COMMENTS

TOTAL POPULATION: A CONSTITUTIONAL BASIS FOR APPORTIONMENT REAFFIRMED IN *GARZA V. LOS ANGELES COUNTY*

"[A]pportionment based on total population is nothing new—it has been used consistently throughout the county's redistricting history. The county is seeking to change the rules at this stage of the game when the Latino population is growing in numbers and strength."[1]

I. INTRODUCTION

Today, a large portion of the Latino population in the United States, and more specifically in Los Angeles County, is comprised of immigrants. According to the U.S. Constitution, every one of these inhabitants is to be counted for the purpose of representation in national and state legislatures.[2] Total population is the constitutionally-mandated base for apportionment in California as well.[3] However, there are opponents of "equal representation"[4] who feel that *citizen* or *voter* population should be the apportionment base for representation in national, state, and local government.

Throughout the political history of the United States, the notion of equal representation had largely remained unquestioned. In

1. Antonia Hernandez & Harry Pachon, *In Apportioning Districts, Every Head Ought to Count*, L.A. TIMES, Oct. 5, 1990, at B7.

2. U.S. CONST. art. I, § 2, cl. 3, which states that "representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, *according to their respective Numbers* . . .", thus, requiring that representation in the House of Representatives be based on total population. The Supreme Court held in Reynolds v. Sims, 377 U.S. 533 (1964), that the Equal Protection Clause of the Fourteenth Amendment requires that the seats in both houses of a bicameral state legislature must be apportioned on a total population basis.

3. *See* CAL. ELEC. CODE § 35000; Gaffney v. Cummings, 412 U.S. 735, 747 (1973); Chapman v. Meier, 420 U.S. 1, 24 (1975).

4. "Equal representation" is the language used by proponents who argue that the United States Constitution mandates the counting of every person for apportionment purposes, regardless of citizenship status. "Electoral equality" is the language used by proponents who argue that since the Constitution prohibits voter dilution, apportionment must be based on a citizen population.

the past when the demography of the United States was very different, it did not matter which population base was used for apportionment. Large concentrations of undocumented immigrants or adult non-citizens did not exist. In much of the United States today, it still does not matter.[5] However, the recent phenomenal growth of the Latino community has raised questions as to the legitimacy of non-citizen's representation in national, state and local government.

Today, there are more non-citizen Latinos in the United States than there are Latinos who are registered voters.[6] All Latinos, whether they are eligible to vote or not, have the right to be counted for apportionment purposes. Partly because of anti-immigrant sentiment and the fear of vote dilution, pressure has mounted in the legislature and the courts in hope of excluding non-citizens from the apportionment base.[7] Recently, in Los Angeles County, the Latino population (citizens and non-citizens) faced a challenge to its right to be fully represented in the legislature because of this change in the demographic status of the Latino population. This move to exclude some Latinos from being counted for apportionment purposes was propelled to the forefront of national attention in 1988, when Latinos, joined by the United States, filed a lawsuit seeking reapportionment of districts for the 1990 election of the Los Angeles County Board of Supervisors.

In *Garza v. County of Los Angeles*,[8] the district court held that the Board had intentionally fragmented the Latino population in apportionments since 1959,[9] thus denying the Latino community an equal opportunity to participate in the political process. During the discussion of a remedial plan, the County asserted that because many county Latinos were currently ineligible to vote because they

5. John E. McDermott, *California Commentary; At Issue: Citizens' Right to Govern*, L.A. TIMES, Sept. 10, 1990, at B5.

6. "According to surveys, 63% of Latino immigrants say they want to become U.S. citizens but only 25% are eventually naturalized." (Harry Pachon, president of National Association of Latino Elected and Appointed Officials, speaking to more than 500 delegates at the Annual Convention of NALEO.) Dave Lesher & Gebe Martinez, *Latinos Claim 90's As Their Power Decade at Convention*, L.A. TIMES, June 29, 1991, at B1.

7. Garza v. County of Los Angeles, 756 F. Supp. 1298 (C.D. Cal. 1990).

8. For a recent discussion of anti-immigrant sentiment, see Rick Rodriguez, *Immigration Debate Inflames Emotions*, L.A. TIMES, Mar. 6, 1993, at A2 (discussing California Governor Wilson's proposed bill prohibiting children who are illegal aliens from attending public schools); Lynne Duke, *Activists Perceive Backlash From the Baird Affair*, WASH. POST, Feb. 19, 1993, at A13 (discussing the presumed unfitness of Zoe Baird to be U.S. Attorney General and the impact of her disqualification on the perception of hiring illegal aliens). For a contrary position, see Antonio Gonzalez & Richard Martinez, *Southern California Voices: A Forum For Community Issues*, L.A. TIMES Nov. 2, 1992, at B4 (describing a movement in New York City to grant noncitizens the right to vote in city and state elections).

9. 756 F. Supp. at 1303. *See also Key Apportionment Issues Resolved in L.A. County Redistricting Suit*, 59 U.S.L.W. 1081 (Nov. 27, 1990) (LEXIS, Nexis Library, Omni File).

were not yet U.S. citizens,[10] and since Latinos in Los Angeles County were concentrated in one district, the vote of a citizen in that district was weighted more heavily than those of citizens in other districts. The County argued that the result would be unconstitutional voter dilution for citizen voters.[11] At the heart of the County's argument was the proposition that the population basis for political jurisdictions should be registered voters and should exclude immigrants who are ineligible to vote.[12]

However, on November 2, 1990, the U.S. Court of Appeals for the 9th Circuit agreed with Judge David V. Kenyon and held that under the "one-person, one-vote principle",[13] a reapportionment plan must be based on total population, not voting population. The Court of Appeals held that the "one-person, one-vote" principle was derived from the constitutional requirement that the members of the House of Representatives be elected from districts whose apportionment base is made up of the total numbers of inhabitants.[14] Basing the drawing of districts on the number of voters, instead of basing it on total population, would impair access to elected representatives in districts in Los Angeles County with a greater percentage of non-voting populations.[15] The Court in *Garza* specifically addressed the rights of Los Angeles County's non-citizen population, which includes aliens and children, and held that for purposes of apportionment they were to be counted.[16]

However, Judge Alex Kozinski, in his dissenting opinion in *Garza*, questioned the constitutionality of basing apportionment on total population to achieve equal representation. Instead, he advocated "electoral equality"[17] which would be achieved by basing legislative apportionment on citizenship alone. The principle of electoral equality recognizes that persons eligible to vote are the ones who hold the ultimate political power over our democracy.[18] Kozinski argued that basing apportionment on voting population would assure that those eligible to vote would not suffer dilution of that important right by having their vote given less weight than that

10. "Only 42% of Los Angeles County's Latinos who are 18 years old and older are citizens, compared to 97% of the black residents and 95% of whites. By 1980, Latinos made up 28% of the county's population but were only 14% of its citizens," quoting McDermott, *supra* note 5.

11. Garza v. Los Angeles County, 918 F.2d 763, 773 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991).

12. Hernandez & Pachon, *supra* note 1.

13. The "one-person, one-vote" principle was first enunciated by the Supreme Court in Wesberry v. Sanders, 376 U.S. 1 (1964).

14. *Garza*, 918 F.2d at 763.

15. *Key Apportionment Issues Resolved in L.A. County Redistricting Suit*, 59 U.S.L.W. 1081 (Nov. 27, 1990) (LEXIS, Nexis Library, Omni File).

16. *Garza*, 918 F.2d at 775.

17. *Supra* note 4.

18. *Garza*, 918 F.2d at 781 (Kozinski, J., dissenting).

of electors in another location.[19]

The position, that the counting of non-citizens in the apportionment base dilutes the vote of citizens, is strongly supported even by some minority scholars.[20] Furthermore, commentators have objected that the inclusion of non-citizens in the apportionment base actually violates the Constitutional principle of "one-person, one-vote".[21] John McDermott, lead counsel for Los Angeles County, argued that basing apportionment on total population is not "equality" but "ethnic preference" imposed solely to create a district in which Latino voters are a majority.[22]

In *Garza*, the 9th Circuit Court of Appeals clearly followed the Supreme Court standard previously enunciated in *Wesberry v. Sanders*,[23] and applied in *Reynolds v. Sims*,[24] that "the fundamental principle of representative government is one of *equal representation for equal numbers of people*, without regard to race, sex, economic status, or place of residence within a state."[25]

One unfamiliar with the Constitutional debate highlighted in the *Garza* opinion might query why it is so important to have total population as the basis for apportionment.[26] The principle of equal representation is best served by apportionment based on total population; it assures that all Latinos living within a district—whether eligible to vote or not—have roughly equal representation in the legislature.[27] It assures that constituents have equal access to their elected officials, by ensuring that no official has a disproportionately large number of constituents to satisfy.[28] Assuming that elected of-

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19. *Id.* at 782.

20. *See* ABIGAIL THERNSTROM, WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS (1987); *see also* LINDA CHAVEZ, OUT OF THE BARRIO 52-56 (1991). The author does not mean to imply that these scholars need be defined by the fact that they may be Latino(a) or African-American, nor that merely by their identity these scholars have more sensitivity to the issues faced by people of color. The author cites them as illustrative of the controversial nature of this discussion and the lack of consensus even among those who might be more concerned about equal political participation.

21. For a general discussion, see Dennis L. Murphy, *Note: The Exclusion of Illegal Aliens From the Reapportionment Base: A Question of Representation*, 41 CASE L.REV. 969 (1991). For a similar view, see Jim Slattery & Howard Bauleke, *The Right to Govern is Reserved for Citizens: Counting Undocumented Aliens in the Federal Census for Reapportionment Purposes*, 28 WASHBURN L.J. 227 (1988).

22. McDermott, *supra* note 5.

23. 376 U.S. 1 (1964).

24. 377 U.S. 533, 560 (1964).

25. *Garza*, 918 F.2d at 774 (emphasis added).

26. *Id.* at 781 (Kozinski, J., dissenting) (articulating the reasons why total population is important to constituents).

27. Even though Kozinski dissents in the *Garza* decision, he cites Davis v Bandemer, 478 U.S. 109, 132 (1986) (plurality) for the proposition that an elected official represents all persons residing within his district, whether or not they are eligible to vote and whether or not they voted for the official in the preceding election." *Garza*, 918 F.2d at 781 n.5.

28. Providing services and information to their constituents —no matter what their

ficials are able to obtain benefits for their districts in proportion to their share of the total membership of the governing body, a principle of equal representation also assures that Latino constituents are not afforded unequal government services depending on the size of the population of the districts in which they reside.[29]

Furthermore, Latino non-citizens have a legitimate right to representation in local, state and national government. They are guaranteed protection of their rights under the Fourteenth Amendment's Equal Protection Clause.[30] This right to representation *requires* that they be included in the apportionment base.

New challenges to the right of representation for all Latinos, whether citizens or non-citizens, loom in the horizon. Legal challenges to the redistricting of Los Angeles County, the state, and the national legislature are not over. In the near future, we should expect to hear elaborate public arguments with a common theme: non-citizens should not be a part of the apportionment base.[31] Because of the change in the demographics of the Latino population in Los Angeles County and elsewhere, this position is a direct challenge to the future of Latino political empowerment.

These challenges will not die easily. The United States Supreme Court has chosen not to consider this issue to date.[32] In the event that the Supreme Court recognizes the need for its guidance in apportionment policies, this Article seeks to construct an authoritative argument for basing legislative apportionment on total population. The author will demonstrate that apportionment based on total population is the appropriate standard to apply in future apportionment cases, and that it is a position supported by Constitutional doctrine and Congressional legislative history, as well as Supreme Court jurisprudence.

II. THE CONSTITUTIONAL HISTORY OF APPORTIONMENT

The constitutional history of the United States has consistently chosen to support apportionment based on total population. Whenever there have been efforts to limit apportionment to citizens or voters only, such proposals have been defeated. In fact, the apportionment base has *always* included non-citizens. In colonial

age or status—is one of the most important functions of elected officials. Hernandez & Pachon, *supra* note 1.

29. *Garza*, 918 F.2d at 781 (Kozinski, J., dissenting).

30. *See* discussion *infra* part II.B.2.

31. *See* Hernandez & Pachon, *supra* note 1.

32. The Supreme Court refused to review the decision of the Ninth U.S. Circuit Court of Appeals on January 7, 1991, even though the County asked the Supreme Court to clarify whether drawing boundaries to reflect the population, rather than the electorate, would violate the high court's own 1964 edict of "one-person, one-vote". *Court Lets Stand Change in Los Angeles County Voting Districts*, UPI, Jan. 7, 1991 (LEXIS, Nexis Library, UPI File).

America, all individuals, whether eligible to vote or not, were counted for representation in local government. In 1787, the Great Compromise, signed by the delegates at the Constitutional Convention, explicitly required that apportionment in the House of Representatives be based on a total population standard.[33] In 1866, during the debates over the passage of the Fourteenth Amendment, Congress voted to continue basing apportionment on total population, and voted down an amendment which would base apportionment on the *voting* population.[34]

A. *Voting System Prior to the Signing of the Constitution*

The American colonies established a voting system which supports the Court's conclusion in *Garza*, that using a citizen or voting population base in apportionment is not required or mandated. During colonial times, the voting population was significantly smaller than it is today because of the imposition of many voting requirements, including property, age, and sex requirements.[35] Yet the greater population which could not vote was still included and counted for representation purposes, including women, children, and men who did not meet the voting requirements.

B. *The Constitutional Mandate*

The Constitution expressly provides that apportionment in the legislature is to be based on numbers of people, not on numbers of voters. This conclusion is apparent when examining the express language in Article 1, and can be inferred from the reference to slaves ("other Persons"), who were to be counted for apportionment purposes even though they could not vote.[36]

The statutory construction of this Constitutional article was hotly debated before its adoption. The debate which surrounded the adoption of Article 1, Section 2 of the U.S. Constitution is of important historical consequence because delegates to the Constitutional Convention of 1787 fought vigorously to base representation

33. *See* discussion *infra* part II.B.1.

34. *See* discussion *infra* part II.B.2.

35. For a discussion of voting requirements established by the thirteen original colonies and early America, *see* MARCHETTE CHUTE, THE FIRST LIBERTY, A HISTORY OF THE RIGHT TO VOTE IN AMERICA 1619-1850 (1969); CORTLANDT F. BISHOP, HISTORY OF ELECTIONS IN THE AMERICAN COLONIES (1893); ALBERT E. MCKINKLEY, THE SUFFRAGE FRANCHISE IN THE THIRTEEN ENGLISH COLONIES IN AMERICA (U. of Pa., Series in History 2 (1905)).

36. U.S. CONST. art. I, § 2, cl. 3 states that "representatives and direct Taxes *shall be apportioned among the several States,* which may be included within this Union, *according to their respective Numbers,* which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons."

in the House of Representatives on total population.[37] Furthermore, the constitutional mandate for basing apportionment on total population is reaffirmed in Article 1, Section 2, Clause 3, which establishes the decennial census.

1. *The Debate at the Constitutional Convention*

The U.S. Supreme Court in *Wesberry*[38] discussed Article 1, Section 2, and the intent of the Framers of the Constitution, by thoroughly analyzing the historical debate which took place at the Constitutional Convention in 1789. The Supreme Court pointed out that some delegates believed that each voter should have a voice equal to that of every other in electing members of Congress.[39] However, the Supreme Court concluded that in resolving the bitter controversy over which population to use for apportionment purposes, the Framers of the Constitution decided that no matter what the mechanics of an election, whether statewide or by districts, total population was to be the basis of the House of Representatives, and thus, that was the language used in Article 1, Section 2, Clause 3 of the U.S. Constitution.[40]

The Supreme Court in *Wesberry* refers to the many delegates to the Convention who repeatedly stated that representation should be based on total population: James Madison was one of the strongest proponents who argued that "if the power is not immediately derived from the people, in proportion to *their numbers*, we may make a paper confederacy, but that will be all."[41] James Wilson, a delegate from Pennsylvania, succinctly articulated the argument when he said that "equal numbers of people ought to have an equal number of representatives" and representatives "of different districts ought clearly to hold the same proportion to each other, as their respective constituents hold to each other."[42]

The impasse finally ended when a majority of the states acquiesced to the compromise suggested by Roger Sherman and other delegates from Connecticut.[43] This agreement, commonly referred to as the "Great Compromise", was necessary in order to allay the fears of the smaller states who feared that if population were to be the only basis of representation, the more populous states would

37. *See* discussion *infra* part II.B.1.

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

39. *Id.* at 10.

40. *Id.* at 8.

41. *Id.* at 10 (citing M. FARRAND, THE RECORD OF THE FEDERAL CONVENTION OF 1787 472 (1911) [hereinafter FARRAND] (emphasis added).

42. *Id.* (citing FARRAND, *supra* note 41, at 180).

43. *Id.* at 13 (citing FARRAND, *supra* note 41, at 193, 342-43 (Roger Sherman); FARRAND, *supra* note 41, at 461-62 (William Samuel Johnson)).

elect a large number of representations and control the national government.

One part of the compromise was that the Senate would be comprised of two senators from each State regardless of population size. The other side of the compromise was that, as provided in Article 1, Section 2, members of the House of Representatives should be apportioned among the several States "according to their respective Numbers."[44] Thus, the compromise expressly provided that apportionment in the House of Representatives would be based on total population.[45]

Furthermore, not only were "free persons" to be counted in determining representation, but so were those bound to service for a term of years (indentured servants) and "three-fifths's of all other Persons" (slaves). By these terms, the Framers refused to limit representation to citizens or voters. Rather, the Constitutional apportionment mandate explicitly included non-voters.

The Constitution also embodied Edmund Randolph's proposal for a periodic census to ensure 'fair representation of the people'. The decennial census was a means of assuring that 'numbers of inhabitants' would always be the measure of representation in the House of Representatives.[46] That the Framers did not intend representation to be limited only to citizens or voters is evident. The delegates to the Constitutional Convention also overwhelmingly agreed to a resolution offered by Randolph to base future apportionment squarely on numbers and to delete any references to wealth.[47]

The Supreme Court in *Wesberry* also noted the discussion in the state-ratifying conventions. The Court explicitly recognized Madison's position, outlined in *The Federalist*,[48] describing the method which his and other States would probably adopt when apportioning State representation: The counting of total number of inhabitants, not only was a suitable way to represent wealth, but in any event was considered the only proper scale of representation.[49]

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44. *Id.*

45. *Id.* (stating that "when the delegates agreed that the House should represent 'people' they intended that in allocating Congressmen the number assigned to each State should be determined *solely by the number of the State's inhabitants*").

46. *Id.*

47. *Id.* at 14.

48. THE FEDERALIST PAPERS, eighty-five essays written by Alexander Hamilton, James Madison and John Jay between 1787-88 under the pseudonym "Plubius" to help secure ratification of the proposed Constitution in New York state are considered the single most authoritative source for understanding the character of our constitutional system. In THE FEDERALIST No. 54, 369 (James Madison) (J. Cooke ed., 1961), Madison states that "it is a fundamental principle of the proposed Constitution that apportionment was to be Founded on the aggregate number of inhabitants of each State."

49. *Wesberry*, 376 U.S. at 15 (citing THE FEDERALIST No. 54, 368 (James Madison).

The court in *Federation for American Immigration Reform (FAIR) v. Klutznick*[50] also examined the constitutional debate which took place at the 1787 Constitutional Convention, and considered whether the Framers of the Constitution specifically intended *illegal aliens*[51] to be counted in the decennial census mandated by the Constitution. In *Klutznick*, legislators and groups concerned with alleged apportionment problems posed by illegal alien populations brought suit against the Secretary of Commerce and others challenging the constitutionality of the census. They argued that the exclusion of illegal aliens from the apportionment base was mandated by the Constitution, which contemplated the inclusion of solely lawful residents in the population figures from which apportionment is based.

The constitutional basis of the plaintiff's argument was that "the whole number of persons" does not, in historical context, include illegal aliens, although they conceded that lawful residents, citizens and aliens, were included.[52] However, they argued that the concept of illegal aliens was unknown to the Framers.[53] Therefore, an intent to grant representation to persons unlawfully in the country cannot logically be imputed to the Framers of the Constitution.[54]

Although, the court in *Klutznick* focused on whether plaintiffs had standing, it also stated that the merits of this constitutional objection to apportionment based on total population was unpersuasive. The court stated that the language of the Constitution requires the counting of the "whole number of persons" for apportionment purposes, and while illegal aliens were not a component of the population at the time the Constitution was adopted, they are clearly "persons".[55]

The court in *Klutznick* concluded that by making express provisions for Indians and slaves, the Framers demonstrated their awareness that without such provisions, the language chosen would be all-inclusive. The court pointed out that "the Framers must have been aware that this choice of words would include women, children, bound servants, convicts, the insane—and aliens,"[56] since

50. 468 F. Supp. 564 (D.D.C. 1980), *appeal dismissed*, 447 U.S. 916 (1980).

51. The term "illegal alien" is by definition a subgroup of the non-citizen population. Other groups included in the non-citizen population are legal resident aliens and those individuals granted political asylum or amnesty.

52. *Klutznick*, 486 F.Supp. at 567.

53. There were no "illegal" aliens in Revolutionary America and for nearly a century after the Constitutional Convention because there existed no U.S. law prohibiting aliens until the 1875 statute which excluded prostitutes and the immigration of convicts. Act of March 3, 1875, ch. 141, 18 Stat. 497 (1875).

54. *Klutznick*, 468 F. Supp. at 564.

55. *Id.* at 568. *But see* Murphy, *supra* note 21, for the proposition that illegal aliens are not "persons" under the Constitution.

56. *Klutznick*, 468 F. Supp. at 576.

the same article grants Congress the power "to establish a uniform rule of naturalization."[57] *Klutznick* correctly held that there was little on which to base a conclusion that *illegal* aliens should be excluded from the apportionment base, simply because persons with their legal status were not an element of the population at the time that the Constitution was written.[58]

2. *The Debate Over the Fourteenth Amendment*

The language which was adopted in the Fourteenth Amendment is identical to the language in Article 1, Section 2, of the Constitution, that "the whole number of persons" were to be counted for apportionment purposes. The legislative history reveals that upon passing the Fourteenth Amendment in 1866, Congress mandated a total population base for apportionment, and not voter or citizen population.[59]

The Fourteenth Amendment evolved from a resolution reported to both houses of the Thirty-ninth Congress by the Reconstruction Committee of Fifteen on April 30, 1866. Debate in the House of Representatives lasted for three days.[60] Much of the debate concerned the change in the basis of representation effected by the second section of the proposed amendment. Section Two proposed to change the basis of legislative apportionment from total population to voting age population. Moreover, passage of the Amendment required that all five sections of the Amendment be approved.[61] After considerable heated debate, the proposal to limit apportionment to voters or citizens with the adoption of the Fourteenth Amendment was rejected by both the House of Representatives and the Senate.[62]

The concern over vote dilution was one of the important issues raised by many of the Congressmen debating the Amendment. However, there were many other important issues raised in the House of Representatives and the Senate during the discussion of the Amendment—issues which dominated the discussion and determined the outcome of the debate.[63] The most compelling discus-

57. U.S. CONST. art. I, § 8, cl.4.

58. *Klutznick*, 468 F. Supp. at 576.

59. *See infra* pp. 83-87.

60. H.R. 127, 39th Cong., 1st Sess. (1866).

61. See *Reynolds v. Sims*, 377 U.S. 533 (1964) (Harlan, J., dissenting) (emphasizing that the Amendment was a single text, discussed as a unit in Congress, proposed as a unit, and ratified as such by the States).

62. For a general discussion of the debates of the Thirty-ninth Congress and the adoption of the Fourteenth Amendment, see William W. Van Alstyne, *The Fourteenth Amendment, the "Right" to Vote, and the Understanding of the 39th Congress*, 1965 SUP. CT. REV. 33 (1965).

63. These issues are discussed in detail by this author in Memorandum from Aide Cristina Cabeza, Intern, Mexican American Legal Defense and Educational Fund to

sions revolved around New England's voting power, the historical foundation of the United States, the denial of existing representation, and the denial of representation to women and underage males.[64]

a. *New England's Voting Power*

Foremost on the minds of many Congressmen of the day was a concern that a change in the apportionment base would dilute New England's voting power since its population was largely composed of women and aliens who were ineligible to vote. Under the old basis for apportionment, these individuals were represented in the legislature because they were a part of the total population. Thus, the New England states would lose representation. Naturally, representatives from these states were quick to protest,[65] but other states felt it was the proper solution to equalize representation.

One senator believed that the language, as written in the proposed amendment, regarding the denial of representation in proportion to the denial of suffrage did *not* apply to the immigrants denied suffrage in the Northern states. He argued that "[t]he section does not rest upon the proposition that those whom the States treat as unfit to vote shall not be represented, for it is so framed as to continue to the northern and eastern States their twenty representatives that are based upon non-voting population."[66]

b. *Historical Foundation of the U.S.*

Members of Congress believed that basing apportionment on voting population ignored the historical foundation of the United States including the history of the Constitutional debates and the formation of this nation.[67] One member of the House argued that the historical foundation of the U.S. Constitution required representation based on population, and that the new amendment was a deprivation of fair representation.[68]

Richard Fajardo, lead counsel in *Garza v. County of Los Angeles*, MALDEF (Summer 1991) (on file with the CHICANO-LATINO L. REV.).

64. *Id.*

65. CONG. GLOBE, 39th Cong., 1st Sess. 2467 (1866) (statement of Rep. Boyer).

66. *Id.* at 2939 (statement of Sen. Hendricks).

67. For a history of the Constitutional debate, see *Wesberry*, 376 U.S. at 8-16.

68. CONG. GLOBE, 39th Cong., 1st Sess. 2538 (1866) (Rep. Rogers stating:

> I assert that the second section of this proposed amendment is unparalleled in ferocity. *It saps the foundation of the rights of the States, by taking away the representation to which they would be entitled under the present Constitution.* When the gentleman from Ohio [Mr. Bingham] brought forward a proposition from the committee on reconstruction to amend the Constitution of the United States, *interfering with the elementary principles of taxation and representation, the principles for which our fathers fought when they rebelled against the tyranny of King George and the English Parliament who undertook to tax the people of the colonies without representation, the proposition was defeated in*

Still another senator argued similarly that the proposition to change the apportionment base to voting population violated the historical principle of "no taxation without representation." Therefore, representation as a principle was to be based on total population, independent of citizenship.[69]

c. *The Denial of Existing Representation*

Changing the apportionment base to voting population denied representation previously granted by the U.S. Constitution. One senator proposed an amendment to the Constitutional Amendment when he realized that the Southern states were losing not only additional representatives for the freed Blacks, but also the three-fifths representation they already had under the old Constitution. He proposed textual changes in the amendment which would allow the Black population of the South to retain at least their original three-fifths representation. The amendment was rejected.[70]

d. *The Denial of Representation to Women and Underage Males*

Finally, the Senate hotly debated the proposed change and its impact on representation for females and males under the age of twenty-one. States had already been given the authority to decide who could vote and who would be denied suffrage. Yet in 1866, although states could exclude large numbers of the population, those excluded were still part of the apportionment base and were given representation.

Changing the apportionment base to include only voting age population would have denied representation to women and children. Women and children had traditionally been counted for apportionment purposes to insure that their interests were protected. In 1866, none of the States gave females, or males under twenty-one years of age, the right to vote. The right to vote was given to male "protectors" who were entrusted to protect the interests of the

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this House upon the ground that it would destroy a fundamental principle, that there should be taxation only according to representation.) (emphasis added).

The argument is still persuasive since non-citizen residents of the U.S. cannot vote but are nonetheless required to pay taxes.

69. *Id.* at 2944 (Sen. Edwards stating:

The fathers who founded this Government acted upon the idea not only that *the representation, as a principle, in general was to be based upon population, independent of the franchise, independent of citizenship*, but there was always to go with it, for the security of every part of the country, that other principle, that *direct taxation, the involuntary burdens which the citizen must bear, must stand always guarded by the right of representation*;

I entirely disagree with those who have argued for this new doctrine, and in my mind it is clear that the existing basis is the only true one, the only one consistent with the true idea of a representative republican government.) (emphasis added).

70. *Id.* at 2940, 2942 (statement of Sen. Hendricks).

whole community, including women and children. Debate revolved around the premise that husbands and fathers would represent them, even though these males could very well be non-citizens, or absent from the State in question. At that time, many male citizens were migrating to the Western states and temporarily leaving their women and children behind. One senator was concerned that the emigration of males to the western territories would deprive women and children of representation and would result in over-representation for sparsely settled territories.[71]

Another senator responded by arguing that the men who left their families and travelled West would still represent the interests of their families when they exercised political power in the West.[72]

In the end, the debates at the Constitutional Convention and those over the Fourteenth Amendment came to the same conclusion: total population was to be the reapportionment base. Likewise, Latino non-citizens are thus, explicitly protected by the Constitution and the Fourteenth Amendment and *must* be included in the apportionment base.

III. CONGRESSIONAL STATUTORY ACTION

If one looks at U.S. legislative history, one quickly discovers that voting population has never been the accepted base for apportionment. During the early nineteenth century, non-citizens who lived in U.S. territiories were given representation before they became citizens.[73] Furthermore, legislative proposals to exclude illegal aliens from the apportionment base are often raised in Congress prior to the decennial census. The legislative proposals of 1929, 1932, 1940, and most recently, 1989, are examples of these types of efforts.[74] In fact, all of these proposals failed and thus elimination of non-citizens from the apportionment base has never been mandated by the U.S. legislature.

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71. *Id.* at 2962 (stating:
The theory is that fathers, husbands, brothers, and sons to whom the right of suffrage is given will in its exercise be as watchful of the rights and interests of their wives, sisters, and children who do not vote as of their own. . . . While the rules of suffrage are different in the different States, the plan of basing representation in the national Legislature upon the number of voters in each would be manifestly unjust . . . . The Union contains many recently settled States . . . . These new States to a great extent are settled by emigration from the older States, and it has been and will ever continue [to be] the case that a much larger proportion of this emigration are male. The consequence is that the newly settled States contain a very much larger proportion of males than the older States, and therefore a much larger ratio of voters.)

72. *Id.* at 2987 (statement of Sen. Sherman).

73. *See* discussion *infra* part III.A.

74. *See* discussion *infra* part III.B.

A. *Territorial Voting*

In the decades of American expansion during the early nineteenth century, there is evidence of non-citizen voting in the territories of the United States. Immigrants enticed to settle land west of the Mississippi River were given the right to vote despite their non-citizen status. The only requirement was a declaration of intent to become a citizen. These early settlement statutes were later incorporated into the constitutions of Alabama, Arkansas, Florida, Georgia, Indiana, Kansas, Minnesota, Missouri, and Texas.[75]

Therefore, the right to vote and citizenship do not necessarily go hand in hand. Furthermore, at a different time in American history, we see again that a citizen population was not the basis for representation, by the acknowledgement that these "non-citizens" had a right to representation as well as suffrage.

B. *Legislative Proposals to Exclude Aliens*

During the first half of this century, a variety of proposals were made to exclude aliens from the apportionment base. Debates raged in Congress in 1929, 1932, and 1940 with similar outcomes in each session: exclusion of aliens from the apportionment base could not be achieved by a simple legislative act but would require a constitutional amendment.[76] In 1989, as time for the 1990 census drew near, similar proposals to exclude aliens from the apportionment base were introduced into Congress.[77]

During the 71st Congress, the legislative counsel for the Senate concluded that statutory exclusion of aliens from the apportionment base would be unconstitutional.[78] During the 86th Congress and the course of similar debate, the subject of *illegal* aliens was raised. Asked whether "aliens who are in this country in violation of law have the right to be counted and represented",[79] Representative Celler of New York responded:

> The Constitution says that all persons shall be counted. I cannot quarrel with the founding fathers. They said that all should be counted. We count the convicts who are just as dangerous and just as bad as the Communists or as the Nazis, as those aliens here illegally, and I would not come here and have the temerity to say that convicts shall be excluded, if the founding fathers say they shall be included. The only way we can exclude them would be to pass a constitutional amendment.[80]

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75. Minor v. Hapersett, 88 U.S. 162 (1874).

76. *See, e.g.*, H.R. Res. 20, 71st Cong., 1st sess. (1929); H.R.J. Res. 97, 72nd Cong., 1st Sess. (1932).

77. *See infra* text accompanying note 81.

78. 71 CONG. REC. 1821 (1929).

79. 86 CONG. REC. 4372 (1940).

80. *Id.*

Not surprisingly, the proposal to exclude aliens from the population base was rejected. As recently as 1989, Congress considered several proposals which would eliminate illegal aliens from the reapportionment base.[81] However, none of these bills was passed by Congress and the 1990 Census ultimately included illegal aliens.

IV. SUPREME COURT JURISPRUDENCE AND ITS REQUIREMENTS

U.S. Supreme Court precedent requires that the reapportionment base be total population. In its prior decisions addressing the issues of equal representation and electoral equality, the Supreme Court has consistently held that the Constitutional mandate must be followed.[82] However, some language in relevant Supreme Court decisions has allowed advocates of electoral equality to insist that preventing voter dilution is a more important goal than providing equal representation for all persons residing in the United States. Yet, the Supreme Court's refusal to review the Ninth Circuit's decision in *Garza* is an indirect affirmation that total population is the correct standard, or at the very least that it is a standard whose goal of equal representation takes precedence over electoral equality.

In *Wesberry*, the Supreme Court ordered Georgia's legislature to redraw its congressional districts because of large differences in population between districts. The Court held that "construed in its historical context, the command of Article I, § 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."[83]

Because the language in *Wesberry* is ambiguous, proponents of electoral equality have constructed a counterargument requiring ap-

81. *See* H.R. 744, 101st Cong., 1st Sess., 135 CONG. REC. H144 (1989) (providing for prevention of the distortion in the reapportionment of the House of Representatives caused by the use of census figures that include illegal aliens); H.R. 1468, 101st Cong., 1st Sess., 135 CONG. REC. H 709 (1989) (calling for the exclusion of illegal aliens from the census for purposes of congressional apportionment); H.R. 2661, 101st Cong., 1st Sess., 105 CONG. REC. H2816 (1989) (requiring exclusion of illegal aliens from the decennial census); H.R.J. Res. 199, 101st Cong., 1st Sess., 135 CONG. REC. H648 (1989) (proposing a constitutional amendment to include only natural citizens in census counts undertaken to determine the apportionment of members of the House of Representatives); S. 358, 101st Cong., 1st Sess., 135 CONG. REC. S7939 (1989) (proposing an amendment to S.B. 358 in order to exclude illegal aliens in census counts because of impact on reapportionment).

82. Although the Supreme Court has consistently held in *Wesberry*, *Reynolds*, *Richardson*, and *Kirkpatrick* that the constitutional mandate must be followed, it has not explicitly addressed the issue of whether equal representation takes precedence over electoral equality. However, Judge Kozinski conceded in *Garza* that tradition and language supported a total population basis for apportionment, and that he "would not be surprised to see [the Supreme Court] limit or abandon the principle of electoral equality in favor of the principle of representational equality". *Garza*, 918 F.2d at 785.

83. *Wesberry*, 376 U.S. at 7-8.

portionment to be based on voter population.[84] The Court by its ambiguity has allowed various interpretations of "population" to be appropriately used in apportionment. Some argue that "population" can mean either total or voting population, since the Court cautions against voter dilution, as well as requires "counting numbers".

In a most confusing statement, both propositions, equal representation and electoral equality are intertwined by the Court:

> "It would defeat the principle solemnly embodied in the Great Compromise—*equal representation in the House for equal numbers of people*—for us to hold that, within the States, legislatures may draw the lines of congressional districts in such a way as to give some *voters* a greater voice in choosing a Congressman than others. *The House of Representatives, the Convention agreed, was to represent the people as individuals, and on a basis of complete equality for each voter.*"[85]

But despite the dictum about avoiding voter dilution, the *Wesberry* Court held that apportionment should be based on total population.[86]

Undoubtedly, in 1964 the demographics of the population represented by the Georgia legislature was very different from that in Los Angeles County today. In *Wesberry*, large differences in the population of different districts caused voter dilution, while in *Garza*, the County argued that basing the supervisorial districts on similar numbers was the cause of voter dilution. *Garza* can be viewed as seminal in the evolution of jurisprudence in this area, as equal representation becomes the more important tenet of the Constitution.

Justice Harlan's dissent in *Wesberry* suggests that the language in the apportionment clause of the Constitution—"in allocating Congressmen the number assigned to each State should be determined *solely* by the number of the State's inhabitants"—is not a principle "solemnly embodied"[87] in the Great Compromise. He argued that the word "solely" must be deleted in order to make the statement true, since there are explicit constitutional provisions which run counter to this number-of-inhabitants standard, including the 'three-fifths compromise' which deviates from the principle of representation according to the number of inhabitants of a

84. *See Garza*, 918 F.2d at 778 (Kozinski, J., dissenting).
85. *Wesberry*, 376 U.S. at 14 (emphasis added).
86. *Id.* at 18 (stating:
While it may not be possible to draw congressional districts with mathematical precision, *that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal* for the House of Representatives. That is the high standard of justice and common sense which the Founders set for us) (emphasis added).
87. *Wesberry*, 375 U.S. at 26.

State,[88] the provision that each State shall have a Representative regardless of its population,[89] and the fact that the delegates agreed on a composition of a Senate without any regard to population.[90] Justice Harlan argued that these departures from a strictly population-based Congress indicated that the Framers recognized the possibility that alternative principles combined with political reality might dictate conclusions inconsistent with an abstract principle of absolute numerical reality.[91]

However, Justice Harlan agreed that the "three-fifths compromise" regarding the slave population is evidence that the Framers did not mean to base apportionment on *voting* population.[92]

In *Reynolds*,[93] the Supreme Court applied the *Wesberry* standard to the apportionment of state legislative seats, and held invalid the existing apportionment provisions, as well as both of the proposed plans for the two Houses of the Alabama legislature because they were not based on a total population base.[94] The Supreme Court stated that "[p]opulation, is of necessity, the starting point for consideration and the controlling criterion for judgement in legislative apportionment controversies."[95]

The Appeals Court in *Garza* also applied the standard implemented in *Reynolds*. That case specifically addressed the issue of applying federal apportionment law to state legislatures and other political subdivisions, and the Supreme Court announced that arguments against a federal analogy were moot.[96] Thus, the *Garza* court was free to apply case law affecting the national and state legislatures to its local apportionment case.

Meanwhile, Judge Kozinski argued that the *Reynolds* court was most concerned with electoral equality. He queried whether a redistricting plan that allows different voting power to voters in different parts of the county impairs the one-person, one-vote principle

88. *Id.* at 27 n.8.
89. *Id.*
90. *Id.*
91. *Id.* at 27 n.9.
92. *Id.* at 27 (Harlan, J., dissenting:
Representatives were to be apportioned among the States on the basis of free population plus three-fifths of the slave population. *Since no slave voted, the inclusion of three-fifths of their number in the basis of apportionment gave the favored States representation far in excess of their voting population. If, then, slaves were intended to be without representation, Article I did exactly what the Court now says is prohibited: it "weighted" the vote of voters in the slave States.* Alternatively, it might have been thought that Representatives elected by free men of the State would speak also for the slaves.) (emphasis added).
93. Reynolds v. Sims, 377 U.S. 533 (1964).
94. *Id.* at 567-68 (holding that as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature be apportioned on a population basis).
95. *Id.* at 567.
96. *Id.* at 575.

even though raw population figures are roughly equal. Kozinski cited portions of *Reynolds* which seemed to argue that voter dilution was to be avoided at all costs. For example, he pointed out that the *Reynolds* court believed "an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State."[97]

In *Burns v. Richardson*,[98] the Supreme Court addressed the ambiguous language of its prior apportionment decisions. The Court acknowledged that in its discussion in *Reynolds* it had carefully left open the definition of "population". In conceding that it had discussed voter population and citizen population in substantially equivalent terms, the Court explained that it was making no distinction between the acceptability of such a voting population standard and a test based on total population.[99]

The Court's intentional avoidance of the issue in its previous decisions can also be inferred from other language in *Richardson*. The Court admitted that it had not addressed the "population" issue in *Reynolds* nor in any other decision, nor had it suggested that the States were required to include aliens, convicts, short term or temporary residents, transients, or any others denied the vote, in the apportionment base by which their legislators were distributed and against which compliance with the Equal Protection Clause was to be measured. Rather, the Court explicitly held that the decision to include or exclude any such group involved choices about the nature of representation with which they had been shown no constitutionally founded reason to interfere.[100]

The *Garza* majority discussed the County's arguments regarding the Supreme Court holding in *Richardson* and stated that the County was correct in pointing out that *Richardson* seemed to permit states to consider the distribution of the voting population as well as that of the total population in constructing electoral districts. But, the *Garza* court also noted that *Richardson* did not *require* states to do so. Instead, the Court appropriately held that *Richardson* did not overrule the portion of *Reynolds* that held that apportionment for state legislatures must be made upon the basis of total population.[101] Consequently, when the Supreme Court refused to review the Ninth Circuit's opinion in *Garza*, the Justices all but affirmed their proposition in *Richardson*.

97. *Garza*, 918 F.2d at 780 (Kozinski, J., dissenting) (quoting *Reynolds*, 377 U.S. at 568).

98. 384 U.S. 73 (1966).

99. *Id.* at 91.

100. *Id.* at 92.

101. *Garza*, 918 F.2d at 774.

In *Kirkpatrick v. Priesler*,[102] discussion focused on the ambiguous language again. The Supreme Court restated its holding in *Wesberry*, requiring states to draw congressional districts with mathematical precision using an "as nearly as practicable" standard. However, the Court went on to say that one man's vote must be worth as much as another in a Congressional election. The Court recognized that once again it was being called on to elucidate the "as nearly as practicable" standard.[103]

One possible interpretation of the *Kirkpatrick* Court's holding is that the total population standard is only a means of achieving the goal of equality in voting power. This might be inferred from the Court's statement that equal representation for equal numbers of people is a principle *designed to prevent* debasement of voting power and diminution of access to elected representatives.[104]

However, this is an incorrect inference. The *Garza* court interpreted *Kirkpatrick* and held that the purpose of redistricting is not only to protect the voting power of citizens. Ensuring equal representation for equal numbers of people is a coequal goal.[105]

Kozinski disagreed with the majority's characterization of *Kirkpatrick* and offered an alternative interpretation of the Supreme Court's decision. He felt that the Supreme Court's passing reference in *Kirkpatrick*, regarding preventing debasement of voting power, suggests only that the Court did not consider the possibility that the twin goals might diverge in some cases. According to Kozinski, since *Kirkpatrick* contains no discussion of this issue, the case provides no clue as to which principle has primacy where there is conflict between the two.[106]

V. OTHER ARGUMENTS SET FORTH IN *GARZA*

The holding in *Garza* is based on the principles discussed in this article as well as other important factors. Under an equal protection argument, the court saw the need to protect non-citizen Latinos' right to access their representatives, and the right of aliens and minors to petition the government.[107]

A. *Interference With Access to Representatives*

The *Garza* court affirmed the right of non-citizen Latinos to access their representatives. The court agreed with the plaintiffs that interference with individuals' access to elected representatives

102. 394 U.S. 526 (1969).
103. *Id.* at 527-528.
104. *Id.* at 531.
105. *Garza*, 918 F.2d at 775 (quoting *Kirkpatrick*, 394 U.S. at 531).
106. *Id.* at 784 (Kozinski, J., dissenting).
107. *See* discussion *infra* part IV.A-C.

impermissively burdens their right to petition the government.[108] In addition, non-citizen Latinos have the right to petition the government for services.[109] If apportionment was based on voting population, residents of the more populous districts would have less access to their elected representatives. The most adversely affected are people living in districts with a greater ratio of non-voting populations, including aliens and children.[110]

B. *Rights of Aliens*

The *Garza* court was specifically concerned with the right of aliens to petition their representatives, a right which is adversely affected when districts are based on voting population. Since 1886, the Supreme Court has recognized that aliens are "persons" within the meaning of the Fourteenth Amendment, and thus, entitled to equal protection.[111] The court also affirmed that the equal protection right serves to allow political participation by aliens short of voting or holding a sensitive public office.[112]

It is important to note that the *Garza* majority found that all individuals, including aliens, were protected by the Fourteenth Amendment. The majority rejected Judge Kozinski's position which advocated redistricting on the basis of voting capability because it would constitute a denial of equal protection to the plaintiffs.[113]

C. *Rights of Minors*

The *Garza* court also expressed concern that the right of minors to petition their government would be abridged in a regime which bases districts on voting population. The court recognized that minors have the right to political expression.[114] Changing the reapportionment base to include only citizen or voting population would be an impermissible denial of equal representation to children, and particularly to young adults who have not yet reached the voting age. The court illustrated this dilemma by referencingciting

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108. *Garza*, 918 F.2d at 775 (citing E.R.R. President's Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 137, *reh'g denied*, 365 U.S. 875 (1961)).

109. In Los Angeles County, non-citizens are entitled to various federal and local benefits such as emergency medical care and pregnancy-related care. CAL. WELF. & INST. CODE §§ 14007.5, 17000 (*West* 1991). They also have a right to have a voice in how their taxes are spent. DAVID CARLINER, THE RIGHTS OF ALIENS AND REFUGEES: THE BASIC ACLU GUIDE TO ALIEN AND REFUGEE RIGHTS (1990).

110. *Garza*, 918 F.2d at 774.

111. *Id.* at 775 (citing Yick Wo v. Hopkins, 118 U.S. 356, 368 (1886)).

112. *Id.* at 775 (citing Bernal v. Fainter, 467 U.S. 216 (1984), and Nyquist v. Mauclet, 432 U.S. 1 (1977)).

113. *Id.* at 776.

114. *Id.* at 775 (citing Tinker v. Des Moines Community School Dist., 393 U.S. 503, 511-13 (1969)).

the California Supreme Court's decision in *Calderon v. City of Los Angeles*,[115] which held that the U.S. Constitution requires apportionment by total population.

The court in *Calderon* held that adherence to a total population standard, rather than one based on registered voters, was more likely to ensure that those who cannot or do not cast a ballot may still have some voice in government. Thus, a 17-year-old has the same right of equal representation as a 21-year-old registered voter. Even though the 17-year-old is prohibited by state law from voting, he might wish to and can communicate his views on the Vietnam War to the elected representative from his area.[116]

Furthermore, much of a legislator's time is devoted to providing services and information to his constituents, both voters and non-voters. The *Calderon* court correctly discerned that a district which, although large in population, has a low percentage of registered voters would, under a voter-based apportionment, have fewer representatives to provide such assistance and to listen to concerned citizens.[117]

VI. CONCLUSION

All Latinos, even non-citizens, must be counted for apportionment purposes. Analyzing the history of the framing of the Constitution and of the Equal Protection Clause of the Fourteenth Amendment, as well the legislative history of the United States, and Supreme Court jurisprudence, the Ninth Circuit Court of Appeals reached a decision in *Garza* which guaranteed equal representation for Latinos living in Los Angeles County.

Those who wish to exclude illegal immigrants from the population base fail to recognize that there is a fuzzy line between legal immigrants who are U.S. citizens and those who are not.[118] There are many Latinos in the U.S. who are legal residents of this country. In Los Angeles County, Latino residents who are not yet citizens have a right to representation. How is the government going to determine which Latino aliens are to be counted and which are not? Should the line be drawn at those who have already begun the naturalization process? Do we include those who are seeking amnesty through the Immigration Reform and Control Act? These are questions advocates of electoral equality fail to ask and obviously fail to answer. Perhaps Congress will decide that illegal aliens do not count at all, but legal immigrants count as three-fifths of a "person" for apportionment purposes.

115. 4 Cal.3d 251, 481 P.2d. 489 (1971).
116. *Garza*, 918 F.2d at 775-76 (citing *Calderon*, 4 Cal.3d at 258-59).
117. *Id.*
118. Hernandez & Pachon, *supra* note 1.

Antonia Hernandez, President and General Counsel of the Mexican-American Legal Defense and Educational Fund, and Harry Pachon, Executive Director of the National Association of Latino Elected and Appointed Officials, are two prominent advocates of equal representation who believe that an absolute obstacle to full Latino empowerment is the fact that there are large segments of the Latino population who have immigrated legally but are not yet citizens. Hernandez and Pachon astutely point out that concluding that immigrants should be ignored in political apportionments is an exercise in flawed reasoning reminiscent of 18th century arguments that slaves should count only as three-fifths of a person when apportioning congressional districts.[119] Likewise, Latinos need to ask why the Supreme Court has refused to consider an issue which may result in such distorted reasoning about a group's right to representation.

It should also be noted that the Justice Department stepped in on behalf of the Bush administration and argued that the county's contention that it is unconstitutional to apportion on the basis of total population represented a quite recent change in apportionment politics. The Justice Department pointed out that in assuming this position, county officials were in fact repudiating the state law which requires apportionment based on total population, and abandoning their own twenty-five year practice of redistricting on the basis of total population. Surprisingly, even the Bush Administration believed the county had changed its position in an effort to serve its own political interests.[120]

The root of the entire apportionment battle in Los Angeles County is a fear that Latinos may become a viable political force. The County had followed one set of rules for over a quarter of a century, and as a result areas of majority Latino population were intentionally gerrymandered in order protect the incumbencies of the Board of Supervisors. When the Latino population grew too large to ignore and a challenge to the power structure arose, the County tried to change the rules—by advocating for apportionment based on voting population. Fortunately, the Ninth Circuit followed the constitutional mandate of equal representation for *all* persons and affirmed the *only* correct standard.

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119. *Id.*

120. *Supra* note 32.

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