Future of Voting Rights Litigation: Elections at the Legislative Level

Berkeley La Raza Law Journal

Follow this and additional works at: http://scholarship.law.berkeley.edu/blrlj

Recommended Citation
Available at: http://scholarship.law.berkeley.edu/blrlj/vol6/iss1/4

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z388Q0R

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley La Raza Law Journal by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
Panel 2: Future of Voting Rights
Litigation: Elections at the
Legislative Level

Comments by Richard P. Fajardo†

It is interesting to be speaking about the Voting Rights Act as a
candidate, rather than as a lawyer.

Let me begin by setting a context. I want to describe the recent
litigation against the County of Los Angeles, but I want to set the litiga-
tion in the context of how the Voting Rights Act,¹ and subsequent case
law developed, and what work remains for the rest of the decade. My
perspective is one, not only of a lawyer who has litigated these cases, but
as a potential legislator who must look to the big picture of how to pro-
tect the rights of Hispanics and other minorities, to ensure that their
votes are meaningful.

I know many of you are familiar with how voting rights law has
developed, and how far we have come. However, in order to set a com-
mon point of reference, let me provide some background.

The Voting Rights Act was first enacted in 1965, primarily to pro-
tect the voting rights of African Americans across the country, but espe-
cially in the South. In 1975 the Voting Rights Act was amended to
protect four language minorities: Spanish-speaking minorities, Asian/
Pacific Islanders, Native Americans, and Alaskan natives.

In 1980 the Supreme Court, in City of Mobile v. Bolden,² held that in
order to prove a violation of the Voting Rights Act, a plaintiff was re-
quired to show that a disputed practice was “conceived or operated as [a]
purposeful devic[e] to further racial . . . discrimination.”³

In 1982 Congress amended the Voting Rights Act to remove the
Bolden intentional discrimination of proof requirement. The language of

† Partner at Litt, Marquez & Fajardo. Mr. Fajardo was formally an attorney with the Mexi-
can-American Legal Defense and Educational Fund (MALDEF) where he was very involved in
redistricting litigation in the City and County of Los Angeles. He was lead counsel in the historic
voting rights lawsuit, Garza v. Los Angeles County Board of Supervisors, which found that the Los
Angeles Board had intentionally discriminated against the Latino community when it redrew its
1981 district lines. This lawsuit resulted in the first election of a Latina to the L.A. County Board
County of Supervisors. Mr. Fajardo received his Juris Doctorate from UCLA School of Law.

3. Id. at 66.
the Voting Rights Act was amended to prohibit any practice or procedure which results in the denial of the right to vote based on race, color or membership in these language minorities. Moreover, Congress provided that a violation of Section 2 was established if, based on the "totality of the circumstances," a plaintiff demonstrated that the political process was not equally open to a protected class of citizens, in that its members have less opportunity to participate in that process. The Senate Judiciary Committee report lists seven factors, known as the "Senate factors," which could be considered in determining whether there is a violation. The Senate Report observed that the list of factors was neither comprehensive nor exclusive, and that "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." Thus, the Senate factors were not intended as a check list, but rather as a list of factors the courts could consider in evaluating Section 2 violations. The courts were to examine the case as a whole and determine whether the minority community has been excluded from not only the political process, but also from the socio-economic fabric of the community.

This Congressional amendment to Section 2, requiring only proof of a discriminatory impact of a voting practice or procedure, rather than proof of intentional discrimination, was affirmed by the Supreme Court in *Thornburg v. Gingles.*

Indeed, *Gingles* is a very interesting case. Many persons, including many in the civil rights community, see *Gingles* as a watershed case, since it affirmed the principle that a plaintiff need not prove intentional discrimination to prove a violation of the Voting Rights Act. *Gingles*

---

4. Section 2 of the Voting Rights Act, as amended, provides:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guaranties set forth in section 1973b(2) of this title [protecting language minorities], as provided by subsection (b) of this section. (Emphasis added).

5. 42 U.S.C. § 1973 (b). The full language is as follows:

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population. (Emphasis in original).


7. Id. at 27.

8. Id. at 29.

went on to set three criteria necessary for a plaintiff to demonstrate a *prima facie* violation of the Voting Rights Act. These criteria, as I will demonstrate below, shifted the focus of proof from a “totality of circumstance” proof of voting rights violations to a statistical gauntlet necessary to demonstrate a voting rights violation.

Under *Gingles*, a plaintiff must establish three factors to demonstrate a *prima facie* case of a Section 2 violation: a plaintiff must establish that a minority community is compact, is politically cohesive, and that the white community votes as a block so as to defeat the choices of the minority community.

The first criterion, compactness, requires that a minority community be “sufficiently large and geographically compact to constitute a majority in a single member district.” Recent cases have refined this compactness criterion to require a plaintiff to demonstrate that the affected minority group is at least 50% of the citizen voting age population in a potential single member district. There are some exceptions. I will not get into the exceptions but, in essence, that is the guiding principle.

The second factor is political cohesiveness, i.e., a minority community must demonstrate that the community is politically cohesive, or that the community votes in such a way that the community can be said to have a distinct choice. This factor is best illustrated by *Gomez v. Watsonville*. The district court found that 95% of the Hispanic voters in heavily Hispanic precincts supported Hispanic candidates and that Hispanic voters ranked Hispanic candidates first or tied for first. Thus, the Hispanic community in Watsonville voiced a clear preference for Hispanic candidates. Moreover, the Supreme Court noted that “if the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests.”

The third factor is the mirror image of minority political cohesiveness: “the minority [community] must be able to demonstrate that the white majority votes sufficiently as a block to enable it . . . usually to defeat the minority's preferred candidate.” Again, using *Gomez* to illustrate the point, while Anglo voters made up 60% of all voting age residents, the court found that only 13% of voters in predominately An-

---

10. *Id.* at 51.
13. 863 F.2d 1407 (9th Cir. 1988).
14. *Id.* at 1414.
15. 478 U.S. at 51.
16. *Id.* at 51.
COMMENTS BY RICHARD P. FAJARDO

Anglo precincts voted for Hispanic candidates (as opposed to 95% of Hispanic voters in heavily Hispanic precincts). Moreover, Anglo voters ranked Hispanic candidates last or nearly last among their choices.17 Thus, the white community in Watsonville never supported any candidates the Hispanic community supported.

A minority group that is politically cohesive within a white voting bloc can have its candidate defeated. It is clear that while minorities have distinct preferences, whites as a matter of pattern and practice, will vote to defeat those choices. As the Court stated, "[w]e observe that the usual predictability of the majority’s success distinguishes structural dilution from the mere loss of an occasional election."18

The new problem Gingles presents is that in voting litigation, these three prima facie factors have become major statistical battles, rather than a search, as originally intended, for the totality of circumstances.

The Garza v. Los Angeles County case was such a statistical battle.19 It was a battle to search for the numbers: how many citizens were there in Los Angeles County; how many Hispanics were there; how many Hispanics were citizens of voting age, registered voters, frequent or regular voters; could statistical regression analysis demonstrate the voting patterns of Hispanics, whites, or African Americans, Asians or others. Thus, I would estimate that 50 to 60% of the four-month trial was focused on these statistical questions—questions not only about what the numbers were, but what was the appropriate methodology to determine these numbers.

Gingles appears to focus attention away from the totality of the circumstances analysis. Instead, it focuses more attention on the statistical factors presented in a case, especially the number of persons, citizens and other demographic factors. This focus on numbers has a significant impact on how these cases are litigated. It is only after plaintiffs have established their prima facie case that the courts will examine the other Senate factors. And while plaintiffs were allowed to present facts on the Gingles issues and Senate factors, in the Garza case in chief, as well as in other cases in which I have been involved, plaintiffs still had to spend an inordinate amount of trial time focusing on statistical issues.

As mentioned above, Gingles established the method for proving a discriminatory impact case. Romero v. City of Pomona held that to show a violation of the Voting Rights Act, a plaintiff must establish that a district can be created in which Hispanics are at least 50 percent of the citizens voting age population (CVAP). The district court in Garza modified this rule slightly, although the Court of Appeals did not address this

17. 863 F.2d at 1417.
18. Gingles, 478 U.S. at 51.
19. 918 F.2d 763 (9th Cir. 1990), cert. denied, 111 S. Ct. 681 (1991).
point in its opinion. *Garza* held that the compactness factor is established, even if Hispanics do not make up 50% of a district’s CVAP, if the minority community can establish it has “the potential to elect candidates of their choice.”

In *Garza*, the Court found that Hispanics in Los Angeles County could not form a district in which they were 50% of the citizen voting age population. However, a Hispanic district could be formed in which Hispanics were the largest ethnic group. In 1980, in such a district, Hispanics would make up 46% of the citizens; whites, the next largest ethnic group, would make up 41%, with 13% African Americans and Asians. In addition, plaintiffs established that by examining elections in the potential Hispanic district, Hispanics could elect candidates of their choice with a 46 percent CVAP. Thus, Hispanics did have the potential to elect candidates of their choice even though they did not have a 50 percent CVAP.

The Court in *Garza* also examined the growth of the Hispanic population in the potential Hispanic district and took its findings into account. The population patterns described above were possible only if such a potential district was created in 1980. In 1988, when the case was filed, and in 1990, when the case went to trial, plaintiffs were able to demonstrate to the satisfaction of the court that the Hispanic citizen population had increased to well over the threshold 50 percent CVAP.

However, the Ninth Circuit Court of Appeals did not rely on either theory of “potential to elect” or “Hispanic population growth” as the basis for its decision. Instead, the Ninth Circuit focused on the intentional discrimination which was proven to exist in the development of the Los Angeles County redistricting plans.

This focus on intentional discrimination is interesting because, in a sense, we have come full circle. Whereas in *Mobile v. Bolden*, the intent principle was used to exclude cases, *Garza* basically refined how findings of intentional discrimination operate in light of the amendments to the Voting Rights Act. First and foremost, *Garza* held that where there is a finding of intentional discrimination, there is no need to prove the compactness threshold factor that a minority community is at least 50% of the CVAP.

Los Angeles County, of course, continued to argue that they did not intentionally discriminate against Hispanics. The county supervisors argued that they were locked in a political battle between Democrats and Republicans, between liberals and conservatives. The Republicans argued that they wanted to create a Republican Hispanic district, but Hispanics do not vote Republican, so they could not do it. The 1980 Redistricting Plan, the supervisors argued, was simply a compromise on how to create lines. The ideological factions could not resolve their con-
flict, so the compromise was to draw lines that were essentially the 1970 district lines with minor modifications.

The Court in Garza did not buy this argument for two reasons. First, plaintiffs demonstrated that the district boundary lines established before 1980 were themselves a product of a history of discrimination starting with the gerrymandering of Hispanics in 1958 after then Los Angeles City Council Member Edward Roybal was defeated in the race for supervisor. Second, the 1980 process demonstrated that the Supervisors sought to protect their incumbency on the Board of Supervisors by splitting the Hispanic community and preventing the potential block of voters from threatening any existing incumbents. Garza thus held that while the protection of incumbents is a legitimate goal, it is not a legitimate goal under the Voting Rights Act to protect incumbents at the expense of a minority community.

So what happens now? The work is certainly not over. In fact, in a lot of ways we are just starting. There has been a lot of focus on state redistricting issues: the redistricting of the State Assembly, the Senate, and the Congress. Organizations like MALDEF and the coalition built around MALDEF's efforts have been working on these issues.

In addition, a number of Asian and African-American communities are working around these state redistricting efforts. Much attention will also be focused on the census issues. Will these adjusted figures be released? If they are, will they have to be fine-tuned?

Much attention is also being focused on the redistricting of small communities. This includes the decennial redistricting of those cities that currently have district lines which are a product of litigation, e.g., the cities of Watsonville, Los Angeles, San Diego. All the counties, including Los Angeles County, have gone or will go through redistricting.

Finally, a number of groups are starting to focus on challenging "at large" election systems. Currently, most of the cities, school boards, water districts and other boards in California use "at large" elections to elect their elected officials. In many instances those communities have significant Hispanic populations, without any Hispanic representation on their boards. I believe there will be significant litigation through the 1990s challenging the use of these "at large" election systems. Such challenges will allow minority communities to have a big impact on the legislative process.

Interestingly enough, there is litigation springing up around the reverse situation. The City of Stockton is a good example of a situation in which there were at large elections that went by referendum to single member districts. Single member districts did create more minority legislators. There was an initiative process to repeal the at-large elections, in this case, by the white community. Litigation surrounded the retro-
gressive effects because of the idea that the Latino community and other minority communities would be harmed by going back to some modification of at-large elections.

Finally, there is the potential for new legislation to deal with many of these issues. Last year, Assemblyman Peter Chacon (D-San Diego) introduced legislation to require city councils and school boards over a certain size to conduct elections using single member districts. The bill was passed by the legislature, but was vetoed by then-Governor Dukmejian. I am sure this bill will resurface, so perhaps the outcome will be different. Nevertheless, it will have ramifications on the political structure.

Let me close by discussing the potential impact of these issues, not only in California, but the country. Redistricting has significantly increased the level of political participation of minority communities, including Hispanics. The increased level of community activity and participation in Los Angeles County is a direct result of the redistricting of Los Angeles County which gave the Latino community a greater opportunity to participate in the political process. A by-product of the current redistricting effort of Los Angeles County is that Latinos are running for six assembly seats. In each district, there is an average of one to three potential candidates.

In Southeast Los Angeles County, which includes cities like Maywood, Bell Gardens, and Cudahay, Hispanics have a potential Hispanic assembly seat, a state senate seat, and a congressional seat. The redistricting of these areas has stirred much political excitement. The community has also begun to organize itself: candidates at all levels have begun voter registration drives; candidates have Get Out The Vote programs; and those candidates have to talk about issues important to the Hispanic community.

There is a lot of political activity revolving around these districts, and the level of participation is significantly higher than it was this time ten years ago.

Thank you.
Minority voting rights has become perhaps the most debatable, yet least debated, of all affirmative action issues, I argued in *Whose Votes Count?*. The 1965 Voting Rights Act was passed to enfranchise southern blacks. But in 1992, a voting rights violation is a districting plan that contains nine majority black districts when a tenth could be drawn. Black and Hispanic candidates are now entitled to maximum protection from white competition—a maximum number of "safe" minority districts in which to run. A right to proportionate electoral results—minority officeholding in proportion to the minority population—has replaced equal electoral opportunity as the principle that informs voting rights enforcement. Access to the ballot without respect to race was a morally clear-cut issue in 1965, but the present commitment to maximizing minority officeholding through racial gerrymandering is not. In fact, that commitment not only violates basic principles upon which American democratic government rests, but often deprives minority voters of the electoral influence they might otherwise have. In two districts that are each 35 percent black, African American voters will often be the decisive swing vote. Concentrate that electorate in one 70 percent black district, however, and they will have lost the chance to have two representatives beholden to their support. More representation will have been exchanged for one sure minority seat. Racial gerrymandering in the service of proportionate ethnic and racial representation is thus neither in the public interest nor necessarily in the interest of minority voters.

As this perspective suggests, I am critical of the Voting Rights Act, but not of the original 1965 legislation. My concern is with what has happened to the statute in subsequent years—with its odd and unanticipated evolution.

That point needs to be stressed. The questions I raise are only about a radically transformed act—one that bears little relation to the original statute. The distinguished voting rights attorney, Frank Parker, once asked how the liberal Twentieth Century Fund (which supported me) and the Harvard University Press (my publisher) could have signed on to such a "conservative" book as *Whose Votes Count?*. In fact, no one

† Abigail M. Thernstrom, an adjunct professor at Boston University's School of Education, is the author of *Whose Votes Count? Affirmative Action and Minority Voting Rights*, which received, among other accolades, the 1987 Anisfield-Wolf Book Award for best book on race and ethnicity, nonfiction category. Professor Thernstrom is on the Board of Directors of the Landmark Legal Foundation and is a member of the Aspen Institute's Domestic Strategy Group, headed by Senator Bill Bradley and William Bennett. Professor Thernstrom received her B.A. from Barnard College, and her M.A. and Ph.D. from Harvard University.
either at the Twentieth Century Fund or at Harvard University Press thought of the book as in any way conservative; they saw it as a ringing defense of integrated politics and an integrated America—the original idea behind the act. That's still their view—and mine as well.

Here, stripped down to their crude, bare essentials, are some of the arguments I made, and continue to make:

In 1965 the Voting Rights Act was indisputably about basic enfranchisement: making good on the promise of the Fifteenth Amendment ninety-five years late. Every witness at the original congressional hearings on the proposed statute made that clear. The Assistant Attorney General for Civil Rights, John Dunne, likes to say that the Voting Rights Act was always about ensuring a fair share of power to minority voters. But that puts the point misleadingly. The act guaranteed an opportunity to enjoy power—that same opportunity that all citizens have in a democratic political system. A “fair share” of power—whatever that means—was not the promise. In fact, in a democratic system, power is properly shared when its distribution is the result of participation by citizens who exercise their right to become politically engaged. It was that right to choose to become politically engaged—that basic right denied southern blacks—that the 1965 act ensured.

One need not even look at the 1965 hearings to grasp the statute’s original purpose; an elementary sense of history will do. Mr. Dunne is fond of quoting President Lyndon B. Johnson, who presided over the passage of the act. “Discrimination in voting” LBJ said, “is a wrong that no American can justify in his heart.” And in 1965 every American understood his unmistakable message. Discrimination meant racist registrars, racist literacy tests, and, if necessary, violence used to keep southern blacks from the polls. That was the shameful wrong that no decent citizen could justify. Subsequent enforcement of the Act has blurred the distinction between racist registrars and districting plans that fail to provide black candidates with maximum protection from white competition. But districting schemes that force both black and white office-seekers to form interracial coalitions are not the same as those racist arrangements that stripped black voters of all potential political influence in much of the pre-1965 South. It was the latter that the Voting Rights Act was designed to attack.

If the aim of the original act was to pull southern blacks into the political process, it succeeded beyond all expectations by 1970. Who can question that story? Time and time again, black politicians like Andrew Young have expressed marvel at how quickly they moved from outside agitator to inside player as a consequence of black ballots. The black vote also irrevocably changed white politics in the South. The rules of the political game were fundamentally altered; explicit racism became
By the early 1970s, even South Carolina Senator Strom Thurmond—once an arch segregationist—had extended his famed constituent services to black voters, and was working to secure federal funds for black mayors and black colleges.

Yet the power to make or break white candidates, many civil rights advocates believe, is totally insufficient; in fact, enfranchisement is close to meaningless unless black and Hispanic ballots elect black and Hispanic officeholders, they argue. The point is at best only a partial truth. A disproportionately low number of black and Hispanic officeholders is a signal that something may be wrong with the electoral process—that racism may be distorting the outcome. But the numbers themselves—the fact of disproportionately low officeholding—is only the beginning of a legitimate inquiry. Numbers are suggestive, not decisive. If a county is 40 percent black, and yet blacks hold only 10 percent of the seats on the county council, we certainly want to know why. Discrimination may not be the explanation. Whites lose elections for many reasons; so do candidates who are black and Hispanic. In the enforcement of the Voting Rights Act, we seem to assume that while white candidates go down to defeat for a variety of normal political reasons, those who are black or Hispanic lose for only one: race or ethnicity. That assumption is wrong.

The impulse to use the law to guarantee not just votes, but “meaningful” votes, is one with which we can all sympathize. Who wants to cast a “meaningless” ballot? And groups traditionally left out of the political process are prime candidates for special efforts to ensure inclusion. But here’s the problem: the notion of meaningful votes, or votes that “fully” count, invites a definition that gives those ballots maximum weight, defined as officeholding—maximum power to elect black or Hispanic candidates. That in turn implies an entitlement, built into our law, to proportional racial and ethnic representation. Yet the effort to reserve legislative seats for members of racial and ethnic groups in proportion to their numbers is equally as controversial as policies that reserve a certain proportion of seats in a classroom or jobs in a plant for specially designated groups.

This controversial policy has now been adopted by the Department of Justice. The Voting Rights Act has been interpreted to include an entitlement to electoral arrangements that promote (to the extent possible) racial and ethnic proportional representation on legislative bodies. Or rather, proportional representation for two groups only: blacks and Hispanics. (We do not worry about the number of Jews or Poles occupying legislative seats.) The Justice Department now tells “covered” states and counties, in effect, either you draw the maximum number of majority black and Hispanic districts or we will object. It further tells those juris-
dictions not subject to the automatic preclearance provision (Section 5): either you maximize minority officeholding, or you will see us in court.

It is a message without foundation in the law, I hasten to add. The Justice Department is supposed to enforce the law, but no law directs government attorneys to insist on racially gerrymandered districts in the alleged interest of "fair" representation. In fact, the Supreme Court's rulings interpreting Section 5 of the Act explicitly reject any notion of entitlement to proportionate racial and ethnic representation. Retrogression is the right question, the Court has held. A new districting arrangement violates Section 5 when it leaves black voters worse off than they were before—when jurisdictions act to strip the enfranchisement provisions of their expected meaning. These decisions, however, are simply ignored by the Justice Department, which labels them "old," although in fact no new Supreme Court rulings suggest they are outmoded. In enforcing the act, in other words, the government has adopted new standards without judicial sanction. An executive agency has assumed legislative powers, rewriting the law.

The department has been free to rewrite the law because jurisdictions are skittish about going to court. They do not want to oppose the interests of minority candidates (who like "safe" districts from which to run) and risk being labeled "anti-civil rights." In addition, the myth of moral simplicity—the myth that voting rights still means voting rights in the LBJ sense—insulates these issues from close scrutiny. Such insulation means that very basic questions are not addressed. For instance, what does "an equal opportunity to elect the representatives of their choice" mean? When is an electoral process one in which all citizens can choose to partake? When do blacks, Hispanics and whites stand on equal electoral footing? What, in short, does a democracy look like in practice?

The Justice Department's implicit answer is at odds with basic democratic theory. Results are the measure of a democracy, it says. Democracy is about outcome not process. Yet process was the clear concern of the Voting Rights Act and all its amendments. The statute aimed to rid the nation of electoral processes tainted by racism. Its goal was to provide equal electoral opportunity. Counting minority officeholders (looking at outcomes) may provide clues to an improper process, but—to reiterate an earlier point—such a head count has the most limited significance. In every walk of life, in every country in the world, members of groups are over- and under-represented for a variety of often mysterious reasons. What we can't explain in the way of disproportionately low representation, we tend to label racist, but racism is often a too-simple label pasted on a complicated process.

---

Racism as the obvious explanation for a disproportionately low number of blacks and Hispanics on law school faculties, in symphony orchestras, on professional tennis teams, and in positions of political power is of course almost irresistible in a country with such dirty hands on questions of race. And while for some—myself included—the change in the status of blacks over the last thirty years seems breathtaking, for others, it is precisely the lack of progress that is most striking. In fact, it is this issue (which translates into a cluster of issues) that most divides the two sides of the minority voting rights question. How racist a country are we still? Are we one country, two countries, or perhaps three or four—each defined by race and ethnicity? Is race still the dominant factor in elections? To what degree can the American political process be trusted if left to its own devices? From different perceptions of the facts—from different answers—flow very different ideological conclusions.

Current enforcement of the Voting Rights Act assumes the worst about America. The Kerner Commission view in 1968—two nations, separate and unequal—inform enforcement. But a society in which the horizons of trust do not extend beyond race and ethnicity cannot become one community of citizens. Of course the lines of race and ethnicity that divide us will not entirely disappear if we ignore them. But we can refrain from reinforcing those divisive lines through our public policies. We can use public policy to deliver a message about what a good society is all about—what a community of citizens means. The forces of separatism seem to be gaining ground—the reputation of Malcolm X is on its way up, while Dr. Martin Luther King, Jr. appears to be falling out of fashion. Worst of all, the federal government itself has joined hands with those who wear tee-shirts emblazoned with “it’s a black thing—you wouldn’t understand.” Thus the Justice Department implies that black voters can never be represented properly by whites—or, by extension, white voters by blacks. The potential for creating bonds across racial and ethnic lines is nothing but a myth. This is the message that the Justice Department has written into our law—and it is not only sad but pernicious.

The message that minority voters cannot trust whites, and that representatives and constituents must be color-coordinated is both bad policy and bad politics. As the distinguished sociologist, Seymour Martin Lipset, has recently pointed out, “[w]hile the civil-rights movement of the 1960s asked Americans to live up to a single unassailable ideal, today it sets up a conflict between two core American values: egalitarianism and individualism.”

tive action policies—is rapidly polarizing the politics of race in America. Policies designed to promote proportional ethnic and racial representation in schools, factories and legislatures are driving the races apart and threatening to shape a society that is, in fact, less racially just. But if most Americans oppose preferential and separatist policies, who supports the idea? Support, Lipset argues, comes largely from the political and social elites, Republicans as well as Democrats, who are pitted against the wishes of a majority of the American public. The struggle over preferential treatment is in reality less a conflict between whites and blacks than between the people and their leaders.

The Justice Department is part of the political elite of which Lipset speaks—imposing upon a more sensible public policies that are not in the public interest and not in the interest of those minorities it purports to serve. Some courageous black voices—Representative John Lewis, for instance—are now beginning to say it. "The goal of the struggle for the right to vote was to create an interracial democracy in America," Representative Lewis has recently said. "It was not to create separate enclaves. . . ." Perhaps, ironically, a Clinton Justice Department will hear the message to which the Bush administration—with its ostensibly anti-quota bias—has been deaf.

In sum, current federal policy is a sad betrayal of the commitment to an integrated society that the civil rights movement originally made. Moreover, it violates basic democratic premises about the fluidity of the categories into which voters put themselves—the different emphases they place on their racial, ethnic, religious, class, gender and other identities. Individual citizens in our society are supposed to choose how they think of themselves, and those choices will often vary from election to election. In pasting racial and ethnic labels on voters and assuming that only racial identity counts for purposes of districting and other electoral arrangements, the Department of Justice substitutes a rigid system of group rights for that of individual representation.

Mr. Dunne argues that in insisting on legislative quotas—race-based gerrymandering to protect black candidates from white competition—he is only enforcing the law. But Congress never envisioned the 1965 Voting Rights Act as an instrument for electoral apartheid. Mr. Dunne is rewriting the law to conform to separatist notions that can only work to harden the racial and ethnic lines that already divide us.

Race and ethnicity may still have much to do with the way people vote; often, too much. But we build the expectation of racial and ethnic separation into our basic political structure at our peril. Reality is not

3. Id. at p. 53-62.
perfect, but our principles should remain so. We need electoral arrangements that deliver the right messages.

And the right messages are: that we are all Americans, that we are in this together, that the government thinks of us and treats us as individual citizens with individual (not group) rights, that whites can represent blacks and blacks can represent whites, that we have no need for legislative quotas since distinct racial and ethnic groups are not separate nations in our society and finally, that race does not and should not define the content of our character, political or otherwise.

The messages that we deliver in our public policies are important. They help to shape the society. And these messages square with the intent and language of the voting rights law.
Comments by J. Gerald Hebert†

I want to thank you for this opportunity to speak with you today on the important issue of voting rights and reapportionment. The Supreme Court has declared that the right to vote is "a fundamental political right, preservative of all rights."¹ It is for that reason that the Civil Rights Division of the Department of Justice views voting rights as the bedrock upon which all other rights rest.

Today, I would like to discuss some of the Justice Department's activities in the voting rights field that have a direct impact on issues discussed in this Symposium and upon the Hispanic community throughout the land.

The Civil Rights Division is firmly committed to fighting discrimination against Hispanics, whether such discrimination is overt or concealed. It is a battle we take quite seriously and one in which we have been personally involved. Because "su voto es su voz" ("your vote is your voice"), let me take a few minutes today to highlight some of the more significant matters and accomplishments in the voting rights area.

The Voting Rights Act was passed twenty-seven years ago to rid this nation of racial discrimination in voting and in the political process. It is considered by many to be perhaps the strongest and most effective antidiscrimination measure ever enacted in the history of our nation. In 1975, Congress amended the Voting Rights Act to extend to Hispanic and other language minority citizens who speak little or no English, an opportunity equal to that enjoyed by other citizens to participate in all aspects of the political process.² These amendments are commonly known as the minority language amendments of the Voting Rights Act, which will expire in 1992 unless Congress extends them.³

The Justice Department strongly supports extension of the minority language amendments. The Assistant Attorney General in charge of the Civil Rights Division, John R. Dunne, recently so testified before Con-

† Special Litigation Counsel, Voting Section, Civil Rights Division, United States Department of Justice, Washington, D.C.

2. See 42 U.S.C. 1973b(f) and 42 U.S.C. 1973aa-1a. See also Department of Justice Guidelines Concerning Implementation of the Provisions of the Voting Rights Act Regarding Language Minority Groups, 28 C.F.R. § 51 (1992) et seq. Generally speaking, the majority language provisions of the Voting Rights Act require affected jurisdictions to provide election materials and assistance "in a way designed to allow members of applicable language minority groups to be effectively informed of and participate effectively in voting-connected activities; and...take all reasonable steps to achieve that goal." 28 C.F.R. § 55.2(b)(1), (2) (1992).
3. In August 1992, the Congress enacted, and the President signed into law, an extension of the minority language provisions of the Voting Rights Act to the year 2007. The extension also
gress. This Administration, under the leadership of President Bush and Attorney General Barr, has said that it is firmly committed to protecting the rights of Hispanic citizens and other members of minority language groups. We urge you to join the Department of Justice in lobbying Congress to extend the law.

Through the minority language amendments, the Justice Department's Voting Rights Section routinely reviews, under Section 5 of the Voting Rights Act, many bilingual election provisions affecting Spanish-speaking voters. The affected jurisdictions are located primarily in the Southwest. As part of our responsibility under the Act, the Department of Justice reviews these changes to ensure that their implementation has not been undertaken with a discriminatory purpose and that such changes will not have a discriminatory effect. The Justice Department has found that, while the bilingual election provisions of the Voting Rights Act have produced some significant improvements in the delivery of election information to Spanish-speaking voters, there are many jurisdictions where the bilingual election program is inadequate. For example, some jurisdictions adopting a bilingual election program have failed to adequately translate English election information into Spanish. In those circumstances, the Justice Department must deny preclearance. As a result, those jurisdictions have gone back and retranslated the election notice so that it fully and accurately reflects what is set out in English.

Language is not the only barrier, or indeed the most important barrier that Hispanic voters face. A common problem is the fragmentation of Hispanic communities among Anglo majority legislative districts. The fragmentation of the Hispanic community is often undertaken to protect Anglo incumbents and prevent Hispanic voters from electing candidates.

amended the coverage formula under the Act. As a result, States and political subdivisions thereof are subject to the bilingual provisions if the Director of the Bureau of Census determines that:

(i) more than 5% of the citizens of voting age of such State or political subdivision are members of a single language minority and are limited-English proficient; or

(ii) the illiteracy rate of the citizens in the language minority as a group is higher than the national illiteracy rate.


5. Examples of where the Attorney General has interposed objections under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, to voting changes involving bilingual elections include the following: Objection of March 4, 1977 to Monterey County, California's bilingual election and postcard registration procedures; Objection of October 3, 1977 to Lamar CISD's (Texas) bilingual oral assistance program; and Objection of August 6, 1985 in Dawson County, Texas bilingual elections procedures.
of their choice. In the past decade, the Civil Rights Division has done something about that inequity by challenging redistricting plans drawn for two of the nation's largest cities, Chicago and Los Angeles. As a direct result of that litigation, both cities redrew their electoral districts to eliminate the dilution of Hispanic voting strength, which the Department of Justice and minority plaintiffs had challenged. Thus, Hispanic voters have been able to cast meaningful ballots under a fair election plan which resulted, not surprisingly, in an increase in the number of Hispanics elected to those governing bodies. The Department of Justice is continuing that policy, so let me turn to a couple of recent lawsuits which are of major importance to Hispanic-Americans.

With the invaluable assistance of Marc Rosenbaum and Richard Fajardo, we successfully litigated a case brought under Section 2 of the Voting Rights Act challenging the Los Angeles County Board of Supervisor's redistricting plan — a plan that divided the county, with a population larger than 42 states, into five supervisorial districts. Although Hispanics are now more than one third of the county's population, no Hispanic had served on the County Board of Supervisors in this century. The Justice Department alleged, and the court found, that Hispanics had been shut out of the electoral process in the county. The Court held that the district lines split the large and compact Hispanic community among three of the five districts, thereby ensuring that Hispanic voters were effectively precluded from electing candidates of their choice to the Board of Supervisors.

The Court also found that "the Supervisors and their aides understood the potential for increasing Hispanic voting strength and sought to

8. Id.
9. As a result of United States v. City of Los Angeles, supra, the City of Los Angeles redrew its city council boundaries and created a second district in which Hispanic voters were able to elect a candidate of their choice to the city council.
10. Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, prohibits any voting standard, practice or procedure which "results" in discrimination on account of race, color, or membership in a language minority group. The statute goes on to provide that a violation is established if, "based on the totality of the circumstance," it can be shown that a "political processes[ ] leading to nomination or election" operates to deprive minorities of equal opportunity to "participate in the political process and to elect a representative of their choice." Id.
11. In Garza v. Los Angeles County, supra note 7, both the district court and the Ninth Circuit Court of Appeals held that Los Angeles County, in fragmenting Hispanics in its redistricting plan, engaged in intentional discrimination at the time the challenged districts were drawn. As the court of appeals observed: "[W]e agree with the district court that the supervisors' intentional splitting of the Hispanic core resulted in a situation in which Hispanics had less opportunity than did other county residents to participate in the political process and to elect candidates of their choice." 918 F.2d at 771.
avoid the consequence of a redistricting plan designed to eliminate the fragmentation of the Hispanic population."  

Assistant Attorney General Dunne argued part of the case to the Ninth Circuit Court of Appeals, which upheld the trial court's decision. The United States Supreme Court then declined to hear the case, which finally assured that Hispanic voters would be able to elect their preferred candidate to the Board of Supervisors. As a result of a special election held to implement a fairly drawn districting plan ordered into effect by the Court, Hispanic voters elected Gloria Molina to the Board of Supervisors. With a representative of Hispanic descent serving on the Board, Hispanic citizens of Los Angeles County, at long last, will have a direct impact on many of the most important social issues affecting them.

Another major case which we have been involved in is *LULAC v. Mattox.* This case was brought by Hispanic and black citizens of Texas challenging the at-large election of trial court judges. The United States, with the Assistant Attorney General taking the lead, argued in the Fifth Circuit Court of Appeals (as a friend of the court) that Section 2 of the Voting Rights Act applies with full force to the election of trial judges. We were not successful in the Court of Appeals, but in June of 1991 we all rejoiced when the United States Supreme Court reversed the Court of Appeals and held that Section 2 applies to the election of trial court judges.

The Justice Department has also used its authority under Section 5 of the Voting Rights Act to protect the rights of Hispanic voters. Section 5 of the Voting Rights Act gives the Department of Justice broad authority to review changes in voting rules in certain specified states and localities. Before those changes can go into effect, the Justice Department makes sure that the changes do not discriminate against minorities. Our Section 5 authority has kept us very busy over the course of the year. We have reviewed over 1,000 reapportionment plans—from places as diverse as Alaska and Georgia, New York City and Louisiana, California and Virginia, New Mexico and North Carolina—to make sure that the

---

13. Garza v. Los Angeles County, 918 F.2d 763 (9th Cir. 1990), cert denied, 111 S. Ct. 681 (1991). The court of appeals agreed that "[t]he Supervisors intended to create the very discriminatory result that occurred." 918 F.2d at 771.
14. 914 F.2d 620 (5th Cir. 1990) (en banc).
15. See Brief for the United States as Amicus Curiae in *LULAC v. Clements,* 914 F.2d 620 (5th Cir. 1990) (en banc).
reapportionments meet the basic standards of fairness for racial and language minorities dictated by the Voting Rights Act.

In a number of places — for example, in Georgia, North Carolina, Mississippi, and Louisiana — the Justice Department interposed objections because we found discrimination against black voters. In several other instances, — most notably, the redistricting plans for the New York City, Houston and Dallas city councils, and for the Texas State House of Representatives and the New Mexico State Senate, the Justice Department interposed objections because we found discrimination against Hispanics.

Let me describe two of those instances, both for their intrinsic interest and to give you a flavor of how we conduct our Section 5 review. The proposed map for the New York City Council created only six viable Hispanic districts out of a total of 51, even though Hispanics constituted approximately one quarter of the City’s population - but only 15% of the registered voters. There were two other districts in which Hispanics constituted a majority of the voting age population but only a slim plurality of the registered voters. Blacks were a very close second. Our analysis indicated that there was a significant risk that Hispanics would not be able to elect candidates of their choice in those districts because of a number of factors, including their lower voter turnout rate.

These concerns had been brought to the attention of the New York Districting Commission by members of the Hispanic community, but the Districting Commission rejected proposals to add Hispanic voters to those districts. The Justice Department’s task was to decide whether the Commission had been motivated, in whole or in part, by a discriminatory purpose or whether the Commission had acted for a valid, non-racial reason. The Commission argued that it had a valid reason, namely to avoid weakening Hispanic majorities in adjacent areas. The Justice Department’s analysis, however, revealed that changes could be made that would not endanger the adjacent Hispanic districts. There was also evidence that Hispanics had not been treated as fairly as other groups in the districting process. The New York Districting Commission also appeared to be making choices throughout its plan, including areas of the city not covered by Section 5, that consistently disfavored Hispanics. Based on the totality of the circumstances, the Justice Department concluded that the Commission did not have valid reasons for rejecting the proposals to strengthen the marginal Hispanic districts and giving the Hispanic voters in those districts a real opportunity to elect candidates of their choice. Accordingly, the Justice Department interposed an objection.

In Houston, the city council fragmented concentrations of Hispanic voters in order to create one very safe Hispanic city council district,
rather than creating two city council districts with minority voting age populations of 9% black and 58% Hispanic in one, and 13% black and 58% Hispanic in the other. The city attempted to justify its rejection of the two-district arrangement on the grounds that neither district was viable for Hispanics. The city noted that Hispanic voters — due to lower registration rates — would constitute less that 40% of the electorate in each of the districts.

The Hispanic community, however, favored the two district alternative and this raised doubts in our minds about the bona fides of the city’s explanation. Those doubts were reinforced by our analysis, which indicated that, as Hispanic community leaders claimed, the two districts would be viable for Hispanic supported candidates. Hispanics would be the leading minority group, by far, in each of the two proposed districts so that, as between blacks and Hispanics, the districts would be clearly Hispanic. Moreover, minority voters — blacks and Hispanics together — would constitute majorities of the electorate in each of the districts, approximately 58% in one and 53.5% in the other. At least in this area of the city the two minority groups had a history of working together.

Some claim that this progress is not progress at all and that the Voting Rights Act has been expanded beyond its original purposes. I am alarmed by such uninformed criticism. If the protections of the Voting Rights Act stopped at the polling booth, as the revisionist accounts would have it, minority voters would have achieved a pyrrhic victory. They would have been left with the right to vote in losing battles against those who would manipulate election systems to ensure their self-preservation and the defeat of minority interests.

Through effective enforcement of the Voting Rights Act, which has enjoyed bipartisan support, our nation’s political life has been altered inexorably for the better. Consider that in 1968, there were 14 black legislators serving in the seven southern states specially covered by the Voting Rights Act. By 1990, there were 143 black state legislators in these states. Similar gains have been seen in the number of Hispanic officeholders since the protections of the Voting Rights Act were extended to

---


19. U.S. Commission on Civil Rights, POLITICAL PARTICIPATION (1968), appendix 1. These states were Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina and Virginia.

Hispanics and other language minorities in 1975. Including the local level, minority officeholding has skyrocketed; so that today there are nearly 7,400 black and about 4,200 Hispanic elected officials.

This progress has been achieved largely because of the protections against discriminatory election systems and districting plans, not merely because the Justice Department eliminated formal barriers to voter registration.

I am always surprised when I hear the hollow claim that the Voting Rights Act fosters quotas and racial polarization. It does no such thing. Indeed, it fights them.

One must recognize at the outset that voting rights cannot be debated in a political vacuum. Electoral reality must predominate. The stark, if sad, reality of racial bloc voting is that, in many parts of this country, minority voters simply cannot elect candidates of their choosing unless they constitute a majority of voters in the district.

Most minority elected officials are currently serving — or at least were first elected — from districts in which minority voters comprised the substantial share, if not the majority of the electorate. Many of those districts — for example, the current congressional districts served by Congressman Lewis (Georgia), Espy (Mississippi), and Jefferson (Louisiana) — were products of the Voting Rights Act, drawn only as a result of the objections to discriminatory plans entered by the Department of Justice or as a result of litigation in federal court.

Minority candidates have been able to win elections in majority white districts. Governor Douglas Wilder in Virginia is an excellent example. But he is also an exception. Generally, minority supported candidates are successful only in black districts where minority voters are in the majority. Indeed, recent studies have shown that only about one percent of the white majority state legislative districts in the south are represented by minority legislators. That is why minority vote dilution is such an effective and pernicious form of discrimination and why the Justice Department is sworn to combat it.


22. The number of Hispanic office holders more than doubled between 1973 and 1987. NATIONAL ROSTER OF HISPANIC ELECTED OFFICIALS, NALEO, 1988 at vii. In six states where Hispanics are a significant proportion of the population (Arizona, California, Florida, New Mexico, New York, and Texas), the number of Hispanic elected officials increased from 1,280 in 1973 to 3,027 in 1988. Id., at Table 10. By 1991, the number of Hispanic office holders nationwide had increased to 4,202. NATIONAL ROSTER OF HISPANIC ELECTED OFFICIALS, NALEO, 1991 at Table 4.

Black office holders also increased dramatically, from 1,469 in 1970 to 7,335 in 1990. See BLACK ELECTED OFFICIALS, supra note 20, at Table 1.

To recognize this empirical fact is not to condone or encourage racially polarized voting. But to ignore this fact is to risk the gains that have been achieved.

Finally, let me digress for a moment and respond to some criticism that is untrue, unfounded and calculated to undercut the important work of our Voting Rights Section. Despite what some may try to argue, the Voting Rights Section in the Justice Department exercises its statutory authority in a non-partisan manner to ensure compliance with federal law. We are not concerned with — and do not even consider — the partisan political implications of one plan versus another. Our mission and our charge is to demand compliance with the Voting Rights Act and the Constitution. We will continue to do so regardless of whether that helps Republicans or Democrats, liberals or conservatives. We will not be frightened off by those who cannot seriously dispute our legal theories but, instead, seek to discourage us by impugning our motives.

No better example exists than our much-heralded success in challenging the Los Angeles County redistricting plan. The Justice Department alleged and the federal court found that the County Board, with three Republicans and two Democrats, had intentionally fragmented the politically cohesive, geographically compact Hispanic community in an effort to ensure that Hispanic voters would be politically ineffective.\(^2\) As a result of our success, a new election plan was ordered into effect, and a Democratic majority now governs Los Angeles County because the Hispanic community chose an Hispanic Democrat to represent them. The point, however, is not who was chosen, but who did the choosing. The Justice Department will continue to enforce the Voting Rights Act even-handedly, and will tolerate no deviation from the paramount principle of equal voting opportunity.

Just one last thought: if Hispanic and other minority citizens are to take their rightful place in the legislative bodies and elected judiciary of this country, we must ensure that the road leading to nomination and election is non-discriminatory and provides equal opportunity to all. The voices of minorities — in whatever language they speak — must be heard if we are to achieve truly representative government. I pledge to you that the Voting Rights Section at the Department of Justice will continue to spend our energy and to use our authority under the Voting Rights Act to achieve that result.

Muchas gracias por la invitación.

---

24. Garza v. Los Angeles County, 918 F.2d 763 (9th Cir. 1990).