Justice Kennedy’s jurisprudence is undergoing a radical transformation. From his early years on the Court and up until his dissenting opinion in *Grutter*, decided in 2003, Justice Kennedy could not be considered a friend of the civil rights community. But things are clearly different. This Part explains the shift in relation to Kennedy’s status as a super-median.

A. What’s in a Super-Median?

The concept of a swing – or median – justice is well-ingrained in our political consciousness. This is the one justice in the Court’s ideological middle, the one vote that decides all the important and contested cases. Justice O’Connor was widely seen as a swing voter throughout his years on the Court, and so was Justice Powell. In recent years, and particularly since Justice O’Connor’s retirement, Justice Kennedy is widely considered the Court’s swing justice.

And yet, all medians are not the same; some are more powerful than others. Consider, for example, the fact that Justices Marshall, Blackmun, and Souter could be considered at one time or another to have been the Court’s median justices. Differences in the power and influence of median justices are captured by the term “super median.” According to Professors Epstein and Jacobi, super medians are those swing justices who “(1) are crucial to the formation of majority coalitions and, thus, to the outcome of any given decision and (2) are influential in dictating the terms of the Court’s opinion and, thus, to the formulation of any precedent it establishes, especially in consequential or otherwise high-profile decisions.” Both of these conditions make sense. In order for a swing justice to merit the super

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50 See JEREMY WALDRON, LAW AND DISAGREEMENT (1999).
51 See Epstein and Jacobi, *supra* note 14, at 54 (figure 3).
52 Id. at 51
median label, she must be a consistent member of the majority coalition, and she must also be influential within that coalition.

Epstein and Jacobi explain the rise of super medians as a function of the preferences of all other justices. In their words, attaining the status of super median is a “function of the relative proximity between the swing Justice and those nearest to him or her.” More specifically, super medians arise when two conditions are met. The first condition is what Epstein and Jacobi label the ideological “gap” between the median justice and the justices to her left and to her right on the Court’s ideological continuum. As this gap grows, the less likely it is that majority opinions can be formed without the median voter. The second condition is what they call the “overlap” in the distribution of the preferences of the median justice and the closest justices decrease. They illustrate this concept with the following figure:

Making sense of this figure requires two preliminary explanations. First, note the small vertical line under each justice’s name. This is the Martin Quinn ideal point estimate for that justice. This means, in other words, that this is the justice’s most preferred position on the ideological continuum. Second, the parabolas represent the distribution of the justice’s preferences. The narrower the parabola, the more consistent a justice’s votes are, which in turn means that their ideal point provides a better approximation of their vote in any particular case. In contrast, a wider parabola means that the justice’s vote is harder to predict consistently in reference to her ideal point. This shows flexibility on the justice’s part, or the ability to join different coalitions.

The crucial insight here is how much the preference distribution of the median justice converges with those around her. The more that these preferences convergence, the more likely it is that majority coalitions can form without the median. This is exactly what happens to Justice Souter, the median

53 Id. at 43.
54 Id. at 74.
55 See id. at 46 (citing Andrew D. Martin & Kevin M. Quinn, Dynamic ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999, 10 POL. ANALYSIS 134, 135 (2002)).
56 See id. at 81-82.
justice during the 1991 Term. In contrast, as the overlap decreases, the preference distributions diverge and the less likely it is that majority coalitions can form without the swing justice. This is Justice O’Connor’s position in 2001.

This is also Justice Kennedy’s position in 2006, the Term when the Court decided Parents Involved. The next section explores the implications of this finding.

B. Justice Kennedy as Super Median

It is a well established adage in American politics that swing justices hold the balance of power within the Court. This is particularly true for the super medians, that is, the justices whose positioning within the Court’s ideological continuum invariably demands that they must form part of most majority coalitions. This is particularly important for close cases, when one vote makes all the difference in the outcome. This is when super medians can take the majority wherever they wish for it to go.

To suggest that Justice Kennedy is a super median is hardly a surprise. Far more interesting is the fact that he was so during the 2006 Term, when he authored Gonzalez v. Carhart and provided the crucial fifth vote in Parents Involved. These two cases exemplify Justice Kennedy’s status at the center of the Roberts Court. Carhart is important because it underscores how the big questions in constitutional law are directly influenced by Justice Kennedy. This is the quintessential role of a super median. Constitutional law is whatever the super median says it is. This is a remarkable power. As Noah Feldman recently explained,

> It is Kennedy’s apparent unpredictability -- and his willingness to make common cause with both factions in different cases -- that is the source of his overwhelming power in court and country. This year, there have been nine 5-4 cases; Kennedy has been in the majority every time. (Last year he was the controlling vote in 12 of 17 cases decided 5-4; the previous year 20 out of 25.)

This description neatly encapsulates Kennedy’s status on the Court as explained by Epstein and Jacobi. Justice Kennedy’s “unpredictability” is reflected in a wider preference distribution, which in turn allows him to move among coalitions within the Court with relative ease. He is part of most narrow majority coalitions because the gap between his ideological preferences and those of the justices on either side of him is wide. These are the sources of Kennedy’s power and influence.

But Parents Involved is just as important as an example of the freedom that a super median enjoys to expound on his particular constitutional vision. This is judicial independence in its truest form. Super medians can do as they wish because any winning coalition must include their votes in the final tally. This is where idiosyncratic legal theories take hold and unorthodox readings of legal texts receive an

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59 Feldman, supra note 1.
honest hearing. According to his critics, this is a fit description of Justice Kennedy. As Feldman writes, “Justice Kennedy is different. His opinions tend to be grounded on strong statements of principle. Yet many find his tacking from right to left mystifying, frustrating and unpredictable. They question what consistent principles could guide such apparently disparate conclusions, and hint darkly at incoherence or self-aggrandizement.”60 This is judicial independence in its truest form.

This is one easy way to explain Justice Kennedy’s apparent jurisprudential evolution. Justice Kennedy’s views are changing because they can, because his status as super median allows him to do so. When Justice Kennedy wrote his majority opinion in Miller, for example, he did so from a position of weakness, in that he needed to preserve Justice O’Connor’s vote within the five-member majority. The following year, in Vera v. Bush,61 Justice O’Connor left no doubt about the centrality of her views in this area, as she both wrote a majority opinion for the Court as well as a concurrence to her own majority. Upon Justice O’Connor’s retirement, Justice Kennedy could finally assert his own views. This is when we see LULAC, decided the Term following O’Connor’s retirement.

To say that Justice Kennedy’s views changed once he became a super median, however, is not to solve the puzzle of Justice Kennedy’s shift. For the question still remains: how to reconcile the early Kennedy with the Kennedy we see in LULAC and Parents Involved? One very attractive argument focuses on the concept of constitutional domains. According to Professor Gerken, the way to explain Justice Kennedy’s shift is to look to the domains where these cases arise. In LULAC, the domain is not race itself but the First Amendment, political association, and political identity. In Parents Involved, similarly, the domain is also not race but public schools as socializing institutions, as sites where children learn to be good democratic citizens. Once he changes his filter, Justice Kennedy can then talk about race in far more interesting and helpful ways than when he focuses on race alone. Consider in this vein, for example, his apparent shift about the diversity rationale from Grutter to Parents Involved. In Grutter, Justice Kennedy is highly critical of the diversity rationale as a compelling state interest for higher education. Yet in Parents Involved, he embraces this same rationale. According to Professor Gerken, “Justice Kennedy’s newfound embrace of Grutter suggests not a doctrinal switch, but a more fine-grained approach to the educational domain than either O’Connor or Scalia offered in that case.”62 The same can be said of his switch from the Shaw cases to LULAC.

To be sure, Professor Gerken makes a very compelling case that Justice Kennedy is up to something different from his prior jurisprudence. But her argument is still missing something important. This is because to agree that Justice Kennedy is now focusing on constitutional domains is not to answer the original puzzle, about the origin of this shift. Why is Justice Kennedy focused on constitutional domains in LULAC but not in Miller, in Parents Involved but not in Grutter? Similarly, how to explain his subsequent decisions in Ricci63 and Bartlett,64 where Justice Kennedy appears to revert back to his old, unimaginative and formalistic self?

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60 Id.
62 Gerken, supra note 37, at 117.
This is why I think that the answer must lie somewhere in between. Making sense of Justice Kennedy’s shift demands that we look not only to his written opinions carefully and thoughtfully, as Professor Gerken has done, but also that we attend to the institutional question that lies at the heart of the shift. The fact that Justice Kennedy became a median justice beginning in 2006 is a crucial part of this story. This is because he can only entertain the idea of constitutional domains from a position of independence and strength, which is exactly what his status as super median affords him. Before then, Justice Kennedy had to behave far more strategically.

And while the early returns from the recently completed 2010 Court Term can be interpreted as somewhat equivocal, it remains true that Justice Kennedy remains safely in the Court’s middle.

The question for the future is whether Justice Kennedy remains a super median within the Court, or whether the ideological positions of his colleagues on the Court have evolved since 2006. This is a particularly timely inquiry in light of the appointments of Justice Sotomayor in 2009 and Justice Kagan in 2010. And while the early returns from the recently completed 2010 Term can be interpreted as somewhat equivocal, it remains true that Justice Kennedy remains safely in the Court’s middle.

Consider, first, the fact that he joined the majority of the Court in ninety-four percent of all decisions on the merits.\(^{65}\) Chief Justice Roberts was the next justice with the highest frequency of votes with the majority, at ninety-one percent.\(^{66}\) The same pattern holds when considering only divided cases, with Justice Kennedy forming part of the majority coalition eighty-eight percent of the time, and the Chief justice right behind him at eighty-three percent. Looking only at the five-to-four cases offers a similar picture. These are the cases worth looking at closely. They are the difficult cases where the Court often divides along ideological lines, and where the super medians put their influence to use. Out of 16 such cases, Justice Kennedy was in the majority 14 times, or eighty-eight percent. More tellingly, he joined the four conservative justices in ten 5-4 decisions, and the moderate justices in four of these cases. This is true of Justice Kennedy through the years, his ability to coalesce with both conservative and moderate coalitions. In order to see this, consider the following graph.\(^{67}\)

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\(^{66}\) See id.

\(^{67}\) See id. at 14.
Note first how much the Court tilts to the right in the last 15 years. Even those years when Justice Kennedy or Justice O’Connor is considered a super median, they have joined their moderate colleagues in a very low percentage of cases. In the 2005 Term, for example, O’Connor joined her moderate colleagues in approximately 15% of the 5-4 cases, and Justice Kennedy joined his moderate colleagues approximately ten percent of the time in the 1996 Term. There are spikes in the graph, to be sure – note specifically Justice Kennedy’s 1997 Term and O’Connor’s 2002 Term – but these are exceptions to the general rule. In specific reference to Justice Kennedy, it is clear that he has been a reliable conservative vote through the years. Only once in the last fifteen Terms did the frequency of his votes with the conservative coalition dip below fifty percent. Interestingly, this was the time that marked his ascendancy on the Court as super median.

The real story of this graph is the dramatic change seen in Justice Kennedy around the time of Justice O’Connor’s retirement. He went from joining no opinions with his moderate colleagues during the 2001 and 2002 Terms to joining fifty percent of the 5-4 decisions. This is a remarkable development. It also corroborates Epstein and Jacobi’s insight that super medians may be as flexible and inconsistent as they wish to be. In fact, to be a super median means precisely that, the independence to join one’s colleagues as needed. In Justice Kennedy’s case, it demonstrates the ability to adapt in order to remain in control of the Court’s decision-making. This is LULAC. This is also Parents Involved.
I do not wish to overstate the case. The Kennedy we see during the 2010 Term is not the same Kennedy we saw during the 2006 Term. That was a Term, after all, when Kennedy was in the majority of every 5-4 case. Only twice did Justice Kennedy not side with the majority in a closely divided case during the 2010 Term. The cases were *Bullcoming v. New Mexico*, a Sixth Amendment confrontation clause case, and *CSX Transportation, Inc. v. McBride*, a case interpreting the requirements of a federal statute. A third case, *Freeman v. United States*, also merits consideration. This is a 5-4 decision authored by Justice Kennedy where Justice Sotomayor wrote a controlling concurring opinion. This is the position where Justice Kennedy often finds himself. But rather than downplay Kennedy’s role on the Court in light of these three cases, it would be far more instructive to examine these cases closely and the reasons behind Kennedy’s diminished influence.

One obvious answer is that no justice can possibly control every close case. This is because as preferences shift and coalitions form within issue domains, any given justice may control the outcome of a case. The gap and the overlap of ideological preferences are not static measures but issue bound. This is what makes the October 2006 Term so notable. To be a member of every 5-4 majority, as Justice Kennedy was that particular Term, is either a remarkable show of power and influence, or else an obvious display of a justice lacking in guiding principles. It may be a little bit of both.

A related explanation lies in the issue domains of the cases in question.68 These are hardly the “polite-moral” issues that hold our collective attention but technical legal issues that matter only to the specific litigants and any affected publics. The meaning of the Federal Employment Liability Act, the requirements of the Federal Rules of Criminal Procedure and the demands of the Confrontation Clause are not the issues that capture our attention. The same can be said of the justices. These are the kinds of issues that the justices could decide in near anonymity and with true independence.

In saying all of this, I do not intend to minimize in any way Justice Kennedy’s role within the Court. He remains, in Lyle Denniston’s words, “the virtual embodiment of the tendencies of the Roberts Court.”69 As we look to the future, we must continue to pay attention to whatever Justice Kennedy says and does. This is, after all, “Justice Anthony Kennedy’s country – the rest of us just live in it.”70 The next Part examines the implications of this argument for the future of the Second Reconstruction.

II. Shifting Sands: The Evolving Race Jurisprudence of Justice Kennedy

Something is amiss in Justice Kennedy’s race jurisprudence. Go back to his early days on the Court, the days of *City of Richmond v. Croson*,71 *Metro Broadcasting v. FCC*,72 *Presley v. Etowah County*,73 and *Rice

68 See Peter K. Enns and Patrick C. Wohlfarth, The Swing Justice 23 (paper prepared for the Annual Meeting of the Midwest Political Science Association, March 31-April 3, Chicago, IL) (concluding that “we view the swing justice as a case-specific concept”).


70 Feldman, supra note 1.


v. Cayetano, and you cannot miss the uncompromising and narrow nature of his approach to the use of race by the state. This is true both as a question of constitutional law and when interpreting federal law. But the story has begun to shift in recent years. In both LULAC and Parents Involved, Justice Kennedy is far more nuanced and compromising in his approach to the use of race. These decisions cannot be reconciled with Kennedy’s early decisions. The justice is clearly undergoing a shift in his thinking as reflected in his written opinions. This first Part details this shift.

A. First Pass: City of Richmond, Metro Broadcasting and Race Neutrality

In his early years on the Court, Justice Kennedy displayed a clear suspicion of any use of race by the state, as reflected in his uncompromising application of strict scrutiny across settings and contexts. This was true whether the governmental entity in question was a state, a local government, or any branch of the national government. This was also true even if the racial classification was benign in nature, designed to benefit historically underrepresented minorities. To Justice Kennedy, all uses of race must be catalogued under the same rubric, irrespective of the motive behind its implementation. Jim Crow laws, South African apartheid laws, and affirmative action policies were one and the same. Context and history meant nothing.

His first pass at the question came in City of Richmond v. Croson. In the case, the Court must decide whether a 30% racial set-aside policy by the Richmond city council could withstand constitutional scrutiny. This was not by any reasonable measure an easy case. The first obvious difficulty centered on the proper standard of review for laws intended to benefit members of underrepresented racial groups. The case also forced the Court to confront the legacy of discrimination in the South and the steps that state and local governments may take in compliance with the Equal Protection Clause to remedy this legacy. A final difficulty focused on the set-aside policy at the heart of the case. This was a classic and expected outcome of a political struggle as seen every day in American politics. Could the Court strike down this particular bargain under the guise of upholding a prior constitutional compromise intended to bring former slaves into full citizenship status?

The conservative majority on the Court had very little difficulty striking down the Richmond set-aside policy. In a lead opinion authored by Justice O’Connor, the Court concluded that the use of race by the state must be subject to strict scrutiny. This was not by any reasonable measure an easy case. The first obvious difficulty centered on the proper standard of review for laws intended to benefit members of underrepresented racial groups. The case also forced the Court to confront the legacy of discrimination in the South and the steps that state and local governments may take in compliance with the Equal Protection Clause to remedy this legacy. A final difficulty focused on the set-aside policy at the heart of the case. This was a classic and expected outcome of a political struggle as seen every day in American politics. Could the Court strike down this particular bargain under the guise of upholding a prior constitutional compromise intended to bring former slaves into full citizenship status?

The conservative majority on the Court had very little difficulty striking down the Richmond set-aside policy. In a lead opinion authored by Justice O’Connor, the Court concluded that the use of race by the state must be subject to strict scrutiny. This was true irrespective of the stated intentions of those who enacted the policies and regardless of the source of the policy. In fact, in this particular case, the majority found reason to be distrustful of the political body behind the policy, since the Richmond city council had a majority-black membership. Accordingly, “[t]he concern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts would seem to militate for, not against, the application of heightened judicial scrutiny in this case.” The Court was also unpersuaded by the context in the case, and the fact that this was an attempt by the city of Richmond to address its own legacy of discrimination. This point elicited a spirited response from

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74 528 U.S. 495 (2000).
76 Id. at 495-96 (citing Ely, The Constitutionality of Reverse Racial Discrimination, 41 U.Chi.L.Rev. 723, 739, n. 58 (1974) (“Of course it works both ways: a law that favors Blacks over Whites would be suspect if it were enacted by a predominantly Black legislature”)).
Justice Marshall, who argued in dissent that “[o]ur cases in the areas of school desegregation, voting rights, and affirmative action have demonstrated time and again that race is constitutionally germane, precisely because race remains dismayingly relevant in American life. In adopting its prima facie standard for States and localities, the majority closes its eyes to this constitutional history and social reality.”

Justice Kennedy concurred in the case, for two reasons. First, with Justice Scalia, he agreed that the principle of race neutrality lies as the moral imperative behind the command of equal protection. And yet, he did not sign on to Justice Scalia’s opinion, which adopted a bright line rule of striking down all racial preferences that are not designed to remedy prior unlawful acts of racial discrimination. Instead, he wrote separately to underscore his agreement with Justice O’Connor’s adoption of a strict scrutiny test. He did so because he was “not convinced” that Scalia’s rigid test was necessary “at this point.” He was also “confident” that the strict scrutiny test would “in application . . . operate in a manner generally consistent with the imperative of race neutrality.”

Put simply, there was no nuance there. There was no discussion of context, or history, or of the source for the command of racial neutrality. This was a simplistic, straight-forward concurrence. Race is dangerous and toxic, and it is up to the Court to ensure that states use it only in the rarest of moments.

Second, Justice Kennedy was not ready to decide whether the source of the challenged policy mattered for constitutional purposes. Or, in his words, “[t]he process by which a law that is an equal protection violation when enacted by a State becomes transformed to an equal protection guarantee when enacted by Congress poses a difficult proposition for me; but as it is not before us, any reconsideration of that issue must await some further case.” This is an important concession. It underscores Justice Kennedy’s penchant for deliberate adjudication as demanded by the common law approach. But he need not wait too long to decide the question.

The following term, in Metro Broadcasting v. FCC, the Court faced the question Justice Kennedy purposefully left open. The case featured a number of racial preferences adopted by the Federal Communications Commission and endorsed by Congress in the assigning or transfer of broadcasting licenses to minority-owned firms. In an opinion authored by Justice Brennan, the Court surprisingly upheld the federal program as consistent with equal protection principles. The first line of the opinion spoke volumes about the Court’s posture in the case: “The policies before us today can best be understood by reference to the history of federal efforts to promote minority participation in the broadcasting industry.” Consequently, the Court held that race-conscious plans directed by the federal government must serve important governmental goals and must be substantially related to those goals. The plan in question, the Court concluded, met this standard of review.

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77 Id. at 558.
78 Id. at 518.
79 See also id. at 519 (“Nevertheless, given that a rule of automatic invalidity for racial preferences in almost every case would be a significant break with our precedents that require a case-by-case test, I am not convinced we need adopt it at this point.”).
81 Id. at 552-53.
Justice Kennedy, in an opinion joined by Justice Scalia, dissented. This is a noteworthy opinion for at least two reasons. First, the narrow window that Justice Kennedy appeared to leave open in *Croson* – on the question of the proper standard of review for race conscious plans enacted by Congress – is closed emphatically in *Metro Broadcasting*. All uses of race, whether by the federal government or the states, are subject to strict scrutiny. This is noteworthy because it offers a glimpse into Justice Kennedy’s approach to constitutional adjudication. It would be hard to believe that he would have reached a different answer to this question the prior term. But he did not answer the question because it was not properly presented.

Second, one cannot escape the ease with which Justice Kennedy analogizes the plan under review to the most derided cases and regimes of the last hundred years. His begins with *Plessy* and argues that its “standard of review and its explication have disturbing parallels to today’s majority opinion that should warn us something is amiss here.” In reference to the need under the policy to define which racial minorities are included as beneficiaries, Kennedy quotes Justice Stewart’s dissent in *Fullilove* that “[i]f the National Government is to make a serious effort to define racial classes by criteria that can be administered objectively, it must study precedents such as the First Regulation to the Reichs Citizenship Law of November 14, 1935, translated in 4 Nazi Conspiracy and Aggression, Document No. 1417-PS, pp. 8-9 (1946).” Justice Kennedy also makes use of *Korematsu* and South Africa’s apartheid laws.

Justice Kennedy concludes his short dissent with a passage worth quoting in full:

> Perhaps the Court can succeed in its assumed role of case-by-case arbiter of when it is desirable and benign for the Government to disfavor some citizens and favor others based on the color of their skin. Perhaps the tolerance and decency to which our people aspire will let the disfavored rise above hostility and the favored escape condescension. But history suggests much peril in this enterprise, and so the Constitution forbids us to undertake it. I regret that after a century of judicial opinions we interpret the Constitution to do no more than move us from “separate but equal” to “unequal but benign.”

This passage highlights Justice Kennedy’s narrow and acontextual approach to the use of race by the state. Its lessons are clear. Race is no more than skin color. Our racial history counsels that the use of race poses grave dangers. And there is no such thing as benign uses of race. We use race as a public policy tool at our own peril.

### B. Coming into his own: Miller’s Tale

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82 Id. at 632.
83 Id. at 633 n.1 (quoting Fullilove v. Klutznick, 448 U.S. 448, 534 n.5 (1980) (Stewart, J., dissenting)).
84 See id. at 633, 635. In response, the majority “fail[s] to understand how Justice Kennedy can pretend that examples of “benign” race-conscious measures include South African apartheid, the “separate-but-equal” law at issue in *Plessy* v. Ferguson, and the internment of American citizens of Japanese ancestry upheld in *Korematsu* v. United States.” Id. at 564 n.12. And more importantly, the majority is just as confident as Justice Kennedy is not that an ‘examination of the legislative scheme and its history’ will separate benign measures from other types of racial classifications.” Id.
85 Id. at 637-38.
The 1990 Census and the resulting redistricting season thrust the Court right in the middle of a very contentious debate over the role of race in politics. This debate presented the justices with very difficult questions of representation. How best to represent the interests of voters of color as required by the Voting Rights Act? In other words, how to resolve the inevitable tension between descriptive representation, which entailed the creation of majority minority districts, and substantive representation, which focused on the election of like-minded representatives irrespective of race? Complicating matters, the use of race in redistricting has clear and direct political consequences. This is because racial minorities – and particularly black voters – are generally Democratic voters. To create majority-minority districts is to essentially pack Democratic voters. It is no surprise that Republican strategists prefer these districts, while Democratic leaders favor the representation of interests.

In the early 1990’s, this tension reached the high court. And the justices failed to impress. The first case, Shaw v. Reno, 86 arose out of familiar circumstances. Democratic leaders in North Carolina drew a state congressional map with only one majority-minority district. The Department of Justice objected to this first plan and demanded the creation of a second majority minority district. This objection arose from the authority granted to the DOJ by the Voting Rights Act. Whether this was the proper reading of the Act or not, it was clear that the state of North Carolina only drew this second district when required to do so by federal authorities. But there were only so many Democratic voters to spread around, so in order to uphold the gains of the previous plan while complying with DOJ’s reading of the law demanded much cartographical creativity. In the eyes of the conservative majority on the Court, in fact, the resulting districts were simply bizarre, too ugly for words, and clearly unconstitutional. In Justice O'Connor’s words,

> we believe that reapportionment is one area in which appearances do matter. A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group-regardless of their age, education, economic status, or the community in which they live-think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes. 87

A few things jump right off from this passage. First, note the allusion to apartheid once again. The analogy is particularly inapt here, since the districts at issue were some of the most integrated districts in the country and a near-perfect reflection of the racial composition of the state as a whole. 88 Second, the anti-essentialist impulse could not be clearer. People must be treated by the state as individuals and not members of groups, and they must not be stereotyped into roles and ascribed identities that they have not chosen for themselves.

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87 Id. at 647.
Third, it is important that the Court paid no attention to the context under which this case arose and the empirical realities on the ground. The fact that the state had been forced to draw the second district, or the fact that the pressure had come under DOJ’s particular reading of the VRA, proved irrelevant. The Court majority had its own particular story, and it was sticking to it.

Finally, it is crucial that the facts in Shaw did not fit traditional conceptions of constitutional harm in the voting rights context as then understood. That is, the facts fit neither vote dilution nor vote denial claims. This was something completely different; unless it was not different at all. The Court held that the use of race in redistricting violates equal protection principles when “a reapportionment plan rationally cannot be understood as anything other than an effort to segregate citizens into separate voting districts on the basis of race without sufficient justification.”93 In so holding, the Court conceded that this claim was “analytically distinct”90 from traditional equal protection claims. The claim soon came to be known as an “expressive harm.”91 The reach of this inquiry, at least in 1993, appeared boundless.

Soon after Shaw, it was open season on majority minority districts. Or so it appeared. The question for the future was whether the Shaw inquiry demanded the existence of bizarre districts, as Justice O’Connor’s language strongly suggested. But the Court forged a new path in the very next case. In Miller v. Johnson,92 the Court confronted a districting scheme that resembled the traditional districts of old. The context was eerily similar: a districting plan, a DOJ objection, and the creation of a new majority black district. What this plan lacked was a bizarre district in the mold of Shaw. In an opinion authored by Justice Kennedy, however, the Court explained that “bizarreness is [not] a necessary element of the constitutional wrong or a threshold requirement of proof.”93 Rather, shape is important “because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature’s dominant and controlling rationale in drawing its district lines.”94 This was the genesis, two years after Shaw, of the predominant factor test.

In concluding, Justice Kennedy offered an ode to the anti-essentialist principle at the heart of his opinion.95

The [Voting Rights] Act, and its grant of authority to the federal courts to uncover official efforts to abridge minorities' right to vote, has been of vital importance in eradicating invidious discrimination from the electoral process and enhancing the legitimacy of our political institutions. Only if our political system and our society cleanse themselves of that discrimination will all members of the polity share an equal opportunity to gain public office regardless of race. As a Nation we share both the obligation and the aspiration of working toward this end. The end is neither assured nor

89 Id. at 652.
90 Id.
93 Id. at 913.
94 Id.
95 See id. at 911 (“[T]he Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.”).
well served, however, by carving electorates into racial blocs. . . . It takes a shortsighted and unauthorized view of the Voting Rights Act to invoke that statute, which has played a decisive role in redressing some of our worst forms of discrimination, to demand the very racial stereotyping the Fourteenth Amendment forbids.96

This conclusion is in line with Shaw in that they both share a disdain with race essentialism. Both opinions make clear that the state must not choose political identities for the voters; this is something that each individual voter must do for herself. Both opinions are also borne of an idealism that wishes to remove race from public life. This is true even if the facts on the ground counsel otherwise, and irrespective of the views held by other institutional actors. The conservative majority holds epistemic authority on this question under its interpretation of the equality principle. There is simply no room for debate.

In the next case in this long and forgettable saga, Justice Kennedy reinforced his formalism on questions of race and redistricting. The case was Bush v. Vera.97 Two particular passages of his concurring opinion intrigue me. The first is the passage where he argues that the Court “would no doubt apply strict scrutiny if a State decreed that certain districts had to be at least 50 percent white, and our analysis should be no different if the State so favors minority races.”98 This is an arresting sentence. To be sure, a demand that districts must be “at least 50 percent white” should strike us as odd and even bizarre. The world of race and politics as practiced in the United States would have to evolve dramatically for such a demand to make any sense at all. I cannot even begin to imagine what such a world would look like. This is another way of saying that context and history make all the difference in the world. That Justice Kennedy uses this passage as a way to clinch his argument that strict scrutiny is the obvious standard in the case tells us a great deal about his frame of mind on questions of race in the mid-1990’s.

The second is a passage where Justice Kennedy offers as an example of an unjustified racial district the notion of “gratuitous race-based districting.”99 This would be districting where the state used race for no particular reason at all. To Justice Kennedy, any use of race by the state unsupported by a compelling state interest is a “gratuitous” use of race. This is something that the state must not do. Without question, this is a very narrow and unforgiving understanding of race. It is also dismissive of our racial history. But more importantly, it is also the law.

C. A New Leaf: LULAC and Parents Involved

As late as 2003, Justice Kennedy continued to hold narrow and formalistic views on questions of race. In Grutter v. Bollinger,100 for example, he argued in dissent that the Michigan Law School’s admissions plan could not survive a proper application of strict scrutiny. Echoing the spirit of earlier analogies, he wrote that “[p]referment by race, when resorted to by the State, can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and in the idea of

96 Id. at 927-28.
98 Id. at 996.
99 Id. at 999.
equality.” This is a view of race as a “corrosive category,” and one where only a narrowly tailored policy that pursues a compelling state interest can meet his standard of fairness. Above all, as he reiterated throughout his dissent, his concern was that all applicants must receive individualized review. This is the same anti-essentialist sentiment he expressed through the years.

And then, beginning in 2006, something happened. Justice Kennedy’s views on race have “softened.” Two cases figure prominently in this apparent metamorphosis. The first case is *LULAC v. Perry*, where Justice Kennedy joined the four moderates on the Court and struck down a legislative district in Texas under section 2 of the Voting Rights Act. The second case is *Parents Involved v. Seattle School District No. 1*, where the Court struck down voluntary racial integration plans for the public schools in Louisville and Seattle. Justice Kennedy wrote a concurring opinion that looks nothing like his opinions of old. This section examines both opinions in turn.

1. **LULAC and Latino Essentialism under the Voting Rights Act**

When it comes to Justice Kennedy’s views about the Voting Rights Act, we know two things: first, that he is deeply committed to an anti-essentialist reading of anti-discrimination law, and the VRA lies at the core of this commitment; and second, that he is ambivalent about the constitutionality of the Act. Taken together, these two commitments make Justice Kennedy a reliable vote on the Court for strict, narrow, and often acontextual readings of the Act. This is also what makes *LULAC v. Perry* such a puzzling opinion. This case is worthy of attention because it appears to compromise both commitments.

In *LULAC*, the Court faced the mid-decade Texas gerrymander orchestrated by Congressman Tom DeLay. In an opinion authored by Justice Kennedy, the Court struck down one of the challenged districts under section 2 of the Act. Incidentally, this was the first time in the history of the Act that the Court had so held under section 2. In order to reach this conclusion, Justice Kennedy must face his anti-essentialist reading of anti-discrimination law. He must also confront his long-standing skepticism about the constitutionality of the Voting Rights Act. On both of these questions, his published opinion is nothing short of astounding.

Consider first the anti-essentialist critique. This is the concept that individuals must be treated as individuals and not as members of groups. Justice Kennedy is firmly within this camp, as we saw earlier. And yet, in *LULAC*, Justice Kennedy was taken by the fact that the Texas plan had removed Latinos from a particular district because they were about to achieve a numerical majority and act against the incumbent Republican congressman, Henry Bonilla. This was something that the state could not do. More importantly, Justice Kennedy’s concern was that “the State took away the Latinos’ opportunity because Latinos were about to exercise it.” That is to say, Latinos, not Democratic voters, were about to

101 *Id.* at 388.
102 See *id.* at 394 (“Prospective students, the courts, and the public can demand that the State and its law schools prove their process is fair and constitutional in every phase of implementation.”).
103 Gerken, *supra* note 37, at 104.
achieve real political power, and only then would the state step in and ensure their minority status. In Justice Kennedy’s words,

[even if we accept the District Court’s finding that the State’s action was taken primarily for political, not racial, reasons, the redrawing of the district lines was damaging to the Latinos in District 23. The State not only made fruitless the Latinos’ mobilization efforts but also acted against those Latinos who were becoming most politically active, dividing them with a district line through the middle of Laredo.\textsuperscript{108}

This is a remarkable statement coming from a justice who explicitly derides the essentialization of voters of color in the name of a particular brand of racial justice. This is the same justice, after all, who wrote a decade earlier: “When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, “‘think alike, share the same political interests, and will prefer the same candidates at the polls.’”\textsuperscript{109} In the Shaw cases, treating Democratic voters as black voters was to engage in demeaning stereotyping. In LULAC, to treat Latinos as Democratic voters was a cognizable harm under section 2. Reconciling the tension between the old Justice Kennedy and the new is difficult if not downright impossible.

One way out of this tension is apparent, yet ultimately flawed. In the Shaw cases, the plaintiffs argued successfully that the resulting shape of the majority minority districts in question was bizarre to the point of unconstitutionality. As a statutory question, it could be argued that minority voters in North Carolina’s District 12 did not have a section 2 right to their district. This is because they could not meet all three of Gingles’ factors.\textsuperscript{110} Quite obviously, they could not meet the first factor, the compactness requirement. The bizarre nature of the challenged districts made clear that black voters in District 12 were not “sufficiently large and geographically compact to constitute a majority in a single-member district.”\textsuperscript{111} In LULAC, however, Justice Kennedy concluded that Latino voters in the old District 23 held a section 2 right to their district. One could argue that this conclusion alone renders a comparison between the two cases inapposite.

To so exonerate Justice Kennedy would be to miss the most interesting and important part of his opinion in LULAC. To be sure, Justice Kennedy concluded that Latinos in District 23 held a section 2 right to their district, a right that the legislature could not take away from them. But far more telling is how hard he must labor to reach this conclusion.\textsuperscript{112} The Chief Justice, for one, was not impressed:

Whatever the majority believes it is fighting with its holding, it is not vote dilution on the basis of race or ethnicity. I do not believe it is our role to make judgments about which mixes of minority voters should count for purposes of forming a majority in an electoral

\textsuperscript{108} Id. at 440.
\textsuperscript{109} Miller v. Johnson, 515 U.S. 900, 911-12 (1995) (quoting Shaw v. Reno, 509 U.S. 630, 647 (1993)); see Metro Broadcasting v. FCC, 497 U.S. 547, 636 (1990) (Kennedy, J., dissenting) (“The perceptions of the excluded class must also be weighed, with attention to the cardinal rule that our Constitution protects each citizen as an individual, not as a member of a group.”).
\textsuperscript{111} Id. at 50.
\textsuperscript{112} See LULAC, 548 U.S. 399, 423-442 (2006).
district, in the face of factual findings that the district is an effective majority-minority
district.\textsuperscript{113}

It is downright impossible to read the Chief Justice’s dissent and not puzzle over what Justice Kennedy
might be up to. It may very well be that he is intent on having a say on the clumsy and distasteful way in
which Republicans, both in Texas and at the national level, conducted themselves.\textsuperscript{114} But it is also true
that whatever his motivations, Justice Kennedy clearly aligned himself with a view about race in the
political context that he abhorred a decade before. \textit{LULAC} simply does not square with \textit{Shaw} and its
progeny.

The second point is equally baffling. Up to his controlling opinion in \textit{LULAC}, it is hardly a stretch to
consider Justice Kennedy a foe of the Voting Rights Act in general and racial districts in particular.
Consider in this vein his concurring opinion in \textit{Georgia v. Ashcroft},\textsuperscript{115} decided in 2003:

\begin{quote}
As is evident from the Court's accurate description of the facts in this case, race was a
predominant factor in drawing the lines of Georgia's State Senate redistricting map. If
the Court's statement of facts had been written as the preface to consideration of a
challenge brought under the Equal Protection Clause or under § 2 of the Voting Rights
Act of 1965, a reader of the opinion would have had sound reason to conclude that the
challenge would succeed. Race cannot be the predominant factor in redistricting under
would doom a redistricting plan under the Fourteenth Amendment or § 2 seem to be
what save it under § 5.\textsuperscript{116}
\end{quote}

These are not the words of a staunch supporter of section 2 of the Act but, rather, the words of one who
is waiting for the right moment to strike it down on constitutional grounds. There can be no other way if
the predominant factor test retains any vitality. This is because any time section 2 of the Act is invoked,
race will predominate. This was \textit{Shaw}, and this was also \textit{Miller}.

In \textit{LULAC}, however, race predominated, and unapologetically so. Yet Justice Kennedy was hardly the
skeptic justice he had been in the recent past. Instead, no hurdle proved too difficult for him: not the
lower court’s findings and the clear error test;\textsuperscript{117} not the actual words of the lower court’s opinion;\textsuperscript{118}
and certainly not the constitutional concerns that occupied him in the past. The right of Latinos in
District 23 to their district must be vindicated, and Justice Kennedy joined the moderates and happily
put himself up to the task.

2. \textit{Parents Involved} and the Legacy of \textit{Brown}

\begin{footnotes}
\item[113] \textit{Id.} at 511 (Roberts, C.J., dissenting).
\item[114] See Charles, \textit{supra} note 39.
\item[116] \textit{Id.} at 491 (Kennedy, J., concurring).
\item[118] See \textit{id.} at 498-500.
\end{footnotes}
Justice Kennedy’s concurring opinion in *Parents Involved v. Seattle School District No. 1* offers a similarly telling example of Kennedy’s evolving equal protection views. In an important sense, the opinion is vintage Kennedy: school districts can use race in student assignments, but can only do so as a last resort. This is the controlling opinion in case, and so it demands carefully scrutiny. But Kennedy’s concurring opinion is far more important because it continues with the story of Kennedy’s transformation begun in *LULAC*. This is not the Kennedy of old, the author of narrow and inflexible opinions. This is a justice willing to give complex constitutional questions their due care. Three arguments deserve close attention.

The first argument highlights the debate within the Court over the legacy of *Brown*. Chief Justice Roberts quoted from the plaintiffs’ briefs in *Brown* that “the Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race.” He then asked, “[w]hat do the racial classifications at issue here do, if not accord differential treatment on the basis of race?” Justice Thomas similarly argued that “[r]acial imbalance is not segregation,” and so the school districts in Louisville and Seattle are not pursuing the constitutional goals of *Brown*. With the Chief Justice, Justice Thomas wrote that the opposite is in fact true: the reformers in Louisville and Seattle are in the same moral and constitutional space as the segregationists who defended segregated school systems in *Brown*.

The dissenters took a decidedly different view of history. Justice Stevens chided the Chief Justice for relying on *Brown* to strike down racial balancing plans. More specifically, he argued that the Chief Justice “rewrites the history of one of the Court’s most important decisions.” Justice Breyer similarly wrote that “it is a cruel distortion of history to compare Topeka, Kansas, in the 1950’s to Louisville and Seattle in the modern day – to equate the plight of Linda Brown (who was ordered to attend a Jim Crow school) to the circumstances of Joshua McDonald (whose request to transfer to a school closer to home was initially declined).”

Justice Kennedy’s jurisprudence places him distinctly within the first camp, which views *Brown* and *Parents Involved* as morally equivalent. But his concurring opinion in *Parents Involved* betrays this understanding of his jurisprudence. His words could not be any clearer, or any more surprising:

This is by way of preface to my respectful submission that parts of the opinion by The Chief Justice imply an all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account. The plurality opinion is too dismissive of the legitimate interest government has in ensuring all people have equal opportunity regardless of their race. The plurality’s postulate that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race,” ante, at

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120 *Id.* at 747.
121 *Id.*
122 *Id.* at 750.
123 See *id.* at 773-74
124 *Id.* at 799.
125 *Id.* at 867.
is not sufficient to decide these cases. Fifty years of experience since Brown v. Board of Education, 347 U. S. 483 (1954), should teach us that the problem before us defies so easy a solution. School districts can seek to reach Brown’s objective of equal educational opportunity. The plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of de facto resegregation in schooling. I cannot endorse that conclusion. To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken.\textsuperscript{126}

Justice Kennedy’s position is surprising because he is willing to recognize that the questions facing the Louisville and Seattle school boards are difficult questions, devoid of simplistic answers. This is a remarkable shift for a justice who once agreed with the view that the creation of bizarre majority-minority districts bore an uncomfortable resemblance to racial apartheid.\textsuperscript{127}

The second argument looks back to the \textit{Grutter} case and the diversity rationale. To be sure, the mere use of a prior case as settled law should hardly qualify as noteworthy. But Kennedy is not simply accepting \textit{Grutter} as settled law; in fact, he is reversing himself within the space of four years.\textsuperscript{128} Whereas in \textit{Grutter} he chastised Justice O’Connor’s use of the diversity rationale, in \textit{Parents Involved} he suggested that “a district may consider it a compelling interest to achieve a diverse student population. Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered.”\textsuperscript{129} Explaining this change is not easy.

The third argument focuses on what might well be the most influential conservative canard in history: Justice Harlan’s colorblind language in \textit{Plessy v. Ferguson}.\textsuperscript{130} The passage reads as follows: “Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.”\textsuperscript{131} Conservative jurists and commentators often turn to this language while criticizing affirmative action and similar policies as inconsistent with constitutional principles. This is an argument for the moral equivalence of racial segregation and racial integration.\textsuperscript{132} All uses of race, no matter their motives, are suspect and presumed unconstitutional. As Chief Justice wrote at the close of his opinion in \textit{Parents Involved}, “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”\textsuperscript{133}

\textsuperscript{126} Id. at 787-88.  
\textsuperscript{130} 163 U. S. 537 (1896).  
\textsuperscript{131} Id. at 559. (Harlan, J., dissenting).  
\textsuperscript{133} Id. at 748 (2007).
Criticisms of this line of argument are plentiful, from diverse quarters. The one place one would not expect a critique to arise is Kennedy’s chambers. In *Parents Involved*, however, this is exactly what Justice Kennedy did. In his words,

The statement by Justice Harlan that “[o]ur Constitution is color-blind” was most certainly justified in the context of his dissent in *Plessy v. Ferguson*, 163 U. S. 537, 559 (1896). The Court’s decision in that case was a grievous error it took far too long to overrule. *Plessy*, of course, concerned official classification by race applicable to all persons who sought to use railway carriages. And, as an aspiration, Justice Harlan’s axiom must command our assent. In the real world, it is regrettable to say, it cannot be a universal constitutional principle.

This is a remarkable statement for any conservative jurist, and much more so for the jurist who penned *Miller v. Johnson* and who continually questions the constitutionality of the Voting Rights Act. It is aspirational in outlook yet realist in application. This is clearly a different Justice Kennedy. Which leads directly to the question of the next Part: what are the implications of the fact that the fate of the Second Reconstruction rests in the hands of one man?

III. Why it Matters

To this point, I have argued that as a super-median, Justice Kennedy is free and independent to decide cases as idiosyncratically as he wishes to decide them. This is why we witness a shift in his views on race, from an uncompromising stance in his early years on the Court and through 2003, to a more flexible and contextual approach beginning around 2006. The implications of this shift are far-reaching. The implications for constitutional litigation are obvious: for the politico-moral cases, those cases that grab the public’s attention and energize the culture wars, the vote of Justice Kennedy is crucial. Such is the life of a super median. In turn, the implications for constitutional theory directly follow; this is the counter-majoritarian difficulty on steroids. Is it possible to defend the notion that a single justice, if properly situated within the Court’s ideological spectrum, can determine some of the most important constitutional questions of his generation? The final section examines the implications of this question for constitutional law generally, and in so doing makes this abstract question far more concrete. This is the question of the constitutionality of the Voting Rights Act, the “crown jewel” of the civil rights movement. Is the constitutionality of the Act really in the hands of Justice Kennedy? Assuming that Justice Kennedy retains his status as super median, so that he remains independent to consult his newfound domains jurisprudence, how is he likely to answer this question?

A. Constitutional Litigation

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135 *Parents Involved*, 551 U.S. at 788.

136 Bradley Canon defines politico-moral cases as those controversies where “the disputants approach policy questions not in term of political wisdom or experience, but in nonpolitical terms of absolute right or wrong.” Bradley C. Canon, *The Supreme Court as a Cheerleader in Politico-Moral Disputes*, 54 J. POL. 637, 638 (2002).
Justice Kennedy’s status as super median has obvious implications for constitutional litigation. As the one justice whose vote must form part of any majority coalition, litigators must pay undue attention to Justice Kennedy’s preferences. This makes for challenging strategizing. Justice Kennedy’s wide preference distribution – his known “unpredictability” – makes the task of predicting his vote difficult. But there are clues.

The first basic step is to focus on the particular domain in question. Context matters. Whether public schools, questions of political association and identity, or prison reform, Justice Kennedy is moved and influenced by the particular domain where the questions arise. This is important.

The next step is more challenging. Once a particular domain is identified, litigators must try to assess the proper principles that govern the particular domain. Professor Gerken does a terrific job of identifying the principles that govern the public school and political association domains in Justice Kennedy’s constitutional world. But she does so by cobbling together bits and pieces from Justice Kennedy’s written opinions. I wonder whether she would have been able to identify similar principles without the benefit of Kennedy’s written account. Looking to the future, the task is to identify what those principles may be. Two principles stand out above all others.137

The first principle – and here Justice Kennedy is channeling his inner-Brennan and Walter Murphy138 – is the concept of human dignity. In the recent Brown v. Plata,139 the California prison case, Justice Kennedy wrote for a sharply divided Court that “[p]risoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment.” Justice Kennedy has deployed this argument in myriad cases and contexts, from the anti-sodomy statutes in Lawrence v. Texas140 and the abortion laws in Planned Parenthood v. Casey141 to congressional restrictions on partial-birth abortions142 and even suits against states in state courts for money damages, even when the states have broken federal law.143 The lesson is clear: “Anyone who wants to win his vote would do well to argue that someone’s dignity is being violated somewhere.”144

The second principle is the jealous protection of the authority of the judiciary to interpret the Constitution. Justice Kennedy is clearly a judicial supremacist, and this is true across myriad settings and contexts. The classic exposition of this principle appears in City of Boerne v. Flores,145 a case where Kennedy appeared miffed that Congress had attempted to overrule a judicial interpretation of a

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137 See Feldman, supra note 1.
139 No. 09–1233, decided May 23, 2011.
144 See Feldman, supra note 1.
substantive constitutional provision. According to Kennedy, this principle dated as far back as the founding and the canonical *Marbury v. Madison*.\textsuperscript{146} This was something Congress could not do. The principle was also present in *Plata*; Kennedy’s opinion for the Court came only after years of litigation and the disregard by state prison officials of court orders demanding prison reform. In some respects, this is also an important part of the story in *Bush v. Gore*\textsuperscript{147} and the wrongful districting cases,\textsuperscript{148} particularly *Miller v. Johnson*.\textsuperscript{149} In the former, the Court worries about a rogue state court changing the rules of the game in order to elect their preferred candidate; in the latter, the Court worries that the Department of Justice is interpreting the Voting Rights Act unconstitutionally. In both cases, Kennedy and his brethren make clear that the Court is in charge of constitutional questions.

Looking ahead, the lessons of this argument are both clear and unsurprising: litigants must pay close attention to Justice Kennedy’s particularities and subtleties. It matters whether the issue is voluntary school integration plans or political gerrymandering, prison reform or the constitutionality of the Voting Rights Act, and it also matters how Kennedy interprets these various contexts. This is hardly news. Far more interesting and important are the implications of this argument for constitutional theory and the Bickelian challenge. This is the subject of the next section.

**B. Constitutional Theory and the Bickelian Challenge**

Writing in the early 1960’s, and undoubtedly influenced by the perceived excesses of the Warren Court, Alexander Bickel offered his influential charge against the institution of judicial review. This was the famed “countermajoritarian difficulty.”\textsuperscript{150} In his words,

> [W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not on behalf of the prevailing majority, but against it. This, without mystic overtones, is what actually happens. . . . [I]t is the reason the charge can be made that judicial review is undemocratic.\textsuperscript{151}

The claim is ultimately about accountability and democratic pedigree. Supreme Court justices are unelected political actors, granted life tenure in order to render them independent by design. Their democratic pedigree is decidedly low. In contrast, the democratic pedigree of elected officials is concomitantly high. They are accountable to the electorate and must be cognizant of public opinions or else face the consequences in the next election.

\textsuperscript{146} 5 U.S. (1 Cranch) 137 (1803).
\textsuperscript{147} 531 U.S. 98 (2000).
\textsuperscript{149} 515 U.S. 900 (1995).
\textsuperscript{151} *Id.* at 16-17; HENRY STEELE COMMAGER, *MAJORITY RULE AND MINORITY RIGHTS* 55 (1958) (“Whatever the logical support for the theory [of judicial review,] it cannot be found in the philosophy of democracy if by democracy we mean majority rule; whatever the practical justification, it cannot be found in the defense of fundamental rights against the assault of misguided or desperate majorities.”).
Whatever one thinks about the straight-forward simplicity of the argument, it remains true that Bickel’s charge dominated constitutional scholarship almost from the time that Bickel issued his challenge.152 Some argue that it still does.153 The response, in fact, is said to border on an “obsession.”154

As a general matter, the claim is not terribly interesting, nor is it descriptively accurate. For all the noise that surrounds Bickel’s famed difficulty, it is still true that the Court is seldom out of step with public opinion for long.155 The appointment process ensures as much.156 To be sure, the Court is not a majoritarian institution in every case, but this is hardly an indictment on the institution. The fact that the Court can stand against public opinion is an interesting question in its own right, but that is not the question that Bickel asked.157

For my purposes, the example of Justice Kennedy as super median indicts the institution of judicial review in a far more important and revealing way. It is challenging to justify as a normative matter – though not impossible – granting the Supreme Court the power to overrule the present wishes of elected officials on the basis of vague and imprecise constitutional language. Bickel got this much right.

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152 See Steven Croley, The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law, 62 U. Chi. L. Rev. 689, 712 (“[R]esponding to the countermajoritarian difficulty has been an important staple on the menu of constitutional theory since the appearance of Bickel’s influential book.”); Robert M. Cover, The Origins of Judicial Activism in the Protection of Minorities, 91 YALE L.J. 1287, 1288 n.2 (1982) (“The osq;countermajoritarian difficulty’ has spawned the central line of constitutional scholarship for the last thirty years.”); see also Croley, supra, at 712 n.66 (documenting some of the many published acknowledgments to Bickel’s influence).

153 See Suzanne Sherry, Too Clever by Half: The Problem with Novelties in Constitutional Law, 95 NW. U. L. Rev. 921 921 (2001) (“[T]he osq;counter-majoritarian difficulty’ remains--some forty years after its christening--a central theme in constitutional scholarship. Indeed, one might say that reconciling judicial review and democratic institutions is the goal of almost every major constitutional scholar writing today.”).


157 For a recent revitalization of the Bickelian challenge as a moral claim, see Richard H. Pildes, Is the Supreme Court a “Majoritarian” Institution?, 2010 SUP. CT. REV. 103.
But could anyone defend granting one justice the power to decide some of the most difficult and contested questions of public policy in a country of well over 300 million people? Put differently, how to defend Justice Kennedy’s role on the Court as super median?

This is an arresting claim. Consider in this vein Justice Kennedy’s recent shift on questions of race. This essay argues that the best way to explain it is by looking to Kennedy’s newfound status as super median, which in turn allowed him to contextualize his jurisprudence accordingly, in domain-like fashion. That is to say, Justice Kennedy is now able to explore his views about public schools, the crafting of district lines as politically associative practices protected by the First Amendment, or the role that the concept of human dignity must play in decision-making. The Constitution is whatever Justice Kennedy says it is, irrespective of text, history, precedent, or even Justice Kennedy’s own views on the matter. It is a brave new world, but that is precisely the world of the super median.

This is a remarkable power. It is also unjustifiable. This is why Justice Kennedy’s position on the Court, and his recent shift, offer an inimitable example of attitudinalist jurisprudence and its perils. To see more clearly the implications of this view, the next section turns to a more concrete example. This is the ongoing debate over the constitutionality of the Voting Rights Act.

C. Constitutional Law and the Challenge to the Second Reconstruction

To this day, the Voting Rights Act stands as the clearest example of our national commitment to eradicating racial discrimination from the political process. The problem at hand had proven quite difficult, even intractable. Dating back to the late nineteenth century, jurisdictions throughout the South institutionalized the mass disenfranchisement of otherwise eligible Black voters. This condition endured unabated for well over half a century. When Congress finally faced up to the problem, it could only do so from a position of weakness so long as southern congressmen held together. The resulting legislation – the Civil Rights Acts of 1957, 1960, and 1964 – reflected this weakness. The best the legislation could do was open up the federal courts to adjudicate claims of racial discrimination in voting. But such a response proved no match for the ingenuity and recalcitrance of defiant southern jurisdictions. A stronger response was needed.

This was the Voting Rights Act of 1965. The success of the Act can be attributed to the fact that it radically shifted basic legal burdens and presumptions. Under prior law, the federal government must come to local courts and carry its burden of showing the unconstitutionality of the laws under review. In other words, the laws were presumed constitutional unless and until the federal government could prove otherwise in open court. Under the VRA, however, any voting law enacted by jurisdictions covered by section 4 of the Act is presumed to be unconstitutional until the federal government determines otherwise. These covered jurisdictions were also subject to the appointment of poll watchers and voting registrars. No longer would the voting rights of voters of color be subject to the whims of local registrars and state and local governments.

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Almost as soon as President Johnson signed the bill into law, South Carolina challenged the constitutionality of the new law. Unremarkably, in *South Carolina v. Katzenbach*, the Supreme Court sided with the overwhelming national coalition that supported the law. In an opinion authored by Chief Justice Warren, the Court concluded that the Act was a rational response to a problem that had plagued the country for generations. The Court was deferring to congressional wishes, to be sure, but this was no run-of-the-mill rationality review. Having myriad testimony and congressional findings at its disposal, the Court made use of them all, as if to justify the aggressive nature of the new law. This approach to constitutional review did not sit well with Justice Brennan. In notes he wrote to the Chief Justice on the margins of the first circulated draft of the opinion, Brennan questioned the need to include any reference to legislative findings in the opinion. Justice Brennan was looking to the future. To be sure, the record in support of the VRA was robust and exemplary. He knew that the Court would not always have access to such a record.

History has borne out Brennan’s critique. In the very next case — *Katzenbach v. Morgan* — the Court faced a similarly difficult constitutional question: assuming the constitutionality of the literacy test, could Congress prohibit the denial of the right to vote to a person who completed a sixth grade education in Puerto Rico (presumably an education in Spanish) due to her inability to read or write English? The answer could not be clearer: Congress could presumably not do so unless it could show, as in *South Carolina*, that the state law was racially discriminatory. But there was only one problem, which Justice Harlan was happy to point out in dissent: Congress had proffered no findings in support of this provision. Not a one. This was nothing more than a “legislative announcement” that the law in question violated equal protection principles. In writing the opinion for the Court, Justice Brennan must thus rely on traditional rational basis review, the kind that places few if any demands on legislatures. And that is precisely what he did. In the face of a barren record, he wrote, for example, that “§ 4(e) may be viewed as a measure to secure for the Puerto Rican community residing in New York nondiscriminatory treatment by government—both in the imposition of voting qualifications and the provision or administration of governmental services, such as public schools, public housing and law enforcement.” The Court was not about to engage in a review of a non-existent record, so it was left to argue that “[i]t is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.” This was rationality “review” by name only.

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159 383 U.S. 301 (1966)
163 Id. at 669 (Harlan, J., dissenting) (“There is simply no legislative record supporting such hypothesized discrimination of the sort we have hitherto insisted upon when congressional power is brought to bear on constitutionally reserved state concerns.”).
164 Id. at 669.
165 Id. at 652.
166 Id. at 653.
Through the years, Justice Brennan’s concerns took on added significance. While upholding the constitutionality of the Act, the Court would often highlight facts on the record to support its decision. In *City of Rome v. United States*, for example, the Court offered the following:

In considering the 1975 extension, Congress acknowledged that largely as a result of the Act, Negro voter registration had improved dramatically since 1965. Congress determined, however, that “a bleaker side of the picture yet exists.” Significant disparity persisted between the percentages of whites and Negroes registered in at least several of the covered jurisdictions. In addition, though the number of Negro elected officials had increased since 1965, most held only relatively minor positions, none held statewide office, and their number in the state legislatures fell far short of being representative of the number of Negroes residing in the covered jurisdictions. Congress concluded that, because minority political progress under the Act, though “undeniable,” had been “modest and spotty,” extension of the Act was warranted.

This is now an accepted axiom in our constitutional law, that Congress’ enforcement powers must be exercised only when supported by an adequate record. This is the central teaching of *City of Boerne v. Flores*. But to suggest that this requirement began with *City of Boerne* is to be blind to the lessons of history. Justice Brennan could foresee this outcome a generation before.

This is where we find ourselves today. In *Namudno v. Holder*, the demise of the VRA seemed inevitable, by a 5-4 vote and with Justice Kennedy casting the deciding vote. The oral argument led to no other conclusion. Once the opinion came out months later, however, the justices went out of their way to avoid the constitutional question, choosing instead to decide the case on statutory grounds, even if such grounds made no sense at all. The most sensible way to interpret the *Namudno* decision is by placing four justices on either side of the constitutional divide, with an undecided Justice Kennedy in the middle. Unable to reach an agreement on the constitutional question, the Court did the only sensible thing, which was to avoid the question altogether. The door remains open until Justice Kennedy makes up his mind one way or another. This would not be the first time that Justice Kennedy holds constitutional doctrine hostage to his idealism.

The question for the future of the Voting Rights Act thus hinges on Justice Kennedy’s approach to this particular question. Two approaches appear likely. Justice Kennedy may look back to his federalism jurisprudence and the concept of human dignity as applied to the states. This is an argument that ascribes to the states a dignitary interest. In Kennedy’s words, “[t]he States thus retain ‘a residuary and inviolable sovereignty.’ They are not relegated to the role of mere provinces or political corporations,

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167 446 U.S. 156 (1980).
168 *Id.* at 180-81.
171 For example, in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), four justices were ready to brand political gerrymandering cases as political questions, while four justices were prepared to provide judicially manageable standards. Unable to agree with either side, yet unsure that either side had the better argument, Justice Kennedy set the question aside for the future. An answer still awaits.
but retain the dignity, though not the full authority, of sovereignty."\(^{172}\) This is also an argument that resonates in conservative circles and dates back to the Senate debates in the Summer of 1965, when critics of the Act equated the status of covered jurisdictions to that of “conquered provinces.”\(^{173}\) More recently, critics similarly allude to the myriad “federalism costs” imposed by the Act.\(^{174}\) If Justice Kennedy understands the effect of the Act under this rubric, it is likely that he will side with the conservatives and strike down the special provisions of the Act. But by no means is this argument a slam dunk.\(^{175}\)

Alternatively, Justice Kennedy might return to his concurring opinion in\(^{176}\) Parents Involved, where he acknowledged that Justice Harlan’s paean to the colorblind principle in his Plessy dissent remains an elusive ideal. “In the real world,” Justice Kennedy wrote, “it is regrettable to say, it cannot be a universal constitutional principle.”\(^{177}\) The same is true in the voting rights context. The history of race and voting rights in the United States is, most notably, a history of outright defiance at the state and local level to the enfranchisement of colored citizens.\(^{178}\) This is the history that Congress confronted in 1965, and which the Court cited in support of the constitutionality of the Voting Rights Act. While much has improved in the intervening four decades, Congress determined in 2006 that the Act remains a necessary tool in the fight against racial discrimination in voting. Whether rightly or wrongly, it stands to reason that the same “real world” that led Justice Kennedy to soften his views in Parents Involved should lead him to soften them here as well. After all, as in Parents Involved, “the problem before us defies so easy a solution.”\(^{179}\) This is another way of saying that if the recent past is any indication, both context and history should lead Justice Kennedy to uphold the constitutionality of the Voting Rights Act.

**Conclusion**

The fate of the Second Reconstruction rests in the hands of Justice Kennedy. At first glance, this is a concern for anybody who cares about racial justice. But Justice Kennedy’s recent jurisprudential turn on questions of race, which this Essay explains by pointing to his status on the Court as a super median, is encouraging. This is an encouraging turn not because Justice Kennedy will ultimately reach the right answers to these questions, whatever those answers may be, but because he is turning away from the


\(^{175}\) See Michael Halberstam, *The Myth of “Conquered Provinces”: Probing the Extent of the VRA’s Encroachment on State and Local Autonomy*, 62 Hastings L.J. 923 (2011) (arguing that the alleged “federalism costs” exacted by the Act should not lead the justices to strike down the law).


\(^{178}\) Parents Involved, 551 U.S. at 788.
crass formalism on questions of race that exemplified his early jurisprudence. These are difficult questions and Justice Kennedy is giving them their due attention.