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Comments

Reapportionment and Latino Political Power in California in the Wake of the 1990 Census

Yvonne Gonzalez Rogers†

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“Power is not going to be given to us, it’s got to be taken.”

INTRODUCTION

Despite recent gains, Latinos continue to struggle for political power and political equality. Latinos constitute the largest minority group in California, 25.8%. Yet, Latinos hold a mere 5.0% of the seats in the State Assembly, a minuscule 7.5% in the State Senate, and 6.7% of the congressional delegation. This marked disparity raises the question: how could such a situation exist?

The answer to this question focuses on racial gerrymandering, one of the causes for the disparity between the Latino population and the disproportionate number of Latino elected representatives, and touches upon at-large systems of voting, another political mechanism which dilutes minority voting strength. Admittedly, other causes contribute to the disparity, but since the California Legislature has been unable to develop politically acceptable plans for reapportionment, the focus on gerrymandering is particularly timely.

Reapportionment is the process of dividing the population into districts from which representatives are elected. This process of designating districts has been viewed historically as both neutral and egalitarian. However, such a view is far from the truth. The legislature itself draws the new district lines from which the legislative representatives are elected. Consequently, incumbents draw lines to create districts in which the constituencies will in all likelihood reelect the incumbents.
This technique, called gerrymandering, is not egalitarian but protects incumbents by invariably diluting the voting strength of any opposition. Since Latinos and other racial minorities are typically not incumbents and have been systematically isolated from the political arena, gerrymandering is particularly burdensome for these communities. Given this historic isolation, the law regulating gerrymandering as it relates to racial minorities centers on the effects, not the intent, of the incumbents.

In this paper, I discuss the issue of political representation of Latinos in California. At the outset, I describe the basic problem presented by racial gerrymandering. Then, I delineate two normative models of representative government focusing primarily on the role of the representative. I next describe how these models have been applied by the Supreme Court of the United States and Congress. Finally, I link the normative models and the descriptive applications to the California experience. In conclusion, I discuss the potential reforms in apportionment that the Latino community should embrace as a means of increasing its political participation and representation in the California political arena.

I. THE PROBLEM: DILUTION OF LATINO VOTING STRENGTH

A. Definitions and Techniques

"Racial gerrymandering" occurs when incumbents draw district lines that decrease the voting strength of highly concentrated groups of racial minorities. This result is an issue regardless of whether an intent to discriminate exists. Political gerrymandering results when the incumbents draw lines that dilute the strength of the minority political party. Here intent is an issue. Gerrymandering affects all who seek to

9. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 514-15 (1983) notes that Gerrymandering comes from: Elbridge GERRY + (sala)MANDER, from the shape of an election district formed in 1812 in Massachusetts while Mr. Gerry was governor. Gerrymander is defined as: "to divide (a territorial unit) into election districts to give one political party an electoral majority in a large number of districts while concentrating the voting strength of the opposition in as few districts as possible." Id. at 515.

10. This paper will discuss the issue of intentional discrimination as it developed through the Supreme Court and Congress. While intent was once required, evidence of racial gerrymandering is now based on its impact on minority voting strength. However, evidence of intent can help to discharge the plaintiffs' burden in proving vote dilution since the "showing of injury in cases involving discriminatory intent need not be as rigorous . . ." Garza v. County of Los Angeles, 918 F.2d 763, 771 (9th Cir. 1990); see also infra text accompanying notes 155-59.

11. The issue of whether a controlling political party can act in its own self-interest and against that of another political party is beyond the scope of this paper. Until Davis v. Bandemer, 478 U.S. 109 (1986), scholars assumed that as long as districts were of equal population ("one person, one vote" doctrine, see infra part III.A.) and racial minorities were not discriminated against, district lines could be drawn without any other restraints. In Davis the Supreme Court held that intentional discrimination against an identifiable political group, which resulted in an actual discriminatory
participate in the political arena but disparately harms racial minorities who have historically been denied access to the political process. Further, the two major political parties frequently cloak themselves behind the cause of minority representation as a means of achieving their own ends. In California, political gerrymandering contributes to the problem of too few Latinos in the state legislature.

In general, racial gerrymandering can be effectuated in three ways: splitting, packing, and stacking. First, the incumbents can dilute the strength of a community's aggregate vote by drawing lines to split the community. Using this splitting technique, an otherwise coherent Latino community will not be represented in a single district. Instead, small parts of the community will be subsumed into several other districts and no district will contain a majority of Latinos.

Second, incumbents can draw lines to minimize the impact of a community's vote by "packing votes." For example, if in Los Angeles, the Latino community were large enough to have a majority of voters in two districts, lines could be drawn so that one district would be overwhelmingly Latino (70, 80 or even 90 percent or more) and the second would contain a Latino minority. Thus, the influence of the Latino community would be limited to one district.

Third, racial gerrymandering can be accomplished through a "stacking" technique. Use of this technique would combine an area with a high population of Latinos and one with an area of an equally high population of Afro-Americans. This combination would put two minority groups against each other and, in effect, neutralize each group's power.

The most widespread political technique that results in the dilution of minority voting strength is the at-large voting system. Under an at-large system, all voters of a city, county, or school district vote for each effect, and which consistently degraded a voter's or a group of voters' influence on the political process, violated the equal protection clause of the Fourteenth Amendment. Id. at 127, 132.


14. See, e.g., Robinson v. Commissioners Court, Anderson County, 505 F.2d 674, 679 (5th Cir. 1974) (holding that an Anderson county apportionment plan that split the greatest area of black concentration in the county's most populous city into three precincts unconstitutionally diluted the county's black vote).

15. Note, supra note 13, at 790.


17. Note, supra note 13, at 790.

18. See Sims v. Baggett, 247 F. Supp. 96, 109 (M.D. Ala. 1965) (the court ruled that an apportionment plan where predominantly black counties were aggregated counties for the sole purpose of preventing elections of blacks to house membership was unconstitutional).
of the potential officeholders. This system is used most frequently for election of city council members, county boards of supervisors, school boards and other local political divisions. The at-large technique favors a winner-takes-all approach to election and in effect denies minority groups an opportunity to elect their choice for candidate as long as they do not constitute fifty percent of the voting age population. Thus, even if the Latino community constitutes a significant minority population, as the minority it will always lose.\textsuperscript{19} By contrast, under a system using single-member districts, a Latino community which constitutes a minority group in a city or county could nevertheless be a majority in a single-member district and thereby elect a Latino representative. Single-member districts thus facilitate minority communities' efforts to gain a meaningful voice in government, while at-large elections suppress their voice.

\textbf{B. Historic Discrimination Against Latinos}

The California tradition of racial discrimination against Latinos found its roots in the Mexican-American War and the California Gold Rush. The 1848 signing of the Treaty of Guadalupe Hidalgo between the United States and Mexico ostensibly guaranteed all Mexicans who remained in California after the Mexican-American War full rights as citizens. In its first session, however, the California Legislature enacted a foreign miners' license tax effectively eliminating the competition of miners who were of Mexican descent ("Mexican-Americans").\textsuperscript{20} Moreover, during the Gold Rush a wave of lynchings and murders of Mexican-Americans caused them to relinquish their mining claims and flee for safety to southern California. Additionally, not one of the forty-eight delegates to California's first constitutional convention was "Mexican." This history of discrimination has shaped, if not created, the foundation for political exclusion of Latinos in California.\textsuperscript{21}

Discriminatory practices in education, employment and politics per-

\textsuperscript{19} A discussion of the effects of the majority vote requirements on candidates of racial or ethnic backgrounds extends beyond the scope of this note as do other effects of racial discrimination. I am concentrating solely on the issue of how these political institutions and techniques have affected the minority community and how to overcome those particular political hurdles. For a discussion of the effects of the majority vote requirements on minority candidates; see generally, Laughlin McDonald, \textit{The Majority Vote Requirement: Its Use and Abuse in the South}, 17 \textit{URB. LAW} 429 (Summer 1985); Katharine Inglis Butler, \textit{The Majority Vote Requirement: The Case Against Its Wholesale Elimination}," 17 \textit{URB. LAW} 441 (Summer 1985); Paul Jeffrey Stekler, \textit{E lecting Blacks to Office in the South-Black Candidates, Bloc Voting and Racial Unity Twenty Years After the Voting Rights Act}, 17 \textit{URB. LAW} 473 (Summer 1985).

\textsuperscript{20} See RODOLFO ACUNA, OCCUPIED AMERICA: A HISTORY OF CHICANOS, 114 (3d ed. 1988).

\textsuperscript{21} REPORT OF THE CAL. STATE ADVISORY COMMITTEE TO THE U.S. COMMISSION ON CIV. RTS., \textit{POLITICAL PARTICIPATION OF MEXICAN-AMERICANS IN CALIFORNIA} 405 (August 1971) [hereinafter COMMISSION REPORT].
assist today and reinforce existing barriers to Latino participation. For example, in order to minimize the strength of the Latino vote in California, the legislature imposed literacy and educational requirements for voters, employed English-language ballots and threatened voters with deportation. The courts have since held these barriers unconstitutional, but much of the damage has already been done. Without a tradition of representation, Latinos have made only minimal progress in the political arena.

One obvious manifestation of racial discrimination that continues is the gerrymandering of districts with large Latino populations to ensure the reelection of Anglo incumbents. Contemporary gerrymandering in California is synonymous with former U.S. Congressman Phillip Burton, who was renowned for locking himself up in a hotel room with maps and emerging with a reapportionment plan. He fulfilled the Democratic Party's primary goal of protecting incumbents. A State Advisory Committee to the U.S. Commission on Civil Rights ("the Commission") concluded in 1971, after interviewing legislators, attorneys and representatives of Latino organizations that Latinos "in California ha[ve]...

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22. Denise Hulett, in a statement before the California Senate Election and Reapportionment Committee, addressed the barriers which continue to confront Latinos. She stated that state sanctioned segregation in education has adversely affected high educational attainment by Hispanics. See generally Los Angeles Unified School District v. United States District Court, 650 F.2d 1004, 1005 (9th Cir. 1981) (Ferguson, J. Dissenting); Crawford v. Board of Education, 17 Cal. 3d 280, 130 Cal. Rptr. 724, 551 P.2d 28 (1976); Westminster v. Mendez, 161 F.3d 774 (9th Cir. 1997) (en banc).

Discrimination in employment and other societal arenas also persists, harming Hispanics. See Gutierrez v. Municipal Court of Southeast Judicial Dist., County of Los Angeles, 838 F.2d 1031, 1039 (9th Cir. 1988), vacated as moot, 490 U.S. 1016 (1988) (English-only rule as a condition for employment held to be discriminatory. Although condition permissible in some instances when justified by business necessity, the rule is often a mask for intentional national origin discrimination); DeRonde v. Regents of University of California, 28 Cal. 3d 875, 172 Cal. Rptr. 677, 683 (1981) (societal discrimination against ethnic minorities in California); Martinez v. Superior Court for Placer County, 108 Cal. App. 3d 695, 761-62, 166 Cal. Rptr. 756 (1980) (Reynoso, J., dissenting and taking judicial notice of historical national origin discrimination in California). See hearing on Redistricting Before the California Senate Election and Reapportionment Committee, Hayward, March 1, 1991 at 3-4 [hereinafter Senate March 1st Hearing] (statement of Denise Hulett, Voting Rights Attorney, Mexican American Legal Defense and Education Fund (MALDEF)).

23. In Castro v. State of California, 2 Cal. 3d 223, 85 Cal. Rptr. 20, 466 P.2d 244 (1970), the plaintiff challenged Article II, Section 1 of the California Constitution which required that all ballots be printed in English. The plaintiff argued that this constitutional provision violated the Equal Protection Clause of the Fourteenth Amendment because it barred otherwise eligible voters from exercising their right to vote. The Supreme Court of California agreed and held that the non-English population needed a political voice "to have any realistic hope of ameliorating the conditions in which they live." Id. at 240, 85 Cal. Rptr. at 32, 466 P.2d at 256. The California Supreme Court required the State to incur the expense of publishing ballots in both Spanish and English.

The constitutional provision also required voters to be citizens of the United States, at least 21 years old, residents (a) of California for at least one year, (b) of the county in which he or she would vote for at least 90 days, and (c) of the precinct for at least 54 days. These residency requirements had a disparate effect on migrant workers who tended to be Latino. Compare with the present provision: "[a] United States citizen 18 years of age and resident in this state may vote." Cal. Const. art. II, § 2 (voter eligibility).
been gerrymandered out of any real chance to elect [their] own representatives to the State Legislature or the United States Congress in a proportion approaching [their] percentage of the state population.\textsuperscript{24} The Commission found that not only were reapportionment plans "designed by incumbents, for incumbents, [and] as a service to incumbents,"\textsuperscript{25} but that the incumbents did not comprehend the illegality and immorality of the racial gerrymandering which occurred as part of the process. Not surprisingly, the legislators were unwilling to take any action to change the situation.\textsuperscript{26}

Gerrymandering has not only diluted the Latino vote directly but has undermined Latinos' motivation to participate in the electoral process. Senator Alan Cranston once stated that:

'[D]espite the rapid emergence of political activism in the Mexican-American community, access to the states' political institutions remains virtually closed to this community. The reasons for this are complex, but they have a common root: the Mexican-American has been systematically excluded from the opportunities available to the Anglo community that lead to political, economic, and social success.'\textsuperscript{27}

While the Latino community may have become apathetic as a result of this systematic exclusion, given the opportunity, the political consciousness of the Latino community will reawaken.\textsuperscript{28}

Intent on making opportunities, leaders from the Latino community are trying to influence the 1990 reapportionment. The lines drawn during the next reapportionment will determine (1) the degree to which the Latino community will participate in the political sphere, (2) the amount of limited social resources which will be distributed to the community, (3) the strength of the political party in power and (4) the influence of Latinos on policies and programs important to Latinos.\textsuperscript{29} Unless the Latino community can secure representation in the California Legislature, it will continue to face political isolation again into the twenty-first century.

\textsuperscript{24} \textit{Commission Report}, supra note 21, at 8.
\textsuperscript{25} \textit{Id.} at 9.
\textsuperscript{26} \textit{Id.} at 9-10.
\textsuperscript{27} \textit{Id.} at 24.
\textsuperscript{28} Although many social scientists have argued that the American public as a whole is politically apathetic, experience demonstrates that newly-empowered minorities, such as blacks in the South, treasure and exercise their right to vote. \textsc{Gary C. Jacobson, The Politics of Congressional Elections} 75-81 (1983); \textit{See} \textsc{Richard A. Brody, The Puzzle of Political Participation in America}, in \textsc{The New American Political System} 296-97, (A. King ed. 1978); \textit{see also}, \textsc{Raymond E. Wolfinger & Steven J. Rosenstone, Who Votes?} (1980).
\textsuperscript{29} \textit{Symposium, Latinos in the Law}, 6 \textsc{Chicano L. Rev.} 34, 37 (1983).
II. NORMATIVE MODELS OF REPRESENTATIVE GOVERNMENT

The legal and political debates regarding reapportionment and dilution of minority voting hinge, in theory, on notions of how our republican form of representative government should operate. The United States government is based on Rousseau's notion of self-rule: people give up their natural rights in exchange for civil ones; they can be ruled and free if they rule themselves and therefore sovereignty derives its authority from the assent of the people.30 The question then becomes how best to implement this notion of self-rule.

Voters elect representatives to a central government because the republic was, in the time of the Framers, and continues to be, too large to accommodate direct democracy as existed in Athens during the days of Plato.31 Within this constraint, this section seeks to answer the questions: who should the representatives represent? and which interests (if any) should they advocate?

I have organized notions of representation under two models, not as all encompassing theories of government, but as a means for discussing the questions presented above. The first model, which I call Madisonian republicanism, has two components. First, its posits that ideally representatives should subordinate special interests to those of the general public whenever they deliberate public policy. Representatives should not be narrowly parochial when they engage in policy debates. Theoretically, a wide-ranging debate should lead to laws created for the common good. Madisonian republicanism argues for simple numerical equality. Second, it is based on the principle that representation should be allocated in terms of population. The second model argues for proportional representation.

A. Madisonian Republicanism

James Madison acknowledged that a government which guaranteed liberty would result in a diversity of opinions and interests.32 Consequently, he was concerned that the diversity would "factionalize" the thirteen states. For Madison, "interests [were] multiple, shifting alignments, largely subjective and likely to conflict with the welfare of the

31. See THE FEDERALIST No. 52 (J. Madison) (R.P. Fairfield 2d ed. 1966) (This "scheme of representation [is] a substitute for the meeting of the citizens in person") Id. at 165; see also THE RECORDS OF THE FEDERAL CONVENTION OF 1787, (M. Farrand ed., 1927) cited in HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION (1967) "Representation is made necessary only because it is impossible for the people to act collectively." Id. at 86.
nation." Thus, Madison proposed a "republican remedy for the disease most incident to republican government" characterized by factionalism. The republican remedy for factionalism required that representatives make the rational choice to act, without self-interest, and seek to attain the public good. The public good was to supersede all considerations of private interests.

Madison relied on a notion of representation consisting of three parts: agency, deliberation, and population. First, a representative should be one who is given the authority to act through election or appointment. Such power terminates when the authorization is withdrawn or at the end of the term of office. Second, Madison argued that representatives should deliberate about issues with the intent of reaching a result consistent with the common good. This kind of deliberative process is more efficient if homogeneity of ideas and values exists since fundamental value differences are often irreconcilable. Third, Madison believed that since power originated with the people, representation should be allocated according to population size which is manifested in geographic areas, states and districts.

This model is problematic in at least two respects. First, representatives do, in fact, act upon self-interest. On rare occasions they do enact legislation for the common good but only if it will not affect a bid for reelection. Thus, Madison's assumption that representatives will pursue the common good is weak and undermines his theory of representative government.

In a nation of multiethnic, multicultural, and multiracial populations, diverse preferences are bound to play a role in legislative deliberation and yet this model represses diversity. Granted, despite the differences of race, ethnicity, gender, sexual orientation and religion, to name a few, we are all human and can benefit from participating in the social contract as described by Rousseau. However, Madison fails to show that humans can deliberate in a vacuum, without reference to interests, morals, or even notions of what is good. Rousseau,

33. PITKIN, supra note 31, at 192. See also, THE FEDERALIST No. 10, (James Madison) (A faction is "a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.") Id. at 78.
34. THE FEDERALIST, No. 10 at 23.
35. MORGAN, supra note 32 at 56.
37. Id. at 1548. I would note that not all models of republicanism require disinterested deliberation. I include this factor because the argument is recurrent during debates concerning representation of racial minorities.
38. See, e.g., RICHARD F. FENNO, JR., HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS (1978).
39. Rousseau asserts that in order for the "general will" to be expressed clearly, "there should
Kant, Hegel, Rawls, and others have all sought to determine how one might find the common good or the general will. They have to a lesser or greater degree been unable to provide any guidance. Given the problems associated with acting upon preferences, we must learn to control the tendency, not ignore its existence.

Second, while Madison sought to create a government of checks and balances to control the "ambitious and designing," the government he created is actually a tool of those politicians. Majoritarian government is a winner-takes-all approach to representation. Majoritarian systems do not favor minority interests, particularly when minority constituents are scattered among many regions. Even though a minority group may constitute a significant portion of the nation, they may not constitute a majority in any single area. Thus, they do not get represented at all.

The Madisonian republican model, then, assumes that legislators do not act upon personal preferences. The model requires that representatives transcend parochial interests to promote the common good. While such a choice may be rational, representatives have not, in fact, chosen to be no associations in the state" because private interest misleads the direction of the people as sovereign. Rousseau, The Social Contract supra note 30, at 74-75.

40. Immanuel Kant endeavors to give moral content to Rousseau's general will. Kant argues that the content of "reason free from inclination" can be achieved in the "neumenal world" through a "categorical imperative," namely to "[a]ct in accordance with a maxim that can at the same time be valid as a universal law." See Fundamental Principles of the Metaphysics of Morals (T.K. Abbott trans., 1909).

41. Georg Wilhelm Friedrich Hegel took Rousseau's general will and created the concept of a "universal or rational will." According to Hegel, individuals, if they act as moral agents will not act in conflict with others. See generally Hegel's Philosophy of Right (T.M. Knox trans., 1952).

42. John Rawls develops Kant's neumenal position by arguing that individuals will commit to minimal principles of justice derived independently of political consideration through the "original position" under a "veil of ignorance." Rawls asserts that since the principles which are derived in the original position constitute minimal notions of justice, they are valueless. J. Rawls, A Theory of Justice, Book II, Ch.3 (1971).

43. In simplistic terms: Rousseau's theory of the general will lacks content, and while the "general will" is necessary to connect the people as the sovereign to a majoritarian rule of government, use of this concept is arbitrary. Kant's theory which gives content does not work unless those operating under the categorical imperative share values. If they do not, then no unified good will result. Similarly, Rawls' principles of justice are no more concrete. Those in the original position are made risk-averse and therefore their actions are skewed toward egalitarianism. Ultimately, those in the original position must ask "what is fair" which begs the question.

44. Morgan, supra note 32, at 52.

45. Sir Arthur Lewis, who considers majority rule undemocratic, has argued that if democracy means that "all who are affected by a decision should have a chance to participate in making that decision, either directly or through chosen representatives," then excluding minorities, "clearly violates the primary meaning of democracy." W. Arthur Lewis, Politics in West Africa 64-65 (1965). See also, Iris M. Young, Justice and the Politics of Difference (1990) arguing that "a commitment to a unified public . . . in practice tends to exclude or silence some groups." Id. at 183.
act solely for the common good. Thus, instead of providing guidance in overcoming self-interested legislative politics, the Madisonian model places too much trust in the majority's capacity to consider the general good, an assumption made at the expense of both minorities and diversity.

B. Proportional Representation

The second model, which I refer to as proportional representation, carries with it two notions of representative government. First, propostionalists argue that representatives make policy decisions based upon particular preferences. Second, because of this propensity to act pursuant to self-interested preferences, propostionalists believe that the legislature should mirror all the interests of the people; it should be a miniature of the electorate.46

Proportional representation is used to describe an electoral system in which seats of governmental bodies are allocated in proportion in the percentage of votes a party receives in an election. According to John Adams, only through proportional representation can "true representation" be achieved.47 Furthermore, it envisions representatives not as agents acting on the authority of the ballot box, but rather as representatives chosen for certain personal characteristics, such as their ethnic background or political affiliations.48 "The representative does not act for others; he [or she] stands for them, by virtue of a correspondence or connection between them, a resemblance or reflection."49

Proportional representation as a model for government thus values the "expression and affirmation of diverse perspectives and interests."50 The proportional representation model also challenges the presumption that representatives can deliberate solely motivated by the common good: "a common good may have been possible in a small, participatory city-state as Rousseau's Geneva. But the odds are against it in Madison's

46. Proportionality is one way of dealing with the issue of special interests but it is not the only way. See, e.g., R. Dahl, Dilemmas of Pluralist Democracy: Autonomy vs. Control (1982); see also, Still, Political Equality and Election Systems, 91 Ethics 375 (1981). Still argues that "political equality is not a single concept, but a group of distinct (though related) criteria which have not previously been adequately distinguished." He posits that despite the benefits of majoritarian democracy, as implemented through at-large voting systems, that system of government is dangerous to racial minorities because it fails to account for the realities of racial and political factions. Id. at 377.

47. John Adams, Letter to John Penn, Works (Boston, 1852-1865), quoted in Pitkin, supra note 31, at 60.

48. A correlative notion values symbolic representation. Thus, minority constituencies would be present through the elected individual, who would serve as their leader and spokesperson. This person would be the recipient and object of the feelings, expressions, and actions of like-minded constituents—whether they result from cultural pride or racial prejudice. Id. at 92.

49. Id. at 61.

50. Sunstein, supra note 36, at 1587.
extended sphere, which is neither homogeneous, participatory, nor small.”

This model espouses democratic principles of allowing a constituency to express weighted preferences. Weighted preferences are designed to overcome the dangers of majoritarian tyranny by allocating power not upon geographical location, but among political parties.

A proportional system of government allocates seats according to the number of votes a party receives in an election. Proportionalists believe that in order to accommodate the wide range of preferences which exist in society, the political system must be composed of multiple parties. Underlying this theory is the notion that an individual will join the party which advocates those interests most important to that individual. The concept of fostering multiple parties allows groups which hold minority views to voice those views directly, rather than having them co-opted or diluted by being included in a slate of issues being advocated by a more centrist party.

Proportionalists do not dwell on whether legislators are capable of determining the common good; they assume that legislators will not. Instead proportional representation tries to account for the inevitability of preferences in decision-making by focusing on the composition of the legislature. Proportionalists argue that the composition will determine the outcome of the issues debated therein through bargaining and compromise among special interests.

However, despite some countries’ (e.g. Switzerland) seeming success in implementing a system of proportional representation, the model suffers from serious limitations. Most significantly it does not provide adequate guidance in determining to which primary group individuals belong. Should individuals form groups around values of ethnicity, race, religion, language, politics, ideology, sexual orientation or some other organizing principles? Moreover, the model does not indicate how large a group must be to merit representation. However, the primary purpose of the proportional representation model—to give a voice to all these groups even if they are not concentrated in one geographic area—may justify increased fractionalization during deliberation of policy issues.

53. Michael L. Balinski & H. Peyton Young, Fair Representation: Meeting the Ideal of One Man, One Vote 87 (1982).
III. DESCRIPTIVE APPLICATIONS OF THE NORMATIVE MODELS

Citizens living in a democracy have a right to participate in the political process; participation is basic to a government predicated on self-rule. Madisonian republicanism and proportional representation present notions of how participation can be achieved through representative means and how minority constituencies should be represented. In this section, I describe how the judiciary and the legislature have used these models to design rules regarding the fairness of minority representation. In particular, I describe the federal courts’ and Congress’ efforts to protect minorities from vote dilution focusing on the use of the “one person, one vote” doctrine and the Voting Rights Act as the primary means of combatting racial gerrymandering.

Relying on a model of Madisonian republicanism and focusing on the rights of individuals, the U.S. Supreme Court attacked the problem of minority vote dilution by creating the basis for the “one person, one vote” doctrine in Baker v. Carr. On the other hand, the proportional representation model has been largely rejected in the United States because it does not focus on individual rights. Proportional representation exists only to the extent that the Voting Rights Act (“VRA”) explicitly protects the rights of minority groups, rather than individuals.

A. “One Person, One Vote” Doctrine

“[Latinos] cannot rely on the good graces of the legislative body.”

The Supreme Court has sought to protect racial and ethnic minorities by fashioning individual rights of access to political processes. One of the ways by which the Supreme Court has chosen to do this is through the “one person, one vote” doctrine. The “one person, one vote” doctrine does not solely mean that each person has a right to vote. The doctrine also requires that each vote have the same weight as any other. In effect, this doctrine has prohibited legislatures from engaging in malapportionment by creating districts that are not of roughly equal population.

To use an illustration, residents of a state elect one state senator from each county. If one county has 1,000 people and another has 100,000, those voting from the smaller county have more voting strength than those from the larger county since each district can elect only one senator. Not only is the larger county’s per capita representation lower, but access to the representative is also more difficult since there are more

57. ALAN HESLOP, COMMISSION REPORT, REPORT TO THE ROSE INSTITUTIE OF STATE AND LOCAL GOVERNMENT 9 (1982).
constituents to serve than in the smaller county. By preventing disparities of weight of different votes, the “one person, one vote” doctrine has constrained gerrymandering that dilutes access to the political process.

In 1962, the Supreme Court planted the seeds for the “one person, one vote” doctrine when it held in *Baker v. Carr* that the issue of apportionment was justiciable because review was not barred by the political question doctrine. The apportionment plan at issue created districts with equal numbers of registered voters. Consequently, there existed a significant disparity of voting strength between large and small counties.

The Court found that when a significantly smaller number of voters could elect the same number of representatives as a large district, the votes of those in the larger district had been diluted. The Court held that this practice violated the Equal Protection clause of the 14th Amendment. The apportionment plan described in *Baker* did not differ significantly from others existing at that time. Apportionment plans in other states appeared facially constitutional but, in reality, contained enough exceptions to make the results clearly unconstitutional.

The Court expanded on *Baker* in *Gray v. Sanders* when it actually created the term “one person, one vote” by stating that: “[t]he conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—‘one person, one vote.’” However, the Court’s opinion did not provide any substantive standards or guidelines for states to follow in implementing a constitutionally acceptable plan.

In 1963, the Supreme Court gave concrete meaning to the “one per-

59. *Id.* at 254. The Court found that as a consequence of this practice, approximately thirty-seven percent of the Tennessee population elected sixty-one percent of the State senate and forty percent elected sixty-four percent of the lower house. *Id.* at 253.
60. *Id.* Justice Brennan, writing for the majority, reversed the three-judge district court panel’s dismissal and remanded the case. Some legal scholars have argued that the holding in this case should not apply with equal vigor in states where the minority population does not necessarily consist of citizens of the United States. Thus, debates exist about whether states which border on Mexico and which must deal with an illegal immigrant population should include those people in the apportionment of election districts.
61. ROBERT G. DIXON J., DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 120 (1968).
63. *Id.* at 381. The facts of *Gray* reveal that Georgia had implemented a system of apportionment similar to that of the United States Senate. Each county in Georgia possessed the same number of representatives, regardless of the size of the population. This geographical system resulted in greater voting strength for the least populated, rural counties. The Court held that voters could not be classified based upon where they lived if it would dilute the voting power of any person’s vote in a statewide election. *Id.*
son, one vote" doctrine in *Wesberry v. Sanders* by requiring the population within each congressional district to be mathematically equal to every other district.\(^6^4\) The facts in *Wesberry* paralleled those in *Baker*. The representative from Georgia's fifth congressional district represented two to three times more constituents than those from other districts.\(^6^5\) Based on a historical interpretation of Madison's vision of republicanism, the Court held in *Wesberry* that Article 1, Section 2 of the Constitution required equal representation for "equal numbers of people, without regard to race, sex, economic status, or place of residence within a State."\(^6^6\)

The Court's mathematical precision test, articulated in *Reynolds v. Sims*,\(^6^7\) mandated that states create districts with the same population.\(^6^8\) Thus, the vote of a member of a racial minority would weigh the same as the vote of a member of the majority, and access to a representative would not be diluted. Under this construction, the Equal Protection Clause would be satisfied.

In 1964, upon hearing the case of *Reynolds v. Sims*, the Supreme Court loosened the "mathematical precision" test as it applied to state legislative districts, while maintaining its use in federal districts.\(^6^9\) The Court held that while districts should be apportioned "as nearly of equal population as is practicable," it was a "practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters."\(^7^0\) The Court therefore concluded that "[m]athematical exactness or precision is hardly a workable constitutional requirement."\(^7^1\) The Court specifically called for the states to

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\(^{6^5}\) *Id.* at 2.

\(^{6^6}\) *Reynolds v. Sims*, 377 U.S. 533, 561. The Court argued that the Framers intended that representation to the U.S. House of Representatives be based on population. The Court quoted James Madison who supported the notion of population-based representation: "[i]f the power is not immediately derived from the people, in proportion to their numbers, we may make a paper confed- eracy, but that will be all." *Wesberry*, 376 U.S. at 10.

\(^{6^7}\) 377 U.S. 533 (1964).

\(^{6^8}\) *Id.* at 561 (1964).

\(^{6^9}\) *Id.* at 534-35. The Court held that the rigid standard should be more flexible where state districts were concerned as opposed to congressional districts. The Court further stated that "[s]ince, almost invariably, there is a significantly larger number of seats in the state legislative bodies to be distributed within a State than congressional seats, it may be feasible to use political subdivision lines to a greater extent in establishing state legislative districts than in congressional districting while still affording adequate representation to all parts of the state." *Id.* at 578. Thus, the Court indicated that where districts are very small, political subdivisions may be more appropriate tools for ensuring adequate representation than strict mathematical exactness. Consequently, states should have the flexibility to consider political subdivisions for their legislative districts, which encompass only a very few political subdivisions, even though such consideration is not appropriate for congressional districts, which encompass too many political subdivisions to make subdivision cohesion meaningful for ensuring representation.

\(^{7^0}\) *Id.* at 577.

\(^{7^1}\) *Id.*
make "an honest and good faith effort" to attain equality among the districts. After the series of cases following Reynolds, the Supreme Court made it clear that the "one person, one vote" doctrine applied to both houses of a state's legislature and to local elections. However, the standard was less rigid than at the federal level.

In Kirkpatrick v. Preisler the Court required states to justify any variance between the actual size of a congressional election district and the ideal size, "no matter how small." The 1960 decennial census indicated that Missouri had a population of 4,319,813. Therefore to create absolute equality, each of the ten congressional districts should have consisted of a population of 431,981.

The reapportionment plan at issue resulted in a range of district sizes that deviated from the ideal: from one over-populated by 3.13% to one underpopulated by 2.84%. The district court found that Missouri had not relied on the most accurate census data. Further, Missouri had failed to justify the variances where the "simple device of switching some

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72. Id. Notwithstanding the foregoing, the Court refused to be swayed by the argument that the judiciary should not enter into the "political thicket" of apportionment and into "mathematical quagmires." Rejecting the argument that state apportionment presented non-justiciable, political questions, the Court held that "a denial of constitutionally protected rights demands judicial protection." Id. at 566.

73. See Maryland Committee v. Tawes, 377 U.S. 656 (1964) (Supreme Court invalidating the Maryland reapportionment plan).

74. See Avery v. Midland County, 390 U.S. 474 (1968) (local governmental units must be apportioned by equal population principle).

75. The Court's findings in Reynolds, and Maryland Committee, eventually led to the dismantling of California's reapportionment scheme, which had allowed the counties of Alpine, Inyo, and Mono (total pop. 14,294) to elect one state senator while Los Angeles (6,308,717) also elected one senator (Feeney). See Jordan v. Silver, 241 F. Supp. 576 (C.D. Cal. 1964), aff'd per curiam, 381 U.S. 415 (1965).


77. Id. at 531.

78. Id. at 529-531.

79. Id. at 528-529. The Missouri plan created the following districts:

<table>
<thead>
<tr>
<th>District No.</th>
<th>Population</th>
<th>% Variation from Ideal</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>439,746</td>
<td>+1.80</td>
</tr>
<tr>
<td>2</td>
<td>436,448</td>
<td>+1.03</td>
</tr>
<tr>
<td>3</td>
<td>436,099</td>
<td>+0.95</td>
</tr>
<tr>
<td>4</td>
<td>419,721</td>
<td>-2.84</td>
</tr>
<tr>
<td>5</td>
<td>431,178</td>
<td>-0.19</td>
</tr>
<tr>
<td>6</td>
<td>422,238</td>
<td>-2.26</td>
</tr>
<tr>
<td>7</td>
<td>436,769</td>
<td>+1.11</td>
</tr>
<tr>
<td>8</td>
<td>445,523</td>
<td>+3.13</td>
</tr>
<tr>
<td>9</td>
<td>428,223</td>
<td>-0.87</td>
</tr>
<tr>
<td>10</td>
<td>423,868</td>
<td>-1.88</td>
</tr>
</tbody>
</table>

Ideal population per district ................................................... 431,981
Average variation from ideal ..................................................... 1.6%
Ratio of largest to smallest district ........................................... 1.06 to 1
Population range between largest and smallest ................................. 25,802

Id. at 529.
counties from one district to another would have produced a plan with markedly reduced variances. . . ." The Court found that the variances were avoidable and an alternative existed.

The Supreme Court unequivocally denied Missouri’s argument that there be a fixed numerical or percentage of population variance which would create a *de minimis* standard existing in conjunction with the “as nearly as practicable” standard. The Court held that toleration of any deviation from its standard undermined the goal of maintaining equality in voting strength for each district. Furthermore, the Court could not conceive of how it could determine what the *de minimis* standard should be. Allowing such a policy would encourage legislators to reach for the *de minimis* threshold rather than precise mathematical distribution.

Since *Kirkpatrick*, the Supreme Court has established three rules for evaluating variances from an ideally populated district. For congressional districts, deviations under 10% are prima facie constitutionally valid, while deviations between 10% and 16.4% are prima facie unconstitutional. Deviations greater than 16.4% are unconstitutional and probably unjustifiable. The State must justify prima facie unconstitutional deviations based on “legitimate considerations incident to the effectuation of a rational state policy,” such as preserving the integrity of county and city lines, maintaining compact and contiguous districts, or retaining natural or historic boundaries.

The Supreme Court is not strict in approving state legislative districts or local governing board districts. However, whenever a court is

80. *Id.*
81. *Id.* at 529-531.
82. *Id.* at 530.
83. *Id.* at 531.
84. *Id.*
89. See Reynolds, 377 U.S. 533; Abate v. Mundt, 403 U.S. 182, 185-86 (1971) (approving
forced to implement a plan, the Supreme Court applies the highest standards. These plans must pass a three-part test: (1) they must avoid multi-membered districts,\textsuperscript{90} (2) they must seek to attain mathematical precision in the population of each district,\textsuperscript{91} and (3) the plan must be "free from any taint of arbitrariness or discrimination."\textsuperscript{92}

Although the Court intended the "one person, one vote" doctrine to provide equal access to individuals by requiring equally populated districts, it did not dictate to the states how they should draw district lines. Nevertheless, the Court did provide some general considerations to which States can refer in creating a plan.\textsuperscript{93} States can create districts based upon considerations of compact or contiguous territories or political subdivisions, such as cities, counties, or towns.\textsuperscript{94} The Court has cautioned, however, that considerations of historical, economic, or other group interests do not justify, in and of themselves, departure from the substantial equality standard.\textsuperscript{95}

The Court has focused consistently on the constitutional guarantee of "fair and effective" representation. Its conception of representation parallels Madison's model. The Court has found that:

\begin{quote}
[R]epresentative government is in essence self government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his [or her] State's legislative bodies. Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them. Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his [or her] state legislature. Modern and viable state government needs, and the Constitution demands, no less.\textsuperscript{96}
\end{quote}

In keeping with this view, the Court has held that states must provide "substantially equal state legislative representation" regardless of race or residence.\textsuperscript{97}

The development of the "one person, one vote" doctrine has solved the numerical problem of malapportionment. That is, legislative districts are of roughly equal population. However, racial and political gerrymandering can persist because the doctrine allows parties in power to draw...\textsuperscript{98}

\begin{footnotes}
\item[90] Chapman v. Meir, 420 U.S. 1, 26-27.
\item[91] Id. at 27.
\item[92] Connor v. Finch, 431 U.S. at 415 (quoting Roman v. Sincock, 377 U.S. 695, 710 (1964)).
\item[93] Reynolds, 377 U.S. at 578.
\item[94] Id. at 578, 580-81. See, e.g., Brown v. Thomas, 462 U.S. 835, 849 n.103.
\item[95] Reynolds, 377 U.S. at 579-80.
\item[96] Id. at 565.
\item[97] Id. at 565-566, 568.
\item[98] See, e.g., Brown v. Thomas, 462 U.S. 835, 849 n.103.
\end{footnotes}
lines through mountains, cities, streets, and buildings as long as the population in each district remains roughly equal. The Supreme Court has argued that as long as every vote carries the same weight, everyone is being accorded the same access to the political process. However, in reality, the “one person, one vote” doctrine provides racial and ethnic minorities with only nominal voting equality.

B. Voting Rights Act

In the wake of the Civil Rights Act of 1964, Congress enacted the Voting Rights Act of 1965 ("VRA") to protect minorities from any "voting qualifications or prerequisites" that would deny or abridge their right to vote. In addition, the VRA requires that states ensure that all "political processes leading to nomination or election be equally open to participation" by all citizens regardless of "race or color."99

In this section, I discuss the history of the VRA and the application of its two primary sections: Section 5 which requires the state or political subdivision100 to obtain approval, or "preclearance," of any change in its electoral process before its implementation, and Section 2, which provides a legal remedy for discriminatory voting practices.101

Since the passage of the 1965 Voting Rights Act, Congress has repeatedly amended it to strengthen its provisions. The 1970 amendments mandated a five-year ban on the use of literacy tests and other potentially discriminatory prerequisites to registration. In 1975, Congress required that states and counties continue to preclear any changes and made permanent the 1970 ban on discriminatory voting prerequisites. In addition, the 1975 amendments expanded the scope of Section 5 beyond race and color to members of language minority groups.102 In 1982, Congress extended the term of the VRA for an additional 25 years, until 2007.103

The VRA requires preclearance of all changes to the electoral system under two scenarios. The preclearance process triggers if (a) the Attorney General determines that the state has employed a "test or de-

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100. "Political subdivisions" are defined as "any county or parish, except where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting." 28 C.F.R. § 51.2 (1990). In addition, "all political subunits with a jurisdiction (e.g. counties, cities, school districts) are subject to the requirements of Section 5." 28 C.F.R. § 51.6 (1990).
102. Language minority groups are defined as "persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage." 28 C.F.R. § 51.2 (1990).
vice" which denies or abridges the right of citizens to vote and (b) less than 50 percent of the voting age citizens either registered to vote or voted in the last presidential election.\textsuperscript{104} Test or device is defined as:

any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or . . . knowledge of any particular subject, (3) possess good moral character, or (4) prove [any] qualifications by the voucher of registered voters of members of any other class.\textsuperscript{105}

The second scenario occurs when more than five percent of the voting age citizens are members of a single language minority and secondly, the state or political subdivision in which they live provides "any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, only in the English language."\textsuperscript{106}

In practice, Section 5 of the VRA serves as the proactive component of the law. States must seek preclearance approval from the Department of Justice ("DOJ") prior to enacting any change that would affect voting, districting, or election procedures. Sixteen states, in whole or in part, are subject to this preclearance procedure.\textsuperscript{107} The DOJ has specifically indicated that changes affecting voting include, but are not limited to, changes in qualifications, registration, balloting, language or literacy requisites, districting, polling places, electoral systems, terms of office, and campaigning.\textsuperscript{108}

Once the DOJ receives a Section 5 preclearance submission, it has sixty days to object.\textsuperscript{109} During this time, the public has an opportunity to comment on the proposed change.\textsuperscript{110} If no objection is forthcoming, the jurisdiction can implement the proposed change. The DOJ has processed over four hundred objections and, in general, it approves most submissions.\textsuperscript{111}

While the 1982 Amendments to the VRA extended jurisdiction until

\textsuperscript{104} 42 U.S.C.A. § 1973b(b).
\textsuperscript{105} 42 U.S.C.A. § 1973b(c).
\textsuperscript{106} 42 U.S.C.A. § 1973b(g)(3).
\textsuperscript{107} Pursuant to 28 C.F.R. § 51 (1991), those states subject to the procedure include, in alphabetical order, Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia. Pursuant to the same administrative regulation only certain counties in the following states are subject to the procedure: California (4), Florida (5), Michigan (2 townships), New Hampshire (10 towns), New York (5), North Carolina (40), and South Dakota (2). For a complete list see 28 C.F.R. § 51 (1991), Appendix A.
\textsuperscript{109} 28 C.F.R. § 51.9(a) (1991).
\textsuperscript{111} Motomura, Preclearance Under Section Five of the Voting Rights Act, 61 N.C.L. REV., 189, 191 (1983). Whether this rate of approval implies that the DOJ is not adequately protecting minority groups or that the states have not diluted their voting power is unclear.
2007, jurisdictions can request a "bail out" from supervision.\footnote{112} To "bail out," the jurisdiction must demonstrate to a federal court that it has complied with the VRA for the preceding ten years and that it has implemented procedures to guarantee participation by minority communities.\footnote{113} For example, in 1975, when Congress extended jurisdiction to all states with a language minority comprising five percent of the population, Section 5 automatically covered New Mexico, which immediately and successfully petitioned for a bailout.\footnote{114}

In \textit{Beer v. United States}, the Court provided guidance to the DOJ by devising a two-prong test for approving Section 5 submissions regarding redistricting plans.\footnote{115} The Court held that first, the submission must pass a retrogression test; that is, it must enhance or leave unchanged the position of racial or ethnic minorities. Second, the Supreme Court found that even if the proposal met the retrogression test, if the proposal unconstitutionally discriminated in any other manner, it would violate the VRA.\footnote{116} Conversely, the Supreme Court found that any enhancement in the minority position would satisfy the VRA.\footnote{117}

At least one scholar has argued that, as a practical matter, the VRA provides no more protection than the "one person, one vote" doctrine. Hiroshi Motomura posits that because the two-prong test of \textit{Beer} has not given adequate guidance to the Attorney General, the DOJ has been forced to rely on the case law regarding voter dilution and reapportionment.\footnote{118} Despite Motomura's claims, I believe the VRA does provide greater protection than the "one person, one vote" doctrine.

Under Section 2 of the VRA, a legal remedy may exist even if no violation of the "one person, one vote" rule has occurred. For example, a practice that dilutes minority voting strength may be actionable even if election districts are equal in population size. The present state of the

\footnote{112}{42 U.S.C.A. § 1973b(a) (as amended, 1982).}
\footnote{113}{42 U.S.C.A. § 1973(a) (1982).}
\footnote{114}{\textsc{National Conference of State Legislators Reapportionment Task Force, Reapportionment Law: The 1990s} 41 (Washington, D.C. October 1989) [hereinafter NCSL]. In 1982, however, a successful Section 2 challenge was waged against New Mexico. The court mandated that for the subsequent ten years (until 1994), New Mexico had to preclear all legislative reapportionment plans. \textit{Id.} at 44, n.166.}
\footnote{115}{425 U.S. 130 (1976).}
\footnote{116}{\textit{Id.} at 141. \textit{See also}, Motomura, \textit{supra} note 111, at 194.}
\footnote{117}{\textit{Beer} involved the apportionment of city council districts in New Orleans. On a seven member council, two were elected at large and five from single member districts (SMDs). In four of the SMDs, whites constituted a majority in the fifth, African Americans constituted a population majority but only fifty percent of the registered voters. The 1971 redistricting as issue provided one district with both a majority in black population and in voters. A second district contained a black population majority but maintained the white voter majority. The Supreme Court upheld this plan because it enhanced the position of African Americans by guaranteeing one district and did nothing to diminish their ability to exercise their right to participate in the process. \textit{Id.} at 134, 142.}
\footnote{118}{Motomura, \textit{supra} note 111, at 195.}
law exists despite *City of Mobile v. Bolden*, where the Court held, by a 5-4 vote, that in the absence of discriminatory intent, minorities could not challenge electoral practices even if they effectively diluted minority voting strength through racial gerrymandering. The Court rejected reliance on evidence of the impact of voting procedures on minorities and increased their burden of proof by requiring proof of intent. The result in *Bolden* was not entirely unexpected given the conservative shift in the Supreme Court. Furthermore, the Court had endeavored to avoid the issue of intent opting instead to limit remedies for racial discrimination in the electoral process to those provided by the "one person, one vote" principle which was deeply rooted in notions of individualism and majoritarian democracy.

Congress quickly responded by amending the VRA in 1982 to prohibit any practice that results in the dilution of minority voting strength, regardless of intent. As amended, the Act mandates that potential violations be evaluated using a result-oriented test. According to the accompanying Senate report:

[Senate Bill] 1992 amends Section 2 of the Voting Rights Act of 1965 to prohibit any voting practice, or procedure [that] results in discrimination. This amendment is designed to make clear that proof of discriminatory intent is not required to establish a violation of Section 2. It thereby restores the legal standards, based on the controlling Supreme Court precedents, which applied in voting discrimination claims prior to the litigation involved in *City of Mobile v. Bolden*. The Amendment also adds a new subsection to Section 2 which delineates the legal standards under the results test by codifying the leading pre-*Bolden* vote dilution case, *White v. Regester*.

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120. *Id.* at 70-74. *See also*, NCSL, *supra* note 114, at 51.
121. Justice Stewart, who replaced Justice Douglas, provided the swing vote in *Bolden*.
122. James A. Blacksher & Larry T. Menefee, *From Reynolds v. Sims to City of Mobile v. Bolden: Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 HASTINGS L.J. 1, 5, 19 (Sept. 1982). The authors argue that the Court had been progressively dissatisfied with the principles espoused in *Zimmer v. McKeither*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff’d sub nom.* *East Carroll Parish School Board v. Marshall* 424 U.S. 636 (1976); *White v. Regester*, 412 U.S. 755 (1973). The 5th Circuit had found that even if districts met population requirements, minorities could nevertheless challenge the plans if evidence showed a racially motivated gerrymander or direct dilution of voting strength. In its review, the Supreme Court upheld the 5th Circuit’s vote dilution theory. *Id.* at 25.
123. S. REP. No. 417, 97th Cong., 2nd Sess. 28 (1982) [hereinafter *SR-417*].
The pre-\textit{Bolden} standard required courts to evaluate voting dilution claims based upon the "totality of circumstances."\textsuperscript{125}

Congress supplemented the legislative history of the amendments by describing factors that would tend to prove a case alleging dilution of minority voting strength. Thus, when evaluating changes in district lines, the DOJ considers as background evidence of the extent to which minorities "have been denied an equal opportunity to participate meaningfully in the political process [and] to influence elections and the decisionmaking of elected officials in the jurisdiction."\textsuperscript{126} Similarly, the DOJ has established a complex set of criteria for evaluating the strength of potential claims.\textsuperscript{127} These factors include: (1) the history of official discrimination against minority groups to register, vote, or otherwise participate in the political process; (2) the extent of racial polarization or block voting; (3) the existence of a discriminatory slating process; (4) racial appeals in campaigns; (5) official unresponsiveness to minority needs, for example, evidence of discrimination in the areas of education, employment, and health; (6) the extent to which minorities hold office; and (7) use of election practices which enhance discrimination against minorities, such as at-large elections.\textsuperscript{128} The DOJ also considers the extent of racial polarization and the extent to which present and past discrimination has adversely affected voter registration and election participation.\textsuperscript{129}

Despite the criteria outlined by Congress and the DOJ, the Supreme Court in \textit{Thornburg v. Gingles}\textsuperscript{130} created its own test to measure discriminatory effects under the "totality of the circumstances" standard.\textsuperscript{131} The Court referred to the factors described in the legislative history but found only three crucial factors to prove voting dilution.\textsuperscript{132} According to this three-prong test, the minority group must prove that: (1) its group is "sufficiently large to constitute a majority in a single and geographically compact district,"\textsuperscript{133} (2) the minority group "is politically

\begin{thebibliography}{99}
\item \textsuperscript{126} 28 C.F.R. \textit{§} 51.58(b)(1)(2) (1990). \textit{See also} 28 C.F.R. \textit{§} 51.9 (referring specifically to redistricting).
\item \textsuperscript{127} \textit{Id.}
\item \textsuperscript{128} \textit{SR-417, supra note 123, at 29.}
\item \textsuperscript{129} 28 C.F.R. \textit{§} 51.58(b)(3), (4).
\item \textsuperscript{130} 478 U.S. 30 (1988).
\item \textsuperscript{131} \textit{Id.} at 30-31.
\item \textsuperscript{132} \textit{Id.} at 36.
\item \textsuperscript{133} \textit{Id.} at 50. As a rule of thumb, the DOJ has found that a district comprised of 65% minority group members will guarantee representation. \textit{See} Smith, \textit{supra} note 12, at 46. Similarly, it is
\end{thebibliography}
cohesive, [i.e. that a significant number of minority group members usually vote for the same candidate]134 and; (3) the white majority votes as a block usually defeating the minority candidate, absent special circumstances such as an unopposed candidate.135

Even though the VRA is a temporary measure due to expire in 2007, it does provide for rectification of past dilution of voting rights. Furthermore, Congress acted swiftly to protect minorities from the harsh intent-based test in *Bolden*. While the legislative history specifically rejects proportional representation,136 the VRA moves somewhat in that direction by examining the outcomes of the political process to assess whether minorities enjoy equal access.

IV. APPLICATION OF THE MODELS TO CALIFORNIA

A. Goals for the Latino Community

In California, "gerrymandering [is] a fact of life," said Richard Alatorre, State Assemblyman in the 55th District for Los Angeles and Chair of the Assembly Elections and Reapportionment Committee for the 1970 reapportionment.137 If Latinos were represented at the federal level in proportion to their population in California, they would hold almost three to four times as many positions as they do now; at the state level, they would occupy about twice as many offices.138 The Latino community is underrepresented at all levels of government—municipal, county, state, and federal—and in all branches of government—legisla-

also asserted that a district with 50-60% minority population will guarantee a minority representative and that 30-40% should result in general influence; see also Symposium, supra note 29, at 55 (comments by Dr. Walter Zelman, Executive Director, California Common Cause).

134. *Gingles*, at 51.

135. *Id.* Based on this test, the Supreme Court invalidated the North Carolina redistricting plan in part. *Id.* at 30.

The issue of racial polarization embodied in factors one and three requires plaintiffs to use a combination of two statistical analyses, homogeneous precinct analysis and bivariate regression analysis, to prove a "legally significant standard that racial polarization exists." *Id.* at 58. "Homogeneous precinct analysis isolates racially segregated precincts, determines how members of the predominant race voted and uses the results to estimate the voting behavior of other members of that tract throughout the challenged electoral district." Bivariate statistics demonstrates "a correlation between the race of the voter and the level of voter support for certain candidates." *Id.* at 61, 74. The correlation is used to estimate future voting patterns. The *Gingles* Court required that plaintiffs prove racial polarization for each specific district. Second, the court found that statistical data showing racial polarization over a period of time was more probative than single-election analysis. In *Gingles*, three years of longitudinal study was found sufficient to establish polarization. *Id.* at 61. See, NCSL, supra note 114, at 65, 66; see also, Richard L. Engstrom, When Blacks Run for Judge: Racial Divisions in the Candidate Preferences of Louisiana Voters, 73 JUDICATURE 87 (Aug.-Sept. 1989) (evaluating judicial election preferences in Louisiana).


137. COMMISSION REPORT, supra note 21, at 66.

138. CALIFORNIA ALMANAC, supra note 4, at 293, 630.
tive, executive and judicial. However, the battles over reapportionment in California focus primarily on the legislative rather than the executive or judicial branches. The lack of Latino leaders in government is a direct result of racial gerrymandering, discrimination, and other structural barriers created to dilute the Latino vote.

Two strategies exist for increasing the numbers of Latinos in the political arena. The fair access strategy works within the existing system, while the proportional representation strategy focuses on changing the system to accommodate the Latino community and other minority groups similarly situated.

The fair access strategy uses existing tools, such as the VRA and the "one person, one vote" doctrine to increase representation. To its credit, this strategy benefits from feasibility and timing. Using these tools allows the Latino community to press for change through acceptable venues. Otherwise, entrenched incumbents will continue to resist change at every turn.

The proportional representation strategy challenges the approach of working within the system. According to this view, even if gains could be made, representation would increase only marginally. In addition, the majoritarian form of government would continue to exclude minorities. Thus, proponents of a proportional representation strategy argue that only through radical reform will true change occur.

1. First Strategy: Fair Access

Currently, the Latino community in California is working the system to create greater access to the political process in the belief that such access will result in increased representation. This section traces the advances made, focusing in particular on the political and legal means used to effectuate change.

A fair process strategy is politically and legally sound. The Latino community is competing with others for attention during the reapportionment battle. Many interest groups do not believe that racial considerations should be given top priority. Chris Bowman of the San Francisco Republican Central Committee argued that reapportionment should result in the seemingly neutral scheme of designating "two [assembly] districts for every one senate district" regardless of other considerations.

139. For example, Don Ellison of Common Cause stated to the Senate Reapportionment Committee that "the number one factor should be geography" and therefore that San Francisco should have one senate district, not two. Hearing, supra note 1, at 27.

140. Hearing, supra note 1, at 48. Cal. Const. Art. XXI, requires that the California legislature draw forty senate districts and eighty assembly districts. The Republican party holds 30 seats of the 80 Assembly seats and only 13 of the 40 Senate seats. The California State Government
After the 1980 census, Latino organizations formed a coalition, Californios for Fair Representation (CFR), to testify during the reapportionment hearings. CFR argued that the legislature should not divide Latino communities to bolster the strength of political parties and incumbents. In addition, CFR asserted that not only should the process be fair, but that they should have a voice in creating the process used. They further argued that with increased political access and voice, Latino leaders could foster increased political participation in the community. CFR understood that the fair access strategy did not guarantee representatives. However, the Latino community continues to be vocal during the 1990 reapportionment process and to use the rhetoric of the fair access strategy.

San Francisco County Commissioner Jim Morales asked: "will those in power realign at the risk of their own power or will the rules attempt to preserve the past?" Generally, those in power will opt to preserve the past. Thus, Latinos have brought class action suits to challenge election procedures that deny them access to the political process, including successful actions against municipal and county governments. These cases are based on the "one person, one vote" doctrine and the VRA. Litigation continues to be a key tool in increasing the political participation of Latinos.

I will discuss three cases which have been based on the Madisonian republican notion of voting rights. Each of these challenged municipal reapportionment plans involves an area where a large Latino population lives. Calderon v. City of Los Angeles began by challenging the use of voter registration as a basis for reapportionment. Having succeeded in securing the guarantee of the "one person, one vote" doctrine for all local reapportionments in California, Garza v. County of Los Angeles challenged the county's use of the splitting technique to dilute the minority community. Garza resulted directly in the election of a Latino representative. Finally, Gomez v. Watsonville used the VRA specifically as
an affirmative means of increasing the ability of the Latino to gain representation. The success of this litigation has helped Latinos strengthen their opportunities for political advancement.

a. Calderon v. City of Los Angeles

The "one person, one vote" doctrine was central to a 1964 suit involving the City of Los Angeles. The City Charter required that municipal district lines be drawn based on either population or "substantially equal numbers of registered voters." In *Calderon v. City of Los Angeles*, a class of Latinos challenged the provision arguing that districts should be based on equal population, not equal voters. The State argued that even if districts contained equal population, the quantity of voters, not inhabitants, in any given election would determine the strength of an individual's vote.

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Angeles County Board of Supervisors in the new, predominantly Latino district, Seat No. 1. Ms. Molina was the first Latino elected since the 1870s and the first woman ever elected.


148. Art. II, § 6, subdivision 2(a) of the Charter of the City of Los Angeles read in pertinent part: "[b]etween the dates of July first and September fifteenth of each fourth year, commencing with the year of 1964, the Council shall . . . redistrict the City into fifteen (15) districts and such districts shall be used for all elections of councilmen. . . . Districts so formed shall not deviate in the number of voters by more than ten percent above or below one-fifteen of the total number of registered voters in the City of Los Angeles at the close of registration for the direct primary state elections held during the year in which such districts are to be established, and as nearly as practicable such districts shall be bounded by natural boundaries or street lines."

149. 4 Cal. 3d 251, 93 Cal. Rptr. 361, 481 P.2d 489.

150. Id. at 254, 93 Cal. Rptr. at 366, 481 P.2d at 492-93. The statistics from the districts in Los Angeles reveal the disproportion in population that resulted from creating districts with equal numbers of registered voters.

<table>
<thead>
<tr>
<th>DISTR. NO.</th>
<th>POPULATION</th>
<th>VOTERS</th>
<th>% VARIATION FROM IDEAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>9</td>
<td>260,503</td>
<td>74,624</td>
<td>+15.28</td>
</tr>
<tr>
<td>15</td>
<td>228,814</td>
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<tr>
<td>4</td>
<td>153,462</td>
<td>75,063</td>
<td>-9.50</td>
</tr>
</tbody>
</table>

Ideal population per district ........................................ 194,496
Average variation from ideal ........................................ 5.12
Ratio of largest to smallest district ............................. 1.7 to 1
Population range between largest and smallest .................... 107,041.

Id. at 261, 93 Cal. Rptr. at 367, 481 P.2d at 495.

151. Id. at 255, 93 Cal. Rptr. at 364-65, 481 P.2d at 492-93.
Based on the "one person, one vote" doctrine, the district court held in favor of the plaintiffs. The court found that a population standard would be "more likely to guarantee that those who cannot or did not cast a ballot [would] still have a voice in the government." In addition, the district court indicated that plans designed to dilute, minimize, or cancel the voting power of racial groups were constitutionally suspect. According to the court, any deviation from a population standard required justification. Thus, the court shifted the burden to the government to prove a compelling interest in an alternative standard. The City of Los Angeles failed to meet this burden.

b. **Garza v. County of Los Angeles**

Gerrymandering of racial minority communities is manifest most widely in California through the splitting technique. In *Garza v. County of Los Angeles*, a class of Latinos in cooperation with the United States government sought to redraw district lines for the Los Angeles County Board of Supervisors after the 1981 reapportionment. The plaintiffs argued that the original line drawing process was contaminated by racial gerrymandering. The Court found that the Board of Supervisors systematically and intentionally fragmented the Latino community to prevent political cohesion and strength. The Ninth Circuit upheld the district court's determination that the Board "engaged in intentional discrimination [in order] to keep the effects of those prior discriminatory reapportionments in place, as well as to prevent Hispanics from attaining a majority in any district in the future." The Ninth Circuit noted that the Board "acted primarily on the political instinct of self-preservation".

152. *Id.* at 258-59, 93 Cal. Rptr. at 365, 481 P.2d at 493.
153. *Id.* at 260-261, 93 Cal. Rptr. at 367, 481 P.2d at 495.
154. *Id.* at 262, 93 Cal. Rptr. at 368, 481 P.2d at 501.
155. *Id.* at 262, 93 Cal. Rptr. at 367, 481 P.2d at 486. Based upon Gomillion v. Lightfoot, 364 U.S. 339 (1960), the State argued that the plaintiff had to prove that the reapportionment plan resulted from some "oppressive action" or impermissible gerrymandering. The Court rejected the State's argument that the burden of proof was misplaced. See also, Jackson v. Pasadena City School District, 59 Cal. 2d 879, 31 Cal. Rptr. 606, 382 P.2d 878 (1963).
156. For instance, in 1958, Ernest Debs narrowly defeated Edward Roybal (a congressman) in the election for District 3 in Los Angeles County with a mere margin of 52.2%. (It should be noted that election to the Los Angeles Board of Supervisors is no minor post. Each supervisor represents more people than a member of the United States Congress and together they allocate a budget larger than most states.) Immediately thereafter, Mr. Debs gerrymandered the districts to include between 50,000-100,000 more white voters from District 4, which included parts of Beverly Hills, West Hollywood and West Los Angeles. The new boundary line diluted Mr. Roybal's strength in the Latino community, which lived in the eastern portion of the district. Mr. Debs continued increasing the number of white voters in 1963, 1965, and 1970. Then, during the 1981 reapportionment process, Democrats and Republicans alike agreed to split East Los Angeles into three separate districts, diluting the strength of the Mexican-American community. *Garza*, 918 F.2d at 766-67, n.1:(65), (67), (68), (88), (89), (109), (110), (138), and (179) (findings of district court).
157. *Id.* at 766.
[and intended] the continued fragmentation of the Hispanic core and the dilution of Hispanic voting strength. The court held that evidence of discriminatory intent eliminated the plaintiffs' burden of proving that the Latino community had the ability to constitute a majority in the district under the first prong of the Gingles test requiring geographic compactness.

The court of appeals rejected the county's position that the district court's plan was invalid as a matter of law because it included noncitizens. In its view, the district court complied with federal and state precedents requiring that districts be drawn on the basis of population. The Ninth Circuit stated that districts based solely on voter registration diluted the services minorities received from their political officials. Because non-citizens use governmental services, if they were not included in a district, the demand for services in districts with large minority populations would be substantially higher than in other districts.

c. Gomez v. Watsonville

In Gomez v. Watsonville, Section 2 of the VRA was used to challenge the at-large system for the mayoral and city council elections in Watsonville. According to the 1980 census, Watsonville was populated primarily by Latinos, but no Latino had ever been elected under the at-large system of voting. Despite these facts, the trial court found that Section 2 of the VRA, which requires that all political processes be

158. Id. at 768, n.1(181). See also, Select Senate Election and Reapportionment Committee 17-18 (Feb. 1, 1991) statement of Richard P. Fajardo, MALDEF Staff Attorney, quoting White v. Regester, 412 U.S. 755, 766 (1973), "[t]he political process leading to the nomination in an election was not equally open to participation by the group in question - that its members had less opportunity than other residents to participate in the political process and to elect legislators of their own choice."). Id. at 17. Fajardo argued that "[t]his does not mean [that] equal access to the political process ... simply mean[s] equal access to the ability to register or to go down to the polling place and cast a ballot. In order to cast a meaningful ballot a minority community must have the wherewithal to make their votes count in a meaningful manner and to the extent that a community is intentionally fragmented in order to keep them from being a political threat is in itself a violation of the Voting Rights Act." Id.


160. CAL. CONST. art. XXI, § 1(b) reads: "[t]he population of all districts of a particular type shall be reasonably equal." See also, CAL. ELEC. CODE, §§ 30010, 30020 requiring that Assembly and Senate "districts be reasonably equal" respectively. §§ 35000 and 35101 require that county supervisor and city districts "shall be as nearly equal in population as may be."

161. Gomez, 863 F.2d 1407. The city consisted of six members plus one mayor. Three of the city council seats were up for election every odd-numbered year. The three candidates with the highest number of votes won the election. Voters could vote for three candidates.

162. Of a total population of 23,543, "Hispanics" consisted of 48.9 percent; Anglos of 45.2 percent; Asian and Pacific Islanders, 5.4 percent; and Blacks 0.5 percent. However of the 48.9 percent Hispanics, only 37.0 percent of those were citizens. Id. at 1409.

163. Between 1971 and 1985, eight Latinos ran and lost city council races. In 1979, one Latino
"equally open to participation," was not violated. 164

Based upon the Gingles test, the appellate court reversed. First, it found that Latinos could constitute a majority in two districts if the electoral system created one district for each of the six city council members. 165 Second, the court held that ninety-five percent of Latino voters supported Latino candidates and therefore that the community was politically cohesive. 166 Third, the court found that the evidence proved racial polarization: only thirteen percent of voters in predominantly Anglo precincts voted for Latinos, and no Latino had ever held council seats. 167

d. Results

The success of litigation based on the "one person, one vote" doctrine and the VRA by no means ensures changes in actual representation. Since the 1970s, when the Latino community began legal efforts to combat the most obvious uses of racial gerrymandering, the proportion of Latinos in political office has increased minimally.

Some argue that low numbers of Latinos in the legislature result not from line drawing but from poor voter turnout and lack of campaign funds. The poor voter turnout argument is unpersuasive for two reasons. Courts have found, and common sense emphasizes, that low voter turnout results directly from the historical and systematic dilution of community voting. 168 Second, an overwhelming majority of local political subdivisions in California elect representatives pursuant to an at-large voting system similar to that in Watsonville. 169 Since Latinos never constitute a majority, they can never elect their candidates to office. The opportunity for racial minorities to elect members to city councils, school boards, and other political subunits diminishes, and these systematic bar-

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164. Id. at 1411, 1417-1419.
165. The trial court based its decision on the fact that sixty percent of the Latinos would still live in other districts. The appellate court found that factor irrelevant. Id. at 1414, citing Campos v. City of Baytown, Texas, 849 F.2d 1240, 1244 (5th Cir. 1988).
166. The "issue is essentially whether the minority group has expressed clear political preferences that are distinct from those of the majority." Gomez 863 F.2d at 1415. The trial court should have evaluated "actual voting patterns rather than speculating as to the reasons why many Hispanics were apathetic." Id. at 1416.
167. Id. at 1417.
169. Only seventeen of 291 California cities with a population of over 10,000 elect by single-member districts. CALIFORNIA ALMANAC, supra note 4, at 11-16; see also Senate March 1st Hearing, supra note 22, at 4 (statement of Denise M. Hulett).
riers create a disincentive to participate. Once these barriers are eliminated, advocates for Latino communities argue, registration and voter rates will increase.

Lack of campaign funds creates a disincentive for Latinos to run for office. Stated bluntly by San Francisco Supervisor Jim Gonzalez, "many say that economic power and political power are related, they're identical . . . [Politics] is a game for the rich." However, lack of campaign funds is not an issue until a candidate believes that he or she has a viable chance to win in a particular district. If supporters of that candidate are split among districts, then the likelihood of a victory drops significantly.

Even if the fair access strategy is entirely successful, the gains available to the Latino community will be incremental. Although Latinos constitute over a quarter of the population, they are widely scattered throughout the state. As a consequence, even if the legislature were to make increasing the number of Latino representatives in the legislature its top priority during the reapportionment process, it could only create one or two more safe seats in the Assembly. Given its low voter registration and turn-out rates, the Latino community must densely populate an area in order to ensure both a majority of Latino population and voters in the district. With these additional seats, Latinos would still only hold approximately eleven percent of the seats.

This phenomenon can be attributed directly to the fact that Madisonian republicanism requires geographic cohesiveness: the only groups accommodated under Madison’s model were the people living in states, which are geographic constituencies. The fact that the Latino community is not concentrated in certain areas dilutes its strength in a majoritarian system of government. Given

170. Senate March 1st Hearing, supra note 22 at 3 (statement of Denise M. Hulett).
171. For example, in Salinas and Watsonville, California, forcing a change from at-large voting to single-member district voting resulted in a tripling of Latino registration rates. In Watsonville, registration “skyrocketed” upon the filing of the lawsuit. Id.
172. Hearing, supra note 1. Supervisor Gonzalez argued that it costs $300,000 to wage a campaign for supervisor in San Francisco, $250,000 for an incumbent; $400,000 to run for the Assembly; and $1 million for the state Senate seat. Id.
173. For example, the gains made during the 1980 reapportionment were incremental. The State Senate Committee on Elections and Reapportionment, having decided that with three senate seats the Latino community was adequately represented, consciously decided to make “subtle” changes in rural counties. In the Monterey area—16th district (Sen. Walter Stiern), the Senate increased the minority population to 35 percent: 22.1% Latino, 10.9% black, and 2.2% Asian. Due south, in the 17th district, the Senate transferred Merced County and San Luis Obispo to increase the minority population to 31.2 percent: 22.4% Latino, 5.0% Asian, and 3.8% black. See Symposium, supra note 29, at 51. Latino presence in the legislature did not increase, but incremental progress was furthered by increasing the concentration of Latinos in particular districts.
174. Assembly Committee on Elections, Hearings (March 19, 1991) (statement of Bruce Cain, Professor of Political Science, Associate Director of the Institute of Governmental Studies, Univ. of Calif., Berkeley). Some voting rights experts believe the number could be as high as four representatives. Interview with Denise Huelett, Voting Rights Attorney, Mexican American Legal Defense and Education Fund “MALDEF” (March 19, 1991).
these limitations, the Latino community has made relatively significant gains in recent years.

2. Second Strategy: Minority Representation

We need not suppose that when power resides in an exclusive class, that class will knowingly and deliberately sacrifice the other classes to themselves; it suffices that, in absence of its natural defenders, the interest of the excluded is always in danger of being overlooked; and, when looked at, is seen with very different eyes from those of the persons whom it directly concerns.—J.S. Mill

Is process enough to ensure that the voices of the Latino community will be heard? Proponents of proportional representation say no. Even though this strategy has failed to gain support in the United States, the Madisonian republican model's failure to give minorities a voice warrants consideration of proportional representation as an alternative. This approach must be based on a political choice that pluralism and diversity within governing bodies are valuable.

This section discusses proportional representation's benefits for the Latino community and the problems associated with its implementation. The primary benefit in proportional representation is that minority constituencies are accorded a voice. Modern advocates describe an apportionment scheme that allows racial groups to control election results in a percentage of districts roughly comparable to their percentage of the population. Thus, in California, proportionalists would lobby the Democratic Party to apportion districts so the number of Latino representatives in the state legislature would be closer to twenty-five percent, rather than the eleven percent available under the fair process strategy.

The need for greater participation from the Latino community in the current, homogeneous body of California government has been acknowledged by those outside the Latino community. The California State Advisory Committee ("Committee") to the United States Commission on Civil Rights ("Commission") has called for a strategy that goes beyond formal access. The Committee conducted public meetings during the reapportionment debate after the 1970 census concerning the "political participation of Mexican-Americans." The Committee found at that time only 1.98% of all appointed and elected officials were Latinos, a low figure absent discrimination and gerrymandering.

In its report to the Commission, the Committee recommended that the governor and legislature take affirmative steps to increase the per-

175. DENNIS F. THOMPSON, JOHN STUART MILL AND REPRESENTATIVE GOVERNMENT 18 (1976).
176. COMMISSION REPORT, supra note 21, at 1.
177. Id. at 45.
percentage of Latinos among California's appointed and elected officials.\textsuperscript{178} The Committee did not propose specific steps. However, at least with reference to political appointments, the only feasible solution is for the governor or others in the executive branch to appoint more Latinos.

While Anglo representatives to the legislature argue that they are sensitive to the needs of the particular ethnic communities they represent, the rhetoric sounds hollow given the present state of affairs. A representative from the Latino community has stronger associational ties to the community and is better able to communicate with the constituency and the legislative body than a non-Latino representative.\textsuperscript{179} A Latino representative is able to perceive accurately the interests and the attitudes of the community. A proportional representation system gives minority group members the power to effectuate change in their own communities. Even if the community has identifiable interests which any representative could easily advocate, proportionalists conceive of representation in a manner different than the present norm. Because of cultural similarities, constituents will have a greater affinity with a Latino representative and as a consequence be empowered.\textsuperscript{180} Representatives from the community can serve as role models and demonstrate that governmental power can be used to create opportunity.

The present majoritarian government denies minorities a voice in their government and results in voter apathy in minority communities. Until that voice is revived, the electors will continue to be the rich, not the poor; the learned, not the common; the haughty heirs, not the humble; the powerful, not the people.

Implementing a proportional representation strategy in the legislature requires vast changes in our current political system. Representation would no longer focus on geographical constituencies but would define groups on the basis of other cohesive factors. Two major hurdles exist to implementing such a scheme. First, proportionalists must define the primary groups to be accorded representation. Second, proportionalists must determine how this model can be implemented in spite of the current two-party system.

Advocates of this scheme argue that overcoming the disparities caused when only majority candidates are elected through a republican system of voting—to the exclusion of minority candidates—justifies wrestling with the problem of group identification.\textsuperscript{181} In the short run, implementation of a proportional representation model is difficult be-

\begin{itemize}
\item \textsuperscript{178} Id. at 18.
\item \textsuperscript{180} Young, supra note 45, at 43 (discussing group identity).
\item \textsuperscript{181} Sanders, supra note 52.
\end{itemize}
cause we need to determine the basis for grouping constituents: ethnicity, sexual orientation, economic status, religious, ideological, or political affiliation, to name a few. In the beginning, implementation of this strategy would be limited to those groups that historically have been denied access to the political arena. Since this strategy for change is not constitutionally mandated, reforms directed at groups already protected under the VRA would be more acceptable because marginal changes have already been made in that arena.

Since a proportional representation model is not bound to territorial representation but encourages the proliferation of parties, the long-term prospects for successful implementation are better. With time, more political parties will form as different combinations of groups unite and thereby dismantle the two-party system. People could choose which party most closely represents their weighted group allegiances, and then power could be allocated according to these political choices.

Implementation of a proportional model in government necessarily limits the power of the incumbents in order to make room for newcomers. Consequently, an obstacle to its implementation arises from those vested political interests. In the words of Frederick Douglass, "[p]ower concedes nothing without a struggle. It never did, and it never will." Unfortunately, minorities lack the right to effectuate radical change outside the power structure as it currently exists; thus, it will be difficult to redistribute power from incumbents to minority officeholders.

The California Supreme Court stated in *Calderon* that: "[c]rucial though voting is as a method of participation in representative government... access to elected officials is also an important means of democratic expression—and one that is not limited to those who cast ballots." The problem with implementation of the access strategies is that political participation in the process may not overcome the advantage of incumbency. During the 1970 apportionment battle, when asked about the tradeoff between greater Latino representation and the vested interest of incumbents, Senator Jesse Unruh, Speaker of the Assembly for most of the 1960s, stated bluntly: "Certainly [ignoring the interests of

182. The Supreme Court has specifically rejected the argument that minorities have a constitutionally protected right to elect representatives of their own racial or ethnic background. See *White v. Regester*, 412 U.S. 755, 765-66 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 149-50 (1971); Motomura, *supra* note 106, at 196, n.41. Although, the Supreme Court did not prohibit a state legislature from considering race and proportionality when redistricting.


186. 4 Cal. 3d at 259, 93 Cal. Rptr. at 366, 481 P.2d at 494.
incumbents] would be better for the Mexican-American population, but that just isn't going to happen. It just isn't going to happen." As opposed to the fair access strategy whose reforms are largely incremental, a strategy which emphasizes proportional representation might serve the community better.

The Latino community in California is widely dispersed. The fair access strategy is not satisfying because Latino communities may not gain representation if they cannot show geographic cohesion. Ultimately, in the annals of history, political scientists will evaluate whether Latinos were able to integrate and participate effectively in the political process by determining whether they achieved representation proportional to their numbers. They will not undertake the statistical analysis necessary to determine whether the Latino community successfully held as many seats in the legislature as the geographic cohesion prong would allow.

CONCLUSION AND POTENTIAL REFORM

Since the 1970s, Latinos have made incremental progress in increasing representation. In 1971, only three of approximately 160 state and federal elected officials were Latino (1.9 percent). In 1981, of the 163 state and federal elected officials, Latinos represented one of the 41 congressional representatives (2.4%), three of the forty state senators (7.5%), and four of the eighty assembly members (5%).

After the 1980 census, the percentage of Latinos in California increased from 19% to 23.7%. The most recent census indicates that Latinos have increased to 25.6% and it is highly likely that these figures represent a severe undercount of the community. Today, the Latinos in office include three in the House of Representatives (6.67%), three in the state senate (7.5%), and four (5.0%) in the assembly. The number of seats held by Latinos remains significantly lower than the actual percentage of Latinos in California.

Political realities preclude implementing a proportional scheme of representation similar to European models. The VRA as of 1982 pro-

188. Id. at 4.
189. CALIFORNIA ALMANAC, supra note 4 at 2-3 (J.S. Fay 5th ed. 1990) referencing the State Census Data Center and the State Population Research Unit.
190. The State of California among others has sued the Census Bureau arguing that the census failed to account for a substantial number of minorities, especially the non-English speaking, recent immigrants, and the poor. California asserts that the undercount resulted in the potential loss of a congressional seat and federal funds. City of New York, et al. v. Dept of Commerce, 88 Civ. 3474 (E.D.N.Y. 1990).
191. CALIFORNIA ALMANAC, supra note 4, at 293, 630.
tects against racial gerrymandering in its most egregious forms, but communities must organize and stand vigil to guarantee that its principles are implemented. However, there are reforms available to strengthen the ability of racial minorities to hold political office.

First, based upon the fair access strategy, reforms can have the most significant impact at the local levels. States should require all election for multi-membered boards or councils to be from single-member districts. This allows small concentrations of minorities to elect representatives to boards and councils concerned with the basic implementation of fundamental services and policies; such as schools, water, and sanitation. Furthermore, single-member district voting decreases the burden of campaign finances because the constituency canvassed is smaller. Once minorities can attain power at the local level, advancing to the state and national political arenas will be more feasible because they will have the experience and constituency base to be elected.

Second, if states will not require single-member districts at the local level, then Congress should lessen the burden of proof for Section 2 claims of voter dilution. The statistical analysis required to show past discriminatory election processes are at times impossible to complete. Plaintiffs should be allowed to aggregate the discriminatory impact on all minorities in a given community, rather than separate the impact for each class of minorities.192

Third, to account for their interests, minority groups should encourage the formation of new political parties or lobby for greater cohesion within the existing party structure. Recognizing the American tradition of a two-party system, Lloyd N. Cutler suggests an additional congressional membership-at-large to supplement the present Congress.193 Seats could be awarded in a quasi-proportional scheme. When voters make a choice for congressional representatives and for president, they will be given a "second ballot" with which they may choose their preference for the controlling party in the House of Representatives. The parties would receive additional seats based upon the proportion of votes received. These seats would be filled from a party list of candidates submitted prior to the election. This reform has the advantage of not appearing to be a "proportional" scheme because it provides additional

192. Some district courts have adopted this approach; however it is not uniformly accepted. See, e.g., League of United Latin American Citizens v. Midland Independent School District, 812 F.2d 1494, 1500 (5th Cir. 1987), vacated and aff'd on other grounds, 829 F.2d 546 (1987).

seats and focuses on enhancing party cohesion.\textsuperscript{194}

Finally, based on the notions embodied in the proportional representation scheme, the executive should make a more concerted effort to appoint minorities to governmental positions in relative proportion to their numbers. Since the legislature is absorbed in preserving its vested interests, the executive is an important alternative means of providing minorities with greater representation. Admittedly, the executive faces political pressures. On the other hand, a decision of the executive to embrace pluralism and actively seek qualified Latinos and other minorities to appoint does not conflict directly with the executive’s own tenure. Whereas, reapportionment directly affects the limited number of legislative seats available; the more Latinos and other minorities gain these seats, the more current incumbents are losing them.

As we debate these theoretical reforms, the fight to achieve greater political voice continues behind closed doors, in courtrooms, and in legislative hearings. As individuals, Latinos can feel secure that a Madisonian model of representative government protects their right to have their votes carry the same weight as all other individuals. The Latino community as a whole, however, can only be assured that its interests are represented to the extent that officeholders sympathetic and responsive to their concerns win office. Regardless of whether the fair access or proportional representation strategy is more appealing to the community, what is most important is that the community diligently continues to fight for political equality. Political power will not be given to the Latino community. The community must stay active and fight to reclaim its right not just to be a participant in the political arena, but to be an influential player.

After this article was completed, the 1990 California reapportionment began in earnest and MALDEF, on behalf of the Latino community, played a significant role in the development of the proposed maps. Ultimately in November, 1991, an independent commission developed a map which was approved by the California Supreme Court on January 26, 1992, despite vigorous opposition from legislators and minority advocates that the plan ran afoul of the VRA and the “one person, one vote” doctrine. On March 4, 1992, a federal court refused to stay execution of the plan thereby deferring to the state’s judgment. Although Latinos made gains in Southern California where the new districts did not split their communities, the same did not occur in the San Joaquin Valley area. The struggle continues. . . .

\textsuperscript{194} Id.