Casenote

Garza v. County of Los Angeles: Preservation of Minority Group Voting Strength as Justification for Deviation from One Person-One Vote Standard

Robert G. Retana†

INTRODUCTION

In *Garza v. County of Los Angeles*, a consolidation of two civil suits filed in August and September of 1988 in U.S. District Court in Los Angeles, the Los Angeles County Board of Supervisors has been charged with violating the 1965 Voting Rights Act by re-drawing its five districts in 1981 in such a way as to scatter the County's Latinos and deny them representation.[1] The suit could become one of the nation's most significant voting rights cases in terms of population affected. With 8.3 million residents, Los Angeles County is among the most populous counties in the United States.[2]

The 1965 Voting Rights Act bars any governing body from reducing the electoral participation of any minority group.[3] The suit names the

† Third-year student, Boalt Hall School of Law, University of California, Berkeley, B.A., 1984, Columbia University.

1. The suits are consolidated as Yolanda Garza et al., Plaintiffs, United States of America, Plaintiff, Lawrence K. Irvin, et al., Plaintiff-Intervenors v. County of Los Angeles, California, Los Angeles Board of Supervisors, et al., Defendants. Individually, the suits are United States of America v. County of Los Angeles, CV88-5435KN(EX); and Garza v. County of Los Angeles, CV88-05143KN(EX).

Final arguments for *Garza* ended April 10, 1990, closing almost three months of trial. Los Angeles Daily Journal, April 11, 1990, at 1, col. 3. As of this publication, the case was still under submission .

2. U.S. BUREAU OF THE CENSUS, COUNTY AND CITY DATA BOOK (1988). This figure represents the population of Los Angeles County for 1986.

3. The Voting Rights Act of 1965, section 1973, provides in pertinent part:

(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 guarantees set forth in section 1973(f)(2) of this title, as provided in subsection (b) of this section.

Los Angeles County Registrar-Recorder, who oversees elections, and the five supervisors.[4] The U.S. Justice Department, the Mexican American Legal Defense and Educational Fund, and the American Civil Liberties Union filed suit to force a reapportionment before the 1990 county elections.[5] The suit contends that the all-white board split up Latino neighborhoods among three districts in violation of the federal Voting Rights Act and accused the Board of drawing its districts in such a way as to weaken the political clout of the County's 2 million Latinos.[6]

The suit indicates that the County's Latino population jumped from 1.2 million in 1970, or about 18.3 percent of the County's 7 million residents then, to over 2 million, or 27.6 percent of the County's 7.4 million residents, in 1980.[7] The Board is required to divide the population evenly when district lines are re-drawn every decade. In 1981, the Board rejected a proposal to create two inner-city districts, which would have increased the possibility that a minority member would be elected to the Board. One district would have combined a number of African Americans and Latinos, while another district would have contained a Latino majority. But the plan, which ran into fierce opposition from Board members, was turned down.[8] In the County's 138-year history, there have been no Latino supervisors and only one African American, who was appointed to the Board but who later lost an election to retain her seat.[9]

The Justice Department conducted a demographic study, which was confirmed by a study conducted by the Rose Institute of Claremont McKenna College, which demonstrated that a large, contiguous Latino population resides in the eastern and central section of the county. That population, which could have potentially elected a Latino supervisor, was divided among three supervisorial districts in the County's 1981 re-

---

(b) A violation of subsection (a) of this section is established if, based on the totality of the 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) of this section 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.

42 U.S.C. § 1973 (as amended June 29, 1982).

4. *See* Los Angeles Daily Journal, Aug. 25, 1988, at 1, col. 3.

5. *See Id.*

6. *See* Los Angeles Daily Journal, Oct. 6, 1988, at 4, col. 1.

7. For statistical data see U.S. BUREAU OF THE CENSUS, 1980 CENSUS OF POPULATION, CHARACTERISTICS OF THE POPULATION 18 (1981) (vol. 1); *See also* Los Angeles Times, March 23, 1989, § B, at 2, col. 1.

8. Los Angeles Times, May 26, 1988, at 1, col. 2

9. Los Angeles Times, Jan. 27, 1989, § 2, at 7, col. 3.

districting plan.[10]

A redistricting plan which was proposed as a settlement to the current litigation included a majority Latino district. The proposed plan did not create a new district. It realigned the presently existing districts so that one is made up primarily of Latinos. However, in order to maintain the Latino majority within that district, it must be between 6.9% and 12% smaller than the rest of the districts within Los Angeles County.[11]

However, malapportionment may occur when districts are unequal in size because votes are then unequally weighed. The votes of those residing in smaller districts count more because fewer people are able to have the same amount of representation for their district. The United States Supreme Court has allowed some deviation from the one person-one vote standard in order to further important governmental policies. This Note argues that preservation of minority group voting strength is a policy which can justify a deviation from the equal population standard in reapportioning a county's supervisorial districts.

There are two distinct concepts which emerge in the area of reapportionment to achieve fair representation. The first is that the vote of an individual as nearly as practicable should equal that of another individual. The second concept, however, views the individual as a member of a group, with shared interests with other members of each group. Therefore, although a court reviewing a reapportionment plan is concerned with affording equal weight to the vote of each individual, certain state or local governmental policies which account for group interests will allow some deviation from strict mathematical equality.

The stringent requirements found in congressional apportionment are somewhat relaxed at a state and local level, allowing more room for implementation of innovative state policies with regard to apportionment and representation. Therefore, the policy of preserving minority group voting strength has its strongest chance of withstanding constitutional challenge in a local apportionment plan. The Supreme Court has held that deviations in population equality among districts in state legislative apportionment which are less than 10% are de minimus and do not make out a prima facie case of discrimination. However, population deviations between two districts of more than 10% must always be justified by a rational state policy. The apportionment plan must also be narrowly tailored so that the deviations involved are only those which are necessary to achieve the state's policy.

Although the Supreme Court was previously presented with the policy of preserving minority group voting strength as a justification for

10. Los Angeles Times, June 7, 1988, at 1, col. 1.

11. Interview with Mark Rosenbaum, General Counsel, American Civil Liberties Union Foundation of Southern California, in Los Angeles (May 7, 1990).

such deviations, it did not rule on its validity due to insufficient evidence that the plan involved was drawn to achieve that goal.[12] Therefore, in approving a deviation from the one person-one vote principle, the plan submitted must be demonstrated to deviate from equality in population only to the extent absolutely necessary to achieve the proffered governmental goal. This Note will argue that a court should allow a reapportionment plan with a majority Latino district which is smaller than other districts, as was proposed in Los Angeles County, in order to preserve that minority group's voting strength.

I.
GENERAL FRAMEWORK FOR CONGRESSIONAL APPORTIONMENT

Article 1 § 2 of the Federal Constitution has been the guiding constitutional provision in congressional apportionment. The requirement of Article 1 § 2 that congressional representatives be chosen "by the people of the Several States" mandates equal representation for equal numbers of people.[13] Although the Supreme Court has recognized that "it may not be possible to draw congressional lines with mathematical precision,"[14] it nonetheless requires that districts be apportioned to achieve population equality "as nearly as practicable."[15] This standard permits only those limited population variances which are unavoidable despite a good-faith effort to achieve precise mathematical equality, or for which justification is shown.[16] Even variances of less than one percent in congressional districts are unconstitutional if a good faith effort to achieve precise mathematical equality could have produced smaller variances.[17]

There is therefore a two-part test for determining the constitutional validity of congressional apportionment. First, the court must consider whether the population differences among the congressional districts could have been reduced or eliminated altogether by a good faith effort to draw districts of equal population. If not, the apportionment plan will be upheld. Second, if the population differences were not the result of a good faith effort to achieve population equality, each significant variance must be shown to have been necessary to achieve some legitimate goal.[18]

12. *See* Karcher v. Daggett, 462 U.S. 725, 743 (1983) (attempt to justify population deviations in reapportionment plan on the ground that they preserved the voting strength of minority groups was not supported by the evidence).

13. Wesberry v. Sanders, 376 U.S. 1 (1964).

14. *Id.* at 18.

15. *Id.*; *see* Karcher v. Daggett, 462 U.S. 725, 730 (1983).

16. Kirkpatrick v. Preisler, 394 U.S. 526 (1969).

17. Karcher v. Daggett, 462 U.S. 725, 731-35 (1983).

18. *Id.* at 730-31.

If the court considers the proffered goal legitimate and the variances necessary, the plan will pass constitutional muster.

II.
STANDARDS FOR STATE LEGISLATIVE REDISTRICTING

While population alone has been the sole criterion of constitutionality in congressional redistricting under Article 1 § 2, the Equal Protection Clause affords states broader lattitude in state legislative redistricting. In *Reynolds v. Sims*,[19] the Court held that some deviations from a strict equal population principle are constitutionally permissible in the two houses of a bicameral state legislature, where incident to the effectuation of a rational state policy, so long as there is no significant departure from the basic standard of equality of population among districts.

> In [*Westbury*] the Court stated that congressional representation must be based on population as nearly as is practicable. In implementing the basic constitutional principle of representative government as enunciated by the Court in *Wesberry*—equality of population among districts—some distinctions may well be made between congressional and state legislative representation. Since, almost invariably, there is a significantly larger number of seats in 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. To do so would be constitutionally valid, so long as the resulting apportionment was one based substantially on population and the equal-population principle was not diluted in any significant way. Somewhat more flexibility may therefore be constitutionally permissible with respect to state legislative apportionment than in congressional districting.[20]

The Court therefore held that insuring some voice to political subdivisions in at least one legislative body may, within reason, warrant some deviations from population-based representation in state legislatures.[21] The Court declined, however, to spell out any precise constitutional test for state legislative apportionment schemes, stating "Developing a body of doctrine on a case-by-case basis appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements in the area of state legislative apportionment."[22]

In *Mahan v. Howell*,[23] the principal question presented for review

19. 377 U.S. 533 (1964).
20. *Id.* at 577-78.
21. *Id.* at 580.
22. *Id.* at 578.
23. 10 U.S. 315 (1973).

was whether or not the Equal Protection Clause of the Fourteenth Amendment, like Article 1 § 2, permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality in the context of state legislative reapportionment. The principle that Article 1, § 2 of the Constitution permits only population variances among congressional districts which are unavoidable despite a good faith effort to achieve absolute equality, or for which justification is shown, was first expounded in *Wesberry v. Sanders*,[24] and in *Kirkpatrick v. Preisler*.[25] However, in *Mahan v. Howell*, the Supreme Court stated that although the *Wesberry*, *Kirkpatrick*, and *Wells* line of cases would continue to govern congressional reapportionments, the rigor of the rule of those cases was inappropriate for state reapportionment challenges under the Equal Protection Clause of the Fourteenth Amendment.[26]

The facts in *Mahan v. Howell* were that in 1971 the Virginia General Assembly had reapportioned the state for the election of state delegates and senators. The apportionment statutes were invalidated by a District Court which ruled that a 16.4% variation from the ideal district population of 46,485, where one district was overrepresented by 6.8% and another being underrepresented by 9.6%, caused the reapportionment plan to violate the one person, one vote principle.[27] Although the District Court noted that the deviations were traceable to the desire of the General Assembly to maintain the integrity of traditional county and city boundaries, and that it was impossible to draft district lines to overcome unconstitutional disparities while maintaining such integrity, it held that the State proved no governmental necessity for strictly adhering to political subdivision lines.[28] The District Court thereby substituted its own plan which had a percentage variation from the ideal district of about 10%, but which did not follow political subdivisions in many instances.[29]

The Supreme Court held that the constitutionality of Virginia's legislative redistricting was not to be judged by the more stringent standards that *Kirkpatrick* and *Wells* make applicable to congressional reapportionment, but instead by the Equal Protection test enunciated in *Reynolds v. Sims*. "Application of the 'absolute equality' test of *Kirkpatrick* and *Wells* to state legislative redistricting may impair the normal functioning of state and local governments."[30]

> We reaffirm its holding [*Reynolds*] that "the Equal Protection Clause re-

24. 376 U.S. 1 (1964).
25. 394 U.S. at 527-528; *see also* Wells v. Rockefeller, 394 U.S. 542, 546 (1969).
26. 410 U.S. 315 (1973).
27. *Id.* at 319.
28. *Id.* at 319-320.
29. *Id.* at 323-324.
30. *Id.* at 323.

> quires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." We likewise reaffirm its conclusion that "[s]o long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature."[31]

Although the District Court had held that the State had proved no governmental necessity for strict adherence to political subdivisions lines, the Supreme Court stated that the proper equal protection test is not framed in terms of governmental necessity but instead in terms of a claim that a State may rationally consider.[32] Under this test, the Supreme Court held that the decision of the Virginia General Assembly to provide representation to subdivisions was valid when measured against the Equal Protection Clause of the Fourteenth Amendment.

> The inquiry then becomes whether it can reasonably be said that the state policy urged by Virginia to justify the divergences in the legislative reapportionment plan of the House is, indeed, furthered by the plan adopted by the legislature, and whether, if so justified, the divergences are also within tolerable limits. For a State's policy urged in justification of disparity in district population, however rational, cannot constitutionally be permitted to emasculate the goal of substantial equality.[33]

The Supreme Court stated that since the latitude afforded to states in legislative redistricting is somewhat broader than that afforded to them in congressional redistricting, "Virginia was free as a matter of federal constitutional law to construe the mandate of its Constitution more liberally in the case of legislative redistricting than in the case of congressional redistricting, and the plan adopted by the legislature indicates that it has done so."[34] The Court also held that the population disparities among the districts that have resulted from the pursuit of this plan do not exceed constitutional limits.[35] The Court declined, however, to impose a stringent mathematical standard for state legislative apportionment.

> Neither courts nor legislatures are furnished any specialized calipers that enable them to extract from the general language of the Equal Protection Clause of the Fourteenth Amendment the mathematical formula that establishes what range of percentage deviations is permissible, and what is not. The 16-odd percent maximum deviation that the District Court found to exist in the legislative plan for the reapportionment of the House

31. *Id.* at 324-325 (quoting *Reynolds*, 377 U.S. at 577, 579).
32. *Id.* at 325-26.
33. *Id.* at 326.
34. *Id.* at 327.
35. *Id.* at 328.

> is substantially less than the percentage deviations that have been found invalid in the previous decisions of this Court. While this percentage may well approach tolerable limits, we do not believe it exceeds them. Virginia has not sacrificed substantial equality to justifiable deviations.[36]

The Supreme Court thereby concluded that the policy of maintaining the integrity of political subdivisions lines which was advanced as justification for disparities in population among districts was rational, and that the plan did in fact advance that policy. In recognizing the legitimacy of preserving political subdivisions, the court has noted their shared distinct interests and values due to occupation, social class, or racial or ethnic composition.[37] The minority representation interests of political subdivisions are similar in principle to those of racial minorities seeking equality of representation. Residents of political subdivisions share an interest in the outcome of local legislation by virtue of living in the same political unit, as do racial minority voters.

The constitutionality of a state's legislative redistricting plan is therefore not to be judged by the same stringent standards that are applicable to congressional reapportionment, but by the substantial equality standard of the Equal Protection Clause. Variations from a strict equal population principle are constitutionally permissible if based on legitimate considerations incident to a policy which a state may rationally consider, and if the reapportionment plan is narrowly tailored to achieve the goals of that policy.

III.
APPLICABILITY TO COUNTY GOVERNMENTS

In *Sailors v. Board of Education*[38] the Supreme Court decided that the "one man-one vote" rule did not apply to elections of members of a county school board where the members of the board were not chosen by popular election and were considered to have held nonlegislative offices as to which the Constitution did not require popular elections.

> Viable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation. At least as respects nonlegislative officers, a State can appoint local officials or elect them or combine the elective and appointive systems as was done here.[39]

---

36. *Id.* at 329.

37. *See* Brown v. Thompson, 462 U.S. 835, 841 n.5 (1983) (citing special economic and social needs of individual counties as justifying representation by counties); Karcher v. Daggett, 462 U.S. 725, 776 n.12 (White, J., dissenting) (criticizing one person, one vote rule for failing to allow grouping of constituencies with similar concerns).

38. 387 U.S. 105 (1967).

39. *Id.* at 110-111.

In *Dusch v. Davis*,[40] electors of five boroughs brought suit against local and state officials claiming that a consolidation plan violated *Reynolds v. Sims*.[41] An amended plan was approved by the District Court; however, the Fourth Circuit Court of Appeals reversed.[42] The Supreme Court reversed the Court of Appeals stating "In *Sailors v. Board of Education* we reserved the question whether the apportionment of municipal or county legislative agencies is governed by *Reynolds v. Sims*. But though we assume *arguendo* that it is, we reverse the Court of Appeals."[43] The Court went on to hold that the constitutional test under the Equal Protection Clause is whether there is "invidious discrimination."[44] As the Court found no such discrimination, the requirement that each of the councilpersons be a resident of the electing borough did not render the plan unconstitutional.[45] The Court approvingly quoted the District Court:

> The plan does not preserve any controlling influence of the smaller boroughs, but does indicate a desire for intelligent expression of views on subjects relating to agriculture which remains a great economic factor in the welfare of the entire population. As the plan becomes effective, if it then operates to minimize or cancel out the voting strength of racial or political elements of the voting population, it will be time enough to consider whether the system still passes constitutional muster.[46]

The decision in *Avery v. Midland County*,[47] however,settled the conflict of authority in lower federal courts regarding the applicability of the "one man-one vote" rule to county and municipal governments. In an opinion by Justice White, expressing the views of five members of the Court, it was held that the Midland County Commissioners Court was a unit of local government having general governmental powers over the county's entire geographic area, and therefore was subject to the "one man—one vote" rule, and the Constitution did not permit its members to be apportioned among single member districts of substantially unequal population.[48] The Court noted that the Equal Protection Clause does not require that the State never distinguish between citizens, only that the

40. 387 U.S. 112 (1967).

41. 377 U.S. 533 (1964).

42. *Dusch*, 387 U.S. at 114.

43. *Id.* (citation omitted).

44. *Id.* at 116 (citing Reynolds v. Sims, 377 U.S. at 561 (judicial focus must be upon ascertaining whether there has been any discrimination against certain of the State's citizens which constitutes an impermissible impairment of their constitutionally protected right to vote. Such a case presents questions of alleged invidious discriminations against groups or types of individuals in violation of constitutional guarantees)).

45. *Id.* at 115.

46. *Id.* at 116-117.

47. 390 U.S. 474 (1968).

48. *Id.* at 483-485.

distinctions that are made not be arbitrary or invidious.[49]

> The *Sailors* and *Dusch* cases demonstrate that the Constitution and this Court are not roadblocks in the path of innovation, experiment, and development among units of local government. We will not bar what Professor Wood has called "the emergence of a new ideology and structure of public bodies, equipped with new capacities and motivations. . . ." Our decision today is only that the Constitution imposes one ground rule for the development of arrangements of local government: a requirement that units with general governmental powers over an entire geographic area not be apportioned among single-member districts of substantially unequal population.[50]

In *Avery*, although each of the four districts in Midland County elected one commissioner, one of the districts contained about 95% of the county's population.[51] Therefore, although a county's redistricting plan may include districts with unequal populations, if the size of the variations are substantial as in *Avery*, without adequate justification they may be considered impermissible and violative of the Equal Protection Clause.

Note also that extending the application of the Equal Protection Clause to local legislatures was motivated, in part, by a desire to preserve the voting strength of minority groups from strict majoritarian rule.

> Inequitable apportionment of local governing bodies offends the Constitution even if adopted by a properly appointed legislature representing the majority of the State's citizens. The majority of a State—by constitutional provision, by referendum, or through accurately apportioned representatives—can no more place a minority in oversized districts without depriving that minority of equal protection of the laws than they can deprive the minority of the ballot altogether, or impose upon them a tax rate in excess of that to be paid by equally situated members of the majority.[52]

Therefore, where a minority group has been found to have suffered debasement of their voting strength by being divided into various districts, in none of which they constituted a majority, the preservation of that group's voting strength is arguably a rational consideration which may allow a local government some deviation from the equal population standard. An advocate for such a plan should argue that based on *Reynolds* and *Mahan*,[53] the line of cases governing congressional apportionment are inapplicable. So long as the plan is based substantially on population, variations should be justified by the Supreme Court's reason-

49. *Id.* at 484.

50. *Id.* at 485-486 (quoting R. Wood, 1400 GOVERNMENTS 175 (1961)).

51. *Id.* at 486.

52. *Id.* at 481 n.6.

53. *See supra* notes 19-23 and accompanying text.

ing in *Mahan, Sailors, Dusch,* and *Avery*. That is, the policy of preserving minority voting strength need not be a governmental necessity, but instead a rational state policy.

As with Affirmative Action, the fact that this plan is remedial in nature, as opposed to an unjustified preference, will make it more likely to be upheld by a court.[54] The cases show that local governments are given more latitude with regard to apportionment so long as they are within tolerable limits, and the policy is in fact furthered by the plan. Arguments regarding local flexibility and changing urban conditions should be used as well as responsiveness to local concerns, so that, as stated in *Avery*, the Constitution does not become a roadblock to innovation. If *Dusch* allowed deviation from the one person-one vote principle to permit intelligent expression of views regarding agriculture, it seems that a minority group which is now a significant percentage of the state and county's population should be able to have its views articulated as well. Similarly, providing representation to political subdivisions, as in *Mahan*, is an analogous governmental interest which has been deemed permissible. *Mahan* recognized that, notwithstanding equality of representation, there are groups with distinct interests who are entitled to representation as such. Therefore, where there is evidence of past discrimination against a minority group, a local government should be able to use its latitude in reapportionment to remedy past debasement of that group's voting strength. Even if such a justification would not be allowed under a congressional reapportionment plan, it should be argued that at a local level, under the relaxed Equal Protection test of "substantial equality," it should be permissible.

Arguments to the contrary are likely to be as follows. Some courts have held that there is no different standard for local governments than that used in congressional apportionment. If this is successfully argued, it will make it much harder to justify the necessary deviations and arguments regarding local control will be useless. For example, the California Supreme Court, in *Calderón v. City of Los Angeles*,[55] rejected the argument that based on *Avery v. Midland County*, the City of Los Angeles was not subject to the strict rule of equality with regard to local apportionment. The Court invalidated an article of the Los Angeles City Charter which provided that districts "shall not deviate in numbers of voters by more than ten percent above or below one-fifteenth of the total number of registered voters in the City of Los Angeles."[56] The State

54. *See, e.g.* Califano v. Webster, 430 U.S. 313 (1977) (Social Security Act provision upheld which allowed women to exclude three more lower-earning years than men because it was based on objectively-verifiable discrimination against women.)

55. 4 Cal.3d 251, 481 P.2d 489, 93 Cal. Rptr. 361 (1971).

56. *Id.* at 266, 481 P.2d at 499, 93 Cal. Rptr. at 371.

Supreme Court reviewed various U.S. Supreme Court decisions and concluded, "[t]hose decisions involved congressional districting, which is based on article 1, section 2, of the federal Constitution and for which the Court has prescribed a rule of equality 'as nearly as practicable.' "[57] The Court continued:

> By contrast, state and local apportionment is guided by the dictates of the equal protection clause; for such jurisdictions, the constitutional mandate, enunciated first in *Reynolds*, has been "substantial equality." Despite the different constitutional bases and the varying formulae, however, "it has never been apparent that the Court sees these two clauses as producing different yardsticks for districting matters."[58]

In support of this argument, the State Supreme Court cited the decision in *Kirkpatrick v. Preisler,* [59] where the United States Supreme Court invalidated population variances among Missouri congressional districts. The State Court noted that *Kirkpatrick* repeatedly cited *Swann v. Adams,*[60] which involved redistricting of the Florida State Legislature. Also, "on the same day the Court decided *Swann*, it reversed and remanded a *congressional* apportionment case" for further consideration in light of *Swann v. Adams.*[61]

The State Supreme Court in *Calderón*, therefore concluded that "the [U.S. Supreme] court clearly seems to imply that decisions concerning state legislatures are interchangeable with those involving congressional districts so far as the constitutionally required standard of mathematical uniformity is concerned."[62]

The California Supreme Court therefore rejected the argument of the City of Los Angeles that based on the language in *Avery v. Midland County,*[63] the strict rule of equality in congressional apportionment does not apply to local governmental bodies like the Los Angeles City Council. The Court noted that the passage cited in *Avery* was illustrated by citation to decisions involving representatives chosen at large such as *Dusch v. Davis*, supra, or officials who were appointed instead of

---

57. *Id.* at 267, 481 P.2d at 499-500, 93 Cal. Rptr. at 371-372 (citing Wesberry v. Sanders, 376 U.S. 1 (1964)).

58. *Id.* (citing Reynolds v. Sims, 377 U.S. 533, 579 (1964); and quoting Dixon, *The Warren Court Crusade for the Holy Grail of 'One Man-One Vote,'* THE SUPREME COURT REVIEW 219-224 (1969).)

59. 394 U.S. 526 (1969).

60. 385 U.S. 440 (1967).

61. Calderón v. City of Los Angeles, 4 Cal.3d at 267, 481 P.2d at 500, 93 Cal. Rptr. at 372. The case referred to is Duddlston v. Grills, 385 U.S. 455 (1967).

62. *Id.* at 267, 481 P.2d at 500, 93 Cal. Rptr. at 372.

63. "This Court is aware of the immense pressures facing units of local governments, and of the greatly varying problems with which they must deal. The Constitution does not require that a uniform straightjacket bind citizens in devising mechanisms of local government suitable for local needs and efficient in solving problems." Avery v. Midland County, 390 U.S. 474, 485 (1968). *See supra* notes 47-52 and accompanying text.

elected.[64] "Such cases hardly support a contention that popularly elected representatives, chosen from the individual districts, may represent significantly unequal numbers of people."[65] However, note that it was not this analysis of *Avery* alone which proved fatal to the City of Los Angeles' argument.

> While the above analysis alone might not convince us of the *per se* invalidity of the charter provision here at issue, when it is coupled with another factor, we are satisfied that the section cannot stand. That factor is the Supreme Court's frequent rejection of any mathematical formula which purports to establish an "acceptable" variance from ideal equality. Correspondingly, the court has insisted that any such deviation be justified by the governmental unit on the basis of "legitimate considerations incident to the effectuation of a rational state policy. . . ."[66]

Therefore, the fact that the Los Angeles Charter provision flatly validated variances of ten percent from the ideal per-district figure and dispensed with the legal requirement that the City justify each deviation, caused the State Supreme Court to hold that it was unconstitutional.[67] The government runs a strong risk of being held in violation of the Equal Protection Clause if it can not justify its plan with a state interest that will account for the figures involved.[68]

This second reason distinguishes *Calderón*. While the City of Los Angeles sought to legislate a generally permissible level of deviation without justification by some rational state policy, a redistricting plan should be demonstrated as narrowly tailored to deviate from absolute equality only as is necessary to implement the rational state policy of preserving minority voting strength. Unlike *Calderón*, a redistricting plan should not seek an unjustified variation or attempt to adopt a permissible level of variation within a county's districts without requiring justification.

In addition, it is not so clear that congressional, state legislative and local apportionment plans are all measured by the same yardstick. The language cited in *Avery* as well as *Mahan v. Howell*, supra, clearly indicate that congressional apportionment is measured by a more stringent standard. Until the United States Supreme Court overrules its decisions or presents a new holding to the contrary, it should be argued that these

64. 4 Cal.3d at 268, 481 P.2d at 500, 93 Cal. Rptr. at 372.

65. *Id.* at 268, 481 P.2d at 500. 93 Cal. Rptr. at 372.

66. *Id.* at 269, 481 P.2d at 501, 93 Cal. Rptr. at 373 (quoting Reynolds v. Sims, 377 U.S. 533, 579; *see supra* note 19 and accompanying text).

67. *Id.* at 270, 481 P.2d at 502, 93 Cal. Rptr. at 374.

68. *See, e.g.*, Regents of University of California v. Bakke, 438 U.S. 265 (1978) (affirmative action may only be used where explicit judicial, legislative or administrative findings have been made of special constitutional or statutory violations).

cases are still good law, and lower court cases to the contrary are less persuasive and even incorrect.

IV.
PERMISSIBLE DEVIATIONS

In *Abate v. Mundt*,[69] the Supreme Court held that a reapportionment plan for New York's Rockland County Board of Supervisors, which produced a total deviation of equality of 11.9%, did not violate the Equal Protection Clause. The Board of Supervisors consisted of five members, each of whom also served as the executive of one of the County's five towns.[70] Under this system of local government, the County Legislature was not separately elected; rather, its members held their County offices by virtue of their election as town supervisors.[71]

> In assessing the constitutionality of various apportionment plans, we have observed that viable local governments may need considerable flexibility in municipal arrangements if they are to meet challenging societal needs, and that a desire to preserve the integrity of political subdivisions may justify an apportionment plan which departs from numerical equality. These observations, along with the fact that local legislative bodies frequently have fewer representatives than do their state and national counterparts and that some local legislative districts may have a much smaller population than do congressional and state legislative districts, lend support to the argument that slightly greater percentage deviations may be tolerable for local government apportionment schemes. . . . Of course, this Court has never suggested that certain geographic areas or political interests are entitled to disproportionate representation. Rather, our statements have reflected the view that the particular circumstances and needs of a local community as a whole may sometimes justify departures from strict equality.[72]

Based on the long tradition of overlapping functions and dual personnel in Rockland County government, and because the plan contained no built-in bias tending to favor particular political interests or geographic areas, the Court held that the reapportionment plan did not violate the Constitution.[73]

In *Gaffney v. Cummings*,[74] the Supreme Court held that minor deviations from mathematical equality among state legislative districts are not sufficient to make a prima facie case of invidious discrimination under the Equal Protection Clause.

---

69. 403 U.S. 182 (1971).
70. *Id.* at 183.
71. *Id.*
72. *Id.* at 185 (citations omitted).
73. *Id.* at 187.
74. 412 U.S. 735, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973).

> We have repeatedly recognized that state reapportionment is the task of local legislators or of those organs of state government selected to perform it. Their work should not be invalidated under the Equal Protection Clause when only minor population variations among districts are proved. Here, the proof at trial demonstrated that the House districts under the State Apportionment Board's plan varied in population from one another by a *maximum* of only about 8% and that the average deviation from the ideal House district was only about 2%. The Senate districts had even less variations. On such a showing, we are quite sure that a prima facie case of invidious discrimination under the Fourteenth Amendment was not made out.[75]

Gaffney stands for the proposition that with respect to state legislative reapportionment, minor deviations from population equality are considered legally irrelevant. If the deviations involved in a plan such as that proposed for Los Angeles County are not in the de minimus range, they should then be argued to be permissible subject to justification by the state's interest in preserving Latino voting strength. Although the cases discussed so far deal with protecting minority interests of structural units such as political subdivisions, the values for providing such protection are the same for racial minorities. If the court recognizes that towns or counties often constitute communities with shared distinct interests and values, that concept can easily be extended to racial minorities, especially when they live in a contiguous area. Presumably minorities concentrated in a specific area of a county are close enough in economic status that their interests as a group would be compatible enough to support the analogy to a political subdivision.

In a most recent decision regarding local government deviations from the "one person-one vote" standard, the Supreme Court, in *Board of Estimate v. Morris*,[76] invalidated apportionment of New York City's Board of Estimate, which consisted of three members elected citywide and the president of each of the city's five boroughs. The structure of the Board of Estimate was held inconsistent with Equal Protection because although the boroughs have widely disparate populations, each had equal representation on the Board.[77] The Court noted that the parties had stipulated that the deviation involved was 78%, and somewhat larger with respect to budget matters when only two citywide members participate.[78]

> We note that no case of ours has indicated that a deviation of some 78% could ever be justified. At the very least, the local government seeking to support such a difference between electoral districts would bear a very difficult burden, and we are not prepared to differ with the holding of the

75. *Id.* at 751 (emphasis in original).
76. 489 U. S. —, 109 S.Ct. 1433 (1989).
77. *Id.* at 1436.
78. *Id.* at 1442.

> courts below that this burden has not been carried. The city presents in this court nothing that was not considered below, arguing chiefly that the board, as presently structured, is essential to the successful government of a regional entity, the City of New York.[79]

The Court concluded that the City's proffered governmental interests (accomodation of "natural and political boundaries as well as local interests")[80] did not suffice to justify such a substantial departure from the one person-one vote ideal.[81]

The cases cited above by the Supreme Court in *Board of Estimate v. Morris,* regarding permissible deviations, are helpful in understanding when deviations may be considered permissible. *Brown v. Thompson,*[82] involved a deviation from population equality with an average deviation of 16% (from the ideal number of residents per representative) and a maximum percentage deviation of 89% (between the largest and the smallest number of residents per representative). The Supreme Court held that Wyoming's long standing and legitimate policy of preserving county boundaries justified the deviations.[83] In discussing deviations which are generally permissible, the Court noted:

> We have held that "minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State." Our decisions have established, as a general matter, that an apportionment plan with a maximum population under 10% falls within this category of minor deviations. A plan with larger disparities in population, however, creates a prima facie case of discrimination and therefore must be justified by the State.[84]

Wyoming's constitutional requirement that each county have at least one representative in its House of Representatives justified a county with only 2,924 persons having its own representative. The ideal apportionment would have been 7,337 persons per representative.[85] The court emphasized that it was not deciding whether Wyoming's policy of adherence to county boundaries justified the deviations throughout Wyoming's districts. Rather, the issue was whether it justified "the additional deviations from population equality resulting from the provision of rep-

---

79. *Id.* at 1442 (the Court cites as examples Brown v. Thompson, 462 U.S. 835, 846-847 (1988); Conner v. Finch, 431 U.S. 407, 410-420 (1977); Chapman v. Meier, 420 U.S. 1, 21-26 (1975); Mahan v. Howell, 410 U.S. 315, 329 (1973)).

80. *Id.*

81. *Id.* at 1443.

82. 462 U.S. 835 (1983).

83. *Id.* at 847.

84. *Id.* at 842-43 (quoting *Gaffney,* 412 U.S. at 745; and citing as examples Connor v. Finch, 431 U.S. 407, 418 (1977) and White v. Register, 412 U.S. 755, 764 (1973).).

85. *Id.* at 839.

resentation to Niobrara County."[86] The court concluded that "[i]t can scarcely be denied that in terms of actual effect on appellants' voting power, it matters little whether the 63-member or 64-member House is used."[87] The court noted further that under the 63-member plan, the average deviation per representative would be 13% and the maximum deviation would be 66%. "These statistics make clear that the grant of a representative to Niobrara County is not a significant cause of the population deviations that exist in Wyoming."[88]

This case is important to a reapportionment plan which adds a representative in order to provide representation to a minority group. It demonstrates that a court can look at a particular district being challenged and evaluate its effect on the voting strength of the challenger instead of deciding whether the entire reapportionment plan and its total deviations are constitutional. It appears to be an incremental analysis of reapportionment as opposed to a blanket judgement on the entire plan. A rational state policy will, under this analysis, allow a district to be substantially unequal from other districts so long as it does not, in and of itself, create significant total deviations.

Los Angeles County's Board of Supervisors may not lend itself to this analysis in that the Board governs a set number of districts—currently five—and the proposed reapportionment plan does not include a sixth district but rather involves a realignment of the presently existing districts.[89] However, if the total deviations involved in the proposed plan are significant even without the smaller Latino district, perhaps *Brown* could be used to show that a challenger's voting strength has not been diluted significantly through the creation of a majority Latino district, and therefore the Equal Protection Clause was not violated. On the contrary, voting strength of non-Latinos was probably previously inflated due to the division of the Latino population into three separate districts. Reapportioning to create a Latino district involves not a debasement, but a realignment of political strength to be more inclusive and remedy dilution of voting strength suffered in the past by Latinos.

A. Court Ordered Plans

In *Connor v. Finch*,[90] the Supreme Court held invalid a Mississippi District Court's legislative reapportionment plan which resulted in maximum population deviations of 16.5% in the Senate districts and 19.3% in the House districts. The Court stated that a court is held to stricter

86. *Id.* at 846.
87. *Id.*. at 847.
88. *Id.*. at 847.
89. *See supra* note 11 and accompanying text.
90. 431 U.S. 407 (1977).

standards than a state legislature when departing from the *Reynolds* "as nearly of equal population as practicable" standard, and that the burden of articulating special reasons for following such a policy in the face of substantial inequalities is correspondingly higher.[91] The Court therefore held that the District Court failed "to identify any such unique features . . . as would permit judicial protection of county boundaries in the teeth of the judicial duty to achieve the goal of population equality with little more than de minimus variation."[92]

Chapman v. Meier[93] first established that a court ordered plan must achieve the goal of population equality with little more than de minimus variation. "Where important and significant state considerations rationally mandate departure from these standards, it is the reapportionment court's responsibility to articulate precisely why a plan of single-member districts with minimal population variance cannot be adopted."[94] The Court therefore held a court-ordered reapportionment plan with a 20% variance constitutionally impermissible absent significant state policies requiring its adoption.[95]

Note that both *Connor* and *Chapman* involved court ordered plans which contained multi-member districts. Therefore, a single member district plan with detailed findings by the court as to why the variations involved are necessary could be constitutionally permissible. Even if the variations in population are over 10%, under *Abate*, *Brown* and *Gaffney*, one could argue that the deviations are small enough to be considered permissible so long as the justification for such deviations are spelled out explicitly on the court's record. Note also that although *Kirkpatrick v. Preisler*[96]stated that there are no variances in population small enough to be considered de minimus, *Connor* and *Chapman* indicate that a court ordered plan can have slight variations in population which are de minimus. If a plan's deviations are under 10%, such deviations are arguably de minimus. If the variations are higher however, the disparity may create a prima facie case of discrimination, and therefore must be justified by a rational state policy to be permissible.

B. Los Angeles Distinguishable Due to Large Population

Because of the size of Los Angeles County, it may be argued that a redistricting plan for the Los Angeles Board of Supervisors is distinguishable from other reapportionment cases with permissible or de mini-

91. *Id.*. at 419-420.
92. *Id.*. at 420.
93. 420 U.S. 1 (1975).
94. *Id.*. at 27.
95. *Id.* at 24.
96. 394 U.S. 526 (1969).

mus deviations due to the number of people involved in even the smallest of deviations. An argument could be made that because Los Angeles County is so large, it should be easier to make populations of districts within the County highly equalized.

> For example, assume that the local governing bodies of both Los Angeles County, California, and Hamilton County, New York, are being challenged for violations of the "one man-one vote" rule. Assume also that each county's apportionment of its ten-man legislature deviates from the ideal by 10%. Although the same standard should be applied, the factor of population size may produce a different result. The population of Hamilton County is just 4,714, while Los Angeles County boasts a population of more than seven million residents. Although both cases involve local governments, the 10% deviation affects 700,000 people in Los Angeles. Unless sufficient reason is shown why the district lines could not be redrawn to correct the disparity of approximately 70,000 people among the districts without detracting from the goal of fair and effective representation, the California legislative scheme should be invalidated. However, the same percentage deviations would involve fewer than 500 Hamilton County residents. Redrawing district lines in order to pick up only fifty people might be an enormously difficult task. Therefore, if other elements of the county's districting scheme fulfill the good-faith requirements, it should pass constitutional muster.[97]

Since the above article was written, Los Angeles County has increased in population to 8.3 million residents; therefore, a 10% deviation would now affect 830,000 people.[98] In comparison, *Gaffney v. Cummings*[99] involved reapportionment of house districts which, according to the 1970 census, contained a population of 3,032,217. In *Brown v. Thompson*, Wyoming's population, based on the 1980 census, was only 469,557.[100] In contrast to this, Los Angeles has districts which contain more people than some counties or even states involved in the cases cited above. Therefore, an attempt may be made by a challenger of such a plan to distinguish a 10% or so deviation in Los Angeles County from all other reapportionment plans which the Supreme Court has held permissible due to the number of people affected.

This type of statistical argument can be easily countered. The Supreme Court has consistently held that there is no mathematical test for the validity of a given apportionment plan. It has also repeatedly stated that what is permissible or impermissible in one state is not necessarily permissible or impermissible in another. With regard to mathe-

97. Note, *Reapportionment—Nine Years into the "Revolution" and Still Struggling*, 70 Mich. L.Rev. 586, 611-12 (1972).

98. U.S. BUREAU OF THE CENSUS, COUNTY AND CITY DATA BOOK (1988). This figure represents the population of Los Angeles County for 1986.

99. 412 U.S. 735 (1973).

100. 462 U.S. 835, 839 (1983).

matical formulations of the rule in apportionment cases, it has warned against any attempt to state in mathematical language the constitutionally permissible range of deviations. "In our view the problem does not lend itself to any such uniform formula, and it is neither practicable nor desirable to establish rigid mathematical standards for evaluating the constitutional validity of a state legislative apportionment scheme under the Equal Protection Clause."[101] With regard to comparisons between states, the Supreme Court has said that "what is marginally permissible in one State may be unsatisfactory in another, depending on the particular circumstances of the case."[102]

Therefore, one could demonstrate that in deciding the constitutionality of a particular reapportionment plan, a court should not look to other states and compare the number of people involved in various plans for guidance. The court has always scrutinized the rationality of a state's policy for any deviations in upholding or denying the constitutionality of a state's reapportionment plan. Policy reasons for allowing any deviations are based on notions like local autonomy and responsiveness to local concerns, not on the insignificance of the number of people involved or on numerical precision. Therefore, the fact that previous reapportionment cases which would support the deviations desired in Los Angeles County involve states or counties with significantly smaller populations should not hinder their persuasiveness. A court must look to the reasoning for allowing the deviations and not the size of the populations involved.

V.
RESULTING LEGAL FRAMEWORK

A person challenging the proposed reapportionment of Los Angeles County would therefore have to allege a dilution of his or her right to vote under the "one person, one vote standard" enunciated in *Reynolds v. Sims*.[103] This interest in voter equality is a nondeference interest which, if injured, would cause the state to have to justify its actions. That is, a challenger would have to demonstrate that allowing Latinos to have a representative in a smaller district causes his or her vote to carry less weight. Being in a district where a larger number of people have the same amount of representation as the smaller Latino district on the Board of Supervisors could establish such a diminution.

The Equal Protection Clause requires uniform treatment of persons standing in the same relation to the governmental action questioned or challenged. Therefore, the government has a duty not to make invidious

101. Roman v. Sincock, 377 U.S. 695 (1964).
102. Reynolds v. Sims, 377 U.S. 533 (1964).
103. 377 U.S. 533 (1964).

distinctions among its citizens absent justification. The state must have a reason for making one person's vote worth more than another's in any election. As discussed above, *Reynolds, et seq*, do not require strict mathematical equality; some deviations are permissible so long as they are justified by a rational state policy.

The Supreme Court has been willing to allow much greater deviation from mathematical equality in the apportionment of state legislatures or local governmental bodies. The Court has established a de minimus category that covers minor population variations which would include all deviations of less than 10%. Such minor deviations do not make out a prima facie violation of Equal Protection and may require no justification by the state for the variations among districts.[104] Even deviations above this 10% range can be justified by legitimate state considerations. Less justification is required for state and local redistricting than in federal congressional redistricting. A congressional apportionment plan must be equalized "as nearly practicable" with each deviation justified by an interest which can be shown to be a governmental necessity. With state and local reapportionment the justification need only be one which a state may rationally consider. This rational basis test allows local governments more latitude with respect to apportionment, thereby allowing the implementation of policies which reflect local concerns and interests.

The reapportionment cases indicate that to demonstrate a rational basis the government must show that the proposed apportionment plan is narrowly tailored to meet its proffered objectives. If the plan over-regulates or is inefficient it may be held invalid. A plan which is not drawn to achieve the state's interest with precision may cause the state's legitimate interest to fail to justify the deviations involved.

Therefore, in order to successfully challenge a reapportionment plan like that proposed for Los Angeles County, it must be demonstrated that the state interest of preserving voting strength of minorities is irrational, and/or that the deviations involved are not necessary to achieve that purpose. Without access to the specifics of the numerical figures of the plan involved, it is impossible to evaluate its vulnerability due to not being narrowly tailored. However, the rationality of a state's desire to preserve the voting strength of Latinos is evaluated below.

VI.
PRESERVING VOTING STRENGTH OF MINORITIES

The Supreme Court has pretermitted the question of the legitimacy of preserving the voting strength of racial minority groups as a legislative

104. *See, e.g.*, White v. Regester, 412 U.S. 755 (1973).

congressional apportionment goal. In *Karcher v. Daggett*,[105] the Supreme Court held that the attempt to justify population deviations in a New Jersey reapportionment plan on the ground that they preserved the voting strength of racial minority groups was not supported by the evidence. Although the reapportionment plan was therefore held unconstitutional, it is significant that the Court did not condemn the proffered justification as inadequate in and of itself. Instead, the problem stemmed from a plan which was not narrowly tailored to achieve such a goal of preserving minority group voting strength.

> Nowhere do appellants suggest that the large population of the Fourth District was necessary to preserve minority voting strength; in fact, the deviation between the Fourth District and other districts has the effect of diluting the votes of all residents of that district, including members of racial minorities, as compared with other districts with fewer minority voters. The record is completely silent on the relationship between preserving minority voting strength and the small populations of the Third and Sixth Districts.[106]

In the dissenting opinion, Justice White, joined by Justices Burger, Powell and Rehnquist expressed the view that population deviations in the plan were statistically insignificant and had no relevant effect on relative representation.

> Our cases dealing with state legislative apportionment have taken a more sensible approach. We have recognized that certain small deviations do not, in themselves, ordinarily constitute a prima facie constitutional violation. Moreover, we have upheld plans with reasonable variances that were necessary to account for political subdivisions, to preserve the voting strength of minority groups, and to insure political fairness. . . .[107]

In *Gaffney v. Cummings*,[108] a Connecticut reapportionment plan for the state legislature, which was based on a "political fairness" principle designed to reflect the relative strength of the major political parties, was upheld by the Supreme Court.

> [W]e have not ventured far or attempted the impossible task of extirpating politics from what are the essentially political processes of the sovereign States. Even more plainly, judicial interest should be at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so. There is no doubt that there may be other reap-

105. 462 U.S. 725 (1983).

106. *Id.* at 743-44.

107. 462 U.S. at 780-81 (citing Gaffney v. Cummings, 412 U.S. 735 (1973), and White v. Regester, 412 U.S. 755 (1973), for the proposition that small deviations alone do not constitute a violation; and citing Mahan v. Howell, 410 U.S. 315 (1973), and *Gaffney* as examples of reasonable variances upheld).

108. 412 U.S. 735 (1973).

> portionment plans for Connecticut that would have different political consequences and that would also be constitutional. Perhaps any of appellees' plans would have fallen into this category, as would the court's had it propounded one. But neither we nor the district courts have a constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State.[109]

Therefore, although *Gaffney* did not specifically involve racial minorities, it does demonstrate that a political compromise, which takes into account various interests of groups within a given area, may withstand constitutional challenge so long as the deviations are not so substantial as to defy justification. In *Karcher v. Daggett*, the fatal flaw of the plan was not its justification, but the fact that the deviations from population equality were not demonstrated to be directly related to the state's goal of preserving minority voting strength.

Additionally, in *United Jewish Organizations v. Carey*[110] the Supreme Court held that the use of racial criteria in districting and apportionment is permissible.

> Section 5 [of the Voting Rights Act] and its authorization for racial redistricting where appropriate to avoid abridging the right to vote on account of race or color are constitutional. Contrary to petitioners' first argument, neither the Fourteenth nor the Fifteenth Amendment mandates any *per se* rule against using racial factors in districting and apportionment. Nor is petitioners' second argument valid. The permissible use of racial criteria is not confined to eliminating the effects of past discriminatory districting or apportionment.[111]

The Court therefore allowed the use of racial criteria by the State of New York in the reapportionment of its counties.

> [D]istricting plans would be vulnerable under our cases if "*racial or political groups* have been fenced out of the political process and their voting strength invidiously minimized"; but that was not the case there, and no such purpose or effect may be ascribed to New York's 1974 plan. Rather, that plan can be viewed as seeking to alleviate the consequences of racial voting at the polls and to achieve a fair allocation of political power between white and nonwhite voters in Kings County.
>
> In this respect New York's revision of certain district lines is little different in kind from the decisions by a State in which a racial minority is unable to elect representatives from multimember districts to change to single-member districting for the purpose of increasing minority representation. This change might substantially increase minority representa-

109. *Id.* at 754.
110. 430 U.S. 144 (1977).
111. *Id.* at 161.

> tion at the expense of white voters, who previously elected all of the legislators but who with single-member districts could elect no more than their proportional share. If this intentional reduction of white voting power would be constitutionally permissible, as we think it would be, we think it also permissible for a State, employing sound districting principles such as compactness and population equality, to attempt to prevent racial minorities from being repeatedly outvoted by creating districts that will afford fair representation to the members of those racial groups who are sufficiently numerous and whose residential patterns afford the opportunity of creating districts in which they will be the majority.[112]

The language quoted above, along with the holding in *Karcher v. Daggett*, would seem to provide a strong basis for arguing that use of race is a permissible state or local governmental interest which may justify variations in district populations. The Supreme Court had two opportunities to rule against use of race in apportionment, and declined to do so. At a local level, it should be even easier to justify such a policy since local governments are given wider latitude to deviate from the one person-one vote standard. Creation of a Latino district would be for the purpose of providing fair representation to a group that has been disenfranchised for a significant portion of the County's history.

When a local government undertakes to remedy past discrimination, however, it must now apparently do so in a manner that is narrowly tailored to findings of past discrimination.[113] The Supreme Court in *Ricmond v. Croson* explained the limitations on states in redressing societal discrimination.

> That Congress may identify and redress the effects of society-wide discrimination does not mean that, a fortiori, the States and their political subdivisions are free to decide that such remedies are appropriate. Section 1 of the Fourteenth Amendment is an explicit constraint on state power, and the states must undertake any remedial efforts in accordance with that provision. To hold otherwise would be to cede control over the content of the Equal Protection Clause to the 50 state legislatures and their myriad political subdivisions. The mere recitation of a benign or compensatory purpose for the use of a racial classification would essentially entitle the states to exercise the full power of Congress under § 5 of the Fourteenth Amendment and insulate any racial classification from judicial scrutiny under § 1. We believe that such a result would be contrary to the intentions of the Framers of the Fourteenth Amendment, who desired to place clear limits on the States' use of race as a criterion for legislative action, and to have the federal courts enforce those limitations.[114]

---

112. *Id.* at 167-68 (quoting *Gaffney*, 412 U.S. at 754, and adding emphasis).

113. City of Richmond v. J.A. Croson Co., 488 U.S. —, 109 S.Ct. 706, 102 L.Ed.2d at 854 (1989).

114. 109 S.Ct. at 719, 102 L.Ed.2d at 880.

The Supreme Court in *Croson* therefore held that the Fourteenth Amendment's Equal Protection Clause was violated by the City of Richmond's minority set aside program due to the absence of adequate findings of discrimination.

> While the States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief. . . ."[I]t is essential that state and local agencies also establish the presence of discrimination in their own fact-finding processes or upon determinations made by other competent institutions."[115]

Therefore, in addition to being narrowly tailored to show that any deviations are necessary to achieve the proffered state policy, race conscious relief must also be tailored to specific findings of past discrimination within a state or local government. In *Wygant v. Jackson Board of Education*,[116] the Supreme Court held that the fact that society as a whole has discriminated against a minority group is too amorphous a basis for imposing a racially classified remedy. A factual determination must therefore be made to provide a strong basis in evidence that remedial action is necessary. In some ways, this makes it easier to argue for preserving minority voting strength within a single county district. If the evidence introduced is sufficient to show that the Latino population has suffered a history of continuous debasement of their voting strength due to gerrymandering, the race conscious relief requested may survive challenge under *Croson*. If a long history of such debasement can be demonstrated in the court's record, having one representative, after being submerged into three white majority districts for a long period of time, does not seem to be disproportionate relief. Lack of such findings, however, can be fatal to the desired apportionment plan. In *Whitcomb v. Chavis*,[117] the Supreme Court held that evidence that an African-American ghetto in Indiana had fewer resident legislators than its proportion of the county's population did not prove invidious discrimination.

Likely challengers to such a plan would include white voters who would be placed in larger districts and could allege that Latinos are receiving disproportionate representation on the County's Board of Supervisors. Other minority groups may also challenge the plan claiming that their voting rights should also be protected by the government and that they also lack adequate representation on the Board of Supervisors.

115. 109 S.Ct. at 887, 102 L.Ed.2d at 889 (quoting Days, *Fullilove*, 96 Yale L.J. 453, 480-81 (1987)).

116. 476 U.S. 267 (1986).

117. 403 U.S. 124 (1971).

However, it should be argued that with respect to the white voters, their voting strength is not a reduction but an *equalization* of their previously inflated voting strength. For example, in Los Angeles County, where Latinos were divided into three districts, whites arguably have disproportionate representation on the Board of Supervisors. Therefore, allowing a Latino representative would not be a result of a preference per se for Latinos, but a remedial measure which aims at equality of representation.

With respect to other minority groups, the argument would be that the governmental policy for creating a Latino district is not based on any unique feature of the Latino population other than the history of debasement of their political strength. If another group can show it has also experienced the effects of gerrymandering in Los Angeles County, it could potentially expect that the preservation of their voting strength should also be considered in such a plan.[118]

> [W]ere we asked to decide whether any given rival group—German-Americans for example—must constitutionally be accorded preferential treatment, we do have a "principled basis" . . . for deciding this question, one that is well-established in our cases: The Davis program expressly sets out four classes which receive preferred status. . . . The program clearly distinguishes whites, but one cannot reason from this a conclusion that German-Americans, as a national group, are singled out for invidious treatment. And even if the Davis program had a differential impact on German-Americans, they would have no constitutional claim unless they could prove that Davis intended invidiously to discriminate against German Americans. . . . If this could not be shown, then . . . the only question is whether it was rational for Davis to conclude that the groups it preferred had a greater claim to compensation than the groups it excluded.[119]

Therefore, although a plan is race conscious in that it specifically seeks to form a Latino district, the resulting reapportionment plan should be able to withstand challenge from rival groups so long as any impact on those other groups was not the result of the government's intent to invidiously discriminate against them. If this can not be demonstrated, the government need only demonstrate a rational basis for preferring Latinos in a reapportionment plan. If facts indicate that Latinos have experienced exclusion from the political process in a manner unlike any potential claimants, the government should be able to withstand any such challenge.

Arguments against preserving minority group voting strength as an adequate state policy will include the fact that § 2 of the Voting Rights Act, as amended June 29, 1982, specifically disclaimed the creation of a

118. *See, e.g.,* Regents of University of California v. Bakke, 438 U.S. 265, 358-62 (1978) (Brennan, J., concurring).

119. *Id.* at 359 n.35.

right to proportionate representation.[120] As was noted in *Thornburg v. Gingles*,[121] the disclaimer was essential to the compromise that resulted in passage of the amendment. "We know that Congress intended to allow vote dilution claims to be brought under § 2, but we also know that Congress did not intend to create a right to proportional representation for minority voters."[122]

The preservation of minority group voting strength, however, is not dependant upon the creation of such right in the Voting Rights Act. It is instead based on constitutional claims under the Equal Protection Clause. Just as political subdivisions, or long standing political structures are allowed to justify deviations from equal population standards without being specifically sanctioned by the Voting Rights Act, preserving minority voting strength can be justified through use of Supreme Court constitutional precedent. Although minorities are not guaranteed proportional representation, where they have been victims of gerrymandering, remedial relief to preserve their voting strength can be justified as a rational state policy. That is, even though Latinos are not guaranteed a right to proportional representation under the Voting Rights Act, a unit of government should be able to correct past inequalities in order to provide representation for a victimized group. Also, even if such a justification were not sufficient for congressional reapportionment purposes, it should be argued that at a local level, the policy need only be rational. With sufficient findings on the record, if the deviations are only such as are absolutely necessary to achieve the aim of preserving minority group voting strength, one could make a strong case for the local governmental policy.

VII.
RELEVANT POPULATION BASE

There appears to be conflicting authority as to the relevant population base used in composing a district for reapportionment. For instance, the California Supreme Court has held that use of registered voters may violate equal protection, while the Ninth Circuit cases state that in a cause of action based on Section 2 of the Voting Rights Act of 1965, eligible minority voter population is the relevant population base.

A. California Law

In *Calderón v. City of Los Angeles*,[123] the California Supreme Court, Sullivan, J., held that city charter provisions and ordinances passed

120. S. REP. NO. 97-417, 97th Cong., 2d Sess. 193-94 (1982).
121. 478 U.S. 30, 84 (1986) (O'Conner, J., concurring).
122. *Id.*
123. 4 Cal.3d 251, 481 P.2d 489, 93 Cal. Rptr. 361 (1971).

thereunder as to councilmanic district apportionment, which were based on voter registration rather than on population, denied equal protection where apportionment on such basis resulted in the largest district having 70% more people than the smallest.

> The genesis of the present controversy lies in a seeming looseness in the language of the myriad United States Supreme Court decisions which have sought to interpret the "one man, one vote" principle since the issue of electoral apportionment was first held justiciable nine years ago. Over the years, the court has "used the words 'inhabitant,' 'citizen,' 'resident,' and 'voter' almost interchangeably in describing those who deserve representation, without indicating which of these bases for measuring substantial equality is most appropriate." In particular, the court has tended to treat as fungible two quite distinct concepts: first, that each district should contain equal numbers of people—a "population" standard; and second, that each voter is entitled to to have his ballot carry an equal impact—a "voter" standard.[124]

The California Supreme Court noted in *Calderón* that this dichotomy was recognized and resolved by the United States Supreme Court in *Burns v. Richardson*,[125] which involved a Hawaii apportionment plan based on registered voters. Due to a large number of military personnel based in Hawaii and the large influx of tourists, a sizeable number of people present in the state were not permanent residents and hence ineligible for state citizenship. The Supreme Court in *Burns* held that a state was free to limit its apportionment base solely to state citizens, rather than using total population figures, thereby excluding "aliens, transients, short term or temporary residents, or persons denied the right to vote for conviction of crime."[126]

The Supreme Court, however reached a different conclusion with regard to the validity of the registered voter standard:

> Such a basis depends not only upon criteria such as govern state citizenship, but also upon the extent of political activity of those eligible to register and vote. Each is thus susceptible to improper influences by which those in political power might be able to perpetuate underrepresentation of groups constitutionally entitled to participate in the electoral process, or perpetuate a "ghost of prior malaportionment."[127]

In addition, the Supreme Court observed that the number of registered voters may fluctuate in a given election based upon such factors as a peculiarly controversial election issue, an extremely popular candidate,

---

124. *Id.* at 255, 481 P.2d at 490-491, 93 Cal. Rptr. at 362-363 (footnote and citation omitted) (quoting Note, *Reapportionment*, 79 Harv. L.Rev. 1226, 1254 (1966)).

125. 384 U.S. 73 (1966).

126. *Id.* at 92.

127. *Id.* at 92-93 (footnote omitted) (quoting Buckley v. Hoff, 243 F.Supp. 873, 876 (D.C. Vt. 1965)).

or even weather conditions.[128] In light of these considerations, the Supreme Court held that the Hawaii apportionment plan satisfied the Equal Protection Clause "only because on this record it was found to have produced a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population basis. "[129]

The California Supreme Court in *Calderón* therefore reasoned that use of a population standard rather than one based on registered voters "is more likely to guarantee that those who cannot or do not cast a ballot may still have some voice in government."[130]

> Thus a 17 year old, who by state law is prohibited from voting, may still have strong views on the Vietnam War which he wishes to communicate to the elected representatives from his area. Furthermore, much of a legislators time is devoted to providing services and information to his constituents, both voters and nonvoters. A district which, although large in population, has a low percentage of registered voters would, under a voter-based apportionment, have fewer representatives to provide such assistance and to listen to concerned citizens.[131]

The State Supreme Court noted that "access to elected officials is also an important means of democratic expression—and one that is not limited to those who cast ballots."[132] The Court also noted that such access is "embodied in the First Amendment's guarantee of 'the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.' There is nothing in that amendment to limit its protection to registered voters."[133]

The State Court also noted that the voter based system, according to the figures presented, resulted in severe underrepresentation of districts with heavy concentrations of African-Americans and Mexican-Americans.[134] Noting that the United States Supreme Court has asserted that an otherwise acceptable apportionment plan may fail to pass constitutional muster if it operates to minimize or cancel out the voting strength of racial or political elements of the voting population,[135] the State Court held that plaintiffs and other residents of Los Angeles were denied equal protection and the plan was therefore invalid.[136]

By our holding today we should not be understood to condemn a voter-

128. *Id.* at 93.
129. *Id.* at 93.
130. 4 Cal.3d at 259, 481 P.2d at 493, 93 Cal. Rptr. at 365.
131. *Id.* at 259, 481 P.2d at 494, 93 Cal. Rptr. at 366 (footnote omitted).
132. *Id.* at 260, 481 P.2d at 494, 93 Cal. Rptr. at 366 (footnote omitted).
133. *Id.* at 259 n.8, 481 P.2d at 494, 93 Cal. Rptr. at 366 (citing Tinker v. Des Moines Community School District, 393 U.S. 503, 506 (1969)).
134. *Id.* at 260, 481 P.2d at 494, 93 Cal. Rptr. at 366.
135. *Id.* at 260, 481 P.2d at 495, 93 Cal. Rptr at 367.
136. *Id.* at 262, 481 P.2d at 496. 93 Cal. Rptr. at 368.

> based apportionment in all circumstances and for all time. Where such a plan is shown to fairly reflect population distribution, it may withstand constitutional attack. The Supreme Court in *Burns* isolated several factors which would contribute to such a result, and we present these as guidelines for the future.[137]

The factors the State Court laid out are as follows. First of all, the court stated that voter registration is likely to show a significant correlation to population distribution if a high percentage of those eligible to vote are in fact registered. Second, reapportionment should take place frequently in order to keep up with registration changes. Third, the use of registration statistics from presidential elections as opposed to local races will ensure a high level of participation and avoid fluctuations in interest in particular local elections which will become frozen into a given apportionment scheme. Finally, introduction of a system of permanent personal registration will help ensure stability and accuracy of registration rolls, thus making them a better reflection of population distribution.[138]

Therefore, at least for purposes of any state law claims and all constitutional claims, it should be argued that the Latino district in the proposed reapportionment plan should include as many segments of that population as possible in order to produce the smallest deviation and still maintain a Latino majority within the district. Based on *Calderón* and *Burns*, it appears that undocumented workers are clearly left out of the relevant population. However, non-voting or unregistered Latinos, as well as children and non-voting age persons should be included in the population in order to enlarge the Latino population as much as possible. Any attempt to use registered voters or even those eligible to vote as the relevant population should be resisted.

B. Federal Law

In *Romero v. City of Pomona*,[139] the Court of Appeals held that for purposes of an action under Section 2 of the Voting Rights Act of 1965,[140] the relevant population is the eligible minority voter population when determining whether a minority group can constitute a voting majority of a single-member district. The Court of Appeals interpreted *Thornburg v. Gingles*[141] as using voting majorities, rather than raw population totals, as the touchstone for determining geographical compactness.

---

137. *Id.* at 264-265, 481 P.2d at 498, 93 Cal. Rptr. at 370 (footnote omitted) (citation omitted).
138. *Id.* at 265, 481 P.2d at 498, 93 Cal. Rptr. at 370.
139. 883 F.2d 1418 (9th Cir. 1989).
140. 42 U.S.C. § 1973 (as amended June 29, 1982).
141. 478 U.S. 30 (1986). *See supra* notes 121-122 and accompanying text.

> Cases before and after *Thornburg* acknowledge that a Section 2 claim will fail unless the plaintiff can establish that the minority group constitutes an effective voting majority. . . . More recently our assesment of geographic compactness was based upon the number of eligible minority voters, rather than total minority population. The district court was correct in holding that eligible minority voter population, rather than total minority population, is the appropriate measure of geographic compactness.[142]

Therefore, although in state court a strong case could be made for using overall population, in federal court, eligible voters comprise the relevant population. Theoretically, one could argue that under *Erie Railroad Co. v. Tompkins*[143] state substantive law should be applied, at least to the constitutional and state claims. In a practical sense, however, it is uncertain whether this is in any way helpful to an analysis of *Garza*, since it is based significantly on federal claims under the Voting Rights Act.

VIII.
CONCLUSION

Although there is no direct, on-point authority for the proposition that preservation of a minority group's voting strength may justify deviations from the one person-one vote standard in a county's supervisorial districts, there are several factors which will support such a justification. First of all, local governments are given more latitude in reapportionment than are congressional apportioners. Therefore, a local government's policy need only be rational instead of necessary. Secondly, minor deviations from population equality standards do not necessarily make a prima facie Equal Protection case, thus a small deviation of 10% or so could be considered a de minimus or permissible deviation at the local level.

Most importantly, the Supreme Court has allowed race to be taken into account in apportionment cases. Provided that the evidence of past discrimination is sufficient to warrant remedial relief, one could make a strong case for preserving minority voter strength by creating a district which is not exactly equal to the others. Although there is no right to minority representation in proportion to their population, there is a right to equality of representation in government, and where that has been abridged through gerrymandering, a local government seeking to remedy past discrimination may rationally do so by creating a slightly smaller Latino majority district within a county in order to preserve that group's

142. *Romero*, 883 F.2d at 1426 (citing Gómez v. City of Watsonville, 863 F.2d 1407, 1414 (9th Cir. 1988), cert. denied, 109 S.Ct. 1534 (1989) (presence of two districts where "Hispanics would constitute a majority of the voters and would be able to elect representatives of their choice" satisfies *Thornburg*'s geographic compactness standard)).

143. 304 U.S. 64 (1938).

voting strength. An attempt should also be made to include as many segments of the Latino population as possible, resisting the use of eligible voters as the relevant population, so as to make the Latino district larger and thereby creating less deviation between districts.