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MAKING THE VOTING RIGHTS ACT RELEVANT TO THE NEW DEMOGRAPHICS OF AMERICA: A RESPONSE TO FARRELL AND JOHNSON*

LEO F. ESTRADA**

Professor Estrada responds to what he views as the three themes of Professor Farrell and Professor Johnson's Principal Article. Estrada argues that the demographic trends that affect political representation are more complex than Farrell and Johnson describe. Estrada begins with a discussion of changing demographics and inter-group conflict, particularly between Latinos, Blacks, and Asians, and discusses the potential political ramifications for these minority groups in the new demography evidenced by the 2000 census. After discussing majority-minority districts, Estrada focuses on the disenfranchisement of Latino and Asian voters and the use of demographic data in the construction of representative districts as it relates to the Latino population. He concludes with an examination of issues presented by the 2000 census demographic data, the solutions posed by Farrell and Johnson, and future ramifications for the Voting Rights Act.

INTRODUCTION

Redistricting is the process of restructuring political space, and demographic change is the basic element of that process. At the national level, population size is the only factor determining apportionment process—each state's share of seats in the House of Representatives.¹ Within a state, when populations grow above the average, districts must contract to decrease their populations. When

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1. U.S. CONST. amend. XIV § 2. "The decennial reapportionment of the United States House of Representatives is carried out in accordance with a statutory formula, called the 'method of equal proportions,' established in 1941." Peter S. Watson, How to Draw Redistricting Plans that Will Stand Up in Court, Address before the National Conference of State Legislators 1 (Nov. 7, 1999) (citing 2 U.S.C. §§ 2a, 2b (1994)).

populations decline below the average, districts must expand to increase their populations. Within a district, changes in the population's composition can determine whether it becomes a more diverse or a more homogeneous district. When the mix of populations provides for a sufficient number of minority voters in a district, those voters will have a high probability of electing a candidate of their choice.

In their paper on the new demography, Farrell and Johnson acknowledge the significance of demographic change in advancing the political participation of America's minority groups.² The authors focus on three important themes: (1) changing demographics and increasing inter-group tensions, (2) creation of majority-minority congressional districts, and (3) factors that continue to disenfranchise minority voters. The demographic trends affecting political representation is more complex than portrayed by the authors as described in the following sections.

CHANGING DEMOGRAPHICS

Farrell and Johnson begin with a discussion on demographic growth in America.³ In fact, the United States is the only technologically advanced and industrially modernized country in the world that is growing in population.⁴ Other nations such as France, Japan, Italy, Germany, and Russia, among others, are experiencing negative growth.⁵ The United States experiences growth when other countries do not because net immigration accounts for about forty percent of the nation's growth.⁶ The remaining growth is due to natural increase (births minus deaths).⁷ The continued growth of the United States, coupled with differential growth of minority populations, continually changes the mosaic we call America.

A major theme of the Farrell-Johnson paper is that inter-group competition for political power is inevitable based largely on

2. Walter C. Farrell, Jr. & James H. Johnson, Jr., *Minority Political Participation in the New Millennium: The New Demographics and the Voting Rights Act*, 79 N.C. L. REV. 1215, 1217-19 (2001).

3. *Id.* at 1218 (stating that the United States will experience continued population growth substantially above replacement rates).

4. Population Reference Bureau, *World Population Data Sheet: Demographic Data and Estimates for the Countries and Regions of the World*, June 2000, at 2-9.

5. *Id.* at 7-8.

6. See NPG, *Fast Facts About U.S. Population Growth*, at <http://www.npg.org/facts/uspopfax.htm> (listing population statistics for the United States) (last visited Sep. 13, 2001) (on file with the North Carolina Law Review).

7. See *id.*

demographic change. The authors then move from their discussion of growth to a discussion of the increased inter-minority tensions that have arisen due to these demographic changes.⁸ Demographic change in itself does not automatically lead to tensions without certain conditions that the authors fail to discuss. For example, for the purposes of redistricting, trends in demographic growth among minority populations may not be as important as trends in geographic concentration and geographic dispersal. Latino growth has been characterized by geographic concentration of newcomers even as longer-term residents suburbanize.⁹ Given their numbers, Latino dispersion has often resulted in re-concentration in suburban areas, creating new suburban ethnic enclaves or "barrios." Asian growth is a combination of subgroup concentration, as in the case of Vietnamese and Koreans, and subgroup dispersion, as in the case of Filipinos and Japanese.¹⁰ By contrast, since the 1980s, African Americans have experienced extensive intra-metropolitan movement away from the inner city.¹¹ Ironically, as suburban residential opportunities for African Americans have increased, their political impact on elections in traditional African-American districts has decreased. These intra-metropolitan changes have important consequences since the redistricting process typically rewards growth and concentrated populations.

INTER-GROUP TENSION

Farrell and Johnson provide survey evidence from Los Angeles, California of inter-group tensions based primarily on inter-group perceptions that lead to inter-group antagonisms.¹² Inter-group tensions are not new. They occur in all communities that undergo transition and succession by a new group.¹³ Tensions based on

8. See Farrell & Johnson, *supra* note 2, at 1219.

9. Vilma Ortiz, *The Mexican-Origin Population: Permanent Working Class or Emerging Middle Class*, in ETHNIC LOS ANGELES 266-270 (Roger Waldinger & Mehdi Bozorgmehr eds., 1996).

10. Lucie Cheng & Philip Q. Yang, *Asians: The "Model Minority" Deconstructed*, in ETHNIC LOS ANGELES, *supra* note 9, at 334-39.

11. David M. Grant et al., *African Americans: Social and Economic Bifurcation*, in ETHNIC LOS ANGELES, *supra* note 9, at 400.

12. See Farrell & Johnson, *supra* note 2, at 1219-22, 1248-49.

13. See CHANDLER DAVIDSON, RACE AND CLASS IN TEXAS POLITICS (1990); Melvin L. Oliver & James H. Johnson, Jr., *Inter-Ethnic Conflict in an Urban Ghetto: The Case of Blacks and Latinos in Los Angeles*, in 6 RESEARCH IN SOCIAL MOVEMENTS, CONFLICTS AND CHANGE 57 (Richard Ratcliff ed., 1984); see also PETER K. EISINGER, THE POLITICS OF DISPLACEMENT: RACIAL AND ETHNIC TRANSITION IN THREE AMERICAN CITIES (1980); RAPHAEL J. SONENSHEIN, POLITICS IN BLACK AND WHITE:

misperceptions and stereotypes are significant in the discussion of elections when people act on those perceptions, for example, by voting against candidates solely due to their group membership. Bloc voting studies have documented white bloc voting against African Americans and Latinos.¹⁴ I am not aware of any evidence, however, of bloc voting by Latinos against African Americans or vice versa.

In assessing inter-minority tension between Latinos and Blacks, the authors err by using one strident editorial as being representative of Latino attitudes toward African Americans.¹⁵ Latino perceptions are too complex to be summarized by a writer speaking as an individual and not on behalf of a Latino constituency.

In the end, Latino growth will outpace that of African Americans in most parts of the United States, and, at least in the near future, Latinos will remain geographically concentrated.¹⁶ Thus, it is inevitable that Latino electoral representation will increase. Although the Latino and African-American populations are of approximately equal size, African Americans have twice the representation in Congress. African Americans with a population of thirty-five million have thirty-eight congressional representatives.¹⁷ By contrast, thirty-five million Latinos have nineteen congressional representatives and have ample opportunities to increase their representation as their voter base continues to grow.¹⁸ The most important question then is how will greater Latino electoral representation be achieved. Will it be achieved at the expense of African Americans or at the expense of white progressive elected officials?

The authors list ten congressional districts currently held by African Americans with substantial and growing Latino populations.¹⁹

RACE AND POWER IN LOS ANGELES (1993).

14. BERNARD GROFMAN ET AL., *MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY* 70-73 (1992).

15. See Farrell & Johnson, *supra* note 2, at 1223 (citing Jack Miles, *Blacks vs. Browns*, THE ATLANTIC MONTHLY, Oct. 1992, at 51).

16. Leo Estrada, *The Hispanic Population of the United States: A First Look at the New Millennium*, HISPANICS TODAY, 2001, at 2.

17. See Members of the Congressional Black Caucus, 107th Congress, at <http://www.house.gov/ejohnson/cbcmembers4.htm> (listing the members of the Congressional Black Caucus) (last visited on Sept. 12, 2001) (on file with the North Carolina Law Review); J.C. Watts, Jr., at <http://www.house.gov/watts> (providing information on the lone Black Congressman who is not a member of the Congressional Black Caucus) (last visited on Sept. 12, 2001) (on file with the North Carolina Law Review).

18. NALEO EDUCATION FUND, 2000 NATIONAL DIRECTORY OF LATINO ELECTED OFFICIALS (2001).

19. See Farrell & Johnson, *supra* note 2, at 1250.

The implication that future African-American losses will come primarily from challenges by Latinos seems fully off the mark. For example, in California the loss of African-American representation has not come at the hands of Latinos. In fact, Kevin Shelley, a white male, succeeded assemblyman Willie Brown (now Mayor of San Francisco).²⁰ A white male, Don Peralta, now holds the State Senate seat formerly held by African-American Barbara Lee.²¹ An Asian female, Wilma Chan, now represents the Assembly seat formerly held by African-American Elijhu Harris.²² A white male, Dick Floyd, holds the Assembly seat formerly held by now Congresswoman Juanita McDonald.²³ The Oakland mayoralty seat formerly held by an African American, Lionel Wilson, is now held by former Governor Jerry Brown,²⁴ and any challenge to Congresswoman Barbara Lee will probably come from a white male, Don Peralta.²⁵ In sum, the

20. 1996 GENERAL ELECTION RETURNS FOR CALIFORNIA STATE ASSEMBLY, *District 12*, <http://vote96.ss.ca.gov/Vote96/html/vote/assy/M12.961218083528.html> (last visited Sept. 17, 2001) (on file with the North Carolina Law Review).

21. 1996 GENERAL ELECTION RETURNS FOR CALIFORNIA STATE ASSEMBLY, *District 9*, <http://vote96.ss.ca.gov/Vote96/html/vote/assy/M09.961218083528.html> (last visited Sept. 17, 2001) (on file with the North Carolina Law Review).

22. African Americans lost this district in 1996 to Don Perata. 1996 GENERAL ELECTION RETURNS FOR CALIFORNIA STATE ASSEMBLY, *District 16*, <http://vote96.ss.ca.gov/Vote96/html/vote/assy/M16.961218083528.html> (last visited Sept. 17, 2001) (on file with the North Carolina Law Review). It then passed to Audie Bock, a white woman, in 1998, and finally to Wilma Chan in 2000. See CALIFORNIA SECRETARY OF STATE—VOTE98, *State Assembly District 16*, <http://vote98.ss.ca.gov>Returns/stasm/1600.htm> (last visited Sept. 17, 2001) (on file with the North Carolina Law Review); Member of the State Assembly, http://www.ss.ca.gov/elections/sov/2000_general/assemb.pdf (last visited Sept. 17, 2001) (on file with the North Carolina Law Review).

23. 1996 GENERAL ELECTION RETURNS FOR CALIFORNIA STATE ASSEMBLY, *District 55*, <http://vote96.ss.ca.gov/Vote96/html/vote/assy/M55.961218083528.html> (last visited Sept. 17, 2001) (on file with the North Carolina Law Review). After Rep. Floyd was termed-out, the seat was won by a Latina, Jenny Oropeza in 2000. Member of the State Assembly, http://www.ss.ca.gov/elections/sov/2000_general/assemb.pdf (last visited Sept. 17, 2001) (on file with the North Carolina Law Review).

24. County of Alameda, California, *Oakland Mayor*, <http://www.co.alameda.ca.us/rov/v984/ROVE971032.HTML> (last visited Sept. 17, 2001) (on file with the North Carolina Law Review).

25. Peralta's State Senate District encompasses Rep. Barbara Lee's Congressional District. Congressional District 30 (Berman) was 53% Latino in 1990 and 65% Latino in 2000. U.S. Bureau of the Census, *Selected Characteristics of Persons by Race and Hispanic Origin: 1990*, at 167–68, at <http://www.census.gov/prod/1/90dec/cph4/tables/cph4tb06/table-17.pdf> (last visited on Sept. 17, 2001) (on file with the North Carolina Law Review). Congressional District 20 (Dooley) was 56% Latino in 1990 and 64% Latino in 2000. U.S. Bureau of the Census, *Selected Characteristics of Persons by Race and Hispanic Origin: 1990*, at 157–58, at <http://www.census.gov/prod/1/90dec/cph4/tables/cph4tb06/table-17.pdf> (last visited on Sept. 17, 2001) (on file with the North Carolina Law Review). Congressional District 50 (Filner) was 41% Latino in 1990 and 51% Latino in 2000. U.S. Bureau of the Census, *Selected Characteristics of Persons by Race and Hispanic Origin:*

losses of African-American representation in California have come at the hands of primarily white (and in one case Asian) progressives, rather than Latinos, as Farrell and Johnson concluded.

The California congressional seats most likely to be challenged by Latinos in California are those currently held by white, male Democrats: Calvin Dooley (in the Central Valley), Howard Berman (in the San Fernando Valley), and Bob Filner (in San Diego). Each of these congressional seats is already located in a majority Latino population district.

Is competition for political office inevitable between African Americans and Latinos? The answer, I think, is possibly “yes,” but the result need not be conflictive. In fact, there are numerous instances of election collaboration between minority groups.²⁶ Stephen Erie has noted that Asians and Latinos have coalesced around bilingual education.²⁷ Latinos and African Americans have also coalesced to fight against police brutality.²⁸

1990, at 187–88, at <http://www.census.gov/prod/190dec/cph4/tables/cph4tb06/table-17.pdf> (last visited on Sept. 17, 2001) (on file with the North Carolina Law Review). The 2000 census figures above are calculated with the current 1990 lines. The 2001 redistricting process can lower or increase the proportion of Latinos in those congressional districts.

26. STEVEN P. ERIE ET AL., *PATHS TO POLITICAL INCORPORATION FOR LATINOS AND ASIAN PACIFICS IN CALIFORNIA* 30–32 (1993). Current examples of inter-racial cooperative and coalition efforts in California exist: (1) The Assembly seat held by Antonio Villaraigosa had been held by Latino elected officials since it was created in the 1990 redistricting. Upon being termed out, Villaraigosa endorsed an openly gay, white woman, Jackie Goldberg, who represented the area in the Los Angeles City Council. This was an unprecedented action since the expectation was that he would endorse a Latino or Latina to succeed him. With Villaraigosa's endorsement, Goldberg won against two Latino opponents. Ted Röhrllich, *Goldberg to Enter Race to Replace Villaraigosa*, L.A. TIMES, May 14, 1999, at B4. (2) A Latina State Assemblywoman, Gloria Romero, decided to run for the State Senate. She endorsed an Asian woman, and Monterrey Park City Councilwoman, for her “Latina” district. The Asian, Judy Chu, won against a Latino opponent. Frank del Olmo, *Commentary: Turning the Ethnic Factor on its Head*, L.A. TIMES, May 20, 2001, at M5. (3) The 37th Congressional District has increasingly become more Latino. In 2000, this district was 57% Latino, yet no Latino candidates challenged the current African American Representative, Juanita Millender-McDonald. She won against several African American opponents. Member of the State Assembly, http://www.ss.ca.gov/elections/sov/2000_general/assembly.pdf (last visited Sept. 17, 2001) (on file with the North Carolina Law Review). (4) In preparation for the 2000 redistricting process, three major organizations representing Latinos (Mexican American Legal Defense and Education Fund), African Americans (NAACP Legal Defense and Education Fund), and Asians (National Asian Pacific American Legal Consortium) joined to create a “unity plan” to protect current section 2 districts, minority incumbents, and against the fragmentation of community of interests. See *THE IMPACT OF REDISTRICTING IN YOUR COMMUNITY: A GUIDE FOR REDISTRICTING 6* (2001).

27. Asians and Latinos coalesce around Prop 227. See STEVEN P. ERIE ET AL., *supra* note 26, at 30–32.

28. Blacks and Latinos coalesce around Rodney King, LAPD. See Emily Adams &

MAJORITY-MINORITY DISTRICTS

Farrell and Johnson present an interesting discussion on the benefits and liabilities in creating minority-majority districts. I wish they had expanded this discussion to include the role that majority-minority districts play in the political arena and to discuss the role for near majority districts like those suggested by Swain, or influence districts.²⁹ This is an important discussion because it is generally assumed that the reduction of majority-minority districts will reduce minority representation. Associating the decline in majority-minority districts with declining minority representation does not reflect the dynamics observed in different minority populations, however. For example, Latinos, but particularly Latinas, have demonstrated their ability to win elections in non-Latino districts more so than other ethnic groups.³⁰ Latinos in California for example, increased their

Frank B. Williams, *Protest Over Police Beating Continues*, L.A. TIMES, Aug. 6, 1994, at B1.

29. Carol Swain, *The Supreme Court's Rulings on Congressional Districts Could Benefit Minority Voters*, in *BLACK FACES, BLACK INTEREST: THE REPRESENTATION OF AFRICAN AMERICANS IN CONGRESS* (1995). Swain makes a compelling argument for "near majority districts," also know as "influence districts," because they are less likely to pack minority voters and also likely to influence the political stance of candidates regardless of the race of the candidate. Farrell and Johnson missed the opportunity to discuss the present and future implications of representation for African Americans.

30. The electoral evidence in California shows that Latina women are more likely to attract crossover votes. As the following list of successful Latina candidates and the proportion of Latino registered voters indicate, they were elected by attracting the vote of non-Latinos: Senator Lez Figueroa (14% Latino registration), Senator Deborah Ortiz (9% Latino registration), Senator Nell Soto (29% Latino registration), Former Assemblywoman Denise Ducheney, (37% Latino registration), Assemblywoman Gloria McLeod (27% Latino registration), Assemblywoman Jenny Oropeza (23% Latino registration), Assemblywoman Sally Havice (18% registration), Charlene Zettel (6% Latino registration). See Member of the State Assembly, http://www.ss.ca.gov/elections/sov/2000_general/assembly.pdf (last visited Sept. 17, 2001) (on file with the North Carolina Law Review); CALIFORNIA STATE SENATE, CALIFORNIA CONGRESSIONAL CONGRESSIONAL DELEGATION PROPOSED DISTRICTS, <http://www.sen.ca.gov/ftp/sen/cngplan/newtextdocument.htm> (last updated Sept. 12, 2001) (providing links to demographic data for the fifty-three proposed state senate districts) (on file with the North Carolina Law Review); CALIFORNIA STATE ASSEMBLY COMMITTEE ON ELECTIONS, REAPPORTIONMENT, AND CONSTITUTIONAL AMENDMENTS, <http://www.assembly.ca.gov/committee/c7/asmfinal/newtextdocument.html> (Sept. 13, 2001) (providing links to demographic data for the fifty-three proposed state assembly districts) (on file with the North Carolina Law Review) [hereinafter CALIFORNIA STATE ASSEMBLY]. A similar pattern exists for successful Asian women candidates: Assemblywoman Wilma Chan (6% Asian registration), Assemblywoman Carol Liu (6% Asian registration), and Assemblywoman Judy Chu (19% Asian registration). See Member of the State Assembly, *supra*; CALIFORNIA STATE SENATE, *supra*; CALIFORNIA STATE ASSEMBLY, *supra*. The role of gender in attracting non-minority crossover votes has not been given the attention it deserves given this body of evidence.

representation in the State Assembly from four in 1991 to twenty in 1999.³¹ Also, Latino representation in the State Senate increased from three in 1991 to seven in 1999.³² Likewise, Asian Americans increased their representation in the State Assembly from zero in 1991 to three in 1999.³³ These increases are somewhat related to the 1990 redistricting process that created some majority-minority seats, but primarily are due to the creation of competitive seats with strong minority influence over the election results.

THE USE OF RACE IN REDISTRICTING

In this post *Shaw v. Reno*³⁴ era, the approach to redistricting must reflect these new demographic realities and legal limitations.³⁵ The authors argue for non-racial approaches to redistricting.³⁶ I do not agree that the post-*Shaw* era calls for totally ignoring the use of race in favor of non-racial approaches. The use of race to create majority-minority districts is consistent with Justice O'Connor's guiding commentary in *Bush v. Vera*:³⁷

Today's decisions in conjunction with the recognition of the compelling state interest in compliance with the reasonably perceived requirement of Section 2, present a workable framework for the achievement of these twin goals. I would summarize that framework, and the rules governing the States' consideration of race in the districting process as follows. First, so long as they do not subordinate traditional districting criteria to the use of race for its own sake or as a proxy, States may intentionally create majority-minority

31. News Release, NALEO News, Latinos Grab Seats in State Houses Nationwide (Nov. 9, 2000), available at <http://www.naleo.org/PressReleases/latinosgrab.htm>.

32. California Journal, Roster and Government Guide, 1992 and 2000.

33. *Id.*; AsianWeek.com, *How Asian American Candidates Fared: Results for Races in San Francisco, California and Nationwide*, Nov. 10–16, 2000, at http://www.asianweek.com/2000_11_10/feature8_allresults.html#assembly (listing the results of California State Senate and Assembly races with Asian-American candidates) (on file with the North Carolina Law Review).

34. 509 U.S. 630 (1993), *on remand sub nom*, *Shaw v. Hunt*, 861 F. Supp. 408 (1994), *rev'd*, 517 U.S. 899 (1996).

35. *Id.*; Wattson, *supra* note 1. Mr. Wattson lists the following guidelines: (1) You may consider race in drawing districts; (2) Avoid drawing a racial gerrymander; (2a) Beware of bizarre shapes; (2b) Draw districts that are reasonably compact; (2c) Beware of making race your dominant motive; (2d) Beware of using race as a proxy for political affiliation; (2e) Follow traditional redistricting principles. *Id.*

36. See Farrell & Johnson, *supra* note 2, at 1232–36 (“First, in constructing congressional and other political districts, the emphasis, given the conservative legal realities, should be on the commonality of interests among district residents rather than on the commonality of race.”).

37. 517 U.S. 952 (1996).

districts and may otherwise take race into consideration, without coming under strict scrutiny. Only if traditional districting criteria are neglected and that neglect is predominately due to the misuse of race does strict scrutiny apply.³⁸

In sum, the section 2 Voting Rights Act (VRA) test can co-exist in principle and in practice with *Shaw v. Reno*.³⁹

COMMUNITIES OF INTEREST

The authors also begin to provide a useful framework to define that legally nebulous term, "community of interest."⁴⁰ I generally agree that commonality of interests can be measured around the following five elements: (1) *Geographic*, including topology, land use, political boundaries and other physical landscape features; (2) *Economic*, including common socioeconomic indicators such as per capita income, home ownership, and poverty; (3) *Behavioral*, including community actions such as voting behavior, political affiliation, commuting, and use of public transit; (4) *Cultural*, including immigration, language, race and ethnicity, and landmarks; and (5) *Place attachment*, including identification with the area and its institutions.

38. *Id.* at 933 (O'Connor, J., concurring) (citations omitted).

39. What appears at first glance to be a contradiction, section 2 of the Voting Rights Act requires that one consider race, for example, in determining retrogression while *Shaw v. Reno* cautions against the use of race solely as the basis and motive for redistricting. 509 U.S. 630, 656 (1993). Justice O'Connor recognizes this dilemma and speaks to the notion of balance. *Id.*

40. See Farrell & Johnson, *supra* note 2, at 1233-36.

Section 2 of the Voting Rights Act of 1965 protects voters from any election procedures, including the redistricting process that deprive them of an effective vote because of their race. In the redistricting process, racial and linguistic minority voters must be protected from efforts to reduce minority voters from having less of a chance to elect the candidates of their choice. The only way to determine minority voter dilution is by using racial and ethnic data. *Shaw v. Reno* suggests that the redistricting process must primarily be based on traditional redistricting criteria and not rely primarily on racial/ethnic data. At first glance these two appear to be contradictory. O'Connor's language balances the two viewpoints and provides a guidepost for the proper role of racial and ethnic data in the redistricting process.

The concept of "communities of interest" is among the traditional redistricting criteria. However, this concept has remained vaguely defined even as its importance has increased as a basis for redistricting. Farrell and Johnson provide a useful foundation for unraveling elements of commonality. I have added an additional component, place attachment, to their list to elaborate on still another common element for "communities of interest."

The first four components of community of interest listed are quantifiable and measurable. The final component is anecdotal and based on local community member testimony.

DISENFRANCHISEMENT

The authors eloquently discuss the disenfranchisement of voters, a topic that has been largely muted in recent years until the Florida debacle.⁴¹ The outcome of the litigation surrounding the 2000 Florida vote for presidential candidates diminished the intent of the Voting Rights Act and the ideal that all voters have an equal voice in election outcomes. The Florida election brought to the surface the fact that battles over the right to vote, long considered fought and won, are still underway. Finally, while minority electoral empowerment has typically focused on voter registration, voter education, and get out the vote efforts, the Florida experience demonstrates that equal attention has to be given to monitoring disparities in balloting and mechanisms for counting ballots. The right to vote is a process that does not end when the vote is cast but extends to the decision about which votes are valid and counted.

Without taking away from the national significance of the unequal conditions of voting that affected the Florida minority vote in the last election, which the authors covered well, I would like to focus on other forms of disenfranchisement that affect Latinos and Asians, in particular.

CITIZEN VOTING AGE POPULATION

One form of disenfranchisement is the reliance on citizen voting age population (CVAP) as the criterion for section 2 voting districts. While total population represents all the constituents, and voting age population (VAP) represents the adult voter potential, citizen voting age population (CVAP) represents eligible potential voters (omitting non-citizens).⁴² According to the 1990 census data, in California, thirty-eight percent of the adult Latino population and twenty-seven percent of the adult Asian population are foreign born and non-citizens compared to twelve percent for Whites, and eight percent for Blacks.⁴³

41. *Id.* at 1337–42.

42. Voting Age Population (VAP) includes all persons 18 years and older. VAP is typically used as the denominator in calculating voter registration (Registered Voters are divided by Voting Age Population and multiplied by one hundred: Voters Registered/VAP * 100). Citizen Voter Age Population (CVAP) omits adults who are not U.S. citizens. The use of CVAP as the denominator for Voter Registration results in a more accurate assessment of voter potential for Latinos and Asians because it omits non-eligible adults. When you divide the smaller denominator into the total registered voters, the smaller denominator (CVAP) results in lowering the proportion of Latino (or Asian) voters.

43. In California, approximately seven percent of African-American adults are

Recently, the courts have insisted that the “ability to elect” required a majority CVAP for Latino districts.⁴⁴ This criterion disproportionately affects the Latino and Asian populations. While total population is used in the redistricting process, the courts have moved toward the criteria of “CVAP” to determine electability. Thus, a Latino majority district is not “accepted” by the courts as a viable district until it can be shown that the Latino CVAP represents fifty percent or more of the district. This criteria is not considered for other groups, such as African Americans, and affects Latinos and Asians because high proportions of their populations are non-citizens. Using the CVAP criteria results in the “packing” of Latino districts to attain the required majority CVAP levels. It is also the reason that the more dispersed Asian community will never have a majority CVAP district in California. Meeting the majority requirement, however, forces districts to be drawn with an over-concentration of Latinos beyond what Latinos actually need to win a district. In general, Latinos and Asians are capable of winning strong influence districts without having majority CVAP districts, yet are bound by the law to create such districts.⁴⁵ This is forced upon the redistricting process despite the fact that there are many examples of Latino electoral wins where Latino voter registration approaches a percentage in the mid-thirties.⁴⁶ Latinos in California, for example hold fifteen seats in the State Assembly where Latino registration is

foreign born compared to thirty-eight percent for Latino adults and twenty-seven percent for Asian adults. About three percent of white adults are foreign born. U.S. Bureau of the Census, *Current Population Reports* p-25-1130, GPO (1996).

44. Majority CVAP has been established as the standard for the “ability to elect” by the Seventh and Fifth Circuits. See *Citizenship and the Bright Line 50% Requirement of Valdespino Create a High Hurdle for Section 2 Plaintiffs in the Future*, in AVOIDING A CHALLENGE UNDER THE EQUAL PROTECTION CLAUSE AS INTERPRETED BY *SHAW V. RENO*, *MILLER V. JOHNSON*, AND *BUSH V. VERA* 11 (Douglas E. Markham ed., 1999).

45. In California, the majority of Latino districts and all of the Asian districts have been won with less than fifty percent CVAP. See University of California, Berkeley, Institute for Governmental Studies, Statewide Database, Data Summaries by Assembly District Census Information: Voting Age Hispanic Origin and Race by AD, available at <http://swdb.berkeley.edu/info/census/ad/votehisp.html> (last visited Sept. 22, 2001) (on file with the North Carolina Law Review) [hereinafter *Voting Age Hispanic*]; University of California, Berkeley, Institute for Governmental Studies, Statewide Database, Data Summaries by Assembly District Census Information: Hispanic Origin and Race by AD, available at <http://swdb.berkeley.edu/info/census/ad/hisp.html> (last visited Sept. 22, 2001) (on file with the North Carolina Law Review) [hereinafter *Hispanic Origin*]; Member of State Assembly, *supra* note 30.

46. In California, Latino candidates have won in nine districts with CVAP below thirty percent. See *Voting Age Hispanic*, *supra* note 45; *Hispanic Origin*, *supra* note 45; Member of State Assembly, *supra* note 30.

between twenty-one percent and thirty-six percent.⁴⁷ This translates roughly into twenty-six percent to forty-three percent CVAP. Latinos win these strong influence districts for several reasons: Latino growth in the district during the decade, term limits that overcome incumbent advantages, candidate recruitment and election funding, and developing coalitions that overcome polarized voting.

To make matters worse, Public Law 94-171⁴⁸ requires the U.S. Census Bureau to provide a datatape to all states for the purpose of redistricting and specifies that the data will include population, population by race and ethnicity, and population 18+ and population 18+ by race and ethnicity. However, this redistricting data does not include citizenship data and therefore redistricting must proceed both without this information and with the understanding that a Latino minority-majority district can be challenged if it fails to meet the majority CVAP threshold.⁴⁹ Also, CVAP is locked in time and can only be measured for small geographic areas once in a decade.⁵⁰ Unlike voter turnout that can be measured with each election, CVAP is a snapshot calculated using the decennial census data on the number of citizens eligible to vote.⁵¹ This data is, by definition, anchored to the decennial year. Thus, changes in CVAP over the decade can only be estimated while voter turnout can be re-calculated with accuracy during each election. For the most part, one must

47. In 2002 in California, four Latino officeholders won in districts where Latino voter registration is less than fifteen percent; six Latino officeholders won in districts with Latino voter registration from fifteen to twenty-five percent; four Latino officeholders won in districts with Latino voter registration from twenty-six to thirty-five percent; and eight Latino officeholders won in districts with Latino voter registration from thirty-six to forty-five percent. See *Voting Age Hispanic*, *supra* note 45; *Hispanic Origin*, *supra* note 45; Member of State Assembly, *supra* note 30.

48. This law provides that the U.S. Bureau of the Census will provide redistricting data to all states one year after the decennial census. The law specifies the data to be provided. Act of Dec. 23, 1975, Pub. L. No. 94-171, 89 Stat. 1023 (codified as amended at 13 U.S.C. § 141(c) (1994)).

49. Citizenship data from the Census Bureau will become available in late summer to early fall, 2001—late into the redistricting process. Latino majority districts established as section 2 districts may be challenged later for failing to meet the majority CVAP standard despite the lack of such data during the redistricting process.

50. Citizenship data for small areas, like census tracts, is obtained from the long form of the decennial census. The census provides information on both those who report being born in the United States as well as those who are citizens through naturalization. These two categories combined represent eligible citizens. This information is available once every decade and anchored to the census year, for example, 1990, 2000, or other year.

51. CVAP is calculated by dividing the number of eligible citizens into the number of Spanish surnamed voters. Spanish surnamed voters are determined by matching a list of the most common Spanish surnames against the voter registration list. Unlike the information on citizenship, Spanish surname voter registration can be updated during the decade.

assume no change in the rate of citizen eligibility throughout the decade despite the evidence to the contrary from the Immigration and Naturalization Service (INS) naturalization data.⁵²

Finally, the use of CVAP criteria disenfranchises legal residents who are in the process of naturalization. In areas of high immigration with large numbers of legal residents seeking naturalization, the use of CVAP is overly narrow. Rather, it is arguable that CVAP *and* the number of legal residents seeking naturalization combined represent the appropriate eligible population rather than CVAP alone. Through no fault of their own, a couple of million legal residents seeking a change in their immigration status are backlogged in the INS bureaucracy.⁵³ This slow process can be considered a “practice” preventing eligible individuals from attaining citizenship. Furthermore, the current naturalization fee of \$225 can be considered a “poll tax” preventing legal residents from citizenship and voting privileges.⁵⁴

DEMOGRAPHY: FOR OR AGAINST?

As indicated earlier in the paper, demographic data plays a significant role in the redistricting process. Census produced population data is the official information used by all states for the purpose of redistricting. As our nation has become more

52. As indicated above, the citizenship data is anchored to the year 2000 and will not be updated during the decade. According to the INS, from 1991 to 1997, 1.3 million applicants asked for a legal residence under the Immigration Reform and Control Act of 1986. U.S. IMMIGRATION AND NATURALIZATION SERVICE, STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE, 1998, at 28 (2001) [hereinafter STATISTICAL YEARBOOK]. Over the same period, more than one hundred thousand Cubans entered as refugees. *Id.* at 115. During the same period, 1.4 million legal immigrants entered as family sponsored immigrants. *Id.* at 28. For all of the categories, after five years of continuous residence, legal residents may apply for citizenship following a civics test, health screening, and finger print review by law enforcement. U.S. IMMIGRATION AND NATURALIZATION SERVICE, GUIDE TO NATURALIZATION, 22–24, 26, 36–39 (1999). Given the magnitude of these numbers, it should be obvious that the citizenship figures will change over the next decade.

53. Between 1991 and 1998, 6.2 million persons applied for naturalization. STATISTICAL YEARBOOK, *supra* note 52, at 172. Over that period of time, approximately 3.9 million persons were naturalized. *Id.* The remaining 2.5 million persons represent the current “backlog.” See *id.*; Audrey Singer, *U.S. Citizenship Applications at All Time High*, in POPULATION TODAY 4–5 (2000).

54. Applicants must pay a fee to the INS to submit applications for processing. Immigration and Naturalization Service Fees, 8 C.F.R. § 103.7 (2001). The current fee is \$225, but INS is considering raising it in the near future. *Id.*; Adjustment of Certain Fees of the Immigration Examinations Fee Account, 66 Fed. Reg. 41,456 (Aug. 8, 2001). Reform of the INS naturalization process is a significant civil rights issue for both Latinos and Asians.

demographically complex, demographic analysis will be used to argue on behalf as well as against voting rights. As an expert witness in a recent voting rights challenge to at-large elections, I can list several illustrations of challenges based on the demographic dynamics of the Latino population:⁵⁵

- A) Census data on citizenship for Latinos are overestimated.⁵⁶ This is a significant challenge for calculating electability of a candidate of choice.⁵⁷ This allegation is based on the large share of undocumented population of Latinos in the U.S. who presumably would not report their "true" immigration status. Indirect evidence of over-reporting uses residual methods.⁵⁸ But there is no direct evidence of misreporting of citizenship.
- B) Disparities in socio-economic status between Latinos and non-Latinos are exaggerated by the high proportion of immigrants in the Latino population.⁵⁹ Establishing socio-economic differences is important to establish Latinos as a distinct group. In response, the argument is made that overall differences in SES are important, but additional analysis controlling for the effects of immigration are also appropriate.
- C) Low Latino voter participation is due to eligible voters with no prior voting traditions in their countries of origin.⁶⁰ This is a "blame the victim" strategy based on anecdotal evidence. In response, evidence is provided that voter turnout does not differ between groups.⁶¹

55. See, e.g., *Ruiz v. City of Santa Maria*, 160 F. Supp. 543 (9th Cir. 1998).

56. Peter A. Morrison, *Supplemental Report on Santa Maria*, Expert Report prepared for *Ruiz v. City of Santa Maria* (Mar. 14, 1994). Morrison states, "misreporting of citizenship is a scientifically documented reality, and its occurrence is most pervasive among recently arrived non-citizen immigrants." *Id.*

57. *Id.* It follows that if citizenship is over-reported, then calculations based on CVAP are over-estimated.

58. The limitations of residual methods are noted in, Leo F. Estrada, *Supplemental Report No. 2*, Expert report prepared in *Ruiz v. City of Santa Maria* (Mar. 17, 1994).

59. Peter A. Morrison, *Report for Trial on City of Santa Maria*, Expert Report prepared for *Ruiz v. City of Santa Maria 5*, (Mar. 13, 2000) (stating that the continuing influx of agriculture workers from Mexico, produces the trailing level of socio-economic status among Hispanics measured by citywide averages).

60. Peter A. Morrison, *Demographic Analysis of Santa Maria, California*, Expert Report prepared for *Ruiz v. City of Santa Maria 1* (Dec. 24, 1993) ("Demographic and socioeconomic differences between Hispanics and non-Hispanics predispose lower political participation by Hispanics.").

61. *Id.*

- D) Concentrating non-citizens in jurisdictions exacerbates the disparities in voter participation.⁶² In response, the argument is posed that voter participation is more an issue of candidates and issues than any predisposition to vote.⁶³
- E) Latinos are not demographically homogeneous given the regional differences in the countries of origin.⁶⁴ In response, the argument is posed that Latinos are no more homogeneous or heterogeneous as a group than African Americans, Democrats, or southerners.⁶⁵
- F) Voting differences between Latinos in the inner city and suburbs, illustrate lack of political cohesion.⁶⁶ In response, the argument is made that political cohesion is a measure of willingness to vote for a candidate of their choice for a proposed single member district, not the city as a whole.⁶⁷
- G) Comparisons of Hispanics to non-Hispanics are inappropriate since the non-Hispanic category includes other protected minorities.⁶⁸ In response, the argument is posed that this is a fair comparison for some purposes. In other cases, the fair comparison should be between Hispanics and White, non-Hispanics.⁶⁹
- H) Finally, the persisting "lingering effects" of discrimination decline and dissipate with the mortality and out-migration of affected persons.⁷⁰ In response, the argument is made that discriminatory effects have multiplier effects and generational effects and thus, do not always dissipate with mortality of individuals directly affected, e.g., the Holocaust, etc.⁷¹

On the surface, the use of demographic rationale to argue against expanding minority voter rights appear reasonable enough on the surface, but all are based on flawed assumptions, research, and logic.

62. *Id.*

63. Estrada, *supra* note 58.

64. Morrison, *supra* note 59.

65. Estrada, *supra* note 58.

66. Morrison, *supra* note 60.

67. Estrada, *supra* note 58.

68. *Id.*

69. *Id.*

70. Peter A. Morrison, *Estimating Depletion of a Latino Population Encountering Hypothetical Discrimination in 1950 in Santa Maria*, Appendix A to *Surreply to Dr. Camarillo's Supplementary Report of August 13, 2000*, Ruiz v. City of Santa Maria (Sept. 3, 2000).

71. Estrada, *supra* note 58.

DEMOGRAPHIC ISSUES ARISING FROM THE 2000 CENSUS

The authors omitted from their discussion an important data issue arising from the 2000 census. The issue is how demographers and researchers will deal with the new race categories from the 2000 census that allowed multiple responses to the race question. The Public Law number 94-171 technical documentation lists 296 possible categories of race and one can foresee demographic chaos if the civil rights community does not agree upon some accepted standards in the use of this data.⁷²

SOLUTIONS

In the final section of the paper, Farrell and Johnson provide several solutions. The first is to develop collaborative strategies in order to reduce tensions created by demographic change. I heartily agree, and will only add that one can engage in collaboration voluntarily or by force. In some cases, demographic changes in the constituency may force African-American elected officials into collaborative strategies. This is a welcome opportunity for cross-ethnic coalition building.

CONCLUSION

The Voting Rights Act of 1965 was created as a tool aimed at eliminating discriminatory practices against African Americans by whites in the southern states. Over time, the VRA has been amended in recognition of issues such as language barriers to voting. As the VRA was expanded to other parts of the nation, the distinct demographic composition—multi-ethnic and multi-cultural—in many areas posed a challenge to the VRA because current law provides no incentives for cross-ethnic civil rights solutions.

African Americans, Latinos, and Asians differ among themselves in the consistency of their self-identification, political participation, intra-group unity, abilities to organize voters, and single party affiliation. Despite this, major minority groups in the United States share substantial common ground. Countless examples exist of the willingness to build coalitions and work together to increase the representation of elected officials who will work to improve the conditions of all members of the community. The VRA works to

72. One illustration of how to use these multiple race categories is found in John Hedderson, *Proposed Race/Ethnicity Categories for PL 94-171 Data in the Redistricting Database*, Report to the Los Angeles County Boundary Review Committee, Walter R. McDonald & Associates, May 2001.

create control over a district by one racial or ethnic group but does not encourage bi-racial or multi-racial or multi-ethnic influence districts. The new demographics of our nation will surely put the premises of the VRA to a test in the years to come.

