"Fair" Minority Representation and the California Voting Rights Act

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Abstract

The California Voting Rights Act is slowly eliminating at-large elections in the Golden State and it had a positive outcome for minorities' representation, especially Latinos. It helped ethno-racial minorities elect more candidates of their choice at the local level and created a pool of talent that could be tapped into for higher office. Yet, switching to districts has it limits, in particular when cities are well integrated. And by itself, it may not guarantee that minorities can reach descriptive representation close to their electoral weight. The CVRA does not limit remedies to district systems. Alternative voting systems, such as cumulative voting, as they have become more popular lately, can represent a supplement to single member plurality districts when majority-minority districts are not easily drawn. Besides, California is the only state that managed to pass such a law. When state legislation does not encourage the elimination of at-large systems, alternative voting systems might be the next logical step in electoral reform attempts.

Keywords: California Voting Rights Act, minority representation, racial polarization, at-large elections, single-member districts, proportional voting

Introduction

Over the past 20 years the state of California passed two major electoral reforms that had a tremendous impact on minority descriptive representation: the Independent Redistricting Commissions that eliminated the legislature conflict of interest and took redistricting out of the hands of lawmakers and the California Voting Right Act that forces switching to single-member districts.[1] This article focuses on the latter to evaluate its impact and explore the next phase in electoral reforms aimed at increasing minority representation.

Since 2003, across the state of California, at-large elections have been disappearing.[2] The main reason of this evolution is the passage of California Voting Rights Act (CVRA) in 2002. This Act addresses the problem of at-large elections within the context of racially-polarized voting (RPV) and it applies to most levels of governments: cities, school districts, special election districts.[3] It stems from civil rights lawyer Joaquin Avila's frustration of trying to bring Section 2 claims at the local level especially in rural communities. In essence it is an improved version of the federal Voting Rights Act for the local level. Ethnically diverse cities that hold at-large elections and have few minority officeholders are now vulnerable to lawsuits under the CVRA. All a plaintiff has to do is demonstrate that racially polarized voting, or racial bloc voting, exists, that is that voters belonging to an ethno-racial group consistently vote "as a bloc" for candidates of that same group.[4] As some jurisdictions in California are switching to district elections, either voluntarily or through litigation,[5] one may wonder if the CVRA has lived up to expectations. The answer to this question depends on what one anticipated from the

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law.

If the goal of the CVRA was to produce more opportunities for minorities to elect their candidate of choice, the law is an undeniable success. Indeed, in a context of racial polarization voting, district elections do make the election of minority candidates more likely. However, if one estimates that the goal of this electoral reform was to produce a level of descriptive representation for minority voters that is close to their electoral weight, one may feel that the CVRA came up short or hasn't produced those results yet. Indeed, without local community empowerment and mobilization, switching to districts in the context of racial polarization may not result in spectacular levels of descriptive representation susceptible to satisfy minority groups or activists. The paradox of the CVRA is that its main goal is the creation of single member plurality districts in order to approximate levels of descriptive representation that would be proportional to minorities' electoral weight.

Yet, switching to district elections has its limits. When cities are well integrated, drawing majority-minority districts may not be feasible. At least one settlement in a CVRA case, in Mission Viejo, has imposed a non-district system, a cumulative voting system, in which voters can cast as many as five votes for a single candidate (Robinson 2018). The language of the CVRA does not limit remedies to district systems, but merely lists district systems as one example of "appropriate remedies." Moreover, California is the only state that has passed such a law (Stang 2016). If forcing the end of at-large elections in other states is too difficult, other alternative voting systems may also have the potential to help increase minority representation.

Alternative voting systems seem to be more popular in the US nowadays. In 2018, the state of Maine became the first state in the Union to use cumulative voting for its federal elections. The New York Times editorial board endorsed in 2018 ranked choice voting for congressional elections (Editorial Board 2018). The organization Fair Vote has been receiving a lot of press coverage in its advocating for PR voting systems.[6] Even in the state of California the state's legislature passed a bill in 2016 that would have allowed all cities to switch to ranked-choice voting even though the bill was vetoed by Governor Brown without much explanation (Egelko 2016). The relative popularity of alternative voting system in 2018 is linked to many issues but one of them is the election of minority candidates.

The contention of this article is that districts are not the only option and that alternative electoral systems are a reasonable alternative either when geographical district are too complicated to create under the CVRA or, in the rest of the Union, where state legislation ending at-large systems has not been implemented.

A-Joaquin Avila's Legacy

The California Voting Rights Act has had a tremendous impact on local politics in California, and like most influential pieces of legislation it almost never came about. If it wasn't for the tenacity of one voting rights attorney, the situation of minorities voting rights in California would be quite different.

Joaquin Avila worked for MALDEF from 1974 to 1985, first as a staff attorney, then as a regional associate counsel and from 1982 to 1985 as President and General Counsel. In 1985, he opened a private practice solely dedicated to voting rights cases, the only one of its kind at the time. At MALDEF he had acquired great experience fighting voting rights cases under equal protection standard and when the Supreme Court rendered its decision in Mobile v. Bolden, 446 US 55 (1980), Avila testified before Congress in 1981 to reauthorize and amend the Voting Rights Act. His testimony focused on the state of Texas and put the emphasis on local

jurisdiction and especially the problem that at-large schemes represented for Latinos (Avila 1981). While the new amended Section 2 voted by Congress was a great victory for voting rights advocates because Congress established that is was not necessary to prove intent as part of the evidentiary process to establish discrimination, the new interpretation of Section 2 in Gingles introduced "geographical compactness" as a precondition. Indeed, federal voting rights cases under Section 2 require that a successful plaintiff show that (1) the minority group be sufficiently large and geographically compact to form a majority of the eligible voters in a single-member district,[7] (2) there is racially-polarized voting, and (3) there is white bloc voting sufficient usually to prevent minority voters from electing candidates of their choice.[8] Only if all three of these "preconditions" are proven, the court then proceeds to consider whether, under the "totality of circumstances" the votes of minority voters are diluted.[9]

An ethnic or racial minority had to be geographically compact enough to create a majority-minority district in which the said minority could amount to 50% of eligible voters. Much to the chagrin of Avila, many preliminary studies done before challenges showed that this threshold was too high in many cases. While potential clients came to his office he had to turn them down and explain to them that he could not file the case in spite of a high racial polarized voting and a history of no minority electoral success. So as early as 1984, Joaquin Avila recognized that a state law eliminating the geographical compactness criteria would help fight voting rights cases. From 1989 to 1992, he worked with Assemblyman Peter Chacon to try and pass bills eliminating at-large elections only to see those bills vetoed by Republican governors once they were accepted by the legislature. He tried to work with MALDEF on this issue but the Latino organization made a strategic decision of not focusing on the local level.

Avila especially worked on passing a bill after the seminal Section 2 case in California Gomez v. Watsonville that was successful in 1988 on appeal to the U.S. Court of Appeals for the Ninth Circuit.[10] The Gomez decision helped to renew efforts at the community level to eliminate discriminatory at-large elections and therefore challenges were filed in other parts of California.[11] The Gomez case was a legal success that reverberated throughout the state and the switch to districts in Watsonville led to the election of Latino Oscar Rios in 1989, the community's preferred candidate,[12] who was then elected mayor (Stein 1989). However, the period of successful Section 2 enforcement in California did not last following the case Romero v. City of Pomona, 883 F.2d 1418 (9th Cir. 1989). This was part of a national trend observed by Cain and Miller when Section 2 violations were harder to prove for "other minorities," meaning other than African-Americans.[13] According to Joaquin Avila two major unsuccessful at-large election challenges[14] discouraged any further litigation by private parties.[15]

Since the private bar had been thus far largely responsible for enforcement of minority voting rights, Avila was convinced that this activity needed to be incentivized. Any new state law should accomplish two goals: remove the compactness factor and help private lawyers with their cost.

For several years Avila doubled his effort to have a bill passed in the legislature with no success. It wasn't until 2000 when NALEO invited Avila to do a presentation on redistricting before the legislative caucus of minority officials that Avila mentioned to them that while legislative redistricting was important, local at-large districts were the single most important hurdle to minorities' elections. At the time most city and school districts in California elected their governing boards using at-large election systems.[16] The exceptions (those that elected by district) tended to be the very large cities and school districts. Getting people elected at the local level was crucial to have a pool of experienced candidates that could, then, be viable candidates for

the legislature.[17] This argument probably struck a chord with Richard Polanco who was at the time the Senate Majority Leader because he approached Avila about sponsoring a bill that became SB 976. His chief of staff Saeed Ali took Avila's proposal to the legislative council which came back with a document that Avila disapproved of. He therefore decided to write his own bill, with advice from Robert Rubin, former legal director for the Lawyers' Committee for Civil Rights (LCCR) of the San Francisco Bay Area, convinced that it would not become law. But Richard Polanco really believed in Avila's bill and his position as Majority Leader meant he was owed many favors in the legislature. The bill died once in the Senate but Polanco resuscitated it. It worked its way to the Assembly which tweaked it marginally and was back in the Senate for concurrence. It was adopted in the Senate by a vote of 24 to 10 and in the Assembly by a vote of 47 to 25. In July 2002, Governor Gray Davis pondered vetoing the bill. When Davis representatives contacted Avila, he immediately called Senator Polanco who apparently found the words to convince the governor to sign the bill into law. The California Voting Rights Act of 2001 became law in 2002, with an effective start date of January 1st 2003, "with little fanfare, indeed practically unnoticed by the public or the media" (Adams 2005, 177).

However this was only the first part of the battle, because a law is only as useful as the extent to which it is enforced. It took Avila and Robert Rubin more than two years to prepare to take on their first case with. They filed their first suit in 2003 against the Hanford Unified School District[18] and it was immediately settled and the attorney's fees to the plaintiffs were part of the settlement.[19] So the case was a success however the law wasn't really tested.

The real test for the new law came in 2004 when the city of Modesto was sued and fought back. Avila and Rubin approached George H. Brown since they needed a major law firm (Heller Ehrman) for such a big case. The team filed a suit under the CVRA on behalf of some Latino residents of the city of Modesto. The plaintiffs claimed that racially polarized voting was preventing Latinos from being elected. Moreover, the city had only elected one Latino council member since 1911, even though the city Latino population exceeded 25%, therefore demonstrating an absence of electoral success on the part of the Latino community to elect the candidate of its choice. They initially lost the case in 2005 when the Stanislaus County Superior Court Judge, Roger M. Beauchesne, sided with Modesto and declared the law unconstitutional. Judge Beauchesne argued that the law showed preference to minorities without requiring them to demonstrate need and also ruled that the requirement for the city to pay attorney's fees was an unconstitutional gift of public funds. Judge Beauchesne focused on the CVRA's effort to get around rulings that the VRA required plaintiffs to meet the Gingles test. But they appealed and the constitutionality of the CVRA was confirmed by the 5th district Court of Appeal in December 2006.[20] When the California Supreme Court refused to review the case in 2007, Avila breathed a sigh of relief. His vision had come to fruition.[21] Sanchez v. Modesto ended in settlement after the city voted on a ballot measure to use district voting by 2009. But the city still had to pay $3 million in fees for the defendants' lawyers. In the middle of the Great Recession every city hall and school board in California paid close attention to such a big settlement. And many lawyers did too as voting rights litigation appeared more appealing. Avila had told lawmakers when he testified for the bill in 2002 that he expected other attorneys would take on cases because of favorable incentives written into the measure (Blood 2009). Some might argue that it was self-serving for lawyers to write a law that helps them get paid (Lucas 2011). Yet it is precisely the cost that is the real deterrent for municipalities and makes it so risky to legally fight back. The cost of switching to district elections is very minimal in comparison and that is why so many cities are nowadays doing it voluntarily. The CVRA is such a deterrent that in many cases it is

not even used. In essence it has become, for the local level, what the VRA was in the 1990's for legislative districts.

B-The California Voting Rights Act: A Quiet Revolution?

The California Voting Rights Act addresses the problem of at-large elections within the context of racially polarized voting. At-large districts were a product of the Progressive movement in the early twentieth century to try and weaken neighborhood parochialism and machine politics and to implement a jurisdiction-wide perspective. During the Progressive Era the lack of competition in local elections was also perceived as a big issue. Progressives therefore pushed for nonpartisan elections as a solution to the problem of one-party rule in the cities. Their idea was to promote more business-like administration of cities. They were successful in the sense that nonpartisan elections are a feature of most American cities. Even though in nonpartisan elections the party name does not appear on the ballot and parties do not play a formal role it does not mean that, as a matter of constitutional law, parties are barred from participating in the election.[22] So national parties are weakened by nonpartisan elections but when they get involved in local elections they do bring organizational power. Besides, academic work has shown that voter rely on party affiliation even in non-partisan elections. A study of down-ballot, nonpartisan statewide elections in California showed that voters had difficulty choosing whom to support in the absence of partisan identification. Moreover, a large percentage of voters changed their candidate preference when they discovered their party affiliations (Schaffner and Streb 2002). And yet electoral competition at the local level is almost non-existent. Voter turnout is substantially lower, incumbents are safer and scholars have found no indication that candidates engage in any substantial policy competition (Schaffner, Streb & Wright 2001).[23] This is particularly problematic for under-resourced minority challengers of local political machines. But if at-large elections have such a bad reputation in the US it is especially because many "progressives" used them in order to exclude ethnic and racial minorities from serving on local governmental bodies (McCrary 2011).

The California Voting Rights Act applies to all levels of governments: cities, school districts, and special election districts. It applies only to at-large and from-district electoral systems, or combination systems.[24] Indeed, there are more than two possible redistricting systems. At one extreme are single-member districts and at the other is at-large elections of all members of a city council or other legislators in a given jurisdiction. At-large systems are those in which all the voters in the jurisdiction elect each member of the governing board. In between single-member and at-large systems there are different alternative systems. "From-district" elections (sometimes called "at-large by residency") require each member of the governing board to live within a particular district however elections are still by all the voters in the jurisdiction, rather than being limited to the voters within a district. The from-district system was intended to offer larger geographic representation on the city council than traditional at-large elections while still making sure that council members be accountable to the entire electorate. However, like traditional at-large voting, it can still allow a bare majority of the electorate to win every seat, in effect blocking out minority representation.[25]

There are also combination systems in which, for example, a primary election may be conducted "by-district", but the general election is conducted "from" those same districts: the top-two vote winners in the primary election in each district run for election "at-large" in the general election. All these variations can be challenged if the minority plaintiffs can show that racially-polarized voting (RPV) limits their ability to elect or influence the election of minority-

preferred candidates.[26] Two cities also use at-large by seat voting that differs from the at-large from-district system because the seats do not represent a geographic area. A candidate may run for any seat up for election.[27] Theoretically, this system encourages more political accountability than a traditional at-large election because candidates may target specific incumbents to challenge.[28]

Unlike with the federal VRA there is no requirement of proving geographic compactness, and no necessity to create a hypothetical single-member district consisting of over 50% Latino eligible voter population. In a way, the CVRA, even though it was anterior to this case, provides a solution to the loophole in Bartlett which allows for crossover districts to be drawn in the redistricting process, but does not allow valid crossover claims under Section 2.[29] The CVRA reads:

> An at-large method of election may not be imposed or applied in a manner that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the dilution or the abridgment of the rights of voters who are members of a protected class.[30]

The major requirement is that plaintiffs must prove racially polarized voting prevents the ability of a protected class to elect candidates of their choice or to influence the outcome of an election.[31] The term "protected class," as used in the CVRA, has been recognized as race-neutral in identifying those plaintiffs who have standing to bring a claim and seek remedial action under the statute.[32] A protected class is defined by the CVRA as "a class of voters who are members of a race, color or language minority group, as this class is referenced and defined in the federal Voting Rights Act."[33] Subdivision (b) of California Election Code Section 14028[34] also lays out the framework for the plaintiffs' burden of proof, borrowing from some VRA case law such as LULAC v. Clements, where racially polarized voting may be determined through an examination of election results in which at least one candidate is a member of a protected class, elections involving ballot measures, or any other electoral choices that impact the rights and privileges of members of a protected class.[35]

In addition, there is no need to prove the other Senate Report factors as required under the Federal Voting Rights Act. These Senate Report factors are probative and can be introduced, but they are not necessary.[36] What the federal and CVRA have in common is that there is no requirement to prove an intent to discriminate against minority voting strength. Once a court finds that the elements previously mentioned have been met and a violation of the CVRA has taken place, the court must implement appropriate remedies, including district-based elections tailored to remedy the violation.[37]

And as mentioned before, maybe the most important innovation of the CVRA is that it mandates the award of costs, attorney fees, and expert expenses to prevailing plaintiffs.[38] On the other hand, prevailing party defendants are not entitled to costs unless the court finds the action to be "frivolous, unreasonable or without foundation," a very high standard. Or as Morgan Kousser summarized it:

> Unlike in federal litigation, plaintiffs may be held to be "prevailing parties" (and thus collect fees and costs) if there is a "causal connection" between their lawsuit and a change in the defendants' behavior – for example, if a defendant jurisdiction switches from at-large to district elections once a lawsuit is announced, even if only

> minimal legal paperwork is ever filed. This last provision encourages lawyers to file numerous lawsuits without the fear of having to carry them through complicated hearings, depositions, and trials, and it encourages local jurisdictions to settle well before they begin to run up large bills. (Kousser 2015).

So the CVRA has been very successful in responding to one of the main gaps in Section 2 of the VRA that is the difficulty in bringing Section 2 claims at the local level and in rural communities. However, some issues remain as Paige Epstein noted in 2014:

> Thus, while coalition, crossover, and influence districts clearly seem to be allowed under the CVRA, it remains unclear to what extent such districts are desired, required, or implemented, and what shape such districts are required to take. Relatedly, the CVRA does not appear to allow for vote dilution claims to be brought against jurisdictions with district-based election systems.

C-The slow death of at-large elections through litigation

The question raised by at-large elections in the context of the minority rights revolution is not new. In 1968 Paul A. Freund wrote that "while the major outlines of the reapportionment doctrine may be settled, there remain a host of questions still unresolved: its application to local government, the legal status of gerrymandering, the limits on multimember districts, the use of weighted or fractional voting in the legislature" (Freund 1968, 6). In 1982 Malcolm E. Jewell was still wondering: "As we enter the period of post-1980 reapportionment, one of the questions that remain is whether the trend toward single-member districts in state legislatures and city councils will continue" (Jewell 1982, 129). In California, in 2019, the process is underway through litigation. First came Modesto, then Compton, Anaheim, Escondido, Whittier, Palmdale and others. Ethnically diverse cities that hold at-large elections and have few minority officeholders have proved vulnerable to lawsuits under the California Voting Rights Act. All a plaintiff has to do is demonstrate that racially polarized voting exists[39] and sometimes that can be done with election results that reveal contrasting outcomes between predominantly minority precincts and Anglo ones. Roughly three quarters of California school boards use at-large voting (245 out of 944), as do many city councils and other local boards. Many jurisdictions fearing a lawsuit have switched to single-member district elections, usually after receiving the "demand letter" from lawyers. No local government has won a state voting rights lawsuit, and jurisdictions that can't demonstrate fair treatment of minorities in at-large election systems must pay plaintiffs' legal fees. So across California, many community college and school districts are eliminating at-large elections (Landsberg 2009).[40] Cities have been more reluctant, leading to a series of legal actions.[41]

We can also observe that most lawsuits resulted in a ballot measure to adopt districts. That is because the general rule in California was that cities could only switch from one system to another by majority vote of that city's electorate. However, as of 2017 cities with fewer than 100,000 residents could transition from at-large or from district elections to by-district elections with a city council-passed ordinance, if that change was done to address concerns of racial minority vote dilution.[42] And beginning in 2017, new legislation allowed any-sized city to transition to by-district elections without a confirming vote of the electorate.[43]

Figure 1 – California cities that have switched to districts elections since the passage of the CVRA (as of January 2019)

City	population	Latino CVAP[44]	Election cycles	Latinos pre-change	Latinos in 2019	Other Non Anglo
Modesto	201,165	26%	5	1	1	1
Sanger	24,270	74%	4	1	4 (1 mayor)	
Tulare	59,278	43%	3	0	2 (1 mayor)	1
Madera	61,416	60%	3	1	5 (1 mayor)	2
Chula Vista	243,916	51%	2	1	3 (1 mayor)[45]	
Compton	96,455	48%	2	1	1	4 (mayor)[46]
Escondido	143,911	30%	2	1	2	
Santa Barbara	88,410	24%	1	1	3 (1 mayor)	
2016						
King City	12,874	79%	1	0	2	
Los Banos	35,952	55%	1	0	0	2
Chino	77,983	48%	1	0	1[47]	
Palmdale	152,750	46%	1	2	2	
Patterson	20,413	45%	1	1	1	
Riverbank	22,678	44%	1	3	1	1
Visalia	124,442	37%	1	0	0	
Merced	78,958	37%	1	0	2	1
Highland	53,104	36%	1	0	1	
Eastvale	53,683	36%	1	0	0	1
Anaheim	336,265	35%	1	0	1	1 (1mayor)
Woodland	55,468	35%	1	1	3 (1 mayor)	

Buena Park	80,530	29%	1	0	0	1
Wildomar	32,176	29%	1	0	0	
Turlock	68,549	27%	1	1	1	
Hemet	78,657	27%	1	0	0	
Dixon	18,351	27%	1	0	0	
Banning	29,603	26%	1	0	0	1
Garden Grove	170,883	24%	1	0	0	3
Yucaipa	51,367	23%	1	0	0	
San Juan Capistrano	34,593	19%	1	1	1	
Visalia	122,442	37%	1	0	0	
Bellflower	76,616	44%	1	1	1[48]	
2018						
Fullerton	135,161	25%	1	1	1	
Corona	152,374	33%	1	0	0	
Costa Mesa	109,960	21%	1	0	1	1
El Cajon	99,478	22%	1	0	0	1
Eureka	27,191	6%	1	1	1	
Placentia	50,533	26%	1	0	0	1
Rancho Cucamonga	165,269	33%	1	0	0	
Upland	73,732	24%	1	0	2	
		Latino Population				
Chino hills	80,374	29%	1	1	1	
Cathedral City	51,200	59%	1	1	2	
Temecula	111,024	24.7%	1	0	0	
Indio	76,036	68%	1	1	2	
Redlands	68,747	30%	1	0	0	
Murrieta	103,466	26%	1	0	0	
Menifee	77,519	33%	1	0	0	
Jurupa Valley	106,028	70%	1	0	2	1

It needs to be noted that municipalities that have only gone through one election cycle (cities that have switched since 2016) may not have had elections in districts that were susceptible to elect a minority candidate. In time, they may present more minority elected officials. What we observe, though, is an increase in the switching to districts throughout the state leading to an increase in minority elected officials, especially Latinos and an overall increase in the sheer number of Latino candidates being elected on city councils throughout the state.

D-The limits of Geographical Districting and Winner-take-all

1-The CVRA mitigated results

As demonstrated above, most cities in California that have switched to district elections saw, over time, an increase in the number of Latino elected officials. However, not every case was a success. There are examples showing that switching to single member districts in itself is no guarantee of electoral success. It is to be noted that the bulk of the election changes occurred in school districts which resulted in many more minorities being elected locally. In that sense, the CVRA is a real success and its impact goes beyond municipal elections. But city council races are more visible and are the real prizes of local politics. The increase of Latino elected officials thanks to the CVRA is has been steady although not spectacular. Some activists may wish that the revolution happened faster.

To understand why switching to districts is often not enough, many local factors need to be taken into consideration such as the presence of other communities of color, the way the districts are drawn, the quality of the candidates, the absence or presence of several minority candidates, the willingness of the city council to appoint minority candidates in a case of vacancy and, of course, turnout. Most local elections have notoriously low turnout rates. The examples of cities not electing Latino officials after a switch to districts don't undermine the great success that the CVRA has been. They simply show that there is more to electing Latino candidates than the mere switch to districts. Without strong candidates, higher turnout or registration, district elections, while being an improvement, do not necessarily guarantee minority descriptive representation in proportion to the community's electoral weight.

It is often contended during voting rights lawsuits that a switch to district elections would increase minority turnout, because minority voters will realize that they have a much better chance to elect candidates of their choice. While there has long been evidence in support of such a contention (Barreto and Segura 2004), turnout rates for Latinos or Asians can hardly be considered satisfactory as they lag nationally behind Anglos and African-Americans. In many CVRA cases, switching to districts was even combined with other electoral changes to try and boost turnout, most notably to change municipal election dates to coincide with other major state elections, as well as federal elections, such as presidential or congressional, in the month of November.[49] This article suggests that other electoral changes should also be experimented with when majority-minority districts are not doable. In some cities, such as Hesperia for instance, the population is so integrated that it is difficult to create majority-minority districts that would not be struck down by the courts. For that reason MALDEF only sues cities when lawyers can prove majority-minority districts can be created. Moreover, in the rest of the Union, switching to districts is not mandated by state law. If the CVRA model cannot be exported, should alternative voting systems be encouraged?

2-The limits of SMDs

The main problem eliminating at-large election through litigation is that once litigation is over the bulk of the work in terms of community empowerment, outreach and get-out-the vote operation remains to be made. Right after a lawsuit and the publicity it generates, public interest is often high but this tends to recede afterward. If activists limit their tasks to hiring lawyers to change the election system but don't follow through with on-the-ground political outreach during the following election cycles, then the CVRA can't live up to its expectation.

And the expectation can be quite high if the goal is to achieve levels of representation in proportion to the political weight of a given community. Even though minority organization leaders usually deny that proportional representation would be their goal, their position might actually be more ambiguous. Katherine Tate's does an interesting experiment in the 1996 National Black Election Study that finds that black respondents prefer proportional outcomes but do not necessarily see proportional representation as "fair," suggesting considerable confusion in the general public about the connection between voting schemes and electoral success (Tate 2003, 156). Besides, the way statistics are presented always suggests that the absence of proportional representation is suspicious. For instance, the Leadership California Institute California Latino Legislative Caucus and NALEO present figures in a way that is very explicit: according to the census Latinos represented in 2014 38.6% of the California population but 19.6% of voter registration on average between 2002 and 2012. During the same period Latino represented, on average, only 16.5% of the California electorate. These figures are directly compared with Latinos descriptive representation at different levels of responsibility. In 2015 they represented 12.5% of state Senators, 23.8% Assembly members, 9.8% of County Supervisors and 14.6% of city council members (NALEO 2015). Pointing out the discrepancy in this manner implies that the ultimate goal is some sort of proportional representation. The paradox of the CVRA is that its main goal is the creation of single member plurality districts in order to approximate levels of descriptive representation, for Latinos especially, that would be closer to their electoral weight. The question can therefore be asked if in California as a complement to districts, other voting systems may not be adopted to help produce better results. The question of alternative voting system is especially salient in the rest of the Union where state legislation such as the California Voting Rights Act was not adopted.

3-Alternative voting system

The CVRA as it raised the issue of what represents "fair" minority representation begs the question of alternative electoral system. The genesis of the CVRA shows that Avila, a civil rights attorney, operated only in the framework provided by the federal VRA and was only looking for a practical way to tweak it to make litigation more efficient at the local level. The impetus behind his effort was not to come up with a comprehensive reform to look at elections and minority representation. At-large elections have a bad reputation among minority groups because they have been used in the context of a "winner-take-all" system designed to frustrate minority groups. This is a paradoxical trend because most activists seem to advocate for single-member plurality districts while at the same time wishing that elections would yield proportional results. Arend Lijphart presents it as a fundamental choice: "if one's highest priority is to achieve proportionality one has to opt for proportional representation; conversely, if one is unwilling to abandon plurality and geographical districting, one can try to minimize extreme disproportionalities […] but one has to reconcile oneself to not getting proportional or near proportional results" (Lijphart 1982, 105). And yet in such a diverse political environment as the United States both systems can coexist.

The problem with geographic representation is that it advantages geographically concentrated groups. Some formal redistricting criteria are better for certain groups than others. A classic example it that of women for whom majority-minority districts cannot be created. Moreover, even geographically defined communities raise theoretical problems. It can be said that the district process imposes an identity on a given community instead of letting people chose for themselves. With districts there is no escaping the selection bias problem. Just because people are ascribed census attributes does not mean they share a sense of political unity. Political priorities can change between elections or over time. In one election economic issues can be more salient, in another social issues can be perceived as more important. Census data are not collected to estimate policy concerns. Inferring political weight to demographic data can be misleading. PR does not try to predetermine which minorities should be represented.
The problem with districting is far from being new as Robert Dixon already observed in 1968: "A mathematically equal vote which is politically worthless because of gerrymandering or winner-take-all districting is as deceiving as "emperor's clothes" (Dixon 1968, 22). Samuel Isacharroff (1993, 228-229) also remarked that districts are a poor mechanism to reflect the preferences of groups defined through the act of voting:

> it is inconceivable that districted elections better could satisfy these objectives than many of the proportional and semiproportional systems employed elsewhere that assure proportionate results by reproducing voter preferences without state-sanctioned manipulation of the outcomes.

Arguing for alternative voting systems Lani Guinier (1993, 1637) came to the conclusion that:

> Despite judicial reluctance to adopt alternative remedies, the principle of one-vote, one-value satisfies the representational needs of voters in two ways that districting does not. First, it extracts the unfairness of wasted votes from winner-take-all solutions. Votes that would have been wasted in a winner-take-all system are redistributed to voluntary constituencies consistent with the actual level of their political support. Second, it allows voters to choose their representational identity. Rather than imposing a group identity on a given geographic constituency, this system gives voters the opportunity to associate with the identity that fits their own view of psychological, cultural, and historical reality. Thus, racial and other politically cohesive groups could be represented in proportion to their actual strength in the electorate rather than in proportion to their geographic concentration.

However, it is possible to imagine a form of proportional representation (PR) adapted to geographical districts. There is a middle-ground between European style at-large PR systems and American SMD rules that is called semi-PR system championed by scholars such as Engstrom (1998, 2001, 2010)[50] or Amy (2002).[51] The semi-PR systems consist in concentrating multiple votes on one candidate (cumulative voting or CV) or limiting votes to a number less than the number of elected offices (limited voting or LV) or expressing a number of preferences to make surplus votes count (preference voting sometimes called single-transferable voting) (Weaver 1984). These systems have the advantage of lowering the threshold for representation for minority groups and can be adapted to geographical districts (Guigner 1994, 147).[52] Minority voters don't need to constitute majorities within districts in order to have the opportunity to elect

the candidate of their choice so there is no need for district boundaries to selectively include or exclude members. As Michael Kang put it: "The key consideration is that both cumulative voting and limited voting enable the minority to act directly on an affirmative preference for a candidate, but make it more complicated for the majority to fill all available seats and block the election of the minority's candidate" (Kang 2010, 1274).

Another advantage of changing the electoral system can help move away from the fight over statistical data. The criteria that the Supreme Court has identified as "traditional race-neutral districting principles" such as contiguity, compactness, and respect of other government boundaries are more likely to be respected. And geographical "communities of interest" are less likely to be cut by district lines. Also and this has been the case in California especially, when districts are drawn to provide electoral opportunities to a Latino minority, another problem of districting plans is the large disparity that can occur across districts in Voting Age Population or Citizen Voting Age Population.

PR and Semi-PR system have been fairly criticized. When STV has been adopted in California it has mostly been in districts. Where STV has been proposed for at-large systems, such as in Santa Monica in 1992 or Santa Clara in 2018, it's been rejected as much too confusing.[53] While changing electoral systems can be confusing, any community (even the ones least proficient in English) can be educated and can learn to take advantage of new electoral opportunities if accompanied by the right public services.

Another criticism addressed to PR is that it is not adopted to non partisan elections as it is the case in California at the local level. But this is only true of the list system when parties indeed decide who appears on the list and in what order. Yet, the appeal of PR and semi-PR is precisely that they can contribute to move beyond the two-party system that many reformers see today as a constraint on true marketplace-like competition.

The fundamental differences between majoritarian and proportional representation have been debated for a very long time. The stakes are clear. All decisions about political rules are trade-offs. Each system has its advantages and drawbacks. And it is true that changing from one system to another might mean exchanging a set of problems for another.[54] Majoritarian systems supposedly help form a governing majority while proportional systems might offer a more fair representation of minority groups. The question of proportional representation is at the heart of the minority voting rights revolution and can be found in the 1965 Voting Rights Act if one can read between the lines. This is what Bruce Cain calls the "specter of proportionality": "The language of the Voting Rights Act deftly dances around the issue, guaranteeing only that protected classes of individuals who have suffered discrimination have the right to "elect a representative of their own choice." But this vaguely defined formal right evolved over time into an informal goal of roughly proportional descriptive representation, eventually developing critics on both the right and the left" (Cain 2001, 12). The contention of his article is that districts and semi-PR systems are not necessarily antagonistic and can be complementary. Both should be encouraged depending on the demographic and legal context in order to help minorities reach the most "fair" political representation. Local politics seems to be a particularly fertile ground for such experimentation.

Conclusion

The California Voting Rights Act is a tremendously important piece of legislation that is very consequential for the state of California as it led to the disappearance of at-large elections through litigation. It therefore has the potential to help ethno-racial minorities elect more candidates of their choice at the local level and create a pool of talent that can be tapped into for higher office. However, if the work of voting rights attorneys is not supplemented by grassroots efforts and community mobilization the results may be more modest than previously anticipated. That is because district elections are not the panacea of minority representation. In a winner-take-all system geographical districting is a very imperfect tool to reach what activists would consider as "fair representation" that is a level of descriptive representation that is commensurate with the minority electoral weight.

Proportional voting systems seem to have gotten more traction in the US as of late and may appear as the next logical step in electoral reform attempts. While the promises of the federal Voting Rights Act and courts intervention in the regulation of elections left many minority groups and activist frustrated about the modest results in increased descriptive representation, the state of California experimented with electoral reforms such as the California Voting Right Act. This measure has had a positive outcome for minorities, especially Latinos. Yet, by itself, it may not guarantee that minorities can reach descriptive representation close to their electoral weight. Alternative voting systems such as cumulative voting, as they have become more popular, can represent an alternative or a supplement to SMDs when majority-minority districts are not easily drawn or when state legislation does not encourage the elimination of at-large systems.

Notes

1. The only two exceptions are San Francisco in 2002 and Oakland in 2006 adopted "instant runoff" voting (IRV) also called "ranked choice" voting, but the measures were implemented mainly to ensure majority rule and increase turnout.
2. The bulk of the changes occurs in school districts but there is a clear trend in municipalities. It was estimated that in 2002 21 cities in California used district elections (Hajnal et al. 2002). In 2016, that number was multiplied by three as 59 cities had a district system and 16 more cities had adopted districts effective in 2017 or 2018 (Heidorn 2016).
3. As of 2018 at least 88 cities have made the change to by-district elections and two more, the City of Goleta and the City of Carpinteria, agreed to make the change for 2022. Approximately eighteen other cities are in some form of legal dispute but have not yet decided to make the change to by-district elections. Thirty two community college districts, over 165 school districts, and at least 12 other special districts have made the change to by-district elections. The only county that had been voting at-large was San Mateo and has switched to districts (Youstina et al., 2018).
4. This is true even if minorities are the numerical majority in the city. In cities with racially-polarized voting but where minority voter turnout is lower than Anglo turnout, at-large voting can produce all-Anglo city councils in majority non-Anglo cities.
5. As of 2016, a report by Common Cause estimated that 83% (413 out of 483) of California cities still used at-large election systems.
6. See https://www.fairvote.org/

7. *Gingles* didn't specify what the index of a "majority" was – population, voting-age population, citizen voting-age population, registered voters, or the possibility of drawing an "effective minority district" by combining minorities and sympathetic white "crossover" voters. Indeed, Justice Brennan's language in *Gingles* suggests that he believed in the last definition. It wasn't until the 2009 decision in *Bartlett v. Strickland* that the Supreme Court clearly ruled that the proper index was not population or an "effective district," though the 9th Circuit had made such a ruling in *Romero v. City of Pomona*, 883 F.2d 1418 (9th Cir. 1989).
8. *Thornburg v. Gingles*, 478 U.S. 30 (1986), at 50-51
9. 42 U.S.C. § 1973(b) (prescribing the totality of the circumstances standard).
10. *Gomez v. City of Watsonville*, 863 F.2d 1407 (9th Cir. 1988). In 1960 the city of Watsonville had a population of 11,572 including 1,000 Latinos. By 1980, the city's population reached 25,543 with 11,509 Latinos. Latinos residents made up 40% of the city's voting age population, yet only 37% of the city's citizens. Although the District court found evidence of racially polarized voting it concluded that the Latino population was not sufficiently cohesive politically and geographically compact to satisfy Section 2 requirements. The District court recognized that 95% of Latinos had voted for the same candidate but focused on low voter registration and turnout among Latinos as the main reason. The Circuit court disagreed with this assessment, considering instead that "low voter registration evidences the lingering socioeconomic effects of past discrimination." *Ibid*., at 1416, footnote 4.
11. The first direct consequence that the neighboring city of Salinas settled right after *Gomez* to avoid such an expensive trial. It switched to districts for city council but maintained at-large election for mayor. Simon Salinas became the city's first Latino councilman and was elected in a district in which turnout was higher than in Anglo districts. (Adams 2000, chapter 3).
12. Another candidate, Anthony Campos was elected in 1987 but he was perceived by local Latino activists as too close to Anglo interests. (Takash and Avila, 1989).
13. "Even before the retrenchment of *Shaw* and its progeny, "other minority" plaintiffs lost more often than they won. The failure to meet one or more of the *Gingles* criteria could often be traced to the problems of group heterogeneity and multiracial context. The circumstances of Asians and Latinos differ from those of African-Americans in important ways, a situation we have called group heterogeneity." Bruce Cain and Kenneth Miller, *op. cit*., 1998, p. 161.
14. The cases were the cities of El Centro and Santa Maria. (Avila and al., 2007).
15. So much so that in 1999 it's the U.S. Justice Department that threatened to sue the city Santa Paula if it did not switch to a district system, not Latino activists. The city of Santa Paula had a population of 59% Latino but only had one Latino city council member.
16. At the time, there were a total of 478 municipalities: 108 chartered cities and 370 general law cities. Only twenty-seven cities (or 5.6% of the total number of cities) conducted elections by districts. Based upon a 1995 survey, it was estimated that 65% of public school districts conducted at-large elections, 20% had candidate residency districts and at-large voting and 15% had district elections.
17. This strategy was echoed by state Senator Gil Cedillo when he declared: "Ten years from now, the benefits of generating local electoral opportunities for Asians, Latinos, and African Americans under the CVRA should swamp the 10 new legislative and con-

gressional seats created by the Citizen's Commission. In fact, the 10 new seats will have limited meaning without a pipeline of qualified, experienced, and empowered locally elected officials that can rise to those offices." (Cedillo, 2011).

18. *Gomez v. Hanford Joint Union School District*. There had not been any Latino on the district board of trustees in 20 years, despite a population that was 38 percent Latino.
19. It wasn't the first time that Hanford (population of 33,000 in 1990) made the news because of at-large elections. In 1993, the at-large City Council election was switched to district after the Department of Justice found that, in the context of racially-polarized voting this method diluted minority votes. Hanford is the largest city in Kings County, a jurisdiction that is covered by Section 5 of the Voting Rights Act. The DOJ refused preclearance because the city's annexations diluted Latino populations and at-large election systems had prevented Latino voters to elect a candidate of their choice (Adams, 2000, chapter 5).
20. 51 Cal. Rptr. 3d 821 (2006), 145 Cal. App. 4th 660.
21. It should also be noted that Modesto appealed to the U.S. Supreme Court. Avila didn't relax until the U.S. Supreme Court denied *cert*. in the case.
22. *Cal. Democratic Party v. Lungren*, 919 F.Supp. 1397, 1399 (N.D. Cal. 1996) (California constitutional amendment barring parties from endorsing candidates in nonpartisan elections violates the First Amendment).
23. For a study as to why this is the case see Schleicher, 2007.
24. Elec. Code § 14026(a), 14027.
25. In 2016, eight cities had "at-large from-district" elections: Alhambra, Elk Grove, Eureka, Newport Beach, Reedley, Stockton, Santa Ana, and Woodside. In November 2016, voters in Eureka and Stockton repealed their "from-district" election systems.
26. Suspect features under the CVRA include a history of electoral losses by minority candidates or a history of unresolved issues disproportionately impacting the minority community (affordable housing, street and sidewalk maintenance, juvenile crime, etc.), while the said minority represents an important part the of the general population.
27. Before 1979, Pasadena had a system in which candidates ran in primaries in districts, but if they received 60% of the votes, there was no jurisdiction-wide runoff. This was repealed in a referendum that was held because of a Section 2 case, a case that was abandoned after the referendum.
28. Only two charter cities, Santa Clara and Sunnyvale use "at-large by seat" elections because California state law does not expressly allow general law cities to use this method. Until recently, Chula Vista and Modesto also used this system but both cities switched to by-district elections.
29. *Bartlett v. Strickland*, 556 U.S. 1(2009), Justice Kennedy's opinion: "States that wish to draw crossover districts are free to do so where no other prohibition exists. Majority-minority districts are only required if all three *Gingles* factors are met and if §2 applies based on a totality of the circumstances. In areas with substantial crossover voting it is unlikely that the plaintiffs would be able to establish the third *Gingles* precondition—bloc voting by majority voters." For a larger discussion on potential claims by coalition plaintiffs under the CVRA see Cuevas Ingram, 2012.
30. Cal. Elec. Code § 14027.
31. Elec. Code § 14028.
32. *Sanchez v. City of Modesto*, 145 Cal. App. 4th 660, 681-86 (Cal. Ct. App. 2007) cert.

denied, 552 U.S. 974 (2007), holding that CVRA is race-neutral, that the city failed to show that CVRA was facially invalid and that all persons, regardless of race, have standing under CVRA to sue for race-based vote dilution, such that CVRA is not subject to strict scrutiny under equal protection jurisprudence.

33. Cal. Elec. Code § 14026(d), referring to 42 U.S.C. § 1973 et seq.
34. Cal. Elec. Code § 14028(b).
35. *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 865, 876 (5th Cir. 1993) (en banc) (LULAC II) ("Section 2 and the Senate Report instruct us to consider the number of minority candidates elected to office." One of the Senate Report factors for a Section 2 claim that goes towards the totality of circumstances analysis of vote dilution is "the willingness of the racial or ethnic majority-in this case, white voters-to give their votes to minority candidates").
36. *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 865, 876 (5th Cir. 1993) (en banc) (LULAC II) ("Section 2 and the Senate Report instruct us to consider the number of minority candidates elected to office." One of the Senate Report factors for a Section 2 claim that goes towards the totality of circumstances analysis of vote dilution is "the willingness of the racial or ethnic majority-in this case, white voters-to give their votes to minority candidates").
37. Cal. Elec. Code § 14029.
38. See id. § 14030. Moreover, the state court is authorized to grant upward adjustment or a fees multiplier.
39. The trial court in *Jauregui v. City of Palmdale* (Los Angeles County Super. Ct. No. BC483039) held that it was sufficient if plaintiffs proved that polarized voting occurred in an at-large electoral system. Upheld on appeal, B253713 (Cal. Ct. App. Jun.10, 2015).
40. National Demographics, Douglas Johnson's company, identified in 2016 195 jurisdictions that had switched to districts elections: 131 school districts, 28 cities, 1 county, 27 community college districts, and 8 other special districts. http://www.ndcresearch.com/updated-counts-cvra-driven-changes/
41. According to the MDI survey, 88% of California cities (423 cities) still used some form of at-large voting in 2016. *National League of Cities, Municipal Elections*, available at: http://www.nlc.org/build-skills-and-networks/resources/cities- 101/city-officials/municipal-elections.
42. Cal. Gov. Code Sec. 34886 ("the legislative body of a city with a population of fewer than 100,000 people may adopt an ordinance that requires the members of the legislative body to be elected by district or by district with an elective mayor … without being required to submit the ordinance to the voters for approval").
43. AB 2220 (Cooper) (Ch. 751, Statutes of 2016) (amending Cal. Gov. Code Sec. 34886).
44. Citizen Voting Age population estimates were provided by Levitt and Johnson, 2016.
45. City council member Jill Galvez (District 2) is not a Latina but her husband is from Mexico.
46. City council member Janna Zurita's ethnic identity was once at the heart of a lawsuit (Evans, 2012). Will Evans, "White-dominated California redistricting boards face legal threats over racial makeup," *California Watch*, March 12, 2012, https://www.scpr.org/news/2012/03/09/31578/white-dominated-boards-face-legal-threats-over-rac/
47. Paul Rodriguez was first appointed, he then won reelection in 2018 in District 1.

48. Councilmember Juan Garza was appointed before being elected in 2017 in his new District 5.
49. In 2004 some bay area cities (Berkeley, Oakland, San Francisco and San Leandro) also adopted Instant Run Off Voting (also called Ranked Choice Voting) in order to cut cost and increase turnout. But only charter cities are allowed to adopt this voting method. In 2016 a bill allowing general law cities to adopt IRV was vetoed by the Governor (Senate Bill 1288 (Leno 2016)).
50. "Neither cumulative nor limited voting guarantee any particular election outcome, but they can, depending on the setting and the implementation, provide minority voters with reasonable opportunities to elect representatives of their choice." (Engstrom 2010, p. 107).
51. Today 321 jurisdictions in the US use a form one of these forms of voting. For a website tracking them see https://www.sightline.org/2017/11/08/over-300-places-in-the-united-states-have-used-fair-voting-methods/
52. Guinier argues that that cumulative voting systems permit "recognition of both the existence and intensity of minority voter preference" (Guinier, 1991, 1461-65).
53. In June 2018, Measure A was rejected by the Santa Clara voters by a margin of 846 votes. The city (with Asian population of 40.4% and Latino population of 17.5%) was finally split in 6 districts.
54. "Cumulative voting turns out not to be without cultural and political costs, which we identify as precisely as we can. But those costs do not appear substantial" (Pildes and Donoghue, 1995, 243).

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