

How to Determine Intent: Lessons from L.A.*

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In a series of decisions from 1970 to 1980, the United States Supreme Court shifted from an "effect" standard to an "intent" standard in racial and sex discrimination cases. Every step along the road from the Jackson, Mississippi swimming pool closing case¹ to the Mobile, Alabama city commission case² was criticized by professors and policymakers.³ Indeed, the last step was so controversial that Congress overturned the Court's *City of Mobile v. Bolden* decision in the major

* Unless otherwise noted, all memoranda, deposition transcripts and other sources cited refer to *Garza v. County of Los Angeles*, 756 F. Supp. 1298 (C.D. Cal. 1990), aff'd, 918 F.2d 763 (9th Cir. 1990), cert. denied, 111 S. Ct. 681 (1991), and are available from the author.

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¹ *Palmer v. Thompson*, 403 U.S. 217 (1971).

² *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

³ Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 *Yale L.J.* 1205 (1970); Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 *Sup. Ct. Rev.* 95; Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction*, 86 *Yale L.J.* 317 (1976); Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 *N.Y.U. L. Rev.* 36 (1977); Perry, *The Disproportionate Racial Impact Theory of Racial Discrimination*, 125 *U. Pa. L. Rev.* 540 (1977); Miller, *Proof of Racially Discriminatory Purpose Under the Equal Protection Clause: Washington v. Davis, Arlington Heights, Mt. Healthy, and Williamsburgh*, 12 *Harv. C.R.-C.L. L. Rev.* 725 (1977); Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 *San Diego L. Rev.* 1041 (1978); Clark, *Legislative Motivation and Fundamental Rights in Constitutional Law*, 15 *San Diego L. Rev.* 953 (1978); Sellers, *The Impact of Intent on Equal Protection Jurisprudence*, 84 *Dick. L. Rev.* 363 (1980); Soifer, *Complacency and Constitutional Law*, 42 *Ohio St. L.J.* 383 (1981); Blacksher & Menefee, *From Reynolds v. Sims to City of Mobile v. Bolden: Have the White Suburbs Commandeered the Fifteenth Amendment?* 34 *Hastings L.J.* 1 (1982); Note, *Making the Violation Fit the Remedy: The Intent Standard and Equal Protection Law*, 92 *Yale L.J.* 328 (1982); Binion, "Intent" and Equal Protection: A Reconsideration, 1983 *Sup. Ct. Rev.* 397; Weinzweig, *Discriminatory Impact and Intent Under the Equal Protection Clause: The Supreme Court and the Mind-Body Problem*, 1 *Law & Inequal.* 277 (1983); Parker, *The "Results" Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard*, 69 *Va. L. Rev.* 715 (1983); Boyd & Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 *Wash. & Lee L. Rev.* 1347 (1983); Karlan, *Discriminatory Purpose and Mens Rea: The Tortured Argument of Invidious Intent*, 93 *Yale L.J.* 111 (1983); Ortiz, *The Myth of Intent in Equal Protection*, 41 *Stan. L. Rev.* 1105 (1989).

amendment to the 1982 Voting Rights Act, allowing plaintiffs in voting rights cases to prevail by proving *either* a racially discriminatory intent or a racially discriminatory effect.⁴

How much difference has the shift made? Do Supreme Court decisions during the century following the passage of the Fourteenth Amendment in 1868 throw any light on the Court's more recent course? How, exactly, have courts said intent must be proven, and how do their standards comport with logic and normal professional conduct among historians? What sorts of evidence are relevant to proving intent, and why are they relevant? How, in practice, should one go about evaluating hypotheses about the motives of the framers of governmental rules?

The best path to answers to such questions begins, it seems to me, with a detailed examination of one case. In August, 1988, the Mexican American Legal Defense and Educational Fund and the American Civil Liberties Union filed *Yolanda Garza v. County of Los Angeles*⁵ in the United States District Court for the Central District of California. Shortly thereafter, the United States Department of Justice instituted a similar suit against the county. Having testified as a historian and political scientist in six previous federal voting rights cases, I served as an expert witness for MALDEF and the ACLU on the question of whether, in recent years, the supervisorial district lines in Los Angeles county had been drawn with an intent to discriminate against Hispanics. This paper is a revised and much expanded version of the one I presented to the court.

As in other cases, *Garza* was complex enough to require the attention of a professional historian because no one incident or piece of evidence was, by itself, conclusive.⁶ Decided in favor of the plaintiffs by Judge David V. Kenyon on June 4, 1990, *Garza* deserves detailed attention not only for the light it throws on the general theoretical questions noted above, but also because the record on motivation is extraordinarily rich, as Los Angeles county has one of the largest populations of any jurisdiction ever sued in a voting rights case, and as it is the most important voting rights suit involving Hispanics ever filed.

⁴ S. Rep. No. 417, 97th Cong., 2d Sess. 27 (1982).

⁵ 756 F. Supp. 1298 (C.D. Cal. 1990), aff'd, 918 F.2d 763 (9th Cir. 1990), cert. denied, 111 S. Ct. 681 (1991).

⁶ McCrary & Hebert, Keeping the Courts Honest: The Role of Historians as Expert Witnesses in Southern Voting Rights Contests, 16 S.U.L. Rev. 101, 105 (1989).

I. ETHNIC DISCRIMINATION BY GERRYMANDER

A. *Introduction and Overview*

I begin by considering, very briefly, some examples from the historical record of anti-minority gerrymandering. Social science provides few laws of human behavior. Consequently, we often turn to past or present day analogies for guidance. It is instructive to note that the first time in American history when enough minority group members could vote to make a substantial difference in political outcomes, the three major techniques of gerrymandering ("packing," "stacking," and "cracking," to be defined below) were used by supposed allies, as well as by enemies, to dilute the power of minority voters. The fact that Deep South redistricters of the 1870s and 1880s instantly knew how to accomplish various kinds of gerrymanders creates a presumption that when we observe anti-minority effects in a redistricting, they were intended. Furthermore, the fact that observers of a century ago discerned discriminatory intent, not by looking for verbal admissions of a desire to disadvantage minorities, but by considering the obvious effects of redistricting plans, demonstrates how commonsensical and historically precedented it is to determine discriminatory intent from discriminatory effects.

Particular partisan and demographic traits of Hispanics in contemporary Los Angeles County affect the character of discrimination against them in redistricting. Predominantly Democratic and slightly less segregated than the African-American or Anglo populations, Hispanics also have a smaller proportion of registered voters to total population than the other two groups. Since these traits are widely known to those who draw boundary lines, they suggest that anti-Hispanic gerrymandering is at least as likely to be accomplished by splitting areas of Hispanic concentration as it is by concentrating them in a few districts.

State and county laws and guidelines that affected county reapportionment imposed severe constraints on the process, particularly on the 1981 redistricting. The most significant was the necessity for the final plan to receive the votes of four of the five supervisors, for it meant that the aggressive, newly-elected Republican majority on the Los Angeles County Board of Supervisors in 1981 could not jam through its preferred redistricting plan.

Incumbents have a large advantage in elections to the Board, not only because they can raise much more money in campaign contributions, but because they can design their own districts to help themselves and disadvantage potential opponents. The third section of the

paper examines in detail the pattern of redistricting from 1959 through 1971, and represents an attempt to determine, in key instances, why specific changes were made. The most important fact for the purposes of this case is the pattern of growth of the district that contained the largest proportion of the "Hispanic core" area from 1950 on, the Third Supervisorial District. Instead of taking in more of the areas in which Hispanics lived or were moving into, the Third District ballooned into the Anglo suburbs. The repeated rejection of cities in greater East Los Angeles by Third District Supervisor Ernest E. Debs, often over the vociferous objections of colleagues who wanted to unload these areas on him, constitutes a racially discriminatory pattern of largely successful attempts to minimize the Hispanic percentage of the population in the most Hispanic county supervisorial district.

The 1972 reapportionment of the Los Angeles City Council and efforts to expand the number of members on the Board of County Supervisors from 1935 to the present involved the same issues of minority representation, as well as several of the major participants in the 1981 redistricting, and thus cast light on the intent of county redistricters. In 1972, then City Councilman Edmund D. Edelman realigned two City Council districts containing large parts of East Los Angeles to create a new councilmanic district that had a Hispanic population majority. Redistricters in Los Angeles knew how to draw districts that would be more reflective of the will of the Hispanic community, and they learned, through watching the subsequent battles between incumbent Anglo Councilman Art Snyder and a series of Hispanic challengers, the effect of drawing a district with certain characteristics. Efforts to expand the County Board again and again raised the issue of Hispanic representation; any politically aware person must have known and must still know that such representation is at stake each time the expansion issue is considered. To defeat expansion proposals, as voters did twice in the 1960s and 1970s, and as a majority of the Board of Supervisors repeatedly did during the 1980s, is to deny, consciously, one means of giving Hispanic voters a better chance to elect candidates of their choice. The 1980 elections that overturned the Democratic majority on the Board and ended the political career of the only member of a minority group to serve on the Board from 1875 until 1991, changed the character of the participants in the 1981 redistricting and unquestionably altered its outcome. Since several of those who had major roles in trying to draw boundaries in 1981 played important parts in the 1980 campaigns, and since those campaigns suggest a great deal about the climate of racial opinion at the time of the redistricting,

it is necessary to review what went on in the 1980 supervisorial elections.

Two demographic changes during the 1970s—the marked increase in the proportion of the county's population that was Hispanic and the disproportionate growth of the Hispanic proportion in the First and Third Districts—also conditioned the 1981 redistricting. Two Anglo supervisors, Edmund Edelman and Peter F. Schabarum, were potentially at risk from the rising Hispanic percentages in their districts, even if the lines remained as they were, and particularly if they were changed to track Hispanic growth more closely.

Republicans in 1981 carried out a secret plan for a private reapportionment effort in which a redistricting expert, Joseph Shumate, would be paid out of the Republican supervisors' campaign funds to design and evaluate the political aspects of redistricting plans. The only plans that the Boundary Commission, appointed by the supervisors, seriously considered were plans apparently drawn by Shumate, partly with the use of data from the Republican-connected Rose Institute at Claremont McKenna College.

Democrats also had their secret plans for 1981. Edelman's deputy, Jeff Seymour, surreptitiously got the County's Regional Planning and Data Processing Divisions to match precinct and census tract data in order to prepare an extensive report for Edelman giving the results of a long series of elections at the census tract level for Edelman's district. The 335-page computer printout of these returns also demonstrates the defensive nature of the Democratic efforts after they lost their majority on the Board. The Republican Board members proposed wholesale changes in the district lines. The Democrats planned from the beginning to maintain something much closer to the status quo.

The personal histories of the five initial appointees to the Boundary Commission, all close political confidants of the supervisors, reflect a great deal about their actions, as well as about their later explanations of those actions. After a protest by the Hispanic redistricting group, Californios for Fair Representation, the supervisors expanded the Commission by adding five members of minority groups. All the negotiating, however, went on behind the scenes, and was conducted by the five Anglo members. The public hearings were a facade, and a plan proposed by the Californios group was never seriously considered, either by Democrats or Republicans.

Republicans on the Boundary Commission failed to divide the representatives of the two Democrats on the Board, and failed to get them to accept plans containing a district that had a majority of Hispanics in the

population. Because no radical plan could command the support of four supervisors, the Board began anew and, in a series of private meetings, negotiated minor changes that preserved the fissure in the East Los Angeles community. Again, public hearings were purely for show, while the important discussions went on behind closed doors. Hispanic activists emerged from the process as frustrated and angry as did Republican activists, if not for the same reasons.

The final section of the paper steps back from *Garza* to consider the development of the intent standard in equal protection and voting rights law. Courts discovered connections between intent, effects, and racial discrimination long before the 1970s, and doctrinal developments a century ago closely parallel more recent ones. Beginning with the three 1880s Chinese laundrymen's cases,⁷ the Supreme Court first claimed to reject evidence of intent as improper, then declared such evidence admissible, but inadequate.⁸ Finally, by the 1915 grandfather clause cases,⁹ the Supreme Court rested its abrogation of that notorious clause principally on inferences about motivation. More recent cases from *Brown v. Board of Education*¹⁰ through *Washington v. Davis*¹¹ and *Rogers v. Lodge*¹² apparently enshrined an intent standard, but were actually decided on the basis of much the same sort of evidence as is required under an effect standard. Although several commentators have attacked the intent standard as unworkable or too difficult to meet, no one has previously tried to classify the types of evidence that are necessary to demonstrate intent, the rationales for each of them, and the causal logic behind various proposed intent standards. After doing so, I apply these criteria briefly to various hypotheses that might be offered to explain the shape of Los Angeles county supervisorial districts. The evidence in the *Garza* case is complex, but conclusive. The Los Angeles county supervisors could preserve their racially exclusive club only by manipulating district lines to keep the burgeoning Hispanic community split.

⁷ *Barbier v. Connolly*, 113 U.S. 27 (1885); *Soon Hing v. Crowley*, 113 U.S. 703 (1885); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

⁸ *Williams v. Mississippi*, 170 U.S. 213 (1898).

⁹ *Guinn v. United States*, 238 U.S. 347 (1915); *Myers v. Anderson*, 238 U.S. 368 (1915).

¹⁰ 347 U.S. 483 (1954).

¹¹ 426 U.S. 229 (1976).

¹² 458 U.S. 613 (1982).

B. Gerrymandering in General

American politicians have always been quick to discover and eager to use electoral rules and practices that advantage themselves and disadvantage their opponents. Disfranchisement, gerrymandering, electoral violence, intimidation, bribery, and ballot tampering may not be the best of the American tradition, but they have often played large roles in shaping it.¹³ To the old saw, "Anytime you hear a politician speaking of 'the public interest,' you'd better keep your hand on your wallet" should be added another: "Anytime an electoral procedure is changed, you have only to ask who did it to know who benefited." Protestations of virtue in reapportionment cannot be taken seriously, and can only have been made with a wink and a nudge.

Having planned for a private reapportionment effort secretly paid for by the newly elected three-man Republican majority on the Los Angeles County Board of Supervisors, Ron Smith, Supervisor Deane Dana's appointee to the Boundary Commission¹⁴ in 1981, averred that his only motive in designing a redistricting plan was "to do a noble and good thing . . ."¹⁵ Likewise, Supervisor Michael Antonovich declared that he selected his former campaign aide Allan Hoffenblum to the Commission because he "would be able to be fair," and that his only instruction to his other Boundary Commission nominee, Dr. Frederico Quevedo, was "to be fair."¹⁶ The Chairman of the Boundary Commission, Blake Sanborn, maintained that the effect of the redistricting on the political fortunes of the supervisor who picked him, Peter F. Schabarum, "never entered [his] mind at all."¹⁷ On the other side of the partisan aisle, Robert Bush, Supervisor Kenneth Hahn's appointee to the Commission, denied absolutely that he and Hahn ever discussed the "political implication of the configurations of the different plans," for instance, their effects on Hahn's reelection chances.¹⁸ Further, Alma Fitch, former chief deputy to Supervisor Edmund D. Edelman and his choice for the Commission, claimed that the only instruction

¹³ See J. Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910* (1974).

¹⁴ See *infra* section IV.D.

¹⁵ Deposition Transcript of Commissioner Ron Smith at 184 [hereinafter Smith Deposition Transcript].

¹⁶ Deposition Transcript of Supervisor Michael Antonovich at 42-43 [hereinafter Antonovich Deposition Transcript].

¹⁷ Deposition Transcript of Chairman Blake Sanborn at 144-45 [hereinafter Sanborn Deposition Transcript].

¹⁸ Deposition Transcript of Commissioner Robert Bush at 162-63 [hereinafter Bush Deposition Transcript].

she received from her boss was to "[d]o the best job you can. Whatever kind of district I have when this is over I'll be glad to run in."¹⁹

More forthright is a statement by the chief consultant to the California Assembly's Special Committee on Reapportionment in 1981, Professor Bruce E. Cain: "... every plan is going to have a bias. Every plan is going to have a slant. And therefore every plan is going to be a gerrymander in some sense. It is going to have an intention to it. It is going to favor some groups and not others."²⁰ Framing electoral arrangements is always a zero-sum game. For every winner, there is at least one loser. If the incumbent supervisors of Los Angeles County have been the likely winners, because they have reapportioned themselves, who, over the past several reapportionments, especially that of 1981, have been the losers?

Because *Garza* involved the contention that the intended losers have been members of minority ethnic groups, Hispanics in particular, it is appropriate to begin this paper by considering the process of anti-minority gerrymandering in general and by putting it in some historical perspective. It is logically possible that those who have redrawn lines have until recently ignored ethnicity, and that since the 1965 passage of the Voting Rights Act, redistricters have tried to promote, not impede the interests of minority groups. Has discriminatory gerrymandering been so rarely understood, attempted, or accomplished that one's initial impulse should be great skepticism toward any such claim? Or, on the contrary, has anti-minority redistricting been so universally recognized, widely undertaken, and repeatedly perpetrated that one should expect that when it *does* happen, it was *meant* to happen?

C. Gerrymandering in Historical Perspective

There are no better places for someone interested in the gerrymandering of racial and ethnic minorities in America to start than Mississippi and South Carolina in the 1870s and 1880s.²¹ Deep South blacks first voted after the Military Reconstruction Act of 1867. The pro-black Radical Republicans who controlled these two states, which had the largest proportions of African-Americans in the country, evidently understood perfectly the tactics of "cracking" (splitting minority

¹⁹ Deposition Transcript of Former Chief Deputy Alma Fitch at 175 [hereinafter Fitch Deposition Transcript].

²⁰ Cain, *Latinos in the Law: Meeting the Challenge - Reapportionment*, 6 *Chicano L. Rev.* 34, 56 (1983).

²¹ The best introduction to racial gerrymandering is Parker, *Racial Gerrymandering and Legislative Reapportionment*, in *Minority Vote Dilution 85-117* (C. Davidson ed. 1984).

groups between districts)²² and "stacking" (keeping effective minority voting percentages below some threshold level).²³ The racist Democrats, who drew the congressional lines in Mississippi after 1875 and in South Carolina after 1881, added to these the technique of "packing" (concentrating one's opponents in the smallest number of districts).²⁴ Even without overt statements of the intent behind these particular reapportionments, political commentators of the 1870s and 1880s concluded from their effects alone that they were meant to be discriminatory. Looking at them today, it is easy to see why the circumstantial evidence seemed so conclusive.

Consider Figure 1 and Panels A-1 and A-2 of Table 1.²⁵ From 1867 to 1875, Republicans spread black (and, therefore, safely Republican) majorities among three of the four districts, apparently hoping to hold the Fourth District with a black/upland white coalition. No county was divided, and, nearly a century before *Reynolds v. Sims*,²⁶ there was little variation in the district populations. In the first reapportionment after the 1870 census, the Republicans proved even craftier, keeping three strongly black majority districts and adding an at-large seat (the state as a whole was 59% black). Blacks filled all four black majority seats. (See Table 2, Panel A). In 1875, the Republicans overreached themselves, drawing two marginal districts with slight preponderances of African-Americans. The two "whitest" districts also contained the most people. Democratic violence and chicanery overcame the natural Republican majorities in these two districts.

So many counties were split in the post-1881 reapportionment that it is apparently not possible to compute racial percentages for all of the districts for the last map in Figure 1.²⁷ However, no statistics are really necessary. This gerrymander passes the "inter-ocular traumatic test"—it hits you between the eyes. The gem of this malapportionment, the Seventh District, according to the *New York Times*, "contains all the precincts of black voters that could be strung together with the faintest connection of contiguous territory."²⁸ Not apparent from the map is

²² *Id.* at 89-92.

²³ *Id.* at 92-96.

²⁴ *Id.* at 96-99.

²⁵ S. Parsons, W. Beach & M. Dubin, *United States Congressional Districts and Data, 1843-1883*, at 121, 136, 184-86, 212-13 (1986); S. Parsons, M. Dubin & K. Parsons, *United States Congressional Districts, 1883-1913*, at 68-69, 138 (1990). See also *N.Y. Times*, July 13, 1882, at 5, col. 1; *N.Y. Times*, July 27, 1882, at 5, col. 1.

²⁶ 377 U.S. 533 (1964).

²⁷ I want to thank Professor Stanley B. Parsons for sending me unpublished data on the post-1883 South Carolina and Mississippi congressional districts.

²⁸ *N.Y. Times*, July 13, 1882, at 5, col. 1.

FIGURE 1: SOUTH CAROLINA CONGRESSIONAL APPORTIONMENTS, 1867-1893

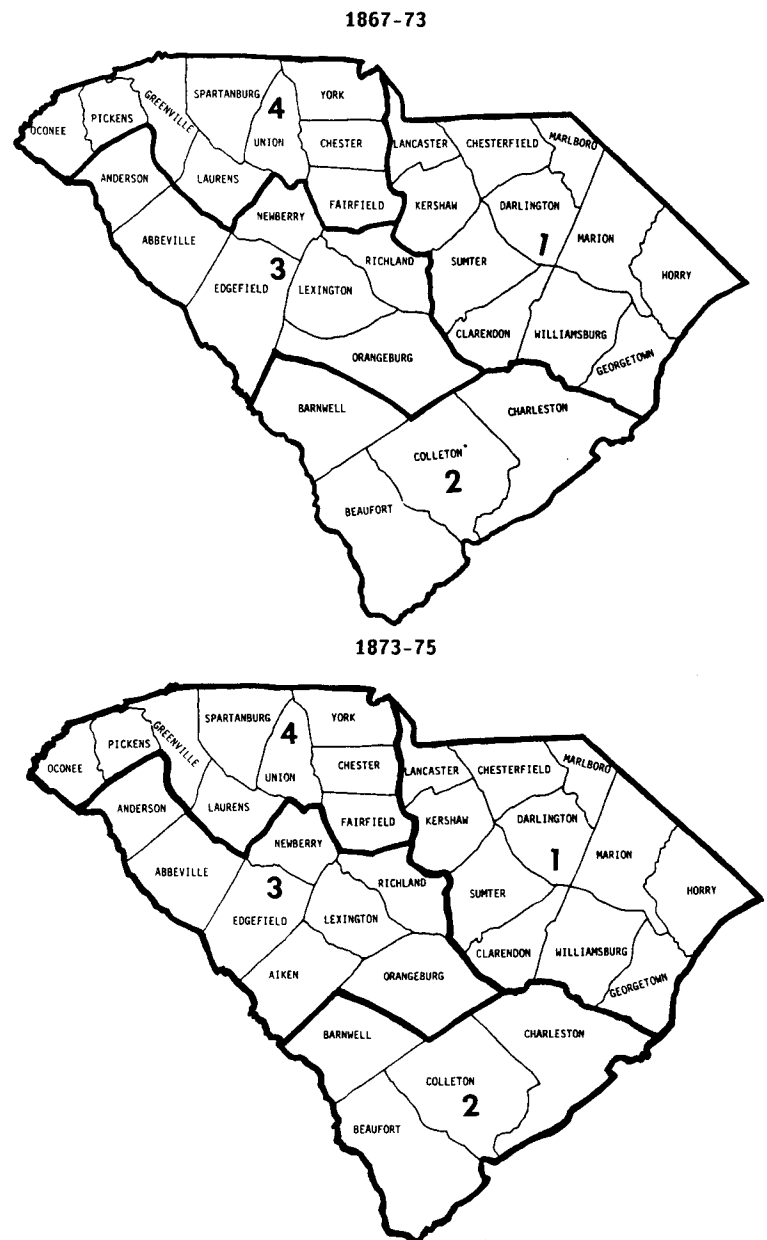
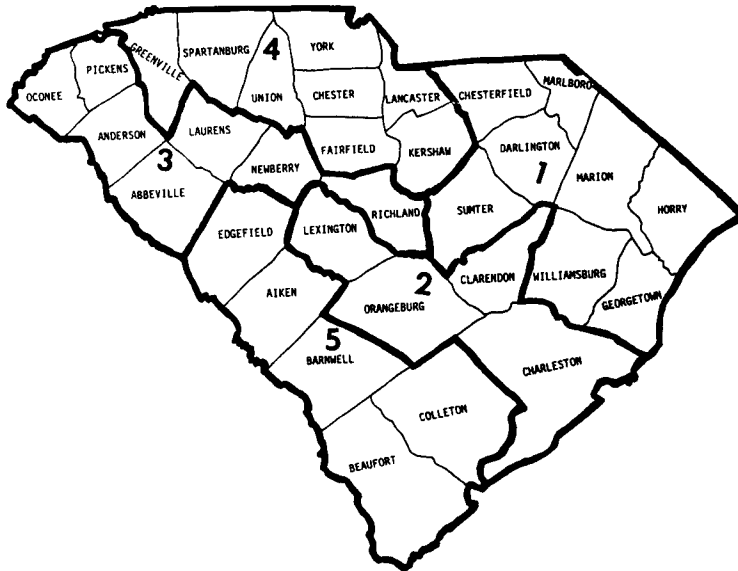


FIGURE 1: SOUTH CAROLINA CONGRESSIONAL APPORTIONMENTS, 1867-1893 (CONTINUED)

1875-83



1885-93

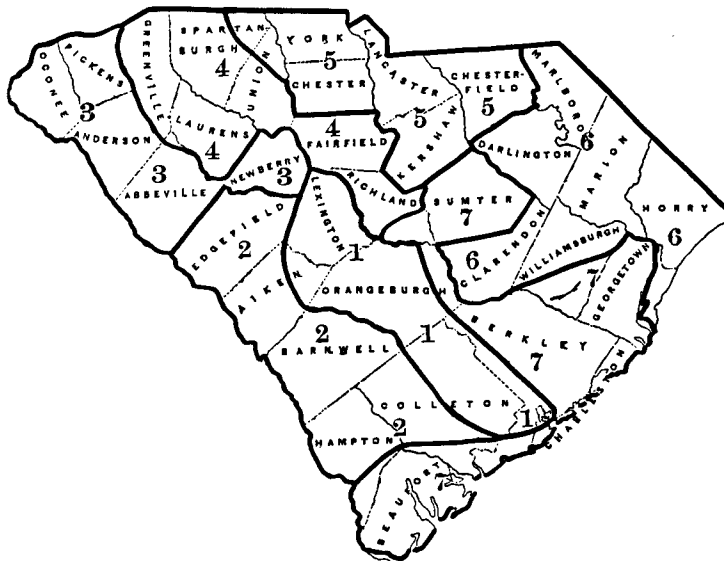


TABLE 1: PACKING, STACKING, AND CRACKING
DISTRICTS IN SOUTH CAROLINA AND MISSISSIPPI, 1867-1893

Years	Districts						
	1	2	3	4	5	6	7
Panel A-1: % of Population Black by District, South Carolina							
1867-73	59.9	68.4	58.3	46.7			
1873-75*	60.6	69.6	59.0	46.1			
1875-83	59.6	64.5	51.6	51.1	67.5		
1885-93	**	63.0	52.3	56.9	57.1	56.6	81.7
Panel A-2: % of State's Population in Each District, South Carolina							
1867-73	24.5	26.0	24.8	24.7			
1873-75*	24.2	25.3	26.8	23.8			
1875-83	19.6	18.8	20.2	21.8	19.6		
1885-93	20.1	14.2	13.7	12.6	12.6	13.4	13.3
Panel B-1: % of Population Black By District, Mississippi							
1869-73	47.9	49.0	52.9	63.3	58.2		
1873-77	21.9	56.1	59.4	57.1	56.4	54.4	
1877-83	45.0	52.5	40.9	52.0	52.0	77.5	
1885-94	49.2	53.7	80.4	53.8	51.6	52.6	64.5
Panel B-2: % of State's Population in Each District, Mississippi							
1869-73	17.7	16.1	18.7	26.9	20.5		
1873-77	16.3	17.8	16.1	17.6	15.2	17.1	
1877-83	20.8	15.5	15.2	15.4	15.9	17.2	
1885-93	12.3	14.9	11.5	17.3	17.0	11.1	15.9

* Also one at-large district.

** Figure unavailable because county lines crossed.

that this new "boa constrictor" district stretched between the homes of two incumbent Republican Congressmen, a black who resided in Beaufort County and a white who lived at the other end of the district in Sumter County.²⁹

Mississippi's experience in the Reconstruction and "Redeemer" eras is also instructive. In 1868, the risk-accepting Republicans created two safe and three competitive districts, splitting the heavily black counties of Bolivar, Sunflower, Coahoma, and Tunica off from their Delta brethren in an attempt to bolster what they hoped would be an appreciable highland white Republican vote. (See Figure 2). The two most populous districts were also the most heavily black. The Republicans

²⁹ Id.

TABLE 2: PARTY AND RACE OF CONGRESSMEN IN SOUTH CAROLINA AND MISSISSIPPI, 1868-86

Panel A: South Carolina

<i>Year Took Office</i>	<i>Republicans</i>		<i>Democrats (All White)</i>
	<i>White</i>	<i>Black</i>	
1868	4	0	0
1869	3	1	0
1871	1	3	0
1873	1	4	0
1875	3	2	0
1877	0	3	2
1879	0	0	5
1881	1	1	3
1883	1	0	6
1885	0	1	6

Panel B: Mississippi

<i>Year Took Office</i>	<i>Republicans</i>		<i>Democrats (All White)</i>	
	<i>White</i>	<i>Black</i>		
1869	5	0	0	
1871	5	0	0	
1873	4	1	1	
1875	2	1	3	
1877	0	0	6	
1879	0	0	6	
1881	0	1	6	
1883	1	0	5	(1 Greenback)
1885	0	0	7	

"wasted" many of their votes by concentrating too many people in two districts. After the 1870 census, the Republicans trimmed their majorities but kept fairly safe cushions in five districts, while conceding the First to white Democrats. Table 2, Panel B, which shows the actual results of the electoral process, reflects these redistricting changes perfectly.

Rather than wait for a new census, the Democrats, who had perpetrated the violent "Revolution of 1875" in Mississippi, immediately reapportioned the congressional seats. Known throughout the country at the time as the "shoestring district," the new Sixth ran all the way between the northern and southern borders of the state, tracking the Mississippi River and drowning the state's black population in its

FIGURE 2: MISSISSIPPI CONGRESSIONAL APPORTIONMENTS, 1869-1893

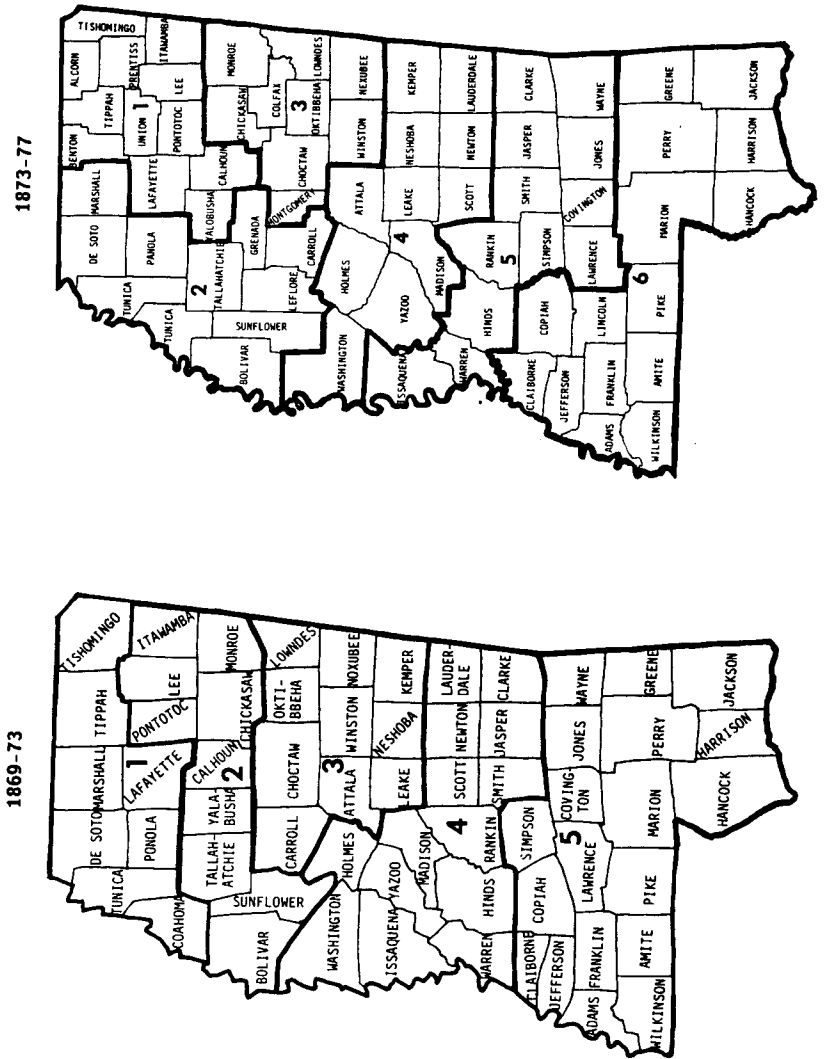
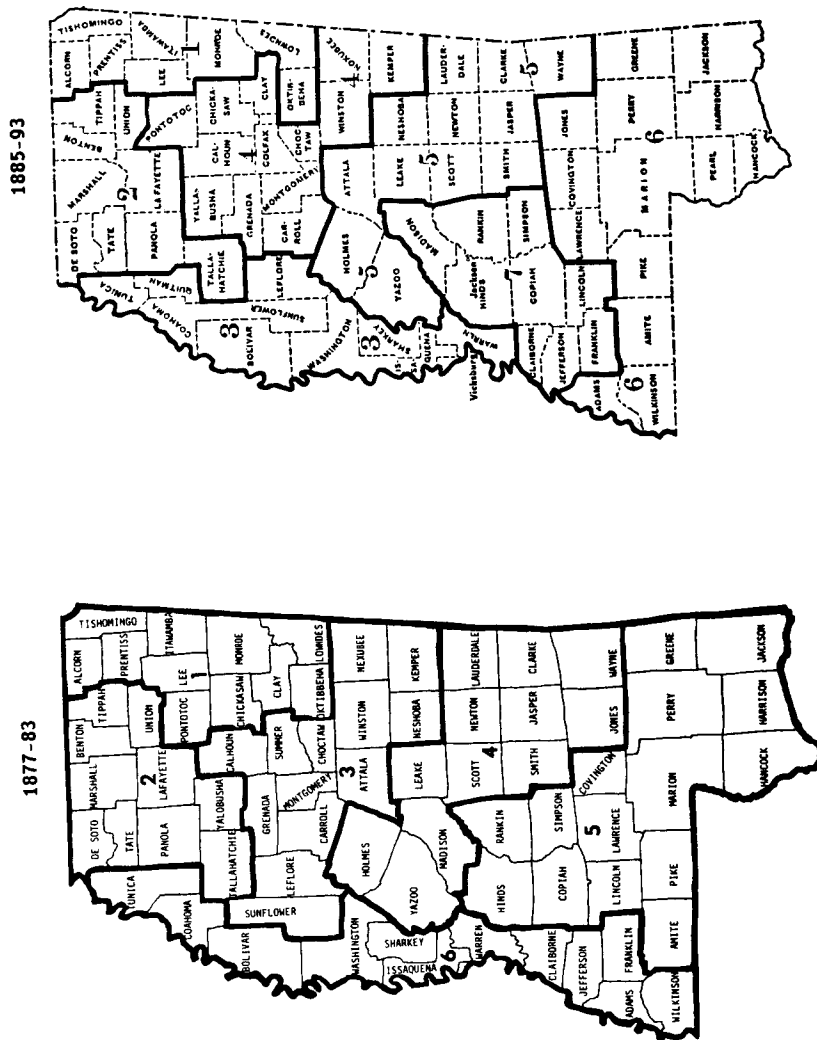


FIGURE 2: MISSISSIPPI CONGRESSIONAL APPORTIONMENTS, 1869-1893
(CONTINUED)



course. Two of the six districts were safely white (and therefore Democratic), three would require only a limited amount of ballot box stuffing and night riding for the Democrats to carry, and the Sixth was overwhelmingly Republican. Frightened by the assassinations of at least 200 white and black Republicans in the state in 1875, most blacks apparently gave up politics in Mississippi for the next four years.³⁰

In 1881, the Democrats retied the shoestring, which was represented by black Congressman John R. Lynch of Adams County, running it east-west, instead of north-south. In the *New York Times* correspondent's summary, "the whole reapportionment scheme, therefore, turned upon the problem of beating Lynch, and an examination of the Sixth District will show that the Bourbons [Democrats] did the best job that it was possible to do. The only trustworthy Republican counties in the whole district are the two that belonged to Mr. Lynch's old district, Adams and Wilkinson."³¹ The others were sparsely populated and largely white.³² Lynch lost. As Table 1 shows, the Democrats created one overwhelmingly black Delta district, the Third; one substantially black district, the Seventh; and five districts that stacked the African-Americans so skillfully that they ranged only from 49.2% to 53.8% black. In such districts, including Lynch's home district, it was simple to alter a few tallies, throw out a few thousand votes, or announce solemnly that mules or horses had eaten selected ballot boxes.³³ Fraud worked easily because gerrymandering had reduced the task to manageable proportions.

In these two states, Democratic gerrymanders had turned an 8-3 probable Republican margin to 12-1 Democratic. Since voting was well-known at the time to be extremely racially polarized—a conclusion borne out by extensive statistical analyses³⁴—a partisan gerrymander amounted to a racial gerrymander. Similar reapportionments created the "Black Second" in North Carolina, the "Black Fourth" in Alabama, and less notorious concentrations elsewhere.³⁵

³⁰ V. Wharton, *The Negro in Mississippi, 1865-1890*, at 190 (1947).

³¹ *N.Y. Times*, July 27, 1882, at 5, col. 1.

³² *Id.*

³³ V. Wharton, *supra* note 30, at 204 (citing *Hinds County Gazette*, Nov. 23, 1881 and *Raymond Gazette*, Nov. 10, 1883).

³⁴ See J. Kousser, *supra* note 13 (containing numerous tables estimating voting patterns by race).

³⁵ E. Anderson, *The Black Second: Race and Politics in North Carolina 1872-1901* (1981); Wiggins, *Alabama: Democratic Bulldozing and Republican Folly*, in *Reconstruction and Redemption in the South* 68-69 (O. Olsen ed. 1980); Kousser, *The Undermining of the First Reconstruction*, in *Minority Vote Dilution* 32 (C. Davidson ed. 1984).

Outside the South in the late nineteenth and early twentieth centuries, there were too few distinguishable, geographically concentrated racial or ethnic groups to be the subject of flagrant gerrymandering, but the same principles were applied to partisan groups. As a political scientist phrased the rule of thumb in 1906: "Make your district majorities as small as is safe; make your opponents' district majorities as large and as few as possible; throw away as few of your own votes and as many of your opponents' as you can."³⁶ In sum, the principles of partisan and anti-minority gerrymandering are so universally recognized as to create a strong presumption that, when boundary lines have the effect of discriminating, they were in fact drawn with the *intention* of discriminating.

D. Gerrymandering Hispanics

That most honestly brash of California politicians, the late Jesse Unruh, who as Assembly Speaker presided over the epic post-*Reynolds* reapportionment of the 1960s, once acknowledged that "[r]eapportionments are designed by incumbents, for incumbents, as a service to incumbents."³⁷ Continuing this candor, he announced in 1971 hearings of the California State Advisory Committee of the U.S. Commission on Civil Rights that "[q]uite obviously the Mexican American community has been reapportioned more with regard to how it would maximize the Democratic representation that [*sic*] it has to how it would maximize the Mexican American representation."³⁸ According to Los Angeles City Councilman Richard Alatorre, who was chairman of the Reapportionment Committee of the State Assembly in 1981, Hispanic areas had been divided in congressional, state legislative, and Los Angeles City Council apportionments in California before 1981.³⁹

It is the disproportionately Democratic affiliation of Hispanics in Los Angeles that makes them useful in gerrymanders.⁴⁰ According to The Rose Institute, 70.4% of the Latino registered voters in Los Angeles

³⁶ Argersinger, *The Value of the Vote: Political Representation in the Gilded Age*, 76 *J. Am. Hist.* 59, 66 (1989) (citing J. Woodburn, *American Politics: Political Parties and Party Problems in the United States* 275 (1906)).

³⁷ California State Advisory Committee to the U.S. Commission on Civil Rights, *Political Participation of Mexican Americans in California* 9 (1971) [hereinafter *Advisory Committee, Political Participation*].

³⁸ *Id.* at 23.

³⁹ Deposition Transcript of Councilman Richard Alatorre at 24-27, 45-46, 51-52 [hereinafter *Alatorre Deposition Transcript*].

⁴⁰ For an excellent summary of the political science literature on Mexican-American politics, see Garcia, *Politics: Introduction*, in *The Mexican American Experience* 185-200 (R. De LaGarza ed. 1985).

County in 1988 were Democrats, 20.4% were Republicans, and 9.2% declined to state or were affiliated with minor parties.⁴¹ According to Prof. Richard Santillan, "... the Democratic leadership during times of redistricting has deliberately distributed Chicano voters into as many districts as possible to maximize and take advantage of guaranteed Chicano support for non-Chicano Democratic candidates."⁴² Conversely, Prof. Alan Heslop, head of The Rose Institute and former Executive Director of the California State Republican Central Committee, has stated: "Republicans seek to concentrate Latinos excessively [by] bringing them together in a single district to waste Democratic votes"⁴³ Or as Assembly minority leader Ross Johnson stated, "If seats are created in the Hispanic areas that increase the opportunity for Hispanic representation, . . . it follows as the night the day that in the suburban areas there will be greater opportunities to elect Republicans."⁴⁴

That Hispanics are somewhat less segregated from other ethnic groups than are African-Americans or white Anglos in California is widely understood by reapportionment experts.⁴⁵ The Los Angeles City Community Development Department identified Anglo, black, "Spanish," "mixed," and "Asian" housing clusters from 1950 through 1980. On average, Anglo clusters were 87.5% Anglo, black clusters were 81.2% black, but "Spanish" clusters were only 61.2% Hispanic, and "Asian" clusters were a mere 36% Asian.⁴⁶ Because of the degree of segregation, it is easiest to draw safe Anglo political districts, but Hispanics are clearly not so mixed within the Southern California community as to make it very difficult to cluster them politically, or, alternatively, to determine where to divide them.

It is also a well-recognized factor in reapportionments that there are greater proportions of both non-citizens and children among Hispanics than among Anglos or blacks. The Rose Institute estimates that 38% of the California Hispanic population is less than eighteen years of age,

⁴¹ The Rose Institute, *Facts and Figures on California's Latino Voters* (1988), Bates #107473 [hereinafter Rose Institute]. Documents collected for the *Garza* case were often stamped with sequential numbers, referred to as "Bates numbers" in the records of the case. That convention has been adopted here. The Bates documents are available from the author.

⁴² Santillan, *The Hispanic Community and Redistricting 4* (R. Santillan ed. 1981).

⁴³ Deposition Transcript of Professor Alan Heslop at 227 [hereinafter Heslop Deposition Transcript]. Cf. Zelman, *Latinos in the Law: Meeting the Challenge - Reapportionment*, 6 *Chicano L. Rev.* 34, 54. (1983).

⁴⁴ Johnson, *Latinos in the Law: Meeting the Challenge - Reapportionment*, 6 *Chicano L. Rev.* 34, 60 (1983). It is instructive to note that Johnson implicitly assumed that all Republican officeholders would be Anglos.

⁴⁵ Cain, *supra* note 20, at 40.

⁴⁶ Navarro, *A Report on California Redistricting and Representation for the Los Angeles Chicano Community*, in R. Santillan, *supra* note 42, at 142.

while another 38% does not have U.S. citizenship.⁴⁷ The rate of voter registration among California Anglos is believed to be about 61%, while among Hispanics who are citizens, the rate is only 45%.⁴⁸ Although none of the Los Angeles County reapportionment experts in 1981 or earlier seem to have used citizenship or Hispanic voter registration estimates explicitly,⁴⁹ and although supervisors' offices deny that they give any less attention to the problems of non-citizens than they do to those of citizens,⁵⁰ it is universally understood that the proportion of voters to population is lower among Hispanics than among Anglos.⁵¹

Under what conditions, then, can Hispanics be elected to office in contemporary California? In Los Angeles county, there were three congressional districts in which more than 30% of the registered voters were of Spanish origin in 1982, according to Justice Department figures: the Twenty-Fifth (39.6%), the Thirtieth (35.6%), and the Thirty-Fourth (33.4%). The 1980 total populations of the three districts were 63.6%, 54.2%, and 47.6% of Spanish origin, respectively. In none of these districts, however, was there a majority of registered voters who were Hispanic. Yet several Hispanics, Edward Roybal, Mathew Martinez, and Esteban Torres, won election in those three districts, and have continued to win throughout the 1980s. In the State Senate, there were two districts of over 40% Spanish origin in voter

⁴⁷ The 1980 U.S. Census estimated the proportion of the Spanish origin population below voting age at 38.6%. See Estrada, *Latinos in the Law: Meeting the Challenge - Political Strategies*, 6 *Chicano L. Rev.* 7, 15 n.36 (1983).

⁴⁸ Rose Institute, *supra* note 41, at Bates #107629.

⁴⁹ Deposition Transcript of Councilman Edmund Edelman at 161-62, 165-66 [hereinafter Edelman Deposition Transcript]; Deposition Transcript of Deborah Turner at 79, 241-42, 378 [hereinafter Turner Deposition Transcript]; Deposition Transcript of Allan Hoffenblum at 243-44 [hereinafter Hoffenblum Deposition Transcript]; Deposition Transcript of Lauro Neri at 121 [hereinafter Neri Deposition Transcript]; Deposition Transcript of Peter Fonda-Bonardi at 79 [hereinafter Fonda-Bonardi Deposition Transcript]; Deposition Transcript of R. Wayne Bannister at 97, 100 [hereinafter Bannister Deposition Transcript]; Deposition Transcript of Dr. Frederico Quevedo at 41-42 [hereinafter Quevedo Deposition Transcript]; Deposition Transcript of Norman Murdoch at 75 [hereinafter Murdoch Deposition Transcript]; Deposition Transcript of Robert Walters at 82 [hereinafter Walters Deposition Transcript]; Deposition Transcript of Joseph Shumate at 341 [Shumate Deposition Transcript]; Smith Deposition Transcript at 186; Fitch Deposition Transcript at 69, 172-73, 186-87; Heslop Deposition Transcript at 310.

⁵⁰ Edelman Deposition Transcript at 161-62; Deposition Transcript of Supervisor Deane Dana at 327 [hereinafter Dana Deposition Transcript]; Deposition Transcript of Mas Fukai at 78-79, 95 [hereinafter Fukai Deposition Transcript].

⁵¹ E.g., Shumate Deposition Transcript at 86-88; Hoffenblum Deposition Transcript at 243-44; Deposition Transcript of Miguel Garcia at 29-30 [hereinafter Garcia Deposition Transcript]; Deposition Transcript of Armando Duron at 58-59 [hereinafter Duron Deposition Transcript].

registration in 1982: Art Torres' Twenty-Fourth (47.9% Spanish origin) and Joseph Montoya's Twenty-Sixth (40.1%). In the State Assembly, Lucille Roybal-Allard's Fifty-Sixth District had a 62.6% Spanish origin proportion of registered voters in 1982, Richard Polanco's Fifty-Fifth was 38.0%, and Charles Calderon's Fifty-Ninth was 42.3%. Only one Anglo Assemblyperson, Sally Tanner, represents a district, the Sixtieth, that was as high as 30% Spanish origin in voter registration (34.2%).⁵² Only one of these districts has a majority of Hispanic voters, but all of them are a third or more Hispanic. Whatever might be the case in nonpartisan elections, in partisan contests in substantially Democratic districts, Hispanic politicians who win primaries can generally obtain the votes of enough non-Hispanic whites, African-Americans, and Asians to win office.⁵³

New Latino candidates, like non-incumbents of all ethnic groups, are most likely to be successful in contests for open seats or in those with substantially redrawn boundaries. From 1904 to 1962, there were no Chicanos in the lower house of the California legislature.⁵⁴ After the decadal reapportionment of 1961, two were elected. In 1968, Peter Chacon, whose district has the smallest Hispanic percentage of any Hispanic member of the California Assembly, upset a Republican who was indicted by a grand jury a few days before the election. After the 1971 reapportionment, the number of Hispanics in the California legislature rose from two to six.⁵⁵ The 1981 redistricting added two more Hispanics to the legislature, as well as two more to the U.S. House of Representatives.

California's experience in this regard is typical. The number of Hispanics elected to the Arizona legislature jumped from five to eleven after the 1971 reapportionment.⁵⁶ In Colorado, the election following the 1964 reapportionment sent six more Hispanics to the state legislature.⁵⁷ In New Mexico, the number of Hispanics in the state senate jumped from seven to twelve in the aftermath of post-*Reynolds* redis-

⁵² For slightly different estimates that support the same substantive conclusion, see Rose Institute, *supra* note 41, at Bates #107480-107492. See also U.S. Bureau of the Census, 6 Congressional Districts of the 99th Congress (1985).

⁵³ See the survey-based analysis of the 1982 congressional general election in the Thirtieth District between Marty Martinez and John Rousselot in Cain & Kiewiet, *Ethnicity and Electoral Choice: Mexican American Voting Behavior in the California 30th Congressional District* in R. De LaGarza, *supra* note 40, at 213-17.

⁵⁴ Padilla, *Chicano Representation by Court Order: Impact of Reapportionment*, in R. Santillan, *supra* note 42, at 86.

⁵⁵ *Id.* at 86-89.

⁵⁶ *Id.* at 85.

⁵⁷ *Id.* at 90.

tricting.⁵⁸ In Texas, court-ordered as well as regular decadal reapportionment helped raise the number of Hispanics in the state legislature from six in 1962 to twenty in 1978.⁵⁹

Four simple conclusions in this section of this paper need to be emphasized: (1) because they are slightly less geographically concentrated than most other ethnic groups, at least in Los Angeles county, it is easier to discriminate against Hispanics in reapportionment by cracking and stacking than by packing them; (2) because Hispanics are, on average, younger and less likely to be citizens than Anglos or African-Americans, the voting population of any district will usually have a smaller Hispanic proportion than the total population; (3) where partisan designations provide cues and partisan loyalties encourage habitual voting patterns, Hispanic candidates can win elections in contemporary California in districts that are between 30% and 50% Hispanic in voter registration;⁶⁰ (4) non-incumbents fare best in open or newly realigned districts.

II. STATE AND COUNTY LEGAL REQUIREMENTS AND GUIDELINES FOR THE REDISTRICTING OF THE LOS ANGELES COUNTY BOARD OF SUPERVISORS

The size of the Los Angeles County Board of Supervisors has been five since 1885, when it was reduced from seven.⁶¹ Repeated proposals by official and citizens' committees, as well as by various members of the Board to increase the number have failed, the most recent being defeated in referenda in 1962 and 1976.⁶² Under current state law, it takes a vote of the people to change the number of supervisors on any

⁵⁸ *Id.* at 92.

⁵⁹ *Id.* at 96.

⁶⁰ In the midst of the 1981 county reapportionment process, Congressman Ed Roybal reminded representatives of Californios for Fair Representation that the district that sent him to Congress in 1962 did not have a majority of Hispanic voters and that several other California Hispanic politicians had been elected from partisan districts with similar ethnic proportions. See Reich & Mendoza, *Latinos Push for Political Power*, L.A. Times, Aug. 17, 1981, part I, at 3, col. 2.

⁶¹ Memorandum to Supervisors of 1st and 4th Districts from Department of Auxiliary Services, L.A. County, Bates #108127. When it was established in 1852, the Board had five members. Changes in state law mandating that more heavily populated counties have seven supervisors (Cal. Political Code § 4022 (1872)), plus the increase in the county's population, forced an increase from five to seven supervisors in 1882. In 1883, the state legislature required that all counties elect just five supervisors, that they be from districts, not at large, and that the districts be "as nearly equal in population as may be." See Cal. Gen. Laws Ann. act 75, §§ 13-16 (Deering 1883). Accordingly, the supervisors reduced their number to five.

⁶² See *infra*, part III, section D.

county board, but there is no state policy constraining the number. There are eleven county supervisors in San Francisco.⁶³

Board members are elected for four-year terms by the voters of each district. The terms are staggered, with three members elected in years that are divisible by four, and two members two years later. There is a nonpartisan primary election in June. If no candidate gains a majority, there is a runoff election between the two top vote-getters in November.

Any Board of Supervisors in California can reapportion itself at any time within one year after a general election.⁶⁴ Since the 1965 case of *Miller v. Board of Supervisors of Santa Clara County*,⁶⁵ and perhaps since the U.S. Supreme Court case of *Reynolds v. Sims*,⁶⁶ Boards have been required to reapportion themselves on a population basis after every decadal census.⁶⁷

According to California law, codified in sections 35000-35006 of the Election Code, a Board of Supervisors may appoint a Boundary Commission of any size to assist it in reapportioning itself, but the Commission proposals are only advisory, not binding. As of 1981, the guidelines in section 35000 stated that in reapportioning itself, the Board "may give consideration to the following factors: a) topography; b) geography; c) cohesiveness; d) community of interests of the districts."⁶⁸

In 1971, the Los Angeles County Supervisors' Boundary Commission adopted for itself additional guidelines: "a) preserve the historical representation of certain areas closely identified with a particular district; b) insofar as possible not divide cities by supervisorial district boundaries; and c) insofar as possible not separate cities or communities sharing common interests and problems peculiar to a section of the county."⁶⁹

⁶³ Gonzalez & Riddell, Representation or Illusion? District Elections, with an Overview of San Francisco, in R. Santillan, *supra* note 42, at 176.

⁶⁴ Memorandum from L.S. Hollinger to Board of Supervisors, Dec. 7, 1961, Bates #000160-000162.

⁶⁵ 63 Cal. 2d 343, 405 P.2d 857, 46 Cal. Rptr. 617 (1965).

⁶⁶ 377 U.S. 533 (1964).

⁶⁷ Memorandum from Donald K. Byrne, Deputy County Counsel, to Board of Supervisors, Oct. 8, 1965, Bates #000324-000329.

⁶⁸ 1979 Cal. Stat. 546, codified at Cal. Elec. Code § 35000 (West 1989) (amended 1991).

⁶⁹ Memorandum from James S. Mize to Each Supervisor, Jan. 19, 1981, Bates #00737. That the last guideline was in addition to the "community of interest" factor in the state law implies logically that "community of interest" meant more than not splitting cities. Even though there is a great deal of talk in various boundary committee reports of the importance of not splitting cities, every reapportionment has done so, even before strict population equality requirements went into effect. For instance, in 1962, five cities —Long Beach,

The most significant provisions of the election code for reapportionment require four supervisors, rather than a simple majority of the Board, to concur before any reapportionment is legal, and set a deadline (September 24 in 1981) for the Board to act. This, at least, has been the usual interpretation of the ambiguous "two-thirds" language in the 1913 County Charter.⁷⁰ Before 1963, the four-vote requirement does not seem to have been questioned.⁷¹ In 1965, it was believed that only three votes were necessary, even though the final plan received four.⁷² By 1971, the County Counsel's Office was unsure whether three or four votes were required, but again, consensus precluded the testing of this matter in the courts.⁷³ Finally, in 1981, when it finally really mattered whether a simple or an extraordinary majority was needed to accept a final plan, the County Counsel's office casually issued only oral advice on the matter.⁷⁴ If no plan were adopted before the deadline,

Monterey Park, Paramount, Signal Hill, and South Gate—were partially included in the First Supervisorial District. Parts, but not all of Compton, El Segundo, Los Angeles, Redondo Beach, South Gate, and Torrance were in the Second. Parts, but not all of Los Angeles, South Gate, and Vernon were in the Third. The Fourth cut up Compton, Long Beach, Los Angeles, Redondo Beach, Signal Hill, South Gate, and Torrance. The Fifth also included part of Los Angeles. The metropolis of South Gate was split between four different supervisorial districts! First Supervisorial District, March 12, 1962, Bates #101142.

⁷⁰ The Los Angeles County Charter, article 2, section 7 (1912) states: "The Board of Supervisors may, by a two-thirds vote of its members, change the boundaries of any supervisor district." Article 2, section 4 provided for five supervisors, despite the fact that the 1911 enabling act passed by the state legislature only set a lower limit—three—on board size. As conversion to decimal values will quickly remind one, two-thirds is closer to three-fifths than it is to four-fifths. The two-thirds requirement for supervisorial redistricting first entered state law in an 1889 amendment to section 16 of the 1883 amendments to the political code. See Cal. Gen. Laws Ann. act 245, § 16 (Deering 1889). Since the 1883 law had set the number of supervisors for every county at five, the ambiguity was present at the creation. Those who drew the Los Angeles County Charter in 1912 evidently copied this provision from state law.

⁷¹ Memorandum from Bob Blinn to John Leach, Feb. 21, 1963, Bates #102688-102692. Blinn stated that if a pending bill in the legislature, S.B. 475, passed, the number of votes needed to adopt a plan would drop from four to three.

⁷² Memorandum from John R. Leach to Emmett Sullivan, Nov. 10, 1965, Bates #000190-000191.

⁷³ Memorandum from Edward H. Gaylord, Assistant County Counsel, to John D. Maharg, County Counsel, June 7, 1971, Bates #101463-101470. The passage of Proposition 9 in 1964 apparently overrode the Charter's two-thirds requirement, substituting a simple majority. Memorandum from Donald K. Byrne, Deputy County Counsel, Oct. 20, 1965, Bates #102820-102821.

⁷⁴ Deposition Transcript of Edward G. Pozorski at 199-202 [hereinafter Pozorski Deposition Transcript]. Contemporary newspapers, as well as many depositions, reflect the understanding of the fact and the significance of the four-vote requirement. See, e.g., L.A. Times, Sept. 19, 1981, part II, at 1, col. 1; Pasadena Star-News, Sept. 23, 1981, at A-14, col. 1. The chief Republican reapportionment expert, Joseph Shumate, a San Franciscan, did not know of the four vote requirement when he began to draw plans. Shumate stated, "When I realized that, I thought it would be very difficult." Shumate Deposition Transcript at 266-67.

the line-drawing would be taken out of the Supervisors' hands and delegated to a three-person committee consisting of the District Attorney, the County Assessor, and the Sheriff, which would have the power to act, before the end of the calendar year, without the approval of the Board.⁷⁵ Provisions of the election code and county charter require supervisors to live within the boundaries of their districts and have been interpreted to disallow any boundary change that places a supervisor's home in another district than the one from which he was elected.⁷⁶

Naturally, provisions of the U.S. Constitution and the Voting Rights Act also applied to the 1981 redistricting, although there was no mention of them by the decisionmakers.

III. POLITICS AND REDISTRICTING WITHIN THE LOS ANGELES COUNTY BOARD OF SUPERVISORS, 1958-1976

A. *The Lack of Minority Representation and the Incumbency Advantage*

Two of the three members of the first governing body of Los Angeles county under United States rule, Augustin Olvera and Luis Roubideau, were Californios. County Judge Olvera, the head of the Court of Sessions that ruled the county from 1850 until the formation of the Board of Supervisors in 1852, reportedly spoke no English. Although the county was geographically much larger than it is today, the population, according to a state census, was only 7,831, or approximately 1000

His proposed concentration of Hispanics in the Third District would eventually threaten Mr. Edelman with a "viable Hispanic [opponent]. . . . Politicians in general don't like that kind of thing." *Id.*

⁷⁵ Memorandum from Richard Schoeni to Board of Supervisors, July 9, 1981, Bates #100367-100368.

⁷⁶ Article 2, section 4 of the Los Angeles County Charter required each supervisor to live in his or her district. L.A. County Charter art. 2, § 4 (1912). Article 2, section 7 stated in part: "No such boundaries shall ever be so changed as to affect the incumbency in office of any supervisor." Cal. Elec. Code § 35006 (West 1989) (as amended in 1979 by Cal. Stat. 546), which is headed "Effect of change of boundaries on term of office . . .," states:

The term of office of any supervisor who has been elected and whose term of office has not expired shall not be affected by any change in the boundaries of the district from which he was elected. At the first election for county supervisors in each county following adjustment of the boundaries of supervisor districts, a supervisor shall be elected for each district under the readjusted district plan that has the same district number as a district whose incumbent's term is due to expire.

Whether or not these provisions allow a supervisor to continue serving temporarily if redrawn boundaries cut his or her home off from his or her district, it has been interpreted in practice in redistricting documents to prohibit such a redrawing absolutely.

TABLE 3: LOS ANGELES COUNTY SUPERVISORIAL TENURE, 1945-89

<i>District</i>	<i>Supervisor</i>	<i>Years Served</i>
1	William A. Smith	Dec. 5, 1938 - Dec. 4, 1950
	Herbert C. Legg	Dec. 4, 1950 - March 27, 1958 (died)
	Frank G. Bonelli	June 10, 1958 - Feb. 14, 1972 (died)
	Peter F. Schabarum	March 6, 1972 - present
2	Leonard J. Roach	Jan. 9, 1945 - Dec. 1, 1952
	Kenneth Hahn	Dec. 1, 1952 - present
3	John Anson Ford	Dec. 3, 1934 - Dec. 1, 1958 (resigned)
	Ernest E. Debs	Dec. 1, 1958 - Dec. 1, 1974 (resigned)
	Edmund Edelman	Dec. 1, 1974 - present
4	Raymond V. Darby	Dec. 4, 1944 - March 5, 1953 (died)
	Burton W. Chace	March 20, 1953 - Aug. 22, 1972 (died)
	James A. Hayes	Aug. 31, 1972 - June 5, 1979 (resigned)
	Yvonne B. Burke	June 14, 1979 - Dec. 1, 1980 (defeated)
	Deane Dana	Dec. 1, 1980 - present
5	Roger W. Jessup	Dec. 5, 1932 - Dec. 3, 1956
	Warren M. Dom	Dec. 3, 1956 - Dec. 1, 1972 (defeated)
	Baxter Ward	Dec. 1, 1972 - Dec. 1, 1980 (defeated)
	Michael Antonovich	Dec. 1, 1980 - present
	Overall Average	14 years

times less than in 1990, and only 377 men voted in the county's first election.⁷⁷ Until 1874, one and often two of the five supervisors had Spanish surnames.⁷⁸ Between 1875 and 1991, no person with a Spanish surname served on the Board. No blacks, white women, or Asians have ever been elected to the Board of Supervisors in Los Angeles county. Yvonne Burke, a black woman, was appointed to the Board in 1979, but lost the 1980 election to Deane Dana.

In the post-World War II era, supervisorial seats have been very secure. Only eighteen different persons have occupied one of the five county seats of power between 1945 and 1991. The average tenure of those eighteen persons (including the time, if any, before 1945) has been fourteen years. (See Table 3). Most either retire voluntarily or die in office. Since 1970, only three incumbents have been defeated for reelection. As Table 4 shows, incumbents are rarely seriously challenged. Their margins over their chief opponents have averaged a whopping 36%, and they have usually gathered a sufficiently large majority (not just plurality) of the vote to avoid November runoffs. In

⁷⁷ J. Guinn, *Historical and Biographical Record of Southern California 132-37* (1902).

⁷⁸ Records of the Board of Supervisors, Supervisors by District Candidate, 1850-79, Bates #108116, #108154-108156.

only four of twenty-four primary contests since 1970 has an incumbent failed to obtain a majority. Overall, incumbents have averaged a hefty 65% of the vote.

TABLE 4: INCUMBENCY ADVANTAGE ON THE LOS ANGELES COUNTY BOARD OF SUPERVISORS: PERCENTAGES OF THE VOTE RECEIVED BY FIRST AND SECOND-PLACE FINISHERS, 1970-88

<i>Year, Month</i>	<i>District</i>	<i>Candidate</i>	<i>Percent</i>
1970 June	3	Debs (I)	58
		Rutledge	16
1972 June	1	Bonelli (I)	72
		Ruggles	28
	1	Schabarum (I)	50
		Campbell	20
	2	Hahn (I)	85
		Taylor	15
	4	Hayes	36
		Braude	22
1972 November	5	Dorn (I)	47
		Ward	46
	4	Hayes (I)	57
		Braude	43
	5	Ward	45
1974 June		Dorn (I)	55
	1	Schabarum (I)	71
		Ruggles	20
	3	Edelman	33
1974 November		Ferraro	26
	3	Edelman	57
		Ferraro	43
1976 June	2	Hahn (I)	81
		Taylor	7
	4	Hayes (I)	59
		Gallagher	13
	5	Ward (I)	62
1978 June		Rudell	22
	1	Schabarum (I)	56
		Donaldson	28
	3	Edelman (I)	74
		Molina	14
1980 June	2	Hahn (I)	88
		Taylor	9
	4	Burke (I)	42
		Dana	21
	5	Antonovich	44
1980 November		Ward (I)	41
	4	Dana	53

TABLE 4 (CONTINUED)

<i>Year, Month</i>	<i>District</i>	<i>Candidate</i>	<i>Percent</i>
		Burke (I)	47
	5	Antonovich	55
		Ward (I)	45
1982 June	1	Schabarum (I)	64
		Dunn	25
	3	Edelman (I)	72
		Munoz	12
1984 June	2	Hahn (I)	86
		Bracey	4
	4	Dana (I)	57
		Pope	36
	5	Antonovich (I)	62
		Woodlock	28
1986 June	1	Schabarum (I)	100
	3	Edelman (I)	84
		Venus de Milo	7
1988 June	2	Hahn (I)	84
		Smith	4
	4	Dana (I)	75
		Drobman	13
	5	Antonovich (I)	45
		Ward	22
1988 November	5	Antonovich (I)	64
		Ward	36
Average Margin		Incumbents	36
Average Margin		Open Seats	12
Average Percentage of Vote		Incumbents	65

Open seat contests, on the other hand, often attract well-known, well-financed competitors, and margins of victory correspondingly shrink. Assemblyman James Hayes, who had the endorsement of retiring Supervisor Burton Chace in 1972, battled Los Angeles City Councilman Marvin Braude in the primary.⁷⁹ Two years later, three Los Angeles City Councilmen, Ed Edelman, John Ferraro, and Ernani Bernardi, struggled for the Third District seat of retiring Supervisor Ernest Debs. Despite Debs's endorsement of Ferraro, Edelman won, but his margin was much less than in any of his subsequent contests.⁸⁰

⁷⁹ In August, Chace died in an auto accident and Governor Reagan appointed Hayes to the seat, making him the incumbent by November.

⁸⁰ Increasingly identified with the pro-developer Republican wing of the Board, Debs ran behind then Los Angeles City Councilman Edelman, 36-31, in a poll taken before Debs decided not to run. Only 13% of those polled in his district recognized Debs as their supervisor. Some retirements are not entirely voluntary. See L.A. Times, Oct. 18, 1973, part I, at 3, col. 5; L.A. Times, Nov. 13, 1973, part II, at 1, col. 4.

B. Electoral Politics and Redistricting Politics

There are two major reasons that incumbent supervisors win so overwhelmingly. First, they are able to raise so much money that they frighten away most opponents and heavily outspend those who do run against them. The best funded non-incumbent campaign since 1980, County Assessor Alexander Pope's 1984 race against Dana, was outspent by nearly three to one.⁸¹ Pope lost the primary by a 57% to 36% margin.⁸² In 1987, three years before they were scheduled to run for reelection, incumbents Peter F. Schabarum and Edmund Edelman between them had on hand campaign funds totalling nearly \$1.5 million. The Republican Schabarum's political action committee distributed at least \$850,000 to other candidates and campaigns from 1981 to 1987,⁸³ including \$213,000 to Dana in 1984.⁸⁴ Although he failed in attempts to interest candidates in running against his longtime enemy, liberal supervisor Kenneth Hahn, Schabarum did sufficiently arouse Hahn's anger to lead him to donate about \$100,000 to opponents of supervisors Schabarum, Dana, and Antonovich.⁸⁵ Incumbent supervisors collected 91% of the campaign contributions given to supervisorial candidates from 1981 to 1986.⁸⁶ Seriously challenged in the primary and runoff in 1988, Antonovich spent \$2.8 million in winning re-election.⁸⁷ As contributors of under \$100 have become less important, accounting for only two percent of the total contributions in the 1980s, favor-seeking businesses, developers, and lobbyists have bought in.⁸⁸ The Summa Corporation, which planned to build a marina north of the Los Angeles International Airport, contributed \$195,000 to various supervisors from 1980 to 1988.⁸⁹ For all the ideological struggle on the Board, contributors to incumbents seem to be markedly nonpartisan. For example, former Edelman aide Jeff Seymour, a longtime Democratic activist who now lobbies the county for developers and others with special interests in county actions, contributes to every

⁸¹ Elected countywide, the office of Assessor is a visible one in Los Angeles county. R. Stern, *Money and Politics in the Golden State: Financing California's Local Elections* ch. 11, at 11 (1989) (unpublished manuscript available from the author).

⁸² L.A. Times, June 11, 1984, part I, at 11, col. 1.

⁸³ *Id.* at 13.

⁸⁴ *Id.* at 14.

⁸⁵ *Id.*

⁸⁶ *Id.* at 15.

⁸⁷ *Id.* at 16.

⁸⁸ *Id.* at 18.

⁸⁹ *Id.* at 26.

supervisor and encourages his clients to do likewise.⁹⁰ In sum, most Los Angeles County elections have been characterized by massive incumbent fundraising.⁹¹

The second means incumbent supervisors have of maintaining their positions is through redistricting. One gauge of how much redistricting matters to a supervisor is the fact that after the minor line-changing in 1981, the two supervisors whose boundaries were shifted most, Hahn and Edelman, both sent out letters blanketing the areas added to their districts. Hahn, who had received 88% of the vote in 1980,⁹² enclosed a brochure describing the paramedic program in the city of Los Angeles with his effusive letter offering his new downtown Los Angeles constituents assistance with any county service.⁹³ An Edelman aide encouraged his boss, who had won re-election in 1978 with 74% of the vote, to send a similar letter puffing Edelman's "14 point program," as well as his housing, health, and anti-gang efforts.⁹⁴

The supervisors have redrawn their boundaries seven times in the past thirty-eight years. Five of those seven instances were not immediately after the decadal census, and, as numerous records from the County Regional Planning group show, the 1953, 1955, 1959, 1963, and 1965 reapportionments were based on county estimates of intercensal population, not on U.S. Census data alone. As Table 5 shows, population growth has been uneven in the county, especially during the 1950s and '60s, but, as it also demonstrates, the redistricting often did not adequately respond to uneven populations in the districts and in some crucial cases, was obviously not a response to malapportionment at all. Apart from the mandates of state and national law, the redistrictings have in fact been responses to politics.

One of the most instructive instances is the 1959 reapportionment. In 1958, John Anson Ford retired from the Third District seat. Four major candidates jumped into the open seat contest: Los Angeles City Councilmen Harold A. Henry, Ernest E. Debs, and Edward R. Roybal, and Board of Education member Paul Burke. Despite a Los Angeles Times endorsement of the conservative Republican Henry, Democrats Debs and Roybal proved the top vote-getters in the June primary and waged a hot campaign in the November runoff. The more liberal

⁹⁰ Seymour Deposition Transcript at 74-78.

⁹¹ R. Stern, *supra* note 81, at 21.

⁹² Summary, Election of Supervisor, Second District, June 3, 1980, Bates #109731.

⁹³ Letter from Kenneth Hahn to Constituents, Nov. 20, 1981, Bates #109780.

⁹⁴ Memorandum from "Bob" to Edelman, Sept. 25, 1981, Bates #110514. The memorandum was sent just a day after the supervisors finalized a reapportionment plan.

TABLE 5: PERCENTAGES OF LOS ANGELES POPULATION IN EACH SUPERVISORIAL DISTRICT, BEFORE AND AFTER EACH REAPPORTIONMENT, 1950-81.*

Year	% of Population in District				
	1	2	3	4	5
1953	28.4	13.3	10.7	24.8	22.8
...	...	reapportionment,	1953	...	...
1953	22.0	18.1	18.1	21.8	19.9
1955	22.6	17.4	17.0	21.8	21.0
...	...	reapportionment,	1955	...	...
1956	23.6	17.0	16.2	21.9	21.2
1958	24.4	16.5	15.3	21.7	22.1
...	...	reapportionment,	1959	...	...
1959	25.1	16.4	18.4	18.2	21.9
1962	26.7	15.6	17.2	18.2	22.3
...	...	reapportionment,	1963	...	...
1965	26.4	17.1	18.3	17.3	20.9
...	...	reapportionment,	1965	...	...
1966	21.6	18.3	20.3	18.1	21.7
1968	21.7	17.9	20.5	18.1	21.8
1970	22.0	17.6	19.4	18.1	22.9
...	...	reapportionment,	1971	...	...
1971	20.0	20.0	20.0	20.0	20.0
1975	20.4	19.1	19.7	20.3	20.5
1980	20.3	19.0	21.1	19.3	20.2
...	...	reapportionment,	1981	...	...
1981	20.0	20.0	20.0	20.0	20.0
1985	20.8	19.8	20.4	18.9	20.1
1989	21.3	19.9	21.0	18.0	19.8

* Bates numbers for sources of population estimates

1953 #1	102382	1966	102139
1953 #2	102296	1968	102128
1955	102365	1970	101376
1956	103688	1971	101807
1958	102296	1975	102051
1959	102269	1980	100215
1962	102207	1985	103018-103019
1965	102161	1989	Los Angeles Times

June 5, 1990, at A27.

Roybal, a Mexican-American, balanced Debs's endorsements by the Los Angeles Times and much of the business and civic establishment with the backing of Ford and Saul Alinsky-trained Hispanic organizers. On election day, many of Roybal's Hispanic supporters were challenged—he claimed, unjustly and irregularly—at the polls. The election was sufficiently close that four recounts were needed to determine

the winner.⁹⁵ Those who were active in his campaign still maintain that Roybal was counted out.⁹⁶

The year after his hairbreadth victory, Debs privately negotiated a deal with Fourth District supervisor Burton Chace, whose seat was up for election in 1960.⁹⁷ Chace deeded Debs Beverly Hills, West Hollywood, and West Los Angeles, which comprised about a seventh of the people in his district, as Table 5 shows. Chace, according to an insider newsletter that circulated widely in county circles and was distributed to Boundary Commission members in 1962 by the County Administrative Office, wished to avoid a contest with rich and well-connected Los Angeles City Councilwoman Rosalind Wyman. Wyman, a Democrat, would probably not—and did not—oppose Democratic Debs, the newsletter explained, though she had been expected to mount a contest against Republican Chace.⁹⁸

It is clear enough why Chace wanted to act at all (to avoid a challenge from Wyman), why he wanted to move then (because he was up for reelection in 1960), and why he could not make a deal with anyone else (only Hahn's and Debs's districts bordered on West Los Angeles, and Hahn preferred to run in a working class, ethnically mixed constituency, not Beverly Hills). But why was Debs receptive to the deal? Why help a partisan, and, presumably, ideological foe, Chace, against a more compatible possible colleague, Wyman, especially since forcing her into Debs's district might have led her to run against Debs? Why the timing? Since there was no effective equal population requirement in California before 1965, there was no legal pressure to act, and, since the 1960 census was but a year off, there were practical reasons for waiting. Why move the district west, instead of east? Debs did not attempt to take in any of Frank Bonelli's First District, the largest of the five in population, even though the largely working class area to the east of Debs's district might seem natural territory for a Democrat. The obvious problem was that gaining territory from Bonelli would have moved Debs farther into the Latino core area, the stronghold of Ed Roybal, the candidate who had come so close to beating Debs a few months earlier.

⁹⁵ L.A. Times, May 14, 1958, part 1, at 23, col. 2; L.A. Times, June 1, 1958, part 2, at 7, col. 1; L.A. Times, Sept. 16, 1958, part 3, at 3, col. 3; L.A. Times, Oct. 26, 1958, part 1A, at 3, col. 1; L.A. Times, Nov. 2, 1958, part 2, at 2, col. 6; L.A. Times, Nov. 8, 1958, part 1, at 4, col. 2; L.A. Times, Nov. 19, 1958, part 1, at 29, col. 3.

⁹⁶ Montanez-Davis Deposition Transcript at 30-38; Boyarsky, *Crossover Dreams*, L.A. Times Mag., Oct. 22, 1989, at 16.

⁹⁷ Debs Statement at Board of Supervisors Meeting, July 17, 1962, Bates #104417-104418.

⁹⁸ L.A. Newsl., Nov. 24, 1962, Bates #000187.

Roybal had lost neither his city council seat nor his ambition. Before he took in Beverly Hills, West Hollywood, and West Los Angeles, 22.7% of the population in Debs's Third District had Spanish surnames. By contrast, the western area that he annexed from Chace was but 2.6% Spanish-surnamed, bringing the district's total in 1960 below 20%.⁹⁹ Circumstances suggest, in other words, that Debs moved west to "whiten" his district.

The enactment of a new law in 1961 that mandated periodic reapportionments and required that a "Boundary Commission" be appointed to make recommendations for new lines¹⁰⁰ did not change the basic mode of operation: The supervisors still negotiated changes among themselves. The commissioners were lightning rods to deflect attention and criticism away from the supervisors, as the events of 1962-63 clearly demonstrate.

At a March 1, 1962 meeting, each supervisor appointed a boundary commissioner.¹⁰¹ Under Chairman Emmett M. Sullivan, an experienced Long Beach politician appointed by Fourth District Supervisor Burton W. Chace, the Boundary Commission delayed action until after a referendum in November on expansion of the Board to seven members.¹⁰² Before the Board voted to put the expansion measure on the ballot, an insider newsletter reported that if the number of seats remained at five, there were plans to move the Third District north into the San Fernando Valley, transfer Compton from Chace's Fourth to Hahn's Second District, and shift East Los Angeles from Debs to Hahn.¹⁰³ This is yet another indication of Debs's apparent desire to shed Hispanic East Los Angeles.¹⁰⁴ After the defeat of the expansion proposal, the Boundary Commission reconvened. Again, the Newslet-

⁹⁹ These figures are based on a comparison of district maps supplied by the county and precinct totals collected by Prof. Dwayne Marvick of UCLA, supplied by the U.S. Department of Justice.

¹⁰⁰ Act effective Sept. 15, 1961, 1961 Cal. Stat. 1855 (codified as amended at Cal. Elec. Code § 35001 (West 1989)), cited in Memorandum from L.S. Hollinger to the Board of Supervisors, Dec. 7, 1961, Bates #000160-000162.

¹⁰¹ Minutes of Board of Supervisors Meeting, Mar. 1, 1962, Bates #000151-000158.

¹⁰² Boundary Commission Report, July 19, 1962, Bates #000092-000093; Zeman, *Realignment of Supervisors' Districts Pushed Through By County Board*, L. A. Times, May 15, 1963, at 1, col. 7 [hereinafter Zeman, *Realignment Pushed*]. On the expansion proposal, see *infra* section III.D.

¹⁰³ L.A. Newsl., Apr. 28, 1962, Bates #000117-000118. The credibility of this report is increased by the fact that John R. Leach of the County Administrative Office, who served as coordinator of the Boundary Commission, circulated the paper to all members of the Boundary Commission. See Bates #000115, 000076-000082.

¹⁰⁴ Similarly, Zeman noted in the Los Angeles Times, May 15, 1963, that Debs had favored the 1962 expansion of the board to seven "perhaps" because he hoped that his district would "withdraw from the East Los Angeles area into the remaining downtown, Hollywood, Beverly

ter stated that Debs wanted to move his district into the San Fernando Valley and that "Debs will have to give up East Los Angeles and surrounding territory to Hahn."¹⁰⁵ Working not only with population data, but also with information on voter registration by party, the Boundary Commission members acted as agents for their supervisors.¹⁰⁶ As George Marr, a thirty-six year veteran in the county Regional Planning Department who carried out staff work for the supervisory reapportionments during this period phrased it, each boundary commissioner "had their [sic] wish list and 'don't you dare give me that area' or 'don't you dare take this area away from me,' and then they would sit down and argue. Pardon me.—discuss the information. And then they would go back and refer to their appointers [the supervisors] to see if they should change their attitude."¹⁰⁷ And as Boundary Commission coordinator John Leach commented in a memo to Boundary Commission Chairman Sullivan, after the Commission had completed its report, but before that report was made public: "The [Boundary] Committee approved everything that the supervisors had agreed to . . . None of the [Boundary] Committee members will be at the Board meeting on Tuesday. I suggested they stay away, so they would not have any questions asked of them . . . I get the definite feeling that the Board members feel adjustments will be necessary right after the 1964 elections."¹⁰⁸

While secrecy facilitated horse-trading, it outraged the Los Angeles Times and the League of Women Voters.¹⁰⁹ The report was "submitted" to the Board April 11, 1963, but only made public May 13, when the supervisors, after a full five minutes of discussion, with no attempt to allow comments from (other) interested parties, voted four to one to adopt it, with Hahn in dissent.¹¹⁰ The Commission had considered

Hills and West Los Angeles portions of his district." Zeman, *Realignment Pushed*, N.Y. Times, May 15, 1963, at 3, col. 3.

¹⁰⁵ L.A. Newsl., *supra* note 98.

¹⁰⁶ Memorandum from Adeline Gebhart to John Leach, Bates #000125-000147; Memorandum from Leach to Boundary Commission, June 14, 1962, Bates #000123; List of Registration by Party for Incorporated Cities for November 6, 1962 Election, Bates #000076-000082. Especially interesting is a memorandum from Leach to Supervisor Chace (not to a Boundary Commission member), January 30, 1963, giving detailed registration figures by party for the areas involved in a series of proposed swaps between the First, Second, and Fourth Districts.

¹⁰⁷ Marr Deposition Transcript at 74.

¹⁰⁸ Memorandum from Leach to Sullivan, May 9, 1963, Bates #000037.

¹⁰⁹ A series of stories and a letter to the editor appeared in the Los Angeles Times. See L.A. Times, May 14, 1963, at 1, col. 6; L.A. Times, May 15, 1963, at 1, col. 8; L.A. Times, May 22, 1963, at 1, col. 6.

¹¹⁰ L.A. Times, May 15, 1963, at 1, col. 8.

switching 154,300 people in Alhambra, San Gabriel, Monterey Park, and South San Gabriel from the First to the Third District, but for unstated reasons left all these greater East Los Angeles areas with First District Supervisor Frank Bonelli.¹¹¹ The principal alterations switched 52,500 people in the San Fernando Valley and 41,300 in Eagle Rock from Dorn's Fifth to Debs's Third District, 52,000 in Long Beach from Bonelli's First to Chace's Fourth, and 117,300 people in Torrance, Culver City, and the Mar Vista area from the Fourth to Hahn's Second.¹¹² The additions further diluted the Hispanic percentage in the Third District's population, which had been 19.8% in 1960, by adding territory that was only 2.1% Hispanic.¹¹³ Even after the May 13 vote, Bonelli publicly moved to shift Monterey Park and Alhambra from his bloated First District to Deb's underpopulated Third, as well as much of the east San Gabriel Valley to Dorn's Fifth, but the Board took no further action before the October 6 legal deadline.¹¹⁴ Again, Debs had shunned the offer of more territory in the Hispanic core, moving, instead, north over the mountains and into the predominantly Anglo San Fernando Valley areas of Sherman Oaks and Studio City and northeast into ethnically similar Eagle Rock. Overall, the changes did not equalize the population between areas very much. In fact, Chace, whose district had contained 18.2% of the population before the 1963 redistricting, held but 17.2% after it.¹¹⁵

Because the variation in population between Los Angeles County supervisorial districts was greater than allowed by the California Supreme Court decision of *Miller v. Santa Clara County*,¹¹⁶ the supervisors had to redistrict again in 1965.¹¹⁷ A majority of the 1965 Bound-

¹¹¹ For the proposal, see Mimeograph, Supervisorial Districts Boundaries—Population Changes Effected by Certain Suggested Area Adjustments, undated, Bates #000164.

¹¹² L.A. Times, May 15, 1963, at 1, col. 8; Letter from Emmett M. Sullivan to Board of Supervisors, May 9, 1963, Bates #000232-000235.

¹¹³ These figures were calculated in the same manner as in supra note 99.

¹¹⁴ L.A. Times, May 22, 1963, at 1, col. 6.

¹¹⁵ Figures listed in the L.A. Times, May 14, 1963, at 1, col. 8; L.A. Times, May 15, 1963, at 1, col. 8. The proportions in each district before and after the 1963 redistricting were as follows:

District	Before	After
1	26.6	25.9
2	15.6	17.3
3	17.3	18.7
4	18.2	17.2
5	22.3	20.8

¹¹⁶ 63 Cal. 2d 343, 405 P.2d 857, 46 Cal. Rptr. 617 (1965).

¹¹⁷ Letter from Donald K. Byrne, Deputy County Counsel, to Board of Supervisors, Oct. 8, 1965. Bates #000324-000329.

ary Commission had served on that of 1962-63. The Commission considered a proposal by Russell Quisenberry, the appointee of Supervisor Warren Dorn, to dislodge 90,000 people in Alhambra and San Gabriel, areas close to the Hispanic core, from Bonelli's First District and give them to Debs's Third.¹¹⁸ Dorn himself proposed that the change take place after the 1966 elections, apparently to decrease the threat to Debs, who was up for election then.¹¹⁹ Instead, the final report pushed Alhambra and San Gabriel into Dorn's Fifth District and moved 87,000 San Fernando Valley residents from Dorn to Debs.¹²⁰ Dorn termed this needlessly complicated two stage shift "ridiculous."¹²¹ Why did Debs insist on it? According to George Marr, the

¹¹⁸ Boundary Commission Document, Population Data, Population by City and District, July 1, 1965, Bates #101090.

¹¹⁹ Untitled handwritten notes, undated, Bates #102841.

¹²⁰ Boundary Commission Final Report, in Government Trial Exhibit 96 (1965), Bates #102814-102822.

¹²¹ Untitled handwritten notes, undated, Bates #102841. The county claimed during trial that the notes were written by John R. Leach, who was in 1965 Assistant County Chief Administrative Officer and the principal staff member of the Boundary Commission, rather than by Dorn, and offered an affidavit by Dorn to this effect. Dorn, ailing and retired to Morro Bay, California, some 200 miles northwest of Los Angeles, was not available to testify or to be deposed. Leach is dead. See Stipulation Regarding Trial Exhibit 96 and Order, Bates #102837-102842. The handwritten notes, with bracketed portions supplied for clarity, read in full:

leave Alh[ambra] & S[an] Gabriel alone for time
being - (until after 1966 elections)

Then Debs will go from 18.2% to 19 %
(1,256,000 pop[ulation] to 1,311,000 pop[ulation])

Bonelli will go from 26.3% to 22.97%
(1,813,000 pop[ulation] to 1,582,000)

If Bonelli would give, instead
83,000 people in Lakewood to Chace,
he would then have 21.8% inst[ead] of the rec[ommended] 21.7%
Chace would have 19.5% instead
of the rec[ommended] 18.3%

To Burbank [Bld.] 43,000 between S[an] Diego Freeway & Hollywood
Freeway Extension

To Oxnard [St.]	44,000
	<u>87,000</u>

[The above two areas were unincorporated parts of the City of Los Angeles
proposed to be switched from Dorn to Debs.]

If Bonelli gives direct to Debs

Alhambra	64,000
San Gabriel	<u>26,000</u>
	90,000

It results in:

Debs - Now 1,256,000 population

"general feeling" that Debs's staff conveyed as to why their boss desired to move further north, instead of east, was that the (Anglo) voters in the San Fernando Valley are "our kind of people."¹²² The total area shifted to the Third District in 1965 had been 8.3% Hispanic in population in 1960.¹²³

18.2% of total Co. pop[ulation]	
Monterey P[ark]	+47,000 pop[ulation]
So[uth] San Gabriel (uninc[orporated] area)	+30,000 "
Area So[uth] of Venice Blvd to Hahn	-22,000 "
Alhambra	+64,000
San Gabriel	+26,000
	+145,000
	Net
Then Debs has	1,401,000 pop[ulation] 20.3%
And I have now 1,450,000 pop[ulation]	
21.1% of pop[ulation]	
+12,000	Sierra Madre
-8,000	Agoura-Calabasas
+19,000	Uninc[orporated] area east of San Gabriel and So[uth] of Hunt[ington] Dr[ive]
	or 1,473,000
	21.4%

Which is bad enuf - i.e. adding to an already 'high' district.
But not as bad as

They propose - which is ridiculous
Doesn't give me a [new] 90,000
(San G[abriel] & Alhambra) and then
take off 68,000 in S[an] F[ernando] Valley
for Debs - why shift areas between
3 districts - (Bonelli to Dorn to Debs)
when you can go direct from Bonelli to Debs
Debs is already taking Mont[erey] P[ark] &
uninc[orporated] area east of that (So[uth] San Gabriel),
and Alh[ambra] and city of San Gab[riel] make
a total square continuous
compact area with Mont[erey] P[ark]
and So[uth] San Gabriel

Internal evidence in the note makes it appear likely that the notes are, indeed, Dorn's. Even if they were made by Leach, the chief of staff of that year's reapportionment, their importance in showing a departure from a normal or reasonable outcome and in casting doubt on non-self-interested reasons for the particular lines drawn is unimpaired.

¹²² Marr Deposition Transcript at 75-76. In the only such instance from 1958 to the present, the Third District did move east into Monterey Park and unincorporated south San Gabriel. The 77,000 people in this area, however, were more than offset by the 87,000 in the San Fernando Valley.

¹²³ These figures were calculated in the same manner as in supra note 99.

Perhaps seeking to avoid protests against secrecy, which the League of Women Voters had repeated in 1965, the Boundary Commission that was set up in 1971, two of whose members were veterans of earlier reapportionments, cosmetically opened their hearings to the public.¹²⁴ Appointed April 20, the Commission met three times from June 21 to July 13, adopting a plan that was subsequently ratified by the supervisors.¹²⁵ Whether because they recognized the charade for what it was or not, members of the public did not, in fact, bother the county officers by participating.¹²⁶ ". . . Never before," Supervisor Hahn remarked in 1981, "has anyone come in to object or support" a redistricting plan.¹²⁷ In the words of a newspaper reporter, in 1971, ". . . redistricting sailed through with no hitches."¹²⁸

What really happened was that Richard Schoeni of the Executive Office of the Board met with the chief deputies of each supervisor several times, in order to determine their bosses' desires, and then drafted three comprehensive plans.¹²⁹ Schoeni presented these to the Boundary Commission formally on July 1, and twelve days later, presumably after more offstage negotiation, the Commission agreed on a final plan.¹³⁰ No one on the Commission drew a plan or even part of one.¹³¹ As Supervisor Hahn remarked in 1981, speaking of previous reapportionments, "It was all done by the Supervisors."¹³²

Although neither the Boundary Commission nor the supervisors' offices appear to have been presented with explicit racial or ethnic data regarding proposed changes in each district, the results of the process continued the trends of the redistricting of the 1960s. Population was further equalized by shifting territory from the peripheral First and Fifth Districts to the more central Second, Third, and Fourth, but the

¹²⁴ For the League of Women Voters' protest, see Memorandum from John Leach to Emmett Sullivan, Nov. 10, 1965, Bates #101400; Boundary Commission Minutes, 1971, Bates #000358, 101452, 101807.

¹²⁵ Boundary Commission Report, 1971, Bates #101374-101398; Motion by Supervisor Chace, June 8, 1971, Bates #101400; Boundary Commission Minutes, 1971, Bates #000358, 101452, 101807.

¹²⁶ Schoeni Deposition Transcript at 54-55, 245-46.

¹²⁷ L.A. Daily News, Sept. 23, 1981, Bates #110424.

¹²⁸ Knowles, Conflict Emerging in Area Redistricting Fight, Pasadena Star-News, Aug. 9, 1981, Bates #110450.

¹²⁹ Schoeni Deposition Transcript at 36-43, 54-62, 303-05; Memorandum from Jeff Seymour to Ed Edelman, May 11, 1981, Bates #110317; Marlow Deposition Transcript at 61-63.

¹³⁰ Supervisorial District Boundary Commission Minutes, June 21, 1971, Bates #000358; Supervisorial District Boundary Commission Minutes, July 13, 1971, Bates #101452.

¹³¹ Schoeni Deposition Transcript at 42.

¹³² Minutes of Board of Supervisors' Meeting, Sept. 22, 1981, Bates #100044.

switches were accomplished in ways that made key incumbents more secure. Chace's Fourth or "beach cities" district curled around and moved north and inland to take in such conservative areas, close to Orange County, as Lakewood and Cerritos from Bonelli's vast First District, as well as the northern part of middle class Torrance from Hahn's south central Second. The largest change, involving more than 150,000 people, pushed Debs's Third District further into the San Fernando Valley, adding the overwhelmingly Anglo Van Nuys and Panorama City sections of the city of Los Angeles.¹³³

Calculations based on the printed census statistics by tract, which were used in a computerized form by the 1971 redistricters, show that the populations of the districts could have been equalized more simply, without divisions in any city except Los Angeles, in a manner that added to, rather than subtracted from the Latino percentage in the Third District. Instead of twisting the Fourth District north at its eastern boundary, it could have been moved directly north at its northern boundary, picking up the demographically similar canyon areas from Brown's Canyon west to the Ventura County line. Since the First District had more than its requisite one-fifth of the population, and the Third had less, Bonelli could have deeded Debs two towns on their border, El Monte and Pico Rivera, and could have given up the eastern section of Rosemead, instead of taking in the western section, as actually happened. Such a logical, if hypothetical shift from the First to the Third District would have given Debs an area that resembled East Los Angeles more and more every day, and that was in 1970 40.8% "Spanish language."¹³⁴ Just these changes and the shift of the Palms and Rancho Park areas of Los Angeles from the Third to the Second District (which really took place) would have brought all districts within a percent of the 20.0% target. In place of such straightforward changes, however, Debs in fact acquired an area that was not 41%, but only 13% Latino. East Los Angeles formed, in effect, a semipermeable wall, allowing Hispanics, but not the boundary of the Third District, to move east.

In sum, even before 1981, redistricting was employed to strengthen incumbents, and some direct and much indirect evidence indicates that

¹³³ Boundary Commission Final Report, 1971, Bates #101374-101398; L.A. Times, July 16, 1971, part II, at 1, col. 2. Alternative plans in the files of the Boundary Commission would have shifted some of the territory that Bonelli lost to Hahn, instead of to Chace.

¹³⁴ These calculations are based on a comparison of maps supplied by the county and printed population figures by census tract in U.S. Bureau of the Census, 1970 Census of Population and Housing: Census Tracts: Los Angeles - Long Beach, Calif. Standard Metropolitan Statistical Area (1972), at Tables P-1, P-2.

the supervisors kept the Hispanic core area split in order to preserve their offices against potential challengers who might particularly appeal to Hispanics. In particular, repeated treks of Supervisor Ernest Debs's Third District in western and northern directions, begun almost as soon as Debs barely vanquished the first major Hispanic politician in modern California history, Edward Roybal, diluted the Hispanic percentage of the population in the Third District markedly. Had the Third District moved east into Alhambra, San Gabriel, and similar communities, as was proposed in 1965 and at other times, instead of west into Beverly Hills and north into Eagle Rock and the San Fernando Valley, the political and ethnic complexion of the district would have been considerably different, and Debs might well have faced one or more challengers that were not the choice of "our kind of people."

C. The 1972 Reapportionment of the Los Angeles City Council

Although the apportionment of other governmental bodies was not directly at issue in *Garza*, that of the Los Angeles City Council in the early 1970s is relevant for three reasons: first, its central issue was Hispanic representation; second, it involved then-city councilman and later county supervisor Ed Edelman, as well as many of the Hispanic activists who would subsequently participate in the 1981 county reapportionment; third, its very visible results, well-known to everyone who followed Southern California politics during the period,¹³⁵ helped to shape both assumptions and tactics in 1981.

Before 1971, Los Angeles City Council districts had been apportioned according to the number of registered voters. In that year, however, the California Supreme Court ruled in *Calderon v. City of Los Angeles*¹³⁶ that apportionment must be based on population, and that it could take "group interests" into account. As the Council's Charter and Administrative Code Committee, headed by Edelman, began to weigh different plans, "Chicanos for Fair Representation" (hereinafter CFR), an umbrella group active in the contemporaneous statewide reapportionment, began to interest itself in the Council redistricting.¹³⁷ Actually a coalition of Hispanics and liberal Anglos, CFR asked the

¹³⁵ For instance, when discussing whether a Hispanic district could easily be formed in Los Angeles, former Antonovich chief deputy Kathleen Crow remarked: "Art Snyder was in a city councilmanic district which was predominantly Latino, yet he was reelected time and time again." Crow Deposition Transcript at 222.

¹³⁶ 4 Cal. 3d 251, 260, 481 P.2d 489, 494, 93 Cal. Rptr. 361, 366 (1971).

¹³⁷ Santillan, *The Chicano Community and the Redistricting of the Los Angeles City Council, 1971-1973*, 6 *Chicano L. Rev.* 122, 127 (1983).

Council to redistrict without regard to incumbency, to order all the elections for 1973 (instead of allowing those elected in 1971 to serve out their four-year terms, as the City Charter provided), and to adopt a plan drawn by Clifford Lazar that made District Fourteen 74% Hispanic in population and District Four, 43.5%.¹³⁸ The Los Angeles Times believed that CFR's plan would "probably turn three incumbents out of their jobs."¹³⁹

The ambitious Edelman, who reportedly aspired to run for mayor if Councilman Tom Bradley lost in 1973 to incumbent Sam Yorty as he had in 1969, was caught in something of a dilemma: no plan that inconvenienced too many incumbents could hope to secure the necessary ten votes from the Council. On the other hand, Hispanic activists were pressing him to concentrate enough Hispanics in a few districts to make it possible to elect Hispanic candidates.¹⁴⁰ And to become mayor, Edelman would need to attract votes from the increasingly large Hispanic population. In this case, however, Edelman's dilemma also provided an opportunity, and he took it. Another potential mayoral hopeful, Yorty ally Arthur Snyder, held the district with the second highest proportion of Hispanics, the Fourteenth. By combining Lincoln Heights, Boyle Heights, and El Sereno, which were East Los Angeles Hispanic communities that had been split into four districts by previous City Council lines, Edelman could make a bid for Hispanic support while causing trouble and perhaps defeat for an enemy.¹⁴¹

Edelman's statement when he made his plan public echoed ironically during the *Garza* trial in 1990. Next to equalizing the population of each district, Edelman announced, the most important goal that he had in the 1972 reapportionment was serving "the interests of ethnic minorities." He had increased the Hispanic proportion in Snyder's district from 38% to 68%, and added two "Hispanic growth districts," one 30% Hispanic in the Echo Park area, and one 23% in the northeast San Fernando Valley.¹⁴² He had also kept the three districts then represented by African-Americans Gilbert Lindsay, Billy Mills, and Tom

¹³⁸ Id. at 127-28.

¹³⁹ L.A. Times, Aug. 14, 1972, part II, at 6, col. 1.

¹⁴⁰ Edelman Deposition Transcript at 154; Fitch Deposition Transcript at 62.

¹⁴¹ Santillan, supra note 137, at 133-34; Statement by Councilman Edmund D. Edelman to the Los Angeles City Council Charter and Administrative Code Committee, August 10, 1972, at 2 [hereinafter Edelman Statement]. Edelman's aide Alma Fitch, who was to be Edelman's first appointee to the Boundary Commission in 1981, compiled the population figures for Edelman in this reapportionment, and she negotiated with aides of other councilmen to determine what changes were acceptable to their bosses. Fitch Deposition Transcript at 41-49; Edelman Deposition Transcript at 145.

¹⁴² Edelman Statement, supra note 141, at 2-3.

Bradley stable. His plan, he declared, "provides an opportunity for Mexican-American representation on the Council . . . It is my belief that the Los Angeles City Council faces both a legal and a moral duty to provide fair representation for the Mexican-American community. I might point out that above and beyond the legal requirements of the Calderon Case, there is a more pressing moral obligation for the City Council to affirmatively act to provide an opportunity for just representation for the large and vital Mexican-American community of our city."¹⁴³

Neither CFR nor Snyder liked Edelman's plan, both of these strange bedfellows attacking the scheme publicly on the ground that it did not go far enough toward massing the Hispanic population. The Mexican American Legal Defense and Educational Fund (MALDEF) claimed that the Hispanic population proportion in the Fourteenth District was actually only 57%, and pointed out that Edelman's map still split such Hispanic areas as Echo Park, while Snyder asserted that 45% of the Hispanics in the District were under eighteen years of age and another 40% were not citizens.¹⁴⁴ Although he did not propose a redistricting setup himself, Snyder castigated Edelman's divisions for making it a "practical impossibility" to elect a Hispanic candidate in any councilmanic district.¹⁴⁵ Apparently in a move to placate incumbents, MALDEF came up with another plan, this containing three districts that its authors said were 65%, 45%, and 30% Hispanic, respectively. After listening to forty-three Hispanic witnesses endorse this MALDEF compromise and disapprove Edelman's efforts, the Council voted 13-1, and, later, 10-2, to accept Edelman's lines.¹⁴⁶

Mayor Sam Yorty vetoed the plan on the ground that it was unfair to Hispanics, although Edelman charged that Yorty's veto was merely a bid for Hispanic votes in the next year's mayoral race.¹⁴⁷ In any case, the Council quickly overrode the Mayor's negative, Snyder and Yorty ally John S. Gibson dissenting, along with Marvin Braude, who charged

¹⁴³ *Id.* at 4-5.

¹⁴⁴ Santillan, *supra* note 137, at 130; L.A. Times, Sept. 9, 1972, part II, at 1, col. 2; Alatorre Deposition Transcript at 70. Snyder did not give the source of the citizenship figures that he used. Further, it is not clear whether he meant that 85% of the Hispanic population (45% + 40%) was ineligible, or that 67% (45% + 40% of the remaining 55%) was. In either case, a substantial, though smaller, percentage of non-Hispanics would have been ineligible because they were underage or non-citizens, as well. One thing his statistic cannot mean is that the Fourteenth District's voting age citizen population was only about a quarter Hispanic (68% * 15%) / ((100% - 68%) + (68% * 15%)) = 24.3%.

¹⁴⁵ L.A. Times, Sept. 9, 1972, part II, at 1, col. 2.

¹⁴⁶ Santillan, *supra* note 137, at 130-31; L.A. Times, Sept. 9, 1972, part II, at 1, col. 2.

¹⁴⁷ L.A. Times, Sept. 16, 1972, part II, at 1, col. 2.

that Edelman's plan did not go far enough, presumably meaning far enough toward creating winnable Hispanic districts.¹⁴⁸ Braude, a liberal Westside Democrat, was then engaged in a hot runoff campaign for county supervisor with former Assemblyman and Republican conservative James Hayes. The fact that the Beverly Hills Bar Association, an Anglo organization, was a conspicuous member of CFR, was probably not lost on Braude.¹⁴⁹

MALDEF and several other groups sued in state court, charging unconstitutional dilution. On the basis of the relatively undeveloped case law at the time and the fact that the reapportionment substantially increased the Hispanic proportion in the Fourteenth and other districts, the state appeals court turned down the mandamus petition.¹⁵⁰ The splitting of Districts Thirteen and Fourteen to create a new district with a two-thirds Hispanic majority in the population—an increase in the most Hispanic district from 40% to 68%—contrasts sharply with the repeated decreases of the proportion of the Third County Supervisorial District in each succeeding reapportionment.¹⁵¹ Although severely challenged by Hispanic candidates in repeated recalls and regular elections, Snyder survived politically until a series of scandals led to his retirement in 1985.¹⁵²

Political activists drew two contradictory lessons from Snyder's experience. On the one hand, it underlined the fact that a Hispanic population majority was no guarantee of success for Hispanic candidates against a "masterful" and hardworking Anglo politician who could raise larger campaign funds than any other Los Angeles City Councilman from oil and developer interests.¹⁵³ On the other hand, it is not so easy to be an Anglo politician in a minority district. Snyder was the first

¹⁴⁸ *Id.* See also *L.A. Times*, Sept. 20, 1972, part I, at 3, col. 2.

¹⁴⁹ For the participation of the Beverly Hills Bar Association in CFR, see Santillan, *supra* note 137, at 128-29. Braude had voted against expanding the Los Angeles City Council, a move that was explicitly designed to make it possible to elect a Hispanic in 1970. See *L.A. Times*, July 28, 1970, part II at 1, col. 4; *L.A. Times*, July 31, 1970, part II, at 1, col. 4. By 1972, the chief issue between Braude and Hayes was whether to expand the Board of Supervisors to make it easier to elect members of racial and ethnic minorities. By 1972, Braude favored expansion. See *L.A. Times*, Sept. 16, 1972, part II, at 1, col. 2.

¹⁵⁰ *Castorena v. City of Los Angeles*, 34 Cal. App. 3d 901, 915-18, 110 Cal. Rptr. 569, 578-80 (1973).

¹⁵¹ On the shifting of districts and the round of political score-settling generated by it, see *L.A. Times*, Mar. 5, 1973, part II, at 1, col. 2.

¹⁵² *L.A. Times*, Jan. 3, 1985, part I, at 1, col. 2; *L.A. Times*, Oct. 3, 1985, part II, at 1, col. 2.

¹⁵³ Reuben Jacinto, who ran against Snyder for the city council in 1967, described Snyder as "a masterful politician" who developed "a strong following in the Hispanic community." Jacinto Deposition Transcript at 29-30. Snyder was "extremely responsive" to Hispanics in his district, according to Los Angeles Vice-Mayor Grace Montanez Davis. Davis Deposition

Los Angeles City Councilman to be faced with a recall election since 1946. After the 1972 reapportionment, Snyder learned Spanish and hustled grants for bricks and mortar projects for his district. His chief opponents were Hispanics who charged that he did not represent their community adequately. And his re-election victories were often by very tight margins. In 1984, for instance, he won only in a recount.¹⁵⁴

As a prelude to the 1981 Board of Supervisors' reapportionment, the case of the Fourteenth District has a third implication. The Council, led by Edelman, knew how to draw seats that would provide Hispanics with better chances to elect candidates of their choice; it knew that doing so conflicted with the protection of Anglo incumbents, and that when a sufficient majority could agree that one colleague was expendable, redistricting politics could work in favor of previously excluded ethnic groups.¹⁵⁵

D. Efforts to Expand the Board of Supervisors

In 1852, when the Los Angeles County Board of Supervisors was first established, each of its five members represented 1566 people. By 1986, according to a U.S. Census estimate, Los Angeles County had a population of 8,295,900 people—far and away the largest county in the nation—but the number of supervisors had not changed. Each of the five represented about 1.659 million people. Population growth in the

Transcript at 46-48. On his fundraising, see L.A. Times, Mar. 16, 1974, part I, at 18, col. 1; L.A. Times, Jan. 3, 1985, part I, at 3, col. 1.

¹⁵⁴ L.A. Times, Jan. 13, 1974, part I, at 3, col. 1; L.A. Times, Mar. 20, 1974, part I, at 1, col. 3; L.A. Times, Feb. 24, 1975, part I, at 3, col. 1; L.A. Times, Apr. 2, 1975, part I, at 3, col. 5; L.A. Times, Nov. 13, 1973, part II, at 1, col. 5; L.A. Times, Oct. 3, 1985, part II, at 1, col. 1; Davis Deposition Transcript at 46-48.

¹⁵⁵ The opening date of the *Garza* trial was put off during the month of December, 1989, for negotiations between attorneys of the county and the plaintiffs. The county offered to settle the lawsuit, on the basis of a plan drawn by Joseph Shumate, that targeted the strident Pete Schabarum, raising the percentage of Hispanic population and Hispanic registered voters in his district to 63% and 36.5%, respectively. Bitterly denouncing Deane Dana, who had teamed with Democrats Edmund Edelman and Kenneth Hahn to approve the proposal, Schabarum contacted Republican leaders throughout the state to crack the party whip over Dana. Under Shumate's plan, Dana shed heavily black Compton and anti-developer Malibu from his district, and Mike Antonovich picked up ten wealthy Republican suburbs to pad his majorities. Talks collapsed when the county refused to negotiate after the plaintiffs made a counterproposal that would have raised the Hispanic population percentage in Schabarum's district to seventy and the Hispanic registered voter percentage to 49.4. See L.A. Times, Dec. 6, 1989, at B1, col. 2; L.A. Times, Dec. 7, 1989, at B1, col. 2; L.A. Times, Dec. 13, 1989, at A1, col. 3; L.A. Times, Dec. 15, 1989, at B3, col. 5; L.A. Times, Dec. 16, 1989, at B3, col. 4; L.A. Times, Dec. 19, 1989, at B1, col. 2; L.A. Times, Dec. 20, 1989, at A1, col. 1; L.A. Times, Dec. 22, 1989, at B2, col. 5; L.A. Times, Jan. 3, 1990, at B1, col. 3. The episode perfectly supports the referenced sentences in the text, which were written two months before it happened.

county between 1980 and 1986 alone—818,700—was more than 100 times its *total* population when the number of supervisors was first fixed at five. In population, each supervisorial district was larger than the populations of fifteen states, or of three average congressional districts. If a candidate campaigned door to door talking to each constituent for ten minutes, it would take him or her over fifty years. With officials from eighty-five cities competing for media attention, supervisors are probably the least well-known truly powerful civilian officials in the country. In land area, Los Angeles County is nearly four times as large as the state of Rhode Island and more than twice as large as the state of Delaware.¹⁵⁶

The population per elected official is much larger in the Los Angeles County government than in any other county government in the nation, and the county has by far the largest population per district of any county that selects its officials from single-member districts. Cook County, Illinois, the nation's second largest county, for example, elects fifteen commissioners from single-member districts. Each represented 353,193 persons in 1986, or about a fifth as many as in Los Angeles County. The thirty-five councilpersons from the five boroughs that make up New York City represented slightly over 200,000 persons each in 1989. San Diego County's five supervisors represented 440,260 persons each, while Orange County's represented 433,360, and Santa Clara's, 280,320. The county closest to Los Angeles in district size is Harris County, Texas (Houston), whose five county commissioners represented an average of 559,660 persons.¹⁵⁷

Not only does such vast size put minority candidates at a disadvantage, because they usually have less ability to raise the vast amounts of money that are necessary to run in such districts, but it also stimulates moves by citizens' groups concerned about adequate representation to propose adding to the Board's numbers. Yet expansion has not been just a "good government" issue, calls for closer representation on one side matched by fears that more county employees would mean more taxes, on the other. For at least a half century in Los Angeles, arguments over increasing the number of supervisors have involved the representation of minority groups.

¹⁵⁶ R. Stern, *supra* note 81, at ch. 11; U.S. Bureau of the Census, *County and City Data Book 1988*, at xxii, 2, 42 (1988).

¹⁵⁷ All population estimates except for New York City were taken from the U.S. Bureau of the Census. See *supra* note 156. New York's population estimates came from the city's election office.

In its 1935 report to the Board of Supervisors, the Committee on Governmental Simplification recommended an expansion of the Board to fifteen members, which was large enough, the committee stated, "to be representative of different groups and sections"¹⁵⁸

As the minority population in the county began to grow, supervisors asked for and received precise estimates of minority proportions. As early as 1953, for example, an internal county report focused on ethnic percentages in each supervisorial district, determining that Hahn's Second District contained 64.6% of the county's African-American population.¹⁵⁹ In 1962, staff from the Regional Planning Commission tabulated the number and percentage of blacks in the Second and a portion of the Fourth Districts, apparently in response to a request from Hahn's office.¹⁶⁰

A 1958 Charter Study Committee Report recommended expanding the Board to eleven members in order to provide more opportunity for people to have direct contact with their supervisors.¹⁶¹ Although Warren Dorn and Ernest Debs voted to put a proposal for a seven person Board on the ballot, they could not obtain a third vote from another supervisor.¹⁶² Another Charter Study Committee Report in 1962, after much controversy over moves for a fifteen, eleven or nine member Board, finally supported a seven member body. This time obtaining votes from the necessary three supervisors, the charter amendment providing for expansion failed in a referendum.¹⁶³ Debs favored the expansion, a Los Angeles Times reporter speculated, because he was "hoping to withdraw from the East Los Angeles area into the remaining downtown, Hollywood, Beverly Hills, and West Los Angeles portions of his district."¹⁶⁴ Among the reasons that supervisors gave for opposing expansion in 1962, the most revealing came in a statement at a Board meeting by Burton Chace, who fought against the change: "I can see it coming, and I can see many, many groups that are in certain

¹⁵⁸ Report of Committee on Governmental Simplification, Los Angeles, California 12 (1935).

¹⁵⁹ Untitled Report, Dec. 15, 1953, Bates #102402-102433.

¹⁶⁰ Untitled work sheet, June 26, 1962, Bates #101242-101245; Memorandum from George Marr to Arlyn V. Weber, Hahn's deputy, July 3, 1962, Bates #101246. The Board voted July 17 to put the expansion measure on the ballot in November.

¹⁶¹ Charter Study Committee Recommendations, 1958, Bates #104029-104127.

¹⁶² L.A. Newsl., April 28, 1962, Bates #000117-000118.

¹⁶³ Charter Study Committee Recommendations, June 6, 1962, Bates #001390-001402, #002751-002761; Transcript of Board Meeting, June 6, 1962, Bates #104254-104276; Returns of County Question Voting, November, 1962, Bates #002917.

¹⁶⁴ Zeman, Realignment of Supervisors' Districts Pushed Through by County Board, L.A. Times, May 15, 1963, part II, at 1, col. 7.

areas that are going to request that they have representation on the Board of Supervisors, new Districts here and there which will be carved out of other Districts *for certain minority groups, et cetera.*"¹⁶⁵

Chace was prophetic. Although the 1958 and 1962 Charter Study Commissions had had but one member with an identifiable Spanish surname, by 1969, Hispanic leaders were speaking for themselves on the expansion issue. First, they pressured the Los Angeles City Council to increase its membership from fifteen to seventeen in order, in a reporter's summary, "to make possible the election of a Mexican-American."¹⁶⁶ Led by Esteban Torres, then president of the Congress of Mexican-American Unity and now a Congressman, Michael Tirado, a special assistant to Congressman Edward R. Roybal, and Miguel Garcia, then of the California Chicano Law Students Association and in 1981 state president of Californios for Fair Representation, Hispanic witnesses strongly backed Councilman Tom Bradley's plea to give Hispanics a "fighting chance" to elect those "who can best articulate" their needs.¹⁶⁷ Losing by a 7-6 council vote on July 27, after Councilman Ernani Bernardi voiced his opposition to what he called "legalized mandatory gerrymandering," the Council reversed itself three days later, 9-6.¹⁶⁸ Voters subsequently defeated the proposal, leading to a further fifteen year struggle that finally eventuated in the election of the Council's first Hispanic since Roybal, Richard Alatorre, in 1985.

Between the defeat and the victory in the Los Angeles City Council, Torres appeared before the County Board of Supervisors in a parallel effort to persuade it to back a similar expansion measure.¹⁶⁹ Torres had been one of eleven Hispanic witnesses who appeared before the Los Angeles County Citizens Economy and Efficiency Committee during its hearings in 1969-70, where he charged that the all-Anglo Board did not understand "the basic needs and aspirations of the Mexican-American community." District lines, Torres and his fellows asserted, had been gerrymandered to dilute the power of the Latino voters.¹⁷⁰ This testimony notwithstanding, the Committee voted 14-5 not to recommend an expansion to seven seats, and the Board voted 3-2 not to

¹⁶⁵ Transcript of Board Meeting, July 17, 1962, Bates #104357-104489, at 62 (emphasis added).

¹⁶⁶ L.A. Times, July 28, 1970, part II, at 1, col. 4.

¹⁶⁷ Id.

¹⁶⁸ L.A. Times, July 31, 1970, part II, at 1, col. 4.

¹⁶⁹ L.A. Times, July 29, 1970, part II, at 1, col. 3.

¹⁷⁰ Report of the Economy and Efficiency Commission, Los Angeles County, July 14, 1970, Bates #001921-002009, at Bates #001948-001949 [hereinafter Economy and Efficiency Commission 1970].

put a seven member proposal on the ballot.¹⁷¹ The minority of five on the Economy and Efficiency Committee favored expansion, and even opponents recognized that the chief aim of increasing the size of the Board was "to give representation to the minorities."¹⁷²

Again in 1974, the Economy and Efficiency Committee debated but could not agree on proposals for a seven member Board and a county chief executive, but this time the deadlock apparently led the County Bar Association to appoint a Public Commission on Los Angeles County Government. Headed by Seth Hufstедler, a leading downtown lawyer, and Harold Williams, Dean of the UCLA School of Management, the twelve member blue ribbon commission, unlike the Economy and Efficiency Committee, included female, black, and Latino members. Its 1976 report, "To Serve Seven Million," pointedly remarked that "The narrow band of citizens from which all Supervisors have been drawn is a proper cause of grave concern. Every successful candidate in the history of the County [since 1875] has been a white male, as has every Sheriff, every Assessor and every District Attorney."¹⁷³ From 1958 to 1972, the report emphasized, there was no turnover at all in the membership of the Board of Supervisors, and three of the four who were replaced between 1972 and 1974 had either died or resigned. "Each district is so large and diverse that the cost of a serious challenge to the incumbent can be prohibitive. . . The scale of these districts has too often led to under representation, particularly in the case of racial and ethnic minorities."¹⁷⁴ To get this "static" government moving and to give citizens a feeling that they were represented, as well as to give minorities and women better chances to break the Anglo male monopoly of offices, the Commission proposed an increase to nine members.¹⁷⁵

The ethnic representation issue, along with opponents' charges that expansion would lead to an increase in taxes, was central to the subsequent referendum. The first reason the Los Angeles Times gave for endorsing Proposition B, the nine member move, was that it raised "the probability that [the Board] would become more representative of ethnic districts—and it could also result in the election of the first

¹⁷¹ Id. at Bates #001954; Report of the Economy and Efficiency Commission, Los Angeles County, 1974, at Bates #002964.

¹⁷² Economy and Efficiency Commission 1970, *supra* note 170, at Bates #001946.

¹⁷³ To Serve Seven Million, in Public Commission on Los Angeles County Government, Feb. 1976, Bates #001341-001389, at Bates #001357 [hereinafter Public Commission 1976].

¹⁷⁴ Id.

¹⁷⁵ Id. at Bates #001357, 001380, 001381.

woman supervisor in history."¹⁷⁶ The Charter Amendment Task Force noted that Proposition B would "increase the ability of the two principal minorities—the blacks and the Latin Americans—to elect representatives of their own race."¹⁷⁷ As the November vote approached, the Los Angeles Times, advertisements, and ballot arguments for Proposition B downplayed the ethnic representation issue, presumably because proponents recognized the unpopularity of such representation with the Anglos who comprised an overwhelming majority of the electorate.¹⁷⁸ Although many leading Democrats and such groups as the AFL-CIO, the League of Women Voters, and the Chamber of Commerce endorsed Proposition B, the only major Republican to do so was Sheriff Peter Pitchess. Supervisors James A. Hayes, Peter F. Schabarum, and Baxter Ward publicly denounced proposition B, which subsequently lost by a 65-35 margin.¹⁷⁹

E. The 1980 Elections: Race, Money, and the Conservative Upsets

As the 1980 elections approached, Democrats held a 4-1 majority on the Los Angeles County Board of Supervisors. New Deal liberal Kenneth Hahn, first elected in 1952, had been joined by former newscaster and maverick Democrat Baxter Ward, who had upset Warren M. Dorn in the Fifth District in 1972, and by westside Los Angeles City Councilman Edmund Edelman, who had succeeded Ernest Debs in 1974. When Republican James Hayes unexpectedly resigned in 1979, Governor Edmund G. Brown, Jr. appointed Yvonne B. Burke to be the first black and the first woman member in Board history. Elected to the State Assembly in 1967 and to Congress in 1972, both from majority nonblack districts, Burke had gained national attention as Vice-Chairperson of the 1972 Democratic National Convention and statewide exposure as the Democratic nominee in an open race for state Attorney-General against George Deukmejian in 1978.¹⁸⁰ Up to the point that the Deukmejian campaign began running television commercials with ethnic overtones attacking Burke's views on busing and the

¹⁷⁶ L.A. Times, June 23, 1976, part II, at 6, col. 1.

¹⁷⁷ Charter Amendment Task Force, County Propositions A & B, Elected Mayor and Size of the Board of Supervisors, Oct. 1976, Bates #104642.

¹⁷⁸ L.A. Times, October 31, 1976, part VIII, at 1, col. 4; L.A. Times, Nov. 1, 1976, part I, at 24, col. 2; Ballot Arguments for the Change by Supervisors Hahn and Edelman, Bates #002916.

¹⁷⁹ L.A. Times, Nov. 4, 1976, part II, at 1, col. 2.

¹⁸⁰ Burke Deposition Transcript at 8-16.

death penalty, Burke's polls, she later remembered, showed her nine percentage points ahead. She lost by a three percent margin.¹⁸¹

Even though the Fourth District was two-thirds Anglo and less than ten percent black, 61.9% of those who registered with one of the two major parties were Democrats, and Jerry Brown had carried the district in the 1978 Governor's race by a 59-41 margin.¹⁸² Intelligent, photogenic, diligent, and very accustomed to interacting with overwhelmingly white groups, Burke began a flurry of activity immediately after her appointment—meeting with local officials who had often felt neglected by the distant Hayes, focusing on noncontroversial community projects, such as cleaning up the beaches and fighting petty crime, and conciliating developers who feared that she would be ideologically opposed to any growth.¹⁸³ Born and raised in South Central Los Angeles, but by 1978 a resident of stylish Brentwood, Burke self-consciously presented herself as an "ethnic crossover" politician—a role that easily attracted plentiful positive media coverage.¹⁸⁴ By January, 1980, all of Burke's well-known Republican potential opponents—State Senator Bob Beverly, whose district covered a third of the Fourth District, former State Controller Houston Flournoy, Assemblyman Paul Priolo, Assemblywoman Marilyn Ryan, State Senator Ollie Speraw, ex-County Assessor Philip Watson, former Congressman Alphonzo Bell, and Long Beach Mayor Tom Clark—had decided to pass up the race.¹⁸⁵ Burke's name was known to 90% of a sample in the district, those sampled were much more likely to view her favorably than unfavorably, and she led Bell and Flournoy by sixteen percentage points in a private poll run by Republican political consultant Allan Hoffenblum and probably paid for by Schabarum.¹⁸⁶ Another consideration that eliminated her strongest undeclared opponent, Beverly, was how to deal with the matter of her race. "There are those who want to beat Yvonne who are racists or close to it," Beverly told the Los Angeles Times. "That's one

¹⁸¹ Id. at 19-22.

¹⁸² L.A. Times, June 15, 1979, part I, at 1, col. 4.

¹⁸³ L.A. Times, Sept. 22, 1980, part II, at 3, col. 4.

¹⁸⁴ On ethnic crossover politicians, see Boyarsky, *supra* note 96, at 8-18. For Burke's self-consciously framed role, see Burke Deposition Transcript at 79-80.

¹⁸⁵ L.A. Times, Dec. 1, 1979, part I, at 28, col. 1; L.A. Times, Dec. 9, 1979, part II, at 1, col. 5; L.A. Times, Jan. 28, 1980, part I, at 3, col. 5.

¹⁸⁶ L.A. Times, Jan. 28, 1980, part I, at 3, col. 5. Hoffenblum told the Los Angeles Times that the poll had been run for someone who was not a potential candidate in the Fourth District. In his deposition transcript, Ron Smith reported a rumor that Schabarum had paid for a poll in the Fourth District in 1979, which found, in Smith's words, that Burke "could not be beaten." Smith Deposition Transcript at 307. As Smith remembered it, Burke's "favorable/unfavorable" ratio was "extremely highly favorable." Id. at 309-10.

thing that bothers me. What do you do with their support? I don't know how you handle that."¹⁸⁷

Deane Dana, a plainspoken, undemonstrative middle-level telephone company executive, who had never before run for public office,¹⁸⁸ and his campaign manager Ron Smith, a Republican political consultant who boasted of his tough campaign tactics,¹⁸⁹ were not as reticent as Beverly. One of ten comparative unknowns facing Burke—it was just the type of contest pollster Hoffenblum had worried in January that Burke would carry by a majority in the primary¹⁹⁰—Dana had to adopt aggressive tactics to differentiate himself from the pack of conservative Republican white male candidates and to hope to force Burke into a two-person November runoff.

The Board's single Republican, Schabarum, backed a former lobbyist for apartment house owners, Mike O'Donnell, whose attempt to tie Burke to white liberals Tom Hayden and Jane Fonda apparently fell flat. Nor did an O'Donnell tabloid distributed just before the primary that contained critical statements about Burke by local officials help his campaign, for several of the officials quickly disavowed the statements attributed to them. O'Donnell finished with 7.9% of the vote. By contrast, Dana capitalized on an endorsement by Deukmejian, whose home was in Long Beach, to edge into the runoff with 21% of the vote to Burke's 42%.¹⁹¹

Behind by twelve points in August and ten in September, facing an incumbent who had represented areas of the district for thirteen years and who had raised more than twice as much money as all her opponents combined in the primary, Dana and Smith resorted to the most openly racist campaign in the recent history of the Los Angeles County Board of Supervisors.¹⁹² Initially, Smith later admitted, he had not planned to emphasize busing, which he chastely characterized as not "a

¹⁸⁷ L.A. Times, Dec. 9, 1979, part II, at 1, col. 5.

¹⁸⁸ At the beginning of the campaign, less, perhaps much less than a majority of a sample recognized Dana's name. Shumate Deposition Transcript at 378.

¹⁸⁹ Burke Deposition Transcript at 56.

¹⁹⁰ L.A. Times, Jan. 28, 1980, part I, at 21, col. 1.

¹⁹¹ L.A. Times, Jan. 28, 1980, part I, at 3, col. 5; L.A. Times, Apr. 26, 1980, part I, at 16, col. 1; L.A. Times, May 29, 1980, part II, at 1, col. 3; L.A. Times, June 5, 1980, part I, at 3, col. 2.

¹⁹² L.A. Times, May 6, 1980, part II, at 1, col. 6; L.A. Times, Sept. 22, 1980, part II, at 1, col. 1; L.A. Times, Oct. 17, 1980, part II, at 1, col. 1. Although he had huffily refused to appear at a television debate hosted by CBS newsmen Bill Stout because Stout had editorialized against his billboards as "close to racism," Dana later blithely denied that he had "ever" heard anyone suggest that "by raising the issue of forced busing, there would be a concern that you were appealing to racial sentiments." L.A. Times, Sept. 13, 1980, part III, at 14, col. 5; Dana Deposition Transcript at 407. Privately, the campaign was even less subtle,

racial issue at all."¹⁹³ Apparently, Burke's lead changed Smith's mind. Even though the Board had no influence whatsoever over pupil placement policies in the public schools, Smith/Dana's billboards proclaimed that "Yvonne Burke Lied on Busing," their television and radio advertisements echoed the theme, and a slick Time magazine-like brochure reiterated charges of Burke's alleged endorsement of "forced busing" three times in seven pages.¹⁹⁴ Burke edged away from earlier votes to allow busing for integration purposes in some circumstances and generally attempted to downplay the issue of race.¹⁹⁵ To counter the "soft on crime" image created by her race and her anti-death penalty stance, which Deukmejian had exploited effectively in the 1978 election for Attorney General, Burke trumpeted her endorsement by Republican Los Angeles sheriff Peter Pitchess, then embroiled in a bitter personal feud with Schabarum.¹⁹⁶ Burke's last leaked poll showed her ahead by four points, with eighteen percent undecided, while Dana's called the contest a dead heat.¹⁹⁷

Undoubtedly realizing that partisan and ideological control of the Board hung in the balance, conservative Republican leader Schabarum provided Dana with a last-minute infusion of \$100,000 that sent a two-page mailer, designed by Smith, into culturally conservative white areas of the district.¹⁹⁸ For a serious challenger to display a photograph of his opponent prominently in his own campaign literature, especially if he is not glamorous and the incumbent is a former model, would seem a foolish campaign tactic under most circumstances. But below a gen-

one Dana fundraiser reportedly pitching for funds to a group of white businessmen with the line "[w]e have to get that black bitch out . . ." Burke Deposition Transcript at 41-43.

¹⁹³ Smith Deposition Transcript at 309-10, 322. Compare the following statement of the 1988 Republican National Campaign Chairman, South Carolina native Lee Atwater: "I, to this day, will not acknowledge that the Willie Horton matter had anything at all to do with race." L.A. Times, Oct. 26, 1989, part A, at 34, col. 2.

¹⁹⁴ L.A. Times, Oct. 22, 1980, part II, at 1, col. 1; L.A. Times, Oct. 27, 1980, part II, at 1, col. 1; L.A. Times, Sept. 22, 1980, part II, at 3, col. 4; Burke Deposition Transcript at 47. Often threatening to crowd the bland Dana out of stories on the campaign, Smith arranged elocution lessons for his inexperienced candidate and flashed him hand signals during televised debates. "Dana sometimes seems to be a totally managed candidate," remarked Los Angeles Times correspondent Bill Boyarsky. L.A. Times, Oct. 27, 1980, part II, at 10, col. 1.

¹⁹⁵ Burke Deposition Transcript at 41-43, 49-50; L.A. Times, Sept. 13, 1980, part III, at 14, col. 5.

¹⁹⁶ Burke Deposition Transcript at 19-22; Schabarum Deposition Transcript at 341-42.

¹⁹⁷ L.A. Times, Nov. 2, 1980, part II, at 1, col. 5.

¹⁹⁸ The brochure was not sent to more liberal white westside areas, such as Santa Monica and Venice, where Dana was behind and where he eventually lost. Schabarum Deposition Transcript at 87, 109-11; Burke Deposition Transcript at 41-43, 61-62; L.A. Times, Nov. 11, 1980, part II, at 1, col. 5. The Schabarum loan or donation amounted to nearly a sixth of Dana's total spending for the primary and general elections. Dana Deposition Transcript at 232.

erously shaded picture of Burke, the flier emphasized not only the contrast between Dana's opposition to "forced busing of school children" and Burke's purported support of it, but also invoked the classic American racist image, accusing Burke of opposing "mandatory prison for rape."¹⁹⁹ Despite denunciations of such tactics as "racist" by prominent white male politicians, the Smith/Dana appeal succeeded, as the Burke lead faded in the last weekend, and Dana won by 53% to 47%.²⁰⁰

The contest between incumbent Baxter Ward and challenger Mike Antonovich attracted less media attention than that between Burke and Dana. A fiscal conservative, Ward had sometimes voted with Schabarum and Hayes to keep expenditures down, but when health and welfare benefits for the poor were at issue, he was much more generous than the Board's Republicans were. Blunt and outspoken, Ward refused to take money from developers and was willing to look Schabarum in the eye, detail the campaign contributions that Schabarum had received from someone with a matter currently up for a vote, and ask Schabarum to recuse himself. In the primary, the widely known former television newsman had refused to take any contributions over fifty dollars or to hire a professional campaign manager.²⁰¹ Antonovich, a personable, very right-wing Assemblyman who had run unsuccessfully for the Republican nomination for Lieutenant Governor in 1978, raised several hundred thousand dollars, much of it from north county developers, with a small, symbolic contribution directly from Schabarum.²⁰² After a ferocious campaign in which, Ward felt, Antonovich purposely distorted Ward's record, Antonovich won by a 55-45 margin.²⁰³ Last minute advertisements and targeted mail overcame a reported five percent Ward lead.²⁰⁴

In an invisible campaign in the Second District in 1980, Kenneth Hahn buried the second place finisher 88%-9%.²⁰⁵ But the new Schabarum-led majority could not have felt very secure. Schabarum,

¹⁹⁹ Schabarum Campaign Mailer, Plaintiffs' Exhibit 287, Bates #170354.

²⁰⁰ L.A. Times, Nov. 2, 1980, part II, at 1, col. 5; L.A. Times, Nov. 6, 1980, part I, at 3, col. 1; L.A. Times, Nov. 11, 1980, part II, at 1, col. 5.

²⁰¹ R. Stern, *supra* note 81, ch. 11, at 6-8; L.A. Times, May 6, 1980, part II, at 1, col. 6; L.A. Times, Apr. 26, 1980, part I, at 16, col. 1; L.A. Times, May 29, 1980, part II, at 1, col. 3; L.A. Times, June 5, 1980, at 3, col. 2.

²⁰² Antonovich Deposition Transcript at 11-14, 22-23, 120-21; R. Stern, *supra* note 81, ch. 11, at 6-8; L.A. Times, May 6, 1980, part II, at 1, col. 6; L.A. Times, May 29, 1980, part II, at 1, col. 3.

²⁰³ Schwellenbach Deposition Transcript at 38-46, 57-60, 87-88. R. Stern, *supra* note 81, ch. 11, at 6-8.

²⁰⁴ L.A. Times, Oct. 16, 1980, part II, at 1, col. 2.

²⁰⁵ L.A. Times, June 5, 1980, part I, at 21, col. 5.

after all, had avoided a runoff in 1978 by a mere six percent against Covina mayor Elaine Donaldson, an underfinanced conservative Republican, and two nominal Democratic candidates.²⁰⁶ A private poll in 1982 showed that only a third of Schabarum's constituents knew who he was and had a favorable opinion of him.²⁰⁷ Antonovich had ousted Ward by less than landslide proportions, while Dana and Smith would likely have more difficulty overcoming a white male opponent. No doubt, Antonovich and Dana could expect increasing funds to flow into their coffers after 1981, and Schabarum had money to spare, but their districts were hardly "ideal" for them, affording "no way to strengthen the Board Majority" through redistricting, as Smith later averred.²⁰⁸ As indicated in Table 2, above, the 1978 and 1980 majorities of Schabarum, Antonovich, and Dana were among the lowest in the Board elections since 1970.

F. Demographic Change in Los Angeles County, 1970-80

Two demographic patterns helped to shape the redistricting process in 1981. Most important was the fact that population growth in Los Angeles county during the 1970s was remarkably evenly spread across supervisorial districts. Table 5 shows that the largest district, the Third, was only 1.1% over the twenty percent equality level in 1980, while no district contained less than nineteen percent of the population. To express the same figures in another way, the difference between the percentages in the largest and smallest districts was about ten percent of the population of a single supervisorial district. As County Regional Planner George Marr noted in a 1978 memo and a later deposition, "if all you were doing was equalizing the population," there was no need to make "massive changes in the boundaries."²⁰⁹

The ethnic mix within the county and within each district, however, was far from stable. Spanish-surnamed individuals became the largest minority ethnic group in Los Angeles county in 1960. During the decade of the 1950s, the number of people in the county with Spanish surnames doubled, and by 1960, the census counted 576,716 of them, which amounted to 9.6% of the population.²¹⁰ In 1970, fifteen percent

²⁰⁶ L.A. Times, May 30, 1978, part II, at 1, col. 1. Schabarum outspent Donaldson and two minor candidates by better than two to one.

²⁰⁷ Schabarum Deposition Transcript at 269.

²⁰⁸ Smith Deposition Transcript at 54-57, 139.

²⁰⁹ Marr Lettergram to Norman Murdock, Dec. 5, 1978, Bates #103553-103563; Marr Deposition Transcript at 174.

²¹⁰ Population and Dwelling Units, in Los Angeles County Regional Planning Commission Report, Apr. 1, 1962, Bates #000106-000109, at 000106.

TABLE 6: ETHNIC PERCENTAGES IN SUPERVISORIAL DISTRICTS
(USING 1971 BOUNDARIES)
1970, 1980, AND 1985

<i>District</i>	<i>Percent White</i>			<i>Percent Latino</i>		
	1970	1980	1985	1970	1980	1985
1.	74.2	55.9	47.9	22.2	36.2	40.3
2.	39.6	23.6	20.6	14.0	26.5	29.5
3.	61.4	45.8	39.5	31.6	41.8	43.8
4.	77.6	66.6	61.1	12.1	16.6	17.8
5.	82.7	72.7	67.4	11.7	16.9	19.3

<i>District</i>	<i>Percent Black</i>			<i>Percent Asian & Other</i>		
	1970	1980	1985	1970	1980	1985
1.	1.7	3.0	3.6	1.0	4.1	8.3
2.	40.5	42.2	39.8	4.7	6.7	10.1
3.	1.4	2.4	3.0	4.3	8.7	13.6
4.	7.0	9.5	9.5	2.3	6.2	11.6
5.	3.6	4.8	5.1	1.2	4.6	8.2

TABLE 7: PERCENT CHANGE IN LATINO PERCENTAGE BY
SUPERVISORIAL DISTRICT

<i>District</i>	<i>1970-80</i>	<i>1970-85</i>
1.	14.0	18.1
2.	12.5	15.5
3.	10.2	12.2
4.	4.5	5.7
5.	5.2	7.6

of Los Angeles county's people considered themselves Mexican-Americans, and another three percent, non-Mexican Latino.²¹¹ From 1970 to 1980, there was a 68% increase in the county's Hispanic population, a 21% increase in its African-American population, and a 20.9% decline in the county's non-Hispanic white population.²¹² By 1980, 27.6% of the county's population was Latino, and the Health Department and County Regional Planning Group estimated that from 30.4% to 31.7%

²¹¹ Study of the Los Angeles County Charter, in Report of the Los Angeles County Citizens Economy and Efficiency Commission, July 14, 1970, Bates #115722-115811, at 115750-115751.

²¹² Third District Highlights, in Regional Planning Commission Report, Apr. 13, 1984, Bates #103410.

of the population was Hispanic in 1985.²¹³ By 1995, demographers projected, Hispanics would surpass Anglos as the largest ethnic group in the county.²¹⁴

Just as politically relevant as the overall increase was the uneven distribution of each ethnic group. Table 6 demonstrates that Hispanics were clustered in Supervisorial Districts One and Three (Schabarum's and Edelman's, respectively), while blacks by 1980 constituted a substantial plurality of Kenneth Hahn's Second District. By 1985, the Health Department estimate was that non-Hispanic whites composed less than fifty percent of the population not only in the Second and Third Districts, but in the First District, as well. In fact, as Table 7 points out, the largest increase in the Hispanic population during the 1970s—a trend that demographers expected to continue through the 1980s—came in the First District. Even if supervisorial district lines were shifted only marginally in 1981, the emerging non-Anglo majorities, especially in Districts One and Three, must have given such cautious politicians as Schabarum and Edelman some pause.

IV. REDISTRICTING THE LOS ANGELES COUNTY BOARD OF SUPERVISORS IN 1981

A. Overview

The final outcome of the 1981 reapportionment was determined by the requirement of obtaining at least four votes from the five supervisors,²¹⁵ the unwillingness of politicians to turn their electoral futures over to people over whom they have no control,²¹⁶ the resolve of the two Democrats, Kenneth Hahn and Edmund Edelman, to stick together no matter what,²¹⁷ and their stubbornness in the face of the onslaught of their partisan/ideological foes and pressures from their usual allies in

²¹³ Countywide Population Estimate for 1985 and Projections to Year 2000 Most Likely Scenario, in County of Los Angeles, Dept. of Health Services, Bates #108075-108109, at 108082-108083.

²¹⁴ Revised Mimeograph, Regional Planning Commission Report, Summary of Projected Ethnic Composition of Los Angeles County, 1980-2000, Mar. 26, 1987, Bates #102946.

²¹⁵ Hoffenblum Deposition Transcript at 69-70; Edelman Deposition Transcript at 322-23; Dana Deposition Transcript at 388; Smith Deposition Transcript at 50, 52; Quezada Deposition Transcript at 31-32, 88-90; Huerta Deposition Transcript at 45; Garcia Deposition Transcript at 60.

²¹⁶ Edelman Deposition Transcript at 326-27; Hoffenblum Deposition Transcript at 369; Pozorski Deposition Transcript at 120.

²¹⁷ Smith Deposition Transcript at 165-66; Quezada Deposition Transcript at 73, 90-91; Bush Deposition Transcript at 86-87; See also San Gabriel Valley Tribune, Aug. 13, 1981, Bates #100255.

the Hispanic community.²¹⁸ In retrospect, an incumbent gerrymander that shifted district lines as little as was necessary to satisfy population equality between districts seems to have been inevitable.

At the beginning of 1981, however, different results seemed possible to two groups. To Pete Schabarum and his proteges who formed the new Board majority, and especially to two brash, aggressive Republican political consultants, Ron Smith and Allan Hoffenblum,²¹⁹ it seemed likely that the Republicans could solidify their tenuous hold on the suburban Board seats²²⁰ while creating problems for their partisan enemies²²¹ and building good will with Hispanics.²²² To Latino activists, the rapid but uneven growth of the Hispanic population entitled it to ethnic representation or at least more influence,²²³ and they were able and willing to combine both insider and outsider tactics to further Hispanic political power. Anglo Republicans, counting on a de facto alliance of convenience with Hispanics to help them overcome Democratic majorities in the state legislature and to coerce Hahn and Edelman into acquiescing in changes that doomed them to permanent powerlessness, facilitated the organization of the Hispanic activists and gave them free but limited access to the computerized redistricting operation at the Rose Institute.²²⁴ In the end, however, the curious combination never really came together, incremental changes in boundary lines preserved the supervisorial fault line in East Los Angeles and did nothing further to shore up shaky Republican control, and both the Hispanic and Republican activists went away discouraged and angry at each other, as well as at the Democrats.²²⁵

²¹⁸ Edelman Deposition Transcript at 210, 213, 284; Seymour Deposition Transcript at 627-29, 644; Plaintiff's Exhibit 190, Memorandum from Jeff Seymour to Ed Edelman, July 24, 1981, Bates #170244-170245.

²¹⁹ Both Smith and Hoffenblum asked to serve on the Boundary Commission. Smith Deposition Transcript at 67; Hoffenblum Deposition Transcript at 57.

²²⁰ Shumate Deposition Transcript at 158, 215, 235-37; Hoffenblum Deposition Transcript at 70-71, 280-81; Dana Deposition Transcript at 274, 369; Smith Deposition Transcript at 89, 223.

²²¹ Hoffenblum Deposition Transcript at 67; Shumate Deposition Transcript at 222-23, 358-59; Edelman Deposition Transcript at 244-45; Quezada Deposition Transcript at 48-50.

²²² Shumate Deposition Transcript at 214, 219, 272.

²²³ Huerta Deposition Transcript at 40; Huerta Testimony before Boundary Commission, Bates #100028-100029.

²²⁴ Heslop Deposition Transcript at 178, 203; Quezada Deposition Transcript at 24-26; Uranga Deposition Transcript at 72; Huerta Deposition Transcript at 37-38; Santillan Deposition Transcript at 17-20, 31-32.

²²⁵ Hoffenblum Deposition Transcript at 245; Smith Deposition Transcript at 44-46, 104; Quezada Deposition Transcript at 75, 114, 118; Uranga Deposition Transcript at 67-69.

B. The Republicans' Secret Plan and The Rose Institute

A February, 1981 "lettergram" sent to Schabarum and Antonovich under Dana's imprimatur, but probably written by Ron Smith,²²⁶ proposed the establishment of a "non-public reapportionment committee" composed of representatives of the three Republicans.²²⁷ Since "the power in reapportionment is information," the memo proposed either using the resources of the Rose Institute, a non-profit group at Claremont McKenna College headed by Alan Heslop, former executive director of the California State Republican Central Committee and still a very active campaign consultant to Republican candidates,²²⁸ or purchasing Rose data and buying data processing services elsewhere. Rose had proposed to make available to the public Boundary Commission population, ethnic, and political data for \$23,950, but the memo writer believed that even more political data would be necessary. Using Rose would save money, but it would mean that the extensive political data would have to be shared with representatives of Hahn and Edelman, who, the writer smirked, "would try to stop our attempts for a fair reapportionment". If the public Boundary Commission did not make use of Rose, the Democrats would have to rely strictly on non-political data, which was appropriate because "after all, their [the Boundary Commission's] decisions really should not be made on a political basis." This and the additional secrecy it afforded tilted the memo writer toward an operation that had no connection with Rose, even though it might cost \$47,000. In either case, he proposed hiring as an expert Joseph Shumate, Smith's partner in the political consulting firm, who, he noted, "was instrumental in the Republican [state] reapportionment of 1970, 1971, and 1972."²²⁹

Disregarding the fear that employment of Rose would raise suspicions of Republican partisanship,²³⁰ the Republican supervisors bought Shumate's advice for \$18,000,²³¹ and charged data collection and

²²⁶ Smith Deposition Transcript at 72-73, 77-78.

²²⁷ Lettergram from Deane Dana to Pete Schabarum and Mike Antonovich, Feb. 27, 1981, Bates #161084 [hereinafter Dana Lettergram].

²²⁸ Heslop Deposition Transcript at 137, 331-33.

²²⁹ Dana Lettergram, *supra* note 227; Letter of Agreement between Shumate-Smith, Pike and the Redistricting Study Group, Mar. 9, 1981, Bates #161085-161086 [hereinafter Letter of Agreement].

²³⁰ Dana Lettergram, *supra* note 227. It is widespread knowledge that Rose has "heavy business and Republican backing." See L.A. Times, Aug. 17, 1981, part I, at 26, col. 1. Savvy former county demographer George Marr believed that the supervisors employed Rose because it was "a Republican think tank." Marr Deposition Transcript at 162.

²³¹ Letter of Agreement, *supra* note 229; Lewis Deposition Transcript at 70, 75, 133; Shumate Deposition Transcript at 53, 55.

processing costs to the county. Rose, which had collected extensive census and political data and designed a frilly reapportionment software package called REDIS under an \$800,000-\$1,000,000 grant from the California Business Roundtable,²³² eventually set a price of \$30,000 for the county's use of it.²³³ The data they proposed to deliver included statistics on "voter turnout and ethnic participation in the political process" and a special allocation of \$1,500 for unspecified "ethnic Hispanic data"—an indication of how transfixed by ethnicity everyone involved in the 1981 process was from the beginning. Charging \$10,000 as "user fee" for the REDIS system, which had already been paid for by the Roundtable grant, and \$3,000 for training in the use of REDIS—instruction, that, according to Rose's chief technician, Robert Walters, took only one to two hours²³⁴—the contract, let to Rose over the objections of county staff²³⁵ and with no competitive bidding,²³⁶ was no bargain for the financially strapped local government.²³⁷ In fact, it is doubtful that anyone with an official position in the county reapportionment effort used Rose at all. According to their testimony, no boundary commissioner, supervisor, supervisory deputy, or county employee drew or evaluated a plan at Rose, although an intern in Schabarum's office, Mike Haines, did apparently use Rose facilities to plot a map that lumped minorities into the Hahn and Edelman districts, but drew no precise boundaries between the Democratic seats.²³⁸ Shumate, a private employee of the Republicans who

²³² Heslop Deposition Transcript at 362; Walters Deposition Transcript at 69.

²³³ Rose Institute Proposal to County of Los Angeles, Bates #100315-100317, 100339-100340.

²³⁴ Walters Deposition Transcript at 36-37.

²³⁵ Schoeni Deposition Transcript at 112-17; Schoeni noted in a memorandum to Schabarum that the "flashing lights and color video display terminal would be fun to have," but useful only "if the Board wished to pursue a radical realignment" of districts. Memorandum from Schoeni to Schabarum, Redistributing - Rose Institute Proposal, Apr. 2, 1981, Bates #100352.

²³⁶ Schoeni Deposition Transcript at 130.

²³⁷ Heslop claimed that the county contract came to Rose unsolicited. Smith, Shumate, Heslop, and Tom Hofeller, then Heslop's second in command at Rose and shortly to become the national Republican party's reapportionment director, had all worked on statewide reapportionment for the Republican State Central Committee in the early 1970s. In light of these chummy relationships and the fact that Shumate's use of Rose was never questioned, although as a person without a contract with the Institute, he had no right under the Institute's policies to use its facilities, it seems likely that the initiation, award, and implementation of the contract were carried out informally by friendly agreement. See Heslop Deposition Transcript at 133-37, 141, 180, 188, 208-09, 211-12, 298, 371; Walters Deposition Transcript at 120-21; Shumate Deposition Transcript at 160-61, 164-66, 174-76.

²³⁸ Seymour Deposition Transcript 122-24; Hoffenblum Deposition Transcript at 78; Bush Deposition Transcript at 46, 48; Turner Deposition Transcript at 234-35; Fitch Deposition Transcript at 164, 168, 194; Crow Deposition Transcript at 37; Lewis Deposition Transcript

had no independent contract with Rose, did use data from Rose, but, as he remembers it, he only drew one plan, and that mostly by hand calculations from paper copies of computer printout.²³⁹ All of Rose's bells and whistles, then, allowed one intern to sketch out a rough partisan plan that clustered minorities helter-skelter into the Democratic districts and that never seems to have been considered seriously by anyone.

C. The Democrats' Secret Plan and the County Bureaucracy

It is instructive to conjecture how the Democrats would have handled the 1981 county reapportionment if Ward and Burke, instead of Antonovich and Dana, had been successful in 1980. Hahn and Edelman, recently re-elected with 88% and 74% of the vote, respectively,²⁴⁰ could have easily afforded changes in their districts. Had Ward been re-elected after having been outspent by better than ten to one by a vigorous, seasoned campaigner,²⁴¹ he would have seemed quite formidable to other potential challengers. Burke's district being adjacent to Hahn's, she, probably the weakest of the Democrats, could have swapped him some working class whites near Orange County for some of his South Central blacks.²⁴² Assuming that Hispanic pressure on the Board would have been as well organized and vociferous as it was in the actual circumstances in 1981, the Democrats would probably have responded as Edelman and his fellow Democrats on the Los Angeles City Council did in 1972—they would have cut up Schabarum's district, as they had abrasive conservative Republican Art Snyder's in 1972, and given him a substantial Hispanic population majority. After all, Hahn disliked Schabarum intensely, both for his politics and for the fact that Schabarum had thwarted Hahn's ambition to succeed to the chairmanship of the Board of Supervisors.²⁴³ Burke would no doubt have sought

at 78; Smith Deposition Transcript at 138, 150-53, 157, 160, 164. See also Plaintiffs' Exhibit 47, May 16, 1989.

²³⁹ Shumate Deposition Transcript at 225-27.

²⁴⁰ See Table 4.

²⁴¹ R. Stern, *supra* note 81, at ch. 11; Crow Deposition Transcript at 98; L.A. Times, Nov. 2, 1980, part II, at 1, col. 5.

²⁴² People involved in the redistricting process in 1981 sometimes reflected on what philosophers would term a "counterfactual" in exactly this way. For example, Bob Bush, Hahn's longtime chief deputy and his appointee to the 1981 Boundary Commission, noted in his deposition: "If the redistricting would have taken place a year before, the structure of the supervisors would probably be different today than it is . . . [w]e had a minority supervisor, we probably could have readjusted the district somewhat to make sure [Burke] got reelected." Bush Deposition Transcript at 38.

²⁴³ Boyarsky, Government by Five Soloists, L.A. Times, Sept. 29, 1989, part II, at 2, col. 5.

revenge for Schabarum's major role in recruiting and financing her opponents. And Ward detested Schabarum, whom he thought a creature of special interests.²⁴⁴ Furthermore, by uniting the Hispanic core in one district, the Democrats could have appeared responsive to one of their key constituencies, and they might have kept Republican activists so busy trying to save Schabarum that they would have left the Democrats on the Board alone at election time.

Instead, since they faced a 3-2 Republican majority, the Democrats adopted a strictly defensive posture, and from the beginning, sought a redistricting as close to the status quo as possible.²⁴⁵ As Hahn's long-time deputy, Mas Fukai, remarked later, Hahn's preference in 1981 was for "just keeping everything he had and keeping it the same . . . he liked the district as it was."²⁴⁶ Hahn's Boundary Commissioner Robert Bush told a reporter after the first meeting of the Commission that, "I don't think that we will be changing all those boundaries very much."²⁴⁷

The Democrats were just as "political" and secretive in their efforts to maintain the status quo as the Republicans were in theirs to change it radically. Each supervisor in 1981 designated one aide as a reapportionment liaison.²⁴⁸ Schabarum and Antonovich named their chief deputies, Mike Lewis and Kathleen Crow, respectively, and Dana picked his former campaign manager, Ron Smith, who had very temporarily been placed on the county payroll.²⁴⁹ Hahn selected Fukai, while Edelman chose Jeff Seymour.²⁵⁰ A member of Edelman's City Council staff from 1972 to 1974, and his supervisorial staff from 1974 on, Seymour was intensely partisan, having been president of Young Democratic clubs in high school and at two colleges, and a member of the county and state Democratic central committees. Edelman's former chief deputy, Alma Fitch, who worked with Seymour for nearly a decade, ranked him as one of the most "political" persons in Edelman's office, giving him "an

²⁴⁴ Schwellenbach Deposition Transcript at 38. Soon after the referendum allowing the county to "contract out" work to private companies passed, "Mr. Schabarum proposed that a contract be awarded to a contributor of his, and I was stunned." *Id.* at 65.

²⁴⁵ No one associated with Hahn or Edelman drew a plan during the 1981 redistricting, except for the minor shift of territory at the very end of the process. Seymour Deposition Transcript at 93-94, 682; Fitch Deposition Transcript at 168, 219.

²⁴⁶ Fukai Deposition Transcript at 64-65, 67. Edelman felt the same way. See Fitch Deposition Transcript at 177-79.

²⁴⁷ L.A. Daily News, July 9, 1981, Bates #110472.

²⁴⁸ Seymour Deposition Transcript at 85.

²⁴⁹ Smith Deposition Transcript at 11.

²⁵⁰ Edelman Deposition Transcript at 260-65.

eight or nine" for that trait on a scale of one to ten.²⁵¹ As Edelman's chief liaison to the Jewish community, Seymour boasted of close personal connections to the Westside "machine" of Howard and Michael Berman and Henry Waxman.²⁵²

On May 11, two and a half months after the "private reapportionment" memo circulated among the Republicans, Seymour sent Edelman a parallel lettergram setting out, at least in part, their aims in reapportionment. "I will be preparing a political analysis of the district to show your strongest areas," Seymour told the supervisor.²⁵³ In particular, Seymour asked Edgar Hayes, director of the county's Data Processing Department, and Leonard Panish, County Registrar-Recorder, to arrange for county staffers to merge population and electoral data for the Third Supervisorial District in order to determine how the people in each census tract had voted in the following elections: the presidential, congressional, and gubernatorial contests from 1976 to 1980; the Burke-Deukemejian Attorney-General's race, Proposition 13 and the 1980 Gann state tax limitation initiative; the 1973 Bradley-Yorty mayoral election; and a few others, apparently later including Edelman's own 1978 supervisorial race, in which he had two Hispanic opponents.²⁵⁴ In addition, Seymour wanted the voter registration by party in each tract.²⁵⁵ After a meeting on June 9, attended by county staff members from the offices of Hayes and Panish as well as the engineering department, computer programmers Donald Gilbert²⁵⁶ and Peter Fonda-Bonardi²⁵⁷ matched electoral and census units and spewed out paper copies giving Seymour what he asked for.²⁵⁸ Fonda-Bonardi was directed by his superiors not to discuss the work he was doing with voting returns. "[T]here was an atmosphere of 'keep it

²⁵¹ Seymour Deposition Transcript at 21-26, 163; Fitch Deposition Transcript at 202.

²⁵² Seymour Deposition Transcript at 43.

²⁵³ Memorandum from Seymour to Edelman, May 11, 1981, Bates #110317. Although in 1989 he did not remember details, Edelman acknowledged in his deposition that he had been generally aware of what Seymour had done in 1981 and that he approved of using party registration and past election data in analyzing the effects of reapportionment plans. Edelman Deposition Transcript at 260-72.

²⁵⁴ Bannister Deposition Transcript at 75; Seymour Deposition Transcript at 300-01. See also Letter from Hayes and Panish to Seymour, Attached Handwritten Sheet, Reapportionment Proposed, June 9, 1981, Bates #109371 [hereinafter Hayes and Panish Letter].

²⁵⁵ Hayes and Panish Letter, *supra* note 254. Seymour Deposition Transcript at 155, 173-74, 272-94.

²⁵⁶ Gilbert remembers working on the project for approximately two to six months. Gilbert Deposition Transcript at 13-14.

²⁵⁷ Fonda-Bonardi Deposition Transcript at 23-24.

²⁵⁸ Marr Deposition Transcript at 144-48.

quiet' . . . My impression was that only one supervisor [Edelman, through Seymour] had asked us for this data, and he didn't want the other supervisor[s] to have these services."²⁵⁹

Since the costs of data collection, programming, and computing time were absorbed into county expenses, Seymour's hush-hush political redistricting effort cost Edelman even less—nothing—than the Republicans' effort cost them. Seymour's operation was also entirely negative and defensive in nature. To draw lines that differed much from the status quo, one would need statistics on all the districts, but Seymour asked only for data on the Third. Even to make large changes in the Third, a 335-page printed copy by census tract, not aggregated into cities or recognized communities, was very unwieldy.²⁶⁰ Because Rose's software allowed someone to redraw lines and quickly reaggregate population, ethnic, and political totals, it was tailor-made for aggressive, radical blitzkreigs. By contrast, Seymour's handiwork was a maginot line.

D. The Boundary Commission and the County Staff

Supervisor Deane Dana's March 17, 1981 motion for the Board to appoint a Boundary Commission set out as one of the Commission's goals to "ensure that ethnic minorities are equitably represented."²⁶¹ A colloquy in that day's Board meeting, however, sliced through the affirmative action rhetoric to get to the incumbent-protecting reality. After Supervisor Edelman mused that "[c]ertainly this [the appointment of the Commission] will take some of the heat off the Board of Supervisors in doing the reapportionment," Supervisor Hahn shot back: "No, it won't. How do you say that, Mr. Edelman? The heat will all be here. We'll just appoint our people and we'll tell them what to do. And they'll say, 'Cut this person out and put this city in.' . . . [T]hat's the way it works."²⁶²

The Commission's chairman, Blake Sanborn, an insurance broker, former City Councilman in, and mayor of, suburban Whittier, Republican activist, and Supervisor Schabarum's representative, does not

²⁵⁹ Fonda-Bonardi Deposition Transcript at 50-52. Both Gilbert and Fonda-Bonardi have vague memories of running similar programs for other supervisor's offices during the 1981 reapportionment, but no one in those offices recalls asking for or receiving them. Existing evidence therefore suggests that this was wholly a Seymour-Edelman project. Gilbert Deposition Transcript at 20; Fonda-Bonardi Deposition Transcript at 29, 81; Bannister Deposition Transcript at 59, 69, 85-86, 89, 91; Marlow Deposition Transcript at 94-95.

²⁶⁰ Third Supervisorial District Voter Analysis, July 2, 1981, Bates #111272-111607.

²⁶¹ Motion by Supervisor Deane Dana, Mar. 17, 1981, Bates #100383.

²⁶² Transcript of Board of Supervisors' Meeting, Mar. 17, 1981, Bates #100055.

appear to have played much of a role on the Commission, and in 1989 recalled almost nothing about the 1981 redistricting.²⁶³ Hahn's choice, Robert Bush, a former newsman who had been a senior deputy in Hahn's office from 1969 to October, 1979, played a canny, almost teasing role in the process.²⁶⁴ Frank to admit that he was "essentially representing his [Hahn's] interests on the Boundary Commission,"²⁶⁵ Bush repeatedly dangled before the Republicans the hope that they might get his vote if they made a few more concessions, but he always drew back, much to their consternation.²⁶⁶ Bush's ally on the Commission, Alma Fitch, had been active in the liberal California Democratic Council during its heyday in the 1950s and '60s. Joining Edelman's City Council staff in 1968, she played an active role in the 1972 City Council reapportionment and became Edelman's chief deputy when he joined the Board in 1975, resigning in March, 1981 to form her own political consulting firm.²⁶⁷ Like Bush, she reportedly led the Republicans to think that she might go along with a modified version of their proposed lines, but she never really agreed to anything.²⁶⁸

The most "vocal" members of the Commission, according to Fitch and others, were Ron Smith and Allan Hoffenblum.²⁶⁹ Smith began working for the Republican Party in high school, and by the time he graduated from college, he was a veteran of both a gubernatorial and a presidential campaign.²⁷⁰ As an employee of the state Republican apparatus in 1971-72, he assisted in the state Republican redistricting effort.²⁷¹ Forming a political consulting firm in San Francisco in 1973 with two other Republican activists, Joseph Shumate and Emily Pike,²⁷² he managed several Northern California campaigns before engineering Dana's controversial last-minute triumph in 1980, an achievement that made Smith a hot commodity on the lecture circuit.²⁷³

²⁶³ Sanborn Deposition Transcript at 8-10. Allan Hoffenblum, however, remembered that Sanborn was "every bit as involved [in the redistricting] as any of us were [sic]." Hoffenblum Deposition Transcript at 351. Ron Smith, however, does not recall ever meeting Sanborn outside Boundary Commission meetings. Smith Deposition Transcript at 177-80.

²⁶⁴ Bush Deposition Transcript at 9-14.

²⁶⁵ *Id.* at 68.

²⁶⁶ Bush Deposition Transcript at 73, 81; Hoffenblum Deposition Transcript at 69-70, 186, 292; Smith Deposition Transcript at 50.

²⁶⁷ Fitch Deposition Transcript at 40-49, 78-84.

²⁶⁸ Hoffenblum Deposition Transcript at 157, 159; Smith Deposition Transcript at 52, 272-74.

²⁶⁹ Fitch Deposition Transcript at 151; Turner Deposition Transcript at 123-24.

²⁷⁰ Smith Deposition Transcript at 285-89.

²⁷¹ Smith Deposition Transcript at 9.

²⁷² *Id.* at 8-9.

²⁷³ Burke Deposition Transcript at 56.

Smith claimed to have acted in civics textbook fashion eight years earlier. When approaching redistricting, one should not have in mind "... if X gets elected, then they'll have more health services," he later asserted. "What you should be thinking about is the process of how they elect the people, not the result of that election, of the actions of the kinds of people who are elected. That shouldn't come into consideration."²⁷⁴ Despite the tight margins of the Republican supervisorial victories in 1980, "... we weren't trying to make the three Republicans better districts. That was not a goal because it wasn't necessary."²⁷⁵ Unlike other commissioners, Smith "did not perceive [himself] to be on that committee as an agent of Deane Dana In that role, my goal was to have it be as nonpolitical as possible."²⁷⁶ Not only did he simply want to draw "a fair redistricting plan,"²⁷⁷ he even attributed the same motive to his Democratic adversaries on the Commission: "I had a feeling that the politicians on the Boundary Commission all felt this: this was our one chance to propose something that was, quote, good government."²⁷⁸ He never "ever" felt, he recalled, that Bush and Fitch torpedoed his plan because they saw it as strengthening the Republican majority on the Board.²⁷⁹ Republicans, so far as Smith, the state chairman for the 1983 Sebastiani reapportionment plan knew, had never conducted a redistricting "which disadvantaged minorities."²⁸⁰ He, Hoffenblum, and Shumate "went into this with hopes of coming up with a district that maximized Hispanic empowerment in the county We weren't going to get any brownie points for having this Hispanic district. We were doing it because it was the right thing to do."²⁸¹ "[A] fair redistricting plan," he asserted, "will help Republicans . . . we really wanted to have a process where there were fair lines drawn."²⁸²

After graduating from the University of Southern California in 1962 with a major in radio and television broadcasting and serving in the Air Force, Allan Hoffenblum got his first job with the Republican Party, and has been in politics ever since. From 1968 to 1972, he was an area director of the party in Los Angeles County, and in the latter year, he became the county director of the Committee to Re-elect the President

²⁷⁴ Smith Deposition Transcript at 41.

²⁷⁵ *Id.* at 139.

²⁷⁶ *Id.* at 171, 212-13.

²⁷⁷ *Id.* at 67.

²⁷⁸ *Id.* at 54-56.

²⁷⁹ *Id.* at 56-57.

²⁸⁰ *Id.* at 65.

²⁸¹ *Id.* at 220-21.

²⁸² *Id.* at 108, 136.

(CREEP). A member of the Republican State Central Committee for a decade, he generally attends the party's state convention.²⁸³

The first campaign in which Hoffenblum was the de facto campaign manager is particularly relevant to his activities on the Boundary Commission. A series of retirements during 1970 and 1971 left the East Los Angeles Forty-Eighth Assembly District open in November, 1971, at the same time that the state legislature was trying to negotiate a redistricting arrangement. A tentative agreement on reapportionment hinged on a victory in the Forty-Eighth by Richard Alatorre, who hoped to become the Assembly's third Mexican-American representative.²⁸⁴ Seeking to sabotage the pact, Republican activists from Sacramento flew down to help Bill Brophy, an Anglo millionaire who was the only Republican in the contest, to garner over fifty percent of all the votes in what was expected to be a low turnout primary.²⁸⁵ When Brophy was forced into a runoff with Alatorre and two candidates from the minor Peace and Freedom and La Raza Unida parties, the activists returned north, assuming an Alatorre victory in the overwhelmingly Democratic district.

Only Hoffenblum persevered. "I took the initiative and was able to raise the funds necessary to design some mailers that went into selective precincts," he remembered seventeen years later.²⁸⁶ One last minute mailer from a nonexistent "Democratic League of Voters" with a mailing address in a vacant lot, signed by a pseudonymous "Patrick S. Sherman" and sent to Anglo areas of the district, denounced Alatorre as not a true Democrat.²⁸⁷ Another, which featured a darkened picture of Alatorre, attempted to tie him to violent Hispanic groups.²⁸⁸ Key to Brophy's eventual 4.5% plurality was the 7.9% of the votes that Raul Ruiz of La Raza Unida garnered. "Brophy didn't win this," Ruiz crowed. "We did."²⁸⁹ According to the then-chairman of the Assembly Elections and Reapportionment Committee, Henry Waxman, "The reason we lost was a cynical alliance of neo-segregationists in the Chicano community with the Republican party." Alatorre was blunter, charging that ". . . the Republican Party financed" La Raza Unida's

²⁸³ Hoffenblum Deposition Transcript at 9-11, 384.

²⁸⁴ Hoffenblum Deposition Transcript at 12; Alatorre Deposition Transcript at 16; Bergholz, Brophy in Upset Defeats Democrat, L.A. Times, Nov. 17, 1971, part I, at 1, col. 3.

²⁸⁵ Hoffenblum Deposition Transcript at 405-07.

²⁸⁶ Id.

²⁸⁷ L.A. Times, Nov. 16, 1971, part I, at 3, col. 6.

²⁸⁸ Alatorre Deposition Transcript at 72-73.

²⁸⁹ L.A. Times, Nov. 17, 1971, part I, at 19, col. 2; L.A. Times, Nov. 18, 1971, part I, at 3, col. 4.

campaign, the high point of the minor party's electoral success in the state.²⁹⁰

Hoffenblum proudly claimed credit for the victory. It was "the only campaign that I was basically responsible for the outcome [in] . . . I called the shots", he remembered.²⁹¹ This last phrase echoes with doubtless unconscious irony, in light of the most spectacular incident in the Brophy-Alatorre contest. After a late dinner the night before the election, Brophy and his administrative assistant Bill King had just returned to Brophy's Highland Park home when some undetermined person fired eight to ten rounds from a .22 caliber rifle through Brophy's front window. No one was hurt. Dramatic pictures and extensive television and radio coverage on election day "gave Brophy publicity and momentum we had never hoped to achieve", according to an anonymous Republican strategist quoted in the Times.²⁹² Much to the amusement of his Sacramento colleagues, Republican Paul Priolo announced on the Assembly floor the day after the election that "he was acting as a broker for [Republican] caucus Chairman [John] Stull, who had worked in Brophy's campaign. 'Mr. Stull has for sale a slightly used .22 rifle,' Priolo said."²⁹³ Alatorre found the incidents less humorous. The contest, he charged, ". . . was used as the training grounds for what ended up being the dirty tricks during the Nixon re-election campaign."²⁹⁴

The man who actually drew the plans for the Republicans was Joseph Shumate, Smith's partner in the San Francisco political consulting firm.²⁹⁵ A user, rather than a designer of computer software systems, Shumate had been a campaign strategist for the Republican State Central Committee from 1969 to 1972.²⁹⁶ Along with Smith and others, he drew redistricting plans for Congress and the state legislature, taking into account, he said later, age, race, income, education, registration, and past voter history in order to maximize Republican representation. At Smith's suggestion, Shumate was hired by the Republican supervisors to draw plans and to advise them of the effects of various plans on "their re-election efforts."²⁹⁷ More forthright than his partner, he

²⁹⁰ L.A. Times, Nov. 18, 1971, part I, at 3, col. 4; Alatorre Deposition Transcript at 72-73.

²⁹¹ Hoffenblum Deposition Transcript at 12, 405-07.

²⁹² L.A. Times, Nov. 17, 1971, part I, at 19, col. 2.

²⁹³ Fairbanks, Brophy Assembly Victory Aids GOP in Reapportionment Fight, L.A. Times, Nov. 18, 1971, part I, at 1, col. 5.

²⁹⁴ Alatorre Deposition Transcript at 73.

²⁹⁵ Shumate Deposition Transcript at 30.

²⁹⁶ Id. at 27, 47.

²⁹⁷ Id. at 136.

acknowledged that what Dana wanted out of reapportionment was "a district that he could win," and that he did not flesh out a proposal that would have added Hispanics to Schabarum's district primarily because, "... it would have done political harm to Supervisor Schabarum . . . eventually he would have faced a viable Hispanic" ²⁹⁸

In 1983, Smith, Hoffenblum, and Shumate were to collaborate again on the radical Sebastiani Initiative, Smith as state chairman, Hoffenblum as media coordinator, and Shumate as principal line-drawer. ²⁹⁹ This plan, drawn at the Rose Institute, was opposed by many leaders of both political parties and virtually all African-American and Hispanic activists. The Sebastiani (or Shumate) Plan cut the number of Assembly districts that were 35% or more Hispanic in population from seven to four. It switched the residences of Assemblyman Alatorre and then newly-elected State Senator Art Torres, as well as that of Assembly Speaker Willie Brown, into new districts with much lower percentages of minorities than in their current districts, Torres's district, for example, becoming 21% Hispanic, instead of 71%. In San Diego and San Bernardino counties, it sliced up existing minority concentrations in the districts of incumbent Latinos Peter Chacon and Reuben Ayala. At the congressional level, the scheme destroyed Edward Roybal's district and threw him into a new, 16% Hispanic district against six-term incumbent Anglo Republican Carlos Moorhead, merged the districts of freshmen Marty Martinez and Esteban Torres and created a new, population majority Latino district in southern Los Angeles County that included the heavily conservative city of Downey. Two congressional seats then held by blacks in Los Angeles county were merged with two Westside seats that contained Anglo Democratic incumbents, at the least forcing painful black-Jewish conflicts, and at the most causing blacks to lose seats. Throughout the state, blacks were packed into fewer and fewer seats. Both MALDEF and black leaders joined a successful suit in the state supreme court to keep the Sebastiani-Smith-Shumate-Hoffenblum Initiative off the ballot. ³⁰⁰

These were the most aggressive members of the 1981 Boundary Commission, then: Ron Smith, fresh from ending the political career of the only member of a racial minority group to sit on the Board of Supervisors in a century, and Allan Hoffenblum, who still vividly

²⁹⁸ Id. at 158, 219-20.

²⁹⁹ Hoffenblum Deposition Transcript at 423-27.

³⁰⁰ L.A. Times, July 7, 1983, part I, at 1, col. 2; L.A. Times, July 10, 1983, part I, at 1, col. 4; L.A. Times, Aug. 27, 1983, part I, at 25, col. 4; Huerta, Sebastiani Plan: A Slip of Latino's, L.A. Times, Sept. 13, 1983, part II, at 5, col. 3.

remembered the first campaign that he had been "responsible" for, one that employed questionable means to choke off, temporarily at least, an opportunity to elect a second Hispanic Assemblyman from Los Angeles County.³⁰¹ Their private technician was a practical line-drawer who in the 1970s, and again in 1983 designed or helped to design districts throughout the state that used every device to minimize the power of ethnic minorities. Asked why he favored creating a "Latino district" on the Board in 1981, Hoffenblum responded: "I've always believed in civil rights . . . and I truly believe that people should have the right to elect their own and not be gerrymandered out of that right."³⁰²

At the Boundary Commission's first public meeting, Hispanic activists attacked the body because it contained no members of minority groups. "Our interests are not served without a Hispanic on this committee," announced Miguel Garcia, state chairperson of Californios for Fair Representation.³⁰³ At the next day's Board meeting, Edelman moved to double the size of the Commission in order to "allow . . . for greater opportunities for us to appoint people from the minority communities—the black, the Chicano, the Asian, and other communities—in Los Angeles County."³⁰⁴ The motion passed without recorded debate. Although the Californios group submitted lists of names from which they hoped the supervisors would pick the additional Commission members,³⁰⁵ the supervisors ignored them, choosing either insiders loyal to them or outsiders who were treated as utterly irrelevant to the redistricting process.

The best known of the five in county government circles was Robert Perkins, an African-American who had successively been chief deputy to supervisors Hayes, Burke, and Dana. Perkins could be relied on. "[T]he only way I survived three supervisors," he later noted, was to "keep my personal views out of the office . . . I sat on the [Boundary Commission] as a minority and certainly I represented my office's position, not my personal position." From his experience, he concluded that "if you expect to have boundaries drawn where all of the groups are going to be really considered, then you need an independent board

³⁰¹ L.A. Times, June 7, 1990, at B1, col. 2. See also section VI.

³⁰² Hoffenblum Deposition Transcript at 277.

³⁰³ City News Service Report, July 9, 1981, Bates #100279. On the Californios group, see *supra* section IV.E.

³⁰⁴ Transcript of the Los Angeles County Board of Supervisors Meeting, July 9, 1981, at 3 (statement of Supervisor Edelman) (available from the author).

³⁰⁵ Perkins Deposition Transcript at 155-57.

rather than a board that's appointed by the Board of Supervisors."³⁰⁶ Perkins's was the only one of the five names of minority Boundary Commission members that Ron Smith, nominally Perkins's subordinate in Dana's office, could recognize in 1989.³⁰⁷

Hahn appointed a retired deputy who had served him for twenty-five years, Davis Lear, a black, while Edelman selected his former deputy Jesus Melendez. During the Boundary Commission process, Melendez reportedly avoided talking to representatives of Californios.³⁰⁸ Both of these veterans apparently played roles that paralleled Perkins's on the Commission, although neither in 1989 remembered any details about the 1981 redistricting at all.³⁰⁹

Antonovich tapped Frederico Quevedo, a medical doctor of Filipino origin who had first met the Supervisor when he treated Antonovich's mother for an illness in 1978.³¹⁰ As Quevedo remembers it, he never met with or received any communications from Antonovich or anyone from his office before or during his service on the Commission, was never consulted on the preparation of any proposal or shown any plan prior to its formal submission to the full body, skipped the final meeting in which the only vote on any plan was taken to attend an annual convention of Filipino doctors, and was never told what the Boundary Commission ultimately decided to do.³¹¹ Like Quevedo, Lauro Neri, a politically inexperienced Hispanic printer who knew the supervisor who appointed him, Pete Schabarum, because they belonged to the same horseback riding club, did not recall either being instructed or consulted by anyone connected with his supervisor.³¹² Allan Hoffenblum, Antonovich's first appointee to the Commission, remembered Quevedo only as "an elderly gentleman, but I don't recall specifically who he was . . . Chinese or Filipino or someone such as that The commission was ten, but it was the five doing most of the negotiating" ³¹³ Although Neri claimed in 1989 that he was "in and out of his [Schabarum's] office a great deal," Schabarum at the same time denied that he recognized Neri's name.³¹⁴

³⁰⁶ Perkins Deposition Transcript at 74, 67-68.

³⁰⁷ Smith Deposition Transcript at 200-01.

³⁰⁸ Quezada Deposition Transcript at 71.

³⁰⁹ Lear Deposition Transcript; Melendez Deposition Transcript.

³¹⁰ Quevedo Deposition Transcript at 21.

³¹¹ *Id.* at 23, 25-27, 51-53, 80-81, 91-92, 137.

³¹² Neri Deposition Transcript at 10-11, 15-16, 47, 59-60, 85-87.

³¹³ Hoffenblum Deposition Transcript at 329.

³¹⁴ Neri Deposition transcript at 60; Schabarum Deposition Transcript at 211.

Two county staff members from the Office of the Board of Supervisors, Richard Schoeni and Deborah Turner, facilitated the redistricting process and played larger roles in the ultimate outcome than any of the Boundary Commission members. As assistant executive officer of the Board, Schoeni served as secretary to the Boundary Commissions of both 1971 and 1981. In 1971, he had consulted the chief deputies of all the supervisors, learned which areas each supervisor wanted to gain or lose, and, on the basis of those consultations, had actually drafted the plan formally proposed by the Boundary Commission.³¹⁵ In 1981, at least up to the time that the Boundary Commission issued its report, he did not perform a similar middleman role. "There was not as much informal interaction between myself and the chief deputies in 1981 . . . there was just a lot less interaction between myself and any of the offices."³¹⁶ As for the commissioners, they rejected his office's offer of assistance, relying, instead, on the Rose Institute.³¹⁷ Nor did he, as he remembers it, draw up a plan to serve as the basis for a settlement in the weeks between the report of the Boundary Commission and the final action by the Board.³¹⁸ Nonetheless, on the last day, it was Schoeni, not Smith or Hoffenblum, who was present helping to provide staff assistance to the supervisors' final negotiations.³¹⁹

Schoeni did earlier oversee the development of five or more plans, at least four of which, known as Plans A, B, C, and D, were presented to, but ignored by the Boundary Commission.³²⁰ These were actually drawn by Deborah Turner, an assistant in the Executive Office, who had neither previous redistricting experience nor a record of political activity. Working on her own with only an adding machine, maps, and aggregate population data for well-established communities within the city of Los Angeles and for smaller cities throughout the county, Turner equalized the populations of the supervisorial districts, making only slight changes in the boundaries.³²¹ She then had the Regional Plan-

³¹⁵ Schoeni Deposition Transcript at 8-12, 36-41, 303-04.

³¹⁶ *Id.* at 82-83.

³¹⁷ *Id.* at 107.

³¹⁸ Jeff Seymour remembers seeing plans newly drawn by the Executive Office of the Board after the report of the Boundary Commission, but before the Board's final vote. Seymour Deposition Transcript at 524, 536.

³¹⁹ Schoeni Deposition Transcript at 395.

³²⁰ Hoffenblum Deposition Transcript at 179. There was also a plan E and at least a map of a plan G (which implies the existence of a plan F, as well), but no precise records of these seem to have survived. See Turner Deposition Transcript at 114-15; Perkins Deposition Transcript at 140.

³²¹ Turner Deposition Transcript at 41, 102-04, 106-09, 111-12, 116; Boundary Commission Final Report, Bates #001210-001221, at 001215-001217.

ning and Data Processing Departments compute ethnic percentages for each of her plans.³²² Denying that she took into account either the political or ethnic consequences of the plans that she drew—and she apparently lacked information on either—Turner seems to have performed as an efficient, nonpartisan clerk. Her actions prove that minor redistricting activity can be a mere clerical task.³²³

E. Californios for Fair Representation

In 1971, Hispanics were not well organized to take part in redistricting, and activists emerged from the process frustrated and angry. At hearings of the California State Advisory Committee to the U.S. Commission on Civil Rights, two Hispanic professors, David Lopez-Lee and Henry Pacheco, presented maps of Los Angeles County showing that East Los Angeles was sliced into several Assembly districts. But they had to rely on the Assembly for statistics, they did not have the resources to draw districts themselves, and they had no data for areas outside East Los Angeles.³²⁴ Even more important, there was no powerful Latino inside the process, since there were only two Hispanic Assemblymen, neither of whom was on the Assembly Reapportionment Committee, and no Hispanic State Senator.³²⁵ Traipse the legislative halls in Sacramento as they might, activists could get no firm commitments for new Hispanic seats, they said. Students yelling “Chicano Power” picketed and milled around, while elder statesmen such as Abe Tapia and Bert Corona, of the Mexican American Political Association, and Richard Calderon, who had been narrowly defeated for Congress in 1970, threatened a massive defection to the *La Raza Unida* party. “The two-party system has failed the Mexican,” Tapia announced. “We don’t need it. We don’t want it.”³²⁶

Although the four additional Hispanics who were elected to the Assembly and State Senate during the decade probably lifted the spirits of Hispanic reformers, and although Hispanic politicians, especially Assembly Reapportionment Committee Chairman Richard Alatorre, were certainly in a much better position to influence the redistricting process in the legislature in the 1980s than in the 1970s, those who took part in the earlier remapping did not want 1981 to be a rerun of 1971. And they were not alone. Despite Governor Ronald Reagan’s

³²² Turner Deposition Transcript at 130-31, 136.

³²³ Id. at 246-48, 260-61.

³²⁴ Advisory Committee, Political Participation, *supra* note 37, at 25.

³²⁵ Id. at 26.

³²⁶ Id. at 49. See also *id.* at 30-33.

veto of the Democratic reapportionment plan in the early 1970s, the Republican Party did not prosper under the lines drawn by court-appointed special masters. In 1979, Democrats enjoyed majorities of 50-30 in the Assembly, 26-14 in the Senate, and 27-16 in Congress. Even the 1980 Reagan landslide could not entirely wipe out Democratic dominance, though it did reduce it to 47-33 in the Assembly, 23-17 in the Senate, and 22-21 in the national House of Representatives.³²⁷ Since Democrats would control the data and the computers in the 1981 state legislature, Republicans had to launch a private effort if they wished to compete equally in private negotiations and the battle for public opinion. Because, as they often acknowledged,³²⁸ Republicans stood to gain if more members of Democratic-oriented minority groups were packed into fewer seats, the Republicans might strengthen potential allies in the statewide reapportionment if Hispanics were better organized for redistricting, and especially if they had access to easily manipulable machine-readable files.

On November 16, 1979, and again on January 31, 1981, the Rose Institute sponsored conferences on "Hispanics and California Redistricting."³²⁹ Although part of Claremont McKenna College, Rose was not a typical academic entity, and these were not the usual scholarly conferences. Lacking an endowment, dependent on a constant stream of grants and contracts,³³⁰ Rose was firmly linked to the Republican Party. Director Alan Heslop was not the only one of the three principal officers of Rose with close ties to the Republican Party. Heslop's "alter ego," Thomas Hofeller, had worked with Heslop, Smith, Shumate, and others on the Republican reapportionment effort in the 1970s and was soon to become director of the Redistricting Department of the Republican National Committee in Washington, and chief fundraiser Dixon Arnett was a former Republican Assemblyman.³³¹ The money that made the Rose REDIS software package possible and that funded the

³²⁷ L.A. Times, Nov. 9, 1978, part I, at 19, col. 2; L.A. Times, Nov. 6, 1980, part I, at 3, col. 2.

³²⁸ As Professor Heslop of the Rose Institute told an August, 1981 hearing of the California Advisory Committee to the U.S. Civil Rights Commission: "This is how Republicans deal with minorities. They put them in as few districts as possible so they can waste their votes." See Report of the California Committee to the U.S. Civil Rights Commission, *Access to Political Representation: Legislative Reapportionment in California 8* (1982) (available from the author). See also Johnson, Symposium: Reapportionment, 6 *Chicano L. Rev.* 34, 60 (1983).

³²⁹ See Navarro & Santillan, *The Latino Community and California Redistricting in the 1980s: Californios for Fair Representation*, in R. Santillan, *supra* note 42, vol. II, at 53-55.

³³⁰ Heslop Deposition Transcript at 270.

³³¹ Heslop Deposition Transcript at 277-79, 360-62; Hofeller Deposition Transcript at 5-8; Shumate Deposition Transcript at 365.

"Hispanic Reapportionment Project" at Rose came from the Republican-oriented California Business Roundtable, and its computer was donated by former Nixon cabinet member David Packard.³³²

The Rose conferences attracted not the usual set of Ph.D.'s, but groups of fifty and 150 Latino politicians and activists, respectively, from around the state. At a February 7 follow-up conference at California State University at Los Angeles, goals were discussed and the name "Californios for Fair Representation" was chosen.³³³ Although the acronyms and three of the four words in the names of the 1971 and 1981 organizations were the same, the change in the first word, from "Chicanos" to "Californios" is instructive. Despite the fact that non-Hispanic members played important roles in the group in 1971, it called itself "Chicano," a truncated form of *Mexicano* with overtones of radicalism and ethnic nationalism.³³⁴ By contrast, "Californios," a reference to the pre-1850 Mexican-American inhabitants and their descendants,³³⁵ exuded tradition and integration into the larger society. In 1981, however, the umbrella organization (hereinafter referred to as CFR) was simply a coalition of representatives of a number of Latino groups.³³⁶

Shortly after the 1979 conference, Rose had hired Dr. Richard Santillan of the California Polytechnic University at Pomona as director of the Roundtable-funded "Latino Redistricting Project," to help map strategy, draw districts, and serve as a spokesperson for Hispanics on reapportionment issues, as well as to facilitate the free use of its computer by CFR members—during off hours late at night.³³⁷ Holder of a Ph.D. in Political Science from Claremont Graduate School, Santillan was typical of the young professionals who led the 1981 CFR, leaders who combined ethnic activism with a demonstrated ability to work within the larger, socially pluralistic system. Of those who were most active in redistricting the County Board of Supervisors, for instance, Steve Uranga was a job training analyst with the county and an active member of the Chicano Employees' Association, while Leticia Quezada was a community relations manager for Carnation Company and a participant in numerous Latino organizations. Both had college degrees.³³⁸

³³² L.A. Times, Feb. 1, 1981, part II, at 4, col. 3; Heslop Deposition Transcript at 178.

³³³ L.A. Times, Feb. 1, 1981, part II, at 4, col. 3; Navarro & Santillan, supra note 329, at 53-55.

³³⁴ M. Meier & F. Rivera, *The Chicanos: A History of Mexican Americans* viii (1972).

³³⁵ Id.

³³⁶ Quezada Deposition Transcript at 128-30.

³³⁷ Santillan Deposition Transcript at 17-24; Huerta Deposition Transcript at 38.

³³⁸ Uranga Deposition Transcript at 9-27; Quezada Deposition Transcript at 6-18.

While willing to use Rose's resources, CFR members were very conscious of wanting to maintain their political independence. Santillan, for instance, was so concerned that Rose's well-known Republican identity would compromise his position that he agreed to take on the job, he said a decade later, only on the condition that no other Rose employee would have any "involvement at all with the [Latino redistricting] project."³³⁹ More interested in results than in posturing,³⁴⁰ as the substitution of "Californios" for "Chicanos" symbolized, the CFR people were willing to compromise and negotiate. Activists, but not political insiders,³⁴¹ they felt no need to protect any specific officeholder or party, and they retained the idealism, naivete,³⁴² and capacity for anger³⁴³ that elected office so often dulls. Lacking real political power, the CFR leaders clearly realized that they had to organize in the Hispanic community, and, above all, that, whatever their tactical disagreements in private, they had to speak with one voice in public.³⁴⁴

Undoubtedly recognizing CFR's sensitivity, the Republicans in the Rose leadership avoided heavy-handed pressure on the group.³⁴⁵ But whereas, at the state level, the drives for more Republican seats and more Latino seats were complementary,³⁴⁶ because Democrats con-

³³⁹ Santillan Deposition Transcript at 31-32.

³⁴⁰ After Assembly Speaker Willie Brown made some impolitic remarks about the unwillingness of the legislative leadership to disadvantage incumbents in order to draw minority seats, CFR did hold a sit-in at his office and rejected an offer to meet with Brown. *L.A. Times*, Apr. 30, 1981, part I, at 3, col. 5; Navarro & Santillan, *supra* note 329, at 62. But both sides shortly cooled down and retired to their respective computers.

³⁴¹ Gloria Molina, now a member of the Los Angeles County Board of Supervisors, was in 1981 a Southern California representative of Assembly Speaker Willie Brown, as well as a CFR activist, but she worked on the county rather than the state reapportionment, where her connections might have compromised her with one side or the other. Molina Deposition Transcript at 7-8, 14.

³⁴² Huerta Deposition Transcript at 58-59.

³⁴³ See Leaflet from Californios for Fair Representation, Open Letter to Residents of Los Angeles County, Sept. 1981, Bates #110351-110352.

³⁴⁴ Santillan Deposition Transcript at 66-67.

³⁴⁵ While CFR leaders remember pressure from Smith and Hoffenblum—see, e.g., Quezada Deposition Transcript at 48-50, 60—they mention none from Heslop or other Rose people, and Heslop denies having anything to do with county redistricting. See Heslop Deposition Transcript at 208-11.

³⁴⁶ Largely on the basis of a sequence of educated guesses, Carlos Navarro, a graduate student working under Heslop's direction and at the same time a key member of CFR's redistricting effort, estimated that for an open seat in the legislature to be safe for a Hispanic, it had to be, on average, 72.6% Democratic. After winning the nomination, he expected the Latino Democrat to beat a Republican by 58-42. Navarro, A Report on California Redistricting and Representation for the Los Angeles Chicano Community, in R. Santillan, *supra* note 42, vol. I, at 148-52; Heslop Deposition Transcript at 179. Such a "waste" of Democratic votes, which was not necessary to elect Hispanic legislators in open seat, partisan contests, would have filled Republicans with glee. See *infra* section I.C.

trolled the legislature, at the county level in Los Angeles, the interests of the controlling Republicans were potentially in conflict with those of CFR. In Sacramento, criticism of the procedures and plans of the State Senate and Assembly leadership and of the reapportionment committees was ipso facto criticism of Democrats. In Los Angeles, it was, first of all, criticism of Republicans. Unless Hoffenblum's and Smith's public and private pressure on CFR to concentrate all their attention at the districts of the incumbent Democrats succeeded,³⁴⁷ the Republicans would regret that CFR members had ever been given access to Rose's Hewlett-Packard computer.

F. The CFR, Smith, and Hoffenblum Plans

The five-person Boundary Commission first met on July 8, 1981, and the minority-augmented Commission, a week later. At the initial meeting, secretary Richard Schoeni emphasized the four-vote requirement and the fact that if the Board of Supervisors did not act by November 1, the decision would be turned over to the District Attorney, Assessor, and Sheriff.³⁴⁸ As anyone who followed politics at the time knew, two of these three officials, John Van De Kamp and Alexander Pope, were liberal Democrats, while, as insiders recognized, the third, Republican Peter Pitchess, was carrying on a nasty feud with Supervisor Schabarum.³⁴⁹ These two provisions gave the Democrats a veto power that they fully realized, and perhaps even provided them the upper hand. As Hahn appointee Robert Bush remarked to a reporter at the meeting, "We are not going to have a situation where three members decide the boundaries and shove them down the throats of the other two."³⁵⁰

The Commission's first meeting also demonstrated how anxious the Commissioners were to make meaningless gestures of concern for the ethnic consequences of redistricting. Bush moved to recommend to the Board its expansion to seven members, a proposal that he had

³⁴⁷ Leticia Quezada saw the effort of Hoffenblum and Smith as a partisan attempt to strengthen the Republican supervisors' seats. See Quezada Deposition Transcript at 48-50, 60. Smith and Hoffenblum put a slightly different "spin" on these same events, but if one allows for different biases, their versions confirm Quezada's. See Smith Deposition Transcript at 46; Hoffenblum Deposition Transcript at 70-71, 92.

³⁴⁸ Handwritten notes of George Marr on Agenda for Boundary Commission, July 8, 1981, Bates #100884 [hereinafter Marr notes].

³⁴⁹ Seymour Deposition Transcript at 400-02; Edelman Deposition Transcript at 322-27; Schabarum Deposition Transcript at 341-42; Hoffenblum Deposition Transcript at 369.

³⁵⁰ Torrance Daily Breeze, July 10, 1981, at A3, col. 1; see also Bush Deposition Transcript at 86-87.

helped Hahn push during the 1970s in order to make it easier to elect ethnic minority members to the body.³⁵¹ Opposed by the Republicans on the Board, as it had been during the 1970s, and continued to be through the 1980s, Bush's suggestion was not seriously considered.³⁵² Even more empty rhetoric was Ron Smith's call at that meeting for "a redistricting plan that provided fair representation for the minorities in Los Angeles County," for it furnished no realistically practicable means whatever of accomplishing that objective.³⁵³ The Commission also asked Deputy County Counsel Edward G. Pozorski to "investigate case law regarding ethnicity as a basis for redistricting to ensure the legality of the final plan," but if he did so, he never filed a written report on the matter.³⁵⁴ At its next meeting, the Commission adopted as its ninth and last guideline a goal of establishing a "fair distribution of ethnic groups," but left "fair" conveniently undefined.³⁵⁵

The public Commission meetings were a sham. As Antonovich's minority member Dr. Frederic Quevedo bleated, a month into the process, "I've been coming to these meetings for four weeks and there has only been one incident where someone has said anything about redistricting. I'm a little disturbed that everyone is just laying back. We should be determining what is acceptable to the supervisors we represent by being on the committee."³⁵⁶ Actually, although neither Quevedo nor any of the other minority Commissioners seems to have been apprised of the fact, negotiations were taking place in private between Smith, Bush, and Fitch.³⁵⁷ The negotiators disregarded the staff-devised plans,³⁵⁸ as well as that presented by CFR at a public Boundary Commission meeting on July 29. CFR's plan, its presentation, and its reception is nonetheless interesting for what they revealed about the tactics and motives of the participants in the 1981 process.

As early as February 2, 1981, even before the group had taken on the name "Californios," MALDEF attorney John Huerta proposed a time-

³⁵¹ Marr notes, *supra* note 348; see also Bush Deposition Transcript at 19.

³⁵² Bush Deposition Transcript at 31. Before the Board rejected Hahn's proposal in 1988, he stressed that "at least one of the new districts could contain a majority of Latino voters." L.A. Times, July 27, 1988, part II, at 4, col. 4.

³⁵³ Final Report of the Supervisorial District Boundary Committee, Bates #100191.

³⁵⁴ Minutes of Supervisorial District Boundary Committee, July 8, 1981, Bates #110510; Pozorski Deposition Transcript at 60-61.

³⁵⁵ Minutes of Supervisorial District Boundary Committee, July 8, 1981, Bates #100245. See also Memorandum from R. Schoeni, Ass't Exec. Officer of the Board of Supervisors County of Los Angeles, July 14, 1981, Bates #100351.

³⁵⁶ L.A. Daily News, Aug. 6, 1981, § I, at 8.

³⁵⁷ Hoffenblum Deposition Transcript at 69-70, 159, 177-79, 186.

³⁵⁸ *Id.* at 179.

table and a set of goals for the organization: "The primary goal is to maximize Hispanic voter influence," Huerta announced. "[A] secondary goal is to increase the number of Hispanic elected officials."³⁵⁹ Keenly aware of the 3-2 Republican majority on the Board and the four-vote rule for adoption of boundaries, CFR decided that to offer a plan with an overwhelmingly Hispanic district would be futile.³⁶⁰ As Professor Richard Santillan put it, CFR realized that the supervisors "are not going to do anything that is going to jeopardize their incumbency."³⁶¹ Consequently, even though some CFR members believed that the group should draw two seats with Hispanic population majorities of approximately 65% and 52%, they finally agreed that because the supervisors would find such percentages "very, very threatening," they would compromise. Accordingly, their plan set the Hispanic population percentages at 50% in District 3 and 42% in District 1, with the vague hope that "we could maybe get someone elected by the end of the decade."³⁶² But while CFR "thought that by not taking a radical approach but just being very reasonable and practical and trying to incrementally improve over the existing fragmentation that there was, that we could sell that plan to this Board of Supervisors," in fact, they could not.³⁶³ "You're talking about messing around with five kings and the way they draw their lines to keep themselves in power," John Huerta reflected later.³⁶⁴

CFR's public and private positions were closer to each other than those of the other participants in the process.³⁶⁵ Testifying before the Boundary Commission, Huerta declared that Hispanics had little political power in Los Angeles County government because of

prior gerrymandering, our demographic profile and economic circumstances. When one's vote is diluted, as it has been in years past, there is less of an incentive to run for office, to vote and to conduct voter education and registration drives. Once this initially happens, it creates a vicious circle that is difficult to

³⁵⁹ Memo from Huerta to "Members of Hispanic Coalition for Fair Representation," Feb. 2, 1981, Bates #1305.

³⁶⁰ Quezada Deposition Transcript at 31-32; Uranga Deposition Transcript at 35-36.

³⁶¹ Santillan Deposition Transcript at 61.

³⁶² *Id.* at 62-63. "Had the protection of incumbents not been such a realistic and primary consideration," Garcia, the state chair of CFR noted, "our plan would have been with greater population numbers of Hispanics in both Mr. Schabarum's and Mr. Edelman's districts." Garcia Deposition Transcript at 58.

³⁶³ Huerta Deposition Transcript at 46. Cf. Quezada Deposition Transcript at 115-16.

³⁶⁴ Huerta Deposition Transcript at 58-59.

³⁶⁵ Compare statements by Santillan and Quezada in *L.A. Times*, Aug. 4, 1981, part II, at 1, col. 1 with Santillan Deposition Transcript at 62-63, and Quezada Deposition Transcript at 31-32.

break out of We are asking you to do this [i.e., adopt the CFR plan] without displacing incumbent supervisors. We are not seeking ethnic or racial representation. We are seeking political influence. We want the ability to elect supervisors and to have political influence with them.³⁶⁶

No other Hispanic group or any Hispanics who were not part of CFR were mentioned in the Boundary Commission minutes or in newspaper reports of its meetings. No independent evidence whatsoever confirms the claims of Hoffenblum and Kathleen Crow, Antonovich's chief deputy, that the Hispanic community was "severely split" in public over whether to concentrate Hispanics in Edelman's district or to increase the percentage in Schabarum's, as well.³⁶⁷

CFR decided early on to disrupt Hahn's Second District as little as possible and to cooperate with any black leaders who took part in the process.³⁶⁸ Unlike Hispanics, blacks, except for elected officials, seem to have paid almost no attention to reapportionment in 1981.³⁶⁹ Until Robert Perkins, Dana's chief deputy and minority Boundary Commissioner, got his old friend William Marshall in touch with CFR, there seems to have been no outside participation by blacks in the county redistricting.³⁷⁰ Marshall and a couple of black friends spent a day at Rose with CFR, caucused together in a corner of the room, and came up with a plan to move Compton and northern Long Beach into the Second District in order to increase the likelihood of electing a black supervisor there if Hahn should retire sometime in the future.³⁷¹ CFR acceded, moving these areas from Dana's Fourth District to the Second, and Marshall testified in favor of the CFR plan before the Boundary Commission.³⁷² On the other hand, Compton officials, as well as some people in Marshall's own group, opposed the move, believing that if they remained in Dana's district, they might be able to influence his vote on some measures of health and welfare, and that they might get a bigger share of construction and other funds that had traditionally been disbursed equally to each district, according to the "divide by five"

³⁶⁶ Huerta Statement to Boundary Commission, July 29, 1981, Bates #100222-100234, at 100228-100229.

³⁶⁷ Hoffenblum Deposition Transcript at 94-99; Crow Deposition Transcript at 214.

³⁶⁸ Santillan Deposition Transcript at 59-61.

³⁶⁹ With Willie Brown as Speaker of the Assembly and Tom Bradley as Mayor of Los Angeles, and with Kenneth Hahn of the Board of Supervisors being impregnable, blacks could well assume that any activism on their part would be superfluous.

³⁷⁰ Perkins Deposition Transcript at 56; see Marshall Deposition Transcript at 38.

³⁷¹ Marshall Deposition Transcript at 42-69, 75-76.

³⁷² L.A. Daily News, July 30, 1981, § I, at 4; Quezada Deposition Transcript at 38; Uranga Deposition Transcript at 40-41.

principle.³⁷³ If they joined Hahn's district, which was already filled with poor minority communities like theirs, competition for discretionary funds would become even more intense, and the likelihood of cutbacks in government services, they feared, would grow. Or, as Hahn put it, more picturesquely, "Compton is the only thing that keeps Deane Dana from trampling over the poor."³⁷⁴

What Smith and Hoffenblum objected to about the CFR plan was not its effect on Edelman's Third District, for the Hispanic population percentage in the Third District in what became known as the Smith and Hoffenblum plans was the same, 50%, as it was in the CFR plan. Their real objection, as both directly or indirectly stated, was that CFR's map raised the Hispanic population percentage in Schabarum's district from 36% to 42%. CFR's design, said Hoffenblum, represented an attempt "to make the First District hard for Schabarum to hold on to."³⁷⁵ Smith elaborated: "What they [CFR] were interested in doing, very clearly, was overturning the results of the 1980 election [i.e., the shift from a 4-1 Democratic to a 3-2 Republican Board], and that was their only interest I mean their whole testimony was, 'you should draw the lines so that a majority of the districts are represented by Democrats.'"³⁷⁶ The only logic in their plan, Smith concluded, "was it would change the political configuration of the county, not change the . . . ethnic representation."³⁷⁷ He had "horrible confrontations" with CFR over the matter, he remembered.³⁷⁸

The goals of Hoffenblum and Smith were, Hoffenblum admitted, very different from those of the Hispanic group: "We wanted to create a Latino district without changing the philosophical makeup of the [B]oard We wanted it to remain predominantly conservative We thought there was a need for an ethnic change. We did not think there was a need for a philosophical change."³⁷⁹ The Republicans could not have disliked the changes in the Fourth and Fifth Districts, since the gains and losses that they sketched out for them, shown in Tables 8 and 9, only added Republican strength. Antonovich would give up increasingly Hispanic San Gabriel, Alhambra, and San Fer-

³⁷³ Gail Diane Cox, *County Faces Deadline in Redistricting Fight*, L.A. Daily Journal, Sept. 24, 1981, part II, at 1, col. 6.

³⁷⁴ Quoted in Pasadena Star-News, Sept. 25, 1981, at A3, col. 3.

³⁷⁵ L.A. Times, Aug. 4, 1981, part II, at 1, col. 1 (quoting Hoffenblum).

³⁷⁶ Smith Deposition Transcript at 102-04.

³⁷⁷ Id. at 223.

³⁷⁸ Id. at 227. Cf. Quezada Deposition Transcript at 60.

³⁷⁹ Hoffenblum Deposition Transcript at 70-71. Cf. Quezada Deposition Transcript at 48-50.

TABLE 8 (CONTINUED)

<i>District</i>	<i>Smith</i>	<i>Hoffenblum</i>	<i>CFR</i>
		Santa Monica Mountains*	—
5.	Malibu	—	—
	Pacific Palisades*	—	—
	Los Feliz*	Los Feliz*	—
	Van Nuys (part)*	—	—
	Sherman Oaks (part)*	—	—
		Sun Valley*	—
		Mission Hills*	—
		Sepulveda*	—
		Eagle Rock*	—
		Atwater*	—
			Arcadia
			Bradbury
			Claremont
			Glendora
			La Verne
			Monrovia
			San Dimas
			Temple City

* not a separate incorporated area.

TABLE 9: CITIES AND COMMUNITIES LOST UNDER THREE PLANS

<i>District</i>	<i>Smith</i>	<i>Hoffenblum</i>	<i>CFR</i>
1.	Huntington Park	Huntington Park	Huntington Park
	Pico Rivera	Pico Rivera	—
	South Gate	South Gate	—
	Downey	—	—
	La Mirada	—	La Mirada
		Walnut Park*	—
			Arcadia
			Bradbury
			Claremont
			Glendora
			La Verne
			Monrovia
			San Dimas
			Temple City
2.	Culver City	Culver City	—
	Lynwood	—	—
	Westchester (part)*	Westchester (part)*	—
		Hawthorne	—
		Lawndale	—
		Mar Vista*	—
		Barnes City*	—
		Lennox*	—
		Alondra*	—
		Downtown*	—
		Westlake*	—
		Wholesale*	—
		Central*	—

TABLE 9 (CONTINUED)

<i>District</i>	<i>Smith</i>	<i>Hoffenblum</i>	<i>CFR</i>
		University*	—
		Santa Barbara*	—
			Pico Union*
3.	Monterey Park	—	Monterey Park
	Eagle Rock*	Eagle Rock*	—
	Los Feliz*	Los Feliz*	—
	Van Nuys (part)*	—	Van Nuys*
	Sherman Oaks (part)*	—	Sherman Oaks*
	—	Bel Air*	Bel Air*
	—	Park La Brea	—
	—	Hancock Park*	—
	—	Sun Valley*	—
	—	Mission Hills*	—
	—	Sepulveda*	Sepulveda*
	—	West Los Angeles* (part)	—
	—	Hollywood (part)*	—
	—	Atwater* (part)*	—
	—	Downtown (part)*	—
	—	Westlake (part)*	—
	—	Wholesale (part)*	—
	—	Central (part)*	—
	—	University (part)*	—
	—	Santa Barbara (part)*	—
	—	—	Arleta*
	—	—	Beverly Glen*
	—	—	Century City*
	—	—	Panorama City*
	—	—	Studio City*
	—	—	Montebello
4.	Santa Monica	—	—
	Compton	Compton	—
	Venice*	—	—
	Malibu	—	—
	Pacific Palisades*	—	—
	—	Artesia	—
	—	Bellflower	—
	—	Paramount	Paramount
	—	—	Carson (part)*
	—	—	Long Beach (part)*
	—	—	Unspecified Los Angeles (part)*
5.	San Gabriel	San Gabriel	San Gabriel
	Alhambra	—	Alhambra
	East San Gabriel*	East San Gabriel*	—
	—	San Fernando	San Fernando
	—	Pacoima	—
	—	Westlake Village*	—
	—	Agoura*	—
	—	Calabasas*	—
	—	Santa Monica Mountains	—
	—	—	Unspecified Los Angeles (part)*

* not a separate incorporated area.

Edelman and his aides could not afford to gloat over the Republicans' discomfort, for the CFR plan raised Edelman's Hispanic population percentage from 42% to 50%. Although Edelman and Jeff Seymour thought that the Supervisor could be reelected in 1982 easily in a district that had a slight Hispanic population majority, Edelman agreed with the suggestion that, eventually, he might have difficulty carrying such a district.³⁸⁰ More troublesome to Edelman was that the CFR plan stripped him of many of the Westside areas that he had represented since his election to the Los Angeles City Council in 1965.³⁸¹ "That area is the heart of the Jewish community," Seymour emphasized.³⁸² Edelman had been working on programs there for fifteen years, and did not wish to deplete all that political capital.³⁸³ Although Seymour and Edelman deny that they opposed the CFR and similar plans partly because they removed Edelman's fundraising base from his district, the Los Angeles Times reported that that was another consideration in the Edelman camp.³⁸⁴ In any case, Edelman never had to take a public stance on the CFR plan, for, as Seymour noted, Hoffenblum and other Republicans were so infuriated by it that it never came to a vote.³⁸⁵ Instead, Seymour and Edelman could meet with CFR representatives, smile sweetly, make no offer to negotiate, and go about their more serious business. Edelman shared Seymour's concern that the CFR plan robbed him of much of his home base, but neither ever conveyed their feelings to CFR, as they would have had to if they had even made a feint at considering the plan seriously.³⁸⁶

Although a contemporary news report indicated that the redistricters looked at "two dozen" plans altogether,³⁸⁷ fairly precise descriptions of but eight of them have survived, only three of which—the CFR, Smith, and Hoffenblum plans—made substantial changes in the 1971 lines.³⁸⁸ Smith and Hoffenblum left the details about the tentative reshufflings that took place as a result of negotiations to Shumate and the Rose

³⁸⁰ Seymour Deposition Transcript at 630-31; Edelman Deposition Transcript at 240-45.

³⁸¹ See Memorandum from Seymour to Edelman, July 24, 1981, Bates #170244-170245; Edelman Deposition Transcript at 315-19.

³⁸² Seymour Deposition Transcript at 627.

³⁸³ *Id.* at 625-28.

³⁸⁴ *Id.* at 642; L.A. Times, Aug. 4, 1981, part II, at 1, col. 1.

³⁸⁵ Seymour to Edelman memo, *supra* note 381; see also Edelman Deposition Transcript at 315.

³⁸⁶ See Seymour Deposition Transcript at 205-07, 644; Edelman Deposition Transcript at 209; Quezada Deposition Transcript at 85-86; Uranga Deposition Transcript at 61-63.

³⁸⁷ L.A. Daily News, Sept. 25, 1981, § I, at 18. See also Hoffenblum Deposition Transcript at 120.

³⁸⁸ The minimal change plans were staff plans A, B, C, and D, and the final plan.

staff. To facilitate the work at Rose, everyone seems to have relied primarily on Henry Olsen, a Claremont undergraduate who knew how to operate the REDIS system, and who, according to Director Heslop, had developed an encyclopedic understanding of politics in Los Angeles county.³⁸⁹ Despite the fact that Hoffenblum remembered that Shumate concocted both the Smith and Hoffenblum plans, Shumate and Smith recalled that Shumate framed only one plan, the so-called Smith plan.³⁹⁰ And while Shumate declared that almost no real work was done at Rose, Smith had memories of numerous phone calls with Rose staffers in 1981.³⁹¹ Since, as Tables 8 and 9 demonstrate, the Hoffenblum plan was considerably more complex than the Smith plan, involving fifteen more unincorporated areas—clusters of census tracts that could be moved back and forth easily only on a computer—it is logical to assume that the orphan was conceived at Rose, perhaps in violation of a clause in its contract with the County that banned Rose employees from actually charting a reapportionment map for the county.³⁹²

As Table 10 demonstrates, the maximum Hispanic percentage in any district under either the Smith or Hoffenblum plans was 50.2%. The Republicans claimed to want to design a scheme that “maximized Hispanic representation.”³⁹³ Why did they not produce a district with a higher Latino percentage? Surely it was possible to do so, as plans drawn for the *Garza* case make clear. Moreover, other things being equal, the fewer predominantly Democratic Hispanics there were in the three Republican districts, the more secure the Republicans would be, and the effects on the political fortunes of Schabarum, Antonovich, and Dana were certainly important to Smith, Hoffenblum, and Shumate.

Another possibility is that the designers were concerned with arranging district lines that looked “pretty” on a map. But this was patently untrue. The Hoffenblum plan extended a finger of Edelman’s district

³⁸⁹ See Hoffenblum Deposition Transcript at 74-81, 153-54; Smith Deposition Transcript at 160; Heslop Deposition Transcript at 180, 186-87. Shumate denied paying Olsen, and said Olsen only performed clerical computer tasks under his supervision in 1981. Shumate Deposition Transcript at 38, 58, 275. Olsen later went to work for Hoffenblum, and played a role in the Sebastiani Initiative. Hoffenblum Deposition Transcript at 338-40.

³⁹⁰ See Hoffenblum Deposition Transcript at 110-11; Shumate Deposition Transcript at 217, 314, 323, 361; Smith Deposition Transcript at 150-52. Smith identified the “Shumate Plan” as being the same as the “Smith Plan.” *Id.* at 163.

³⁹¹ Shumate Deposition Transcript at 188, 225-27, 276, 289; Smith Deposition Transcript at 153, 157.

³⁹² Rose Institute Draft Contract, July 14, 1981, Bates #00178: “[N]o person under the employment of the Institute will participate in drafting and designing any plans for use by the [Boundary] Committee” According to Hoffenblum, “Rose Institute was drawing the plans” Hoffenblum Deposition Transcript at 338.

³⁹³ Smith Deposition Transcript at 168; Hoffenblum Deposition Transcript at 155.

TABLE 10: THE POTENTIAL INFLUENCE OF MINORITIES: PERCENTAGES OF EACH DISTRICT'S POPULATION COMPRISED OF AFRICAN-AMERICANS AND HISPANO-AMERICANS, 1971-81*

District	Year or Plan		1981		
	1971	1980	Smith	Hof.	Final
<i>Panel A: Hispanics</i>					
1	22.2	36.2	34.7	31.3	36.2
2	14.0	24.9	20.6	25.7	26.4
3	31.6	42.4	50.2	50.2	41.8
4	12.1	16.4	17.6	15.5	16.5
5	11.7	16.9	15.0	15.4	16.9
<i>Panel B: Blacks</i>					
1	1.7	3.1	3.7	3.3	3.1
2	40.5	44.7	46.7	46.2	42.9
3	1.4	2.8	4.6	3.4	2.6
4	7.0	9.7	5.2	5.4	9.7
5	3.6	5.0	3.1	4.8	5.0

* The figures in these columns represent the percentage of each district's population that is Hispanic or black. For instance, 22.2% of the First District's population was Spanish-surnamed in 1971, 14% of the Second's was, etc.

Sources:

1971: Report, March 1972, Regional Planning Dept., Bates #101669-101686.
1980 and 1981 Final: Memo from James Mize to Supervisors, Sept. 25, 1981, Bates #100182.

Note that the 1980 percentages are for the districts as drawn in 1981, not 1971.
1981 Smith and Hoffenblum Plans: Boundary Commission Final Report, Bates #1213-1215.

up to the Hispanic cities of San Fernando and Pacoima, and launched Dana over the Santa Monica Mountains, so that his district looked like a giant backwards "J". Smith broke up Dana's "beach cities" district by shifting Venice and Santa Monica to Hahn's, and repeatedly offered to transfer the Pepperdine University campus in Malibu from Antonovich to Hahn, a Pepperdine alumnus, which would have spread Hahn from the Long Beach border nearly to Ventura county.³⁹⁴ In fact, Los Angeles county supervisorial districts had never looked very tidy on a map. Most notorious was the "parrot's beak" in the First District, drawn to keep First District supervisor Frank Bonelli's home in his district,³⁹⁵ but this was by no means the only example. Under Debs and Edelman, the

³⁹⁴ Smith Deposition Transcript at 50; Hoffenblum Deposition Transcript at 151.

³⁹⁵ See Schoeni Deposition Transcript at 304-05.

western portion of the Third District flung a tentacle over the mountains, deeper and deeper into the San Fernando Valley in 1965 and 1971, obviously to encircle more Anglo voters.³⁹⁶ Aesthetic considerations were obviously unimportant.

What *was* important was politics. Since the populations of each district were legally required to be equal, stuffing more Hispanics into the Edelman seat meant transferring some of his liberal Anglos to Dana or Antonovich. Beverly Hills, Hollywood, Westwood, West Hollywood, and similar areas were hardly potentially fertile grounds for a doctrinaire conservative like Antonovich or a colorless novice like Dana, and neither was so politically secure that he could afford to add such territory. Not only was Beverly Hills more than two to one Democratic, its citizens were also the sorts of Democrats who did not defect from the party because of racial appeals. In 1982, Beverly Hills went for Tom Bradley for Governor over George Deukmejian by 62-37. Likewise, Bradley got 60% of the vote in Hollywood, 64% in Westwood, and 77% in West Hollywood. By contrast, two-thirds of the voters in Palos Verdes, Dana's home base, and Glendale, Antonovich's, rejected Bradley.

A closer look at the Smith and Hoffenblum plans, especially at Smith's, which both men avowed was the really "serious" plan,³⁹⁷ makes clear that it was the desire to strengthen the shaky Republican hold on the Board, not their professed concern for the "empowerment" of Hispanics or a "belief in civil rights" that explained the configurations. Although Smith later contended that "there were going to be two Democratic districts and three Republican districts no matter what,"³⁹⁸ in fact 64% of the two-party registration in the county in 1981 was Democratic, and there were plenty of possible configurations that could have changed the political, as well as the ethnic composition of the Board.

From a partisan political standpoint, one of the key features of both the Smith and Hoffenblum plans was the shift of overwhelmingly black Compton from Dana's to Hahn's district. The clumsiness of their rationalizations of the politics behind this move demonstrates the Republican Boundary Commissioners' sensitivity to the issue. Dana lost overwhelmingly black Compton to Burke in 1980 by a tally of 16,118 to 711. Protesting much too much to be credible, both Smith and Hoffen-

³⁹⁶ See *supra* section III.B.

³⁹⁷ Hoffenblum Deposition Transcript at 222. See Smith Deposition Transcript at 150-52, 185-86.

³⁹⁸ Smith Deposition Transcript at 95.

blum swore that Dana expressed reluctance not only to lose the 4.2% of the Compton citizens that supported him, but the other 95.8%, as well. According to Hoffenblum, Dana told him, "I got a lot of support in Compton and I would really be disappointed if I would have to lose the city of Compton."³⁹⁹ Smith chorused that Dana announced to him "that he would do very well in Compton and he would be sorry if he had to lose Compton,"⁴⁰⁰ and that Dana had carried Compton in 1984, when Smith was again his campaign manager, when in fact the official returns give Dana only 34.6% of the vote.⁴⁰¹ Contemporary newspaper accounts painted a different picture, the Los Angeles Times reporting that Dana stalked out of Hahn's office saying, "[i]f I don't get rid of Compton, I won't vote for anything."⁴⁰² The San Gabriel Daily Tribune learned "that Compton was the sticking point when the five men each tried to devise districts in which they could comfortably win reelection. Supervisor Deane Dana, a conservative Republican, wanted Compton out of his district and into the district of liberal Democrat Kenneth Hahn"⁴⁰³

Of twenty-two cities wholly contained within the Fourth District, Dana carried 18, even though some of them were by relatively small margins. Besides Compton, the only other city that he lost in which more than 10,000 people voted was Santa Monica. Smith and Shumate moved Santa Monica, as well as the Venice area of the City of Los Angeles, which was even more of a liberal Democratic stronghold, into Hahn's District. Santa Monica was 56% Democratic in 1982, and Bradley polled 60% of the votes there in the 1982 gubernatorial race. The analogous percentages for Venice were 64% and 71%. By contrast, Downey, which the Smith plan added to his mentor's district, was 55% Democratic, but voted only 34% for Bradley, and South Gate was 65% Democratic and 46% for Bradley. As Dana later acknowledged, Santa Monica and Venice were, along with Compton, his weakest areas.⁴⁰⁴ "I imagine this [the Smith plan] was his idea of the most safe possible district we could possibly have."⁴⁰⁵

³⁹⁹ Hoffenblum Deposition Transcript at 87.

⁴⁰⁰ Smith Deposition Transcript at 145.

⁴⁰¹ Id. at 324; Hayes Deposition Transcript at 22-23, 58-59.

⁴⁰² L. A. Times, Sept. 23, 1981, part II, at 1, col. 5.

⁴⁰³ Id. Dana did not recall any such negotiations and denied that he tried to jettison Compton in 1981. Dana Deposition Transcript at 245, 247, 256-57, 270-71.

⁴⁰⁴ Dana Deposition Transcript at 369.

⁴⁰⁵ Id. at 274.

Of 13 independent cities in the Fifth District, Antonovich lost only San Fernando to Baxter Ward in 1980. Antonovich's Boundary Commissioner, Hoffenblum, moved it into Edelman's district.

The Smith-Shumate Plan reportedly served as the basis for negotiations in which Smith tried to attract either Bush or Fitch.⁴⁰⁶ Both Bush and Hoffenblum agreed that Bush asked to have Santa Monica and Malibu transferred into Hahn's district, and both agreed, as well, that there was little likelihood that any concession would have separated Bush from Fitch.⁴⁰⁷ As Bush expressed it, after the Republican victories in 1980, Hahn "only had one ally . . . Edelman To protect the interests of Supervisor Hahn's district, it was my suggestion that we—that I would not support any proposal . . . that would not also be supported by Supervisor Edelman's representatives."⁴⁰⁸ That pact made Fitch the linchpin of the negotiations. Smith hoped that "Edelman would have pressure [on] him [by] Hispanics, that he would have to accept a Hispanic district."⁴⁰⁹ The strongest attempt to apply pressure on Edelman in public was a statement that Hoffenblum made during or after the meeting at which CFR representatives addressed the Boundary Commission: "We would be remiss," Hoffenblum told the Los Angeles Daily News, truthfully, but tactically, "if we did not have at least one district that was at least 50 percent Hispanic. Otherwise, it looks like we're sitting here trying to save five white supervisors."⁴¹⁰ According to Hoffenblum, the "intense" discussions with Fitch centered on "how Latino . . . would he [Edelman] accept and still vote for the plan."⁴¹¹ Unlike the Hoffenblum and CFR plans, Smith-Shumate did not remove much of Edelman's Westside base from his district. Yet Edelman did not accept it, the negotiations broke down, and just to have some tangible sign of their work,⁴¹² the Commission, by a 5-4 vote (Quevedo, who had endorsed the CFR plan, was conveniently absent)⁴¹³ recommended not the Smith plan, but the mysteriously conceived Hoffenblum plan.⁴¹⁴

Why was something close to the Smith plan not acceptable to Edelman? At the time, Bush denounced the Republican plans for try-

⁴⁰⁶ See Hoffenblum Deposition Transcript at 222.

⁴⁰⁷ Letter from Bush to Supervisors, Aug. 24, 1981, Bates #1280-1281; Hoffenblum Deposition Transcript at 186; Bush Deposition Transcript at 69-74, 81-82.

⁴⁰⁸ Bush Deposition Transcript at 86-87.

⁴⁰⁹ Smith Deposition Transcript at 165.

⁴¹⁰ L.A. Daily News, July 30, 1981, § I, at 4, col. 1.

⁴¹¹ Hoffenblum Deposition Transcript at 157-59.

⁴¹² Hoffenblum Deposition Transcript at 193; Bush Deposition Transcript at 84.

⁴¹³ Boundary Committee Minutes, Aug. 10, 1981, Bates #100207.

⁴¹⁴ See Boundary Commission Final Report, Aug. 24, 1981, Bates #1210-1221.

ing "to get rid of every minority they can"⁴¹⁵ and "to draw a line around the inner city of Los Angeles and to give those problems to districts represented by only two supervisors."⁴¹⁶ Edelman said later that these proposals "lumped Hispanics into one district and changed the boundaries in other districts to I believe weaken Democratic registered voters. I think it seemed to me like it was a Republican plan to weaken Democratic registration in certain districts."⁴¹⁷ His staff, he remembered, computed the partisan percentages for each district under both the Republican plans.⁴¹⁸ During 1981, before *Garza* was filed, Edelman had emphasized the ethnic, rather than the partisan aspects of packing. Unlike the Hoffenblum plan, he told the other supervisors, the boundaries that they ultimately adopted avoided "a clumping of minorities into the central city supervisorial districts . . ."⁴¹⁹ The Final Report of the Boundary Commission, crafted by Richard Schoeni, admitted the packing, and attempted to make a virtue out of it. The Hoffenblum plan "increases the opportunity of Hispanics and Blacks by recognizing that a special community of interest exists for Hispanics and Blacks. Boundaries were developed to increase the electoral effectiveness of these two groups in the Second and Third Supervisorial districts."⁴²⁰

Tables 10 and 11 certainly show that the Smith and Hoffenblum plan increased the percentages of minorities in the districts of the two Democrats. Under the boundaries in place before the 1981 redistricting, 72.8% of the county's blacks were in districts Two and Three (68.5 + 4.3 in Panel B of Table 11). The Smith plan raised that to 81.1%, largely by removing Compton from Dana's Fourth District, while the more complex Hoffenblum proposal increased it to 78.5%. Smith concentrated 51.2% of the county's Hispanics in the Hahn and Edelman districts, and Hoffenblum squeezed 55% of them in. To view the figures another way, as Table 10 demonstrates, Smith lifted the proportion of Edelman's district that was either black or Hispanic from 45.2% to 54.8%, while Hoffenblum stopped at 53.6%. What the Democratic districts gained, the Republican seats lost. Under both Smith and Hoffenblum, Dana's black percentage was cut almost in half, while under Hoffenblum, Schabarum's Hispanic percentage dropped by 13.5% (36.2% - 31.3% / 36.2%).

⁴¹⁵ San Gabriel Valley Tribune, Aug. 13, 1981, at 4A, col. 1.

⁴¹⁶ L.A. Daily News, Aug. 27, 1981, § I, at 5.

⁴¹⁷ Edelman Deposition Transcript at 213.

⁴¹⁸ Id. at 223-25.

⁴¹⁹ Transcript of Supervisors Meeting, Sept. 24, 1981, Bates #100248-100250.

⁴²⁰ Boundary Commission Final Report, Aug. 24, 1981, Bates #100199.

TABLE 11: PACKING AND CRACKING MINORITIES: PERCENTAGES OF THE COUNTY'S TOTAL AFRICAN-AMERICANS AND HISPANO-AMERICANS IN EACH DISTRICT, 1971-81*

District	Year or Plan				
	1971	1980	Smith	1981 Hof.	Final
<i>Panel A: Hispanics</i>					
1	24.2	26.4	25.1	22.7	26.3
2	15.4	18.2	14.9	18.6	19.2
3	34.6	31.0	36.3	36.4	30.3
4	13.2	12.0	12.7	11.2	12.0
5	12.6	12.4	10.9	11.2	12.3
<i>Panel B: Blacks</i>					
1	3.1	4.8	5.8	5.3	4.9
2	74.7	68.5	73.8	73.2	67.8
3	2.6	4.3	7.3	5.3	4.1
4	12.9	14.9	8.2	8.6	15.3
5	6.6	7.7	4.9	7.6	7.9

* This table adds to 100% down columns. For instance, in the first column, the entries mean that 24.2% of all the Spanish-surnamed people in Los Angeles County lived in District One, 15.4% of them lived in District Two, and so on. It does *not* mean that 24.2% of the people in District One in 1971 had Spanish surnames.

Tables 10 and 11, as well as Edelman's criticisms of the Republican offers, suggest that the question ought to be what Edelman had to gain and lose from the Smith plan, not why he didn't accede to it. Edelman knew that he could win the district he had by a landslide. Why subtract Eagle Rock, Los Feliz, and Anglo parts of San Fernando Valley, and add about 100,000 new people, 78,000 of whom were Hispanic, in Pico Rivera and Huntington Park? Why allow Schabarum and Dana to pad their majorities by shifting black and Hispanic Democrats into Hahn's and Edelman's districts, thereby guaranteeing that many of the health and welfare policies that Edelman and Hahn had fought for, with the avid support from their constituents, would be reversed? Self-interest, partisan interest, policy interest, and, the Democrats surely assumed, their constituents' interest all pointed in the same direction—toward rejection of any aggressive Republican proposal such as the Smith or Hoffenblum plans. The wonder is that the hubristic Republican consultants ever imagined that they could induce the Democrats to swallow such a deal.

G. September Anticlimax

After the Boundary Commission deadlocked, Allan Hoffenblum lost interest. "It was my feeling they would jiggle the lines and that would be the end of it," he said in hindsight.⁴²¹ Ron Smith was "disgusted and discouraged" by the Commission's failure, and he "didn't even think about it anymore," learning of the final settlement only through the newspaper.⁴²² The Executive Office of the Board, which had been largely excluded from negotiations that went on under the umbrella of the Boundary Commission, became "pretty quiet" on the subject of redistricting for a time, which must have been quiet, indeed.⁴²³ No one remembers drawing up plans between the August 12 Boundary Commission vote for the Hoffenblum plan and the September 24 vote of the Board,⁴²⁴ but Jeff Seymour recalls seeing some plans that were conceived by either Schoeni or Turner at this time.⁴²⁵ Two otherwise unidentified "peripheral plans"—plans that made minor changes around the peripheries of the districts—may date from this period.⁴²⁶

Although some news reporters⁴²⁷ and CFR apparently believed that the Hoffenblum plan was a live option, in fact, as Richard Schoeni put it, "the Board set aside the Boundary Committee report and proceeded from a clean slate, if you will, with Supervisor Edelman mediating . . ."⁴²⁸ The clean slate, of course, was not a blank map, but the lines that had been drawn in 1971. Patient negotiations between the supervisors themselves, a process reminiscent of that of the 1950s and '60s, produced occasional outbursts, such as Dana's pique over not being able to jettison Compton, and Schoeni's anger over Antonovich's seeming inability to realize that since his district had more than twenty percent of the population, he could not annex any more territory.⁴²⁹ But the negotiations went on, off the record and without leaving a paper or much of a memory trail. Two days before their deadline for acting, the

⁴²¹ Hoffenblum Deposition Transcript at 245.

⁴²² Smith Deposition Transcript at 43-44.

⁴²³ Turner Deposition Transcript at 141.

⁴²⁴ Schoeni Deposition Transcript at 392-95; Turner Deposition Transcript at 357-58, 372-73. The calendar of Schabarum's chief deputy, Mike Lewis, indicates that Lewis met with Shumate on September 1st and 21st, 1981, presumably about reapportionment, but Lewis remembers no details. Lewis Deposition Transcript at 198-99.

⁴²⁵ Seymour Deposition Transcript at 524, 536.

⁴²⁶ Seymour Deposition Transcript at 520-21; Schoeni Deposition Transcript at 399.

⁴²⁷ Cox, L.A. Daily Journal, Sept. 24, 1981, part 2, at 1, col. 5. Pasadena Star-News, Sept. 23, 1981, at A14, col. 1.

⁴²⁸ Schoeni Deposition Transcript at 392-94.

⁴²⁹ Pasadena Star-News, Sept. 25, 1981, at A3, col. 3; L.A. Times, Sept. 23, 1981, part II, at 1, col. 5; Schoeni Deposition Transcript at 374-77.

supervisors staged a public hearing. Although the CFR leaders asked for, and perhaps got a meeting with Edelman earlier in September, they seem to have been left in the dark about the nature of the negotiations that were going on at the time. Realizing that their own plan was not under consideration, but apparently believing that the Hoffenblum plan, which they opposed because it reduced the Hispanic percentage in the First District, the one in which the Hispanic proportion was growing fastest, was still alive, CFR decided to protest. They therefore sent out a fiery handbill in an attempt to boost Hispanic attendance at the Board of Supervisors' only public meeting on redistricting. "LET YOUR VOICES BE HEARD!" the flyer announced in full capitals. "SHOW YOUR SUPPORT FOR FAIR REPRESENTATION FOR THE LATINO COMMUNITY! SHOW YOUR ELECTED OFFICIALS THAT YOU ARE OPPOSED TO MINORITY GERRYMANDERING OF OUR COMMUNITIES." The Hoffenblum plan, the broadside trumpeted, was "a blatant attempt by the conservative members of the board of supervisors to maintain their dominance of the liberal supervisors for the next ten years and at the expense of the HISPANIC community."⁴³⁰ At the Board hearing, an angry crowd repeatedly disrupted proceedings by shouting, and CFR leaders Leticia Quezada, Steve Uranga, Virginia Reade, and Robert Espofino denounced the Hoffenblum plan, Espofino calling it "more than an obvious attempt to maintain the present political status quo . . . unethical, immoral, unjust and in violation of our civil rights."⁴³¹

As the process that had begun in January sputtered to a close on September 24, the last day before reapportionment would be turned over to other officials, supervisors drifted in and out of the formal Board meeting that was still in session in the Board meeting room. Two by two, to avoid the sunshine law requirements of the state's Brown Act, they adjourned to an anteroom to pore over maps and discuss deals. For an hour and a half or perhaps longer, assisted by Deborah Turner and Richard Schoeni of the Executive Office and perhaps by a few of their personal staff members, they thrashed out details, completely ignoring the CFR plan and the other six plans that had been formally considered by the Boundary Commission. Never, so far as anyone remembers about that last day's events, did the Board members consider a plan that raised the Hispanic percentage in any district to a majority or more. Away from the public eye, they did not posture

⁴³⁰ "An Open Letter to Residents of Los Angeles County," Bates #110352.

⁴³¹ Transcript of Board of Supervisors' Meeting, Sept. 22, 1981, Bates #100014-100047. See Espofino's statement at Bates #100036-100037.

about protecting the rights of minorities, but simply went on with the business of cutting deals to protect their futures. Having earlier invested the County's money in The Rose Institute's split-second remapping software and fancy graphics, having raised many people's hopes and wasted many people's time on the Boundary Commission and in public meetings, they ended with Turner calculating and recalculating each minor boundary change on a low-tech adding machine and Schoeni tracing the barely altered lines by hand on a mylar overlay.⁴³²

The plan that the Board adopted on September 24 reduced the proportion of Hispanics in Edelman's district slightly, from 42.4% to 41.8%.⁴³³ In the largest swap, Edelman lost 86,597 people, 74,738 of them to Hahn, of whom 56% were Hispanic and 8.3% were black.⁴³⁴ Besides this minor reduction in ethnic concentration—ironic in the light of all the attention devoted to increasing such concentration throughout the redistricting process—there were no other important changes during the redistricting. The Board's phrasemonger, Pete Schabarum, referred to it as "the ho-hum plan."⁴³⁵

Having raised the Hoffenblum boogeyman, Board members could seem comparatively conciliatory to Hispanics by then adopting what CFR called "the status quo plan." CFR could declare a victory of sorts—at least they had avoided a substantial reduction in the Hispanic percentage in the First District—and lick their wounds privately.⁴³⁶ On his way out of the room after the Board meeting on September 24, Mike Lewis, Schabarum's chief deputy, was still trying to salvage some partisan advantage from the affair. "Edelman screwed you," he told Steve Uranga of CFR. "No," Uranga replied, "the Board screwed us." Recalling the exchange, Uranga elaborated. "Everything about it from the beginning—from the very beginning in my opinion was a farce, a show, and all these county people were participating and all of them had their little roles to play from the boundary committee to the staff of the boundary committee to the board to their aides to their appointees to the boundary committee. The whole thing was a charade or a big

⁴³² Schoeni Deposition Transcript at 365-413; Turner Deposition Transcript at 311-412; Seymour Deposition Transcript at 389-402; Lewis Deposition Transcript at 208-10.

⁴³³ Suggestively, Edelman misremembered the nature of the final plan and of his actions, saying he thought that the percentage of Hispanics in his district had increased over what it had been using the 1971 lines. Edelman Deposition Transcript at 284, 313.

⁴³⁴ Memo from James Mize to Supervisors, Sept. 25, 1981, Bates #106746-106754; see also map of part of the district which Edelman gave to Hahn in 1981, Bates #00182.

⁴³⁵ Transcript of Board of Supervisors' Meeting, Sept. 24, 1981, Bates #100248-100250.

⁴³⁶ Californios for Fair Representation, "Statement to the Press After the Status Quo Plan Passes," Bates #1187; Quezada Deposition Transcript at 114, 141-44.

farce, a big show. They did a very good job of putting on a show, I thought, except . . . for those of us that were the victims of it."⁴³⁷

V. DISCRIMINATORY INTENT AND THE LAW, 1885-1989

A. "Subjective" and "Objective" Intent or "Direct" and "Indirect" Evidence?

Discussions of the uses of the concepts "intent," "motive," or "purpose" in recent fourteenth and fifteenth amendment cases often distinguish between three notions: subjective intent, or what moves individuals to act; foreseeability, or the consequences that objective observers think could reasonably have been expected to follow from a particular action; and institutional intention, or the sum of a series of decisions by different officials.⁴³⁸ These distinctions seem to me neither logical nor, as I argue in this section of this paper, in accord with the usage of judges. All three varieties of intent are fundamentally concerned with explaining why people acted. "Institutional intent" either creates the convenient fiction that collections of individuals act as one person or treats people who served sequentially as though they held office together and as though the decisions that they made occurred simultaneously. "Subjective" and "objective" intent both focus on what was in people's minds and hearts, but discussions of subjective intent tend to emphasize what people said about why they acted, while discussions of objective intent stress external, circumstantial evidence. Because it is the nature of the evidence, rather than the object of the explanation that truly distinguishes different uses of the concept of intent, I will distinguish in the following discussion between "direct" and "indirect" or "circumstantial" evidence, rather than between "subjective" and "objective" intent.⁴³⁹

B. *The Notion of Discriminatory Intent a Century Ago*

The U.S. Supreme Court made its first pronouncements on intent in racial discrimination cases long before the 1970s. In its 1884 and 1885 terms, three cases challenging San Francisco's regulation of laundries raised the issue directly,⁴⁴⁰ and the Court's resolution of them has

⁴³⁷ Uranga Deposition Transcript at 67-69.

⁴³⁸ Kousser, *Expert Witnesses, Rational Choice and the Search for Intent*, 5 *Const. Commentary* 349, 352-53 (1988).

⁴³⁹ Cf. Simon, *supra* note 3, at 1130.

⁴⁴⁰ *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Soon Hing v. Crowley*, 113 U.S. 703 (1885); *Barbier v. Connolly*, 113 U.S. 27 (1885).

interesting implications for more recent history. Hard-working Chinese dominated the laundry business in San Francisco during the 1870s and 1880s. Popular nativist agitation led the city government to pass a series of regulations, impartial on their face, that mandated health and fire inspections, banned night work, and required special licences for laundries operated in wooden structures, supposedly because they represented fire hazards.⁴⁴¹ The purpose of these and other related ordinances, the Board of Supervisors announced, was to "drive [the Chinese] to other states . . ." ⁴⁴² Two lawsuits, *Barbier v. Connolly* and *Soon Hing v. Crowley*⁴⁴³, challenged the anti-night work provision, the first, as an unreasonable infringement on the rights of anyone, no matter what his race, to labor and to acquire property, the second, as a subterfuge for racial discrimination. Sustaining the ordinance against the first challenge as a standard exercise of the police power, Justice Stephen J. Field distinguished in the second case between the purposes and the prejudices of legislators and rejected evidence about their prejudices as improper for judges to consider:

"The motives of the legislators, considered as to the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments. Their motives, considered as the moral inducements for their votes, will vary with the different members of the legislative body. The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile. And in the present case, even if the motives of the supervisors were as alleged, the ordinance would not be thereby changed from a legitimate police regulation, unless in its enforcement it is made to operate only against the class mentioned; and of this there is no pretense."⁴⁴⁴

The logic of Field's position was that the judiciary would consider the intent of the legislators as possibly probative, but, instead of seeking direct evidence of intent, would deduce what motivated them from objective facts. Moreover, intent by itself was insufficient to determine a decision. Plaintiffs had to prove that the effect of the regulation was discriminatory in order to overturn a regulation. This "reasonable

⁴⁴¹ On the efforts of the Workingman's Party and others to eliminate Chinese laundries in San Francisco through regulation, see W. Issel & R. Cherny, *San Francisco, 1865-1932*, at 125-30 (1986); R. Daniels, *Asian America* 39 (1988); A. Saxton, *The Indispensable Enemy* 113-56 (1971).

⁴⁴² R. Daniels, *supra* note 441, at 39.

⁴⁴³ See *supra* note 440.

⁴⁴⁴ *Soon Hing*, 113 U. S. at 710-11.

foreseeability" standard, so long established, is, of course, particularly pertinent to gerrymanders. Indeed, the very name "gerrymander" is based on this usage. It was the salamander-like shape of a congressional district drawn when Elbridge Gerry was governor of Massachusetts in 1812 that gave birth to the word.⁴⁴⁵ Those who looked at the districts drawn in South Carolina and Mississippi during the 1870s and 80s, at the time of the first racial gerrymanders in the history of the United States, were willing to conclude simply by observing the ethnic percentages of each that they were adopted with a racially discriminatory intent.⁴⁴⁶

Fourteen months after *Soon Hing*, the Court, in the third unanimous opinion of this trilogy, issued its opinion in the more famous case of *Yick Wo v. Hopkins*.⁴⁴⁷ What apparently moved the Court to decide this, but not the two previous cases, for the plaintiffs, was that the ordinance on its face gave the Board of Supervisors the power to discriminate between whites and Chinese in granting licenses to laundries in wooden buildings, and that it was demonstrated that the power had been used in precisely this fashion. Quoting from the Circuit Court opinion, which referred to "the notorious public and municipal history of the times" and declared that the anti-Chinese purpose of the ordinance "must be apparent to every citizen of San Francisco,"⁴⁴⁸ Justice Stanley Matthews emphasized not only the fact that every Chinese applicant, but only one Caucasian, who applied for the necessary license, was turned down, but also that the ordinance evidenced by its very terms a discriminatory "necessary tendency." An elementary cross-classification table demonstrates dramatically the overwhelming effect that so impressed the Court, making plain that the discretion open to the Supervisors was employed in a biased manner. (See Table 12.) However necessary proof of effect was to sustain a violation, evidence not available on the face of the ordinance was obviously also important. Otherwise, how did the Court distinguish between the impartial "tendency" of the health and fire inspections and the "opportunities . . . of unequal and unjust discrimination in their administration" of the Supervisors' possible conduct?⁴⁴⁹

⁴⁴⁵ See Baker, Representation and Apportionment, in 3 Encyclopedia of Political History 1128 (J. Greene, ed. 1984).

⁴⁴⁶ See supra section I.C.

⁴⁴⁷ 118 U.S. 356 (1886).

⁴⁴⁸ Id. at 363.

⁴⁴⁹ Id. at 362-74.

TABLE 12: LAUNDRY LICENSE APPROVAL AND RACE OF OWNERSHIP IN
SAN FRANCISCO, 1880's

		<u>Race of Laundry Operator</u>	
		Chinese	Other
<i>License Decisions</i>	Granted	0	80
	Not Granted	201	1

Source: *Yick Wo. v. Hopkins*, 6 S. Ct. 1064, 1066 (1886)

One soaring sentence in Matthews's opinion invited further litigation:

Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.⁴⁵⁰

This invitation was taken up by an obscure black lawyer from Greenville, Mississippi, Cornelius J. Jones, who was simultaneously trying to overturn the state's notorious 1890 "disfranchising" constitution by asking Congress to unseat representatives elected under its voting provisions.⁴⁵¹ Jones's African-American client, Henry Williams, was convicted of murder before an all-white jury drawn from the voter rolls.⁴⁵² Pointing to the discretion granted to registrars to discriminate against blacks through the "understanding" and other clauses, and quoting from newspaper reports of the debates at the constitutional convention, whose delegates repeatedly avowed their racist purposes, Jones asked the Court to void Williams's conviction and overturn the Mississippi constitution at the same time.⁴⁵³ Although the relevant state constitutional provision was at least as suspicious on its face as the San Francisco laundry ordinance thrown out in *Yick Wo*, and although the

⁴⁵⁰ *Id.* at 373-74.

⁴⁵¹ See Newman v. Spencer, reported in H.R. Rep. No. 1536, 54th Cong., 1st Sess. (1896); *Ratliff v. Williams*, reported in H.R. Rep. No. 1537, 54th Cong., 1st Sess. (1896); and *Brown v. Allen*, reported in H.R. Rep. No. 1538, 54th Cong., 1st Sess. (1896). Interestingly enough, the civil rights forces that brought a parallel challenge in 1965 were unaware of Jones's and succeeding efforts. See *Contested Elections in the First, Second, Third, Fourth and Fifth Districts of the State of Mississippi: Hearings Before the Subcomm. on Elections of the Comm. on House Admin., 89th Cong., 1st Sess. (1965)*; Stavis, *A Century of Struggle for Black Enfranchisement in Mississippi: From the Civil War to the Congressional Challenge of 1965 and Beyond*, 57 *Miss. L.J.* 591 (1987).

⁴⁵² *Williams v. Mississippi*, 170 U.S. 213 (1898).

⁴⁵³ *Id.* Interestingly, Jones rested his case entirely on the fourteenth amendment.

Mississippi Supreme Court had, in a companion case,⁴⁵⁴ admitted the racist intent of the convention, Jones had failed to demonstrate that blacks were actually disfranchised by the constitution.⁴⁵⁵ The Mississippi constitution and associated laws "do not on their face discriminate between the races," intoned Justice Joseph McKenna disingenuously, "and it has not been shown that their actual administration was evil, only that evil was possible under them."⁴⁵⁶

Although historians have sometimes treated *Williams* as a more positive endorsement of the "Mississippi Plan" than it was, strictly construed,⁴⁵⁷ contemporary disfranchisers gave it a more circumscribed reading, and feared its apparent implication that proof of a racially discriminatory effect would invalidate southern electoral laws and administrative practices.⁴⁵⁸ The legal threats were particularly acute in Louisiana and Alabama, which adopted versions of the "grandfather clause" to allow illiterate and propertyless whites to assume that they, but not blacks, would be able to register to vote once the new constitutions went into effect.⁴⁵⁹ Delegates to the Alabama Constitutional Convention of 1901 were so openly racist, and the registrars' subsequent discrimination was so flagrant,⁴⁶⁰ that black educator Booker T. Washington had no trouble secretly raising and disbursing the money to finance a legal challenge.⁴⁶¹ Appending several speeches from the Constitutional Convention debates to his briefs as direct evidence of intent, black lawyer Wilford H. Smith demonstrated the requisite effect in two ways. First, the lead plaintiff, literate federal courthouse janitor Jackson W. Giles, and twelve other black Alabamians swore that they were qualified to vote under the law, but had been denied registration solely because of their race. Second, Smith presented extensive newspaper clippings on the comparative numbers of blacks and whites who regis-

⁴⁵⁴ *Ratliff v. Beale*, 20 So. 865 (1896).

⁴⁵⁵ Perhaps Jones thought that demonstrating their absence from the jury panel was sufficient and more relevant than their exclusion from the state's voter rolls, which would have been difficult to demonstrate, in any case, since no official records of registration by race were kept in Mississippi at that time.

⁴⁵⁶ *Williams*, 170 U.S. at 225.

⁴⁵⁷ C. Woodward, *Origins of the New South, 1877-1913*, at 322-23 (1951).

⁴⁵⁸ Oates, 2 Ala. Const. Const. Off. Proc. 2790-91 (1901); Daniel, Va. Const. Proc. & Debates, 2947-48 (1901-02). Cf. 34 Cong. Rec. Appendix 71 (1901).

⁴⁵⁹ J. Kousser, *supra* note 13, at 58-62, 162-71.

⁴⁶⁰ See the *Montgomery Daily Advertiser*, Mar. 7, 1902, at 3, col. 3; Mar. 15, 1902, at 3, col. 4; Mar. 19, 1902, at 2, col. 2; Mar. 21, 1902, at 3, col. 2; Mar. 26, 1902, at 3, col. 2; Mar. 29, 1902, at 7, col. 4; May 6, 1902, at 3, col. 3; May 17, 1902, at 3, col. 3; June 3, 1902, at 10, col. 1; June 4, 1902, at 3, col. 4; June 22, 1902, at 3, col. 4; June 24, 1902, at 1, col. 7.

⁴⁶¹ A. Meier, *Negro Thought in America, 1880-1915*, at 111 (1963).

tered under the new constitution in numerous localities around the state.⁴⁶² Similar suits were filed in Louisiana and Virginia.⁴⁶³

Faced with compelling direct proof of intent, prima facie evidence in the terms of the Constitution, and both individual and collective documentation of the racially discriminatory effects of the law, U.S. district court Judge Thomas G. Jones, a former Alabama governor who had been a delegate to the 1901 state constitutional convention, invoked the "political questions doctrine."⁴⁶⁴ While seeming to admit both intent and effect, "liberal" Supreme Court Justice Oliver Wendell Holmes, writing for a six-man majority, declared the courts unable to counter the power of a state that was so adamant in passing and administering its laws in a discriminatory fashion. Furthermore, if the Court granted Giles's wish to throw out the whole scheme of suffrage regulations as unconstitutional, Holmes continued, in a sophomorically clever argument, under what provisions could he then be registered?⁴⁶⁵

Just as Holmes blatantly ignored both substantive and jurisdictional precedents, which the dissenters in *Giles v. Harris* vigorously pointed out,⁴⁶⁶ the Supreme Court a decade later utterly ignored *Giles*. A suit originally brought by white Oklahoma Republicans who feared the loss of their black supporters, and reluctantly supported by the national administration as part of William Howard Taft's successful effort to gain renomination as the Republican presidential candidate in 1912, and, more avidly, by the just-organized NAACP, *Guinn and Beal v. United States* overturned a 1910 amendment to the state constitution that allowed illiterates to register to vote if they were descended from men enfranchised before the passage of the fifteenth amendment.⁴⁶⁷ No direct evidence of intent or of more general effects than the denial of a

⁴⁶² Montgomery Daily Advertiser, May 7, 1902, at 3, col. 1; June 25, 1902, at 5, col. 5; July 2, 1902, at 9, col. 3; Sept. 4, 1902, at 3, col. 4; Smith, Is the Negro Disfranchised?, 79 Outlook 1047-49 (1905). Elbert Thornton of Barbour County swore that he was able to answer all of a series of questions about government except the following: "What are the differences between Jeffersonian Democracy and the Calhoun principles as compared to the Monroe Doctrine?" Montgomery Daily Advertiser, Oct. 12, 1902, at 18, col. 3.

⁴⁶³ Another Negro Suffrage Case, 74 Outlook 634-35 (1903); Montgomery Daily Advertiser, Nov. 29, 1902, at 1, col. 5; Nov. 30, 1902, at 1, col. 1; Dec. 14, 1902, at 1, col. 6. Selden v. Montague, 194 U.S. 154 (1904); Jones v. Montague, 194 U.S. 147 (1904).

⁴⁶⁴ Montgomery Daily Advertiser, Oct. 13, 1902, at 18, col. 3.

⁴⁶⁵ *Giles v. Harris*, 189 U.S. 475, 486-87 (1903).

⁴⁶⁶ *Id.* at 489-504.

⁴⁶⁷ A. Bickel & B. Schmidt, The Judiciary and Responsible Government, 1910-21, at 927-49 (1984). Whereas *Giles* had been argued on fourteenth and fifteenth amendment grounds, attorneys for the government in *Guinn* added a reference to the Reconstruction Enforcement Acts, thus paralleling the arguments about the Voting Rights Act in *Mobile v. Bolden*, 446 U.S. 55 (1980).

few blacks' right to vote was presented, and Louisiana-bred Chief Justice Edward Douglass White's opinion in this and a companion case from Maryland did not cite *Yick Wo*, *Williams*, or *Giles*.⁴⁶⁸ Doubtless recalling his "conservative" political faction's opposition to the grandfather clause in the 1898 Louisiana constitutional convention,⁴⁶⁹ White ruled similar clauses from Oklahoma and Maryland unconstitutional because the provisions revealed their intent on their faces.⁴⁷⁰ Apparently the states made no effort to provide any non-racial justifications for the clauses.

Moving from objective intent and effect in *Yick Wo*, to effect alone in *Williams*, to political questions in *Giles*, to objective intent and effect with an emphasis on the former in *Guinn*, the turn of the century Supreme Court followed a confusing and contradictory path on occupational and voting rights. In their decisions in cases involving segregation and discrimination in public accommodations and education, moreover, the Court's opinions on motives and impact became even more tangled.

The Justices sometimes assumed that good faith and a nondiscriminatory intent lay behind challenged laws. Perhaps most notoriously, in *Plessy v. Ferguson*, Justice Henry Billings Brown declared that "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority."⁴⁷¹ Of course, Brown undercut his own argument by ending the paragraph in which those words occurred with the assertion that "If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane."⁴⁷² In his most famous dissent, the first Justice John Marshall Harlan scornfully answered Brown: "Every one knows that the statute in question had its origin in the *purpose*, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while traveling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary."⁴⁷³ It is instructive to note that neither in the trial nor in the briefs for *Plessy*,

⁴⁶⁸ *Myers v. Anderson*, 238 U.S. 368 (1914); *Guinn*, 238 U.S. 347.

⁴⁶⁹ J. Kousser, *supra* note 13, at 164-65.

⁴⁷⁰ *Myers*, 238 U.S. at 379; *Guinn*, 238 U.S. at 363-64.

⁴⁷¹ *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

⁴⁷² *Id.* at 552.

⁴⁷³ *Id.* at 557 (emphasis added).

the *gen de couleur* who challenged the Louisiana railroad segregation statute, was there any discussion of what the legislators said about why they passed the law.⁴⁷⁴

Three years later, when the Supreme Court considered the question of whether, in effect, it would enforce the "equal" part of *Plessy's* "separate but equal," Harlan reversed course. The case, *Cumming v. Richmond County Board of Education*,⁴⁷⁵ has several interesting parallels with the *Garza* litigation and the decision in the case represents an extreme against which to judge proposed criteria of intent. Augusta, Georgia had supported two high schools for whites and one for blacks for several years before 1897. Faced with an overflowing black elementary school population, the Board of Education in that year decided to close the black high school, which was, at the time, the only publicly-supported high school for African-Americans in the state, and to convert the building into elementary classrooms and hire elementary teachers. Like the all-Anglo Los Angeles County Board of Supervisors, the all-white Richmond County Board of Education responded to the resultant storm of minority protest by holding a public hearing at which the blacks respectfully presented their grievances, and, like their California counterparts, the white Georgians politely rejected minority criticisms. By the standards of nineteenth century equity law, refusing to provide a mechanism for the dissenters to voice their opposition might have damaged Richmond County's subsequent legal case. By the standards of twentieth century public relations, not adding minority members to the Boundary Commission would have been embarrassing.

Augusta whites also asserted their good faith. It would have been "unwise and unconscionable to keep up a high school for sixty pupils and turn away three hundred little [N]egroes who were asking to be taught their alphabet and to read and write," the Board's lawyers announced.⁴⁷⁶ At the same time that they played upon the judges' heartstrings, the lawyers tried to obscure the fact that the school board could have shifted the money for black elementary schools from the much larger funds for white schools, or that they could have used the 23% increase in state funds for education for the year to continue the

⁴⁷⁴ See the briefs in the files of the *Plessy* case in the National Archives, and references to the literature in Kousser, *Separate but Not Equal: The Supreme Court's First Decision on Racial Discrimination in Schools*, 46 J. S. Hist. 17, 17-44 (1980). The best study of the *Plessy* case is C. Lofgren, *The Plessy Case* (1987). He treats the briefs extensively in Chapters Three and Seven.

⁴⁷⁵ 175 U.S. 528 (1899). Other facts about the *Cumming* case are taken, without further citation, from J. Kousser, *supra* note 13, at 474.

⁴⁷⁶ 175 U.S. at 533.

black high school. Similarly, Republican members of the Boundary Commission claimed to have had only the welfare of Latinos at heart in the 1981 redistricting, while Democrats avowed that at least they saved Hispanics from an even more racially retrogressive redistricting. And the Board of Supervisors as a whole could have taken a number of actions to mitigate the effects of past discrimination, instead of perpetuating it.

In a decision that no one has ever been able to explain satisfactorily, and that has long been recognized as a terrible blot on his reputation,⁴⁷⁷ Justice Harlan ruled, for a unanimous Supreme Court, in favor of Richmond County. To sustain a contention of discrimination under the fourteenth amendment's Equal Protection Clause, Harlan announced, blacks had to demonstrate that the Board of Education had "proceeded in bad faith," that they had been motivated by "hostility to the colored population because of their race," that using public funds to provide high schools for whites, but not for blacks was "a clear and unmistakable disregard of rights secured by the supreme law of the land."⁴⁷⁸

Cumming was no mere matter of degree, of white schools with better teachers, better buildings, or more convenient locations than the black schools. Like *Garza*, *Cumming* was a matter of *absolute* inequality—of *no* black high school, *no* minority supervisors. What more evidence than this absolute distinction, this radically disproportionate effect, could Harlan have asked for? Did he really expect Board members to admit under oath that their sole or principal or even minor purpose had been discriminatory? Surely asking for such evidence would have been unreasonable.

If this radical "racial hostility test" of intent must be met for plaintiffs to prevail, then the Reconstruction amendments would be reduced to a cruel hoax. For while Justice Brown had merely assumed nondiscriminatory motives and impact, Harlan in *Cumming* had brushed aside a patently discriminatory impact, fully evidenced in the record of the case, and placed such an onerous burden of proof on the blacks in the motive inquiry as to make it nearly impossible to bear. If a mere verbal assertion of good faith sufficed to defeat an allegation of discrimination, why would this passage from the opening address to the Louisiana Constitutional Convention of 1898 by its president, Ernest Kruttschnitt, not serve?

⁴⁷⁷ R. Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality* 83 (1977).

⁴⁷⁸ 175 U.S. at 545.

My fellow-delegates, let us not be misunderstood! Let us say to the large class of the people of Louisiana who will be disfranchised under any of the proposed limitations of the suffrage, that what we seek to do is undertaken in a spirit, not of hostility to any particular men or set of men, but in the belief that the State should see to the protection of the weaker classes; should guard them against the machinations of those who would use them only to further their own base ends; should see to it that they are not allowed to harm themselves. We owe it to the ignorant, we owe it to the weak, to protect them just as we would protect a little child and prevent it from injuring itself with sharp-edged tools placed in its hands.⁴⁷⁹

C. *The Twisting Course of Intent and Effect from 1954 to 1986*

If *Plessy* disingenuously assumed a beneficent intent and a nondiscriminatory effect, and *Cumming* ignored impact and demanded proof of an unequivocally malevolent motive, *Brown v. School Board of Topeka*⁴⁸⁰ in 1954 held, as it were, that if one could demonstrate that school segregation had deleterious consequences for African-American children, then the reasons for adopting that policy were either irrelevant or presumed to be invidious. In fact, as Harlan had pointed out in his *Plessy* dissent, everyone knew that white southerners' motives in segregating blacks were discriminatory,⁴⁸¹ and, as the brief for *Plessy* had argued, segregation might have been overturned purely because it made an arbitrary distinction, dividing passengers or schoolchildren along racial lines, rather than along lines of willingness to pay or mental ability.⁴⁸² *Brown* might therefore have rested on intent or substantive due process, rather than effect grounds. Nonetheless, after 1954, acts that segregated people by race were tacitly understood to have a malign intent.

This realignment⁴⁸³ of the law with common sense reached voting rights in the keystone case of *Gomillion v. Lightfoot* in 1960.⁴⁸⁴ Despite massive continued discrimination against black registrants in the black university town of Tuskegee, African-American voting registration had steadily risen and threatened to surpass white registration. To prevent any blacks from being elected, a local act of the Alabama legislature in 1957 snipped the previously square boundaries of the city of Tuskegee

⁴⁷⁹ Quoted in J. Kousser, *supra* note 13, at 164.

⁴⁸⁰ 347 U.S. 483 (1954).

⁴⁸¹ *Plessy*, 163 U.S. at 557.

⁴⁸² C. Lofgren, *supra* note 474, at 157-58.

⁴⁸³ See *Railroad Co. v. Brown*, 84 U.S. (17 Wall.) 445 (1873).

⁴⁸⁴ 364 U.S. 339 (1960). The best study of racial discrimination in Tuskegee politics is R. Norrell, *Reaping the Whirlwind: The Civil Rights Movement in Tuskegee* (1985).

into "an uncouth twenty-eight-sided figure," which had the "effect" of removing from the city's boundaries "all save four or five of its 400 Negro voters while not removing a single white voter or resident."⁴⁸⁵ Faced with a fourteenth and fifteenth amendment challenge, the city offered no non-racial justification for its action, merely claiming an absolute right to regulate its own political affairs.⁴⁸⁶ Reaching beyond the justiciability issue that he began by terming "the sole question"⁴⁸⁷ before the Court, Justice Felix Frankfurter deduced that an "unlawful end"⁴⁸⁸ had motivated Tuskegee officials. He based his deduction on the "unconstitutional result," which he thought was evidenced partly by demographic statistics and partly by a before-and-after map that made the gerrymander obvious.⁴⁸⁹ In a brief opinion, Justice Charles Whitaker concurred on the grounds that the state's "purpose" was to segregate black from white voters, and that under *Brown*, such a segregative purpose violated the fourteenth amendment.⁴⁹⁰ Whether read as an effect case or an intent case,⁴⁹¹ *Gomillion* employed only objective evidence.

Courts took two roads out of Tuskegee. The "pure effect" road led through *Baker v. Carr*⁴⁹² and *Reynolds v. Sims*⁴⁹³ to all of the apportionment cases and at least to the neighborhood of the "political gerrymandering" case of *Davis v. Bandemer*.⁴⁹⁴ In these cases, plaintiffs were not required to show any desires on the part of, say, rural legislators to discriminate against the urban or suburban population of their states in apportionment. The fact of numerical inequality of representation was, by itself, necessary and sufficient to demonstrate a violation of equal protection.⁴⁹⁵ The second road, however, was full of sharp curves and repeated switchbacks, and judges careened from effect to intent in efforts to avoid what they perceived as various slippery slopes on both sides, before finally slowing as the path flattened and straightened.

⁴⁸⁵ 364 U.S. at 340-41.

⁴⁸⁶ *Id.* at 342.

⁴⁸⁷ *Id.* at 341.

⁴⁸⁸ *Id.* at 347 (quoting *United States v. Reading Co.*, 226 U.S. 324, 357 (1912)).

⁴⁸⁹ *Id.* at 340, 347-348 (quoting *Western Union Telegraph Co. v. Fisher*, 247 U.S. 105, 114 (1918)).

⁴⁹⁰ *Id.* at 349.

⁴⁹¹ Ely, *supra* note 3, at 1252-53; Norrell, *supra* note 484, at 119, 124.

⁴⁹² 369 U.S. 186 (1962).

⁴⁹³ 377 U.S. 533 (1964).

⁴⁹⁴ 478 U.S. 109 (1986).

⁴⁹⁵ See Blacksher & Menefee, *supra* note 3, at 14-18; *Rogers v. Lodge*, 458 U.S. 613, 635-36 (1982) (Stevens, J., dissenting).

In *United States v. O'Brien*⁴⁹⁶ and *Palmer v. Thompson*,⁴⁹⁷ majorities of the Supreme Court looked over the precipice of intent and swerved towards an absolute effect standard. O'Brien challenged his conviction for burning his selective service card on the grounds that Congress had been motivated by a desire to suppress dissent when it amended the selective service law in 1965 to prohibit the mutilation of draft cards.⁴⁹⁸ Although the sparse comments on the amendment on the floor of Congress and in the House and Senate reports buttressed O'Brien's contention,⁴⁹⁹ Chief Justice Earl Warren rejected the antiwar student's first amendment defense. Requiring men to possess draft cards, Warren concluded for an 8-1 majority, was the most narrowly drawn means of administering the selective service system, which was incident to the war-making power.⁵⁰⁰ Possession precluded mutilation. And since Congress clearly had the power to enact the amendment, its motive was irrelevant.⁵⁰¹ The effect of the law may have been to remove one dramatic way of protesting, and it presumably had no impact at all on supporters of the Vietnam War, but Warren neglected disproportionate impact entirely.

The *Palmer* case arose from the closing of all publicly-owned swimming pools by the city of Jackson, Mississippi, in the face of federal court-ordered integration.⁵⁰² Contending that courts would have difficulty determining motivation, especially the "sole" or "dominant" motivation of a group of legislators, that an injunction would be futile, because a legislature could merely re-pass the regulation without an incriminating motive, and that judicial inquiry into legislative motives would overstep proper separation of powers bounds, Justice Hugo Black, speaking for a bare 5-4 majority, unequivocally rejected the notion that an equal protection violation could rest solely on intent.⁵⁰³

Dissenting judges and commentators sharply criticized Justice Black's *Palmer* opinion, although they largely ignored parallel arguments in *O'Brien*. In a statement that was nearly four times as long as Black's majority opinion, and which in form resembled an opinion of the court, more than a dissent, Justice Byron White declared that previous cases

⁴⁹⁶ 391 U.S. 367 (1968).

⁴⁹⁷ 403 U.S. 217 (1971).

⁴⁹⁸ 391 U.S. at 370.

⁴⁹⁹ *Id.* at 386-88.

⁵⁰⁰ *Id.* at 381.

⁵⁰¹ *Id.* at 383-84.

⁵⁰² 403 U.S. at 218-19.

⁵⁰³ *Id.* at 227. Earlier in his career, Justice Black had not been so reticent about determining the purposes of legislators. See *Adamson v. California*, 332 U.S. 46, 68-123 (1947).

contained an invidious purpose or motive standard.⁵⁰⁴ His detailed examination of "[t]he circumstances surrounding this action and the absence of other credible reasons for the closings" convinced White that Jackson's motive was to stop integration in public services, a motive that he apparently considered unconstitutional per se.⁵⁰⁵

Professor Paul Brest answered Black's difficulty, futility, and impropriety points more directly.⁵⁰⁶ While weighing motives might be hard, it is unnecessary, Brest contended, to determine the sole or dominant reason for action, because an illicit motive, even if comparatively unimportant, might tip the balance toward action, for instance, by moving a pivotal member or group in a legislative body.⁵⁰⁷ Nor is direct evidence of intent necessary, for, here as elsewhere in the law, circumstantial evidence, such as the sequence of events that led to the decision, the terms of the regulation themselves, or the placement of election district lines, often gives a clear enough indication of motivation, as it did in *Gomillion*.⁵⁰⁸ As for futility, it would be a credulous court, indeed, that would wipe from its memory a prior ruling of illicit motivation when considering a reenacted law.⁵⁰⁹ Finally, every invalidation by a court of a law or administrative practice intrudes on legislative or administrative powers, often in the pursuit of individual constitutional rights. Why is it more of an imposition to question the *motive* for a decision than to upset the decision itself?⁵¹⁰

A week before *Palmer*, five justices, among them four members of the *Palmer* anti-motivation majority,⁵¹¹ had joined an opinion by White in *Whitcomb v. Chavis*.⁵¹² Upholding multimember legislative districts in Indiana against charges that they were racially discriminatory, White began his criticism of the district court opinion, which had reached the opposite result, by asserting that the Reconstruction amendments protected against "purposeful devices to further racial discrimination."⁵¹³ Noting that the plaintiffs had made no effort to prove a racially discriminatory purpose in this case, contending that blacks registered and voted freely, and concluding that black candidates lost in party-line vot-

⁵⁰⁴ 403 U.S. at 241-43.

⁵⁰⁵ *Id.* at 240-41.

⁵⁰⁶ Brest, *supra* note 3.

⁵⁰⁷ *Id.* at 119-20; cf. Ely, *supra* note 3, at 1267-68.

⁵⁰⁸ Brest, *supra* note 3.

⁵⁰⁹ *Id.* at 125.

⁵¹⁰ *Id.* at 128-30.

⁵¹¹ They were Justices Black, Burger, Blackmun, and Stewart. Justice White pointed this out in his dissent in *Palmer*, 403 U.S. at 242.

⁵¹² 403 U.S. 124 (1971).

⁵¹³ *Id.* at 149.

ing when the Democratic ticket on which they were nominated in Indianapolis was defeated, Justice White found no evidence of discriminatory purposes and plentiful signs of other reasons for the less than proportional representation of African-Americans in the Hoosier State's legislature.⁵¹⁴ How those who joined both the *Palmer* and *Whitcomb* majorities reconciled their stances is unclear.

Two years later, Justice White wrote the opinion, this time for a unanimous court, that overturned a multimember legislative districting scheme in Dallas and San Antonio, Texas under challenge as racially discriminatory by black and Mexican-American plaintiffs.⁵¹⁵ What distinguished *White v. Regester* from *Whitcomb v. Chavis* was not direct evidence of intent, or even a clear statement of the necessity to prove intent, but the presence of "enhancing factors"—a history of official and unofficial racial discrimination, language barriers to Spanish speakers, majority vote and numbered place requirements, and a lack of access to a slating group.⁵¹⁶ The "totality of the circumstances,"⁵¹⁷ Justice White announced, proved that members of minority groups "had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice" in multimember districts in Texas.⁵¹⁸ *White* was later reduced to a formula by the Fifth Circuit Court of Appeals in *Zimmer v. McKeithen*.⁵¹⁹

Five years and three new justices after *Palmer*, the Supreme Court adopted an intent standard—but relied primarily on effect evidence to assess motivation.⁵²⁰ Under the equal protection clause, said Justice White for a 7-2 majority in *Washington v. Davis*, "a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."⁵²¹ It would not be unconstitutional "solely because it has a racially disproportionate impact."⁵²² Otherwise—this was the slippery slope on the effect side—all sorts of tax, welfare, regulatory, and other policies that bore more heavily on members of one race than of another would be drawn into question.⁵²³ Nonetheless, "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily

⁵¹⁴ *Id.* at 133-63; see, e.g., *id.* at 134 n.11.

⁵¹⁵ *White v. Regester*, 412 U.S. 755 (1973).

⁵¹⁶ *Id.* at 766.

⁵¹⁷ *Id.* at 769.

⁵¹⁸ *Id.* at 766.

⁵¹⁹ 485 F.2d 1297 (5th Cir. 1973).

⁵²⁰ *Washington v. Davis*, 426 U.S. 229 (1976).

⁵²¹ *Id.* at 240.

⁵²² *Id.* at 230.

⁵²³ *Id.* at 248.

on one race than another."⁵²⁴ Lest it be thought that the blurring of the concepts of motive and impact was careless or inadvertent, Justice John Paul Stevens's concurrence underscored the point that intent could be proven by indirect evidence: "Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds My point in making this observation is to suggest that the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not as critical, as the reader of the Court's opinion might assume."⁵²⁵

A year after *Washington v. Davis*, Justice Lewis Powell outlined some of the ways to prove purpose, drawing heavily on Brest's critique of *Palmer*.⁵²⁶ A racially disproportionate impact "may provide an important starting point" for the inquiry into motive.⁵²⁷ Once plaintiffs showed that race was "a motivating factor"—it was unnecessary to demonstrate that it was "dominant" or "primary"—the burden of proof switched to the defendants to prove that "the same decision would have resulted even had the impermissible purpose not been considered."⁵²⁸ In addition to impact, intent could be deduced from "the historical background of the decision," the sequence of events that led up to it, especially whether there were departures from normal procedures, the legislative or administrative history, and statements from officials.⁵²⁹

A sex discrimination challenge to the Massachusetts veterans' preference for state employment elicited the last major doctrinal discussion of intent from the Supreme Court during the 1970s.⁵³⁰ The concept of discriminatory purpose, announced Justice Potter Stewart's opinion of the court, means "that *the* decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."⁵³¹ Exactly how

⁵²⁴ *Id.* at 242 (emphasis added). Note the close connection of the italicized phrase with the "totality of the circumstances" phrase in *White*, 412 U.S. at 769.

⁵²⁵ *Washington*, 426 U.S. at 253-54.

⁵²⁶ *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

⁵²⁷ *Id.* at 266.

⁵²⁸ *Id.* at 265, 270-71 n.21. Cf. *Mt. Healthy City School District v. Doyle*, 429 U.S. 274 (1977).

⁵²⁹ *Arlington Heights*, 429 U.S. at 267-68.

⁵³⁰ *Personnel Adm'n v. Feeney*, 442 U.S. 256 (1979).

⁵³¹ *Id.* at 279 (emphasis added). Although the sexually differentiated consequences of the veterans' preference were foreseeable, Justice Stewart continued in a footnote to the sentence quoted in the text, the fact that veterans' preferences had allegedly always been considered

this criterion applied to a legislature, which is not a unitary decisionmaker, Stewart did not explore. Like Powell and Stevens before him, Justice Stewart rejected the necessity of proving intent by direct statements: "Proof of discriminatory intent must necessarily usually rely on objective factors."⁵³² And as in *Yick Wo*, the Court seemed most moved by facts that can be encapsulated easily in a 2 X 2 table, such as Table 13. Both the majority and Justices Stevens and White in a concurring opinion seemed to rest their opinions in this "intent case" largely on the bottom left cell of the table. The fact that nearly half the males were non-veterans and that they got hired by the state government approximately proportionately was a clear indication to seven members of the Supreme Court that the veterans' preference was not a mere subterfuge for sex discrimination.⁵³³ (The District and Appeals Courts had focused on the contrast between the two columns. No matter that a minority of men were disadvantaged—98% of women were!)⁵³⁴

TABLE 13: SEX, VETERAN STATUS AND APPOINTMENT TO PUBLIC EMPLOYMENT IN MASSACHUSETTS, 1963-1973

	Sex	
	Male	Female
	Vet 54%	2%
Status	Non-Vet 46%	98%

Source: Personnel Administrator v. Feeney, 442 U.S. 256 (1979).

The intent standard stumbled into the arena of voting rights in 1980 in a confused set of opinions in *City of Mobile v. Bolden*.⁵³⁵ Three justices (Burger, Powell, and Rehnquist) signed onto Justice Stewart's plurality opinion, which ruled that intent was the proper standard, even if a fun-

legitimate and that "the statutory history and all of the available evidence affirmatively demonstrate[d]" that there was no discriminatory intent, was sufficient in this case to undercut the inference of deliberate disadvantage. Assuming the truth of the facts as Justice Stewart stated them, the argument for intent in *Garza* was on much more solid ground because racially discriminatory gerrymandering has long been recognized and condemned. The administrative history and other available evidence affirmatively supported inferences of discriminatory intent and undercut other explanations. *Id.* at n.502.

⁵³² *Id.* at 279 n.24. This statement, as well as the Court's reliance on the facts of impact encapsulated in Table 13, seems to undercut the interpretation of *Feeney* as enshrining "subjective intent" in *Weinzweig*, supra note 3, at 288-89, 318-19.

⁵³³ *Feeney*, 442 U.S. at 270-71.

⁵³⁴ *Anthony v. Commonwealth*, 415 F. Supp. 485, 496 (D. Mass. 1976).

⁵³⁵ 446 U.S. 55 (1980).

damental right such as voting were at stake, that only individual, not group voting rights were protected under the fourteenth amendment, and that the evidence that had convinced District Court Judge Virgil Pittman and the Fifth Circuit Court of Appeals was insufficient to prove intent.⁵³⁶ Four other justices (White, Blackmun, Marshall, and Brennan) believed that the evidence in *Bolden* had proved a discriminatory intent, although Blackmun agreed with Mobile that Judge Pittman's single-member district remedy was too extreme.⁵³⁷ Justice Stevens sided with Mobile on the grounds that the evidence had not proved a discriminatory impact, which he, Marshall, and Brennan believed to be the proper standard.⁵³⁸

Justice Stewart's plurality opinion was subjected to perhaps the most vociferous protest of any Supreme Court civil rights opinion since *Brown*. According to Prof. Avi Soifer, Stewart required an "overwhelming demonstration of the most blatant form of discriminatory motive . . . proof far stronger than the standard of causation generally used in the common law . . . proof akin to that required in a criminal context. . . a smoking gun."⁵³⁹ Civil rights lawyer Frank Parker believed that Stewart had rejected the "foreseeability standard" and had "implied that circumstantial evidence of discriminatory purpose would not suffice to prove discriminatory intent."⁵⁴⁰ Similar glosses on Stewart's opinion fueled the struggle over the renewal of the Voting Rights Act in 1981-82.⁵⁴¹ Was *Bolden* so extreme? Did it establish, unequivocally, not only an "intent" standard, but one that required direct, not objective or circumstantial evidence?⁵⁴² In short, what was *Bolden's* intent?

One consideration that undercuts this extreme reading is that Stewart began by interpreting *Guinn* and *Gomillion* as "purpose" cases, despite the fact that, as shown above, no direct evidence of intent was presented in either case.⁵⁴³ A second is that he recognized the potential relevance of discriminatory impact, merely stating that impact

⁵³⁶ *Id.* at 56-81.

⁵³⁷ *Id.* at 81-84, 95-142.

⁵³⁸ *Id.* at 84-95.

⁵³⁹ Soifer, *supra* note 3, at 390, 400, 404. Cf. Boyd & Markman, *supra* note 3, at 1390 (quoting Sen. C. Mathias).

⁵⁴⁰ Parker, *supra* note 3, at 744. Cf. McDonald, *The Quiet Revolution in Minority Voting Rights*, 42 *Vand. L. Rev.* 1249, 1263-64 (1989).

⁵⁴¹ See Parker, *supra* note 3, at 737-46; Boyd & Markman, *supra* note 3, at 1404-05.

⁵⁴² *Rogers*, 458 U.S. at 636, 638, 643-44 (Stevens, J., dissenting).

⁵⁴³ *Bolden*, 496 U.S. at 63-64. On *Guinn* and *Gomillion*, see *supra* text accompanying notes 462-65, 476-80. See also *O'Brien*, 391 U.S. at 385 (Chief Justice Warren denying that *Gomillion* was a purpose case).

"alone cannot be decisive . . . of discriminatory purpose."⁵⁴⁴ A third is that the plaintiffs had not contended that the at-large system of the Mobile city government had been established with a discriminatory purpose, and they had not pointed to particular officials and particular events that had maintained it for a discriminatory purpose. Stewart specifically reserved the question of discriminatory maintenance, and did not rule out the possibility that objective evidence might be sufficient to prove it.⁵⁴⁵

The difficulty with Stewart's opinion was not that it embraced a direct intent criterion, but that it established no standard at all.⁵⁴⁶ Ignoring Justice White's "totality of the circumstances"⁵⁴⁷ or "totality of the relevant facts"⁵⁴⁸ phrases, Stewart considered four factors, which he rejected as "sufficient proof" of discriminatory purpose one by one, without discussing whether they might be adequate if weighed together, or specifying what sort of additional evidence might tip the scales in the plaintiffs' direction. The fact that no black had ever been elected to the Mobile City Commission, if considered "alone," was only evidence of normal political defeat. Proof of racial discrimination in municipal employment and public services was, by itself, only a "tenuous and circumstantial" indication of the invalidity of the electoral system. The history of past official racial discrimination in Mobile, unless specifically related to the establishment or maintenance of the Commission, was only "of limited help" in the purpose inquiry. The numbered place and majority vote requirements disadvantaged any minority, but did not prove an intent to discriminate against blacks specifically.⁵⁴⁹

The cynical interpretation of Stewart's opinion, especially in light of the trenchant criticisms in the dissents of Justices White and Marshall, was that a result-oriented anti-civil rights faction on the Supreme Court would set standards that were as difficult as possible for minority litigants to meet and would then captiously reject whatever evidence was offered.⁵⁵⁰ The more optimistic gloss was that all the plurality required was greater specificity and care in argument. According to this view, the relations of general trends to particular decisions that established or maintained the electoral systems in question had to be demonstrated explicitly, and either direct or circumstantial evidence of the racially

⁵⁴⁴ *Bolden*, 496 U.S. at 70 (emphasis added).

⁵⁴⁵ *Id.* at 74-76 nn.20-21.

⁵⁴⁶ *Id.* at 96 (White, J., dissenting).

⁵⁴⁷ *White*, 412 U.S. at 768.

⁵⁴⁸ *Washington v. Davis*, 426 U.S. at 243.

⁵⁴⁹ *Bolden*, 496 U.S. at 74-75.

⁵⁵⁰ See *Parker*, *supra* note 3, at 742-45; *Weinsweig*, *supra* note 3, at 322-29.

discriminatory intent of such acts was acceptable. This sort of careful hypothesis testing of causal explanations was just what political historians, particularly historians of southern politics in the nineteenth and twentieth centuries, had been doing for years. When *Bolden* and the companion school board case in Mobile were argued before the district court on remand in 1981, the plaintiffs brought in historians as expert witnesses and concentrated on motivation.⁵⁵¹ Once again, they prevailed, and this time, Judge Pittman's new decisions, full of lessons on Reconstruction and "Progressive Era" history, were not overturned on appeal.⁵⁵²

Besides the *Bolden* remand's empirical proof that it was possible to establish the intent of the original framers of an aged electoral scheme in a court, 1982 brought two other relevant events. First, in a case in which the evidence seemed almost indistinguishable from that in the original *Bolden* case, but where lower court judges had phrased their decisions in intent, rather than effect terms, a 6-3 majority of the U.S. Supreme Court ruled that the at-large system for electing county commissioners in Burke County, Georgia, had been maintained for racially discriminatory reasons.⁵⁵³ Joined in the majority by *Bolden* dissenters Brennan and Marshall, as well as by Chief Justice Burger, who had been part of the plurality in *Bolden*, Justice Blackmun, who had concurred with the outcome in *Bolden* because of the remedy ordered, and Justice O'Connor, who had replaced Stewart, Justice White triumphantly led the retreat from Mobile back to Dallas and San Antonio. Pointedly not citing *Feeney*, White catalogued a series of factors that, he asserted, proved a racial intent in this rural black-majority county: racially polarized voting and no black candidate ever elected; past official discrimination in education and voting regulations, which inhibited blacks' current registration and political participation; exclusion from Democratic party posts until 1976; property qualifications for some offices; hiring discrimination in the county government; the unresponsiveness of the County government to the particularized concerns of African-Americans; blacks' depressed socioeconomic status; the refusal of representatives to the state legislature, who by tradition controlled local legislation, to introduce bills requiring single-member districts; the

⁵⁵¹ P. McCrary, *History in the Courts: The Significance of Bolden v. The City of Mobile*, in C. Davidson, *supra* note 21, at 47-63.

⁵⁵² *Bolden v. City of Mobile*, 542 F. Supp. 1050 (S.D. Ala. 1982); *Brown v. Board of School Commissioners of Mobile County*, 542 F. Supp. 1078 (S.D. Ala. 1982), *aff'd* 706 F.2d 1103 (11th Cir. 1983), *aff'd* 474 U.S. 1005 (1983).

⁵⁵³ *Rogers*, 458 U.S. 613. The *Rogers* opinion was actually made public two days after the passage of the Voting Rights Act, but it is discussed first for organizational clarity.

large geographical size of Burke County; and the majority vote and numbered post requirements for election.⁵⁵⁴

The second event was the debate over and amendment of section two of the Voting Rights Act, which made clear, contrary to the plurality opinion in *Bolden*, that Congress meant to allow plaintiffs in voting rights cases to prevail if they demonstrated *either* intent *or* effect.⁵⁵⁵ According to the Senate Judiciary Committee's report on the bill, a plaintiff who chooses to prove intent under the amended section two may rely on "direct or indirect circumstantial evidence, including the normal inferences to be drawn from the foreseeability of defendant's actions"⁵⁵⁶ Paraphrasing *White v. Regester* and *Zimmer v. McKeithen*, the report also outlined nine factors which might be relevant to proving a case of discriminatory *effect*, only two of which—a candidate slating process from which minorities were excluded, and racial appeals in campaigns—were not considered by Justice White in *Lodge* as indicators of intent.⁵⁵⁷ The conjunction within two days of the publication of the *Lodge* opinion and the passage of the amended Voting Rights Act made clear that it matters less whether the standard in voting rights cases is referred to as "intent" or "effect" than what sorts of evidence are counted as probative and how they are weighed.⁵⁵⁸

The patchwork of intent and effect discussions in other Supreme Court decisions of the 1980s formed a crazy quilt whose doctrinal pattern was strikingly irregular.⁵⁵⁹ In 1981, for instance, the same four justices who had formed the plurality in *Bolden* joined in another plurality opinion in *Michael M.*, a case in which California's statutory rape law was challenged on two grounds: first, that its effect was to discriminate against males; and second, that its adoption in the nineteenth century was tainted by now-outmoded sexual stereotypes of young women.⁵⁶⁰ But whereas in *Bolden*, Rehnquist, Stewart, Burger, and Powell had demanded proof of intent, in *Michael M.*, they returned to the intent-irrelevant view of *O'Brien* and *Palmer v. Thompson*! An impermissible motive, Rehnquist intoned, would not void an "otherwise constitu-

⁵⁵⁴ *Id.* at 624-28.

⁵⁵⁵ See S. Rep. No. 417, 97th Cong., 2d Sess., 27 (1982).

⁵⁵⁶ *Id.* at 27 n.108.

⁵⁵⁷ *Id.* at 29-31; *Rogers*, 458 U.S. at 624-28.

⁵⁵⁸ One commentator even goes so far as to say that in *Rogers*, Justice White "rendered the inquiry into discriminatory purpose somewhat obsolete by replacing the purpose requirement with a results test." Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 *Harv. C.R.-C.L. L. Rev.* 173, 193 n.77 (1989).

⁵⁵⁹ *Weinzweig*, *supra* note 3, at 322-35; *Ortiz*, *supra* note 3, at 1134-42.

⁵⁶⁰ *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 467 (1981).

tional statute."⁵⁶¹ Yet four years later, this time for a unanimous court, Rehnquist rejected a provision of the 1901 Alabama Constitution that disfranchised people convicted of various petty or more serious crimes largely on the ground that it would not have been adopted "but for" a racially discriminatory motive.⁵⁶² This time, motive was not only relevant, but the presence of a "permissible motive," the state constitutional convention's desire to disfranchise poor whites, did not "trump" its racially discriminatory motive.⁵⁶³

In the mid-decade's most important voting rights case, *Thornburg v. Gingles*, Justice Brennan ignored intent altogether in tossing out certain districts adopted in the 1981 North Carolina legislative reapportionment.⁵⁶⁴ The 1982 amendments to the Voting Rights Act rendered effect evidence sufficient, and three of the nine "Senate Report factors" seemed to Brennan more important than the others: minority electoral success, compactness, and cohesion.⁵⁶⁵ Apparently satisfied to have three points to tick off, lower court judges often considered intent evidence, but the Supreme Court did not, at least in the voting rights area, provide further guidance on the proper intent criteria.

D. *Nine Intent Factors and Their Rationales in Voting Rights Cases*

The nine *White-Zimmer* factors, numbered and codified in the 1982 Senate Report, and narrowed to three main points in Justice Brennan's *Gingles* opinion, set out clearly what courts should focus on when determining whether the *effect* of an electoral regulation is illegal. But what factors should typically be taken into account in an *intent* inquiry, and what the rationale for each is has not been explained systematically. Judicial opinions, logic, and my own and others' experiences in normal scholarship and in testimony in voting rights cases suggest that nine elements ought to be taken into account.

Underlying every historical explanation is an implicit or explicit model of human behavior, a theory, often inchoate, of how people typically act in certain kinds of situations. Sometimes based on empirical generalizations, sometimes on rough analogies, and sometimes on common sense, these frameworks should not mechanically determine conclusions—if they do, why bother about the evidence? But they do establish baselines of initial plausibility for different possible interpreta-

⁵⁶¹ Id. at 472 n.7.

⁵⁶² *Hunter v. Underwood*, 471 U.S. 222, 232 (1985).

⁵⁶³ Id. at 228.

⁵⁶⁴ 478 U.S. 30 (1986).

⁵⁶⁵ Id. at 50-51.

tions, and the thinner the available evidence in any instance, the more determinative of conclusions the theory is likely to be. Three examples drawn from the voting rights area illustrate, respectively, the systematic, commonsensical, and analogical foundations of models. At-large elections have repeatedly been found to disadvantage political or racial minorities.⁵⁶⁶ Politicians who desire election or reelection care quite a lot about electoral laws and changes in them.⁵⁶⁷ In the first instance in American history in which a large number of members of an ethnic minority were able to vote, during the post-Civil War era in the Deep South, politicians immediately demonstrated both the willingness and the ability to gerrymander district lines in order to crack, stack, and pack African-American voters.⁵⁶⁸

Judges, as well as historians, have frequently made such models important parts of their reasoning. In *Feeney*, for instance, Justice Stewart stressed that both federal and state governments had long given military veterans special hiring privileges, which implied that there was nothing special about Massachusetts's actions, no unusual animus against women that needed to be explained.⁵⁶⁹ In his plurality opinion in *Bolden*, Stewart claimed—ignoring the mass of contrary scholarly findings, even in one of the works he cited!—that an at-large system of elections “was universally heralded not many years ago as a praiseworthy and progressive reform of corrupt municipal government.”⁵⁷⁰ In *Davis v. Bandemer*, Justice White drew on the common understanding that “whenever a legislature redistricts, those responsible for the legislation will know the likely political composition of the new districts and will have a prediction as to whether a particular district is a safe one for a Democratic or Republican candidate or is a competitive district that

⁵⁶⁶ See, e.g., Engstrom & McDonald, *The Election of Blacks to City Councils: Clarifying the Impact of Electoral Arrangements on the Seats/Population Relationship*, 75 *Am. Pol. Sci. Rev.* 344 (1981); Engstrom & McDonald, *The Election of Blacks to Southern City Councils: The Dominant Impact of Electoral Arrangements in Blacks in Southern Politics* (L. Moreland, R. Steed, & T. Baker, eds., 1987); Davidson & Korbel, *At-Large Elections and Minority Group Representation: A Re-Examination of Historical and Contemporary Evidence*, 43 *J. of Pol.* 982 (1981).

⁵⁶⁷ See, e.g., Argersinger, *Electoral Processes*, in 2 *Encyclopedia of American Political History* 489 (J. Greene, ed., 1984).

⁵⁶⁸ See *supra* section I.C.

⁵⁶⁹ 442 U.S. 256, 261. Note that this was the first sentence in Stewart's opinion after his statement of the facts.

⁵⁷⁰ 446 U.S. 55, 70 n.15 (citing E. Banfield & J. Wilson, *City Politics* 151 (1963)). In his dissent, Justice Marshall gave much fuller and more representative citations, including some to other pages of Banfield and Wilson's book that contradicted Justice Stewart's statement. *Id.* at 105 n.3 (Marshall, J., dissenting).

either candidate might win."⁵⁷¹ The "suspect classification" doctrine reflects judges' empirical generalization that laws that treat people of different races differently are likely to have been motivated by racial prejudice.⁵⁷²

Whatever their validity in particular instances, such generalizations are significant because they provide keys to what one can expect that political actors know and foresee, and because they affect the degree of skepticism with which analysts approach each possible explanation. If one expects politicians never to be interested in reelection or to be ignorant of how to draw district lines or other electoral arrangements to their enemies' or allies' disadvantage, one might accept at face value statements of civic virtue in reapportionment or be genuinely surprised when electoral systems had the effect of disadvantaging minorities. Because of their background importance in shaping reasoning, psychological or sociological models ought to be adopted self-consciously, and they ought to be based on the best available empirical evidence. There is no easier way to construct a biased "law office history" than to begin with one's conclusions, basing them on little more than unexamined individual experiences and values.

The second factor is the historical context, especially the sequence of events, which is important for what it reveals about the general attitudes and interests of decisionmakers. In the remand portion of the Mobile cases, for instance, the plaintiffs demonstrated that the at-large election systems for the Mobile city government and school board originated not in 1911 or 1919, as everyone had assumed at the time of the first *Bolden* case, but in the 1870s, a time of violent racial turmoil, when the vast majority of blacks were still able to vote, and when they had been appointed and elected to offices in Mobile. The fact that white Democratic primaries for the city government were held on a ward basis from 1872 to 1906, while general elections, in which blacks could vote, were at-large, offered further evidence that those who shaped electoral laws at the time were fully aware of the racially discriminatory consequences of their actions.⁵⁷³ Obviously, Mobile decisionmakers knew that the voters preferred ward elections, and they designed elections to let whites settle their battles first in segregated primaries, and then solidly confront blacks in an electoral structure guaranteed to disadvantage minorities.

⁵⁷¹ 478 U.S. 109, 128 (1986).

⁵⁷² Simon, *supra* note 3, at 1070-71.

⁵⁷³ McCrary & Hebert, *supra* note 6, at 107.

Hunter v. Underwood challenged a suffrage provision, section 182, of the 1901 Alabama constitution, which had been formed by a convention whose chief purpose, openly and widely advertised, was to disfranchise as many blacks as possible.⁵⁷⁴ A contention that any of the suffrage provisions was free of the white supremacist zeal that animated that convention was too incredible even for the defendants, who merely argued that the convention delegates wished to disfranchise poor whites, too.⁵⁷⁵ *United States v. Dallas County* involved an at-large election scheme for a county government that had been passed in 1901 between the time when the disfranchising convention was authorized and when it met.⁵⁷⁶ White politicians from Dallas county, of which Selma is the county seat, were among the leaders in the 1901 constitutional convention, and the same motives, the plaintiffs successfully stressed, lay behind the county at-large election provision.

In *Taylor v. Haywood County, Tennessee*, the court found it significant that the county switched to an at-large mode of electing its road commission at its initial opportunity after the election of the first black ever to sit on that board.⁵⁷⁷ In *Garza*, the 1959 redistricting, coming just after the closest election for supervisor in the postwar era⁵⁷⁸ and the only one in which a Hispanic candidate launched a major campaign and taking place just before new census data would be available, raised considerable suspicion. Furthermore, the continued northward, but rarely eastward extension of the Third Supervisorial District in the face of Hispanic protests and political activism in 1971 and 1981 made clear that the ethnic and political consequences of the redistrictings were foreseen by all participants.⁵⁷⁹ Any local or state election laws enacted shortly after the invalidation of institutions such as the white primary,⁵⁸⁰ during the turmoil after the *Brown* decision,⁵⁸¹ a serious contest by a significant minority candidate,⁵⁸² the passage of the Voting Rights Act,⁵⁸³ or coterminous with a minority voter registration cam-

⁵⁷⁴ See J. Kousser, *supra* note 13, at 165-71.

⁵⁷⁵ *Hunter*, 471 U.S. at 231-32.

⁵⁷⁶ McCrary & Hebert, *supra* note 6, at 109-12.

⁵⁷⁷ 544 F. Supp. 1122, 1127-28 (W.D. Tenn. 1982).

⁵⁷⁸ See *supra* section III.B.

⁵⁷⁹ See *supra* sections III.B., III.D., and IV.E.-F.

⁵⁸⁰ *Elmore v. Rice*, 72 F. Supp. 516, 518 (E.D.S.C. 1947); S. Lawson, *Black Ballots: Voting Rights in the South, 1944-1969*, at 49-52 (1976).

⁵⁸¹ *United States v. Marengo County Comm'n.*, 731 F.2d 1546, 1571 (11th Cir. 1984).

⁵⁸² *Zimmer v. McKeithen*, 485 F.2d 1297, 1301 (5th Cir. 1973).

⁵⁸³ *Smith v. Paris*, 257 F. Supp. 901, 904 (M.D. Ala. 1966).

paign or a racially charged election⁵⁸⁴ should come into court bearing a heavy motivational burden.

The third factor should be the text or provisions of the law or regulation, or, in the case of alleged racial gerrymandering, the pattern of the lines, compared to ethnic geography. The law at issue in *Dallas County*, for instance, tacked the at-large scheme on in an illogical and syntactically clumsy way at the end of a section that had clearly established a ward system.⁵⁸⁵ This fact raised the suspicion that the method of election was a last-minute thought, an insurance scheme to preserve white supremacy in case the constitutional convention did not go as planned, or the courts invalidated the resulting constitution.⁵⁸⁶ The addition of some, but not other misdemeanors to the list of felonies for which men were disfranchised by section 182 of the 1901 Alabama constitution was taken to be an indication of racially discriminatory intent by the Supreme Court in *Hunter v. Underwood*, especially since one of the misdemeanors appended was miscegenation,⁵⁸⁷ a racist "crime" for which white men were never convicted in the South. Numbered post, majority vote, anti-"single shot,"⁵⁸⁸ and staggered terms provisions of at-large election systems are indicators of motivation because all are well understood to disadvantage minorities. Similarly, secret ballot acts that denied illiterates any assistance, at the time of widespread illiteracy, especially among African-Americans, broadcast their purpose.⁵⁸⁹ The "uncouth 28-sided figure" was enough to convince the Supreme Court in *Gomillion*,⁵⁹⁰ and the East Los Angeles Wall between the First and Third Supervisorial Districts supported the same inference of ethnically discriminatory desires.

The fourth variety of evidence is basic demographic facts. A rising and/or concentrated minority population, unusually populous or geographically spread out districts, which magnify the disadvantages of representatives of relatively impecunious groups, and populations

⁵⁸⁴ *City of Port Arthur v. United States*, 517 F. Supp. 987, 1020 (D.D.C. 1981).

⁵⁸⁵ 1901 Ala. Acts 890, No. 328, Sec. 6 (Feb. 8, 1901).

⁵⁸⁶ Trial Transcript at 3326 and 3659, *United States v. Dallas County Comm'n*, 548 F. Supp. 875 (S.D. Ala. 1981) (No. 78-578-H), (Testimony of Peyton McCrary and J. Morgan Kousser, respectively).

⁵⁸⁷ 471 U.S. 222, 226-28.

⁵⁸⁸ "Single-shot" or "bullet" voting takes place in multi-member constituencies, when each member of the electorate may vote for more than one candidate. Members of political or social minorities often cluster their votes on one or a few candidates, hoping that the majority group will spread its votes, thereby allowing candidates favored by the minority group to be elected. An anti-single shot law prohibits this practice.

⁵⁸⁹ J. Kousser, *supra* note 13, at 51-56.

⁵⁹⁰ *Gomillion*, 364 U.S. 339 (1960).

whose depressed educational and economic levels reflect the vestiges of past racial and ethnic discrimination are all facts that politicians can be expected to observe, and that, therefore, should be assumed to affect their design of electoral structures. Literate adult male blacks, for example, constituted 78% of one of the four single-member residency districts detailed in the 1901 Alabama law at issue in *U.S. v. Dallas County*, as well as slight majorities of two other districts.⁵⁹¹ Had courts ordered the literacy test in the 1901 Alabama constitution to be fairly administered, therefore, African-Americans would almost certainly have been able to elect at least one commissioner in Dallas County under a ward system. No one, of course, doubted that politics in Selma in 1901 was racially polarized, or that whites considered black political power threatening. Plaintiffs argued that these facts and the hypothesized outcome under single-member districts strengthened the case that the at-large system was adopted with a racially discriminatory intent.⁵⁹² The demographic information and discussion that comprise such a large proportion of the redistricting files in Los Angeles county, especially in 1981, show unmistakably that all participants were aware of the unequal size of the districts and the ethnic facts of the county's life, and that they took these into account in drawing lines between supervisorial districts.⁵⁹³

Two basic political facts, the number of minority candidates elected and the approximate extent of racial polarization among voters, also must be assumed to condition the expectations of officials who frame or maintain electoral arrangements. Blacks and their white allies dominated offices in the Alabama Black Belt during Reconstruction. Although little direct evidence survives about the reasons for moves to substitute appointive for elective local governments in Dallas and other counties, historians have never doubted that racially discriminatory purposes underlay such laws.⁵⁹⁴ That all of the officers appointed were white—a dramatically disproportionate racial effect—is, of course, what primarily convinced historians of the racist intent of the provisions. In a 1978 Sumter County, South Carolina referendum on whether to switch from at-large to single-member districts for the county commission, a newspaper advertisement arranged by the incumbent white commissioners touted the easier election of minority-favored candidates as one of the “advantages” of single-member districts, and (for

⁵⁹¹ Trial Transcript, *supra* note 586, at 3588-3600 (Kousser testimony).

⁵⁹² McCrary and Hebert, *supra* note 6, at 109-12.

⁵⁹³ See *supra* section III.F.

⁵⁹⁴ See Kousser, *The Undermining of the First Reconstruction: Lessons for the Second*, in C. Davidson, *supra* note 21, at 35-36.

anyone who missed the racial cue once) as one of the "disadvantages" of the at-large system. The one black among the seven Sumter County commissioners was not informed of the meeting that authorized the advertisement.⁵⁹⁵ In Chattanooga, Tennessee during the 1970s and 1980s, only one black candidate for the city commission attracted a substantial white crossover vote—a fact evident even without statistical analyses of voting, since he was the only black in that one-third black city to win. It is logical to assume that projections from such past experience conditioned opinions about the consequences of changing to a single-member district system during a referendum on the subject in 1988, voting in which was, as usual, racially polarized.⁵⁹⁶ Similarly, in Los Angeles, everyone who dealt with county government knew that no supervisor was Hispanic in the postwar era, and there was a widespread understanding that, given a viable and otherwise attractive choice, Hispanics usually preferred Hispanic candidates, but Anglos did not.⁵⁹⁷

A sixth factor is the background of key decisionmakers, because it may reflect on their motives in particular instances. The principal framer of section 182 of the 1901 Alabama constitution, John Fielding Burns, was a planter and longtime magistrate in then-80%-black Dallas County, who presided over a court where most defendants were black.⁵⁹⁸ Burns's experiences reduce the plausibility of the argument of the defendants that the section was aimed principally at poor whites.⁵⁹⁹ James Nunnellee, who introduced the Dallas County Commission bill into the State Senate in 1901, was the editor of the *Selma Times*. In 1895, he had written:

The Times is one of those papers that does not believe it is any harm to rob or appropriate the vote of an illiterate Negro. We do not believe they ought ever to have had the privilege of voting. This right was given or forced upon them, and the white people by the bayonet, and the first law of nature, self preservation, gives us the right to do anything to keep our race and civilization from being wiped off the face of the earth.⁶⁰⁰

⁵⁹⁵ Advertisement, Sumter S.C. Daily Item, Nov. 3, 1978, Defendant's Exhibit 74 in *County Council of Sumter County v. United States*, 555 F. Supp. 694 (D.D.C. 1983); Declaration of J. Morgan Kousser at 25-26, in *County Council of Sumter County v. United States*, 555 F. Supp. 694 (D.D.C. 1983).

⁵⁹⁶ Plaintiff's Exhibit 461, *Brown v. Bd. of Comm'n's of the City of Chattanooga, Tenn.*, 722 F. Supp. 380 (E.D. Tenn. 1989).

⁵⁹⁷ See supra section I.D.

⁵⁹⁸ M. McMillan, *Constitutional Development in Alabama, 1798-1901*, at 275 (1978).

⁵⁹⁹ *Hunter*, 471 U.S. at 230-31.

⁶⁰⁰ See M. McMillan, supra note 598, at 225 n.49.

Although their sentiments were no doubt a good deal tamer than Nunnellee's, the key roles of Ron Smith and Allan Hoffenblum in campaigns against prominent minority politicians undercut arguments that they were sincerely concerned only to create districts where blacks or Hispanics would have a fair chance to elect candidates of their choice.⁶⁰¹

Like their backgrounds, other actions of decisionmakers may be indirect indicators of their general attitudes toward minority groups. There are two broad classes of such indicators—process indexes and output indexes. The former includes everything from imposing voting restrictions such as poll taxes or literacy tests to holding hearings and appointing minority representatives to decisionmaking bodies. A legislature that restricted the suffrage in a manner that disproportionately affected members of minority groups, or that won office from such an electorate, may well have been motivated by the same bias when it designed an electoral structure. Thus, Justice Rehnquist's quotation in *Hunter v. Underwood* of parts of the white supremacist opening speech of John B. Knox, the president of the 1901 Alabama Constitutional Convention, and his references to other discriminatory actions of that convention were pertinent to the motives of the convention in adopting section 182.⁶⁰²

Similarly, the purportedly beneficent objects of an official body that does not provide minority group members with a forum to express their views, or that only creates an appearance of listening, are suspect. No Los Angeles county supervisorial redistricting plan adopted since 1953 has been unveiled before the meeting at which it was voted upon. No one outside the inner circles of power has been apprised of the proposed boundaries in time to comment meaningfully. Furthermore, the appointment of minority Boundary Commission members in 1981 and the opening of Commission meetings to presentations by CFR were, as shown above,⁶⁰³ mere shams. The minority Boundary Commissioners were either servants of the supervisors or political ingenuos, and none was included in the Commission's private negotiations. The CFR plan was never considered seriously by either Republicans or Democrats on the Board, or by their representatives on the Commission. It was not that Hispanic groups' opinions were honestly weighed and rejected—an exercise of discretion characteristic of legislative bodies, and one that would have removed at least some of the bad feeling from and part

⁶⁰¹ See supra sections III.D., IV.E., and IV.F.

⁶⁰² 471 U.S. at 230-31.

⁶⁰³ Sections IV.D.-IV.G.

of the legal underpinning of a redistricting challenge. Instead, the Board acted to defuse hostility and potential protest by creating the counterfeit of a fair and open process, by *seeming* responsive without actually *being* responsive.

The term "responsiveness" is more typically applied to output measures, such as gauges of equality of services. If ghettos or barrios have unpaved streets, no sewers, parks and schools badly in disrepair, inadequate police, fire, and medical services, few appointments to boards and commissions, etc., while Anglo areas enjoy excellent public benefits, then one suspects that electoral structures designed or maintained by the same government may be deliberately discriminatory.⁶⁰⁴ But responsiveness is often difficult to determine precisely, for two reasons: first, records are often not available by race or ethnicity or for areas that correspond closely to ethnically distinct districts; and second, measures of different services may give different results. However accurate or unequivocal the measures, responsiveness is not the same as representation, but only an indirect indicator of it. Mussolini made the trains run on time, but dispensed with elections. To make an intent case hinge on responsiveness, as the Fifth Circuit Court of Appeals did in *Lodge v. Buxton*,⁶⁰⁵ is to substitute one's judgment of what government ought to be doing for the voters' right to select candidates of their own choice.

Statements by important participants, which are referred to as "smoking gun" evidence if they are sufficiently incriminating, are difficult to come by and must be interpreted with due caution and skepticism, but may, in some cases, be significant. It is certainly too strong to say that they constitute "no test of intent at all."⁶⁰⁶ The only direct evidence of the intent of the framer of section 182, or of other delegates to the 1901 Alabama Constitutional Convention, is a newspaper interview with John F. Burns, in which he stated his belief that the wife-beating provision of the section alone would disfranchise 60% of the adult male blacks in the state.⁶⁰⁷ The chief sponsor of a 1962 Mississippi law requiring all cities with a mayor-council form of government

⁶⁰⁴ E.g., Defendant's exhibits 109-10, County Council of Sumter County, South Carolina v. U.S., 555 F. Supp. 694 (D.D.C. 1983) (No. 82-0912).

⁶⁰⁵ *Lodge v. Buxton*, 639 F.2d 1358, 1375 (5th Cir. 1981), aff'd sub. nom., *Rogers v. Lodge*, 458 U.S. 613 (1982), reh'g denied, 459 U.S. 899 (1982). The Supreme Court disagreed with the Fifth Circuit on this point, stating that, although proof of unresponsiveness is an important element, it was not the only element from which one can infer discriminatory intent. 458 U.S. at 625 n.9.

⁶⁰⁶ See Weinzwieg, supra note 3, at 333.

⁶⁰⁷ See J. Gross, *Alabama Politics and the Negro, 1874-1901*, at 244 (1969) (unpub. Ph.D. thesis, Univ. of Ga.).

to adopt at-large elections urged its passage in order "to maintain our southern way of life."⁶⁰⁸

But statements from participants may be misleading because people may distort the expression of their intentions in four ways. First, they may simply forget, or say they forget, why they acted. The most common single response by protagonists, sometimes prompted by their counsel, in the depositions in the *Garza* case was "I don't recall."⁶⁰⁹ Second, people may have, or say they have, several motives for acting, and they may retrospectively weigh one sort of intention differently than they actually did when they acted. When discussing why he opposed the Hoffenblum plan in 1981, Supervisor Edelman stressed ethnic factors; when remembering his actions in 1989, he emphasized partisan reasons.⁶¹⁰ Third, people may try to appear to be lambs, when they are actually wolves. The repeated attribution to themselves of the most civic-minded, selfless motives by people whose actions belie their words is one of the delights of *Garza* for the inveterate ironist. Fourth, sometimes sheep perversely wish to seem to be wolves, or at least they hide a bad motive behind a worse one. When they passed poll taxes, literacy or property tests, and white primary laws around the turn of the nineteenth century in the South, upper-class white Democratic disfranchisers often concealed their desire to rid the electorate of poorer whites, especially Republicans and Populists, behind a cloud of racist rhetoric. To be sure, their principal aim was to exclude most African-Americans from the polls, but they hoped simultaneously to eliminate all partisan and class opponents—objectives that they rarely paraded.⁶¹¹ Since sophisticated and well-counseled politicians such as those in Los Angeles are unlikely to litter the area with smoldering guns, the absence of smoke should not be taken to imply that no infraction has been committed.

State policies and formal and informal institutional rules constitute the ninth and last general category of relevance. If every city or county in a particular state has exactly the same electoral structure, it is difficult to argue that one locality adopted that structure for a different purpose than the rest did. If there is no variation, in other words, there is

⁶⁰⁸ See McCrary & Hebert, *supra* note 6, at 105 (quoting the Jackson Clarion-Ledger, Feb. 1, 1962, at 1).

⁶⁰⁹ For example, Richard K. Simon, an attorney for Los Angeles County, and Ron Smith performed the following call-and-response during Smith's deposition: "Mr. Simon: If you don't remember, that's fine. [By the witness]: I don't remember." Smith Deposition Transcript at 98.

⁶¹⁰ See *supra* text accompanying notes 385-88.

⁶¹¹ J. Kousser, *supra* note 13, at 238-65.

no variation to be explained.⁶¹² On the other hand, if there are diverse electoral setups from place to place, then one may possibly have been chosen for racially discriminatory reasons.⁶¹³ Formal rules, such as the necessity to obtain four votes to adopt a redistricting plan in Los Angeles county, and informal rules, such as legislative deference to local Democratic delegations in South Carolina in 1967, also help to shape explanations. In the former case, the existence of the four-vote rule implies that one should discount much of the pro-Hispanic rhetoric of supervisors and their operatives in 1981 as mere posturing, because everyone realized that the final plan adopted would have to satisfy incumbents of both political parties.⁶¹⁴ The tradition of legislative deference in South Carolina suggests that one can concentrate on the intent of the local legislative delegation, ignoring that of other legislators, which makes the problem more tractable.⁶¹⁵

E. Hypothesis-Testing, Counterfactuals, and Standards for Determining the Existence of Racially Discriminatory Motives

When historians attempt to explain some event, they implicitly or explicitly choose between two or more possible explanations on the basis of the extant evidence, relevant theory, and analogies. To say that racial or sex discrimination motivated an action is to say that discrimination caused the action in some sense and that other suggested or possible rationales did not cause it, or were less important, or at least do not wholly exclude invidious discrimination as a cause. Explanations cannot be assessed independently, but only in relation to other explanations. To appraise the evidence for a racially discriminatory motive, arrayed under some or all of the nine rubrics discussed above, one must also examine the cases for other possible motives. How is this to be done, and what weight must be attached to a "bad" motive for it to be sufficiently important to be illegal, or, conversely, how powerful an influence does a "good" motive have to be to wash away possible stains of a bad one? Answers to these questions offered by courts and commentators have been either indeterminate or unsatisfactory.

⁶¹² Of course, one could investigate why the state as a whole adopted the policy in the first place.

⁶¹³ See supra note 586, Trial Transcript at 3529-42 (United States v. Dallas Co.). Cf. McCrary and Hebert, supra note 6, at 118-21 (discussing *Dillard v. Crenshaw Co.*, 640 F. Supp. 1347 (M.D. Ala. 1986)).

⁶¹⁴ See supra sections I.B., IV.A., and IV.D.

⁶¹⁵ See McCrary & Hebert, supra note 6, at 113.

One clear, but clearly wrong answer limits a government's actions only by the inventiveness of its lawyers. "It will be next to impossible," remarks John Hart Ely, "for a court responsibly to conclude that a decision was affected by an unconstitutional motivation whenever it is possible to articulate a plausible legitimate explanation for the action taken."⁶¹⁶ Applying this principle, Ely would have upheld the North Carolina literacy test passed in 1900. Yet no historian who has examined the passage of that provision has ever doubted that it was adopted for a racially discriminatory purpose.⁶¹⁷ Depending on what different judges considered "plausible" or "legitimate," such a standard would either ratify nearly every action or provide no guidance at all. Justice Brown in *Plessy* implicitly accepted the argument that mandatory segregation on railroads was a mere incidental regulation, which lacked any discriminatory intent, while the first Justice Harlan swallowed the Augusta school board's line that by closing the only black public high school in the city, it was merely trying to save money and take better care of black elementary school students.⁶¹⁸ A standard that might fail to rule out disfranchisement, segregation, and racially unequal exclusion from public services cannot be acceptable.

By a similar argument, it is unreasonable to approve just any rationale first offered in debate or reports at the time of adoption of the statute or regulation. Proponents of school segregation from the 1840s on claimed that blacks learned in a different manner than whites did, and that segregation was therefore beneficial for children of both races.⁶¹⁹ Others contended, often plausibly, that racial separation would inhibit violence.⁶²⁰ Accepted at face value, these are unquestionably legitimate governmental ends. It follows immediately that if a court is serious about considering intent, it must pursue the quest beyond simple assertions of beneficent or neutral purposes, even if these were made before the filings of lawsuits. To allow some motive, however worthy, to excuse another motive, however harmful, without further attempts to weigh their importance is to abandon a fair and honest search for

⁶¹⁶ J. Ely, *Democracy and Distrust: A Theory of Judicial Review* 138 (1980). Even more extreme versions of the statement appear in Ely, *supra* note 3, at 1215 n.31, 1278-79.

⁶¹⁷ Ely, *supra* note 3, at 1275-79. For an assessment of the historical evidence, see J. Kousser, *supra* note 13, at 182-93.

⁶¹⁸ See *supra* text accompanying notes 468-73.

⁶¹⁹ See Kousser, *The Supremacy of Equal Rights: The Struggle Against Racial Discrimination in Antebellum Massachusetts and the Foundations of the Fourteenth Amendment*, 82 *Nw. U.L. Rev.* 941, 973-74 (1988).

⁶²⁰ That school desegregation caused white violence against blacks, for instance, was used as an argument for segregation by the racist school board in New Orleans in 1877. See R. Fischer, *The Segregation Struggle in Louisiana, 1862-1877*, at 138-39 (1974).

intent, and to countenance policies that nearly everyone would now condemn.

Two phrases in leading opinions of the Supreme Court reflect somewhat different notions of causality, and in idealized cases, may lead to different decisions. In *Arlington Heights*, Justice Powell remarked that once discriminatory purpose had been shown to be "a motivating factor," the burden shifted to the agency to prove "that the same decision would have resulted even had the impermissible purpose not been considered."⁶²¹ In other words, it had to disprove the hypothesis that a favorable disposition toward racial discrimination was a necessary condition of its action. The formula in Justice Stewart's opinion in *Feeney* not only swaps the burden of proof, but, somewhat surprisingly, may be more favorable to those alleging racial discrimination. "Discriminatory purpose," according to Justice Stewart, "implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."⁶²²

A hypothetical illustration will illuminate facets of these criteria and the roles they might play in more realistic situations, and it will make some sense out of the concept of institutional intent.⁶²³ Suppose that a legislature consists of five robots, whose agenda is set by some fair procedure, such as randomizing the order in which proposals are voted on, and who pass laws by simple majority rule with abstention prohibited. Because they are robots, we know the legislators' true preferences, the information each has, and the decisionmaking procedure each goes through. Suppose that the legislature has selected an electoral law, and that we are trying to determine whether it acted with a racially discriminatory intent.

Consider seven cases:

1. Three robots voted for the law solely on the grounds of race. In this example, racial feelings clearly caused the outcome, and to a court with any sort of causal intent standard, it would not matter what the other two robots did, or why they did it. This is an easy case, so long as we do not adopt the Ely rule.

⁶²¹ 429 U.S. at 270-271 n.21 (1977) (emphasis added). This "but for" test is enshrined in *Simon*, supra note 3, at 1065.

⁶²² 442 U.S. at 279.

⁶²³ Some commentators have in effect given up any effort to deal with mixed motives or institutional intent. See Miller, supra note 3, at 733-34. I do not think the situation is quite that desperate.

2. The most important reason that three robots favored the law was their discriminatory racial preferences, but other views that they had pointed in the same direction. This transgresses the *Feeney* test, but not *Arlington Heights*, because, as I have set up the example, the robots would have made the same decision even if race had not been taken into account. The counterfactual here (assume that race was not a consideration) seems misleading, because we know that race was the primary reason for acting. It follows that a legislature that fails the *Arlington Heights* test is unquestionably guilty of discrimination, but that the actions of a legislature that passes that test may still have been motivated by a discriminatory intent. If intent is the proper criterion, then *Arlington Heights* is a decisive test in only one direction.

The reason for this is that *Arlington Heights* treats hypotheses asymmetrically. It is true, in this example, that the law would have been adopted even if race had not been taken into account, but it is also true that if the other factors had not been considered, but race had been, the law would also have been enacted. The "but for" test requires a *necessary* condition. The example suggests that race need be at most a *sufficient* condition in order to satisfy intuitive notions of intent. If it is appropriate to array the facts of any particular case in a 2 X 2 table, such as Tables 12 and 13, this example indicates the necessity of taking into account all four cells of the table, rather than focusing on only one of them.

3. Four robots split evenly, purely on nonracial grounds, but the fifth votes for the law either solely or principally out of racist principles, and would probably not have done so had race not been a consideration. This is an infraction under *Feeney*, and the example is consonant with informal understandings of causality. After all, a racial motive was decisive. Whether the instance passes *Arlington Heights* or not depends on which side gets the benefit of the doubt in the counterfactual thought experiment. It also seems ironic that *Arlington Heights* might rule the legislature guilty in this instance, in which only one robot was moved by racial feelings, while it would sustain the three racially-motivated robots in case two, above.

4. This is the same as case three, except that the fifth robot cannot weigh all of her preferences against each other simultaneously (as we have been implicitly assuming so far), but makes her decision "lexicographically." That is, she first considers the aspect of the law that is most important to her, and tests it by her values and the information at hand. If that decision produces a tie, she goes on to what for her is the second most important feature, and so on, until she can make a clear choice, at which point she stops. For instance, she may believe that the

most significant facet of an at-large elections scheme is that it produces a citywide viewpoint in each councilperson, which she may favor, but that this is balanced by the fact that such cosmopolitan political figures may be too distant from their constituents to respond to their needs. She then turns to another aspect of the system, hoping eventually to be swayed.

Suppose that race is only the tenth most important consideration about the law for the fifth robot, but that it is the first one that is decisive for her. Then it was, indeed, a racist opinion that caused her to cast her vote for the law, and, since she was pivotal, it was her action that caused the legislature to act. Again, this would be an infringement according to the *Feeney* test, but it would also unequivocally breach *Arlington Heights*, even though race was quite a minor consideration, which only one of the robots took into account. As the impact of racial concerns becomes more and more attenuated, the examples approach closer and closer to "for want of a nail, the shoe was lost, . . ." yarns, but the situations do seem true to the letter, at least, of *Arlington Heights* and *Feeney*.

5. The law passes by a majority of four robots, and not more than one of them acts for a racially discriminatory motive, or unanimously, and not more than two are so infected. This is an infringement under *Feeney*, because the majority acts "in part because of" racism, but is not under *Arlington Heights*, since a majority for the law would have formed regardless of racial considerations. In practice, since one would rarely know enough about the motives of the three-legislator majority to discount race entirely, *Arlington Heights* would also probably invalidate this law.

6. The robots are programmed in such a manner that race cannot be distinguished from some other factor or factors, and that complex of factors causes a majority or a pivotal member to vote for the election scheme. For instance, non-minority incumbents desire to protect their re-election chances, they know that at-large elections disadvantage minority candidates, who might threaten their political careers, and they adopt or maintain at-large elections. Suppose further that in this instance, racial and non-racial considerations cannot be separated from each other by any evidentiary test, because there is no minority incumbent, or at least she is not pivotal in the coalition for at-large elections, and the means chosen to protect incumbents necessarily reduce the opportunity of minority voters to elect candidates of their choice. This example violates the Constitution under both *Feeney's* "in part because of" test, and *Arlington Heights's* "but for" criterion, since no set of

motives that excludes race can result in the passage of the law.⁶²⁴ The illustration also begins to point to potential difficulties in dealing with mixed motives.

In certain instances, intertwined motives may be unraveled through the use of counterfactuals. For example, suppose that in 1965, the Los Angeles County Board of Supervisors could have accomplished the goal of equalizing population by a means that did not disadvantage Hispanics. Suppose, instead, the Board chose a means to population equality that reduced the Hispanic proportion in the Third District, instead of increasing it. Then the two motives may be separated, for the Board did not have to dilute the Hispanic vote in order to achieve population equality.⁶²⁵ The "reasonably available alternatives" argument,⁶²⁶ which gains power when it can be shown that the governmental body considered certain alternatives, is just a means of disentangling motives by employing counterfactuals.

7. Three robots either do not realize that the law will hurt minorities, or they know it, but go ahead for other reasons entirely. This law would withstand an attack under any of the proposed intent criteria, and represents the situation that sophisticated defendants usually claim to have been the case. The example spotlights the importance in intent cases of foreseeability and foresight, as well as the necessity of evaluating hypotheses about other potential motives.

These idealized examples suggest, first, that a disposition to disadvantage voters because of their race should be at most a sufficient, rather than a necessary condition, in order for a rule to be invalidated. Second, not every legislator, or even every legislator who is a member of the majority that passes the law need have been tainted by a racial concern, but only a pivotal member or group of them. Third, to determine sufficiency among pivotal legislators, all explanations, not just a racial hypothesis, must be examined. Fourth, racial and other considerations may be so intertwined as to make it impossible to examine them separately. In such instances, the decision rule must be to treat race plus the associated conditions as if they were a single racial concern. Otherwise, the possibility of finding a violation is eliminated by assumption. Fifth, since people often have mixed motives, and since we nearly always lack full information on legislators' preferences, deci-

⁶²⁴ In *Rybicki v. Board of Elections*, 574 F. Supp. 1082, 1110 (N.D. Ill. 1982), Judge Cudahy of the Circuit Court ruled on this issue that white incumbency preservation "was so intimately intertwined with, and dependent on, racial discrimination and dilution of minority voting strength that purposeful dilution has been demonstrated"

⁶²⁵ See *supra* text accompanying notes 97-104.

⁶²⁶ Simon, *supra* note 3, at 1122-23.

sion processes, and knowledge, their motives in realistic situations will be more difficult to evaluate.

While *Feeney's* causal terminology best states the ideal standard, in practice surviving evidence will usually be fragmentary, and no one fact will be determinative by itself. As a consequence, a more systematic version of the "totality of the circumstances" or "totality of the relevant facts" approaches of *White v. Register* and *Washington v. Davis* will be unavoidable.⁶²⁷ The key question, therefore, should not be "If all possible evidence relevant to the decisionmakers' motives were available, would we conclude that racial feelings were sufficient to have caused the passage of the law?" but, instead, "Given the surviving evidence, is the hypothesis that racial dispositions were sufficient to have caused the passage of the law better supported than alternative hypotheses are?"

F. Falsifying Competing Hypotheses

Evidence on the hypothesis of racially discriminatory intent has already been reviewed.⁶²⁸ But for a historical explanation to be acceptable, it must not only be shown to be plausible, it must also be demonstrated to be better warranted than other analyses, especially those that contradict it, in whole or in part. As a final demonstration of the workability of the multi-factor intent approach and of the feasibility of proof of intent in general, we must evaluate competing hypotheses explicitly.

Rather than put on a full-scale intent case themselves, the defendants in *Garza*, in essence, posed three fragmentary, contradictory hypotheses about the county government's motives in reapportionment through their criticisms of MALDEF's arguments. The first might be termed the civic virtue hypothesis, with a corollary about the constraints inherent in legal requirements. The second stressed good will toward minorities. The third admitted that partisan, ideological, and personal self-interest shaped the lines between supervisorial districts, but contended that Latinos were inadvertently disadvantaged.

Claims by campaign consultants and former supervisorial deputies that they were motivated in reapportionment only by a sense of civic responsibility, or that they cared less for the political welfare of the supervisors whom they represented than for that of millions of anonymous members of minority groups are not credible. Common sense, the history of anti-minority gerrymandering in California and elsewhere, and modern political theory, which begins with the assumption

⁶²⁷ See *supra* section V.D.

⁶²⁸ *Id.*

that politicians consult their self-interest first,⁶²⁹ all undermine such claims.

The effect of their actions casts further doubt on the contention that all they wanted was "to do a noble and good thing."⁶³⁰ District lines proposed by Ron Smith and Allan Hoffenblum, with the assistance of Joseph Shumate, protected their Republican sponsors by ridding their districts of areas that had voted against them in previous elections, especially those that were heavily populated by African-Americans and Latinos.⁶³¹ As the testimony of demographers in the *Garza* case demonstrated, it would have been quite possible to draw a district in 1980 that contained a much higher percentage of Hispanics than either the Smith or Hoffenblum plans did, but no one, Democratic or Republican, attempted to do so.

Democrats claimed to be responsive to minority concerns, but repulsed all efforts to raise the number of Hispanics in Edmund Edelman's Third Supervisorial District in 1981. Edelman made much of his friendliness toward Hispanics and the fact that, as CFR asked, he opposed the Hoffenblum plan. But Edelman never took CFR's own plan seriously, even though CFR leaders rightly considered it a moderate compromise. He never negotiated with CFR, and his final proposal barely changed the status quo, which CFR had worked for months to overturn.⁶³² Furthermore, in reapportionments from 1959 through 1971, Edelman's predecessor, Ernest Debs, had added large numbers of Anglos, but very few Hispanics to his district.⁶³³

The historical context also counts against the civic virtue and minority concern theses. Ideologically committed Republicans had, in 1981, just taken over the Board in a racially-tinged campaign. Aggressive and temporarily unified, they wanted to guarantee their shaky new-found supremacy in a predominantly Democratic county in which members of minority groups overwhelmingly identified with the Democrats. By contrast, the Democrats stolidly resisted, refusing to compromise. In the partisan trench warfare, members of minority groups were cast into no-man's land.

The defendants argued that CFR should have abandoned its own compromise proposal in 1981 and joined the Republicans in support of the Smith Plan, possibly pressuring Edelman to accept a district with a

⁶²⁹ E.g., J. Enelow & M. Hinich, *The Spatial Theory of Voting* 2 (1984).

⁶³⁰ See *supra* note 15.

⁶³¹ See *supra* section IV.F.

⁶³² See *supra* sections IV.E - IV.G.

⁶³³ See *supra* section III.B.

very slight Hispanic population majority. Consequently, they asserted, the Hispanics themselves were responsible for the continuation of the division of Hispanic voters between the First and Third Districts. But in 1981, Smith and Hoffenblum were so unconcerned with conciliating CFR that they did not even inform them that it was the Smith Plan, not the Hoffenblum Plan, that they really favored, and instead of trying to negotiate with CFR leaders, they heatedly denounced them—which took off any pressure that Edelman might have felt to bend to CFR's demands. In fact, both Republican plans, by reducing the Hispanic percentage in the district with the fastest-growing Hispanic population, Schabarum's, were unattractive to Hispanics, and the four-vote rule prevented their adoption anyway, since Edelman and Hahn had no reason to accept a plan that made their partisan opponents more secure. Far from showing that the Republicans acted with good will, this counterfactual merely displays their heavy-handed and inept attempt to conscript Hispanics in their partisan war, their unwillingness to offer Hispanics a winnable district, even at the expense of the Democrats, and their desire to reduce the opportunity for Hispanics to influence politics in any seat currently held by a Republican.

Other actions of the same people likewise belie their statements about their motives. Both Smith and Hoffenblum had directed extremely rough campaigns against prominent minority politicians, and after 1981, along with Shumate, they spearheaded the Sebastiani Initiative, a state reapportionment proposal that would have sharply reduced the number of black and Hispanic officeholders.⁶³⁴

Although legal rules did affect the outcome of redistricting, they did not prevent the supervisors or their allies from constructing a local governmental system that would have made it easier for Latino voters to elect candidates of their choice. No state law set the number of supervisors for the county, and, as Latino activists, a blue ribbon commission, and all of the supervisors recognized from at least 1970 on, expansion of the number of seats on the Board would have greatly increased the possibility of minority representation.⁶³⁵ According to the state election code, the Board may reapportion itself at any time within one year of a general election, and it did so three times in the 1950s and twice in the 1960s. Although overall population growth in the 1970s was spread relatively evenly across the districts, that was not the case during

⁶³⁴ See *supra* sections III.E. and IV.D.

⁶³⁵ See *supra* section III.D.

the 1980s,⁶³⁶ and the supervisors, who had authorized the establishment of a sophisticated demographic estimate unit, had the information on population inequalities and ethnic imbalance at hand. Why, in the face of massive, uneven growth, did the supervisors not take steps to equalize the districts during the 1980s? Why, if any of them really wanted to facilitate minority representation or even to undercut legal challenges, did they not propose to redraw lines before the *Garza* case was filed?

Neither the state election code's guidelines for redistricting, which emphasize geography, cohesiveness, and community of interests, nor the local criteria, which stress preserving traditional boundaries and not splitting cities, are legally binding, and all have been sacrificed in the past to the greater goals of incumbent or ideological advantage.⁶³⁷ County charter provisions that have been held to require four-vote majorities to adopt a redistricting plan and maintenance of each supervisor's residence in his new district may not have been correctly interpreted, and, in any case, would allow incumbents to draw districts more favorable to minorities. This last point is supported by the counterfactual scenario concerning what the Democrats would have done in 1981 had they won all three seats that were up for election in 1980, a thought experiment whose realism was validated by the seeming willingness of the supervisors to sacrifice the splenetic Pete Schabarum in December, 1989.⁶³⁸ Any suggestion that the Board has been constrained by the national Constitutional requirement of "one person, one vote" will not survive a perusal of Table 5.

If the first two apologias fit the facts so poorly that they cannot be taken seriously, what of the third, the unintended consequences thesis? This view implies either that the effect of the line drawing on Hispanics was not reasonably foreseeable or was unforeseen; or, even if foreseen, it was not a reason for adopting the policy, but merely a side effect. Neither contention squares with the facts in this case.

That theory, common sense, and historical experience discredit contentions that politicians who design electoral structures do not under-

⁶³⁶ See *supra* Table 6. As the last row on Table 6 shows, any redistricting to promote population equality during the 1980s would have added territory to the Board's weakest Republican, Deane Dana. It is also interesting to consider the ethnic population estimates of the County's Department of Health Services. Briefly, they show an across-the-board increase in Hispanic percentages, with the First District continuing the pattern of the 1970s and gaining Hispanics fastest. In 1989, the figures indicate that 47.0% of the population in the First District was Hispanic, as compared to 48.7% in the Third District.

⁶³⁷ See *supra* sections II, III.B., and IV.F.

⁶³⁸ See *supra* sections II and IV.C.

stand the consequences of what they are doing, especially when these structures disadvantage minorities, does not need to be expounded at length again in this paper. But it is the pattern of the boundary lines that most convincingly undermines the inadvertency thesis. The best way to visualize the series of institutional decisions at issue in *Garza* is to imagine a split-screen movie showing, on one side, the demographic spread of the Hispanic core during the 1960s, 1970s, and 1980s, when it grew primarily in an easterly direction out the San Gabriel Valley and established a satellite population concentration in and around the city of San Fernando. On the other side of the screen would be a movie of the geographic extension of the Third Supervisorial District from 1959 to 1981, an expansion in almost completely the opposite direction—north and west, away from East Los Angeles, into the Anglo suburbs. (See figure 3). Similar patterns in school segregation cases have led courts to infer discriminatory motivation. If, over a period of time, schools were located in places that maximized the degree to which they were racially segregated, the Supreme Court decided in *Keyes v. Denver School District*, then it is proper to assume that discrimination was intended, and that remedies to repair the past violation are appropriate.⁶³⁹ The Denver school board and the Los Angeles Board of Supervisors had available numerous choices that would have reduced segregation, in the first instance, and reduced the division of the Hispanic vote, in the second. That they instead made decisions that increased segregation and maintained the fragmentation of the Hispanic community supports the inference that they meant to do so.

⁶³⁹ 413 U.S. 189 (1973), reh'g denied, 414 U.S. 883 (1973). See Pearson & Pearson, Denver: *Keyes v. School District No. 1*, in *Limits of Justice: The Court's Role in School Desegregation* 167, 181, 193 (H. Kolodner & J. Fishman, eds. 1978).

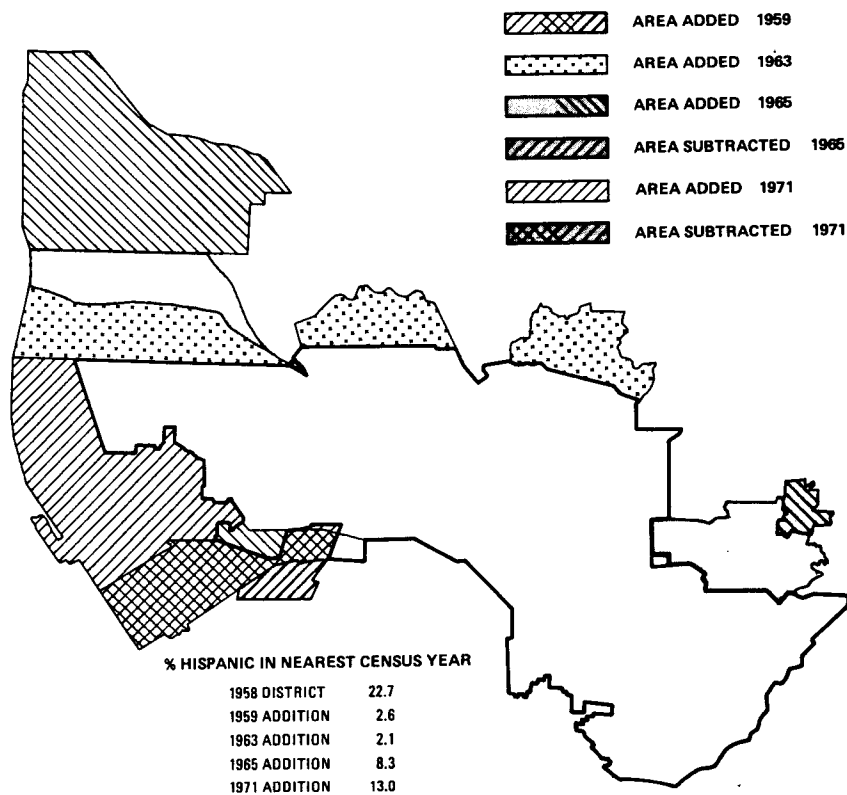


FIGURE 3: THE THIRD DISTRICT'S TREK NORTH AND WEST, 1958-71

To contend that ethnicity was a mere incidental consideration to the 1981 redistricters would be ludicrous. Democrats and Republicans, county computer programmers and Rose Institute mapmakers, CFR and Joseph Shumate all used ethnic data at the precinct, neighborhood, and city levels. No plan was complete without its ethnic tally, and charges of packing, stacking, or cracking the Latino population constantly flew back and forth.⁶⁴⁰ The consequences for Hispanics of every proposed plan were foreseeable and foreseen. The Republican plans sought to bolster Dana and Schabarum by shifting African-Americans and Hispanics out of their districts. Democrats wished to protect their own seats and to threaten Republican seats by refusing to take more minorities. Both, it is true, wished primarily to keep their seats safe and

⁶⁴⁰ See supra part IV.

to make trouble for their enemies. But for both, the necessary *means* to do so were minority voters. The only way to accomplish the goal of incumbent protection was through anti-minority gerrymandering.

VI. EPILOGUE

A. Judge Kenyon on Liability

Beginning in January 1990, the *Garza* trial lasted off and on for nearly three months, taking lay and expert testimony on intent, the degree of racial polarization in elections and estimates of the Hispanic population in the county's thousands of census tracts. Unlike the trial, politics never took a recess. On March 9, the filing date for the June primary in Supervisorial Districts 1 and 3, Supervisor Pete Schabarum shocked the public and his fellow supervisors, Republican as well as Democratic, by failing to qualify for re-election.⁶⁴¹ By that time, every major Hispanic Democrat had either filed for re-election in another contest, which made it impossible under California law for them to run for the supervisorship, or were ineligible because they lived outside the boundaries of the First District. Although Dana and Antonovich threw their support to a Hispanic Republican who had worked for Schabarum for eighteen years, Sarah Flores, Schabarum himself endorsed California Superior Court Judge Gregory O'Brien, an Anglo Republican.⁶⁴² Flores, Schabarum declared, lacked "the educational background. . .the organizational talents. . .[and] the personal skills" required to be a supervisor.⁶⁴³ O'Brien later testified that Dana told him at the time that "if he and Mr. Antonovich backed a Hispanic candidate, Judge [David V.] Kenyon could be persuaded to dismiss the lawsuit."⁶⁴⁴

The day before the June 5 primary, in which Flores placed first with thirty-five percent of the vote to O'Brien's twenty percent,⁶⁴⁵ Judge Kenyon issued a 131-page typescript opinion, ruling for the plaintiffs on all points. After a summary of the findings and claims, the first thirty-two pages of Kenyon's opinion dealt with the factual issues

⁶⁴¹ L.A. Times, Mar. 10, 1990, at A1, col. 6.

⁶⁴² L.A. Times, March 16, 1990, at B3, col. 2. During the primary, Flores' campaign consultant was Dana ally Ron Smith. Id. Only the help of two incumbents allowed Flores to raise \$400,000 for her campaign in less than three months. L.A. Times, June 7, 1990, at B1, col. 2.

⁶⁴³ L.A. Times, March 16, 1990, at B3, col. 2.

⁶⁴⁴ L.A. Times, July 26, 1990, at B1, col. 2. The Times had attributed the same sentiments to Dana and Antonovich four months before Judge O'Brien's testimony, without any direct quotations. L.A. Times, Mar. 16, 1990, at B3, col. 2. Dana hotly denied O'Brien's allegation. L.A. Times, July 26, 1990, at B1, col. 2.

⁶⁴⁵ L.A. Times, June 7, 1990, at B1, col. 2.

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involved in the intent claim, essentially tracking the analysis of sections II-IV of this article. Echoing *Feeney*, Kenyon found

that the Board has redrawn the supervisorial boundaries over the period 1959-1971, *at least in part*, to avoid enhancing Hispanic voting strength in District 3, the district that has historically had the highest proportion of Hispanics and to make it less likely that a viable, well-financed Hispanic opponent would seek office in that district. This finding is based on both direct and circumstantial evidence, including the finding that, since the defeat of Edward Roybal, no well-financed Hispanic or Spanish-surname candidate has run for election in District 3.⁶⁴⁶

In 1981, Kenyon found, "the Supervisors and their aides understood the potential for increasing Hispanic voting strength and sought to avoid the consequences of a redistricting plan designed to eliminate the fragmentation of the Hispanic population."⁶⁴⁷ "The continued fragmentation of the Hispanic vote was a *reasonably foreseeable consequence* of the adoption of the 1981 Plan."⁶⁴⁸ "[D]uring the 1981 redistricting process," he continued, "the Supervisors knew that the protection of their five Anglo incumbencies was *inextricably linked* to the continued fragmentation of the Hispanic Core."⁶⁴⁹ Rejecting the defendants' contention that a plausible non-racial motive trumped a racial one, Kenyon concluded:

The Supervisors appear to have acted primarily on the political instinct of self-preservation. The Court finds, however, that the Supervisors also intended what they knew to be the likely result of their actions and a prerequisite to self-preservation—the continued fragmentation of the Hispanic Core and the dilution of Hispanic voting strength.⁶⁵⁰

B. *The Remedy Phase*

After a predictable explosion at the judge (Antonovich called his decision a "joy ride of judicial activism"⁶⁵¹), the Republicans on the Board apparently decided to treat their defeat as an opportunity. The necessity of settling the federal suit, they contended, allowed them to suspend the County Charter provision requiring a four-vote majority to adopt a redistricting plan, which meant that they could swap pockets of

⁶⁴⁶ Garza, 756 F. Supp. 1298 (emphasis added).

⁶⁴⁷ Id. at 1317.

⁶⁴⁸ Id. at 1318 (emphasis added).

⁶⁴⁹ Id. (emphasis added).

⁶⁵⁰ Id.

⁶⁵¹ L.A. Times, June 5, 1990, at A1, col. 5.

Hispanic and African-American voters in their three districts for conservative Anglos from the two Democratic districts. All through the trial, Joseph Shumate and Michael Meyers, another Republican political consultant allied closely with Schabarum, had been drawing possible five- and seven-district plans—at least twenty-two of them, according to evidence uncovered during the remedy phase of *Garza*.⁶⁵² Both Allan Hoffenblum and Ron Smith were consulted about at least some plans.⁶⁵³ Each new suggestion was sent to The Rose Institute so that the demographic data could be meshed with information on party registration, as well as votes in presidential and senatorial contests and those on propositions dealing with insurance, gay rights, gun control, nuclear arms control, and education spending.⁶⁵⁴ For Dana aide Gaye Williams, the first question to ask about every plan was “Does it ensure a conservative majority?”⁶⁵⁵ But, in 1990 as before, partisanship and ideology were inseparable from ethnic issues. On one list of tracts proposed to be moved from Edelman’s to Antonovich’s district, someone, apparently from Shumate’s firm, scrawled “Move 140,000 from D[istrict] 3 to D5/ All lily white.”⁶⁵⁶

The plan that the Republicans presented to Judge Kenyon on June 27, 1990 increased the overall Hispanic population in the Third District to seventy-four percent, and the percentage of registered voters who are Latino to an estimated 45.5%.⁶⁵⁷ Moving the Third District east strengthened Republican control of the First District—the Schabarum/Flores/O’Brien district—but threatened Dana’s Fourth District in two ways. If Edelman, who lived in the extreme western end of his former district, was transferred into Dana’s Fourth, he might prove a formidable candidate. And if Dana’s, the least populous of the five districts by 1990, inherited the liberal western sections of Edelman’s district, Dana might be in trouble whether or not Edelman ran against him. The consultants’ clever solution to these dilemmas was to extend a tentacle, often one precinct wide, from the body of the Third District several miles west to pick up Edelman’s home, and to move Hahn’s Second

⁶⁵² The voluminous documents turned over during discovery were taken from the three Republican Supervisors’ offices and are Bates-numbered 500,000+ (from Schabarum’s files), 600,000+ (from Dana’s files), and 700,000+ (from Antonovich’s files).

⁶⁵³ Hoffenblum, untitled handwritten sheet, undated, Bates #700004; Letter from Gaye Williams to Joseph G. Shumate, Mar. 2, 1990, Bates #043004.

⁶⁵⁴ See, for example, an untitled, undated computer printout, Bates #004001-004118. For the identification of Rose as the source of similar printouts, see “Rose Institute Tract Listing, District Assignment for Meyers Plan and Summary Memos,” Bates #019001.

⁶⁵⁵ Williams Memorandum to Shumate, Mar. 2, 1990, Bates #043004.

⁶⁵⁶ Untitled, Undated Sheet, Bates #043004.

⁶⁵⁷ L.A. Times, June 28, 1990, at A1, col. 2.

District north, so that it stretched, literally as well as metaphorically, from Watts to Beverly Hills. Since another Third District tentacle reached north to wrest Hispanic areas around the city of San Fernando from Antonovich's Fifth District, Edelman christened this the "octopus map."⁶⁵⁸

Not only was the ridiculous-looking plan a blatant gerrymander designed, as Dana publicly admitted, "to maintain conservative control of the board,"⁶⁵⁹ but the NAACP, which had been largely silent during the trial, charged that the new Second District lines reduced the chances of African-Americans to elect a successor to Hahn once he retired. Although county attorneys contended that their proposal left the African-American population in the Second District stable at thirty-six percent, NAACP and Southern Christian Leadership Conference spokesmen pointed out that the proportion of African-American voters was reduced when the District jettisoned low-turnout Hispanic areas, while adding wealthy high-turnout Anglo areas.⁶⁶⁰ Coupled with Judge Gregory O'Brien's testimony on July 25 that Dana had lied under oath and had privately appeared "fairly contemptuous of Judge Kenyon's integrity,"⁶⁶¹ the plan alienated Judge Kenyon, who accepted instead a MALDEF proposal to create a new First District that was seventy-one percent Hispanic in population and fifty-one percent Hispanic in registered voters.⁶⁶² The new district alignment rendered the June election irrelevant, and Judge Kenyon ordered a primary in the new district for November.⁶⁶³

C. The Appeals

At the same private meeting in which they adopted the "octopus plan," the Board majority allocated \$500,000 to Supervisor Schabarum as a private citizen to carry on the appeals in the *Garza* case even if a new Board decided to settle.⁶⁶⁴ In their briefs to the Ninth Circuit and

⁶⁵⁸ L.A. Daily News, June 28, 1990, at 1, col. 5.

⁶⁵⁹ L.A. Times, June 28, 1990, at A1, col. 2.

⁶⁶⁰ L.A. Times, July 1, 1990, at B1, col. 2. All through the litigation, the county's private attorneys had been arguing that only the proportion of voting age citizens mattered, while lawyers for the plaintiffs stressed the importance of the total population, old and young, citizen and non-citizen alike. Each side, apparently without public embarrassment, switched sides on this point.

⁶⁶¹ L.A. Times, July 26, 1990, at B1, col. 2.

⁶⁶² L.A. Times, Aug. 4, 1990, at A1, col. 1.

⁶⁶³ L.A. Times, Aug. 4, 1990, at A1, col. 1.

⁶⁶⁴ L.A. Times, June 29, 1990, at B1, col. 5. In an editorial entitled "Outrageous Back-Room Deal," the Times denounced the move as an "act of malice. . . [a] cynical, secretive, ruthlessly self-interested raid on public funds" *Id.* at B6, col. 3.

ultimately to the Supreme Court, counsel for the County made two major contentions on the intent issue: first, that "a 'discriminatory purpose' under the Equal Protection Clause. . . is one that reflects racial prejudice, antipathy, hostility or racism;"⁶⁶⁵ second, that there were "equally plausible nonracial goal explanations" for the 1959-1981 remaps, and, in particular, that partisan or ideological goals, not ethnic factors, determined the outcome in 1981.⁶⁶⁶ They did not contend that only "subjective" or direct" evidence was relevant to a motive inquiry, but accepted that circumstantial evidence was probative and argued that the plaintiffs had misinterpreted it.⁶⁶⁷

Although most of the trial testimony in the district court had concerned the degree of racially polarized voting and whether or not a supervisorial district that contained a majority of Hispanic registered voters could be drawn, the three-judge appeals panel of Judges Schroeder, Nelson, and Kosinski rested their liability findings in their November 2, 1990 decision purely on intent.⁶⁶⁸ There was considerable irony in this fact, for during the arguments over the renewal of the Voting Rights Act in 1981-82, many in the civil rights community had argued that *Bolden* had to be overruled because a "subjective intent" criterion was murky and difficult to prove, while statistical and other pure effect evidence was clearer and more straightforward.⁶⁶⁹ In *Garza* the cumulative evidence of discriminatory intent was overwhelming, while the statistical proof of racially polarized voting and the demographic estimates of ethnic composition were more ambiguous.

Even if it were legally necessary in non-intent cases to show that a district containing a majority of Hispanic voters could be created, Judge Schroeder ruled (for herself and Judge Nelson) that a finding of intentional discrimination relieved plaintiffs of the need to demonstrate that such a district could be drawn.⁶⁷⁰ Quoting extensively from Judge Kenyon's factual findings on the purposes of the reapportionments, Schroeder declared them "more than amply supported by evidence in the record," and she rejected the county's proposed legal standard of "other plausible non-racial goals." "The supervisors intended to create the very discriminatory result that occurred," she concluded. "That

⁶⁶⁵ Appellant's Reply Brief on Appeal at 31, *Garza*, 918 F.2d 763.

⁶⁶⁶ *Id.* at 27-30.

⁶⁶⁷ *Id.* See also Appellants' Opening Brief on Appeal at 56-59, *Garza*, 918 F.2d 763.

⁶⁶⁸ *Garza*, 918 F.2d at 771.

⁶⁶⁹ See, e.g., Voting Rights Act: Hearings Before the Subcomm. on the Constitution of the Comm. of the Judiciary, United States Senate, 97 Cong., 2d Session, vol. I, at 367-73 (statement of Laughlin McDonald); Senate Rep. No. 417, 97th Cong., 2d Sess. 24-43.

⁶⁷⁰ *Garza*, 918 F.2d at 769.

intent was coupled with the intent to preserve incumbencies, but the discrimination need not be the sole goal in order to be unlawful."⁶⁷¹

Although Judge Kozinski, a conservative Republican appointed by President Ronald Reagan, dissented on remedy grounds, contending that the Supreme Court's language was ambiguous on the question of whether people or voters should be the basis for allocating political offices,⁶⁷² he forcefully sustained Judge Kenyon's opinion on intent:

When the dust has settled and local passions have cooled, this case will be remembered for its lucid demonstration that elected officials engaged in the single-minded pursuit of incumbency can run roughshod over the rights of protected minorities. The careful findings of the district court graphically document the pattern—a continuing practice of splitting the Hispanic core into two or more districts to prevent the emergence of a strong Hispanic challenger who might provide meaningful competition to the incumbent supervisors. The record is littered with telltale signs that reapportionments going back at least as far as 1959 were motivated, to no small degree, by the desire to assure that no supervisorial district would include too much of the burgeoning Hispanic population What happened here—the systematic splitting of the ethnic community into different districts—is the obvious, time-honored and most effective way of averting a potential challenge.⁶⁷³

To the county's proposed racial hostility criterion, Kozinski responded with a homely example. Would an Anglo who sought to keep minorities out of his all-white neighborhood for fear that their presence would erode the value of his house be guilty of ethnic discrimination? Certainly. "Your personal feelings toward minorities don't matter; what matters is that you intentionally took actions calculated to keep them out of your neighborhood."⁶⁷⁴ The unanimous three-judge decision on the liability issue no doubt discouraged the complete Appeals Court from ordering an *en banc* rehearing and the Supreme Court from granting certiorari.⁶⁷⁵

D. A Candidate of Their Choice

Although the Appeals Court delayed the First District election so that they could hear full arguments in *Garza*, their favorable decision and the refusal of higher bodies to stay or overturn it allowed Judge Kenyon

⁶⁷¹ Id. at 771.

⁶⁷² Id. at 779-85.

⁶⁷³ Id. at 778.

⁶⁷⁴ Id. at 778 n.1.

⁶⁷⁵ *Garza*, 918 F.2d 763.

to order the election to take place. After a flurry of meetings of senior Hispanic officials, four major candidates emerged: Sarah Flores, still backed, if rather halfheartedly, by Dana and Antonovich; Gloria Molina, a liberal Democratic former CFR activist and state Assemblyperson and a 1990 member of the Los Angeles City Council; Art Torres, a liberal Democratic state senator with strong ties to organized labor and environmental groups; and Charles Calderon, a moderate Democratic state senator.⁶⁷⁶ No serious Anglo candidate ran. In the January 15 primary, Molina and Torres finished one-two, with Flores and Calderon trailing.⁶⁷⁷ Any claim that Flores had to be the representative of the Hispanic community⁶⁷⁸ collapsed along with her sponsors' fundraising efforts for her. Despite the similarity of their policy stances and the fact that Torres raised twice as much money, Molina won the February 19 runoff, becoming the first woman ever elected to the Board, as well as the first Hispanic in 116 years.⁶⁷⁹ It was perhaps fitting that Molina, who had spent many hours at the Rose Institute in 1981 trying to draw boundary lines that would eventually allow Hispanics to elect a candidate of their choice, should become that choice.

⁶⁷⁶ L.A. Times, Jan. 17, 1991, at B1, col. 5; L.A. Times, Jan. 23, 1991, at A1, col. 2.

⁶⁷⁷ L.A. Times, Jan. 23, 1991, at A1, col. 2.

⁶⁷⁸ L.A. Times, June 19, 1990, at B7, col. 1.

⁶⁷⁹ L.A. Times, Feb. 20, 1991, at A1, col. 2; see, e.g., *id.* at B1, col. 5.