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GARZA V. COUNTY OF LOS ANGELES: THE DILEMMA OVER USING ELECTOR POPULATION AS OPPOSED TO TOTAL POPULATION IN LEGISLATIVE APPORTIONMENT

ONE OF THE questions left open by the Supreme Court in the reapportionment cases[1] is whether legislative districts may be drawn on a basis other than total population. In *Garza v. County of Los Angeles*,[2] the Ninth Circuit took a new look at this issue. While the majority opinion concluded that apportionment must be based on total population figures,[3] Judge Kozinski, in a lengthy dissent, made a persuasive argument that other figures, such as the number of eligible electors, should be used to revise legislative districts in some instances.[4]

Hispanics in the Los Angeles area were joined by the United States in filing this voting rights action in 1988.[5] The action sought a redrawing of the five districts for the Los Angeles County Board of Supervisors[6] on the grounds that existing boundaries were gerrymandered in order to dilute Hispanic voting strength.[7] The plaintiffs sought the creation of a district with a Hispanic majority for the 1990 election, in which two Board of Supervisors members were to be elected.[8]

The plaintiffs claimed that Los Angeles County had engaged in intentional discrimination in the drawing of district lines after

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1. *E.g.*, Reynolds v. Sims, 377 U.S. 533 (1964).
2. 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 681 (1991).
3. *Id.* at 774.
4. *Id.* at 780-85 (Kozinski, J., concurring in part and dissenting in part).
5. *Id.* at 765.
6. The procedure for elections of the Los Angeles County Board of Supervisors is summarized by the court in *Garza*:

> At least since the beginning of this century, the Board has always consisted of five members, elected in even-numbered years to serve four-year terms. These elections are staggered so that two supervisors are elected one year, and three are elected two years later. Supervisors are elected in non-partisan elections, and a candidate must receive a majority of the votes cast in order to win. If no candidate receives such a majority, the two candidates who receive the highest number of votes must engage in a runoff contest.

Garza, 918 F.2d at 766.

7. *Id.* at 765.
8. *Id.*

the 1980 census, which violated both the Voting Rights Act[9] and the equal protection clause of the fourteenth amendment to the United States Constitution.[10] The plaintiffs also claimed that if the vote dilution was not intentional, the Voting Rights Act was nonetheless violated because the districting plan had the effect of reducing Hispanic electoral power.[11]

After a three month bench trial, the district court found that in 1981 the County of Los Angeles had intentionally fragmented the Hispanic population throughout the districts in order to dilute the effects of the Hispanic vote as a part of a course of conduct that began decades earlier.[12] The district court found the County liable for its intentional vote dilution on two theories. First, it found that section 2 of the Voting Rights Act had been violated because the 1981 redistricting plan resulted in a dilution of Hispanic voting power. Second, the district court found that the County had violated Section 2 of the Voting Rights Act and the equal protection clause because of its intentional discrimination in establishing and maintaining the redistricting plan.[13]

While the district court record showed that it was not possible to draw a district map in 1981 that contained both a substantially equal population in each district and a district with a majority of Hispanic voters, the record did shows that at the time of the action it was possible to create five districts of substantially equal population with one district having a majority of Hispanic voters.[14] The district court gave the County the opportunity to propose a new districting plan, which was subsequently rejected by the court because it constituted a less than good faith effort to remedy the existing violations.[15] The court then accepted and imposed a plan under which one of the five districts had a majority of Hispanics.[16] The County appealed the decision of the district court, based on the Supreme Court's decision in *Thornburg v.*

9. 42 U.S.C. § 1973 (1988). The Voting Rights Act is violated not only by intentional discrimination but also by any practice shown to have a disparate impact on minority voting strength. *See id.* § 1973(b).

10. U.S. CONST. amend. XIV. The Equal Protection Clause is violated if a redistricting plan deliberately minimizes minority political power. *Garza*, 918 F.2d at 766 (citing City of Mobile v. Bolden, 446 U.S. 55, 66-67 (1980)); *see infra* note 24.

11. *Garza*, 918 F.2d at 766; *see infra* note 24.

12. *Garza*, 918 F.2d at 769.

13. *Id.*

14. *Id.*

15. *Id.* at 768.

16. *Id.*

Gingles,[17] arguing that the districts drawn in 1981 were lawful since the challengers could not show that a district with a majority of Hispanic voters could be drawn in 1981.[18] The County also argued that the redistricting plan imposed by the court was inappropriate because many of the Hispanics in the County are noncitizens, and a redistricting plan based on population alone, where Hispanics are given a majority in one district, "unconstitutionally weights the votes of citizens in that district more heavily than those of citizens in other districts."[19]

On appeal before the Ninth Circuit, the panel, consisting of Judges Schroeder, Nelson, and Kozinski, all agreed that the County had intentionally discriminated against Hispanics.[20] The main point of disagreement between the majority opinion and Judge Kozinski's dissent is over the proper remedy. In constructing its remedial plan, the district court drew districts of equal population, as is required by state law. In so doing, the court formed two districts where numbers of voting age citizens are much lower than those in the other three districts. This difference in voting age population creates a disparity in voting power between citizens in a district with a low number of voting age citizens and a district with a high number of eligible voters. The majority held that the district court acted correctly in redistricting according to total population, despite its effect on relative voting power,[21] whereas Judge Kozinski argued the "one person one vote" principle announced by the Supreme Court in *Reynolds v. Sims*[22] is violated by this redistricting plan.[23]

Courts today are faced with many difficulties when attempting to implement a redistricting plan in an area where, using total population figures, the vote of citizens in some districts will be

17. 478 U.S. 30 (1986).

18. *Garza*, 918 F.2d at 769.

19. *Id.* at 773.

20. *Id.* at 769, 778 (Kozinski, J., concurring in part and dissenting in part). The Ninth Circuit also decided the appeal of Sarah Flores from the district court's denial of her motion to intervene. Flores was interested in the outcome of the suit because she was a candidate for supervisor in the election that stood to be invalidated. Flores's petition to intervene was dismissed as untimely. *Garza*, 918 F.2d at 776-77. The majority upheld this decision on appeal because "[i]ntroduction of a new party at that late stage could have resulted in irreversible prejudicial delay in a case where time was of the essence." *Id.* at 777.

21. *See id.* at 773-76.

22. 377 U.S. 533 (1964).

23. *See Garza*, 918 F.2d at 779 (Kozinski, J., concurring in part and dissenting in part.)

debased. As demonstrated by the opinions in *Garza*, Supreme Court precedent does not offer clear guidance in this situation. This comment analyzes the arguments made for the use of total population and eligible voter population based on this precedent, in order to determine which method should be employed.

I. BACKGROUND

There are two significant components to the Ninth Circuit's decision in the *Garza* case. The majority first determined the liability of the County of Los Angeles under the Voting Rights Act and the equal protection clause.[24] Then the majority examined the remedy imposed by the district court to determine whether the redistricting scheme met the constitutional requirements of one person one vote, as established in the reapportionment cases. It is this second part of the decision from which Judge Kozinski dissented.

While never addressing the issue head on, the Supreme Court has frequently commented upon the figures to be used when apportioning state legislative seats. In *Reynolds v. Sims*,[25] the Court applied the one person one vote principle to the apportionment of state legislative bodies and held that "as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis."[26] This standard derives from the constitu-

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24. The Voting Rights Act, 42 U.S.C. § 1973 (1988), "forbids the imposition or application of any practice that would deny or abridge, on grounds of race or color, the right of any citizen to vote." Garza v. County of Los Angeles, 918 F.2d 763, 765 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 681 (1991). In City of Mobile v. Bolden, 446 U.S. 55 (1980), a plurality of the Supreme Court held that this Act prohibited only intentional discrimination, not practices which diluted minority votes without invidious intent. *Id.* at 765-66. In 1982, in response to the *Bolden* decision, Congress amended the Voting Rights Act so that it also forbids any practice shown to have a disparate impact on minority voting strength. *Id.* at 766; *see* 42 U.S.C. § 1973(b) (1988). After this amendment, the Voting Rights Act forbids both intentional discrimination in reapportionment and facially neutral apportionment that has the effect of minority vote dilution. *Id.*

In 1986, the Supreme Court decided Thornburg v. Gingles, 478 U.S. 30 (1986), which discussed the meaning of the 1982 amendment to the Voting Rights Act. In *Gingles*, there was no claim of intentional discrimination. *Id.* at 80. Rather, the claim was that the districting scheme had the effect of diluting the vote of black voters. *Id.* at 46. Under these circumstances, the Court instituted the requirement that the plaintiff minorities show the possibility of voter majority status in at least one district at the time of districting. *Id.* at 50.

25. 377 U.S. 533 (1964).

26. *Id.* at 568.

tional requirement that members of the House of Representatives be elected "by the people"[27] and "the whole number of persons in each state" shall be used to apportion representatives among the several states.[28]

Despite this seeming approval of population figures for state legislative apportionment, the Court in *Reynolds* also noted that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."[29] The Supreme Court reasoned that "[w]eighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable."[30] The Court then stated that "[t]o the extent that a citizen's right to vote is debased, he is that much less a citizen."[31] Finally, the Court pointed out that "the basic principle of representative government remains, and must remain, unchanged—the weight of a citizen's vote cannot be made to depend on where he lives."[32]

In *Burns v. Richardson*,[33] the Supreme Court examined a districting scheme for the Hawaii state legislature that apportioned members on the basis of the number of registered voters in each district. The Court began its reasoning with the proposition that "the Equal Protection Clause does not require the states to use total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured."[34] The Court noted that it had "discussed substantial equivalence in terms of voter population or citizen population, making no distinction between the acceptability of such a test and a test based on total population."[35] The Court also recalled that in no case has it suggested that "the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime, in the apportionment base by which their legislators are distributed and against which com-

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27. U.S. CONST. art. I, § 2; *see Reynolds*, 377 U.S. at 560.
28. U.S. CONST. amend. XIV, § 2.
29. *Reynolds*, 377 U.S. at 555.
30. *Id.* at 563.
31. *Id.* at 567.
32. *Id.*
33. 384 U.S. 73 (1966).
34. *Id.* at 91.
35. *Id.*

pliance with the Equal Protection Clause is to be measured."[36]

While seeming to allow states to apportion on the basis of voting population as well as total population, the *Richardson* decision does not require states to do so. The Court expressly stated that "[t]he decision to include or exclude [aliens and other nonvoters] involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere."[37]

The Supreme Court had the opportunity to examine the question of whether seats in the House of Representatives could be distributed according to voter population rather than total population in *Kirkpatrick v. Preisler*.[38] In *Preisler*, the State of Missouri argued that differences in population of its congressional districts were de minimis and existed in part because eligible voter population was used in redistricting rather than total population.[39] The Court, however, "assum[ed] without deciding that apportionment may be based on eligible voter population rather than total population," and invalidated Missouri's plan because no effort was made to ascertain the number of eligible voters in each district and apportion accordingly.[40] The Court therefore avoided the question of what figures are to be used in legislative apportionment. In *Preisler* the Court also stated that " 'equal representation for equal numbers of people [is] the fundamental goal for the House of Representatives.' "[41]

The Supreme Court's latest pronouncement on reapportionment considered a challenge to the apportionment of the New York City Board of Estimate. In *Board of Estimate v. Morris*,[42] the Court reminded legislative bodies that "[e]lectoral systems should strive to make each citizen's portion equal."[43] The Court also held that "[i]n calculating the deviation among districts, the relevant inquiry is whether 'the vote of any citizen is approximately equal in weight to that of any other citizen.' "[44]

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36. *Id.* at 92.

37. *Id.*

38. 394 U.S. 526 (1969).

39. *Id.* at 530.

40. *Id.* at 534-35.

41. *Id.* at 530 (quoting Wesberry v. Sanders, 376 U.S. 1, 18 (1964)).

42. 489 U.S. 688 (1989) (one person one vote requirements, applied to city board of estimate; governmental interest did justify a 78% deviation from equal voting strength).

43. *Id.* at 693.

44. *Id.* at 701 (quoting *Reynolds*, 377 U.S. at 579).

In *Garza*, the Ninth Circuit attempted to decide which figure, total population or voting population, is to be used for legislative apportionment when total population will cause the debasement of the votes of citizens in some districts. The decision in *Garza* emerges against this backdrop of Supreme Court decisions that provide language supporting either position, but which never address the issue directly

II. *Garza v Los Angeles*

A. The Majority Opinion

The majority opinion, written by Judge Schroeder, begins with a discussion of the liability of the County of Los Angeles for the dilution of minority voting strength, considering liability under the Voting Rights Act and the equal protection clause.[45] The majority then dealt with the County's contention that the district

45. In this part of the decision, the majority addresses the contention of the County that, according to Thornburg v. Gingles, 478 U.S. 30 (1986), "there can be no successful challenge to a districting system unless the minority challenging that system can show that it could, at the time of districting, constitute a voter majority in a single member district." Garza v. County of Los Angeles, 918 F.2d 763, 769 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 681 (1991). The Hispanic appellees counter this contention by arguing that "no majority requirement should be imposed where, as here, there has been intentional dilution of minority voting strength." *Id.*

The majority first discussed the 1982 amendment to Section 2 of the Voting Rights Act, which provides minority groups with a remedy "for vote dilution without requiring a showing that the majority engaged in intentional discrimination." *Id., see* 42 U.S.C. § 1973 (1988). When amending this section, Congress provided a list of factors to guide courts in determining whether there has been a section two violation. *Id.* at 770. This amendment, however, did not affect the remedies already available under section two for intentional discrimination. *Id.* The majority then discussed the *Gingles* case, in which the Supreme Court interpreted the new amendment. *Gingles* set out three conditions for liability for unintentional discrimination based only on discriminatory effects: "(1) geographical compactness of the minority group; (2) minority political cohesion; and (3) majority block voting." *Id.* (citing *Gingles*, 478 U.S. at 50-51).

The majority held that the facts in this case are distinguishable from those in *Gingles*. In *Gingles*, where the discrimination was against blacks, the Court did not consider any claim that the districting plan had been enacted deliberately to dilute the black vote, but rather, dealt with a claim that the plan, regardless of the intent, had the effect of such a dilution. *Id.* (citing *Gingles*, 478 U.S. at 39-41). In the present case, however, "the plaintiffs have made out a claim of intentional dilution of their voting strength." *Id.* Thus the condition imposed in *Gingles* that the plaintiffs demonstrate that they could have constituted a majority in a single member district at the time of reapportionment did not have to be satisfied. To impose this requirement, argued the majority, "would prevent any redress for districting which was deliberately designed to prevent minorities from electing representatives in future elections governed by that districting," a result wholly contrary to the Voting Rights Act and the equal protection clause. *Id.* at 771.

court did not make sufficient findings regarding intentional discrimination. The district court found that the primary motivation of the supervisors was political self-preservation and that the supervisors chose to fragment the Hispanic voting population to achieve that self-preservation. Since "discrimination need not be the sole goal in order to be unlawful," the majority upheld the findings of the district court as to intent.[46]

The majority further found that the plaintiffs showed they had been injured as a result of the intentional discrimination,[47] another requirement under the Voting Rights Act.[48] The majority agreed with the district court that the Hispanic plaintiffs "had less opportunity than other county residents to participate in the political process and to elect legislators of their choice."[49] Finally. with respect to liability, the majority found that "[b]ecause of the ongoing nature of the violation, plaintiff's present claim ought not be barred by laches."[50]

The majority then reached the remedy issue and first considered the County's alternative contentions that it could not be required to redistrict between decennial reapportionments and that only 1980 census data could be used in any such reapportionment. The majority easily dismissed these two claims, holding that decennial reapportionment is not a constitutional maximum frequency for apportionment but rather "a floor below which such frequency may not constitutionally fall."[51] The majority also found that the Supreme Court has never required census figures to be used in redistricting.[52] The majority reasoned that other figures may be considered if the relevant information cannot be obtained

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46. *Id.* (citing Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977) (proof of a racially discriminatory intent or purpose is required to show a violation of the equal protection clause)).

47. *Id.*

48. 42 U.S.C. § 1973(b) (1988); *see* White v. Regester, 412 U.S. 755 (1973) (requiring, in addition to intent, proof that the political processes leading to nomination and election were not equally open to participation).

49. *Garza*, 918 F.2d at 771.

50. *Id.* at 772.

51. *Id.*

52. *See Id.* (citing Kirkpatrick v. Preisler, 394 U.S. 526, 535 (1969) (noting with approval the possibility of using predictive data in addition to census data in designing decennial reapportionment plans); Burns v. Richardson, 384 U.S. 73, 91 (1966) ("[T]he equal protection clause does not require the states to use total population figures derived from the federal census as the standard by which . . . substantial population equivalency is to be measured."))

through census data, or where census data is no longer accurate.[53]

The majority then came to the crux of its dispute with the dissent, whether reapportionment should be based on total population or voting age citizen data. The district court had adopted a plan with nearly equal numbers of persons in each district, and a Hispanic majority in one of the districts. The County argued that since many Hispanics are noncitizens, and therefore nonvoters, and since these Hispanics are concentrated in one district, the vote of a citizen in that district is unconstitutionally weighted more heavily than those of citizens in other districts.[54]

The majority first noted that while *Burns v. Richardson* may permit states to use voting population as well as total population in order to form electoral districts, it does not require states to do so.[55] The majority instead relied on *Reynolds v. Sims*[56] and held that "the *Reynolds* Court recognized that the people, including those who are ineligible to vote, form the basis for representative government."[57] The majority thus ruled that "population is an appropriate basis for state legislative apportionment."[58]

The majority then recognized that California state law requires districting to be based on total population,[59] and that no case cited by the county suggests such requirements are unconstitutional.[60] The majority argued that in *Gaffney v. Cummings*,[61] the Supreme Court upheld a redistricting plan based on total population even though the plan would lead to differences in the number of eligible voters in the districts.[62] The majority noted that "[t]he Court made no intimation that such disparities would render those apportionment schemes constitutionally infirm."[63] Similarly the majority construed the Supreme Court's holding in *Chapman v. Meier*[64] as requiring a court ordered redistricting plan to provide for districts of equal population, unless state poli-

53. *Id.* at 773.
54. *Id.*
55. *Id.* at 774.
56. 377 U.S. 533 (1964).
57. *Id.*
58. *Id.*
59. *Id.* (citing California Elections Code § 35000 (West 1989 & Supp. 1991)).
60. *Garza*, 918 F.2d at 774.
61. 412 U.S. 735 (1973).
62. *Id.* at 747.
63. *Garza*, 918 F.2d at 774.
64. 420 U.S. 1, 24 (1975).

cies dictate otherwise.[65]

The majority then went on to make policy arguments for the use of total population figures instead of voter population. The use of voter population will create districts with large divergences in total population.[66] According to the majority, those residing in more populous districts will have less access to their elected representatives.[67] This "[i]nterference with individuals' free access to elected representatives impermissibly burdens their right to petition the government."[68] The majority asserted that since noncitizens are entitled to various federal and local benefits, "they have a right to petition their government for services and to influence how their tax dollars are spent."[69] A plan that would base districts on voter population rather than total population would dilute the access of voting age citizens to their representative and would abridge the rights of noncitizens and minors to petition their representative and participate in other political expression short of voting or holding public office.[70] Finally, the majority adopted the view of the California Supreme Court that "[a]dherence to 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."[71] Thus the majority concluded that districting on the basis of voting capability, as required by Judge Kozinski's dissent, "would constitute a denial of equal protection to these Hispanic plaintiffs and rejection of a valued heritage."[72]

The majority then proceeded to tie up the loose ends of the decision. It first affirmed the district court's holding that the plan of redistricting submitted by the County did not represent a good faith effort to remedy its violation.[73] The majority also affirmed the district court's findings with regard to reverse discrimination.[74] The majority next addressed the appeal of a denial of a motion to

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65. *Garza*, 918 F.2d at 774.
66. *Id.*
67. *Id.*
68. *Id.* at 775 (citation omitted).
69. *Id.*
70. *Id.*
71. *Id.* (quoting Calderon v. City of Los Angeles, 4 Cal.3d 251, 258-59, 481 P.2d 489, 493, 93 Cal. Rptr. 361, 365 (1971) (the Constitution requires apportionment by total population, not voter population)).
72. *Id.* at 776.
73. *See id.*
74. *Id.*

intervene[75] before remanding the case to the district court to impose a new time schedule.[76]

B. The Dissenting Opinion

Judge Kozinski "enthusiastically join[ed] the majority as to liability" but could not agree with the majority's conclusion "that the district court's reapportionment plan complies with the one person one vote principle announced by the Supreme Court in *Reynolds v Sims*."[77] Judge Kozinski initiated his dispute with the majority by trying to put the figures in some context. According to the system of districting advanced by the district court, "a vote cast in District 1 counts for almost twice as much as a vote cast in District 3."[78]

Judge Kozinski noted the continuing adherence of the Supreme Court to the *Reynolds* proposition that "[w]eighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable."[79] However, he admitted that the Supreme Court has also provided some support for the majority's position that equality of population is to be the guiding principle.[80] While in most cases the distinction between voting population and total population will make no substantive difference, here the distinction does matter: the districts created will either cause unequal voting power or unequal representation. Judge Kozinski attempted to choose between these conflicting principles by going beyond the semantic formulations of the Supreme Court and attempting "to distill the theory underlying the principle of one person one vote and, on the basis of that theory, select the philosophy embodied in the fourteenth amendment."[81] This philosophy is either equality of representation,[82] which is served by apportioning according to total population, or

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75. *See supra* note 21 and accompanying text.

76. *Garza*, 918 F.2d at 777.

77. Garza v. County of Los Angeles, 918 U.S. 763, 779 (9th Cir. 1990) (Kozinski, J., concurring in part and dissenting in part), *cert. denied*, 111 S. Ct. 681 (1991).

78. *Id.* at 780 (Kozinski, J., concurring in part and dissenting in part).

79. *Id.* at 780-781 (Kozinski, J., concurring in part and dissenting in part) (quoting Reynolds v. Sims, 377 U.S. 533, 563 (1964)).

80. *Id.* at 781 (Kozinski, J., concurring in part and dissenting in part).

81. *Id.* (Kozinski, J., concurring in part and dissenting in part).

82. This principle "assures that all persons living within a district—whether eligible to vote or not—have roughly equal representation in the governing body." *Id.* (Kozinski, J., concurring in part and dissenting in part) (footnote omitted).

electoral equality,[83] served by apportioning based on eligible electors.

Judge Kozinski read the Supreme Court's pronouncements to suggest that "what lies at the core of one person one vote is the principle of electoral equality, not that of equality of representation."[84] He garners this from the continuous references in Supreme Court cases to the "personal nature of the right to vote as the bedrock on which the one person one vote principle is founded."[85] Judge Kozinski interpreted the Court's statements in support of the principle of equal representation as being far more conditional than its concern with equalizing the voting power of citizens.[86] Indeed, he concluded that "a careful reading of the Court's opinions suggests that equalizing total population is viewed not as an end in itself, but as a means of achieving electoral equality."[87]

According to Judge Kozinski, *Gaffney v. Cummings*,[88] a case on which the majority relied, actually stands for the proposition that relatively minor population variances are permissible in legislative districting schemes because "[t]otal population . . . is only a proxy for equalizing the voting strength of eligible voters."[89] He also thought the majority dismissed *Burns v. Richardson*[90] too easily. It is the only Supreme Court case that, like *Garza*, presented a divergence between the representational principle and the principle of electoral equality. Since the *Burns* Court approved the departure from population figures because these numbers did not provide an accurate measure of the equality of voting strength between citizens, *Burns* upholds the principle of electoral equality even over representational equality.[91] The Court's references in other cases cited by the majority that seem to support the notion of equality of representation may "suggest only that the Court did not consider the possibility that the twin goals might diverge in

83. "This principle recognizes that electors—persons eligible to vote—are the ones who hold the ultimate political power in our democracy." *Id.* (Kozinski, J., concurring in part and dissenting in part).

84. *Id.* at 782 (Kozinski, J., concurring in part and dissenting in part).

85. *Id.* (Kozinski, J., concurring in part and dissenting in part).

86. *Id.* at 783 (Kozinski, J., concurring in part and dissenting in part).

87. *Id.* (Kozinski, J., concurring in part and dissenting in part).

88. 412 U.S. 735 (1973).

89. *Garza*, 918 F.2d at 783 (Kozinski, J., concurring in part and dissenting in part).

90. 384 U.S. 73 (1966).

91. *Garza*, 918 F.2d at 784 (Kozinski, J., concurring in part and dissenting in part).

some cases."[92]

Judge Kozinski offered that he might be persuaded by the majority's arguments that representational equality is a wiser policy to pursue, but he did not feel "free to ignore what [he] regard[s] as binding direction from the Supreme Court, so [his] own policy views on this matter make no difference."[93] He recognized that were the Supreme Court to consider the issue presently, it might decide in favor of representational equality.

Judge Kozinski then addressed himself to the issues arising from adherence to a policy of equality of voting power. First, he concluded that the districting plan put forth by the district court runs afoul of the notion of voting equality.[94] He then attempted to decide what he considered the most difficult issue in the case: "[t]o what extent, if any, this principle [of electoral equality] may have to give way when it collides with a remedial plan designed to cure the effects of discrimination."[95] Since the goal of a discriminatory action is to put the victims of discrimination in the position they would have enjoyed had there been no discrimination, a district court acting pursuant to the Voting Rights Act is constrained by the principle of one person one vote.[96] Therefore Judge Kozinski would have remanded the case directing the district court to institute a plan that avoids the conflict between representational and voter equality. Only if such a plan could not he formulated would it be necessary to decide the circumstances under which the principle of voter equality must yield to the district court's equitable powers to remedy the effects of discrimination.[97] Judge Kozinski also would have departed from the majority's decision to issue a mandate forthwith because of the strong arguments on both sides of the districting issue and the possibility that the Supreme Court might wish to take up the matter.[98]

III. Analysis

At the very least, reasonable people may differ over whether to favor representative equality or electoral equality. The fact that

92. *Id.* (Kozinski, J., concurring in part and dissenting in part).
93. *Id.* at 785 (Kozinski, J., concurring in part and dissenting in part).
94. *Id.* at 786 (Kozinski, J., concurring in part and dissenting in part).
95. *Id.* (Kozinski, J., concurring in part and dissenting in part).
96. *Id.* at 787 (Kozinski, J., concurring in part and dissenting in part).
97. *Id.* at 788 (Kozinski, J., concurring in part and dissenting in part).
98. *Id.* (Kozinski, J., concurring in part and dissenting in part). Since the opinion of the Ninth Circuit, the Supreme Court has refused to hear this case. 111 S. Ct. 681 (1991).

the Supreme Court has offered no clear guidance on the matter, handing down opinions with language supporting both sides of the issue, does not help to resolve the controversy. There certainly will be no final resolution of the issue until the Supreme Court speaks directly on the matter. Until then, Judge Kozinski seems to have the better argument in trying to adhere to the principles set forth in *Reynolds v. Sims*[99] and its progeny.

First the good news: in most reapportionment schemes, no dispute over which figures should be used, total population or total electors, will arise. Generally, the same results will be achieved using either set of figures. But as the case at hand indicates, the problem arises in some cases and may be a concern in future apportionments of the United States House of Representatives.[100]

Judge Kozinski is correct in attempting to scuttle semantic formulations and get at the underlying principles of one person one vote and the philosophy of the fourteenth amendment. The majority, instead, bends language from Supreme Court cases to promote its point of view while ignoring language from those same cases that supports the notion of electoral equality. The majority also uses its own notions of fairness and inequality, as well as those of the California Supreme Court, to support its views. Judge Kozinski, however, adheres to the relevant Supreme Court opinions.

Both the majority and the dissent faced the difficult problem of trying to extrapolate an answer, using relevant Supreme Court precedent, to an issue the Court has never addressed. The difference between the present case, and the analogous reapportionment cases is that here the satisfaction of the goals of representational equality and voter equality seem to be mutually exclusive. In the reapportionment cases, both principles could be advanced through the use of total population figures. The Court's promotion of the use of such figures, therefore, does not suggest the preference of representational equality over voter equality.

Judge Kozinski's basic argument, and the more compelling as to the use of total population or voter population, is that the Court's opinions calling for the use of total population do so "not

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99. 377 U.S. 533 (1964).

100. This problem could be aggravated on a national level by a continuing increase of illegal aliens who tend to reside in concentrated geographical areas in this country. *See generally* Note, *A Territorial Approach to Representation of Illegal Aliens*, 80 MICH. L. REV. 1342 (1982).

as an end in itself, but as a means of achieving electoral equality."[101] This interpretation solves the confusion of the majority opinion. While many Supreme Court cases call for the use of population figures in apportionment, they do so only where this type of apportionment will lead to electoral equality. The Supreme Court has never required that total population figures be used when this would not advance electoral equality. Indeed, as Judge Kozinski notes, *Burns v. Richardson*,[102] the only case before the Supreme Court where there was a divergence between representational equality and electoral equality, can only be explained as supporting the notion of electoral equality, for the Court approved of the departure from population figures when these figures did not provide an adequate measure of the equality of each citizen's vote.[103]

The majority makes a good argument for the embracement of representational equality. After all, every American school child knows that this country was founded on notions of equal representation for all. The problem is that the Supreme Court cases do not support this reading of the one person one vote concept, even though our heritage might. Nevertheless, representational equality is a goal that must be pursued. The only justification for not attaining this goal is its incompatibility with electoral equality as in *Garza*.

The cloudiness of Supreme Court precedent on this issue, as well as the laudable goals of both representational equality and electoral equality make this case very difficult to decide. This is certainly an issue that needs clarification from the Supreme Court. Judge Kozinski seems to have the better reasoned argument that elector equality must prevail over representational equality when the two are in conflict, based on existing Supreme Court precedent. But because it is one of the cornerstones of our form of government, the Supreme Court today might favor representational equality over electoral equality. The majority in *Garza* must remember that only the Supreme Court has the power to

101. Garza v. County of Los Angeles, 718 F.2d 763, 783 (9th Cir. 1990) (Kozinski, J., concurring in part and dissenting in part), *cert. denied*, 111 S. Ct. 681 (1990).

102. 384 U.S. 73 (1966).

103. *See Garza*, 918 F.2d at 784 (Kozinski, J., concurring in part and dissenting in part).

make such a reversal in precedent. The Supreme Court must realize that it has a duty to the lower courts and the public to provide a resolution to this increasingly important issue.

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