

Michigan Law Review First Impressions

Volume 105


2006

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Recommended Citation

Daniel R. Ortiz, *Cultural Compactness*, 105 MICH. L. REV. FIRST IMPRESSIONS 48 (2006).

Available at: http://repository.law.umich.edu/mlr_fi/vol105/iss1/19

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CULTURAL COMPACTNESS

*Daniel R. Ortiz** †

The Supreme Court's opinions in *LULAC v. Perry*, the Texas redistricting case, confounded expectation. While many believed that the Court would develop the law governing partisan gerrymandering in one direction or another, it did not. As exactly before, such claims are justiciable but there is no law to govern them. In other words, the courthouse doors are open, but until some plaintiff advances a novel theory persuasive to five justices, no claims will succeed. On the other hand, few expected the Court to make any major changes to doctrine under the Voting Rights Act and *Shaw v. Reno*. But *LULAC* did. One change, in fact, may have far-reaching consequences. In an unexpected turn, the Court adopted a new requirement—cultural compactness—under Section 2 of the Voting Rights Act. This requirement reflects a theoretical perspective that many progressive theorists of race and gender have long advocated: anti-essentialism. That, by itself, is surprising. In what follows, I lay out how *LULAC* developed this requirement and what it may mean to voting rights law and to antidiscrimination law more generally. If it is taken seriously, the lesson may be bittersweet: be careful what you wish for.

The Court's development springs from its analysis of whether Texas District 23 violated Section 2 of the Voting Rights Act. In order to boost a Republican incumbent's chances of reelection in a district that was becoming increasingly Latino, Texas had replaced some of District 23's Latino voters with Anglo voters who would more likely vote Republican. The Court found that the plaintiffs had met Section 2's three threshold factors—they had shown that Latinos in the area were "sufficiently large and geographically compact to constitute a majority in a single-member district," that they were "politically cohesive," and that the Anglo majority votes "sufficiently as a bloc to enable it . . . usually to defeat" Latino-preferred candidates. This part of the analysis is unremarkable and makes no real changes to existing Section 2 law.

The next stage of analysis is much more interesting. Texas claimed that District 25, a newly created majority-Latino district, cured any problem with District 23. In the first of its doctrinal innovations, however, the Court held that "one majority-minority district [can] compensate for the absence of another only when the racial group in each area has a § 2 right . . ." In other words, an opportunity district in one area would not "count" in the overall Section 2 calculations unless minority voters within it would themselves

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† Suggested citation: Daniel R. Ortiz, *Cultural Compactness*, 105 MICH. L. REV. FIRST IMPRESSIONS 48 (2006), <http://students.law.umich.edu/mlr/firstimpressions/vol105/ortiz.pdf>.

have an independent Section 2 claim. This development may have several effects. First, it limits where states can locate majority-minority districts to satisfy Section 2. A state cannot decide to meet the requirements by creating majority-minority districts just anywhere. Only certain places will do. Second, these locational restrictions may in turn affect the state's ability to gerrymander. Indeed, this may have been the very reason why the Court created this rule. As many have noted, by failing to develop any tools to regulate political gerrymandering directly, the Court has encouraged people to attack the practice with the only tools available—racial vote dilution and “one person, one vote” claims—even if those tools were developed for very different tasks. Now perhaps the Court is developing racial vote dilution law itself to take that into account. In other words, the Court's inability to address gerrymandering directly might be leading it to develop racial vote dilution law to pick up the slack. Only time will tell whether this is a dangerous development. I tend to think that it is.

The Court next had to determine whether minority voters in District 25 “had a § 2 right”—that is, would minority voters in the area covered by that district hypothetically be able to bring a successful Section 2 claim to force creation of that district or one like it if District 25 did not exist? Here the Court makes its most interesting move. In deciding that minority voters in District 25 could not meet the three threshold factors for Section 2, it reinterpreted the first factor—compactness—in a radically new way. Prior to *LULAC*, the Court had viewed this factor as requiring geographical compactness. That is, plaintiffs had to show that a reasonably geographically compact group of minority voters could form a majority within a district. If a majority could be aggregated only by pulling together voters from far-flung areas, there would be no Section 2 violation. In *LULAC*, however, the Court focused on a different concern as well: the homogeneity of the various minority voters aggregated together. Relying on the district court's findings that Latinos in two parts of District 25 were “disparate communities of interest” with “differences in socio-economic status, education, employment, health, and other characteristics,” it found District 25 to be noncompact. Thus, minority voters within District 25 could never argue that Section 2 required its creation and therefore it could not be used to offset District 23.

In one sense, this move represents the flip side of the Court's *Shaw* line of cases. Those cases held that plans subordinating “traditional districting criteria,” like geographical compactness, to race violated equal protection. They rested in part on the Court's concern that districting plans must not reinforce attitudes of racial distinctiveness—the idea that people are racially heterogeneous. In *LULAC*, by contrast, the Court holds that Section 2 does not allow us to assume that people within a single racial or ethnic group are culturally homogeneous. As Justice Kennedy put it for the majority,

a State may not assume from a group of voters' race that they think alike, share the same political interests, and will prefer the same candidates at the polls The purpose of the Voting Rights Act is to prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race. We do a

disservice to these important goals by failing to account for the differences between people of the same race.

Although the *Shaw* cases worry about the differences *between* groups while *LULAC* worries about the differences *within* groups, they share an animating concern—what some have called “race essentialism.” They just worry about it, so to speak, from different directions. *Shaw* says we should not act as if people of different racial groups are very different from each other—in this context, that Latinos and Anglos think and act differently. *LULAC*, on the other hand, says that we should not assume that people in the same racial group are all really the same—here, that all Latinos have the same interests. Even if racial identity cashes out politically—that is, Latinos of different stripes vote similarly—we must still prove that they are culturally homogeneous. This requirement of “cultural compactness” is quite different from the requirements of geographical compactness and political compactness (what the Court calls political cohesiveness), which the Court had already read into Section 2.

What effect will this anti-essentialist turn have in Section 2 cases generally? If the Court were to require that plaintiffs establish geographical, political, and cultural compactness, Section 2 claims would be much more difficult. In addition to showing that members of the racial community are geographically concentrated and politically cohesive—that is, tend to vote for the same candidates—plaintiffs would have to show that they are culturally, economically, and socially cohesive as well. Indeed, the Court even suggests that health differences among members of the group could matter. Having to prove these more general forms of cohesiveness would make establishing a Section 2 claim very difficult. Could, in fact, even men and women within a racial group be lumped together? To many, their differences, whether due to nature or nurture, are vast.

Luckily, the Court makes clear that is not the requirement. “We emphasize,” it states, that “it is the enormous geographical distance separating Austin and the Mexican-border communities, coupled with the disparate needs and interests of these populations—not either factor alone—that renders District 25 noncompact for § 2 purposes.” In other words, the Court is not saying that plaintiffs have to show that the minority population within a district is both geographically and culturally compact but only that the threshold requirement is not met when plaintiffs can show neither form of compactness. In this view, either geographical or cultural compactness alone is sufficient to satisfy this first threshold requirement. (In fact, though, the Court may limit the impact of cultural compactness even further. It suggests that it applies only across geographically compact subgroups that are themselves geographically dispersed, not within the overall dispersed group.)

This way of reinterpreting compactness, if the Court is serious about it, would open up rather than close down Section 2. It would enable geographically noncompact groups of minority voters to establish violations so long as they can show that they are culturally homogeneous. It would work to

relax the traditional geographical requirement that the Court had previously suggested was central to Section 2.

Is the Court serious about this move? I am not sure. Although some of the Justices who joined this part of Justice Kennedy's opinion, all of whom were necessary for it to represent the opinion of the Court, may be happy to relax geographical compactness, it seems odd to think that Justice Kennedy himself is. After all, he championed geographic compactness in the *Shaw* cases. Perhaps he is willing to relax it so long as *Shaw* requirements operate in the background to prevent it from being relaxed too far. Or perhaps this doctrinal innovation is only a sport that the Court will use primarily to throw a wrench into gerrymanders. In this view, the new compactness requirement may come to resemble the doctrinal innovations of *Bush v. Gore*. Unlike that case, however, *LULAC* does not signal the limited range of the doctrine's application. If the new compactness doctrine is meant as a sport but taken seriously by the lower courts, the Court's inability to develop tools addressing gerrymandering will once again have collateral consequences on racial vote dilution law.

The more interesting question perhaps is what kinds of impact this anti-essentialist turn might have on other areas of law. If we take the Court's anti-essentialism seriously, much of existing equal protection doctrine might change—perhaps for the worse. Take the intent requirement, which has long been central to equal protection. How might taking a more nuanced, complex, and de-essentialized view of race or gender affect it? Should an upper class African-American be able to challenge a law burdening her that was clearly intended to burden only poor African-Americans? Should she have to show that in the relevant jurisdiction rich and poor African-Americans were otherwise culturally compact? If so, how should she do it? Or should the burden be on the jurisdiction to defend on grounds of cultural *noncompactness*? In either case, plaintiffs would find it more difficult to assert equal protection claims.

Or imagine an election law like the one struck down in *Hunter v. Underwood*. In that case, the Alabama Constitution disenfranchised those convicted of crimes “involving moral turpitude,” a category selected because delegates to the 1901 Alabama constitutional convention believed them to be more frequently committed by blacks. The forbidden racial intent was clear. At the time of the constitutional convention, however, women in Alabama could not vote. The provision clearly was not aimed at them. Should Alabama's disenfranchisement provision, then, have been struck down only as applied to African-American men? Or should a woman later disenfranchised under this provision have to show that African-American men and women in Alabama are (or were) culturally compact in order to receive relief?

Affirmative action might become stickier still. Under existing equal protection doctrine, a governmental employer can give a member of an injured racial group a preference in hiring without showing that the individual member was himself injured by the employer's past conduct. All the employer must show is a *prima facie* case that its past conduct injured some members of the group. If the Court were to de-essentialize race, however,

should the employer be able to extend hiring preferences only to those members of the same culturally compact subgroups it can make a *prima facie* showing for having injured in the past? Needless to say, requiring such a showing would make affirmative action more difficult—all in the name of respect for diversity of identity within the injured group. Such diversity is real, of course, but legally recognizing it may be unfortunate to members of the group itself.

Some have already made policy arguments like these with respect to affirmative action in education. Affirmative action in university admissions, they argue, should extend only or primarily to lower class African-Americans, not to other blacks who do not suffer from the same continuing effects of historical discrimination. While meant to target affirmative action more directly to those who have suffered harm in the past, such arguments might explode in their champions' faces. A court concerned with cultural compactness might argue that true diversity—the only permissible legal basis for most affirmative action in education—can only be achieved by ensuring that culturally *noncompact* members of the overall group are admitted. In other words, sensitivity to cultural diversity among black Americans might argue against restricting a program's benefits to any one culturally compact group of blacks. In this view, a program restricted to historically subordinated subgroups might achieve insufficient diversity exactly because they are culturally compact.

A larger danger is that increased sensitivity to diversity within racial and gender groups might lead courts to question the salience of traditional racial and gender categories. If the courts cannot assume that lower class and upper class women are culturally compact, they may come to question why the law should continue to care about the overall category of women. More perniciously perhaps, having to pay more attention to differences within racial and gender groups might make the courts more squeamish about addressing race and gender generally. As Chief Justice Roberts stated in *LULAC*, "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 district It is a sordid business, this divvying us up by race." As this passage suggests, courts forced to dissect racial and gender groups may begin to lose their stomach for the whole antidiscrimination enterprise. Paradoxically, anti-essentialism may become a tool for those least sensitive to racial and gender differences.