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Cover Page Footnote

Democracy Project Director and former National Association for Public Interest Law (NAPIL) Equal Justice Fellow at the Asian American Legal Defense and Education Fund (AALDEF), New York, New York. I wish to thank Margaret Fung, AALDEF Executive Director, for her help in developing this piece and for years of dedication to advancing the interests of Asian Americans. I also would like to thank my partner, Christopher S. Goeken.

ASIAN AMERICAN VOTING RIGHTS AND REPRESENTATION: A PERSPECTIVE FROM THE NORTHEAST

Glenn D. Magpantay*

INTRODUCTION

Asian Americans¹ are one of the fastest-growing minority groups in the nation,² estimated to number more than eleven million people.³ Of the ten states with the largest number of Asian Americans, three are in the Northeast:⁴ New York has the nation's second largest Asian American population,⁵ New Jersey the fifth largest,⁶ and Massachusetts the tenth.⁷ Yet despite the community's growth, size, and concentration, Asian Americans in the Northeast routinely have been overlooked by elected officials at nearly all levels of government.

In these three states, no Asian American has ever been elected to any state legislative or congressional seat. New York City has a population of more than 800,000 Asian Americans, and has never

* Democracy Project Director and former National Association for Public Interest Law (NAPIL) Equal Justice Fellow at the Asian American Legal Defense and Education Fund (AALDEF), New York, New York. I wish to thank Margaret Fung, AALDEF Executive Director, for her help in developing this piece and for years of dedication to advancing the interests of Asian Americans. I also would like to thank my partner, Christopher S. Goeken.

1. By "Asian American," I mean all residents of the United States with ethnic lineage to nations in South Asia, Southeast Asia, and East Asia.

2. *Hispanic and Asian Populations Expand*, N.Y. TIMES, Aug. 30, 2000, at A16.

3. POPULATION DIVISION, U.S. CENSUS BUREAU, RESIDENT POPULATION ESTIMATES OF THE UNITED STATES BY SEX, RACE, AND HISPANIC ORIGIN: APRIL 1, 1990 TO JULY 1, 1999, WITH SHORT-TERM PROJECTION TO NOVEMBER 1, 2000 (Aug. 25, 2000), <http://www.census.gov/population/estimates/nation/intfile3-1.txt>.

4. The declining order is: (1) California, (2) New York, (3) Hawaii, (4) Texas, (5) New Jersey, (6) Illinois, (7) Washington, (8) Florida, (9) Virginia, (10) Massachusetts. POPULATION DIVISION, U.S. CENSUS BUREAU, POPULATION ESTIMATES FOR STATES BY RACE AND HISPANIC ORIGIN: JULY 1, 1990 (Aug. 30, 2000), <http://www.census.gov/population/estimates/state/srh/srh99.txt>.

5. *Id.* (indicating that New York has just over one million Asian Americans).

6. *Id.* (indicating that New Jersey has about 470,000 Asian Americans). This is a significant increase. In 1990, New Jersey was only ranked sixth largest. POPULATION DIVISION, U.S. BUREAU OF THE CENSUS, POPULATION OF STATES BY RACE & HISPANIC ORIGIN: APRIL 1, 1990 (Aug. 30, 2000), <http://www.census.gov/population/estimates/state/srh/srhmars.txt>.

7. *Supra* note 4 (indicating that Massachusetts has just over 233,000 Asian Americans).

elected an Asian American to the City Council. Representatives of Asian neighborhoods, like Flushing, Queens or Chinatown, Manhattan, have at times disregarded the needs of the community and even held residents in disdain.⁸ An Asian American voting rights strategy can guard against Asian Americans being considered outsiders in the American political process while simultaneously enhancing the political incorporation of Asian Americans.

This article will present a strategy for advancing Asian American voting rights and for ensuring that Asian Americans have a full and fair opportunity to elect a candidate of their choice, as guaranteed by the Voting Rights Act,⁹ through an exploration of legal issues in the census, redistricting, and alternative voting systems. First, it will discuss the importance of an accurate count of Asian Americans in the decennial census. Second, it will explore legal strategies to achieve the meaningful representation¹⁰ of Asian Americans through the redrawing of federal, state, and local voting district boundaries. Third, it will review the merits and limitations of alternative voting systems. This article will illustrate challenges and solutions in Asian American voting rights using examples in the Northeast.¹¹ The overarching goal of this article is to provide a strategy to encourage more inclusive, and thus responsive, government, and to promote fairness and democracy in the electoral process.

8. *E.g.*, Celia W. Dugger, *Queens Old-Timers Uneasy As Asian Influence Grows*, N.Y. TIMES, Mar. 31, 1996, at A1 (quoting Councilwoman Julia Harrison, who represents Flushing, as describing Asian immigrants as "colonizers," and their arrival more like "an invasion, not an assimilation," and mistakenly describing Bok Choy (Chinese broccoli) as dandelion). Assembly member Sheldon Silver, the powerful Speaker of the State Assembly, represents Chinatown, but some local residents contend that he has done very little to advance the needs and interests of the community, and has delivered merely resources to the community. *See, e.g.*, Adam Miller, *Shelly's Community Sees No Silver Lining*, N.Y. POST, May 19, 1999, at 5 (labeling Sheldon as "sell out" to his core constituents).

9. 42 U.S.C. § 1973(a)-(b) (1994).

10. Meaningful representation envisions representation in local, state, and national legislatures that can lead to tangible benefits for the Asian American community. *See* Brief for the Congressional Black Caucus as Amicus Curiae in Support of Appellants at 12, *United States v. Hays*, 515 U.S. 737 (1995) (No. 94-558), *reprinted in* A. Leon Higginbotham, *United States v. Hays: Brief for the Congressional Black Caucus as Amicus Curiae in Support of Appellants*, 38 HOWARD L.J. 665, 678 (1995) (discussing the importance of representation). Mechanically, meaningful representation could include the election of a representative of the same race or cultural heritage as the historically disenfranchised community that she represents, a representative electorally preferred by the historically disenfranchised community, or even one who represents and tries to advance the interests of the historically disenfranchised community.

11. The examples herein will focus on New York, New Jersey, and Massachusetts.

I. ACCURATE COUNT OF ASIAN AMERICANS IN CENSUS 2000

A. Asian Americans and the Census

An accurate census should be the cornerstone of any strategy for political empowerment of Asian Americans. Every ten years, the federal government attempts to count the entire population of the nation through the decennial census.¹² The census is used as a basis to determine, plan, and allocate a plethora of state and federal benefits for communities. The census reveals demographic profiles of communities: the number of youth, disabled, poor, non-English speakers, racial and ethnic minorities, total population, etc. Census data are then used in funding formulas to allocate resources for the building of schools, hospitals, and playgrounds, teacher hiring, and services for immigrants, youth, and the elderly.¹³ Census data, by evidencing the numbers of racial and ethnic minorities, also are used to enforce an array of civil rights laws in employment, housing, lending, education, voting rights,¹⁴ and especially to determine the availability of bilingual ballots and voting materials.¹⁵ Politically, census data are used to apportion the 435 congressional seats among the fifty states,¹⁶ and to redraw the boundaries of municipal, state, and congressional districts.¹⁷ With so much at stake, it is im-

12. U.S. CONST. art. I, § 2, cl. 3; 13 U.S.C. § 141 (1994).

13. *E.g.*, U.S. GEN. ACCOUNTING OFFICE, FORMULA GRANTS: EFFECTS OF ADJUSTED POPULATION COUNTS ON FEDERAL FUNDING TO STATES (Feb. 1999); THE U.S. CONFERENCE OF MAYORS, THE FISCAL IMPACT OF THE CENSUS UNDERCOUNT ON CITIES A 34-CITY SURVEY (Jan. 1999), http://www.usmayors.org/uscm/wash_update/census/census_executive.htm; PRICEWATERHOUSECOOPERS, EFFECT OF CENSUS 2000 UNDERCOUNT ON FEDERAL FUNDING TO STATE AND LOCAL AREAS, 2002-2012 (Mar. 9, 2000) (prepared for U.S. Census Monitoring Board), *available at* <http://www.pwcglobal.com/extweb/ncpressrelease.nsf/DocID/43C93C94F37E3A848525689D007430FF>.

14. LEADERSHIP CONFERENCE EDUCATION FUND, CENSUS 2000 EVERYONE COUNTS 1.1 (1999), portions *available at* <http://209.207.129.4/crlibrary/issues/census/1.1.html> [hereinafter LCED, CENSUS 2000].

15. *See* Language Assistance Provisions of the Voting Rights Act, Voting Rights Act, 42 U.S.C. § 1973 (1994); Implementation of the Provisions of the Voting Rights Act Regarding Language Minority Groups, 28 C.F.R. § 55 (2000).

16. *See* U.S. CONST. art. I, § 2, cl. 3; 2 U.S.C. §§ 2a, 2b (1994).

17. *See* 2 U.S.C. § 2c (1994); Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 STAN. L. REV. 731 (1998) (identifying the political difficulties in performing and policing the reapportionment); U.S. COMM'N ON CIVIL RIGHTS, BRIEFING ON THE CIVIL RIGHTS IMPLICATIONS OF THE RECENT SUPREME COURT DECISION ON SAMPLING AND THE CENSUS BEFORE THE U.S. COMMISSION ON CIVIL RIGHTS, (Feb. 12, 1999) (Statement of Edward Still, Director, Voting Rights Project, Lawyers' Committee for Civil Rights Under the Law), *at* <http://www.connectlive.com/events/civilrightscommission/sampling021299.html>.

perative that all people of color, especially Asian Americans, are counted accurately in the census.¹⁸

Despite the importance of an accurate count, 4.4 people million were double-counted in the 1990 census and 8.4 million people were missed completely, yielding a net undercount of four million.¹⁹ The undercounted and overcounted populations were racially and geographically disparate.²⁰ The undercount almost invariably occurred in urban areas, among people of color, immigrants, non-English speakers, and the poor.²¹ The overcount occurred in suburban areas, among largely white, economically affluent communities.²²

Asian Americans particularly were impacted by the census undercount. Nationally, Asian Americans were missed in the census three times as often as whites.²³ In the Northeast, the Asian American undercount was even more severe.²⁴ In New York, 3.2% of Asian Americans residents were not counted by the census.²⁵ In

18. U.S. COMM'N ON CIVIL RIGHTS, BRIEFING ON THE CIVIL RIGHTS IMPLICATIONS OF THE RECENT SUPREME COURT DECISION ON SAMPLING AND THE CENSUS BEFORE THE U.S. COMMISSION ON CIVIL RIGHTS, (Feb. 12, 1999) (Statement of Karen K. Narasaki, Executive Director, National Asian Pacific American Legal Consortium), at <http://www.connectlive.com/events/civilrightscommission/sampling021299.html>. Certainly, all people must be counted in the census. However, people of color traditionally have been missed in the census.

19. LCED, CENSUS 2000, *supra* note 14, at 20.1 (citing the U.S. General Accounting Office).

20. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, REPORT TO CONGRESS—THE PLAN FOR CENSUS 2000, at 5-6 (1997), available at <http://www.uscensus2000.com/main/plans/plan2000.pdf> [hereinafter THE PLAN FOR CENSUS 2000]; LCED, CENSUS 2000, *supra* note 14, at 12.1.

21. THE PLAN FOR CENSUS 2000, *supra* note 20, at 4-6 (indicating that some reasons for the undercount included language barriers, fear of governmental employees, disbelief in the confidentiality of census information, and non-legal living arrangements. Also, the presence of additional family members or multiple families in crowded apartments often violates private leases and local housing codes).

22. See *id.* Some reasons for the overcount were dual home ownership and children attending boarding schools or non-local colleges. *Id.*; LCED, CENSUS 2000, *supra* note 14, at 4.1.

23. LCED, CENSUS 2000, *supra* note 14, at 6.1, 20.1. Specifically, 2.3% of Asian Americans, 4.4% of African Americans, 12.2% of Native Americans living on reservations, and 5% of Latinos were missed in the final census count. This stands in stark contrast to the 0.7% undercount rate of the white population. *Id.* at 1.2.

24. In the Northeast, the undercount rates of Asian Americans were generally higher than 3%; in the West Coast states, the undercount rate of Asian Americans generally hovered around 2%. *Id.* at 20.3; see PRICEWATERHOUSECOOPERS, *supra* note 13, app. A-14. In California the rate was 2.1%, Oregon 2.9%, Washington 2.1%, and Hawaii 1.2%. LCED, CENSUS 2000, *supra* note 14, at 20.3; see PRICEWATERHOUSECOOPERS, *supra* note 13, app. A-14.

25. LCED, CENSUS 2000, *supra* note 14, at 20.3; see PRICEWATERHOUSECOOPERS, *supra* note 13, app. A-14.

Massachusetts, the undercount rate was 3.9%—the highest percentage of all the Northeastern states.²⁶ The undercount was often even more striking on the local level. In Jersey City, New Jersey, which has a large Filipino and South Asian population, the local undercount rate was 3.5%—six times the state undercount rate.²⁷ Although Asian Americans are one of the fastest growing minority groups in the Northeast,²⁸ census undercounts result in the Asian American community losing federal funding,²⁹ state resources,³⁰ and political representation.³¹

The census undercount jeopardizes the political representation of people of color in New York.³² Three of the nation's most undercounted congressional districts are in New York,³³ and all of

26. LCED, CENSUS 2000, *supra* note 14, at 20.3; *see* PRICEWATERHOUSECOOPERS, *supra* note 13, app. A-14.

27. LCED, CENSUS 2000, *supra* note 14, New Jersey app. The state undercount rate was 0.6% for all persons and 1.7% for Asian Americans. *Id.* at 20.3; *see* PRICEWATERHOUSECOOPERS, *supra* note 13, app. A-14.

28. *See* U.S. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, WE THE AMERICANS: ASIAN 1-2 (1993), *available at*, <http://www.census.gov/aprd/wepeople/we-3.pdf>.

29. *See, e.g.*, U.S. GEN. ACCOUNTING OFFICE, FORMULA GRANTS: EFFECTS OF ADJUSTED POPULATION COUNTS ON FEDERAL FUNDING TO STATES (1999); THE U.S. CONFERENCE OF MAYORS, *supra* note 13; PRICEWATERHOUSECOOPERS, *supra* note 13.

30. For instance, the estimated impact of the 1990 census undercount in New York City was a loss in funding that would have supplied ninety-nine schools and 4380 teachers. In Jersey City alone, funds lost through the undercount would have supported five schools and two hundred teachers. Many of these lost education funds would have flowed to minority neighborhoods. *See* Press Release, Children's Defense Fund, Two Million Missing Children: Children's Defense Fund Calculates Undercount of Children in 188 Cities If Census Bureau Cannot Use Recommended Scientific Methods (Sept. 8, 1998) (accompanying attachment, Children Missed by the 1990 Census in 191 Cities), *available at* <http://www.childrensdefense.org/release000322.html>; *see also* PRICEWATERHOUSECOOPERS, *supra* note 13 (finding that in the 2002-2012 period, 169 metropolitan areas are expected to lose \$11.1 billion in federal funds as a result of the 2000 census undercount and that the undercount rate for certain minority groups exceeds five percent).

31. *See* MARK GERSH & KEN STRAMA, NAT'L COMM. FOR AN EFFECTIVE CONG., 1990 CENSUS UNDERCOUNT BY CONGRESSIONAL DISTRICT (1998), *available at* <http://www.ncec.org/under.pdf> [hereinafter GERSH & STRAMA, UNDERCOUNT BY CONGRESSIONAL DISTRICT]; Steven A. Holmes, *New York Hardest Hit by Census Flaws*, N.Y. TIMES, Sept. 18, 1998, at B6.

32. PRESIDENTIAL MEMBERS, U.S. CENSUS MONITORING BD., IMPLICATIONS FOR MINORITY VOTERS IN 2001: AN ANALYSIS FROM THE 1990 CENSUS 11-13 (2001) (reviewing the effect of the undercount on state legislative districts).

33. GERSH & STRAMA, UNDERCOUNT BY CONGRESSIONAL DISTRICT, *supra* note 31. The three congressional districts were in Manhattan, Brooklyn, and the Bronx. *See* Steven A. Holmes, *New York Hardest Hit by Census Flaws*, N.Y. TIMES, Sept. 18, 1998, at B6. Half of the nation's twelve most undercounted congressional districts were in New York, the other half were in California. GERSH & STRAMA, UNDERCOUNT BY CONGRESSIONAL DISTRICT, *supra* note 31.

these are majority-minority districts represented by African Americans or Latinos.³⁴ New York's 12th Congressional District was ranked as the tenth most undercounted congressional district in the nation. More than 27,000 12th District residents were not accounted for by the census.³⁵ Because all representatives must represent approximately the same number of people, the representation of the residents in this district was diluted. Moreover, this undercounted district contains large Asian American communities in the Chinatown, Manhattan and Sunset Park, Brooklyn neighborhoods. By contrast, the most overcounted district was in Long Island, New York, an affluent, suburban, white community.³⁶ The overcount added an estimated 7500 non-existent residents to the district's total population.³⁷ To ensure the fair allocation of political representation, the undercount and overcount must be mitigated.

B. Adjusting the Census for Accuracy

The Asian American Legal Defense and Education Fund ("AALDEF") and other civil rights groups were actively involved in campaigns to ensure an accurate census count. One effort has been to lobby the U.S. Census Bureau to adjust and correct population figures derived from headcounts, by using advanced scientific techniques such as statistical sampling.³⁸

Several indicators predict thousands of Asian Americans again will be missed in the census if only a physical headcount is taken.³⁹ The Census Dress Rehearsal in 1998, a special census count of a sample population, revealed that Asian Americans were undercounted at a rate of six percent.⁴⁰ In the execution of Census 2000, a multitude of problems were reported, especially in counting

34. *See id.*

35. *Id.*

36. *See* Steven A. Holmes, *New York Hardest Hit by Census Flaws*, N.Y. TIMES, Sept. 18, 1998, at B6. The district is in Nassau County. *Id.*

37. *Id.*

38. *See infra*, notes 39-47 and accompanying text.

39. A physical headcount is taken two ways. First, individuals complete and return questionnaire forms which the Census Bureau mails out to every household in the United States. Second, census-takers, who are dispatched to all households that do not return a form, take the information of an individual through a personal interview.

40. *See* Press Release, Econ. & Statistics Admin., Bureau of the Census, Racial, Ethnic Undercounts Detailed For Census 2000 Dress Rehearsal Sites by Census Bureau (Feb. 24, 1999), available at <http://www.census.gov/Press-Release/www/1999/cn99-09.html>.

people of color, immigrants, and language minorities.⁴¹ In New York, for example, AALDEF found that immigrants had to speak English to find a Census Assistance Center to get help in filling out the census form in their native language.⁴² At one point, AALDEF also observed that census-takers canvassing Manhattan's Chinatown did not speak Chinese.⁴³ Undoubtedly, Asian Americans were not completely counted in Census 2000. Taking the extra step of employing statistical sampling would adjust the final figures to make the census more reflective of the true population.⁴⁴

Sampling estimates the number of individuals missed or double counted in the census.⁴⁵ It would begin with individuals who were affirmatively counted in the census.⁴⁶ Then another survey, asking the same questions as the census form, would be taken of a smaller, representative random sample of the population. The variance would be demographically correlated to identify and measure any undercount or overcount.

The use of sampling in the census was originally recommended in the early 1990s by the National Academy of Sciences. The Academy was commissioned by the Republican administration of President George H.W. Bush to develop cost-effective and more accurate methods to correct for the differential undercount and overcount in the census.⁴⁷ Sampling was originally proposed as a

41. See generally Maki Becker, *Asians Watching Census, Legal Defense Fund Wary of Undercount*, DAILY NEWS (N.Y.), July 6, 2000, at QL11; Alvord, *Asian Are Eager to Be Counted in California, Census Finds Community Harder to Reach in N.Y.*, USA TODAY, Apr. 19, 2000, at 16A; Mae M. Cheng, *Down for the Count, Low Response to Census in Queens' Minority Communities*, NEWSDAY, Apr. 7, 2000, at A7; Steven Lee Myers, *Census Letters Go to 120 Million Wrong Addresses*, N.Y. TIMES, Feb. 28, 2000, at A15; David Stout, *Census Takers Uneasy as Mail Response Lags*, N.Y. TIMES, Apr. 5, 2000, at A16. GLENN D. MAGPANTAY & PHILIP M. LIU, ASIAN AM. LEGAL DEF. & EDUC. FUND, COUNTING ASIAN AMERICANS: AN EVALUATION OF CENSUS 2000 PROGRAMS AND POLICIES (2001);

42. Glenn D. Magpantay, *Flawed Census Figures*, N.Y. TIMES, Jan. 1, 2001. See generally MAGPANTAY & LIU, *supra* note 41.

43. Magpantay, *Flawed Census Figures*, *supra* note 42.

44. See Press Release, Econ & Statistics Admin., Bureau of the Census, *Racial, Ethnic Undercounts Detailed For Census 2000 Dress Rehearsal Sites by Census Bureau* (Feb. 24, 1999), available at <http://www.census.gov/Press-Release/www/1999/cn99-09.html>.

45. NATIONAL RESEARCH COUNCIL, MODERNIZING THE U.S. CENSUS 30-31 (Barry Edmonston & Charles Schultze eds., 1995); THE PLAN FOR CENSUS 2000, *supra* note 20, at 7.

46. See note 39 for counting methods used in the census.

47. Decennial Census Improvement Act of 1991, 13 U.S.C. § 141 (1994); NAT'L RESEARCH COUNCIL, PREPARING FOR THE 2000 CENSUS: INTERIM REPORT II, at 1 (Andrew A. White & Keith F. Rust eds., 1997), available at <http://www.nap.edu/books/0309058805/html/index.html>; NAT'L RESEARCH COUNCIL, MODERNIZING THE

mechanism to count the last remaining groups within the population—those that are the most resistant to being counted.⁴⁸ Sampling was proposed merely *to supplement, not replace* a headcount. Sampling has been hailed as a scientifically accepted and more cost effective way to ensure an accurate count of the population.⁴⁹ Yet, erroneously, many journalists thought, and some politicians propagandized, that sampling would completely replace a headcount.⁵⁰

Conservative activists and Republican lawmakers, fearing an accurate count of individuals whom they suspected tended to vote more Democratic—urban dwellers, people of color, and the poor—challenged the use of sampling in the courts.⁵¹ In two U.S. Supreme Court cases, *Department of Commerce v. United States House of Representatives*,⁵² and its companion case, *Glavin v. Clinton*,⁵³ the plaintiffs argued that the Constitution intended the census to be conducted exclusively by a headcount of the population,⁵⁴ and therefore that the use of statistical sampling was impermissible.⁵⁵ The Census Bureau argued that although it still planned to use a headcount in Census 2000, modern and accepted scientific techniques, such as statistical sampling, needed to be employed because of the impracticability and impossibility of literally counting everyone.⁵⁶ Organizations of Asian Americans and other people

U.S. CENSUS (Barry Edmonston & Charles Schultze eds., 1995); THE PLAN FOR CENSUS 2000, *supra* note 20, at 7.

48. NAT'L CONFERENCE OF STATE LEGISLATURES, REDISTRICTING LAW 2000, at 9-12 (1999) [hereinafter NCSL, REDISTRICTING LAW]. Originally the Census Bureau planned to take a headcount of 90% of the population and estimate the remaining 10%. *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 324-25 (1999). That remaining 10% is comprised of the most fearful and unwilling individuals to participate in the census. The cost of counting that remaining 10% is astronomical in comparison to counting the first 90%. THE PLAN FOR CENSUS 2000, *supra* note 20, at 5-6. Whereas the original budget for the census was \$2.78 billion to count 90% of the population, an additional \$1.72 billion was needed to count the remaining 10%. Census 2000 Initiative, *Administration Spells Out Need for Extra Census Funds As Senate Appropriators Meet to Consider Fiscal Year 2000 Request*, NEWS ALERT ARCHIVE, June 10, 1999, available at <http://www.census2000.org/news/99/61099.html>.

49. Lynne Billard, *Sampling and the Census 2000*, Address Before the National Press Club and Congressional Members and Staffers (July 1998, Washington, D.C.), in ASA, STATS #25, Spring 1999, at 6.

50. Victoria Rifkin, *Lawyers Hope Community Work on Census Adds Up*, N.Y. L.J., Apr. 6, 2000, at 1.

51. James Dao, *Census Ruling Reignites a Partisan Battle*, N.Y. TIMES, Jan. 27, 1999, at A17.

52. *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999).

53. *Glavin v. Clinton*, 525 U.S. 316 (1999).

54. *Id.* at 327-28 (citing U.S. CONST. art. I, § 2, cl. 3; 13 U.S.C. § 141(a)-(b) (1994)).

55. *Glavin v. Clinton*, 525 U.S. 316, 327-28 (1999).

56. *Id.* at 323-27.

of color intervened as parties in both lawsuits to defend the Bureau's plans to use statistical sampling.⁵⁷ In 1999, the U.S. Supreme Court partially decided the legitimacy of using sampling in the census. The Court ruled that, under its reading of the Census Act,⁵⁸ sampling could not be used to develop census data apportioning congressional seats among the states.⁵⁹ However, the Court did not expressly bar the use of sampling in the development of census data that would be used for other purposes,⁶⁰ which could include redistricting, distribution of federal funds, allocation of state benefits and resources, and other statistical purposes.⁶¹

Consonant with the Court ruling, the Census Bureau moved forward with a plan that counts the entire population by a headcount, but will produce two census numbers, one "raw" and one "adjusted" using some sampling techniques.⁶² The raw data will be derived exclusively from an effort to count everyone via a strict enumeration. The adjusted data will consist of the strict headcount figures that have been corrected for any inadvertent undercount and overcount—essentially employing sampling as a quality-check device. On December 28, 2000, the raw total population figure of each state was delivered to the president, allowing the apportionment of congressional seats among the states to commence.⁶³ By April 1, 2001, the Bureau will deliver both the raw and adjusted localized data to states in order to redraw voting district boundaries.⁶⁴ Although the raw figures also will be released,⁶⁵ under the

57. Brief for Appellees National Korean American Service & Education Consortium, Inc., *et al.* in Support of Appellants, *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999) (No. 98-404).

58. Decennial Census Improvement Act of 1991, 13 U.S.C. § 141 (1994).

59. *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 334 (1999).

60. *Id.*

61. Dao, *supra* note 51; Editorial, *Taking the Census Two Ways*, N.Y. TIMES, Jan. 27, 1999, at A24.

62. Dr. Kenneth Prewitt, U.S. Census Bureau Director, Statement at the National Press Club, (Feb. 24, 1999), at <http://www.census.gov/pubinfo/www/talkpoint.html>; U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, U.S. CENSUS 2000, UPDATES SUMMARY: CENSUS 2000 OPERATIONAL PLAN 13 (1999), available at <http://www.census.gov/dmd/www/pdf/2000plan.pdf>; Editorial, *supra* note 61.

63. Press Release, Econ. & Statistics Admin., U.S. Census Bureau, Census 2000 Shows Resident Population of 281,421,906; Apportionment Counts Delivered to President (Dec. 28, 2001), <http://www.census.gov/Press-Release/www/2000/cb00cn64.html>. Delivery is mandated per U.S. CONST. art. I, § 2, cl. 3; 2 U.S.C. § 2c (1994); 13 U.S.C. § 141(a)-(b) (1994).

64. 13 U.S.C. § 141 (c) (1994).

65. The figures will be released pursuant to a budget compromise reached between President Clinton and congressional leaders over funding for the Census Bu-

current plan, the adjusted figures are to be designated as the redistricting data.⁶⁶ Barring any change,⁶⁷ this plan raises two issues concerning the constitutional imperative of “one person, one vote,”⁶⁸ which might complicate the redrawing of voting districts.⁶⁹

1. Congressional District Populations

The first issue is whether using raw census figures in apportioning congressional seats among the states will violate the doctrine of “one person, one vote.” Under Article I, all congressional districts within a state must be as nearly equal in population as is “practica-

reau. The budget included funds for a modest statistical sampling operation in order to adjust the raw census figures. *Id.*

66. This set of data is commonly referred to as the “PL 94-171” file. *See* 13 U.S.C. § 141(c) (1994).

67. Early in his presidential campaign, George W. Bush expressed that only a headcount should be used for the census. Since then, he has been silent on the issue. John Mercurio, *Bush May Face Census Battle Clinton Could Quietly Leave Stamp On Redistricting*, ROLL CALL, Dec. 7, 2000; Sherry Sylvester, *Texas Governor Urges Traditional Headcount*, SAN ANTONIO EXPRESS-NEWS, Feb. 23, 2000, at 6A.

68. *Gray v. Sanders*, 372 U.S. 368, 381 (1963). For congressional districts, the doctrine of “one person, one vote” emanates from the Article I of the Constitution. U.S. CONST. art. 1, § 2, cl. 3; *Baker v. Carr*, 369 U.S. 549 (1962). For state and local districts, it emanates from the Equal Protection Clause of the Fourteenth Amendment. U.S. CONST. amend. XIV, § 1; *Reynolds v. Sims*, 377 U.S. 533 (1964).

69. Steven A. Holmes, *The Big Census Issue: Using Sampling in Redistricting*, N.Y. TIMES, Feb. 14, 2000, § 1, at 24. Another issue that will complicate redistricting is the effect of counting and tabulating multiple-race respondents in the census. OFFICE OF MGMT. & BUDGET, GUIDANCE ON AGGREGATION AND ALLOCATION OF DATA ON RACE FOR USE IN CIVIL RIGHTS MONITORING AND ENFORCEMENT, OMB BULLETIN No. 00-02 (Mar. 2000), available at <http://docs.whitehouse.gov/omb/bulletins/b00-02.html>; NCSL, REDISTRICTING LAW, *supra* note 48, at 13; D’Vera Cohn, *Census Will Vary Race Counting*, WASH. POST, Mar. 11, 2000, at A4; Steven A. Holmes, *The Politics of Race And the Census*, N.Y. TIMES, Mar. 19, 2000, § 4, at 3; Diana Jean Schemo, *Despite Options on Census, Many to Check ‘Black’ Only*, N.Y. TIMES, Feb. 12, 2000, at A1 (describing community education efforts).

The census allowed individuals the option of selecting more than one racial/ethnic classification on the census questionnaire form to identify themselves. OFFICE OF MGMT. & BUDGET, GUIDANCE ON AGGREGATION AND ALLOCATION OF DATA ON RACE FOR USE IN CIVIL RIGHTS MONITORING AND ENFORCEMENT, *supra*. This self selection can yield up to sixty-three possible racial and ethnic combinations. Not only will this dramatically complicate the redrawing of voting districts, but it also could jeopardize the enforcement of voting rights laws. The problem is rooted in the methodology of counting multiple race responses. The numbers of people of color can go up or down, depending on how the responses are counted. For example, a half-white, half-Asian person, can be counted as half-white, half-Asian, white, or Asian. Tabulation can only be done with whole numbers, because the total cannot result in a fraction, and bi-racial individuals cannot be counted twice. Computers of the twenty-first century are simply not advanced enough to tabulate persons who are 0.5, 0.25, and down to 0.7 of each racial category for 281 million people. This issue must be explored further, but it is outside the scope of this article.

ble.”⁷⁰ In addition, each person’s vote is entitled to the same weight as that of every other voter.⁷¹ But in the raw figures, each state will have a different percentage of people under- and over-counted.⁷² By using these raw numbers for apportionment, base populations of congressional districts will vary greatly, state by state.⁷³

The apportionment of the total 435 congressional seats is carried out according to a series of simple mathematical formulas.⁷⁴ First, each state is allocated one representative. Then the total population of the United States is divided by the remaining number of congressional seats left to allocate, 385.⁷⁵ An additional number of seats, if any, are allotted to each state based on the state’s population.⁷⁶ These calculations use raw census figures.⁷⁷ The base, or “ideal,” population for each congressional district within a state is then determined by dividing the total state population by the number of districts.⁷⁸ However, because each state experiences differing numbers of people missed, the actual ideal population of congressional districts, determined by adjusted figures, differs greatly by state.⁷⁹

For example, the average population nationally for congressional districts will be about 650,000 this decade.⁸⁰ One state with a low undercount rate could find that the ideal population for each congressional district is 500,000 people, whereas another state with a particularly high undercount rate could set the population per district at 800,000. As a result, representatives from different states will have districts containing different numbers of constituents.

70. *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964).

71. *Reynolds v. Sims*, 377 U.S. 533, 579 (1964).

72. For example, in 1990, 834,516 people in California were not counted in the raw figures, whereas only 1347 were not counted in Rhode Island. LCED, *CENSUS 2000*, *supra* note 14, at 20.1.

73. See NCSL, *REDISTRICTING LAW*, *supra* note 48, at 21.

74. 2 U.S.C. §§ 2a, 2b (1994 & Supp. V 1998).

75. *Id.*

76. *Id.*

77. *Dep’t of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999); *Glavin v. Clinton*, 19 F. Supp. 2d 543 (E.D. Va. 1998).

78. NCSL, *REDISTRICTING LAW*, *supra* note 48, at 21.

79. This variance is not new. In 1992, of states with more than one congressional seat, the smallest congressional districts were in Rhode Island with 501,732 residents, and the largest districts were in Kansas with 619,370. *Id.* at 45-46. Using unadjusted census figures greatly magnifies the differences.

80. Press Release, Econ. & Statistics Admin., Bureau of the Census, *Census 2000 Shows Resident Population of 281,421,906; Apportionment Counts Delivered to President* (Dec. 28, 2000), available at <http://www.census.gov/Press-Release/www/2000/cb00cn64.html>.

Certainly this violates the equal population principle,⁸¹ however the principle has never been applied *among the states*.⁸² The principle has been applied only to deviations in population among congressional districts *within* a state.⁸³

A natural and logical extension of the constitutional principle of “one person, one vote” is to apply it across state boundaries. The Court has held that one person’s vote here must weigh as much as another’s vote there.⁸⁴ Whether “here” and “there” refer to different parts of a state or different parts of the nation should be irrelevant. A constitutional imperative should not yield to formalistic state boundary lines. Following Census 2000, when it is discovered that certain states may have received fewer congressional seats than an accurate census would have entitled them to have, the Court will have occasion to enforce this doctrine.⁸⁵

2. *Intrastate Redistricting*

On April 1, 2001, the Census Bureau will deliver the adjusted data to the states for redrawing the boundaries of congressional, state legislative, and city councilmanic districts.⁸⁶ But the Bureau will also deliver the raw data. The second issue raised when the census produces two sets of data is whether states permissibly may opt to use raw and, admittedly, inaccurate census data for redistricting, notwithstanding the fact that the Bureau has designated the corrected numbers for redistricting.⁸⁷ Redistricting is com-

81. While some variance from the national average is tolerable, deviations that flow from using raw census figures will be much greater in magnitude, and thereby have a significant impact on representation. *Infra* note 94.

82. *See* *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964).

83. *See* *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969); *White v. Weiser*, 412 U.S. 783 (1973); *Karcher v. Daggett*, 462 U.S. 725, 727-28, 732, 741 (1983).

84. *Reynolds v. Sims*, 377 U.S. 533, 579 (1964).

85. New York will be losing congressional seats, and New Jersey and Massachusetts retain their respective number of seats. U.S. CENSUS BUREAU, CONGRESSIONAL APPORTIONMENT, at <http://www.census.gov/population/www/censusdata/apportionment.html> (last modified Dec. 29, 2000). It will not be known what the difference would have been, had the adjusted figures been used, until after the adjusted figures are released on April 1, 2001. Utah filed a case challenging its loss of an additional congressional seat to Georgia. B. Drummond Ayres, Jr., *Eye on a Recount, For Seats in Congress*, N.Y. TIMES, Jan. 8, 2001, at A14. But the basis of that case is *not* the undercount, but rather in where people are counted. It is therefore inapplicable in this analysis.

86. 13 U.S.C. § 141(c) (1994). This set of data is commonly referred to as the “PL 94-171” file.

87. *See* Steven A. Holmes, *The Big Census Issue: Using Sampling in Redistricting*, N.Y. TIMES, Feb. 14, 1999, § 1, at 24; *Virginia v. Reno*, 117 F. Supp. 2d 46 (D.D.C. 2000).

pelled by the Constitution in order to preserve the principle of "one person, one vote," by restoring population equality among the same kind of districts within a state.⁸⁸

A number of states have enacted laws or are considering legislation prohibiting the use of adjusted census data for redistricting.⁸⁹ Alaska, Arizona, Colorado, Kansas, and Virginia have already adopted such laws.⁹⁰ New Jersey⁹¹ and other states are considering similar legislation.⁹² When using unadjusted data, redrawn districts can be made to appear to contain the same number of residents. However, because unadjusted data reflect localized undercounts and overcounts within a state, in truth, districts will be unequal in population size.

For example, when using raw data, one can draw all state senate district boundaries so that each district contains 200,000 people. But the adjusted and more accurate census data will show that one state senator actually represents 300,000 residents, diluting those residents' voting power, while another represents only 100,000. When some districts are more populous than others, voters in these districts will be given more representation than voters in other districts.⁹³ This is violative of the principle of "one person, one vote."⁹⁴

88. For congressional districts, see *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964); for state and local legislative districts, see *Reynolds v. Sims*, 377 U.S. 533, 579 (1964).

89. Nat'l Democratic Redistricting Project, *State By State Round-Up*, IMPAC NEWS, May 2000, at 2 for a review of states and legislation.

90. *Id.* at 2.

91. *Id.* (listing Assem. 2939 (adopted)); Assem. 1682, 209th Leg. (N.J. 2000) (pending, companion to Assem. 2939); Steven A. Holmes, *New Jersey Is a Battleground As States Inherit Census Fight*, N.Y. TIMES, June 6, 2000, at A1.

92. The states include Indiana, Michigan, Minnesota, Nevada, Oklahoma, Utah, Tennessee, and Texas. Nat'l Democratic Redistricting Project, *State By State Round-Up*, IMPAC NEWS, May 2000, at 2.

93. See GERSH & STRAMA, UNDERCOUNT BY CONGRESSIONAL DISTRICT, *supra* note 31; Steven A. Holmes, *New York Hardest Hit by Census Flaws*, N.Y. TIMES, Sept. 18, 1998, at B6.

94. Significant deviations from the ideal population are generally impermissible, although different tests and levels of tolerance for deviation differ by district type. For congressional districts, the authority for one person, one vote lies in Article I, so the standard is "strict equality" in population. *E.g.*, *Karcher v. Daggett*, 462 U.S. 725, 727-28, 732, 741 (1983) (striking down a congressional districting plan with a population deviation of 0.698%). For state and local legislative districts, the authority lies in the Equal Protection Clause of the Fourteenth Amendment, so the standard is the lesser "substantive equality." *E.g.*, *White v. Regester*, 412 U.S. 755, 763 (1973) (upholding a state legislative districting plan with a population deviation of 9.9%). Notwithstanding the differences, the use of raw census data will likely produce much greater deviations, which will likely be violative of the Constitution.

Furthermore, using raw data to redraw voting districts will frustrate the goals of equal representation for racial and ethnic minorities. The undercount and overcount vary by race,⁹⁵ therefore, districts drawn using raw data will not accurately reflect the number of minorities living in those districts.⁹⁶ Such districts, particularly those that encompass sizable racial and ethnic minority communities, will, in reality, be larger in population than districts without or with fewer racial and ethnic minorities.⁹⁷ By disadvantaging these minority groups when electing representatives of their choice,⁹⁸ the voting strength of racial and ethnic minorities will be impermissibly diluted in violation of the Voting Rights Act.⁹⁹

In addition to the issues raised by using statistical sampling, advocacy groups have advanced other census policy changes,¹⁰⁰ community-based organizations have conducted promotional

95. THE PLAN FOR CENSUS 2000, *supra* note 20, at 5-6 (1997); LCED, CENSUS 2000, *supra* note 14, at 12.1; *see also supra* notes 19-23 and accompanying text.

96. GERSH & STRAMA, UNDERCOUNT BY CONGRESSIONAL DISTRICT, *supra* note 31; PRESIDENTIAL MEMBERS, *supra* note 32, at 1.

97. PRESIDENTIAL MEMBERS, *supra* note 32, at 11-13.

98. 42 U.S.C. § 1973(a)-(b) (1994) (noting that minority voter dilution occurs when members of a racial or ethnic minority "have less opportunity than other members of the electorate to . . . elect representatives of their choice").

99. 42 U.S.C. § 1973(a)-(b) (1994). There was some early litigation over whether states could affirmatively opt to use raw census data for redistricting. *Virginia v. Reno*, 117 F. Supp. 2d 46 (D.D.C. 2000). Virginia enacted a law mandating that data for redistricting must be exclusively derived from a strict enumeration. *Reno*, 117 F. Supp. 2d at 47, 49. Because Virginia has a history of proven de jure minority voter discrimination, it is covered under Section 5 of the Voting Rights Act, whereby any change to an election or voting procedure must be precleared. 42 U.S.C. §§ 1973b(a)-(b), 1973c (1994); *Reno*, 117 F. Supp. 2d at 50. Virginia sought declaratory judgment in the U.S. District Court for the District of Columbia concerning the need for preclearance of its new law. *Reno*, 117 F. Supp. 2d at 47-48. Attorneys representing minority voters argued that using raw census figures would offend both the Constitution and the Voting Rights Act, and that only the more accurate adjusted figures should be used for intra-state redistricting. *Reno*, 117 F. Supp. 2d at 50-52. But the state had not implemented the new law because it was not redrawing voting districts. *Reno*, 117 F. Supp. 2d at 50-51. The court dismissed the case, without prejudice, because it was not ripe for adjudication. *Reno*, 117 F. Supp. 2d at 54. Nevertheless, the result is that the new law was not precleared and therefore cannot take effect.

100. For example, groups successfully secured a legal opinion clarifying that the federal law keeping census information confidential will continue to protect the anonymity of undocumented immigrants. Memorandum from Randolph D. Moss, Acting Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, to Andrew J. Pincus, General Counsel, Department of Commerce (May 18, 1999) (on file with author and U.S. Department of Justice, Office of Legal Counsel); Letter from Glenn Magpantay, Asian American Legal Defense and Education Fund, to Ken Prewitt, Dir., U.S. Census Bureau, and Martina Hone, Associate Undersecretary for Economics & Statistics Administration (Jan. 25, 1999) (on file with author).

campaigns to ensure an accurate census count, and the Census Bureau carried out a variety of innovative programs to encourage full participation.¹⁰¹ However, these programs have had varying degrees of success.¹⁰² The activities of community-based and advocacy organizations and the Census Bureau's programs and policies may have helped to encourage Asian American participation in the census, but it is still doubtful that the headcount alone will yield an accurate census. The final measurement of success will be discovered when the census figures are released.

To ensure the most accurate and complete count possible in the census, modern and accepted scientific techniques must be used to

Groups also secured a temporary moratorium on raids conducted by the Immigration and Naturalization Service during the census block-c canvassing enumeration period. Memorandum from Michael A. Pearson, Executive Associate Commissioner, Office of Field Operations, INS, Department of Justice, to Regional Directors, Guidelines for INS Operations During Census 2000 and attached Guidelines for Immigration and Naturalization Service Enforcement Operations During Census 2000 (Mar. 13, 2000) (on file with author); Letter from Asian American Legal Defense & Education Fund and Asian American Task Force on the Census to President William J. Clinton, Doris Meissner, INS Commissioner, Kenneth Prewitt, Census Director (July 1, 1999) (on file with author); Mae M. Cheng, *INS Works Yields to That of Census*, *NEWSDAY*, Mar. 15, 2000, at A30.

In addition, groups successfully lobbied for the relaxation of the Bureau's hiring policy to allow qualified bilingual non-citizen candidates to be hired for census-taker positions. Memorandum from Debra Tomchek, Director for Human Resources Management, Chief Finance Officer, Assistant Secretary for Administration, Department of Commerce, to Kenneth Prewitt, Director, Bureau of the Census (July 14, 1999) (on file with author) (waiving the citizenship requirement for Census employees); 2000 Decennial Census Regional Census Center Administration Memorandum No. 99-113, from Janet R. Cummings, Assistant Division Chief for Budget, Management, Oversight & Recruiting, Field Division, Bureau of the Census, Department of Commerce, to All Regional Directors (July 23, 1999) (on file with author) (announcing changes to the Census Bureau's policy in hiring non-citizens); Letter from Karen Narasaki, Executive Director and Deepa Iyer, Staff Attorney, National Asian Pacific American Legal Consortium, to Secretary William Daley, Department of Commerce, and Director Kenneth Prewitt, Bureau of the Census (Aug. 23, 1999) (on file with author) (expressing concerns about the hiring of non-citizens).

101. These programs included: partnerships with national and local community-based organizations throughout the nation, resulting in grassroots community education campaigns about the importance of the census; the hiring of hundreds of "partnership specialists" to perform outreach to communities of color; a first-ever national paid advertising campaign, as well as advertising targeted to specific undercounted communities; and bilingual assistance programs such as census questionnaire forms in six languages (English, Spanish, Chinese, Tagalog, Vietnamese, and Korean), and Questionnaire Assistance Guides to answering the English census forms in forty-nine languages, all in the hopes of facilitating full participation in the census. U.S. DEPT OF COMMERCE, U.S. CENSUS BUREAU, REPORT TO CONGRESS—THE PLAN FOR CENSUS 2000, *supra* note 20, at 10-13, 21.

102. MAGPANTAY & LIU, *supra* note 41; Alvord, *supra* note 41; Becker, *supra* note 41; Cheng, *supra* note 41; Myers, *supra* note 41; Stout, *supra* note 41.

adjust the raw census figures. Accurate data must be used in redistricting. An accurate census is a critical first step toward ensuring the fair political representation of Asian Americans, and all communities of color.¹⁰³

II. MEANINGFUL REPRESENTATION OF ASIAN AMERICANS THROUGH REDISTRICTING

The next step in ensuring the meaningful representation of Asian Americans is in the redrawing of congressional, state legisla-

103. In addition, other barriers to the vote, such as anti-Asian voter discrimination and language accessibility must be eliminated. Anti-Asian voter discrimination, harassment, and intimidation must be forcefully addressed. See *Diaz v. Silver*, 978 F. Supp. 96, 101 (E.D.N.Y. 1997), *aff'd*, 522 U.S. 801 (1997) (citing Affidavit of Michael Shen for Defendant-Intervenor at ¶ 25 (citing examples of anti-Asian voter discrimination)). Local elections officials typically have ignored such charges or dismissed them as isolated incidents. However, a disturbing trend can be found at polling sites located in neighborhoods with growing Asian American communities, especially those displacing an entrenched, largely white community. Perpetrators of anti-Asian voter discrimination must be forcefully reprimanded, removed from their posts if they are elections officials, and, when necessary, prosecuted to the fullest extent of the law.

Almost two-thirds of all Asian Americans speak a language other than English in their homes. STATISTICAL RECORD OF ASIAN AMERICANS 128 (Susan B. Gall & Timothy L. Gall eds., 1993). In New York City, community exit polls showed almost half of Chinese Americans and almost a third of all Asian Americans did not read English very well. NAPAL, CONDUCTING EXIT POLLS: A GUIDE TO USING EXIT POLLS TO PROMOTE AND SAFEGUARD ASIAN PACIFIC AMERICAN VOTER PARTICIPATION 3 (1995). Thus, even though Asian Americans may be citizens, the right to vote is futile when ballots and voting instructions cannot be understood. See S. TITO SINHA ET AL., ASIAN AM. LEGAL DEFENSE & EDUC. FUND, ASIAN AMERICAN PARTICIPATION IN THE 1993 NEW YORK CITY SCHOOL BOARD ELECTIONS 14 (1993) [hereinafter 1993 AALDEF SCHOOL BOARD REPORT]; MARGARET FUNG ET AL., ASIAN AMERICAN PARTICIPATION IN THE 1996 NEW YORK CITY COMMUNITY SCHOOL BOARD ELECTIONS 14 (1997) [hereinafter 1996 AALDEF SCHOOL BOARD REPORT].

The Language Assistance Provisions of the Voting Rights Act mandates that voter registration forms, ballots, referenda, voting instructions, other voting materials, and interpreters to render oral language assistance must be provided in a language other than English in certain counties. Voting Rights Act, 42 U.S.C. § 1973 (1994); Implementation of the Voting Rights Act Regarding Language Minority Groups, 28 C.F.R. § 55.16 (2000). Currently, ten counties in New York, California, and Hawaii are covered under these provisions. *Id.* § 55, app. However, sometimes programs for providing materials have been poorly implemented, resulting in large numbers of voters being turned away at the voting booth for relatively minor inconsistencies. Claire Hsiang, Editorial, *Burned at the Ballot Box*, N.Y. TIMES, May 11, 1996, at 19; Rose Kim, *Voting Block; Asian-Americans Say Foul-Ups Kept Them From Polls*, NEWSDAY, May 10, 1996, at A3; Jacques Steinberg, *Election Day for School Boards Mixes Apathy, Anger and Disgust*, N.Y. TIMES, May 8, 1996, at B1. Other times, due to the Act's test for coverage, such materials have been denied altogether, thus preventing some Asian communities from participating in the democratic process. Kim, *supra*. The denial has been most serious for Korean Americans in New York. Kim, *supra*. Section 203 must be fully implemented and expanded, particularly as the Asian American community grows in New York, New Jersey, and Massachusetts.

tive, and local district boundaries. Asian Americans comprise sizable communities throughout the Northeast, particularly in New York, New Jersey, and Massachusetts. But redistricting that aims to ensure that Asian Americans have a fair opportunity to elect a candidate of their choice must maneuver cautiously through the Supreme Court's maze of recent voting rights decisions.¹⁰⁴ At the outset, advocates must review Asian American residential geography and communities. The following are examples.

New York City has more than 800,000 Asian Americans. Within the city, existing Asian American neighborhoods are growing and new communities are taking root in each borough.¹⁰⁵ Citywide, the largest communities are Chinese and South Asians, specifically Indians, Bangladeshis, and Pakistanis, followed in number by Koreans and Filipinos. In Brooklyn, most Asian Americans are Chinese,¹⁰⁶ followed by Pakistanis.¹⁰⁷ In Manhattan, the overwhelming majority of Asian Americans are Chinese living in Chinatown, though they have also moved into areas throughout the Lower East Side. In Queens, a mix of Asian Americans in Flushing,¹⁰⁸ Jackson Heights/Elmhurst,¹⁰⁹ and Sunnyside/Woodside¹¹⁰ have surged in numbers. Chinese,¹¹¹ Korean,¹¹² Indian,¹¹³ and Fili-

104. *Shaw v. Reno*, 509 U.S. 630 (1993); *Miller v. Johnson*, 515 U.S. 900 (1995); *Bush v. Vera*, 517 U.S. 952 (1996).

105. See generally NYC DEP'T OF CITY PLANNING, THE NEWEST NEW YORKERS 1990-1994: AN ANALYSIS OF IMMIGRATION TO NYC IN THE EARLY 1990S (1996); NYC DEP'T OF CITY PLANNING, THE NEWEST NEW YORKERS 1995-1996: AN UPDATE OF IMMIGRATION TO NYC IN THE MID '90S (1999).

106. Chinese live primarily in Sunset Park, and increasingly in Bensonhurst, Sheepshead Bay, and Northern Bay Ridge. See *id.*

107. Most Pakistanis live in Coney Island and Midwood. See *id.* There is also a growing South Asian, mostly Bangladeshi and Pakistani, community in the area around the intersection of Church Avenue and MacDonald Street. See *id.*

108. Flushing is mostly Chinese and Koreans, followed by South Asians. See *id.*

109. Jackson Heights and Elmhurst are adjoining neighborhoods. Jackson Heights is a mix of South Asians, including Indians, Bangladeshis, and Pakistanis. Elmhurst seems to be mostly Indian, with growing numbers of Chinese and Filipinos. *Id.* at 89-90.

110. Likewise, Sunnyside and Woodside are adjoining neighborhoods. Both neighborhoods are a mix of South Asians, predominately Indians and some Bangladeshis, with large Filipino, Chinese, and Korean populations. *Id.* at 90.

111. In addition to Flushing and Elmhurst, the Chinese population is also growing in Rego Park and Corona. *Id.* at 90.

112. In addition to Flushing and Woodside, the Korean population is also growing in Bayside and Little Neck. *Id.*

113. In addition to Jackson Heights, Elmhurst, Sunnyside, and Woodside, the Indian population is also increasing in Queens Village, Glen Oaks, and Floral Park. *Id.*

pino¹¹⁴ communities continue to grow across the borough. There also has been exceptional migration of Bangladeshis¹¹⁵ and Indo-Caribbeans into New York throughout the 1990s.¹¹⁶ In 2000, the census estimates that nearly one-in-five Queens residents will be Asian American.¹¹⁷

In New Jersey, Jersey City has large Filipino and Indian populations, along with a sizable Latino community. More Indians, and some Pakistanis, are moving into Edison, Parsippany, and Elizabeth. Koreans are increasing in numbers throughout the northeastern New Jersey peninsula bordering New York City, notably in Palisades Park, Fort Lee, Union City, and Ridgefield.

In Massachusetts, there also are expanding Asian American communities.¹¹⁸ The population of Cambodians in the cities of Lowell, Lynn, and Fall River,¹¹⁹ Vietnamese in Dorchester, and Chinese in Boston's Chinatown continue to grow at a fast rate.¹²⁰ Chinese and Korean communities are growing in numbers in Quincy and Lexington.¹²¹ More South Asians are moving to Brookline.¹²²

In these growing communities, Asian Americans frequently have entered races for elective office, but their defeat has been just as common.¹²³ One explanation may lie in the racial composition of

114. Filipinos have long lived in Woodside and Hollis. They are also migrating to Sunnyside, Briarwood, and Astoria. *Id.*

115. Most Bangladeshi migration has not only been to Jackson Heights, Elmhurst and Sunnyside, but particularly Long Island City and the southern parts of Astoria. *Id.*

116. Perhaps the most intriguing growth in the Asian American population since 1990 has been the migration of Indo-Caribbeans, ethnic Indians who were originally imported as indentured servants to Caribbean nations and then migrated from Guyana, Jamaica, Suriname, and Trinidad to the United States. Most are living in Ozone Park, South Ozone Park, and Richmond Hill. *Id.*

117. POPULATION DIVISION, U.S. CENSUS BUREAU, COUNTIES RANKED BY ASIAN AND PACIFIC ISLANDER POPULATION, JULY 1, 1999 (CO-99-17) (estimating that, in 1999, seventeen-percent of all Queens residents are Asian American), <http://www.census.gov/population/estimates/county/rank/api-r.txt> (August 30, 2000). In 1999, Queens had the largest Asian American population on the East Coast, and was ranked fifth largest in the nation. *Id.*

118. Tom L. Chung, *Asian Americans in Enclaves—They are Not One Community: New Modes of Asian American Settlement*, 5 ASIAN AM. POL'Y REV. 78, 79-80 (1995).

119. Amanda Milkovits, *More Asians, Hispanics call Bay State Home*, PROVIDENCE JOURNAL-BULLETIN, Sept. 5, 2000 at 1C.

120. Chung, *supra* note 118, at 87-88.

121. *Id.* at 83, 90.

122. *See id.* at 81.

123. Seth Mydans, *In Rough World of American Politics, Asian-Americans Stand Out, As Rare*, N.Y. TIMES, June 3, 1993, at A16.

the districts from which they run.¹²⁴ Racially polarized voting still abounds.¹²⁵ The composition of voting districts can facilitate or dampen prospects for Asian Americans to elect a candidate of their choice. In the past, Asian American involvement in redistricting has been defensive, by guarding against the gerrymandering of Asian American enclaves. At the same time, Asian Americans have acted affirmatively by seeking to enhance minority voter representation by creating inclusive legislative bodies.

A. Background: Defensive and Affirmative Redistricting

The Voting Rights Act guards against the dilution of minority voting strength through redistricting, regardless of whether that dilution is caused by racial gerrymandering or whether the redistricting process merely has that effect.¹²⁶ The Act guards against the drawing of voting districts that split minority voters between two or more districts so that minority communities are unable to elect a minority representative.¹²⁷ Asian American neighborhoods have not been immune from such racial gerrymandering. For instance,

124. In addition to the voting system and composition of districts, the lack of comprehensive campaign finance reform also has disadvantaged many Asian Americans in running for elective office. Asian American challengers are particularly disadvantaged in that they have much more difficulty than white challengers in raising the necessary funds to mount viable campaigns. See Brennan Ctr. for Justice, Money and the Politics of Inclusion: The Impact of Campaign Finance Reform on the Representation of Women and People of Color, Conference at New York University School of Law, New York (May 3, 1999). In order for Asian Americans to have a meaningful vote, candidates must have a real chance at winning. Thus, Asian Americans should be a part of the broader movement for progressive campaign finance reform. Similarly, campaign finance reform groups must work to bring people of color into efforts for reform, as well as respond to their particular concerns in reform. See, e.g., Symposium, *Continuing to Build a Movement: Legal and Grassroots Strategies*, 43 How. L. J. 87, 88 (1999) (published as part of a larger Symposium entitled "Campaign Finance as a Civil Rights Issue," hosted by the National Voting Rights Institute and Howard University School of Law in Washington, D.C. on February 12-13, 1999); Brennan Center for Justice, *supra* (comments of Margaret Fung, Asian American Legal Defense and Education Fund and Marisa Demeo, Mexican American Legal Defense and Education Fund) (expressing concerns about restrictions in the ability of legal permanent residents to contribute to political campaigns and proposals mandating that candidates only raise campaign money from within the district).

125. Racially polarized voting refers to when race is the predominant consideration of voters in electing representatives: whites vote almost exclusively for white candidates, while minorities voters vote almost exclusively for minority candidates.

126. 42 U.S.C. § 1973 (1994).

127. Often this is referred to as "fracturing." E.g., *Gingles v. Edmisten*, 590 F. Supp. 345 (E.D.N.C. 1984), *sub nom.* *Thornburg v. Gingles*, 478 U.S. 30 (1986).

in the 1982 New York State legislative redistricting, Chinatown was split between two State Assembly districts.¹²⁸

But enforcement of the Voting Rights Act has, at times, failed to protect Asian Americans from other districting outcomes with less than favorable prospects for meaningful representation. In one situation, Asian American communities are kept together, but lumped into a district with a set of voters who have nothing in common with the Asian American community, or worse, have adverse interests.

For example, in the 1991 New York City Council redistricting, the district that was supposed to give representation to Manhattan's Chinatown, where mostly lower-income Chinese reside, was folded into the heavily white, upscale communities of Soho, TriBeCa, and Battery Park City.¹²⁹ In Queens, some believe the City Council district representing the largely Korean and Chinese neighborhood of Flushing was carefully drawn around the white incumbent's powerbase.¹³⁰ In Boston, Massachusetts, the state senate district encompassing Boston Chinatown was drawn to lump Chinatown with the largely Irish political powerbase of South Boston. Chinese Americans were incorporated in the district simply to make up for population differences, not for any intention of giving them any sort of representation. In each of these examples, Asian Americans were kept together but were completely outvoted. They were not only totally unable to elect an Asian American candidate, but also locked out of electing anyone who would be responsive to their interests.

Asian Americans must be involved in redistricting to ensure their communities are not fragmented, nor their vote diluted. Though the Voting Rights Act will guard against blatant discrimination, it has not always guarded against more subtle forms of political disenfranchisement.

128. Margaret Fung, *Asian Americans Ignored in Redistricting*, N.Y. TIMES, July 13, 1982, at A24; *New Redistricting Plan Splits Chinatown*, N.Y. NICHIBEI, July 15, 1982. In fact, during President Reagan's first term, the Justice Department approved of the plan. See Press Release, Asian American Legal Defense & Education Fund, AALDEF Criticizes Justice Department's Approval of New York Redistricting Plan Dividing Chinatown (July 6, 1982) (on file with author).

129. AALDEF, *City Council Changes: a Disappointment*, OUTLOOK, Spring 1992, at 1 [hereinafter *City Council Changes*]; Margaret Fung, *New York Forum About Politics: A District Like a Mosaic*, N.Y. NEWSDAY, Apr. 12, 1991, at 60 (advocating for a City Council district that included Chinatown with the Lower East Side) [hereinafter *A District Like a Mosaic*].

130. *City Council Changes*, supra note 129, at 1; Dugger, supra note 8.

B. Legal Background to Redistricting

Law-makers and district-drawers¹³¹ are guided by a number of traditional and some constitutional districting criteria.¹³² Districts must be equal in population¹³³ and they cannot be drawn intentionally to discriminate against minority voters.¹³⁴ Districts must be compact¹³⁵ and contiguous.¹³⁶ Borders should preserve political and municipal boundaries, without crossing between towns, cities, and counties.¹³⁷ Finally, they must encompass “communities of interest,” groupings of people who have similar values, shared interests, or common characteristics.¹³⁸

Other common and acceptable redistricting criteria include drawing districts that: protect the reelection of incumbents or avoid contests between two incumbents;¹³⁹ preserve the core of the prior district;¹⁴⁰ preserve natural geographical boundaries (i.e., borders do not cross bodies of water, rivers, or mountain terrain);¹⁴¹ and prevent retrogression of minority voting strength and representation.¹⁴² Race and ethnicity may legitimately be considered in the

131. District-drawers are the technicians who typically work for the law-makers in drawing districts.

132. See NCSL, REDISTRICTING LAW, *supra* note 48, at 75-76 for a review of states which also mandate constitutionally or statutorily compactness, contiguity, preservation of political subdivisions, preservation of communities of interest, incumbency protection, and preserving the core of prior districts.

133. See *Karcher v. Daggett*, 462 U.S. 725, 727-28, 732, 741 (1983); *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964); *Baker v. Carr*, 369 U.S. 186, 198-208 (1962).

134. Voting Rights Act, 42 U.S.C. § 1973(a) (1994); *Shaw v. Hunt*, 517 U.S. 899, 914 (1996).

135. *Bush v. Vera*, 517 U.S. 952, 959-60 (1996); *Shaw v. Reno*, 509 U.S. 630, 646 (1993); *DeWitt v. Wilson*, 856 F. Supp. 1409, 1414-15 (E.D. Cal. 1994), *aff'd and appeal dismissed*, 515 U.S. 1170 (1995).

136. *Shaw v. Reno*, 509 U.S. 630, 646 (1993).

137. *Id.*; *Abrams v. Johnson*, 521 U.S. 74, 98 (1997).

138. *Abrams v. Johnson*, 521 U.S. 74, 100 (1997); *Miller v. Johnson*, 515 U.S. 900, 915-16 (1995).

139. *Abrams v. Johnson*, 521 U.S. 74, 98 (1997).

140. *Id.*

141. *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (noting that a “reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries . . . bears an uncomfortable resemblance to political apartheid”).

142. Retrogression analysis is put into force when the jurisdiction is covered under § 5 of the Voting Rights Act. See Voting Rights Act of 1965, § 5, 42 U.S.C. § 1973c (1996); 28 C.F.R. 51, app. (1997). Coverage under § 5 usually comes about when the jurisdiction had a history of minority voter discrimination. *City of Lockhart v. United States*, 460 U.S. 125, 134-35 (1983); *Beer v. United States*, 425 U.S. 130, 141 (1976). The current legal benchmark to measure retrogression is in flux. *Reno v. Bossier Parish School Board*, 520 U.S. 471, 478-80, 486 (1997).

redistricting process; however they cannot predominate,¹⁴³ in that the consideration of race does not subordinate the aforementioned "traditional" districting principles.¹⁴⁴

In the past, minority voting rights advocates have been involved in redistricting to facilitate the representation of people of color through the redrawing of what were then called "majority-minority" voting districts and now often are referred to as "minority-opportunity" districts.¹⁴⁵ In order to draw such districts, the U.S. Supreme Court originally held in the 1986 landmark case, *Thornburg v. Gingles*, that three preconditions were required.¹⁴⁶ The minority community had to: (1) be sufficiently numerous and compact to form a majority in a single voting district; (2) be politically cohesive, in that members of the minority group tend to vote alike; and (3) suffer from racially polarized voting, where the white majority votes as a bloc so as to routinely defeat the minority group's preferred candidate.¹⁴⁷

Adhering to these principles, a great many new majority-minority voting districts across the nation were drawn at the local, state, and federal levels after the 1991 redistricting.¹⁴⁸ The effort was

143. *Miller v. Johnson*, 515 U.S. 900, 915-16 (1995); see *Shaw v. Reno*, 509 U.S. 630, 642-44 (1993).

144. See *Miller v. Johnson*, 515 U.S. 900, 915-16 (1995).

145. I prefer the term "minority-opportunity," rather than a "majority-minority" voting districts. Technically, a "majority-minority" voting district is a district in which the minority population is, essentially, at least fifty percent plus one or more. The minority group's vote can, independent of any other voting group, select the representative of the district. However, I prefer "minority-opportunity" voting districts, because in essence that is what such districts seek. They look to give the minority group a fair chance, or an opportunity, to elect a candidate of their choice. These districts are particularly needed in a climate of racially polarized voting. This discussion will continue in more detail *infra* Section II.C. I will use both terms interchangeably but will use "majority-minority" to refer to districts drawn in the past or when most of the commentary and litigation has used this terminology. I will assert "minority-opportunity" as a new way to describe future districts which give minorities a fair chance at electoral success.

146. *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986).

147. *Id.* The minority community also had to suffer from racial discrimination under the totality of the circumstances. *Id.* at 55. Justice Stevens stated that this analysis is conducted by a review of "objective factors" codified in the Senate Report accompanying the Voting Rights Act. *Id.* at 36-37, 44 (Stevens, J., dissenting).

148. Fourteen states adopted congressional redistricting plans that doubled the number of congressional majority-minority districts from twenty-six to fifty-two. *Bush v. Vera*, 517 U.S. 952, 1041 nn.37-38 (1996) (Stevens, J., dissenting).

Some conservative commentators argue that majority-minority districts are not needed to achieve minority representation. See, e.g., Abigail Thernstrom, *Voting Rights: Another Affirmative Action Mess*, 43 UCLA L. REV. 2031 (1996). They point out that people of color such as Governor Douglas Wilder of Virginia and Mayor David Dinkins of New York City are elected from both majority-white and majority-

highly successful, especially for African Americans and Latinos.¹⁴⁹ However, these redistricting criteria set a threshold that denied some racial and ethnic groups—largely due to insufficient size or geographic dispersion—the ability to gain representation through majority-minority districts.¹⁵⁰

Throughout the 1990s, the Court further cut back on districting that enfranchised people of color.¹⁵¹ Beginning with the astonishing 1992 decision in *Shaw v. Reno*, the Court announced, for the first time, that white voters could assert a claim of voter discrimination under the Equal Protection Clause when drawn into a majority-minority voting district.¹⁵² Then, in 1995, in *Miller v. Johnson*,

minority areas. See *id.* at 2040 n.32. However, supporters of majority-minority districts counter that nearly every African American member of the U.S. House of Representatives is elected from a district with a black majority population. Brenda Wright, *Is Race-Conscious Districting to Achieve Minority Representation Constitutional?: Yes: Toward a Politics of Inclusion*, A.B.A. J., July 1993, at 44.

149. Fourteen new majority-black and Latino districts were created in eleven states, and eleven new majority-Latino districts were added in six states. Frank R. Parker, *The Constitutionality of Racial Redistricting: A Critique of Shaw v. Reno*, 3 D.C. L. REV. 1, 3 n.5 (1995).

150. *Infra* Section II.C.1; see, e.g., *Diaz v. Silver*, 978 F. Supp. 96, 129 n.22 (E.D.N.Y. 1997) (discussing how Asians do not meet *Gingles* test), *aff'd*, 522 U.S. 801 (1997) (citing *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986)).

151. The modern voting rights cases should not be surprising in light of the Court's conservative colorblind jurisprudence, most notably revealed in its anti-affirmative action cases, such as *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). Linda Greenhouse, *In Step on Racial Policy* N.Y. TIMES, June 14, 1995, at A1. For a fuller discussion of the Court's colorblindness jurisprudence via education, business, and redistricting, see Frank R. Parker, *The Damaging Consequences of the Rehnquist Court's Commitment to Color-Blindness Versus Racial Justice*, 45 AM. U. L. REV. 763 (1996).

152. *Shaw v. Reno*, 509 U.S. 630, 649-50 (1993). *But see* *United Jewish Orgs. v. Carey*, 430 U.S. 144, 150-66 (1977) (holding that white voters may not challenge a districting plan that includes majority-minority districts to promote minority representation). Justice Sandra Day O'Connor's reasoning in *Shaw* was quite remarkable. First, she likened districts that gave racial and ethnic minorities representation to "political apartheid." *Shaw*, 509 U.S. at 647. Second, she intimated that minority representatives were somehow ineffective in representing white voters. See *Shaw*, 509 U.S. at 656-58. Third, she placed higher standards and strict scrutiny on districts giving minorities increased representation, see *Shaw*, 509 U.S. at 653-56, but such standards are seldom applied to majority-white districts, see *Bush v. Vera*, 517 U.S. 952, 1035-36 (1996) (Stevens, J., dissenting). Fourth, when a person of color is elected from an oddly shaped district, that district's shape is now a matter of constitutional inquiry. See *Shaw*, 509 U.S. at 649-50; see also Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 484 (1993). In *Shaw*, O'Connor described the district as "bizarre" in its shape. *Shaw*, 509 U.S. at 655. But in drawing districts, a multitude of factors and considerations come into play. Non-square and non-cyclical shapes are destined. Pildes & Niemi, *supra*, at 441-53; Daniel D. Polsby & Robert D. Popper, *Ugly: An Inquiry Into the Problems of Racial Gerrymandering*

the Court elaborated upon *Shaw*, holding that race could *not* be the predominant criterion in redrawing voting districts.¹⁵³ In this analysis, the consideration of race is allowed, but may not subordinate “traditional race-neutral districting principles” such as compactness, contiguity, respect for geographic and political boundaries, and preservation of communities of interest.¹⁵⁴ Thus, without more, the intentional drawing of majority-minority districts, even with the benevolent intention of enfranchising minority voters, and even when they meet the *Gingles* preconditions, is deemed unconstitutional. Consequently, majority-minority voting districts in North Carolina, Georgia, Louisiana, Texas, Florida, New York, and Virginia were struck down under *Shaw* and *Miller*.¹⁵⁵

In preparation for the 2001 redistricting, minority voting rights advocates and district-drawers are exploring ways to reconcile these cases with the goal of expanding the representation of traditionally underrepresented communities. Asian Americans must be involved in efforts to safeguard the drawing of minority-opportunity districts, while also exploring new strategies that will lead to expanded minority representation.

C. Redistricting and the Asian American Experience

Two traditional strategies to enfranchise minority voters have been the drawing of “minority-opportunity” and “minority-influence districts.”¹⁵⁶ Minority-opportunity districts, previously known as “majority-minority districts,” facilitate the actual representation

Under the Voting Rights Act, 92 MICH. L. REV. 652, 653 (1993). For a Court whose jurisprudence is supposedly “colorblind,” its decisions render an exacerbation of color differentials and the resurgence of racial disenfranchisement under the law.

153. *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

154. *Id.*

155. *Bush v. Vera*, 517 U.S. 952 (1996) (Texas); *Miller v. Johnson*, 515 U.S. 900 (1995) (Georgia); *Shaw v. Reno*, 509 U.S. 630 (1993) (North Carolina); *Diaz v. Silver*, 978 F. Supp. 96, 115-16 (E.D.N.Y. 1997) (per curiam), *aff'd*, 522 U.S. 801 (1997) (New York); *Moon v. Meadows*, 952 F. Supp. 1141 (E.D. Va. 1997), *aff'd*, 521 U.S. 113 (1997) (Virginia); *Hays v. Louisiana*, 936 F. Supp. 360, 370 (W.D. 1996) (per curiam), *appeal dismissed as moot*, 518 U.S. 1014 (1996) (Louisiana); *Johnson v. Mortham*, 926 F. Supp. 1460, 1466 (N.D. Fla. 1996) (Florida). In Illinois, a majority-minority voting district was challenged, however it survived the Court’s scrutiny. *King v. Illinois Bd. of Elections*, 979 F. Supp. 582 (N.D. Ill. 1996), *vacated*, 519 U.S. 978 (1996), *remanded to*, 979 F. Supp. 619 (N.D. Ill. 1997), *aff'd*, 522 U.S. 1087 (1998).

156. J. GERALD HEBERT ET AL., *THE REALISTS’ GUIDE TO REDISTRICTING, AVOIDING THE LEGAL PITFALLS* 10-51 (2000); *see generally* NCSL, *REDISTRICTING LAW*, *supra* note 48, at 47-98 (discussing efforts to enfranchise minority voters).

of racial and ethnic minority groups in the legislature.¹⁵⁷ They can give the minority group a fair and real opportunity to elect a minority candidate, or a candidate who will represent their interests, as guaranteed by the Voting Rights Act.¹⁵⁸ In minority-influence districts, the minority population typically constitutes less than a majority, but is a sizable enough portion of the population (such as thirty percent) that its vote will influence the outcome of a race.¹⁵⁹ A strategy for drawing either Asian-opportunity or Asian-influence districts must ensure that Asian American demographics and residential patterns¹⁶⁰ comport with existing law. New theories such as Asian American "communities of interests" are instrumental in this effort.

1. *Asian Opportunity Districts and the Gingles Limitations*

To draw Asian American-opportunity districts, the *Gingles v. Thornburg* preconditions must be satisfied. Notwithstanding the number and sizes of Asian American population clusters, the first *Gingles* precondition has been difficult to meet on the East Coast.¹⁶¹ In the past, Asian American population clusters on the East Coast have been insufficiently large and compact to form a majority in most types of districts. Asian Americans, though numerous, tended to be geographically dispersed in their residential patterns. Census estimates project that this might continue after 2000, especially for large congressional districts. But in much smaller districts, like those for the lower house of the state legislature or for town councils, Asian American communities may be both large enough and geographically compact enough to constitute majorities. Alas, sufficient size is only the first precondition.

157. Brief for the Congressional Black Caucus as Amicus Curiae in Support of Appellants at 12, *United States v. Hays*, 515 U.S. 737 (1995) (No. 94-558), reprinted in A. Leon Higginbotham, *United States v. Hays: Brief for the Congressional Black Caucus as Amicus Curiae in Support of Appellants*, 38 HOWARD L.J. 665, 665 (1995).

158. 42 U.S.C. § 1973(a)-(b) (1994).

159. *E.g.*, *Armour v. Ohio*, 775 F. Supp. 1044, 1060 (N.D. Ohio 1991) (citing a "large enough black population"); *Rural West Tenn. African-American Affairs Council, Inc. v. McWherter*, 877 F. Supp. 1096, 1111 (W.D. Tenn.) (citing population of 41.6%), *aff'd.*, 516 U.S. 801 (1995); see also NCSL, REDISTRICTING LAW, *supra* note 48, at 63-65.

160. See *supra* notes 105-22 and accompanying text.

161. *E.g.*, *Diaz v. Silver*, 978 F. Supp. 96, 129 n.22 (E.D.N.Y. 1997), *aff'd.*, 522 U.S. 801 (1997) (citing *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986) (holding that Asians were not large enough and too geographically dispersed to meet the *Gingles* preconditions, at least insofar as to draw a majority-Asian district, using 1990 census data); U.S. COMM'N ON CIVIL RIGHTS, CIVIL RIGHTS ISSUES FACING ASIAN AMERICANS IN THE 1990s 159 (1992).

The dearth of data on Asian American voting patterns, particularly on the East Coast, compounded by less than perfect census data, has made it difficult to determine definitively whether Asian Americans also meet the remaining *Gingles* preconditions. Community exit polls documenting Asian American voting behavior¹⁶² have revealed some level of political cohesion among Asian Americans, even across ethnic lines.¹⁶³ But demonstrating the third precondition, that the white majority votes as a bloc so as to regularly defeat Asian American candidates,¹⁶⁴ has been challenging to prove because of the sheer lack of viable Asian candidates on the ballot. Without Asian American candidates, it is impossible to prove that whites were voting against Asian American candidates. And when there have been such candidates, they can sometimes successfully draw upon electoral support from white communities.¹⁶⁵

But when the Census Bureau releases the redistricting data, the community may be able to satisfy *Gingles*. Asian Americans are increasing in numbers throughout New York, New Jersey, and

162. *E.g.*, *Giuliani Captures Asian American Vote by 3-1*, OUTLOOK (AALDEF), Spring 1994, at 1; *3,264 Asian New Yorkers Polled on Election Day*, OUTLOOK (AALDEF), Winter 1997, at 1.

163. While some national mainstream exit polls or California community exit polls report that Asian American seem to be fractured in their voting patterns, Asian Americans on the East Coast tend to rally around candidates they believe represent their interests. Political cohesion around candidates can be discerned, but party loyalty is largely absent. For example, in 1993, the Republican challenger for New York City Mayor, Rudolph Giuliani, captured 67% of the Asian American vote, beating out incumbent Democrat David Dinkins, who received 25% of the vote. In 1996, President Clinton, running for re-election, captured 75% of the Asian American vote. In 1998, Democratic challenger Representative Charles Schumer captured 69% of Asian Americans vote, unseating eighteen-year incumbent Republican Senator Alfonse D'Amato. In each of these races, Chinese, Koreans, Filipinos, and South Asians tended to vote alike. UCLA ASIAN AM. STUDIES CTR., NATIONAL ASIAN PACIFIC AMERICAN POLITICAL ALMANAC, *1998 Asian Pacific American Exit Polls* 38 (9th ed. 2000-01); *3,264 Asian New Yorkers Polled on Election Day*, OUTLOOK (AALDEF), Winter 1997, at 1; Mae M. Cheng, *Asian-Americans Deliver for Schumer*, NEWSDAY, Nov. 5, 1998; *Giuliani Captures Asian American Vote by 3-1*, OUTLOOK (AALDEF), Spring 1994, at 1.

164. *Thornburg v. Gingles*, 478 U.S. 30, 50-52, 55 (1986).

165. For instance, the few Asian American elected officials on the East Coast are all elected from communities with majority white populations. Asian American elected officials are in the state houses of West Virginia and Maryland and local governments of Bergenfield and Holmdel, New Jersey and Newton, Westfield, Attleboro, and Lowell, Massachusetts. UCLA ASIAN AM. STUDIES CENTER, NATIONAL ASIAN PACIFIC AMERICAN POLITICAL ALMANAC (9th ed. 2000-01).

Massachusetts.¹⁶⁶ Certain neighborhoods are becoming increasingly Asian American.¹⁶⁷ Since 1990, there have been a slew of Asian American candidates running for office,¹⁶⁸ many of whom probably lost due to the realities of racially polarized voting.

Nevertheless, *Gingles* still presents serious hurdles for the Asian American community. Asian American opportunity voting districts may continue to be difficult to draw for most legislative bodies. If so, multi-racial minority-opportunity and minority-influence districts may be more viable options to ensure the meaningful representation of Asian Americans.

2. *Emerging Strategies for Asian Americans*

Multi-racial, minority-opportunity districts bring Asian Americans into districts with other racial and ethnic minorities with similar interests.¹⁶⁹ Together, they can constitute a majority of a district's total population. Influence districts have proven to be a somewhat successful remedial attempt to provide representation to communities of color that have been too dispersed to be encompassed within a single majority-minority district.¹⁷⁰ These districts give Asian American voters real opportunities to vote for candidates who will represent their interests.

To draw such districts in light of *Shaw* and *Miller*, the districts must not be drawn to strictly represent only Asian Americans. Rather, they should contain "communities of interest,"¹⁷¹ group-

166. See POPULATION DIVISION, U.S. CENSUS BUREAU, STATES RANKED BY ASIAN AND PACIFIC ISLANDER POPULATION, JULY 1, 1999, <http://www.census.gov/population/estimates/state/rank/api.txt> (August 30, 2000).

167. See generally NYC DEP'T OF CITY PLANNING, THE NEWEST NEW YORKERS 1990-1994: AN ANALYSIS OF IMMIGRATION TO NYC IN THE EARLY 1990s (1996); NYC DEP'T OF CITY PLANNING, THE NEWEST NEW YORKERS 1995-1996: AN UPDATE OF IMMIGRATION TO NYC IN THE MID '90s (1999); Tom L. Chung, *Asian Americans in Enclaves—They are Not One Community: Three Decades of Demographic Changes*, 5 ASIAN AMER. POL'Y REV. 78 (1995).

168. E.g., Leslie Casimir, *Foreign-Born Pols Aim to Make Voices Heard*, DAILY NEWS, Aug. 24, 2000, at 14.

169. E.g., *A District Like a Mosaic*, *supra* note 129, at 60 (discussing a City Council district that includes Chinese immigrants in Chinatown with Latino immigrants in the Lower East Side).

170. E.g., *Armour v. Ohio*, 775 F. Supp. 1044, 1059-60 (N.D. Ohio 1991); *Rural West Tenn. African-American Affairs Council, Inc. v. McWherter*, 877 F. Supp. 1096, 1107 (W.D. Tenn.); NCSL, REDISTRICTING LAW, *supra* note 48, at 63-65. To be clear, influence districts should not be drawn in lieu of minority-opportunity districts. When the minority population legitimately meets the *Gingles* preconditions, a minority-opportunity district should be drawn. NCSL, REDISTRICTING LAW, *supra* note 48, at 51.

171. *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

ings of people with "actual shared interests"¹⁷² and/or common socio-economic characteristics,¹⁷³ that may be predominantly Asian American. The AALDEF has successfully used the community of interest strategy to defend majority-minority voting districts.

Asian Americans successfully defended their community in *Diaz v. Silver*, where they intervened on the side of Latino plaintiffs challenging New York's 12th Congressional District.¹⁷⁴ That district was drawn originally as a majority-Latino district, which is currently represented by the first Puerto Rican-born member of Congress, Nydia Velásquez. Representative Velásquez has long championed the interest of immigrants, the poor, and non-English speakers. The district was a little more than fifty-four percent Latino,¹⁷⁵ and twenty-one percent of the population was Asian.¹⁷⁶ So when the district was challenged under *Shaw*, Asian Americans intervened as parties in the suit to protect the district.¹⁷⁷

The Asian intervenors argued that the Asian American community in the district, which lived in Manhattan's Chinatown and Brooklyn's Sunset Park, constituted a single "community of interest" because they shared common socio-economic characteristics.¹⁷⁸ They spoke a common Chinese dialect, read Chinese-language newspapers, were employed in low-wage industries, had low levels of formal U.S. education, rented their homes, rode the same subway lines, and were immigrants and naturalized citizens.¹⁷⁹ There were also many private and municipal health and social service agencies serving both neighborhoods.¹⁸⁰ Race was simply one of many factors considered in drawing the district

172. *Id.* at 919.

173. *Diaz v. Silver*, 978 F. Supp. 96, 122 (E.D.N.Y. 1997).

174. *Id.* at 116-17.

175. *Boundaries in Dispute*, N.Y. TIMES, Feb. 27, 1997, at B2 (graphical chart and map display) (sourcing Congressional Quarterly (based on 1980 and 1990 census data)); *High Court Stays Its Conservative Course*, XLIX CONGRESSIONAL QUARTERLY ALMANAC 325-26 (listing Hispanic population as fifty-eight percent of population of district).

176. *Boundaries in Dispute*, *supra* note 175.

177. *Diaz v. Silver*, 978 F. Supp. 96, 124 (E.D.N.Y. 1997) (citing AALDEF Mem. Support Intervention, at 1).

178. See Affidavit of Defendant-Intervenor Peter Lau at paras. 46-55; Affidavit of Defendant-Intervenor John Kuo Wei Tchen paras. 9-38, *Diaz v. Silver*, 978 F. Supp. 96, 124 (E.D.N.Y. 1997) (No. 95-CV-2591).

179. *Id.*

180. *Id.*

lines.¹⁸¹ The court accepted this argument, holding that Asian Americans in the 12th Congressional District were a single community of interest, and should be kept together within the district.¹⁸² In so holding, the Court allowed the district to be a constitutionally permissible Asian-influence district.

However, the court did not accept the main arguments by the state or Latino parties, which also tried to defend the district.¹⁸³ The court held that the consideration of race, at least for the Latino community, predominated in the original drawing of the district pursuant to *Shaw* and *Miller*.¹⁸⁴ Thus, the court compelled the state to redraw the district's boundaries.¹⁸⁵ When the legislature redrew the district, it reduced the Latino population, but kept the Asian American communities together.¹⁸⁶ Accordingly, the district became a multi-racial, minority-opportunity district, where forty percent of the residents are Latino and twenty percent are Asian American.¹⁸⁷ The court accepted the new plan and the Supreme Court summarily affirmed the new district lines.¹⁸⁸ Congressmember Velásquez still represents the district, and she still champions the interest of immigrants, the poor, and non-English speakers. Through the district, Asian Americans have enjoyed the meaningful representation of their interests.

This successful defensive strategy can inform affirmative redistricting.¹⁸⁹ Notwithstanding the final result, the court rulings and litigation strategy have been regarded as a way to reconcile the *Shaw* decisions with the goal of safeguarding and increasing the

181. Memorandum of Law of Defendant-Intervenors Peter K. Lau and John Kuo Wei Tchen in Opposition to Plaintiffs' Motion for Summary Judgment, at 22-25, *Diaz v. Silver*, 978 F. Supp. 96 (E.D.N.Y. 1997) (No. 95-Civ-2591).

182. *Diaz v. Silver*, 978 F. Supp. 96, 124 (E.D.N.Y. 1997), *aff'd*, 522 U.S. 801 (1997).

183. The State and Latino parties argued that *Shaw* and *Miller* did not apply; that if they did apply, race was not a predominant criterion in redrawing the district; and that even if race was a significant criterion in drawing the district, the district still survived strict scrutiny. *Id.* at 115-16, 118-23, 130.

184. *Id.*

185. *Id.*

186. Jonathan P. Hicks, *Albany Lawmakers Agree On Redrawn 12th District*, N.Y. TIMES, July 31, 1997, at B5.

187. *Id.*

188. *Diaz v. Silver*, 522 U.S. 801 (1997).

189. J. GERALD HEBERT ET AL., *THE REALISTS' GUIDE TO REDISTRICTING: AVOIDING THE LEGAL PITFALLS* 23 (2000) (citing *Grove v. Emison*, 507 U.S. 25, 41 (1993)). The authors note that the Supreme Court has never addressed the question whether multi-racial majority-minority districts are compelled under the Voting Rights Act to remedy past racial discrimination.

meaningful political representation of Asian Americans and other racial and ethnic minorities.

Drawing districts on the basis of Asian American communities of interest is not simply a legal fiction nor a proxy for race.¹⁹⁰ Asian American communities of interest may be viewed as smaller subsets of the Asian American community. Race and ethnicity, along with income level, educational level, English ability, and other socio-economic characteristics, in addition to external factors and common community concerns and issues, must be used to prove that specific Asian American communities are communities of interest.¹⁹¹

An example of an Asian American community of interest could be found in the Massachusetts' localities where Cambodians tend to have a similar immigrant experience in that they came to the United States as refugees, have limited English proficiency, have little or no formal U.S. education, and are generally low-income. Likewise, some Koreans communities in New Jersey are middle or upper-middle class, employed as professionals, emigrated to the U.S. around the same time, attend similar Christian churches, and have limited English proficiency. In using Asian American communities of interest as the criterion in redrawing voting district boundaries, those districts will be constitutionally defensible.

Moreover, it is also possible that communities of interest could be cross-racial, based on the immigrant experience,¹⁹² economic class,¹⁹³ or common neighborhood concerns.¹⁹⁴ This expands pos-

190. There must be "some common ["tangible"] thread of relevant interests" among the community members. *Miller v. Johnson*, 515 U.S. 900, 920 (1995).

191. See *Lawyer v. Dep't of Justice*, 521 U.S. 567, 581-82 (1997). Another supportive method to prove the existence of a community of interest could be subjective, when the racial or ethnic group, which already shares some socio-economic characteristics, "regard themselves as a community." *Id.*

192. *A District Like a Mosaic*, *supra* note 129, at 60 (advocating for a City Council district that includes Chinese immigrants in Chinatown with Latino immigrants in the Lower East Side).

193. *E.g.*, *Lawyer v. Dep't of Justice*, 521 U.S. 567, 581 (1997) (discussing poor urban-dwelling Latinos); *Diaz v. Silver*, 978 F. Supp. 96, 105 (E.D.N.Y. 1997) (discussing working class Asian and Latinos in the Lower East Side).

194. Karin Mac Donald, *Preparing for Redistricting 2001—Communities Define Their Interests 17* (Aug. 30, 1998) (unpublished manuscript, on file with author) (presented at the 1998 Annual Meeting of the American Political Science Association, Boston, Mass., Sept. 3-6, 1998). Professor Mac Donald conducted a study exploring the concept of "community of interest" with members of the community. Professor Mac Donald's study surveyed residents in Oakland, California. The project was recreated by the AALDEF, as its Community Survey Project. AALDEF's study is surveying Asian American community leaders in Brooklyn, Queens, and Manhattan, New York. One ingenious component of the studies is giving individuals maps of the city

sibilities for drawing multi-racial minority-opportunity districts, especially in situations where Asian Americans are too small in number or geographically diffuse. By using the community of interest strategy, multi-racial minority-opportunity and minority-influence districts, which seek to enfranchise Asian Americans, can be drawn permissibly.¹⁹⁵

In each of these contexts, whether the community seeks minority-opportunity or minority-influence districts, the need for coalition building with other traditionally disenfranchised communities is necessary. Asian Americans must explore common community interests with African American and Latino communities.¹⁹⁶ Additionally, there may be some similar interests with multi-racial groups, such as lesbian/gay/bisexual/transgender, low-income, or working-class communities. Common interests should be explored with the broad goal of ensuring the redistricting process is fair for all underrepresented communities.

Throughout the Northeast, more stable social, political, and service institutions are being established in existing and emerging Asian American neighborhoods. These institutions are engaging and transforming immigrants into active civic participants. Redistricting can help ensure Asian Americans will have some meaningful representation in the legislature. However, redistricting may be limited in that it does not guarantee *self*-representation. Possibilities for self-representation may be enhanced with alternative voting systems.

III. PROPORTIONAL REPRESENTATION AS AN ALTERNATIVE FOR ASIAN AMERICAN REPRESENTATION

Because it has been difficult for Asian Americans to meet the legal standards to form minority-opportunity voting districts,¹⁹⁷ some scholars argue for entirely new voting systems that have been effective in giving a voice to traditionally underrepresented com-

and asking them to draw a line around what they perceived to be their neighborhood boundaries. Respondents are then asked to explain the differences between the area inside and outside the line drawn. The AALDEF study also asks respondents to recount "issues that concern people in the neighborhood" and select other city neighborhoods which are "similar" in characteristics or concerns. AALDEF's study is still ongoing and a report is expected to be released early in 2001.

195. *Diaz v. Silver*, 978 F. Supp. 96, 123 (1997).

196. *E.g.*, *A District Like a Mosaic*, *supra* note 129, at 60 (discussing common interests between Chinese immigrants in Chinatown with Latino immigrants in the Lower East Side).

197. *Supra* Section II.C.

munities. These scholars suggest abandoning the redistricting process altogether and propose proportional representation as a solution.¹⁹⁸

A. Description of Proportional Representation

There are two chief methods for selecting democratically-elected legislative bodies or delegations: single-member districts and proportional representation ("PR").¹⁹⁹

Single-member districts are used predominantly in the United States.²⁰⁰ Under this system, voters residing in a voting district are allowed to select only one candidate and may cast only one vote. The candidate garnering the most votes in each district wins the election, regardless of whether she has obtained even a simple majority of the votes cast.²⁰¹

In contrast, proportional representation is used in most of the world's established democracies.²⁰² Although experience with PR in the U.S. has been limited, there are a number of jurisdictions,

198. See generally *Holder v. Hall*, 512 U.S. 874, 908 (1994) (Thomas, J., concurring); *Dillard v. Chilton County Bd. of Educ.*, 699 F. Supp. 870, 875 (M.D. Ala., 1988), *aff'd*, 868 F.2d 1274 (11th Cir. 1989); LANI GUINIER, *THE TYRANNY OF THE MAJORITY* 41 (1994); Douglas J. Amy, *District Shapes and Interest Representation*, in *CTR. FOR VOTING & DEMOCRACY, VOTING AND DEMOCRACY REPORT 87* (1995) [hereinafter *CVD VOTING AND DEMOCRACY REPORT*]; John B. Anderson, *Opinion/Essays, Go Back to the Drawing Board to Make More Votes Count*, *CHRISTIAN SCI. MONITOR*, Jan. 12, 1996, at 18; Mary A. Inman, *Comment, C.P.R. (Change Through Proportional Representation): Resuscitating a Federal Electoral System*, 141 U. PA. L. REV. 991 (1993); Letter from Cynthia McKinney, Congresswoman, to Congress, *entitled A Bill to Allow Multi-Member Districts* (July 14, 1995), in *CVD VOTING AND DEMOCRACY REPORT, supra*, at 39; Deborah Ramirez, *Multi-Racial Empowerment: It's Not Just Black and White Anymore*, 47 *STAN. L. REV.* 957, 976 (1995); Rob Richie, *How to Implement PR in the U.S.*, in *CVD VOTING AND DEMOCRACY REPORT, supra*, at 15; Joseph F. Zimmerman, *The Federal Voting Rights Act and Alternative Election Systems*, 19 *WM. & MARY L. REV.* 621, 659 (1978).

199. THOMAS T. MACKIE & RICHARD ROSE, *THE INTERNATIONAL ALMANAC OF ELECTORAL HISTORY* 503 (3d ed. 1991). Proportional representation ("PR") is not one electoral system itself, but a general category that includes a variety of systems, such as party list selection, limited voting, cumulative voting, preference or single transferable voting, and single non-transferable voting. For a description of each system, see Arend Lijphart & Bernard Grofman, *Choosing an Electoral System*, in *CHOOSING AN ELECTORAL SYSTEM* 3 (Arend Lijphart & Bernard Grofman eds., 1984) [hereinafter *CHOOSING AN ELECTORAL SYSTEM*].

200. THOMAS T. MACKIE & RICHARD ROSE, *THE INTERNATIONAL ALMANAC OF ELECTORAL HISTORY* 503 (3d ed. 1991); Arend Lijphart & Bernard Grofman, *Choosing an Electoral System*, in *CHOOSING AN ELECTORAL SYSTEM, supra* note 199, at 3.

201. Arend Lijphart & Bernard Grofman, *Choosing an Electoral System*, in *CHOOSING AN ELECTORAL SYSTEM, supra* note 199, at 3.

202. *Id.* Examples include India, Israel, Italy, Japan, Germany, Russia, and Spain. *Id.* at 4.

both historically and today, in which PR is used.²⁰³ Under PR voting systems, non-plurality voting is usually operative in multi-member districts or at-large elections. Voters are not given only one vote, nor are they bound to select only one candidate. Rather, depending on the specific type of PR system, voters simultaneously may cast multiple votes for multiple candidates, cast more than one vote for a single candidate, select a particular slate of candidates, or rank candidates in order of preference.²⁰⁴ PR is designed to give increased representation to minority voting groups, whether they are third-parties, politically cohesive people of color, or some other grouping.²⁰⁵

B. Comparison Between Proportional Representation and Single-Member Districts

Single-member districts and PR have different bases for political representation. Voting from single-member districts facilitates representation based on geographic units.²⁰⁶ As originally envisioned by the framers of the Constitution,²⁰⁷ geographic units, like neighborhoods, have been good indicators of common political, cultural, or ideological characteristics. On the other hand, PR allows individuals to group themselves together by the political interests through which they define themselves, exercised and evidenced by their voting patterns.²⁰⁸ As law professor and former civil rights attorney Lani Guinier noted, PR shifts the focus of electing minority candidates from the external district-drawers to voters' choices in the voting booth.²⁰⁹

203. PR was used for more than 110 years to elect the Illinois House of Representatives. PR also is used in dozens of local town, city, and municipal elections in Alabama, Arizona, California, Massachusetts, New Mexico, Ohio, Texas, and New York. Amy, *supra* note 198, at 87; Richard H. Pildes & Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 U. CHI. LEGAL F. 241, 259 (1995); Richie, *supra* note 198, at 15; Leon Weaver, *Semi-Proportional and Proportional Representation Systems in the United States*, in CHOOSING AN ELECTORAL SYSTEM, *supra* note 199, at 195.

204. Arend Lijphart & Bernard Grofman, *Choosing an Electoral System*, in CHOOSING AN ELECTORAL SYSTEM, *supra* note 199, at 3.

205. *Id.* at 7.

206. Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589, 1603-05 (1993), reprinted in LANI GUINIER, *THE TYRANNY OF THE MAJORITY* 119 (1994) [hereinafter Lani Guinier, *The Emperor's Clothes*].

207. *Wesberry v. Sanders*, 376 U.S. 1, 10-11 (1964) (citing 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 180 (Farrand ed. 1911)).

208. Douglas J. Amy, *District Shapes and Interest Representation*, in CVD VOTING AND DEMOCRACY REPORT, *supra* note 198, at 90.

209. Lani Guinier, *The Emperor's Clothes*, *supra* note 206, at 1594.

Both systems have been able to actualize the representation of people of color in the legislature.²¹⁰ Districts can work well when those communities meet at least the first *Gingles* precondition where they are large, compact, and reside in concentrated areas,²¹¹ like New York City's Harlem, Chinatown, or the Lower East Side. Regularly-shaped districts can be drawn that include a significant number of minority voters, who presumably also have common interests.

There are likewise numerous examples of how PR has achieved the same goals.²¹² Municipal PR voting systems have helped increase the representation of Latinos throughout the Southwest,²¹³ and African Americans in Alabama, Illinois, Ohio, and New York.²¹⁴ When proportional representation was first introduced to elect the New York City School Boards, the representation of African Americans and Puerto Ricans rose significantly, thereby better reflecting their numbers in the city population.²¹⁵

However, under traditional districting systems, Asian Americans have been able to gain representation in limited circumstances. Single-member districts have generally failed to give representation to groups when they are not large, compact, nor concentrated enough to fill larger voting districts, such as congressional districts.

Asian Americans have had a much more positive experience with PR than with single-member districts. Such success has been

210. Arend Lijphart, *Trying to Have the Best of Both Worlds: Semi-Proportional and Mixed Systems*, in CHOOSING AN ELECTORAL SYSTEM, *supra* note 199, at 209-11, 213.

211. Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986); *see also supra* note 146 and accompanying text.

212. Dillard v. Chilton County Bd. of Educ., 699 F. Supp. 870, 875 (M.D. Ala., 1988), *aff'd*, 868 F.2d 1274 (11th Cir. 1989). PR also has facilitated the election of other underrepresented communities, such as women and gays and lesbians. Darren Rosenblum, *Geographically Sexual?: Advancing Lesbian and Gay Interests Through Proportional Representation*, 31 HARV. C.R.-C.L. L. REV. 119, 119 (1996) (commenting on the PR of lesbians and gays in the New York City School Board elections); Richard H. Pildes & Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 U. CHI. LEGAL F. 241, 275-76 (citation omitted) (discussing women in Alabama county legislature).

213. Delbert A. Taebel et al., *Alternative Electoral Systems as Remedies for Minority Vote Dilution*, 11 HAMLINE J. PUB. L. & POL'Y 19, 26-29 (1990).

214. *See* George H. Hallett Jr., *Proportional Representation with the Single Transferable Vote: A Basic Requirement for Legislative Elections*, in CHOOSING AN ELECTORAL SYSTEM, *supra* note 199, at 113, 123; David Van Biema, *One Person, Seven Votes*, TIME, Apr. 25, 1994, at 42.

215. In 1973, a study by the United Parents Association found that the New York City School Boards were much more ethnically representative than any of New York's congressional, state legislative, or any recent city council elections. Hallett, *supra* note 214, at 113, 123.

most pronounced in the New York City School Board elections.²¹⁶ In each recent election, Asian American candidates increasingly have won, many with almost exclusive support from Asian American voters.²¹⁷ This stands in stark contrast to Asian American candidates' experience in elections for other legislative bodies in New York. Even with 800,000 Asian Americans, though there are fifteen Asian American elected officials in the school boards, no Asian has been any elected to the city council, state legislature, or Congress.²¹⁸ PR advocates have been able to show that when groups are not able to gain representation under single-member districts, they can be more successful under proportional representation.²¹⁹

PR can be a way out of the quandary between achieving the goal of minority representation and the *Shaw* cases, which are in tension with such goals.²²⁰ Its supporters span the spectrum from law professor and Assistant Attorney General for Civil Rights Nominee Lani Guinier²²¹ to Supreme Court Justice Clarence Thomas.²²² PR operates as an attractive colorblind solution to the under-

216. See 1993 AALDEF SCHOOL BOARD REPORT, *supra* note 103, at 10-11, 14; 1996 AALDEF SCHOOL BOARD REPORT, *supra* note 103, at 14; Anemona Hartocollis, *U.S. Rejects Voting Plan For Local School Boards*, N.Y. TIMES, Feb. 5, 1999 at B4; Interview with Tito Sinha, Staff Attorney, AALDEF, in New York, N.Y. (June 15, 1999).

217. In 1993, six of a total of eleven Asian American candidates won. 1996 AALDEF SCHOOL BOARD REPORT, *supra* note 103, at 1. In 1996, eleven of the total of fifteen Asian American candidates won election. *Id.* at 1, 4; Jacques Steinberg, *School Board Election Results*, N.Y. TIMES, June 23, 1996, § 13, at 11. In 1999, fifteen of a total number of twenty-one Asian American candidates won. Lynette Holloway, *This Just In: May 18 School Board Election Results*, N.Y. TIMES, June 13, 1999, § 14, at 3.

218. See Hartocollis, *supra* note 216.

219. *Id.*

220. *Whitcomb v. Chavis*, 403 U.S. 124 (1971) (recognizing that single-member district plans may not be the best remedy to a violation of the Voting Rights Act); *Cousin v. McWherter*, 904 F. Supp. 686 (E.D. Tenn. 1995) (suggesting that a non-districting remedy could be pursued, such as cumulative voting); Steven J. Mulroy, *The Way Out: A Legal Standard for Imposing Alternative Electoral Systems as Voting Rights Remedies*, 33 HARV. C.R.-C.L. L. REV. 333, 350-52 (1998); Joseph F. Zimmerman, *The Federal Voting Rights Act and Alternative Election Systems*, 19 WM. & MARY L. REV. 621, 659 (1978); Brief of Amicus Curiae The Center for Voting and Democracy, *Cane v. Worcester County*, 35 F.3d 921 (4th Cir. 1994) (No. 94-1579), *reprinted in part as Edward Still & Pamela Karlan, Cumulative Voting and the Voting Rights Act, in CVD VOTING AND DEMOCRACY REPORT, supra* note 198, at 94 ("Cumulative voting avoids the needs for race conscious district drawing It does not institutionalize the divisions in society by drawing a 'black district,' a 'Latino district' and a 'white district.'").

221. See generally LANI GUINIER, *THE TYRANNY OF THE MAJORITY* (1994).

222. See generally *Holder v. Hall*, 512 U.S. 874, 2594-2602 (1994) (Thomas, J., concurring).

representation of people of color²²³ and overcomes the obstacles presented by the Supreme Court in *Shaw* and *Miller*.²²⁴ Justice Thomas hailed PR because it treats people as individuals, and if those individuals feel more comfortable identifying themselves with a particular racial or ethnic identity, then PR is accommodating in the voting booth.²²⁵ Because Asian Americans commonly vote for Asian American candidates, regardless of their party affiliation, Asian Americans may be able to gain greater representation under PR.²²⁶

Moreover, some laud PR as superior because today, geographic units are becoming less meaningful and less accurate as actual proxies of public and civic identity.²²⁷ PR supporters argue that in America's colonial period, many citizens were tightly bound to their geographic areas.²²⁸ Today, however, many Americans are less tied to and identify less with a particular geographic identity.²²⁹ For instance, twenty percent of all Americans move to a new neighborhood every year.²³⁰ Neighborhoods are becoming increasingly racially integrated.²³¹ Thus, residents of voting districts are developing political cleavages along lines of class, race, gender, and ideology.²³² Modern communication and transportation systems

223. Lani Guinier, *The Emperor's Clothes*, *supra* note 206, at 1617; Mary A. Inman, Comment, *C.P.R. (Change Through Proportional Representation): Resuscitating a Federal Electoral System*, 141 U. PA. L. REV. 1991 (1993); Deborah Ramirez, *Multi-Racial Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957, 977 (1995).

224. Steven J. Mulroy, *The Way Out: A Legal Standard for Imposing Alternative Electoral Systems as Voting Rights Remedies*, 33 HARV. C.R.-C.L. L. REV. 333, 350-52 (1998).

225. *Holder v. Hall*, 512 U.S. 874, 2594-2602 (1994) (Thomas, J., concurring).

226. *See, e.g.*, 1993 AALDEF SCHOOL BOARD REPORT, *supra* note 103, at 13-14; 1996 AALDEF SCHOOL BOARD REPORT, *supra* note 103, at 14.

227. Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1451 (1991), reprinted in LANI GUINIER, *THE TYRANNY OF THE MAJORITY* 71 (1994) [hereinafter Guinier, *No Two Seats*].

228. Douglas J. Amy, *District Shapes and Interest Representation*, in CVD VOTING AND DEMOCRACY REPORT, *supra* note 198, at 87, 89.

229. Lani Guinier, *More Democracy*, 1995 U. CHI. LEGAL F. 1, 8 (1995) [hereinafter Lani Guinier, *More Democracy*].

230. Douglas J. Amy, *District Shapes and Interest Representation*, in CVD VOTING AND DEMOCRACY REPORT, *supra* note 198, at 87, 89.

231. *Id.*; Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1147 (1991), reprinted in LANI GUINIER, *THE TYRANNY OF THE MAJORITY* 41 (1994) [hereinafter Lani Guinier, *The Triumph of Tokenism*].

232. Douglas J. Amy, *District Shapes and Interest Representation*, in CVD VOTING AND DEMOCRACY REPORT, *supra* note 198, at 87, 89; Lani Guinier, *The Triumph of Tokenism*, *supra* note 231, at 1147.

also have changed the way people think of communities.²³³ In such a complex and integrated society, advocates argue that PR is preferable to antiquated single-member districts because PR can account for the many ways Americans identify, and ultimately vote for, their shared interests. Yet, the continued existence of minority neighborhoods is undeniable. While voters certainly define their shared interests by ideology, occupation, economics, race, gender, and sexual identity, they also continue to define those interests by where they live.

Finally, PR advocates say that the system promotes coalition building among various underrepresented groups.²³⁴ In the New York School Board elections, the slating of candidates from various Asian backgrounds often helped each ethnic group gain representation.²³⁵ It can also promote coalitions between Asian Americans and other underrepresented groups like African American, Latino, and lesbian and gay communities.²³⁶ Conversely, some PR advocates argue that districting itself promotes inter-group conflict. In a diverse geographic area, drawing districts to enfranchise one minority group is sometimes done at the expense of another minority group.²³⁷ PR can minimize competing, even clashing group struggles for representation.²³⁸

233. Tory Mast, *History of Single Member Districts for Congress*, in CVD VOTING AND DEMOCRACY REPORT, *supra* note 198, at 37, 39; Lani Guinier, *More Democracy*, *supra* note 229; e.g., *Diaz v. Silver*, 978 F. Supp. 96 (E.D.N.Y. 1997) (referring to the use of subway lines).

234. Guinier, *No Two Seats*, *supra* note 227, at 1491; Darren Rosenblum, *Geographically Sexual?: Advancing Lesbian and Gay Interests Through Proportional Representation*, 31 HARV. C.R.-C.L. L. REV. 119, 121 (1996).

235. See 1993 AALDEF SCHOOL BOARD REPORT, *supra* note 103, at 14.

236. Deborah Ramirez, *Multi-Racial Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957, 987 (1995); Darren Rosenblum, *Geographically Sexual?: Advancing Lesbian and Gay Interests Through Proportional Representation*, 31 HARV. C.R.-C.L. L. REV. 119, 121 (1996).

237. *Johnson v. De Grandy*, 512 U.S. 997 (1994) (showing example in Florida between Cuban Americans and African Americans); Guinier, *No Two Seats*, *supra* note 227, at 1453; Frank R. Parker, *The Consequences of Racial Redistricting: A Critique of Shaw v. Reno*, 3 D.C. L. REV. 1, 7 n.23, 45 (1995) (citing *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977)) (showing example in New York between Hasidic Jews and African Americans) Darren Rosenblum, *Overcoming "Stigmas": Lesbian and Gay Districts and Black Electoral Empowerment*, 39 HOW. L.J. 149, 176-77 (1995) (citing Interview with Judith Reed, General Council for the 1991 New York City Districting Commission, in New York, N.Y. (Dec. 27, 1993). *But see King v. Illinois Bd. of Elections*, 979 F. Supp. 582 (N.D. Ill. 1996), *vacated*, 519 U.S. 978 (1996), *remanded to*, 979 F. Supp. 619 (N.D. Ill. 1997), *aff'd*, 522 U.S. 1087 (1998).

238. PR often avoids the zero-sum game as demonstrated in *De Grandy* and *United Jewish Organizations* where neither group or only one group was accommodated.

C. Concerns About Proportional Representation

Nevertheless, PR is not a panacea and is subject to many serious criticisms. Some include the complexity of administering an election by PR and the possibility of increased legislative factionalization. Moreover, some concerns about PR have been lodged by advocates from communities of color. Though PR facilitates the election of underrepresented groups, certain prerequisites are required before such representation can be assured. Finally, the most significant obstacle is the unlikelihood of adoption of a PR system due to some legal, but mostly political, considerations.

1. Popular Concerns

PR tends to be more complicated to administer and difficult to understand than districting systems.²³⁹ To PR's detriment, voting from single-member districts is simple.²⁴⁰ In district elections, there are usually only two choices, the voter has only one vote to cast for only one candidate, and only one candidate is elected.²⁴¹ Under PR, because voters often have more than one vote, there are more candidates, and more than one person can be elected.

In the 1996 New York City School Board election, where voters ranked their first, second, third, etc., preferences, it took weeks for the votes to be tallied and winners to be determined.²⁴² When candidates did not win on the first round, but seats remained unfilled, surplus votes were transferred to the voters' second choice candidates and then the ballots were recounted.²⁴³ This transfer of votes and recounting continued until all the seats were filled, resulting in a time consuming process. This problem could be resolved partially by using scannable computer ballots, as are used in Cam-

Deborah Ramirez, *Multi-Racial Empowerment: It's Not Just Black and White Any-more*, 47 STAN. L. REV. 957, 975 (1995).

239. Leon Weaver, *Semi-Proportional and Proportional Representation Systems in the United States*, in CHOOSING AN ELECTORAL SYSTEM, *supra* note 199, at 191, 195; Hartocollis, *supra* note 216 (quoting New York City Schools Chancellor Rudy Crew).

240. Arend Lijphart, *Trying to Have the Best of Both Worlds: Semi-Proportional and Mixed Systems*, in CHOOSING AN ELECTORAL SYSTEM, *supra* note 199, at 207, 208.

241. Guinier, *No Two Seats*, *supra* note 227, at 1456 (discussing the limits this system imposes on third parties).

242. Jacques Steinberg, *In Tallying School Board Election Results, Time Is No Object*, N.Y. TIMES, May 9, 1996 at B3; Jacques Steinberg, *Boards and Minds Are Little Changed by School Election*, N.Y. TIMES, June 12, 1996 at A1; Jacques Steinberg, *School Board Election Results*, N.Y. TIMES, June 23, 1996, § 13, at 11.

243. Jacques Steinberg, *In Tallying School Board Election Results, Time Is No Object*, N.Y. TIMES, May 9, 1996 at B3; Jacques Steinberg, *Boards and Minds Are Little Changed by School Election*, N.Y. TIMES, June 12, 1996 at A1.

bridge, Massachusetts, which uses an identical PR system to elect its city council.

PR is more abstruse than other voting schemes, like districting, because a voter's multiple votes can be transferred or cumulated.²⁴⁴ However, exit polls in localities using PR in the United States have demonstrated that while voters are "uncomfortable" with PR, they do tend to understand its voting rules.²⁴⁵ When voting instructions are adequately provided in Asian languages, and knowledgeable interpreters are on-site to provide assistance to both voters and poll workers, many problems can be avoided.²⁴⁶

Lastly, the most common criticism of PR is that it increases legislative factionalization, which thereby paralyzes governments. Enactments usually require a majority, not simply a plurality, vote. A coalition must be established each time to garner the necessary majority support. Legislative fragmentation leads to unmanageable policy making. Critics often cite Israel and Italy as having disastrous PR election systems because of the multitude of parties.²⁴⁷ Candidates can gain a seat in the national legislature of those countries with less than two percent of the entire national electorate.²⁴⁸ To avoid the problem of too many parties in the legislature, a higher election threshold percent of the ballots cast can be imposed to gain a seat.²⁴⁹ For example, Japan and Spain use a five percent threshold to gain a seat;²⁵⁰ those governments are not unwieldy, nor paralyzed by a proliferation of minority parties.

244. Leon Weaver, *Semi-Proportional and Proportional Representation Systems in the United States*, in CHOOSING AN ELECTORAL SYSTEM, *supra* note 199, at 191, 195; Hartocollis, *supra* note 216 (quoting New York City Schools Chancellor Rudy Crew describing the system as "hopelessly confusing"); Jacques Steinberg, *Boards and Minds Are Little Changed by School Election*, N.Y. TIMES, June 12, 1996 at A1.

245. Richard H. Pildes & Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 U. CHI. LEGAL F. 241, 284-85 (1995) (discussing Chilton County, Alabama's use of PR cumulative voting).

246. *Supra* note 103; 1996 AALDEF SCHOOL BOARD REPORT, *supra* note 103, at 11-12, 14.

247. *It's the Same Old Italy*, ECONOMIST, Dec. 16, 2000, at 55.

248. *Divide and Multiply*, ECONOMIST, Apr. 25, 1998, at S8.

249. James W. Skillen, *Public Discourse and Electoral Representation*, in CVD VOTING AND DEMOCRACY REPORT, *supra* note 198, at 17, 19.

250. See generally James W. Skillen, *Public Discourse and Electoral Representation*, in CVD VOTING AND DEMOCRACY REPORT, *supra* note 198, at 17, 19 (identifying the general threshold of five percent); Arend Lijphart, *Trying to Have the Best of Both Worlds: Semi-Proportional and Mixed Systems*, in CHOOSING AN ELECTORAL SYSTEM, *supra* note 199, at 207, 209-11, 213 (highlighting Japan and Spain as two contemporary national-level models of the single non-transferable vote).

2. Concerns from Minority Voting Rights Advocates

For communities of color, certain prerequisites must be met before minorities can gain representation under PR. First, there must be a stable and organized base from which minority candidates routinely can launch viable campaigns.²⁵¹ This is needed in single-member district elections as well, but because PR greatly opens the electoral process,²⁵² the re-election of minority incumbents is not as assured. The campaigns of incumbents of color must be able to withstand frequent challenges from viable candidates. Once a candidate is elected, traditional single-member district-based elections become attractive to both the candidate and sometimes the community because of their inherent protection of incumbents.²⁵³ Under PR, winning is no longer assured and more time may be spent on running campaigns than actually governing.

Second, the cost of running campaigns in PR elections is greater because the voting district is relatively large. Even a candidate who seeks support from only one slice of the electorate will still need to campaign within a larger-sized geographic area, at a much higher cost. Minority candidates already encounter some disability in raising the necessary funds to mount a viable campaign.²⁵⁴ Without public financing of their campaigns, the lack of minority representation may not be alleviated under PR.²⁵⁵

Third, PR is designed to measure, reflect, and award representation to voters.²⁵⁶ Under PR, if there are large communities that do not vote—by choice or by ineligibility—they will be frozen out of representation. In the same way that PR facilitates the representation of voting minorities, it also aggravates the nonrepresentation of non-voting groups. However, single-member districts, in theory, give representation to all residents. This is because the size of the district is determined by the total population, including non-U.S.

251. John B. Anderson, *How Proportional Representative Would Open Up Politics*, in CVD VOTING AND DEMOCRACY REPORT, *supra* note 198, at 3, 5.

252. Hallett, *supra* note 214, at 113, 117; Guinier, *No Two Seats*, *supra* note 227, at 1413, 1475 (footnote omitted); Mary A. Inman, Comment, *C.P.R. (Change Through Proportional Representation): Resuscitating a Federal Electoral System*, 141 U. PA. L. REV. 1991, 2040 (1993).

253. See Cynthia A. McKinney, *A Product of the Voting Rights Act*, WASH. POST, Nov. 26, 1996, at A15 (explaining Congresswoman McKinney's re-election after her previously-drawn majority-minority district was redrawn).

254. See Brennan Ctr for Justice *supra* note 124; *Continuing to Build a Movement: Legal and Grassroots Strategies*, *supra* note 124.

255. *Supra* note 124 (discussing campaign finance reform).

256. *C.f.* Guinier, *No Two Seats*, *supra* note 227, at 1413, 1456 (discussing how districting fails to represent minority interests).

citizens, and all districts must be approximately equal in size.²⁵⁷ Representatives elected from districts still represent the total population of their districts.²⁵⁸ Non-voters may not have contributed directly to the election of the district's representative, but nevertheless they are still entitled to electoral representation and may legitimately hold the representative accountable on issues of concern.²⁵⁹ Thus, the last prerequisite needed before PR can deliver on its promise of improving representation for racial and ethnic minorities is the substantially increased voting rate of racial and ethnic minorities.

3. *Implementation of Proportional Representation*

The most significant challenge confronting PR is its likelihood of enactment. First there may be legal impediments to adopting PR. Under the federal Constitution, PR is a legally permissible method to elect legislative bodies.²⁶⁰ At the local and state level, however, there may be constitutional and statutory prohibitions. Most state constitutions and statutes are silent on the use of PR. A few states, including Ohio, New York, and Massachusetts, have clearly affirmed and allowed its usage.²⁶¹ Others, such as Michigan, California, and, arguably, Rhode Island, have held that PR is not

257. *Ely v. Klahr*, 403 U.S. 108, 116-17 (1971) (Douglas J., concurring); cf. *Burns v. Richardson*, 384 U.S. 73, 91-97 (1966); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 653 (1964); 1993 AALDEF SCHOOL BOARD REPORT, *supra* note 103, at 14 (finding mixed results in two different communities when an Asian American was running for office); 1996 AALDEF SCHOOL BOARD REPORT, *supra* note 103, at 3 (stating that New York City School Boards, which use PR, allows non-citizens with children in the public school to vote in elections).

258. *Ely v. Klahr*, 403 U.S. 108, 110-11 (1971); *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969) (addressing population variances in Missouri voting districts).

259. This is also true of PR voting systems, but because the unit of representation is not geography, but rather voting patterns, the problem of lack of representation is exacerbated under PR.

260. The Supreme Court has held that there is nothing unconstitutional about PR elections in and of themselves. The Constitution does not compel single-member districts. The only barrier to adopting PR for congressional elections is a 1967 federal statute mandating that states use single member districts. Single member districts are nothing more than a political choice, and some members of the Supreme Court already recognize that geographic districting is not a requirement inherent in the American political system. Thus, only a statutory change is necessary. U.S. CONST. art. I, § 2 cl. 3; *Holder v. Hall*, 512 U.S. 874, 897-98, 908-12 (1994) (Thomas, J., concurring); Letter from Cynthia McKinney, *supra* note 198, at 39.

261. Joseph F. Zimmerman, *The Federal Voting Rights Act and Alternative Election Systems*, 19 WM. & MARY L. REV. 621, 640, 658-59 (1978) (citing *Reutener v. City of Cleveland*, 141 N.E. 27, 32 (Ohio 1923); *Johnson v. City of New York*, 9 N.E.2d 30 (N.Y. 1937); *Moore v. Election Comm'rs of Cambridge*, 35 N.E.2d 222, 231 (Mass. 1941)).

permitted.²⁶² Second, and more importantly, are pragmatic political considerations. If seriously considered for implementation, there would be great fear and opposition by incumbents to enacting PR. Incumbents typically prefer electoral systems that preserve their ability to be re-elected. As discussed previously, PR presents serious challenges to the re-election of incumbents.

4. Overall Assessment of Proportional Representation

Concerns about PR, particularly from minority voting rights advocates, are not easily overcome. Without public financing of campaigns, bilingual ballots, and improvement in the low voting rates of Asian Americans, PR may not necessarily be that much more superior to single-member districts in giving communities of color representation. It is undoubtedly a more egalitarian system in that it is designed to facilitate the representation of minority voting constituencies, but academic and theoretical support is seldom sufficient to move elected officials to abandon current electoral systems in favor of new ones.

The likelihood of PR being enacted is dismal. Notwithstanding these drawbacks, the districting process provides an opportunity for discussion of the merits of PR. Already, Congress has hosted a hearing on the Voters' Choice Act, a bill which would allow states the option of using PR to elect all or part of its congressional delegation.²⁶³

PR might be availing in highly integrated, multi-cultural localities like Queens, New York and Boston, Massachusetts. Queens has become tremendously diverse, both ethnically and culturally,

262. *Id.* at 657 (citing *People v. Elkus*, 211 P. 34, 36-37 (Cal. Ct. App. 1922); *Wattles v. Upjohn*, 179 N.W. 335, 341-42 (Mich. 1920); *Opinion to the Governor*, 6 A.2d 147 (R.I. 1939) (advisory opinion)).

263. The Voters' Choice Act, H.R. 2545, 104th Cong. (1995). The bill allows for the use of PR voting systems by allowing states to draw multi-member districts, provided the method of voting is not at-large plurality, but PR. The Act reads:

[A] State that is entitled to more than one Representative in Congress may establish a number of districts for election of Representatives that is less than the number of Representatives to which the State is entitled, if and only if that State uses a system of limited voting, a system of cumulative voting, or a system of preference voting in its multi-member districts.

Id. § 2.

The bill also allows states to combine single member and multi-member districts. *Id.* § 2(f). Finally, the bill cautions that "[t]he rights and remedies established by this Act are in addition to all other rights and remedies provided by law, and the rights and remedies established by this Act shall not supersede, restrict, or limit the application of the Voting Rights Act of 1965." *Id.* at § 3; Letter from Cynthia McKinney, *supra* note 198, at 39.

with very large Latino (mostly Puerto Rican, Colombian, and Mexican), Asian (Chinese, Korean, Asian Indian, Bangladeshi, Indo-Caribbean), white (Jewish, Italian, Greek), African American, and gay/lesbian/bisexual/transgender communities.²⁶⁴ All are deserving of representation. Moreover, some of these groups live in neighborhoods spread throughout the borough. Since drawing voting districts to enfranchise every one of these groups could be vulnerable to challenges under *Shaw*,²⁶⁵ PR may be a viable alternative to the complex and challenging process of redistricting in Queens.

Likewise, the Boston City Council has not been representative of all the racial minorities of the City of Boston. PR could solve this, and actually may even have a more viable chance of implementation in Boston than in other U.S. cities. Boston City Council members are elected both from districts and at-large. There has never been a person of color elected to any at-large position. Boston could maintain the at-large positions, but employ PR to elect those members in an effort to increase the representation of people of color.

In the end, voting from single-member districts will prevail as the prevalent system to elect legislative bodies in the U.S. Thus, the Asian American community must be engaged in the redistricting efforts of 2001 to ensure the process is fair to its members. The long-term goal is to enhance greatly the opportunity of Asian Americans to elect candidates of their choice, as envisioned by the Voting Rights Act. Voting rights litigators, law professors, demographers, Asian American Studies academics, and community leaders must come together to blend social science research and new findings about the Asian American community revealed in the census with legal research on redistricting and minority representation. Community leaders must work closely with legislators and encourage them to draw districts that will enfranchise Asian American voters.

264. NYC DEP'T OF CITY PLANNING, THE NEWEST NEW YORKERS 1990-1994: AN ANALYSIS OF IMMIGRATION TO NYC IN THE EARLY 1990s 86-93 (1996); NYC DEP'T OF CITY PLANNING, THE NEWEST NEW YORKERS 1995-1996: AN UPDATE OF IMMIGRATION TO NYC IN THE MID '90s (1999).

265. This is not to say that drawing single-member districts which give meaningful representation to each of these groups is not at all possible, nor that they would not survive a *Shaw* challenge. Drawing districts on the basis of multi-cultural communities of interest would not only give the groups meaningful representation and be defensible under *Shaw* and *Miller*. *Supra* Section II.B.

CONCLUSION

The quest for greater Asian American representation requires, first and foremost, an accurate count of Asian Americans in the census. Past racially disparate undercounts and overcounts have had devastating effects in the political representation of racial and ethnic minorities. Therefore, the more accurate adjusted census figures must be used throughout the redistricting process.

At the outset of redistricting, advocates should guard against the dilution of minority voting strength and aim for the enfranchisement of traditionally underrepresented communities. In the past, it has been difficult for Asian Americans to draw minority-opportunity districts. But the meaningful representation of Asian Americans can still be achieved through drawing constitutionally defensible multi-racial districts and minority-influence districts. Further, obstacles presented in 1991 may no longer be applicable in 2001.

Increasing numbers of academics and political theorists are discussing, and sometimes promoting, the merits of alternative electoral systems. Proportional representation is certainly an egalitarian system. However, it operates best when there are already strong underlying democratic structures, such as public financing of campaigns, access to the vote through the availability of translated ballots and voting instructions, and substantially increased voting rates among people of color. Without these, PR may not be able to deliver the rewards of minority representation that thousands of pages of scholarly law review articles have discussed.²⁶⁶ Nevertheless, PR deserves further examination and, perhaps, experimentation.

In the Northeast, Asian Americans are a rapidly growing segment of the polity. A movement toward Asian American voting rights aims to secure the meaningful representation of Asian Americans. Meaningful representation can restore the legitimacy of the government in the views of those governed.²⁶⁷ The ultimate goal is both expansive and simplistic—to realize our nation's founding principles, to wit, democracy.

266. See *supra* note 198 for a sampling of articles.

267. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("Governments . . . deriv[e] their just powers from the consent of the governed."); A. Leon Higginbotham Jr. et al., *Shaw v. Reno: A Mirage of Good Intentions with Devastating Racial Consequences*, 62 FORDHAM L. REV. 1593, 1637-38 (1994).