Reimagining Democratic Inclusion: Asian Americans and the Voting Rights Act

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INTRODUCTION

This Article begins with several founding observations about the inclusion of racial minorities in twenty-first-century democracy. First, the current legal

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framework for protecting voting rights in the United States has been dramatically destabilized by Supreme Court decisions that reinterpret the protections against minority vote dilution and require rethinking to survive modern challenges. While the Voting Rights Act of 1965 (VRA)[1] was founded with the clear purpose of increasing the voice and power of minority voters through their aggregation in majority-minority districts, in a post-*Shaw v. Reno*[2] and *Miller v. Johnson*[3] world, race is no longer allowed as the "predominant factor" in redistricting decisions. The Supreme Court has suggested alternatives ranging from a wholesale abandonment of racial classification to the adoption of race-neutral criteria that nevertheless satisfy VRA requirements. But a coherent doctrine to guide lower courts' efforts to protect racial minorities constituting communities of common interest has not yet materialized. The result has been what one scholar terms "an existential crisis"[4] and another scholar terms a "doctrinal interregnum" with uncertain results for minority voters and voting rights jurisprudence alike.[5]

At the same time, the nation itself has undergone dramatic changes in the racial composition of its polity and in the complexity and salience of race as a factor in political life. The fact that we now have a "wise Latina" Justice, a southern black conservative Justice, and a biracial President who is commonly identified with "post-racial" politics speaks to the demonstrable change in tenor and substance since the VRA's passage in 1965, even as democratic inclusion remains an enduring challenge. In this Article, we focus on a relatively unexamined constituent of this complex modern racial diversity that illustrates some of the core features that all minority groups face in continuing VRA challenges: Asian Americans.[6] Herein lies the dilemma of Asian American democratic exclusion. In population numbers, Asian Americans have been the fastest growing racial minority group in the United States over the last few decades. As of 2010, a larger share of new immigrants to the United States come from Asia than from any other region of the world. Yet at the same time, Asian Americans are underrepresented in almost every measure of political incorporation, from ballot boxes to the hallowed halls of government. This claim may raise the eyebrows of those who adhere to prevailing perceptions of Asian Americans as a "model minority" and those who can recall high profile instances of Asian Americans in elected and appointed offices—such as Steven Chu, Nikki Haley, Bobby Jindal, Gary Locke, and the six Asian Americans newly elected to

1. Pub. L. No. 89-110, 79 Stat. 445 (codified as amended in scattered sections of 42 U.S.C.).
2. Shaw v. Reno, 509 U.S. 630 (1993).
3. Miller v. Johnson, 515 U.S. 900, 911–27 (1995).
4. Guy-Uriel E. Charles, *Section 2 Is Dead: Long Live Section 2*, 160 U. PA. L. REV. PENNUMBRA 219, 219 (2012).
5. Heather K. Gerken, Rashomon *and the Roberts Court*, 68 OHIO ST. L.J. 1213, 1213 (2007).
6. "Asian Americans" refers to Americans of Asian descent. Unless stated otherwise, the Article refers to naturalized Asian Americans who are eligible to vote in federal elections.

Congress in 2012.[7] Yet widely accepted measures of political incorporation used to assess voter participation and electoral representation reveal that Asian Americans remain stubbornly and conspicuously underrepresented: a situation that impedes the realization of the VRA's promises to eliminate racial discrimination in voting and to promote democratic inclusion.

In the face of apparent political disempowerment, it is curious that Asian Americans have very rarely succeeded in invoking section 2 of the VRA,[8] a legal measure devised specifically to bolster minority political power. Is this because the necessary conditions for a successful political challenge have not yet arisen? Is the problem a structural one implicating institutional design (a legal problem)? Or is it some combination of both, indicating the double harm of a permanent political minority without ability to secure legal redress under the VRA? What, if anything, should be done to strike an appropriate balance between protecting minority interests and majoritarian principles of democracy when election law has moved away from racial complexity as the world has moved toward it?

Social science and legal scholarship suggest that the legal standards used to trigger the special protections of the VRA contain underspecified assumptions about political behavior and oversimplified understandings about racial identity.[9] This Article attempts to mobilize insights about the political behavior of racial minorities in the service of a multidimensional approach toward thinking about legal remedies for democratic exclusion. Our core contention is that the problem of democratic exclusion is multifactorial and requires a multipronged approach to redress. Such an approach includes augmenting available data about the political participation of racial minorities, refining empirical measures to reflect racial politics in a complex, multiracial electorate, and revisiting available remedies in light of a problem with both political and legal dimensions.

Our multistep argument proceeds in several parts. Part I provides a brief background on the VRA's goal of bolstering minority political power. Parts II and

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7. The six officials elected to Congress in 2012 were Ami Berry, Tammy Duckworth, Mazie Hirono, Tulsi Gabbard, Grace Meng, and Mark Takano. *APAICS Congratulates New Asian American and Pacific Islander Members of 113th US Congress*, ASIAN PAC. AM. INST. FOR CONG. STUD. (Nov. 7 2012), http://www.apaics.org/index.php/news_media/apaics_congratulates_new_asian_american_and_pacific_islander_members_o.

8. 42 U.S.C. § 1973 (2006). Little scholarly work has considered why so few section 2 claims have been brought on behalf of Asian Americans. We take the scarcity of claims as a given for purposes of this Article, although the question merits further investigation.

9. Several influential articles describing this difficulty and calling for improved scholarly approaches have issued from law professors who are also social scientists, including Laura E. Gómez, *A Tale of Two Genres: On the Real and Ideal Links Between Law and Society and Critical Race Theory*, *in* THE BLACKWELL COMPANION TO LAW AND SOCIETY 453 (Austin Sarat ed., 2004), Laura E. Gómez, *Looking for Race in All the Wrong Places*, 46 LAW & SOC'Y REV. 221 (2012), Laura E. Gómez, *Understanding Law and Race as Mutually Constitutive: An Invitation to Explore an Emerging Field*, 6 ANN. REV. LAW & SOC. SCI. 487 (2010), and Osagie K. Obasagoie, *Race in Law and Society: A Critique*, *in* RACE, LAW AND SOCIETY 445 (Ian Haney López ed., 2006). Many of the articles in this special issue respond to that call.

III examine the fit, or rather the misfit, of Asian American political attitudes and voting behavior with the VRA's legal standards. Despite the bleak picture of Asian American political participation painted in Part IV, this Article suggests important shortcomings in traditional means of establishing the empirical grounds for leveraging section 2. Part III presents improved data from an original survey that suggests that Asian American voters merit legal protections under the VRA given commonalities that are as relevant as they are overlooked. Thus, Asian Americans constitute a "negative case" of democratic inclusion in the social science sense that the tests designed to identify and remedy political disempowerment fail to recognize the needs of Asian American voters. Part IV proposes a more nuanced approach to understanding both "racial identities" and "political interests"—one that avoids conceptual problems of racial essentialism while respecting genuine between-group and within-group differences revealed in empirical data. It then builds on the "positive case" for Asian American inclusion by presenting evidence of such shared interests in support of an emerging legal doctrine that communities of common interest merit heightened protection under section 2's voting dilution protections. Part V concludes by reflecting on the normative implications of reforming democratic institutions tasked with promoting equal political opportunity and by entertaining objections to the larger undertaking of reforming the VRA section 2 specifically.

I. VOTING RIGHTS ACT, SECTION 2: MINORITY VOTING DILUTION AND PROTECTION OF COMMUNITIES OF COMMON INTEREST

The history of the VRA encapsulates the long march of American democracy toward freedom and equality. Following years of disenfranchising laws in the form of poll taxes, literacy tests, vouchers for good moral character, disqualifications for crimes of moral turpitude, and white primaries, African American voters in formerly Confederate states were almost completely disenfranchised. Congress passed civil rights legislation in 1957, 1960, and 1964 that contained voting-related provisions.[10] Although these laws made it more difficult for states to keep all of their black citizens disenfranchised, the case-by-case litigation proved to be slow and often ineffectual.[11] Formal and informal

10. The 1957 Act created the Civil Rights Division within the Department of Justice and the Commission on Civil Rights; the Attorney General was given authority to intervene in and institute lawsuits seeking injunctive relief against violations of the Fifteenth Amendment. Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (codified as amended in scattered sections of 28 and 42 U.S.C.). The 1960 Act permitted federal courts to appoint voting referees to conduct voter registration following a judicial finding of voting discrimination. Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86 (codified as amended in scattered sections of 18, 20, and 42 U.S.C.). The 1964 Act also contained several relatively minor voting-related provisions. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 and 42 U.S.C.).

11. *See* S. REP. NO. 89-162, pt. 3, at 6 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2508, 2544 ("Experience has shown that the case-by-case litigation approach will not solve the voting

practices kept black registration rates extremely low in Alabama, Louisiana, and Mississippi, and well below white registration rates in the other southern states.[12] These deficits of commitment and implementation were met with renewed mobilization and dauntless non-violent direct action. Perhaps the defining moment of this sustained groundswell occurred on "Bloody Sunday," March 7, 1965, in Selma, Alabama when a detachment of state troopers and local police descended upon peaceful marchers with gas masks, billy clubs, blue hard hats, on horseback. Images of the brutality captured in media images shocked the conscience of a nation and persuaded President Lyndon B. Johnson to take swift action. Within months, with "the outrage of Selma still fresh,"[13] the President called for the attorney general "to write me the *goddamn* best, *toughest voting rights* act that you can devise."[14] With public opinion on their side, Congress and the President overcame Southern resistance to the strengthened legislation that would become the VRA.

The VRA abolished numerous voting practices and procedures designed to disenfranchise African American voters. section 2 is a permanent measure adopted to prohibit practices that deny or abridge the right to vote on the basis of race.[15] It applies nationwide, therefore allowing the Attorney General or private plaintiffs to challenge discriminatory practices in areas of the country not covered by section 5 (a measure that only applies within covered jurisdictions),[16] and proscribes a variety of discriminatory practices. As President Johnson said upon signing the legislation, "This law covers many pages, but the heart of the act is plain. Wherever, by clear and objective standards, States and counties are using regulations, or laws, or tests to deny the right to vote, then they will be struck down."[17] section 5 tends to receive more scholarly attention than section 2 in light of the recurring congressional reauthorizations required for the temporary

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discrimination problem"); *see also* Chandler Davidson, *The Voting Rights Act: A Brief History*, *in* CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 7, 11–13 (Bernard Grofman & Chandler Davidson eds., 1992).

12. *Id.* at 13.

13. Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act, 2 PUB. PAPERS 840, 841 (Aug. 6, 1965) [hereinafter Remarks in the Capitol Rotunda].

14. RANDALL B. WOODS, LBJ: ARCHITECT OF AMERICAN AMBITION 480 (2006) (emphasis added).

15. 42 U.S.C. § 1973 (2006). The Congressional Record of VRA section 2 and its subsequent amendments does not go into great detail about its rationale for including the non-black racial minority groups. More direct information about the inclusion of non-black minorities and language minority groups can be gleaned from histories surrounding the adoption of section 203 during the 1975 Amendments. *See infra* notes 81–109 and accompanying text for more information about the history of electoral exclusion of Asian Americans that justifies their protection under the VRA; *see also* Terry Ao Minnis, *Asian Americans and Redistricting: The Emerging Voice*, 13 J.L. SOC'Y 23, 34–36 (2011) (providing examples of redistricting practices that have diluted the voting power of Asian Americans).

16. 42 U.S.C. § 1973c (2006).

17. Remarks in the Capitol Rotunda, *supra* note 13.

measure and recent Supreme Court litigation.[18] The focus of this Article, however, is on section 2. Many of the cases arising under section 2—once amended in 1975— involve challenges to redistricting on the basis that proposed district lines dilute minority voting power. Section 2's prohibition against discrimination in voting, however, applies more broadly to *any* voting standard, practice, or procedure that results in denial or abridgement of the right of any citizen to vote on account of race, color, or membership in a language minority group. These proscriptions collectively prohibit institutions and rules that result in protected minority group members having "less opportunity than other residents in the district to participate in the political process and to elect legislators of their choice."[19] Thus, the functional goal of section 2 is to ensure procedural fairness, not to guarantee a specific result. Fairness is defined as equal *opportunity* to achieve political representation, not the *result* of proportionate representation.[20] Still, proportionality is often used as an indicator of fairness in redistricting.[21] A rule or redistricting plan is considered unfair if it leads to the systematic exclusion or severe underrepresentation of a protected group; it is considered fair if a minority group could plausibly elect its candidate of choice.[22]

Ultimately, the fairness of a rule in the context of redistricting is an empirical determination guided by factors enumerated in the Senate Report accompanying the VRA and subsequent case law interpreting those requirements.[23] While the Supreme Court in *Mobile v. Bolden* tried to limit the scope of the VRA to intentional discrimination in redistricting (section 5),[24] Congress examined the history of litigation under section 2 since 1965 and clarified in the 1982 renewal to the VRA that section 2 would consider discriminatory effects to run afoul of the statute. Congress established an amended section 2 results test consisting of nine

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18. *Shelby County v. Holder* is being considered in the 2012 Supreme Court term. The case was argued on February 27, 2013, although the Court has not issued an opinion as this Article goes to press. Shelby Cnty. v. Holder, 133 S. Ct. 594 (2012) (mem.), *granting cert. to* 679 F.3d 848 (D.C. Cir. 2012). Updates for this case appear at *Shelby County v. Holder*, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/shelby-county-v-holder (last visited Mar. 31, 2013).

19. White v. Regester, 412 U.S. 755, 766 (1973).

20. H.R. REP. NO. 97-227, at 30, 48 (1982) ("It would be illegal for an at-large election scheme for a particular state or local body to permit a bloc voting majority over a substantial period of time consistently to defeat minority candidates or candidates identified with the interests of a racial or language minority," but "[t]he fact that members of a racial or language minority group have not been elected in numbers equal to the group's proportion of the population does not, in itself, constitute a violation of the section . . . ."); S. REP. NO. 97-417, at 82 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177 (incorporating language from *White v. Regester* into the section 2 definition that acknowledges the need for equal political opportunity, while including provisos against proportional representation); *see also* James F. Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Result Approach from the Voting Rights Act*, 69 VA. L. REV. 633, 691–95 (1983).

21. *See* Johnson v. De Grandy, 512 U.S. 997, 1000 (1994).

22. S. REP NO. 97-417, at 28–29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 207.

23. *Id.*

24. City of Mobile v. Bolden, 446 U.S. 55, 64 (1980) (holding that section 2 of the original VRA was a restatement and codification of the protections afforded by the Fifteenth Amendment).

"Senate factors" to consider in determining whether the "totality of the circumstances" has a discriminatory effect: (1) the extent of any history of official discrimination in the state or political subdivision that touches the right of minority voters to register, vote, or otherwise participate in the democratic process; (2) the extent to which voting in the elections of the state or political subdivision is racially polarized; (3) the extent to which voting in the elections of the state or political subdivision has used unusually large election districts, majority vote requirements, or other voting practices that enhance the opportunity for discrimination; (4) whether minorities have been denied access to a candidate slating process (if there is one); (5) the extent to which minorities in the subdivision bear the effects of discrimination in education, employment, and health, which hinders their ability to participate in the political process; (6) whether political campaigns have been characterized by overt or subtle racial appeals; (7) the extent to which minority group members have been elected to public office; (8) whether there is significant lack of responsiveness on the part of elected officials to particularized needs of the minority group; and (9) whether the policies underlying voting prerequisites are tenuous.[25] The Senate factors were further specified by the Supreme Court in *Thornburg v. Gingles*, which lays out the standards that are still commonly used in voting rights litigation today.[26] Under the *Gingles* test, minorities demonstrate dilution through submergence if they can show the following: (1) they are sufficiently large and geographically compact to constitute a majority in a single-member district; (2) there is political cohesion within the minority group, typically by showing that a significant number of minority group members usually vote for the same candidate; and (3) the white majority votes sufficiently as a block to enable it to usually defeat the minority voters' preferred candidate.[27] As voting rights scholar Samuel Issacharoff has said, "*Gingles* brought the racially polarized voting inquiry into the undisputed and unchallenged center of the Voting Rights Act, making proof of racial bloc voting the touchstone of a section 2 claim of voting dilution."[28]

Shortly after *Gingles,* a flurry of lawsuits arose challenging redistricting within at-large districts and expanding voter protections. The expansion of voting

25. S. REP. NO. 97-417, at 28–29, *reprinted in* 1982 U.S.C.C.A.N. at 206–07.

26. Thornburg v. Gingles, 478 U.S. 30, 36 (1986).

27. *Id.* at 89–90. Justice Brennan derives the three-part *Gingles* test for determining dilution from several scholarly articles, most notably James Blacksher & Larry Menefee, *From* Reynolds v. Sims *to* City of Mobile v. Bolden*: Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 HASTINGS L.J. 1, 58–61 (1982). *Gingles*, 478 U.S. at 47. He did so in lieu of direct reliance on the legislative history of section 2 (which itself distilled case law such as *White v. Regester*, 412 U.S. 755 (1973), and *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc)). *See* S. REP NO. 97-417, at 17–24 (1982), *reprinted in* 1982 U.S.C.C.A.N. at 194–202.

28. SAMUEL ISSACHAROFF ET AL., LAW OF DEMOCRACY 770 (2d ed. 2001) (quoting Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1851 (1989)).

protections, however, stalled in *Shaw*[29] and *Miller*.[30] In *Shaw*, the Court held that race-conscious redistricting raises equality concerns under the Fourteenth Amendment, creating a tension between aggressive VRA enforcement and color-blind equal protection jurisprudence.[31] The Court recognized that state legislatures are often cognizant of race when they create districts, just as they are cognizant of other distinguishing characteristics such as age, economic status, religion, political affiliation, and other demographic factors.[32] But with regard to race, legislators trying to draw fair districts faced a dilemma. Historically, the legal system has played an important role in defining the election laws that in turn condition politics, given the Court's longstanding intervention to clear political lockups and to protect discrete and insular minorities in particular. Now legislators must try to boost minority electoral power in order to comply with the VRA voting dilution provisions and yet they need to avoid running afoul of the Fourteenth Amendment's cautions about racial classifications after *Shaw*. The Supreme Court's concerns about the use of racial classifications in redistricting intensified after *Miller*.[33] In *Miller,* the Court recognized the importance of acknowledging race for fulfilling the VRA and recognized that communities with "common threads of relevant interests" may have a distinctive racial makeup.[34] But the Court then limited the uses of race so that race could not be a "predominant factor" motivating the legislature's districting plan.[35] To show this impermissible use of race after *Miller*, the Court majority said a plaintiff must prove that "the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or *communities defined by actual shared interests*, to racial considerations."[36]

However, the majority opinion does not define the communities or shared interests that merit deference in line-drawing and discusses the notion of communities of common interest (CCI) with reservation:

> [T]he State's districting legislation [cannot] be rescued by mere recitation of purported communities of interest. . . . A State is free to recognize communities that have a particular racial makeup, provided its action is directed toward some common thread of relevant interests. . . . But where the State assumes from a group of voters' race that they "think alike, share the same political interests, and will prefer the same candidates at

29. Shaw v. Reno, 509 U.S. 630 (1993).
30. Miller v. Johnson, 515 U.S. 900 (1995).
31. *Shaw*, 509 U.S. at 653–58.
32. *Id.* at 646.
33. *Miller*, 515 U.S. at 911–27.
34. *Id.* at 920.
35. *Id.* at 918.
36. *Id.* at 916 (emphasis added).

> the polls," it engages in racial stereotyping at odds with equal protection mandates.[37]

At odds with the concern for racial stereotyping in the majority opinion, a dissenting opinion authored by Justice Ginsburg argues for the ongoing relevance of race and ethnicity in the course of considering communities of interest:

> Along with attention to size, shape, and political subdivisions, the Court recognizes as an appropriate districting principle, "respect for . . . communities defined by actual shared interests." The Court finds no community here, however, because a report in the record showed "fractured political, social, and economic interests within the Eleventh District's black population." But ethnicity itself can tie people together, as volumes of social science literature have documented—even people with divergent economic interests. For this reason, ethnicity is a significant force in political life.[38]

In *Miller*, the Court recognized the importance of acknowledging race for fulfilling the VRA but somewhat paradoxically limited the use of race so that it could not be a "predominant factor" in districting.[39] Historically, the legal system has played an important role in defining the voting rights laws that in turn condition politics, given federal courts' longstanding exception to the usual rule of avoiding political controversies in order to clear political lockups and to protect discrete and insular minorities in particular. This role stands in tension with the stance outlined by Justice Kennedy in *Miller*: "[T]he judiciary retains an independent obligation in adjudicating consequent equal protection challenges [to racial gerrymandering claims] to ensure that the State's actions are narrowly tailored to achieve a compelling interest . . . [and] in enforcing the constitutional limits on race-based official action."[40]

Since the fractured *Miller* opinion, the Supreme Court has offered little guidance to legislatures and lower courts regarding how much emphasis to place on race when adopting so-called traditional redistricting principles that include communities of interest.[41] As Stephen Malone indicated in a law review article published shortly after *Miller*,

> On one hand, consideration of race is unconstitutional if it is the predominant factor. On the other hand, the intentional consideration of race and deliberate creation of districts with a certain racial composition

37. *Id.* at 919–20 (quoting *Shaw*, 509 U.S. at 647).

38. *Id.* at 944 (Ginsburg, J., dissenting).

39. *Id.* at 918.

40. *Id.* at 922.

41. See, for example, *Bush v. Vera*, 517 U.S. 952, 966–70 (1996), and *Shaw v. Hunt*, 517 U.S. 899, 906–08 (1996), two Supreme Court cases addressing the required timing of considering communities of interest without addressing the definition or identification of communities of interest.

> may be acceptable if the district genuinely is drawn in the name of recognizing a community of interest.[42]

Until *Miller*, few if any lower courts recognized communities of interest in vote dilution cases.[43] That situation remained largely unchanged after *Miller* given the Supreme Court's opaque reasoning on race and communities of interest. Accordingly, many predicted the demise of CCI in response to these halting judicial developments.[44] However, reflecting the dissenting opinion in *Miller*'s recognition that ethnicity could properly be part of a community of interest

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42. Stephen J. Malone, *Recognizing Communities of Interest in a Legislative Apportionment Plan*, 83 VA. L. REV. 461–62 (1997).

43. District Court decisions preceding *Miller* mostly declined to recognize communities of common interest. For example, in *Burton v. Sheheen*, the District Court of South Carolina noted,

> [W]hile we do not intend to minimize the important historic and cultural differences which exist between blacks and whites, the color of one's skin, in and of itself, does not create a community of interest. Rather, a *community's views on crime, employment, education, police brutality, urban sprawl, or urban blight* may be just as indicative of a community of interest as whether the members of the community are predominantly black or white or the geometric boundaries of the geographical area. Thus, a community of interest may reflect all of these factors and will vary depending on the legislative body under consideration.

793 F. Supp. 1329, 1357 (D.S.C. 1992) (emphasis added) (footnote omitted), *vacated sub nom.* Campbell v. Theodore, 508 U.S. 968 (1993).

In a very early case, *Major v. Treen*, 574 F. Supp. 325 (E.D. La. 1983), the District Court struck down a new district for violating VRA section 2, explaining that the district meant "[d]iscordant communities of interest, those of New Orleans' older, urban core and its surrounding suburban neighborhoods, are joined. . . . [W]hen coupled with the phenomenon of racially polarized voting, this combination of factors operated to minimize, cancel or dilute black voting strength." *Id.* at 353–54 (footnote omitted). In doing so, it cited voting rights scholar Richard Morrill:

> Citizens vote, in part, according to their identification with various interests, for example, religious values, occupation, class, or rural or urban orientation. There is a strong basis in arguing that "effective representation" or influence on the outcome is enhanced by grouping of like interests together. . . . This is constitutionally required only with respect to race. The geographer will also observe that districts which correspond somewhat to nodal regions, a core urban area and its economic or cultural hinderland united by transportation and communications, will have a greater sense of unity, awareness of common problems, and, perhaps, participation than districts which arbitrarily combine disparate areas and ignore patterns of regional identity and loyalty.

Id. at 354 n.37 (quoting RICHARD MORRILL, POLITICAL REDISTRICTING AND GEOGRAPHIC THEORY 23 (1981)). For more pre-*Miller* cases considering communities of interest, see Malone, *supra* note 42, at 467–70. Cain & Miller, *infra* note 112, enumerate thirty-eight section 2 cases concerning non-black minority voters in the years between 1985 and 1997 in the appendix to their book chapter. In Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH J.L. REFORM 643, 656 (2007), Ellen Katz, along with researchers from the University of Michigan's Voting Rights Initiative, lists more than three hundred section 2 cases concerning black and non-black minority voters until 2007 (including lower court cases that would result in Supreme Court litigation in *League of United Latin American Citizens* (LULAC) *v. Perry*, 548 U.S. 399 (2006)), with coding of party attributes and legal claims, plus supplemental discussion in a comprehensive spreadsheet available online at Ellen Katz, *Voting Rights Initiative Database Master List (Section 2 Litigation: 1982–2005),* VOTING RTS. INITIATIVE, http://www.sitemaker.umich.edu/votingrights/files/masterlist.xls (last visited Mar. 31, 2013).

44. *See* Jackson Williams, *The Courts and Partisan Gerrymandering: Recent Cases on Legislative Reapportionment*, 18 S. ILL. U. L.J. 563, 578 (1994) (writing that, after *Shaw v. Reno*, "[t]he Court's rationale in condemning 'racial gerrymandering' meanwhile, may indicate a death-knell for another neutral principle, the community of interest").

analysis, a few circuit courts took notice and found promising evidence of communities of interest in cases concerning Latino and Asian American voters. For example, the Tenth Circuit in *Sanchez v. Colorado* held that Colorado's legislature had failed to recognize a community of interest among Latino voters because, unlike unlawful districts where "individuals were selected *solely* on the basis of their race, raising the specter of a new genre of political apartheid,"[45] plaintiffs attempted to bring together "Hispanic voters who also live in geographically connected areas that *share the same agricultural and rural communities of interest, along with various socioeconomic concerns*."[46] The same concept was recognized by a district court in New York in the context of Asian Americans claiming common interests in the Chinatowns of Manhattan and Brooklyn despite their geographic separation by boroughs in *Diaz v. Silver*.[47] The Fifth Circuit similarly found a community of interest among Asian Americans in *Chen v. City of Houston*, which upheld a redistricting plan because there was both anecdotal and statistical evidence *within* a district—demonstrating similar income, low quality housing, percentage of persons on public relief, occurrence of illiteracy—and specific factors demonstrating that this district's concerns *differed* from those of a planned community elsewhere.[48] Similar factors for demonstrating CCI under state law have succeeded in California and Michigan during the 2011 redistricting cycle.[49]

A promising 2006 Supreme Court case indicates that the community of interest doctrine endures and may have important consequences for non-black racial minorities such as Latinos and Asian Americans. Because the meaning and purpose of the doctrine is under-theorized and largely unsettled, however, the effects of increased usage are hard to predict without greater clarity on CCI jurisprudence. In *League of United Latin American Citizens v. Perry* (*LULAC*), minority voters and interest groups challenged the Texas state legislature's redistricting plan following the 2000 census, on grounds that it violated VRA section 2.[50] The Texas legislature's redistricting plan made changes to two districts in a manner that would protect the Equal Protection Clause and VRA section 2. Most significantly, Texas's Plan 1374C made changes to District 23 (in west Texas) and District 25 (previously inclusive of Houston in south Texas, but now including a north-south strip from Austin to the Rio Grande Valley).[51] Plan 1374C's changes to District 23 served the dual goals of increasing Republican seats and protecting the incumbent Republican against an increasingly powerful

45. Sanchez v. Colorado, 97 F.3d 1303, 1328 (10th Cir. 1996).

46. *Id.* (emphasis added).

47. Diaz v. Silver, 978 F. Supp. 96, 129 n.22 (E.D.N.Y. 1996), *aff'd*, 522 U.S. 801 (1997).

48. Chen v. City of Houston, 206 F.3d 502, 515–16 (5th Cir. 2000).

49. Minnis, *supra* note 15; Karin Mac Donald & Bruce E. Cain, *Community of Interest Methodology and Public Testimony*, 3 U.C. IRVINE L. REV. (forthcoming 2013) (manuscript at 4–6) (on file with U.C. Irvine Law Review).

50. LULAC v. Perry, 548 U.S. 399, 418–62 (2006).

51. *Id.* at 423.

Latino population that threatened to oust him.[52] With regard to District 23 (in west Texas), the Court applied the *Gingles* test and found that all three *Gingles* requirements were satisfied—prong one being satisfied by establishing that Latinos could have had an opportunity district if its lines were not altered, making the fact that the group did not win an election in 2002 not determinative and recognizing the growing Latino power since—such that the changes to District 23 undermined the progress of Latino voters, who were becoming increasingly politically active and cohesive.[53]

This constituted voting dilution. Texas's new District 25 (in south Texas) included a new Latino majority-minority by joining Houston to a north-south strip from Austin to the Rio Grande Valley.[54] While the new District 25 meant to offset the loss of Latino political power in the Latino opportunity district (District 23), the Supreme Court held it did not successfully offset the loss to Latino communities because the communities at the opposite ends of District 25 have divergent "needs and interests" owing to "differences in socio-economic status, education, employment, health, and other characteristics."[55] Consequently, the Court concluded that the proposed redistricting plan violated the VRA's voting dilution prohibition. Under section 2, Texas diluted minority votes "if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election . . . are not [as] equally open to . . . members of [a racial group as they are to] other members of the electorate."[56] The legislative history of section 2 identifies factors that courts can use in interpreting its "totality of circumstances" standard. These factors include the state's history of voting-related discrimination, the extent to which voting is racially polarized, and the extent to which the state has used voting practices or procedures that tend to enhance the

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52. *Id.* at 424–25.

53. *Id.* at 425–42. More of the relevant factual background in *LULAC*:

> Texas has a long, well-documented history of discrimination that has touched upon the rights of African-Americans and Hispanics to register, to vote, or to participate otherwise in the electoral process. . . . The history of official discrimination in the Texas election process—stretching back to Reconstruction—led to the inclusion of the State as a covered jurisdiction under [s]ection 5 in the 1975 amendments to the Voting Rights Act.

Id. at 439–40 (quoting Vera v. Richards, 861 F. Supp. 1304, 1317 (S.D. Tex. 1994)). Against this background, the Latinos' diminishing electoral support for [incumbent Governor] Bonilla indicates their belief that he was "unresponsive to the particularized needs of the members of the minority group." *Id.* at 423. In essence, the State took away the Latinos' opportunity because Latinos were about to exercise it. This bears the mark of intentional discrimination that could give rise to an equal protection violation. Even if we accept the District Court's finding that the State's action was taken primarily for political, not racial, reasons, the redrawing of the district lines was damaging to the Latinos in District 23. The State not only made fruitless the Latinos' mobilization efforts but also acted against those Latinos who were becoming most politically active, dividing them with a district line through the middle of Laredo. *Id.* at 440.

54. *Id.* at 423.

55. *Id.* at 502, 512.

56. 42 U.S.C. § 1973(b) (2006).

opportunity for discrimination against the minority group.[57] Another relevant consideration is whether the number of districts in which the minority group forms an effective majority is roughly proportional to its share of the population in the relevant area.[58] The *LULAC* Court acknowledged that section 2 does not expressly forbid the creation of a non-compact majority-minority district such as District 25 *if* there is evidence of "communities of common interest" that ought to be grouped into a single district.[59] But it declared that the 300-mile gap between the two Latino communities *plus* a similarly large gap between the needs and interests of the two groups in District 25 made them different "communities of interest."[60]

The outcome in *LULAC* has revived recognition of communities of interest analysis in section 2 minority voting dilution cases, even if it has not clarified the reasoning used to identify them or the means by which it could be implemented within the existing legal framework. In her introductory essay to an Ohio Law School symposium organized in the aftermath of *LULAC*, Professor Heather Gerken writes that legal scholars generally recognize the importance of CCI for racial analysis under section 2 but they significantly differ in their readings of the *LULAC* decision: all scholars agree that the decision established a "floor and

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57. S. REP. NO. 97-417, at 28–29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206–07.

58. Johnson v. De Grandy, 512 U.S. 997, 1010 n.9 (1994).

59. *LULAC*, 548 U.S. at 430–31. Judicial recognition of community of interest dates back at least as far as *Bush v. Vera*, 517 U.S. 952, 999 (1996). Three years later, the Supreme Court in *Hunt v. Cromartie* upheld a majority-minority district with a concentration of black voters as long as the intent behind its creation was political rather than racial. Hunt v. Cromartie, 526 U.S. 541, 551–54 (1999). "Thus, the Court inadvertently gave the nod to the concept of creating a district based on a community of interest rather than its racial makeup, giving proponents an opportunity to draw majority-minority districts in which minorities could predominate." Walter C. Farrell, Jr. & James H. Johnson, Jr., *Minority Political Participation in the New Millennium: The New Demographics and the Voting Rights Act*, 79 N.C. L. REV. 1215, 1234 (2001). While the *LULAC* Court does not cite it directly, the same concept was recognized in the context of an Asian American redistricting challenge by the district court in *Diaz v. Silver*, 978 F. Supp. 96, 129 n.22 (E.D.N.Y. 1996), *aff'd*, 522 U.S. 801 (1997).

> Before *Bush v. Vera*, the Supreme Court in *Miller v. Johnson* discusses CCI with reservation:
>
> [T]he State's districting legislation [cannot] be rescued by mere recitation of purported communities of interest. The evidence was compelling "that there are no tangible 'communities of interest' spanning the hundreds of miles of the Eleventh District." A comprehensive report demonstrated the fractured political, social, and economic interests within the Eleventh District's black population. It is apparent that it was not alleged shared interests but rather the object of maximizing the district's black population and obtaining Justice Department approval that in fact explained the General Assembly's actions. A State is free to recognize communities that have a particular racial makeup, provided its action is directed toward some common thread of relevant interests. "*[W]hen members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes*." But where the State assumes from a group of voters' race that they "think alike, share the same political interests, and will prefer the same candidates at the polls," it engages in racial stereotyping at odds with equal protection mandates.
>
> Miller v. Johnson, 515 U.S. 900, 919–20 (1995) (emphasis added) (footnote omitted) (citations omitted) (quoting Shaw v. Reno, 509 U.S. 630, 646–47 (1993)).

60. *LULAC*, 548 U.S. at 432.

ceiling for section 2 claims, though they differ as to how high the ceiling and how low the floor."[61] Moreover, section 2 cases involving communities of interest after 2007 often arise in the context of two or more minority groups living in close proximity and desiring to form a majority-minority district that surpasses the *Gingles* requirements, further complicating the challenges of applying CCI doctrine to complex fact patterns in an increasingly diverse modern society.[62]

This Article is meant to join in the chorus of voices exploring the implications of CCI for racial equality in voting. It builds, in some respects, on Professor Daniel Ortiz's influential analysis of the racial implications of the *LULAC* opinion in *Cultural Compactness*.[63] Ortiz notes Justice Kennedy's discomfort in *LULAC* with Texas's District 25, which combines poor rural Hispanics along the Rio Grande and wealthier urbanites from Austin with "differences in socio-economic status (SES), education, employment, health, and other characteristics."[64] As a result of his discomfort, Ortiz coins the term "cultural compactness" to describe Kennedy's reconfiguration of the *Gingles* "compactness" requirement to focus on culture, rather than geography or race per se.[65] Ortiz asks what effect this logic will have in minority vote dilution cases.[66] If the Court were to require that plaintiffs establish geographical, political, and cultural compactness, section 2 claims would be much more difficult. But the Court makes clear that this rigid form of compactness is not the literal requirement. "We emphasize," it states, that "it is the enormous geographical distance separating Austin and the Mexican-border communities, *coupled with* the disparate needs and interests of these populations—*not either factor alone*—that renders District 25 non-compact for section 2 purposes."[67] In this view, either geographical or cultural compactness alone is sufficient to satisfy this first threshold requirement. Ortiz concludes, "This way of reinterpreting compactness, if the Court is serious about it, would open up rather than close down [s]ection 2."[68] Similarly, Professor Lisa Kelly argues that "the perpetuation of historical racial segregation and other forces emanating from the racial history of the United States mean that race and place have been and continue to be inextricably

61. Gerken, *supra* note 5.

62. An illustrative list of cases raising coalition districting claims appears in note 254.

63. Daniel R. Ortiz, *Cultural Compactness*, 105 MICH. L. REV. FIRST IMPRESSIONS 48, 50 (2006).

64. *Id.* at 49–50. From Justice Kennedy's decision in *LULAC*:

> Legitimate yet differing communities of interest should not be disregarded in the interest of race. The practical consequence of drawing a district to cover two distant, disparate communities is that one or both groups will be unable to achieve their political goals. Compactness is, therefore, about more than "style points," it is critical to advancing the ultimate purposes of § 2, ensuring minority groups equal "opportunity . . . to participate in the political process and to elect representatives of their choice."

LULAC, 548 U.S. at 434 (citation omitted) (quoting 42 U.S.C. § 1973(b) (2006)).

65. Ortiz, *supra* note 63.

66. *Id.*

67. *Id.* (emphasis added) (quoting *LULAC*, 548 U.S. at 402).

68. *Id.*

intertwined."[69] Resisting the narrowing approach of some scholars,[70] she argues that the importance of race also transcends place, creating a community that has little to do with geography and everything to do with the larger political and cultural community of color. This larger community generally recognizes the reality of racism, the pleasure of a common culture, and the need to act together to effectuate common interests and to remedy common problems that repeat themselves across geographical divides."[71]

Beyond its implications for the *Gingles* compactness requirement, this Article claims that the consequences of redefining cultural compactness extend to a broader inquiry about the relevance of racial difference within minority groups to section 2 analysis. Ortiz begins this task by broadening his initial inquiry beyond the compactness prong of *Gingles*:

> Although the *Shaw* cases worry about the differences *between* groups while *LULAC* worries about the differences *within* groups, they share an animating concern—what some have called "race essentialism." They just worry about it, so to speak, from different directions. *Shaw* says we should not act as if people of different racial groups are very different from each other—in this context, that Latinos and Anglos think and act differently. *LULAC*, on the other hand, says that we should not assume that people in the same racial group are all really the same—here, that all Latinos have the same interests. Even if racial identity cashes out politically—that is, Latinos of different stripes vote similarly—we must still prove that they are culturally homogeneous.[72]

In essence, Ortiz thinks that if we take the Court's anti-essentialism seriously, much of existing equal protection doctrine might change for the worse. Such in-group diversity is real, of course, but "legally recognizing it may be unfortunate to members of the group itself . . . [the] danger is that increased sensitivity to diversity within racial and gender groups might lead courts to question the salience of traditional racial and gender categories."[73] Courts might lose their stomach for the whole enterprise of racial analysis, if forced to engage in fine-tuned thinking about difference.[74] The undesirable result: anti-essentialism becomes a tool for those least sensitive to true diversity, rather than part of the effort to empower "new" racial minorities. However, this dismantling of race is not the only path

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69. Lisa A. Kelly, *Race and Place: Geographic and Transcendent Community in the Post-Shaw Era*, 49 VAND. L. REV. 227, 234–35 (1996).

70. *See* Richard H. Pildes, *The Decline of Legally Mandated Minority Representation*, 68 OHIO ST. L.J. 1139, 1140 (2007).

71. Kelly, *supra* note 69, at 235.

72. Ortiz, *supra* note 63.

73. *Id.*

74. As Chief Justice Roberts stated in his dissenting opinion in *LULAC v. Perry*, "I do not believe it is our role to make judgments about which *mixes* of minority voters should count for purposes of forming a majority in an electoral district. . . . It is a sordid business, this divvying us up by race." LULAC v. Perry, 548 U.S. 399, 511 (2006) (Roberts, J., dissenting).

available to the Court. Instead of throwing "race" out altogether, courts could replace "race" with something meaningful and workable. Scholars could help by providing a more nuanced exploration of culture, for example, that advances understanding of modern diversity and identifies more fine-grained dimensions of group identity (which may still correlate with race).

Existing scholarly attempts to further CCI analysis have been more conceptual than concrete and they differ widely. As previously explained, Gerken quips that scholars' "interpretations of *LULAC* are so different that at times one wonders whether they were reading the same opinion."[75] Professor Pam Karlan, like Ortiz in *Cultural Compactness*, presents an optimistic reading of *LULAC*. She indicates that *LULAC* revives the possibility that racial classifications used to empower Latino voters can serve as a compelling interest—that is, she sees the decision revitalizing a theory of representation rights under section 2.[76] She sees *LULAC* as an effort to take seriously districts drawn to empower racial minorities by making sure they actually work in practice, rather than an attempt to cabin race-conscious districting. While Professor Guy-Uriel Charles claims that representation—not race per se—is the majority's primary concern in *LULAC*, he says that if the decision *were* about race, it was defending a nuanced concept of anti-essentialism that focuses on the authenticity of racial representation: "Justice Kennedy is not deciding between race consciousness and race-blindness; rather, the choice is between token racial representation and authentic racial representation."[77] Professor Rick Pildes offers the most pessimistic reading of *LULAC* as a race case. He reads Kennedy's majority opinion as a continuation of *Shaw*'s message that the Court is "increasingly troubled by—indeed, more and more resistant to—the very concept of minority vote dilution."[78] Consequently, Pildes interprets cultural compactness as a constraint rather than an addendum to the *Gingles* requirement of geographical compactness: "*LULAC* now adds [to *Shaw*] the constraint that such districts must be, not only geographically compact, but ideologically coherent—and most importantly, coherent in a deeper or broader sense than that minority voters share a preference for minority candidates pitted against majority ones."[79]

We sidestep some of these conceptual disagreements in order to take seriously the task of generating a meaningful, workable notion of cultural compactness that serves to demonstrate political cohesion where race itself cannot. We do much of this in the context of Asian American voters. Because much of the CCI dialogue occurred in the immediate aftermath of *LULAC*, the

75. Gerken, *supra* note 5, at 1215.

76. Pamela S. Karlan, *New Beginnings and Dead Ends in the Law of Democracy*, 68 OHIO ST. L.J. 743, 760–61 (2007).

77. Guy-Uriel E. Charles, *Race, Redistricting, and Representation*, 68 OHIO ST. L.J. 1185, 1193 (2007).

78. Pildes, *supra* note 70; *cf.* Kelly, *supra* note 69; Charles, *supra* note 77.

79. Pildes, *supra* note 70, at 1145.

implications for Latino voters are considered far more in number than for Asian American voters. Even so, the CCI issues are just as important for Asian Americans. At least eight cases raising section 2 challenges directly concern Asian American voters, and many of them raise issues of cultural commonality.[80] And indeed, in the context of Asian Americans—a racial designation comprised of numerous subethnic groups such as Korean American, Chinese American, Filipino American, Vietnamese American, and Indian Americans—government recognition of in-group cultural heterogeneity and cohesion may be a key component of increasing democratic inclusion for the group as a whole. The pan-ethnic classification is widely used in government. Congress, upon passing the VRA, used the designation when describing the historical justification for including Asian Americans under the legislation: "Discrimination against Asian Americans is a well known and sordid part of our history."[81] The executive branch similarly used the broad designation when documenting the continuing existence of voting discrimination against Asian Americans: "[R]edistricting plans have diluted Asian American voting strength by fragmenting communities into multiple districts."[82] State and local governments have also recognized redistricting practices that disadvantage Asian American voters in the 2011 redistricting cycle,

80. Ellen Katz's master list codes seven cases as including Asian American voters: Growe v. Emison, 507 U.S. 25 (1993), Debaca v. County of San Diego, No. 92-55661, 1993 WL 379838 (9th Cir. Sept. 27, 1993), Brewer v. Ham, 876 F.2d 448 (5th Cir. 1989), Latino Political Action Comm. v. City of Boston, 784 F.2d 409 (1st Cir. 1986), Common Cause v. Jones, No. 01-03470 SVW(RZX), 2002 WL 1766436 (C.D. Cal. Feb. 19, 2002), Balderas v. State, No. 6:01CV158, 2001 WL 34104833 (E.D. Tex. Nov. 28, 2001), and West v. Clinton, 786 F. Supp. 803 (W.D. Ark. 1992). *See* Katz, *supra* note 43. Texas v. United States, No. 11-1303 (TBG-RMC-BAH), 2012 WL 3671924 (D.D.C. Aug. 28, 2012) also involves Asian American voters and arises after the period documented by Katz.

81. S. REP. NO. 94-295 at 28–30, 28 n.21 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 794–96. While Congress does not elaborate on that history in great detail, historians and race scholars have shown that there is indeed a verifiable history of legal exclusion from citizenship and voting. *See, e.g.*, ERIKA LEE, AT AMERICA'S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA (2003); IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996) (analyzing the Supreme Court's categorization of Asian immigrants as white in light of racial prerequisites to citizenship that included only black-white categories); MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA (2004); LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW (1995). Some of these difficulties specifically involve redistricting practices that disadvantage Asian American voters. *See, e.g.*, Minnis, *supra* note 15, at 25 (describing difficulties in Chicago's Chinatown). Language barriers have also functioned to disenfranchise otherwise eligible Asian American voters. *See, e.g.*, ANGELO N. ANCHETA, RACE, RIGHTS, AND THE ASIAN AMERICAN EXPERIENCE (2d ed. 2006). This history is less often mentioned in mainstream histories of the Voting Rights Act than the story of Selma, but it is nevertheless relevant to understanding democratic exclusion.

82. U.S. COMM'N ON CIVIL RIGHTS, CIVIL RIGHTS ISSUES FACING ASIAN AMERICANS IN THE 1990S 159–61 (1992).

often in the context of coalition districts or assertions of communities of common interest.[83]

Having presented the background of minority vote dilution and the concept of cultural compactness as a supplement to section 2 racial analysis, Part II presents more information about modern racial demographics and their implications for political cohesion amidst culturally defined groups such as Asian American voters.

II. DEMOCRATIC INCLUSION AND DEMOGRAPHIC DIVERSITY

As Part I shows, the VRA was intended primarily to address a specific group (African Americans), a specific dyadic relation (blacks and whites), and a specific set of historical and ongoing practices that excluded one group to the advantage of another.[84] The black-white paradigm that results from the VRA's origins is the default relation in VRA scholarship. Times have changed. By virtue of historical happenstance, passage of the VRA coincided with changes to immigration policy that would dramatically change the profile of racial minorities. Part II expands on the legislative history of the VRA by briefly recounting the increasing demographic diversity since passage of the 1965 VRA. It then considers the implications of this elaborated history for understanding modern challenges of democratic inclusion, particularly those of Asian American voters. In light of these changing circumstances, Part II demonstrates the growing consensus that yardsticks for evaluating whether voting rights are secured or violated are somewhat stuck in time and nonresponsive to social, political, and legal changes.

A. Advancing Understanding of Modern Diversity

Prior to the mid-1960s, the American electorate was predominantly black and white, with the primary challenge being the incorporation of black voters.[85] The number of Asian American voters was comparatively small, and those present were largely native born, due to decades of immigration restrictions preventing the entrance of Asians into the United States. Since the Immigration and Nationality Act was reformed in 1965,[86] America's racial landscape has been radically transformed both in numbers and in the nature of intergroup relations.[87] The

83. Recent examples of Asian American voters presenting evidence of CCI under state law and in local elections arise in New York, California, and Michigan. *See* Minnis, *supra* note 15, at 37–42; Mac Donald & Cain, *supra* note 49.

84. The VRA is nearly unassailable as a successful policy vis-à-vis the goal of bringing African Americans into politics. *See, e.g.*, CONTROVERSIES IN MINORITY VOTING, *supra* note 11; THE FUTURE OF THE VOTING RIGHTS ACT (David L. Epstein et al. eds., 2006).

85. *See supra* Part I.

86. Immigration and Nationality Act of 1965 (Hart-Cellar Act), Pub. L. No. 89-236, 79 Stat. 911.

87. On post-1965 demographic changes see, for example, FRANK D. BEAN & GILLIAN STEVENS, AMERICA'S NEWCOMERS AND THE DYNAMICS OF DIVERSITY 2, 4–5 (2003), and

changed policies resulted in a shift from a nation in which immigration was carefully controlled by national quotas and roughly 90% of immigrants came from Europe to a nation in which immigration rates are booming and about 85% came from Latin America and Asia.[88] Today, Latinos are the largest nonwhite minority group in America.[89]

Asian Americans remain somewhat less in the limelight, but their population change too is impressive. As a group, Asian Americans have grown in size from 1% of the total U.S. population in the 1970 census[90] to about 6% in the most recent 2010 census.[91] Asian Americans have been the fastest growing racial group in the last two decennial censuses.[92] Since 2010, Asians have surpassed Latinos as the single largest group contributing to America's continuing immigrant population.[93] Asian Americans are projected to grow to 9% of the U.S. population before midcentury.[94]

A further dimension of modern diversity is the rising numbers and emerging recognition of Americans of multiple racial and ethnic backgrounds. Although intermarriage rates remain lower than one would expect based on random probability, exogamy is clearly increasing in the United States. As recently as the 1980 Census, less than 7% of all new marriages involved spouses of different races/ethnicities;[95] by the most recent 2010 Census, that rate had more than doubled to 15%.[96] Rates of exogamy, moreover, are higher for Asian Americans (28% of Asian newlyweds marry someone of a different race, compared to 26% of Latinos, 17% of African Americans, and only 9% of whites).[97]

In recognition of this trend and the problems entailed in forcing Americans of mixed backgrounds to choose between lineages and family histories, the 2000 census introduced a "mark one or more" mode of multiracial identification.[98] While the proportion of Americans who opt for multiple identification remains

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JENNIFER LEE & FRANK D. BEAN, THE DIVERSITY PARADOX: IMMIGRATION AND THE COLOR LINE IN TWENTY-FIRST CENTURY AMERICA 121–37 (2010).

88. *Id.* at 12.

89. *Id.* at 56.

90. *Id.* at 12.

91. *The Rise of Asian Americans*, PEW RESEARCH CENTER 2 (2012), http://www.pewsocialtrends.org/files/2013/01/SDT_Rise_of_Asian_Americans.pdf.

92. *Id.* at 1.

93. *Id.*

94. LEE & BEAN, *supra* note 87, at 12. On Asian American population trends, an excellent overview can be found at *The Rise of Asian Americans*, *supra* note 91.

95. Wendy Wang, *The Rise of Intermarriage*, PEW RESEARCH CENTER 5 (2012), http://www.pewsocialtrends.org/files/2012/02/SDT-Intermarriage-II.pdf.

96. *Id.*

97. *Id.* at 8; *see also* LEE & BEAN, *supra* note 87, at 87; RACHEL F. MORAN, INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE (2001).

98. *See* LEE & BEAN, *supra* note 87; THE NEW RACE QUESTION: HOW THE CENSUS COUNTS MULTIRACIAL INDIVIDUALS (Joel Perlmann & Mary C. Waters eds., 2002).

somewhat low (2.4% in 2000 and 2.9% in 2010),[99] the multiracial population is increasing, especially in select demographic quarters. Among youths, there has been a 50% increase in the multiracial population since the 2000 census.[100] Multiracial identification is also especially high among Asian Americans, with 15% of the Asian American "alone or in combination" population in the 2010 census also identifying with another racial or ethnic group.[101] In this contemporary scene, another challenge to the full realization of voting rights is the incorporating recently arrived and naturalized voters.

While the emergence of CCI jurisprudence detailed in Part I and the post-2000 census accounting for multiracialism detailed in Part II are both promising developments, the VRA remains hamstrung by the fact that the original legislation was not written with the scale or tenor of modern diversity in mind. Passage of the Hart-Cellar Act in 1965,[102] which eliminated immigration restrictions on the basis of national origin, resulted in an unprecedented and unanticipated increase in diversity. The initial increase in Asian immigration was compounded by family reunification policies that increased the number of immigrants admitted exponentially.[103] That the resulting diversity was unprecedented is well documented, but that it was unanticipated is less so.[104] However, the emerging consensus is that proponents of immigration reform in 1965 intended the Hart-Cellar provision to be primarily a symbolic gesture.[105] Indeed, as President Lyndon B. Johnson announced during the legislative debates leading up to enactment "This is not a revolutionary bill. It will not reshape the structure of our daily lives."[106] Commenting specifically on Asians and Pacific Islanders in testimony

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99. Susan Saulny, *Census Data Presents Rise in Multiracial Population of Youths*, N.Y. TIMES, Mar. 25, 2011, at A3.

100. *Id.*

101. KAREN R. HUMES ET AL., U.S. CENSUS BUREAU, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010, at 8 (2011), *available at* http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf.

102. Immigration and Nationality Act of 1965 (Hart-Cellar Act), Pub. L. No. 89-236, 79 Stat. 911.

103. The chain migration mechanism that led to a rapid increase of the Asian population under family reunification provisions is explained in DAVID M. REIMERS, STILL THE GOLDEN DOOR: THE THIRD WORLD COMES TO AMERICA 92–99 (2d ed. 1992).

104. HUGH DAVIS GRAHAM, COLLISION COURSE: THE STRANGE CONVERGENCE OF AFFIRMATIVE ACTION AND IMMIGRATION POLICY IN AMERICA 95–103 (2002) (explaining how immigration policies and race-based affirmative action policies came into conflict with each other and resulted in policy contradictions that were widely resented by civil rights advocates); *cf.* Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. REV. 273, 303–17 (1996) (challenging the conventional view that Congress neither anticipated, nor intended, to diversify America by lifting racial quotas and instead concluding that Congress deliberately rejected the idea of a white America and welcomed the diversification that it knew would result from eliminating racial discrimination).

105. Jennifer Hochschild & Traci Burch, *Contingent Public Policies and Racial Hierarchy: Lessons from Immigration and Census Policies*, *in* POLITICAL CONTINGENCY: STUDYING THE UNEXPECTED, THE ACCIDENTAL, AND THE UNFORESEEN 138, 138–64 (Ian Shapiro & Sonu Bedi eds., 2007).

106. Remarks at the Signing of the Immigration Bill, Liberty Island, New York, 2 PUB. PAPERS 1037, 1038 (Oct. 3, 1965).

before Congress in 1964, Attorney General Robert Kennedy remarked, "I would say for the Asia-Pacific triangle . . . 5,000 immigrants would come in the first year, but we do not expect that there would be any great influx after that."[107] Both men, it turned out, were incorrect. Given that Asians were not seen as a primary beneficiary of the group, they were unlikely to have been at the forefront of the minds of legislators during passage of the VRA the same year.

Exacerbating the historical omission of Asian Americans and other racial minorities who predominantly migrated after 1965 in its remedial voting inequality legislation,[108] the government has struggled to keep pace with demographic change. Census efforts have often undercounted Asian Americans as a result of language barriers and difficulties locating and accounting for nontraditional family structures. Nevertheless, bureaucratic efforts to make this increasingly diverse society legible through standardization and commensuration eventually resulted in Asian Americans having an established place in America's "ethnoracial pentagon."[109] The basis of including Asian Americans as an official racial minority group in civil rights legislation is premised on shared experiences of racial discrimination and a proximate place of national origin.

B. Adapting the Black-White Paradigm to Modern Diversity

The black-white dyadic framework underlying the VRA is certainly not without merit. To the contrary, it is rooted in a desire to remedy an egregious history of voting discrimination. With this goal in mind, it has been remarkably successful in improving democratic participation for African Americans.[110] As a framework, it has also been immensely useful in generating research that sheds empirical light on the ways that racial markers can differentially define the everyday realities and opportunities of African Americans and whites across a range of indicia from income and wealth disparities, intergenerational upward mobility, and mass imprisonment to minority political participation and electoral competition.[111]

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107. *Hearing on H.R. 7700 Before the Subcomm. No. 1 of the H. Comm. on the Judiciary,* 88th Cong. 418 (1964) (statement of Robert F. Kennedy, Att'y Gen. of the United States).

108. *See supra* Part I.

109. *See* DAVID A. HOLLINGER, POSTETHNIC AMERICA: BEYOND MULTICULTURALISM 19–20 (1995) (discussing Revised Directive 15 classification).

110. More data on this to come, *infra* Part III. This is not to say that political participation among African Americans is paralleled by equivalent gains in other realms of life, nor to deny that Asian Americans have made comparatively greater strides in non-political fora.

111. On black-white differences in earnings and wealth, see, for example, MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH 204 (2d ed. 2006). On intergenerational upward mobility and residential context, see Patrick Sharkey, *The Intergenerational Transmission of Context*, 113 AM. J. SOC. 931 (2008). On differential rates of mass incarceration, see BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 17, 27 (2006). On minority political participation and electoral competition, see, for example, Lawrence Bobo & Franklin Gilliam, *Race, Sociopolitical*

In comparison, this dyadic framework and the attendant theories on race that derive from it has worked in fits and starts for "other" racial minority groups, such as Latinos and Asian Americans.[112] Moreover, scholars like Professor Juan Perea allege that the dominance of a "black/white binary paradigm" of race scholarship threatens to render the specificity of discrimination against other minority groups opaque, if not altogether occluded.[113] To be clear, we are not pushing an observation about the limitations of a binary view of race to a conclusion about the irrelevance of black-white discrimination or about whether Latinos and Asian Americans will ultimately come to ally with either blacks or whites within a fixed black-white binary view of race.[114] Rather, our main aim here is simply to identify the ways—conceptually and empirically—that our understanding of the challenges facing nonblack minority voters is limited by such a binary view.

Conceptually, the black-white paradigm in voting rights fails to consider that Asian Americans occupy a different place in racial politics than African Americans.[115] That is, they are not just another numerical minority as compared to

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Participation, and Black Empowerment, 84 AM. POL. SCI. REV. 377, 381–83 (1990), and PAUL FRYMER, UNEASY ALLIANCES: RACE AND PARTY COMPETITION IN AMERICA 8–11 (1999).

112. The term "other minorities" is coined by Bruce Cain and Ken Miller among others to explain what happens when black-white paradigms are applied to Latinos and Asian Americans. Loosely, it refers to non-black minorities. *See* Bruce E. Cain & Kenneth P. Miller, *Voting Rights Mismatch: The Challenge of Applying the Voting Rights Act to "Other Minorities," in* VOTING RIGHTS AND REDISTRICTING IN THE UNITED STATES 141, 145–46, 161 (Mark E. Rush ed. 1998).

113. Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CALIF. L. REV. 1213, 1215 (1997); *see also* Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 1 ASIAN L.J. 1, 27 (1994); Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957, 959 (1995); Janine Young Kim, *Are Asians Black?: The Asian-American Civil Rights Agenda and the Contemporary Significance of the Black/White Paradigm*, 108 YALE L.J. 2385, 2386 (1999).

114. Notably, scholars like Herbert Gans and Frank Bean have noted that one possible outcome of the racial and ethnic diversity that is currently being negotiated in America is a form of "black exceptionalism," in which the conditions of African Americans are distinct (and distinctly dispossessed) compared not only to whites, but also to Asian Americans and Latinos. *See* Frank D. Bean et al., *The New U.S. Immigrants: How Do They Affect Our Understanding of the African American Experience*?, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 202, 215 (2009); Herbert J. Gans, *The Possibility of a New Racial Hierarchy in the Twenty-First-Century United States*, *in* THE CULTURAL TERRITORIES OF RACE: BLACK AND WHITE BOUNDARIES 371, 372–86 (Michele Lamont ed. 1999).

115. For more on Asian American politics, see generally Wendy K. Tam Cho & Albert H. Yoon, *Pan-Ethnicity Revisited: Asian Indians, Asian American Politics, and the Voting Rights Act*, 10 UCLA ASIAN PACIFIC AM. L.J. 10 (2005) (discussing the pan-ethnicity of Asian Americans and whether the Voting Rights Act provides any aid toward Asian American political empowerment), Claire Jean Kim & Taeku Lee, *Interracial Politics: Asian Americans and Other Communities of Color*, 34 PS: POL. SCI. & POL. 105 (2001) (discussing the interactions between Asian Americans and other communities of color), Claire Jean Kim, *The Racial Triangulation of Asian Americans*, 27 POL. & SOC'Y 105 (1999) (discussing the racial triangulation of Asian Americans in relation to blacks and whites), Pei-te Lien, *Race, Nativity, and the Political Participation of Asian and Other Americans*, *in* THE POLITICS OF INCLUSION AND EXCLUSION: IDENTITY POLITICS IN TWENTY-FIRST CENTURY AMERICA 25 (David F. Ericson ed., 2011) (discussing voting participation of foreign-born citizens and the transformation of the

majority voters. Their attributes and behaviors as voters differ, such that they are systematically disadvantaged by majoritarian politics. Professors Bruce Cain and Ken Miller set forth basic assumptions underlying the VRA's models of racial politics for black, Latino, and Asian voters in Table 1.[116] The first labeled column describes VRA assumptions that sync with African American voters' historical experience. The subsequent columns capture in general terms how well those assumptions travel as characterizations about Latino and Asian American voters respectively. As Cain and Miller explain, "The first, and in many ways most central, premise is that a protected group has a large (that is, a majority or super majority) core population that is eligible to vote but has been prevented from doing so by institutional barriers."[117]

Table 1: Cain and Miller's Comparison of Group Heterogeneity[118]

	Black	**Latino**	**Asian**
Size	Relatively stable population share; little CVAP-population gap.	Rapidly growing population share; large CVAP- population gap.	Rapidly growing population share; large CVAP-population gap (except Japanese).
Dispersion	High segregation and concentration except in rural South.	Variable concentration levels.	Generally low concentration.
Coherence	High coherence and few nationality differences.	Weak pan-ethnic coherence; moderately high ethnic coherence based on partisanship.	Weak pan-ethnic coherence; moderate to low ethnic coherence with large partisan divisions.
Polarization	High levels in many areas.	Variable levels of white bloc voting.	High levels of white support.

CVAP = Citizen voting age population

American electorate), Paul Ong & Don T. Nakanishi, *Becoming Citizens, Becoming Voters: The Naturalization and Political Participation of Asian Pacific Immigrants*, *in* THE STATE OF ASIAN PACIFIC AMERICA: REFRAMING THE IMMIGRATION DEBATE 275 (Bill Ong Hing & Ronald Lee eds., 1996) (discussing the naturalization and political participation rates of Asian Americans), and Carol J. Uhlaner et al., *Political Participation of Ethnic Minorities in the 1980*s, 11 POL. BEHAV. 195 (1989) (discussing the amount of political participation by members of ethnic minority groups and the factors that affect the level of their activity).

116. Adapted from Cain & Miller, *supra* note 112. Each assumption is explained at 149–54, and its inapplicability is explained at 155–61.

117. *Id.* at 148.

118. *Id.* at 149.

The first and second rows of the table describe basic assumptions about group size and dispersion. While sufficient size and dispersion are relatively easy to prove for African American voters (notwithstanding below-average levels of education/income and high residential mobility that depress voting rates), it is trickier for Latino and Asian American communities who face higher-than-average rates of non-citizenship and age ineligibility, which create large discrepancies between their share of the population and their share of the citizen voting age population (CVAP) and create the impression of an insufficiently large size for *Gingles*.[119] As Cain and Miller note, this CVAP gap for a longer-term group like Japanese Americans is significantly smaller than it is for newer, heavily immigrant-based groups.[120]

While we do not take issue with Cain and Miller's general characterization of the population characteristics of African Americans, Latinos, and Asian Americans with respect to size and dispersion, we do note that these characteristics for Latinos and Asian Americans are changing and vary across the ethnic/national origin subgroups that comprise these heavily immigrant and second-generation based pan-ethnic populations. Focusing just on the spatial concentration of Asian Americans, we note that concentration is high in ethnic enclaves like urban Chinatowns, "Little Saigons," "J-towns," and the like. Moreover, the number of cities in which Asian Americans either constitute or are rapidly approaching a majority of the population is growing. According to the 2010 Census, six cities of 100,000 or more residents have at least 40% Asian Americans: Urban Honolulu (68%), Daly City (58%), Fremont (55%), Sunnyvale (44%), and Irvine (43%).[121]

The VRA presumes that the protected group can demonstrate a persistent pattern of electoral frustration as demonstrated by intragroup cohesion and intergroup polarization. The third row of Table 1 summarizes Cain and Miller's assessment of how blacks, Latinos, and Asians fare on the VRA test's expectation of political cohesion—that protected groups act as a "single political entity exhibiting common political goals and actions."[122] While this standard is relatively easy to meet for African Americans who exhibit the highest levels of political coherence of any racial group, Asian Americans' pan-ethnic groupings, which aggregate across multiple nationalities subsumed in U.S. census classifications of Asian American voters, interfere with perceptions of common interest that are typically measured by political coherence and polarization.[123] Here we take stronger issue with Cain and Miller's assessment that levels of pan-ethnic coherence among Asian Americans are weak and that there are large partisan divisions between the different Asian ethnic sub-groups. Since Cain and Miller's

119. *Id.* at 150.

120. *Id.* at 153.

121. Figures were obtained by the authors from the Census Bureau's "FactFinder" tool at U.S. CENSUS BUREAU, www.census.gov (last visited Mar. 31, 2013).

122. Cain & Miller, *supra* note 112, at 152.

123. *Id.*

analysis in 1998, Asian Americans have become discernibly more politically cohesive, with high rates of partisan voting in the 2008 and 2012 elections and a narrowing gap in the variance of this partisan voting between Asian ethnic subgroups. These recent shifts are referenced and discussed in fuller detail in ensuing sections.

Row four of Table 1 reflects the assumption of racial polarization. This requirement is well suited to African Americans who have a long and well-documented history of disenfranchisement at the hands of white voters.[124] For Asian Americans, we would quibble with Cain and Miller's assessment of "high levels of white support." There are, as we will also see in ensuing sections, some empirical grounds for worry that white opposition to Asian American candidates is prevalent. Perhaps more importantly, the number of cases of Asian American candidates running for political office (in majority white districts) is probably too small to make an accurate judgment of either white support or opposition. Asian Americans quite simply have a relatively limited history of running for elected office—a prerequisite for detecting patterns of electoral frustration.[125] Changing numbers, partisan affiliations, and multiracial urban settlement (as opposed to southern biracial settlement) further complicate calculations of electoral opportunities; it is not always clear when there are enough potential voters to justify a new minority influence district according to the required showing of electoral opportunity.[126]

The challenges that arise in moving from a binary black-white understanding of racial polarization to a more multiplex, prismatic set of relations are not only conceptual and empirical, but also methodological. Leaving aside the particularities of Asian Americans within the *Gingles* frame, empirical legal scholars recognize the mathematical and methodological problems of equalizing voting rights when moving from biracial to multiracial jurisdictions.[127] For the most part, two methods for estimating racially polarized voting have been predominant—a simple bivariate form of ecological regression ("Goodman's regression") and a "method of bounds" based on an analysis of racially homogeneous precincts.[128] These

124. *Id.* at 151.

125. *Id.* For more on immigration-related challenges to electoral participation, see generally Paul M. Ong & Megan Emiko Scott, *Asian American Civil and Political Engagement: Patterns, Challenges, and Potentials*, 18 ASIAN AM. POL'Y REV. 25 (2009).

126. Cain & Miller, *supra* note 112, at 153.

127. John O. Calmore suggests that the types of barriers differ regionally in the biracial south and multiracial California. John O. Calmore, *Race-Conscious Voting Rights and the New Demography in a Multiracing America*, 79 N.C. L. REV. 1253, 1256 (2001).

128. The two primary (to date) contrasting methods for drawing such ecological inferences are presented in Otis Dudley Duncan & Beverly Davis, *An Alternative to Ecological Correlation*, 18 AM. SOC. REV. 665, 665–66 (1953), and Leo A. Goodman, *Ecological Regressions and the Behavior of Individuals*, 18 AM. SOC. REV. 663, 663–64 (1953). The classic statement of the "ecological inference problem"—namely, the issue of statistical "identification" that arises when trying to draw inferences about individual-level motives and behavior from aggregate-level data—is found in W.S. Robinson, *Ecological Correlations and the Behavior of Individuals*, 15 AM. SOC. REV. 351, 351–57 (1950). Excellent surveys of

methods, however, have come under increasing scrutiny in the context of the growing diversity of America's electorate. While legal scholars have taken up this observation about the growing diversity of the electorate, it has largely been in terms of the possibility of a decline in racially correlated voting.[129]

As Professor James Greiner notes, modern diversity also raises specific methodological challenges.[130] The basic problem of inference involved in assessing the presence or absence of racially polarized voting results from needing to know about individual-level behavior and opinion but not being able to observe it. In essence, the secret ballot renders the choices and motivations of white, black, or "other race" voters for white, black, or "other race" candidates unknowable. The typical best-available proxy for these individual-level data are aggregate (usually precinct-level) data, or individual-level data from exit polls or pre- and post-election surveys that rely on cooperation and accurate recall from survey respondents.

Furthermore, existing methods for assessing polarized voting are optimally useful when there are only two racial groups and two political parties involved. With more than two potentially polarized groups (or, for that matter, more than two potentially polarized political parties), the bivariate ecological regression and the method of analyzing homogeneous precincts mentioned in *Gingles* are "inherently fragile."[131] The statistical challenges in inferring individual-level motives and behavior from aggregate-level data are compounded with multiple racial groups for the simple reason that "more racial groups mean more moving parts"—whether within a single precinct or across precincts.[132] The nub of these methodological implications of modern diversity is that the two statistical techniques noted in *Gingles* are clearly outmoded.[133]

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this problem, specific to the realm of voting rights, are in CONTROVERSIES IN MINORITY VOTING, *supra* note 11; D. James Greiner, *Ecological Inference in Voting Rights Act Disputes: Where Are We Now, and Where Do We Want to Be?*, 47 JURIMETRICS J. 115 (2007); J. Morgan Kousser, *Ecological Inference from Goodman to King*, 34 HIST. METHODS 101 (2001).

129. *See* Charles S. Bullock III & Richard E. Dunn, *The Demise of Racial Districting and the Future of Black Representation*, 48 EMORY L.J. 1209, 1228–35 (1999); Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself?: Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1529 (2002); Melissa L. Saunders, *Of Minority Representation, Multiple-Race Responses, and Melting Pots: Redistricting in the New America*, 79 N.C. L. REV. 1367, 1370–73 (2001); Note, *The Future of Majority-Minority Districts in Light of Declining Racially Polarized Voting*, 116 HARV. L. REV. 2208, 2209–11 (2003).

130. *See* D. James Greiner, *Re-Solidifying Racial Bloc Voting: Empirics and Legal Doctrine in the Melting Pot*, 86 IND. L.J. 447, 463–65 (2011).

131. *Id.* at 463.

132. *Id.* at 465.

133. Greiner, specifically, makes a strong and (we find) convincing case that the prevalent uses of Goodman's regression and a "method of bounds" analysis of homogeneous precincts ought to be jettisoned. *Id.* at 464. Greiner further argues that a third and recently popular estimator, Gary King's proposed "solution" to the ecological inference problem, GARY KING, A SOLUTION TO THE ECOLOGICAL INFERENCE PROBLEM: RECONSTRUCTING INDIVIDUAL BEHAVIOR FROM AGGREGATE DATA (1997), ought to be used only as a last resort. Greiner, *supra* note 130, at 470.

Better techniques are well overdue. Greiner and Kevin Quinn, for instance, argue in some recent papers for using a more flexible class of statistical models such as Dirichlet-Multinomial methods that can extend the "2 × 2" case (two races, two parties) to "R × C" ecological models.[134] They also advocate for the attractive statistical properties that result from using a combination of survey-based (for example, exit polls) and ecological aggregate data (for example, precinct results).[135] For Asian Americans, however, the limitations of data are especially acute and render these more advanced methods generally inapplicable.

On this point, a very brief excursion into the state of evidence on Asian American voting behavior is in order. To start with the standard and typically authoritative source of individual-level data on any population subgroup comes from federal agencies such as the U.S. Census Bureau and other federal agencies like the U.S. Bureau of Labor. Here, we note that the first constraint on available data has been the issue of classification—how Asian Americans will be categorized, which subgroups will be separately enumerated, whether and when Asian Americans will be classified together with Pacific Islanders, and the like.[136] The greater constraint lies in federal data collection on voter registration and voter turnout in the Current Population Survey (CPS). The CPS, which is a regular and primary source of federal data on labor force characteristics, collects data on voter registration and turnout every November in which there is a congressional or presidential election.[137] These data are collected in only two interview languages: English and Spanish.[138] With Asian Americans, this is a limiting constraint, as nearly two-thirds of are foreign-born and one in three are limited in their English proficiency.[139] Roughly half or more of certain groups like Vietnamese, Hmong, Cambodians, Laotians, Taiwanese, Koreans, and Chinese, are classified by the

134. *See* D. James Greiner & Kevin M. Quinn, *Exit Polling and Racial Bloc Voting: Combining Individual-Level and R × C Ecological Data*, 4 ANNALS APPLIED STAT. 1774, 1775–76 (2010) [hereinafter Greiner & Quinn, *Exit Polling*]; D. James Greiner & Kevin M. Quinn, *R × C Ecological Inference: Bounds, Correlations, Flexibility and Transparency of Assumptions*, 172 J. ROYAL STAT. SOC'Y 67, 79 (2009) [hereinafter Greiner & Quinn, *R × C Ecological Inference*]. For alternatives other than Multinomial-Dirichlet and King's EI, see also Adam N. Glynn & Jon Wakefield, *Ecological Inference in the Social Sciences*, 7 STAT. METHODOLOGY 307 (2010).

135. Greiner & Quinn, *Exit Polling*, *supra* note 134; Greiner & Quinn, *R × C Ecological Inference*, *supra* note 134.

136. For more on pan-Asian classification, see generally Yen Le Espiritu & Michael Omi, *"Who Are You Calling Asian?": Shifting Identity Claims, Racial Classification, and the Census*, *in* 4 THE STATE OF ASIAN PACIFIC AMERICA: TRANSFORMING RACE RELATIONS 43 (Paul M. Ong ed., 2000).

137. *Voting and Registration*, U.S. CENSUS BUREAU, http://www.census.gov/hhes/www/socdemo/voting (last visited Mar. 31, 2013).

138. *See* Sunghee Lee et al., *Linguistic Minorities in a Health Survey*, 72 PUB. OPINION Q. 470, 472 (2008) (discussing use of only English and Spanish for the Current Population Survey Behavioral Risk Factor Surveillance System).

139. DIANNE A. SCHMIDLEY, U.S. CENSUS BUREAU, PROFILE OF THE FOREIGN-BORN POPULATION IN THE UNITED STATES: 2000, at 24 (2001), *available at* http://www.census.gov/prod/2002pubs/p23-206.pdf.

census as having "limited English proficiency."[140] Moreover, prior research demonstrates that the language in which interviews are conducted produces significant and substantive differences in what people say on surveys.[141] These differences are quite persistent and pervasive; they have a basis in the experience of being an immigrant and ethnic minority.[142]

These same limitations, moreover, are endemic to most exit poll data, the other obvious source of individual-level data on racially polarized voting. The main source of exit poll data—the National Election Pool[143]—surveys its Asian American respondents only in English. There are, to be sure, various other datasets that are more attentive to the nuances involved in surveying Asian Americans. For instance, post-election exit polls from advocacy organizations like the Asian American Legal Defense and Education Fund conduct their interviews in multiple Asian languages (and in English), but these data are often limited in their content (they typically ask a small set of questions about voters' candidate choices), truncated in their sample (by definition, exit polls provide only the data of those who turn out to vote), and biased in their representativeness (the sampling for these exit polls typically skew to an emphasis on heavily Asian precincts).[144] There are other research-based studies that avoid some of these pitfalls, but most of these incur yet others.[145] The 2000 to 2001 Pilot National Asian American Political Survey (PNAAPS),[146] for instance, is limited by a

140. PRESIDENT'S ADVISORY COMM. ON ASIAN AMERICANS AND PACIFIC ISLANDERS, ASIAN AMERICANS AND PACIFIC ISLANDERS: A PEOPLE LOOKING FORWARD 7 (2001) [hereinafter PRESIDENT'S ADVISORY COMM.].

141. *See* Martin Johnson et al., *Language Choice, Residential Stability, and Voting Among Latino Americans*, 84 SOC. SCI. Q. 412, 419 (2003) (describing how survey respondents were significantly less likely to report voting in the 2000 presidential election when interviewed in Spanish); Lee et al., *supra* note 138, at 472; Efrén O. Pérez, *Lost in Translation? Item Validity in Bilingual Political Surveys*, 71 J. POL. 1530, 1531 (2009); Susan Welch et al., *Interviewing in a Mexican-American Community: An Investigation of Some Potential Sources of Response Bias*, 37 PUB. OPINION Q. 115, 116 (1973).

142. See sources cited *supra* note 141.

143. The National Election Pool is a consortium of six major media organizations—ABC, Associated Press, CBS, CNN, FOX, and NBC—that replaced the previous Voter News Services, which dissolved after questionable practices and predictions in the 2000 and 2002 elections. *Frequently Asked Questions About the NEP Exit Poll*, EDISON RESEARCH, http://www.edisonresearch.com/election-research-services/exit-polling-faq-frequently-asked-questions-about-the-nep-exit-poll (last visited Mar. 31, 2013).

144. *Asian Americans at the Ballot Box: The 2008 General Election in Los Angeles County*, ASIAN PAC. AM. LAW CENTER, http://apalc.org/sites/default/files/APALC_BallotBox_LA2008_FINAL.pdf (last visited Mar. 31, 2013); Brian Lee et al., *The Asian American Vote in the 2008 Presidential Election*, ASIAN AM. LEGAL DEF. AND EDUC. FUND, (2009), *available at* http://esc.nccu.edu.tw/modules/tinyd8/content/document/Speech_2012.10.24/AALDEF-ExitPoll-2008.pdf. Other exit polls from the affiliate organizations can be found at *Voting Rights and Section 203*, ASIAN AM. JUST. CENTER, http://www.advancingequality.org/voting-rights (last visited Mar. 31, 2013).

145. A fuller discussion of the data limitations in Asian American voting behavior can be found in JANELLE WONG ET AL., ASIAN AMERICAN POLITICAL PARTICIPATION: EMERGING CONSTITUENTS AND THEIR POLITICAL IDENTITIES 13–15 (2011).

146. The figures reported throughout this Article relating to the 2000 to 2001 PNAAPS are

regional emphasis—since only Asian Americans from five major metropolitan areas (New York, Chicago, Los Angeles, the San Francisco Bay Area, and Honolulu) were interviewed.

From a data perspective, some of the impetus behind our inquiry into the possibility of section 2 claims by Asian Americans comes from the availability of some exciting new data. Our evidence in this Article comes primarily from three recent surveys: the 2004 to 2005 National Politics Study (NPS),[147] the 2007 Los Angeles County Social Survey (LACSS),[148] and the 2008 National Asian American Survey (NAAS).[149] The NPS and the LACSS are surveys focused on better understanding racial politics and race relations. Both surveys include "oversamples" of African American, Asian American, and Latino respondents to enable across-group comparisons.[150] The NAAS is the first nationally representative survey focused exclusively on the political patterns and perspectives of Asians in the United States. The NAAS data are noteworthy for representing a sufficiently large sample (5,159 completed interviews) to allow results to be disaggregated down to the six largest ethnic/national-origin Asian groups in America—Chinese, Filipinos, Indians, Japanese, Koreans, and Vietnamese.[151] The

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the result of the authors' primary analysis of raw survey data. Raw data and the codebook are available through the Inter-University Consortium for Political and Social Research (ICPSR). *See Pilot National Asian American Political Survey (PNAAPS), 2000-2001 (ICPSR 3832)*, ICSPSR, http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/3832 (last visited Mar. 31, 2013) [hereinafter *PNAAPS, 2000-2001*]. More information and data sets are available at NATIONAL ASIAN AMERICAN SURVEY, http://www.naasurvey.com (last visited Mar. 31, 2013); *see also* WONG ET AL., *supra* note 145, at 15–20.

147. The figures reported throughout this Article relating to the 2004 NPS are the result of the authors' primary analysis of raw survey data. Raw data and the codebook are available through the ICPSR. *See National Politics Study, 2004 (ICPSR 24483)*, ICPSR, http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/24483 (last visited Mar. 31, 2013). [hereinafter *NPS, 2004*].

148. The figures reported throughout this Article relating to the 2007 LACSS are the result of the authors' primary analysis of raw survey data. The raw data are not publicly available; co-principal investigators for this study are Mark Sawyer (Lead Principal Investigator, UCLA), Taeku Lee (UC Berkeley), James Sidanius (Harvard), and Janelle Wong (University of Maryland). The codebook is available upon request from Taeku Lee. *See* Mark Sawyer et al., Los Angeles County Social Survey, 2007: Codebook (unpublished) (on file with authors).

149. The figures reported throughout this Article relating to the 2008 NAAS are the result of the authors' primary analysis of raw survey data. Raw data and the codebook are available through the ICPSR. *See National Asian American Survey*, *2008 (ICPSR 31481)*, ICPSR, http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/31481 (last visited Mar. 31, 2013) [hereinafter *NAAS, 2008*].

150. *LACSS, 2007*, *supra* note 148; *NPS, 2004*, *supra* note 147. The survey dates for the 2004 to 2005 NPS are September 3, 2004 to February 25, 2005. *NPS, 2004*, *supra* note 147. A total of 3,339 telephone interviews were conducted, with a final sample of 756 African Americans, 919 non-Hispanic Whites, 404 Caribbean Blacks, 757 Latinos, and 503 Asian Americans. *Id.* at 8. The survey dates for the 2007 LACSS are May to July 2007. *LACSS, 2007*, *supra* note 148. A total of 1,102 telephone interviews were conducted, with a final sample of 276 Asian Americans, 275 African Americans, 275 Latinos, 260 Whites, and 16 Native Americans. *Id.*

151. *NAAS, 2008*, *supra* note 149. The breakdown of the NAAS sample is 1,350 Chinese, 603 Filipinos, 1,150 Indians, 541 Japanese, 614 Koreans, 719 Vietnamese, and 182 respondents from other groups. *Id.*

NAAS is also noteworthy for conducting interviews in eight languages: English, Cantonese, Mandarin, Vietnamese, Korean, Tagalog, Japanese, and Hindi).[152]

Yet even the best currently available data are limited in numerous respects—the data are cross-sectional and allow only for a single snapshot in time, the number of cases (large as it is) is still insufficient to drill down to the level of most electoral jurisdictions, the questions are not tailored for a full analysis of barriers to full political inclusion, the NAAS surveys only Asian Americans (making comparisons on similar issues and items to African Americans, Latinos, whites, and other groups somewhat treacherous), the NPS and LACSS surveys ask only items of comparison across groups and are of limited use in "drilling down" to better understand any single group, and so on. In this relatively data-poor context, our approach here is to use the best data available, with appropriate rejoinders on their limitations. In most cases, the best available data will come from these three surveys.[153]

These conceptual and empirical limitations are revealed in accumulating evidence that existing paradigms do not work well for Asian American voters.[154] Political scientists studying democratic inclusion often focus on two measures used to gauge the extent to which groups are empowered in electoral democracies: participation in elections through voting and representation of electorates through the holding of political offices.[155] Asian Americans are underrepresented on both measures. On the participatory end of the spectrum, voter participation begins with prerequisites for a largely foreign-born population that are not always present for African Americans: naturalization into citizenship, voter registration, and voting itself. There is significant drop-off at each stage. Furthermore, Asian Americans are disproportionately underrepresented, relative to their population

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152. *Id.* Roughly sixty percent of the NAAS sample opted for a non-English interview. *Id.*

153. We are mindful of the fact that D. James Greiner, among others, also cautions against relying solely on survey data to make a positive case about racially polarized voting. In Greiner's words,

> The proper role of surveys in Voting Rights Act disputes is complex and, to my knowledge, has received no scholarly attention to date. But whatever else may be true of them, surveys and exit polls cannot retrospectively provide evidence regarding racial voting patterns going back six or ten or more years, which appears to be what courts often require to support a finding that voting is racially polarized.

Greiner, *supra* note 128, at 120.

154. *See* Calmore, *supra* note 127, at 1280; Leo F. Estrada, *Making the Voting Rights Act Relevant to the New Demographics of America: A Response to Farrell and Johnson*, 79 N.C. L. REV. 1283, 1283 (2001); Kevin R. Johnson, *Latinas/os and the Political Process: The Need for Critical Inquiry*, 81 OR. L. REV. 917, 937–39 (2002); Sylvia Lazos Vargas, *Latino/a and APIA Vote Post-2000: What Does It Mean to Move Beyond "Black and White" Politics?*, 81 OR. L. REV. 783, 810 (2002).

155. *See* Lawrence Bobo & Franklin D. Gilliam, Jr., *Race, Sociopolitical Participation, and Black Empowerment*, 84 AM. POL. SCI. REV. 377, 387 (1990) (noting a link between political participation and representation among African Americans); *see also* Michael Jones Correa, *Bringing Outsiders In: Questions of Immigrant Incorporation*, *in* THE POLITICS OF DEMOCRATIC INCLUSION 75, 75–77 (Christina Wolbrecht et al. eds., 2005) (discussing the salience of political participation and representation among immigrants).

numbers, among active voters and among registered voters. The 2008 CPS Voting and Registration Supplements show that out of the U.S. adult population of Asian Americans, roughly two out of three are naturalized (67%), slightly more than one out of three are registered to vote (37%), and less than one in three report having voted (32%).[156] These two initial stages of immigrant incorporation contribute to the low rates of Asian American voting; once Asian Americans are registered to vote, they vote at a rate (86%) not too different from that of all registered American voters (90%).[157]

On the other measure of inclusion, Asian Americans are disproportionately underrepresented, relative to their population numbers, among elected officials at federal, state, and local levels. In fact, no other racial minority group is as underrepresented, with the exception of Native Americans. In 2006, less than one percent (0.9%) of all members of Congress were Asian Americans and barely one percent (1.1%) in state legislatures.[158] By comparison, 9.4% of the House of Representatives in 2006 were African American and 5.7% were Latino; that same year, 7.2% of state legislators were African American and 3.1% Latino.[159]

A possible third leg of exclusion would be if there were no legal recourse for apparent exclusion via the VRA. As detailed in the next section, we found few legal successes for Asian American voters under the traditional VRA criteria for minority vote dilution. This near absence of VRA successes for a group that is shown to be politically disempowered suggests a need to revamp the legal standards of the VRA to better reflect fairness and equity concerns, possibly by adopting the CCI factors that have emerged in state and federal district courts.[160]

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156. The figures related to the 2008 CPS Voting and Registration Supplement are a result of the authors' primary analysis of raw survey data. Raw data are available through the ICPSR. *See Current Population Survey, November 2008: Voting and Registration Supplement*, ICPSR, http://www.icpsr.umich.edu/icpsrweb/RCMD/studies/25643 (last visited Mar. 31, 2013).

157. *Id.*

158. Pei-te Lien et al., *The Voting Rights Act and the Election of Nonwhite Officials*, PS: POL. SCI. & POL. 489, 490–92 (2007).

159. *Id.*

160. The normative question of whether the VRA *ought* to work for Asian Americans given that it resulted from a particular historical struggle centered around African Americans is a separate question taken up in Part V, *infra*. Though not the focus of this study, we acknowledge that the historical record on this point is conflicted. Our presumption is that the legislative history and the legislation itself lists multiple minorities—at least after the 1975 VRA amendments concerning language minorities—indicating a clear legislative intent that should be realized as a matter of democratic process and traditional principles of statutory interpretation. Moreover, numerous social scientists and historians have documented that the success of the civil rights movement was achieved through concerted civil rights efforts on behalf of multiple racial groups, including Asian Americans. *See, e.g.*, MARK BRILLIANT, THE COLOR OF AMERICA HAS CHANGED: HOW RACIAL DIVERSITY SHAPED CIVIL RIGHTS REFORM IN CALIFORNIA, 1941–1978, at 5–6 (2010); JOHN D. SKRENTNY, THE MINORITY RIGHTS REVOLUTION 57 (2002). All of that said, by suggesting that Asian Americans ought to be included in VRA protections, we are *not* saying that African Americans should be displaced. In fact, we are rock-ribbed in resisting any inclination to view gains in the voting rights and political power of one underrepresented group as necessitating losses for another.

III. ASIAN AMERICANS AS A NEGATIVE "CASE": DEMOCRATIC EXCLUSION UNDER THE VRA AND THE *GINGLES* PRONGS FOR ASSESSING MINORITY VOTE DILUTION

Why study Asian Americans as a "case" of democratic exclusion? In case-selection terms, African Americans are the archetypal case for studying the VRA.[161] This paradigm of African Americans' political cohesion and whites' racial bloc voting has deep foundations in social science research.[162] We know a lot about how factors like group consciousness, linked fate, stereotyping, institutional racism, collective mobilization, and the like define African American politics and the dynamics of vote dilution.

We know far less about whether these processes and predispositions apply to other groups. For example, Asian American immigration stems from a different set of historical and ongoing social practices.[163] These practices result in complex issues of racial formation such as more in-group cultural diversity and pan-ethnic government groupings. One scholar laments the fact that "[a]cademics, journalists, and politicians use pan-ethnic categories (Hispanics and Asians) without considering whether evidence exists that would justify its use. In fact, there has been very little evidence for (or against) pan-ethnicity."[164]

The analytic value of examining Asian Americans is to take a prima facie weak case and examine whether, how, and to what extent the *Gingles* prongs might apply. The starting premise for most casual observers of Asian American voters is an abundance of skepticism, typically founded on the idea that there is simply too much internal diversity of national origins, languages, religions, cultural orientations, geographic concentration, and immigration histories to sustain a legally cognizable group. Rough calculations of litigation outcomes support the general impression that Asian Americans are overwhelmingly unsuccessful at each stage of their section 2 voting dilution claims: only seven cases have been brought by Asian Americans under section 2.[165] The novel facts presented by the handful

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161. For more on case selection, see generally John Gerring, *What Is a Case Study and What Is It Good For?*, 98 AM. POL. SCI. REV. 341 (2004); *see also* Bent Flyvbjerg, *Case Study*, *in* THE SAGE HANDBOOK OF QUALITATIVE RESEARCH 301, 301–14 (Norman K. Denzin & Yvonna S. Lincoln eds., 4th ed. 2011). For an argument that African Americans are an archetypal case, see Taeku Lee, *Race, Immigration, and the Identity-to-Politics Link*, 11 ANN. REV. POL. SCI. 457 (2008).

162. For a few representative examples of this capacious literature, see MICHAEL C. DAWSON, BEHIND THE MULE: RACE AND CLASS IN AFRICAN-AMERICAN POLITICS (1994); KATHERINE TATE, FROM PROTEST TO POLITICS: THE NEW BLACK VOTERS IN AMERICAN ELECTIONS (1993), Jack Citrin et al., *White Reactions to Black Candidates: When Does Race Matter?*, 54 PUB. OPINION Q. 74 (1990), Vincent L. Hutchings & Nicholas A. Valentino, *The Centrality of Race in American Politics*, 7 ANN. REV. POL. SCI. 383 (2004), Lee, *supra* note 161, and Ebonya Washington, *How Black Candidates Affect Voter Turnout*, 121 Q.J. ECON. 973 (2006).

163. *See supra* Table 1; *infra* notes 198–206 and accompanying text*; see also infra* notes 192–97.

164. Michael J. Rosenfeld, *The Salience of Pan-National Hispanic and Asian Identities in U.S. Marriage Markets*, 38 DEMOGRAPHY 161, 161 (2001).

165. See Katz et al., *supra* note 43 (documenting seven cases brought under section 2 and

of claims involving Asian Americans all arose in the lower courts and concern as-of-yet unsettled case law interpreting the application of VRA to multi-racial and "other minority" groups.[166] Other cases raise unique facts concerning Asian American "communities of interest" where the fact patterns may be hard to generalize.[167]

The paucity of Asian American–focused litigation makes systematic analysis of potential plaintiff attributes difficult. However, it can be inferred from judicial treatment of "other minority" groups such as Latinos that the fate of the case rested almost entirely on how well the facts fit the *Gingles* criteria.[168] Anecdotal or journalistic accounts of community needs provide selective in-depth case studies of Asian American struggles to make out a viable claim under the legal tests used to identify and redress minority vote dilution, but they often rest upon sparse data and an advocate's perspective rather than an official court record.

In what follows, we examine how well Asian Americans "fit" with the

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involving Asian American voters as of 2006 to 2007) and related publications from the Voting Rights Initiative available online. Katz's study—the most comprehensive to date—was prepared for the 2006 reauthorization of the VRA and codes cases by race among other factors. *Id.* Texas v. United States, No. 11-1303 (TBG-RMC-BAH), 2012 WL 3671924 (D.D.C. Aug. 28, 2012), also involves Asian American voters and was not included in the Katz study due to date of completion.

166. Katz et al., *supra* note 43; *see also* Cain & Miller, *supra* note 112, at 146. Similar trends appear in the subset of "other minority" cases involving Latinos in some way. Cain & Miller, *supra* note 112, at 146. Bearing in mind that tabulating cases that have made it to completion omit the significant number of threatened or abandoned cases, the authors note that "it is very clear that the 'other minority' plaintiffs in section 2 cases and defendants in *Shaw* claim cases lose more than they win." *Id.*

167. There have been a few efforts to create winnable districts using a community of interest theory. *See infra* Part IV. One such case, concerning New York's Twelfth Congressional District, is *Diaz v. Silver*, 978 F. Supp. 96, 129 n.22 (E.D.N.Y. 1996), *aff'd*, 522 U.S. 801 (1997). This district includes New York's Chinatown. In 1997, the Eastern District of New York heard a *Shaw v. Reno* challenge to the Twelfth Congressional District in New York (arguing that race was the predominant factor in redistricting), but the court ruled that the Asian American population in the district, which mainly encompassed Manhattan's Chinatown and Brooklyn's Sunset Park, constituted a common "community of interest" and allowed it to stand as a "constitutionally permissible Asian-influence district." Carol Ojeda-Kimbrough et al., *The Asian Americans Redistricting Project: Legal Background of the "Community of Common Interest" Requirement*, ASIAN AM. STUD. CENTER 4–5 (2009), http://www.aasc.ucla.edu/policy/CCI_Final2.pdf; *see also* Glenn D. Magpantay, *Asian American Voting Rights and Representation: A Perspective from the Northeast*, 28 FORDHAM URB. L.J. 739, 766–68 (2001) (describing defensive strategies for overcoming vote dilution and community fragmentation in New York City and Boston Chinatowns). The Ojeda-Kimbrough report also notes community efforts to keep the predominantly Chinese American San Gabriel Valley/Monterey Park together and to keep Los Angeles's Koreatown together in the 1980s to 1990s and the 2010 election cycle. Ojeda-Kimbrough et al., *supra*, at 7. In the late 1980s, Korean Americans sought to challenge the Los Angeles redistricting commission's creation of a district that would divide Koreatown into four separate City Council districts and five state Assembly districts, thereby diluting Korean-American voters' prospects for electing a Korean-American councilman. *Id.* In 2012, Korean activists demanded that Koreatown be shifted into a district represented by Councilman Eric Garcetti that consists of Thai Town and Historic Filipinotown, thereby improving the chances of electing an Asian American candidate. *See* David Zahniser, *Koreatown Residents Sue L.A.*, L.A. TIMES, Aug. 1, 2012, at AA3.

168. Cain & Miller, *supra* note 112, at 147.

existing *Gingles* prongs. In effect, census and survey data will show grounds for skepticism as to whether Asian Americans are a population with legitimate, winnable claims qua a pan-ethnic group under *Gingles*. In the section after, we take a fresh look at the possibilities and extent to which Asian Americans constitute a community of common interest, irrespective of the *Gingles* prongs.

On *compactness*, Asians Americans tend to be relatively small and disperse. The Asian American population is concentrated in certain regions of the United States, most notably in Hawaii and California. While there is a significant concentration of Asian Americans in California (one-third of the U.S. Asian American population reside in California),[169] Asian Americans still make up only 12% of California's electorate (adult citizen population).[170] Even at lower levels of jurisdictional granularity, there are only eleven congressional districts in which Asian Americans make up 20% or more of the district's electorate.[171] Of the eleven congressional districts, all but one are in California or Hawaii.[172] Among municipalities, Asian Americans make up 25% or more of the electorate in seventy-five districts.[173]

On *political cohesion*, the earliest exit poll data that allows estimates of the Asian American votes show only 31% favoring the Democrat Bill Clinton in 1992 (see Figure 1). By 2012, there is a dramatic shift, with 73% reporting that they voted for Barack Obama.[174] While the shift in favor of Democratic candidates is unmistakable, it falls significantly shy of the benchmarks set by African American voters since the civil rights era. Yet at the same time, Asian Americans' rates of partisan voting today at least approximate rates seen among Latinos in Figure 1. Moreover, even among African Americans, rates of voting for Democratic Party candidates did not approach current heights until the 1960s, when American National Election Study data show a jump from a 68% Democratic vote for John F. Kennedy in the 1960 election to a reported 94% Democratic vote for Lyndon B. Johnson in 1964.[175]

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169. ELIZABETH M. HOEFFEL ET AL., U.S. CENSUS BUREAU, THE ASIAN POPULATION: 2010, at 9 (2012), *available at* http://www.census.gov/prod/cen2010/briefs/c2010br-11.pdf.

170. WONG ET AL., *supra* note 145, at 97.

171. *Id.* Up though the November 2012 election, Asian Americans represented four Congressional districts: Colleen Hanabusa (HI-1st district), Mike Honda (CA-15th), Doris Matsui (CA-6th), and Judy Chu (CA-32nd District), with Bobby Scott (VA-3rd District), an African American with a Filipino maternal grandfather as a potential fifth. The November 2012 election saw a record five new Asian Americans winning Congressional seats: Ami Bera (CA-7th), Tammy Duckworth (IL-8th), Tulsi Gabbard (HI-2nd), Grace Meng (NY-6th), and Mark Takano (CA-41st). Mazie Hirono, formerly representing Hawaii's 2nd district, retired to win office as Hawaii's junior senator.

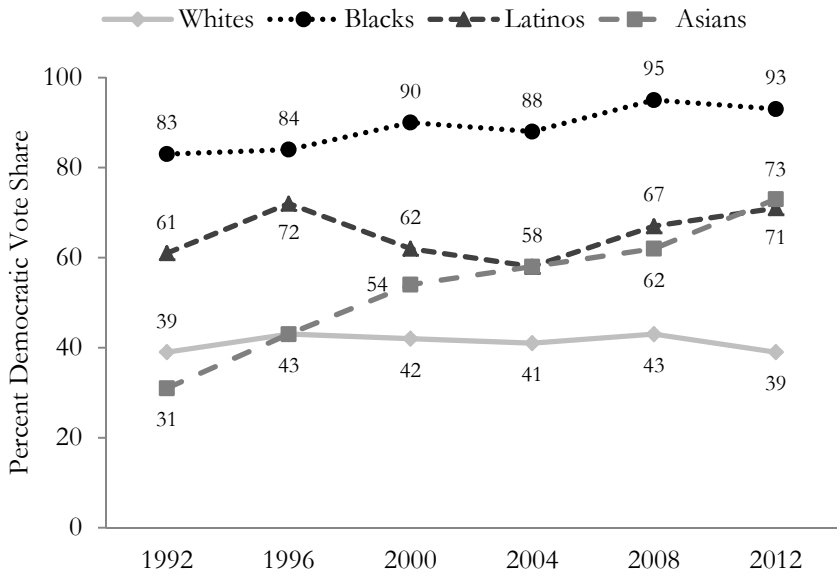
172. *Id.*

173. *Id.* It is also worth noting that the levels of residential segregation are discernibly lower for Asian Americans than they are for either Latinos or African Americans. *See, e.g.*, JOHN ICELAND, WHERE WE LIVE NOW: IMMIGRATION AND RACE IN THE UNITED STATES 58–78 (2009).

174. *See infra* Figure 1.

175. *See* ZOLTAN L. HAJNAL & TAEKU LEE, WHY AMERICANS DON'T JOIN THE PARTY:

Figure 1: Democratic Partisanship by Group, 1992 to 2012[176]



There are two other key measures of the questionable political cohesiveness of Asian American voters. First, even though there is a trend among Asian Americans toward Democratic partisanship, this tendency is not uniform for all constituent groups. Data from the NAAS, a pre-election survey of 5,019 respondents, showed a substantial degree of variation in partiality, ranging from Japanese Americans and Asian Indians, who supported Barack Obama over John McCain by a nearly four-to-one margin to Vietnamese Americans, who favored the Republican McCain over the Democrat Obama by a nearly four-to-one-margin.[177]

RACE, IMMIGRATION, AND THE FAILURE (OF POLITICAL PARTIES) TO ENGAGE THE ELECTORATE 160 (2011).

176. These figures are a result of the authors' primary analysis of raw data compiled from exit polls conducted by Voter News Service and the National Election Pool. *See National Election Pool General Election Exit Polls, 2004*, ICPSR, http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/04181/version/1 (last visited Mar. 31, 2013); *National Election Pool General Election Exit Polls, 2008*, ICPSR, http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/28123 (last visited Mar. 31, 2013); *Voter News Service General Election Exit Polls, 1996*, ICPSR, http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/6989 (last visited Mar. 31, 2013); *Voter News Service General Election Exit Polls, 2000*, ICPSR, http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/3527 (last visited Mar. 31, 2013); *Voter Research and Surveys General Election Exit Polls, 1992*, ICPSR, http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/6102 (last visited Mar. 31, 2013).

177. *See infra* Table 2.

Table 2: 2008 Vote Choice by Asian American Subgroup[178]

	Indian	Chinese	Filipino	Japanese	Korean	Vietnamese	Total
McCain	14%	15%	25%	15%	28%	51%	24%
Obama	50%	44%	32%	57%	42%	14%	39%
Uncertain	36%	41%	43%	29%	30%	35%	37%

Perhaps more notable is the remarkable degree of partisan ambivalence among Asian American voters. More conspicuous than the two-way split between Obama and McCain shown in Table 2 is the striking number of Asian Americans who reported being "certain" they would vote, and yet uncertain about which candidate they supported, even in the last few months of the election (a period when most "horse race" polls might find 5% of likely voters who were undecided).[179]

This ambivalence among likely voters is also found in the notable degree of ambivalence about identifying with either of the two major parties in America. Table 3 shows the responses of NAAS respondents to the question, "Generally speaking, do you think of yourself as a Republican, Democrat, Independent, some other party, or do you not think in these terms?"[180] The results show two key findings. First, a significantly higher proportion of Asian Americans—almost across all groups (except Vietnamese)—identify as Democrats than identify as Republicans. Second, only a minority of Asian Americans identify as either a Democrat or a Republican. In fact, the modal reply to the standard party identification question is some form of non-identification: replying nonidentification—that they do not think in terms of parties, indicating that they "don't know," or refusing to reply altogether.

178. *NAAS, 2008*, *supra* note 149.

179. *See, e.g.*, *Young Voters and the Horserace*, CENTER FOR INFO. & RESEARCH ON CIVIC LEARNING & ENGAGEMENT, (Oct. 29, 2012), http://www.civicyouth.org/youth-on-horserace-52-obama-v-35-romney (reporting that five percent of all likely voters were considered undecided based on an average of national polls in the month before the 2012 presidential election).

180. Karthick Ramakrishnan et al., *National Asian American Survey, 2008: Codebook*, ICPSR 51 (2011), http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/31481.

Table 3: Partisanship by Asian American Subgroup[181]

	Indian	Chinese	Filipino	Japanese	Korean	Vietna-mese	Total
Republican	8%	6%	15%	14%	20%	28%	12%
Democrat	39%	24%	33%	42%	37%	19%	31%
Independent	21%	27%	17%	15%	12%	17%	21%
Non-identifier	32%	43%	35%	29%	32%	35%	36%

Finally, on bloc voting, relevant data are harder to come by. Anecdotally, there are several highly profiled examples of Asian American political candidates who enjoy electoral success in majority white districts, such as current and former governors (former Washington Governor Gary Locke, 1997 to 2005; current Louisiana Governor Bobby Jindal), current and former senators (former California Senator S.I. Hayakawa, 1977 to 1983; current South Carolina Senator Nikki Haley); current and former representatives (for example, former Oregon Congressman David Wu, 1999 to 2011; former California Congressman Robert Matsui, 1993 to 2005; current California Congresswomen Doris Matsui and Judy Chu. These instances, albeit anecdotal and highly selective, suggest that white voters (at least in these districts) are open to voting for an Asian American.

Looking to more representative data, public opinion polls also consistently show that a majority of whites tend to view Asian Americans as less threatening than other racial minority groups and see Asian Americans as facing few barriers to equal opportunity. The NPS asked respondents whether "[t]he more influence Asian Americans have in politics, the less influence people like me will have in politics."[182] Only 12% of respondents agreed with this statement, compared to 34% and 33% who felt this way about the respective influence of African Americans and Latinos in politics.[183]

There is one survey—the 2001 Committee of 100/Martilla study[184]—that found some potential seeds of anti-Asian American bloc voting. The survey asked white respondents "If you were voting for President of the United States, how would you feel about voting for" candidates of different demographic traits.[185] A

181. *NAAS, 2008*, *supra* note 149.

182. James S. Jackson et al., *National Politics Study, 2004: Codebook*, ICPSR 52 (2009), http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/24483.

183. *NPS, 2004*, *supra* note 147.

184. *American Attitudes Toward Chinese Americans and Asian Americans*, COMMITTEE OF 100 (2001), http://www.committee100.org/publications/survey/C100survey.pdf.

185. *Id.* at 41.

higher percentage reported feeling "uncomfortable" about voting for an Asian American (23%) than voting for an African American (15%), a woman (14%) or a Jewish American (11%).[186] Another indirect source of anti-Asian American sentiment is found in self-reports of discrimination. In the NAAS, for instance, 35% of respondents report experiencing discrimination.[187] Similarly, when Asian American respondents to the 2007 LACSS were asked to identify the "most important problem facing Asian Americans," the most commonly identified problem was some mention of discrimination or race relations (20%), higher than the incidence of mentions of immigration (9%), the economy (9%), health care (8%), or education (8%).[188]

This preliminary descriptive data suggests, at first glance, that Asian Americans fail on all three *Gingles* prongs, rendering them a negative case for democratic inclusion under the VRA.[189] But a closer look shows that the evidence is mixed. Within each prong, there is evidence that a closer fit to *Gingles* is emerging over time as Asian American voters adapt to more active forms of civic life and political citizenship that is likely to make the Asian American positive case even stronger. With regard to geographic compactness, demographic changes are leading to high concentrations in a growing handful of districts. While we saw earlier that there are only eleven congressional districts in which Asian Americans rise to even 20% of the electorate, that figure represents a change from previous decades.[190] With regard to political cohesiveness, we saw in Figure 1 that Asian Americans are becoming more partisan over time, and we shall see evidence in the next section that they are also exhibiting greater attitudinal support for group cohesion. With regard to polarization, we just discussed the mixed evidence for anti-Asian sentiments and experiences of anti-Asian discrimination. Given emerging evidence that is more mixed than conventionally believed, the substantial underrepresentation and underparticipation merit some remedy. More fundamentally, much of the mixed data is in need of some kind of framework to

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186. *Id.* at 41. The Committee of 100 survey also found that white respondents were more uncomfortable with the idea of an Asian American CEO of a Fortune 500 company and of an Asian American supervisor at their workplace than were uncomfortable with African Americans, Jews, or women in similar positions of power. *Id.* at 42.

187. *NAAS, 2008*, *supra* note 149. A 2001 survey of Asians Americans in five metropolitan areas found a comparably high thirty-six percent of respondents who reported experiencing discrimination. *PNAAPS, 2000-2001*, *supra* note 146. A 2001 *Washington Post*/Kaiser Family Foundation/Harvard University poll found a thirty-nine percent rate. *Race and Ethnicity in 2001: Attitudes, Perceptions, and Experiences*, KAISER FAMILY FOUND. 26 (2001), http://www.kff.org/kaiserpolls/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=13839.

188. *LACSS, 2007*, supra note 148.

189. For further explanation of the social science terminology "negative case," see James Mahoney & Gary Goertz, *The Possibility Principle: Choosing Negative Cases in Comparative Research*, 98 AM. POL. SCI. REV. 653, 653 n.1 (2004) (defining a "negative case" as a "control" case). *See also* John Gerring, *Is There a (Viable) Crucial-Case Method?*, 40 COMP. POL. STUD. 231 (2007) (discussing how case-study researchers can select their cases).

190. WONG ET AL., *supra* note 145, at 97.

assess whether and when Asian Americans might meet the *Gingles* test or otherwise demonstrate shared political interests.[191]

IV. BUILDING THE POSITIVE CASE: ASIAN AMERICAN INCLUSION AND TESTS OF MINORITY VOTE DILUTION BEYOND *GINGLES*

Professor Jennifer Hochschild in *Race, Reform, and Regulation of Electoral Process* asks the vital question: "Do American minority groups still have 'an' interest?"[192] After all, the seeming failure of Asian Americans to meet the *Gingles* threshold requirements for a successful vote dilution claim is not inherently a problem. The picture presented in Part III is only a problem if Asian Americans in fact share a common interest that is lost because of empirical, conceptual, and doctrinal problems. Empirically, there is a paucity of good data on Asian American political participation, although the range and quality are improving. Conceptually, there is considerable oversimplification of the processes related to group formation and mobilization, which are critical to understanding the exclusion of minority voters. Doctrinally, the legal standards used to interpret VRA requirements, mostly notably *Gingles*, are built around an archetype of racial politics not appropriate to other nonblack minority groups such as Asian Americans. We contend that these conceptual, empirical, and doctrinal problems confuse the picture of democratic inclusion for Asian Americans and impede the development of effective solutions. To answer Hochschild's question succinctly: we say that Asian American voters do share common interests under certain circumstances, even if those interests are not readily discernible under a *Gingles* formulation. Part IV makes the case that applying an alternative framework to racial politics and Asian American voting behavior yields a different picture than in Part III—one that merits democratic inclusion for Asian Americans.

Our goal in the remainder of this section is to answer the call of voting rights scholars to set forth an affirmative vision for overcoming minority vote dilution by reframing inquiry around relevant interests.[193] This Part proceeds in three

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191. There is a degree of ambiguity in our analysis as to *which* of the three *Gingles* prongs is the principal barrier to successful section 2 claims for Asian Americans, or whether some other mediating or confounding factor (like geographic dispersion, lack of institutional capacity or commitment among civil rights groups or political parties) is the key impediment. In a sense, the emphasis we place on communities of common interest implies pride of place for political cohesion as the key here, rather than something else. To the extent that emphasis is given to cohesion, it is the result of our assessment of the window of opportunity presented by recent rulings that bring CCI to the foreground and not our empirically or theoretically based claims that within-group cohesion is foremost among multiple possible blocks to democratic inclusion. We are indebted to Christopher Elmendorf for raising this important consideration.

192. Jennifer L. Hochschild, *Overview: How, If at All, Is Racial and Ethnic Stratification Changing, and What Should We Do About It?*, *in* RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS: RECURRING PUZZLES IN AMERICAN DEMOCRACY 7, 14 (Guy-Uriel E. Charles, et al. eds., 2010).

193. Pam Karlan calls on scholars to spell out an "affirmative vision" of the right to vote.

sections. First, as a starting proposition, the VRA remedy for voting dilution turns on a conception of common "interests" that is both underspecified and undertheorized. To the extent that it can be unpacked, it is built around the political experiences and behaviors of black voters. This section proposes other potentially relevant political interests recognized in more recent and alternative case law. Second, this section discusses a range of potentially useful measures of common interests and presents data from several sources substantiating the existence of shared interests among Asians in America. Third, since courts relying on the undertheorized doctrinal tests such as *Gingles* miss out on other, potentially relevant political interests, this section concludes with prescriptions for courts to develop tests sensitive to the shared interests of a democratically excluded group unable to experience relief under the VRA. These take the form of simple modifications to the *Gingles* formula, increased attention to the "community of common interest" requirement developed in voting rights law, and the more novel use of graded variables and point allocation as methods for ascertaining interests.

A. Defining Asian American Political Interests

The shared basis of commonality that the VRA intends to protect consists in part of ensuring the ability of a minority group to aggregate individual "interests" and formulate group "identities."[194] Conceptually, we propose a framework to redefine interests and recognize the dynamic processes leading from shared identity to shared politics.

Interests, as traditionally defined under the VRA, consist primarily of support for a candidate for partisan office.[195] This narrow measure makes several assumptions about minority engagement in politics that we contest in Part II. A more nuanced picture of minority politics arises in recent jurisprudence on minority vote dilution, with greater consideration of the specific interests underlying racially aggregate categories recognized by lower federal courts as "communities of common interest" and by the Supreme Court as "cultural compactness."[196] These concepts have a venerable foundation in legal theory. Duncan Kennedy distinguishes culture from a more biologically determined conception of race by saying:

> Communities have cultures. This means that individuals have traits that are neither genetically determined nor voluntarily chosen, but rather consciously and unconsciously taught through community life.

Pamela S. Karlan, *The Reconstruction of Voting Rights*, *in* RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS, *supra* note 192, at 34, 34–35.

194. Lee, *supra* note 161, at 458 (discussing the link between demographic identities and group politics).

195. *See id.* at 469–70 (discussing the pursuit of collective group interests through political participation).

196. Ortiz, *supra* note 63, at 48.

> Community life forms customs and habits, capacities to produce linguistic and other performances, and individual understandings of good and bad, true and false, worthy and unworthy.[197]

Defining interests in terms of social processes is especially important for a group whose traits are both in flux and under formation. Asian Americans, we submit, are just such a group. Taking a processual view of criteria like political cohesion is necessary for a group that is overwhelmingly foreign-born or second generation, with shifting migration patterns (both in ethnic group composition and geographic settlement patterns), with a very high degree of internal diversity (ethnic, linguistic, religious, cultural, political), and the like. As we saw earlier in Figure 1, over a span of two decades and six presidential elections, Asian American voting patterns have shifted dramatically from a strong plurality vote for the Republican George W. Bush in 1992 to an even stronger majority vote for the Democrat Barack Obama by 2008 and 2012.

Defining interests in terms of social processes also involves unpacking taken-for-granted assumptions about the conditions under which the voting behavior of individuals in a polity take on the coherence and coordination of collective action. In the history of American law and politics, these assumptions have been recurrently animated by the freedom struggles of African Americans. Our approach is not to challenge or replace the archetypic status of the African American experience, but to distill that experience into its underlying constitutive processes that define and produce a robust community of common interests. African Americans are a "paradigmatic case" in the sense of illuminating from "an intensive study of a single unit with an aim to generalize across a larger set of units."[198]

By understanding and unpacking what is paradigmatic about the African American experience—studied most often vis-à-vis the dyad of black-white relations—we are better able to know whether, when, and how some demographically defined groups are able to crystallize into a "common thread of relevant interests"[199] while others never reach that mark. This entails unpacking what one of us has elsewhere termed the "identity-to-politics link"—the common premise that the demographic categories that are used to classify a population into groups also capture shared political interests and collective political goals among individuals defined by those categories.[200] In short, the identity-to-politics link is the premise that "African Americans" as a demographic category entails an "African American group politics," that "Asian American" entails an "Asian

197. Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705, 723.

198. *See* Flyvbjerg, *supra* note 161, at 308; Gerring, *supra* note 161, at 352.

199. Miller v. Johnson, 515 U.S. 900, 920 (1995).

200. Lee, *supra* note 161, at 458.

American group politics," that "LGBTQ" entails an "LGBTQ group politics" and so on.

We describe this as a *premise* to remind readers that communities of common interest are not preordained by fiat of defining a bounded population and attaching a racial label to that population. Specifying something like the identity-to-politics link sets a basis for both accommodating the anti-essentialist turn of the Court in *Shaw* and *Miller* and rejecting it. The majority opinion in *Miller* quotes *Shaw*: "When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.'"[201] In many (perhaps most) cases, such an assumption will belie the facts of pluralist politics on the ground, but in some cases, it will mirror that reality.

We argue that specifying the identity-to-politics link helps differentiate these two possible outcomes. Specifically, we advocate for a careful and systematic consideration of at least five distinct links in this chain: (1) classification; (2) identification; (3) polarization; (4) politicization; and (5) coordination. *Classification* is the variation in how states and societies render the remarkable diversity of their populations legible through rules and norms of definition and categorization into groups. *Identification* is the variation in the extent to which individuals within those demographically defined groups see the labels used to categorize them as apt or at least serviceable. *Polarization* is the process by which individuals form positive bonds of solidarity and perceive shared group interests—in the classic conception of social identity theory, the processes of in-group favoritism, out-group differentiation, and intergroup competition.[202] *Politicization* is the variation in whether, when, and where those group interests are pursued in political arenas (rather than economic, social, or cultural arenas). Finally, *coordination* is the variation in whether, when, and where mobilization and action are collective. In effect, this last step of coordination is what is sought as evidence of political cohesion—the outcome of an overriding proportion of a group voting according to their collective interests. Specifying these links not only allows us to better understand the precursors to the observed outcome of interest,

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201. *Miller*, 515 U.S. at 911–12 (quoting Shaw v. Reno, 509 U.S. 629, 647 (1993)); *see also* Taeku Lee*, From Shared Demographic Categories to Common Political Destinies: Immigration and the Link from Racial Identity to Group Politics*, 4 DU BOIS REV. 433, 434 (2007); Lee, *supra* note 161, at 458.

202. Not all three aspects of social identity formation necessarily travel together; you can develop a sense of ingroup positive distinctiveness without antipathy toward or competition with a defined outgroup. *See* GORDON W. ALLPORT, THE NATURE OF PREJUDICE 29 (1954); Marilynn B. Brewer, *The Psychology of Prejudice: Ingroup Love or Outgroup Hate?*, 55 J. SOC. ISSUES 429, 430 (1999) (arguing that "ingroup favoritism and outgroup prejudice are separable phenomena"); *see also* Henri Tajfel & John C. Turner, *The Social Identity Theory of Intergroup Behavior*, *in* PSYCHOLOGY OF INTERGROUP RELATIONS 7, 13 (Stephen Worchel & William G. Austin eds., 2d ed. 1986) (stating that "incompatible group interests . . . are not always necessary for development of competition and discrimination between groups").

but also to better diagnose the barriers to achieving political cohesion when it is not observed.

In the archetypical case of African Americans, the links in this chain are well fortified through centuries of disadvantage, contemporary modes of discrimination, and the collective efforts of mobilization against them. For Asian Americans, as we discuss below, the notion of a collective of Asian Americans qua Asian Americans is, *a priori*, far more tenuous. While Asian Americans occupy one corner of America's "ethno-racial pentagon,"[203] beneath that pan-ethnic unifying thread lies a remarkably rich diversity of constituent and concurrently shifting groups. Even at the "classification" stage, various U.S. federal agencies define "Asian" to denote individuals from the Far East, Southeast Asia, or the Indian Subcontinent and individuals who self-identify racially as "Asian Indian," "Chinese," "Filipino," "Korean," "Japanese," "Vietnamese," or "Other Asian" (for example, Burmese, Cambodians, Hmong, Lao, Pakistani, and Thai).[204] With the 2000 census, Native Hawaiians and Pacific Islanders began to be classified separately from Asians.[205]

Moreover, these categories have not remained constant or consistent over time. In just the last half century, the Census Bureau's ethno-racial classification system has been successively remade.[206] In 1960, we saw a shift from enumerator observation (that is, having a trained census worker visit your home and code your identity) to respondent self-identification.[207] In the 1970 and 1980 census, a separate question identifying Americans of Hispanic origin emerged.[208] The

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203. *See* HOLLINGER, *supra* note 109, at 8.

204. *See, e.g.*, Taeku Lee, *Between Social Theory and Social Science Practice: Toward a New Approach to the Survey Measurement of "Race," in* MEASURING IDENTITY: A GUIDE FOR SOCIAL SCIENTISTS 113, 115 (Rawi Abdelal et al. eds., 2009) (listing ethnoracial classifications used throughout the history of the U.S. Census).

205. Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58, 782 (Oct. 30, 1997).

206. On changing ethno-racial classification and its contribution to shifting processes of group-making, see, for example, LÓPEZ, *supra* note 81, at 161 (discussing how questioning previously established assumptions of physicality led to hearings on the addition of a "multiracial" category to the census), MELISSA NOBLES, SHADES OF CITIZENSHIP: RACE AND THE CENSUS IN MODERN POLITICS 16 (2000) (discussing the Office of Management and Budget's defining races for the purposes of the census), MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S 3 (2nd ed. 1994) (noting the census's variance in enumerated racial categories over the decades), Mary C. Waters, ETHNIC OPTIONS: CHOOSING IDENTITIES IN AMERICA 9 (1990) (discussing the efforts of white-ethnic groups in the 1970s to have an ethnic ancestry question added to the census), Joane Nagel, *American Indian Ethnic Renewal: Politics and the Resurgence of Identity*, 60 AM. SOC. REV. 947, 947 (1995) (examining "the phenomenon of ethnic identity change and the role of politics in prompting the reconstruction of individual ethnicity"), and Kenneth Prewitt, *Race in the 2000 Census: A Turning Point*, *in* THE NEW RACE QUESTION: HOW THE CENSUS COUNTS MULTIRACIAL INDIVIDUALS, *supra* note 98, at 354, 354–60 (Joel Perlmann & Mary Waters eds., 2003) (discussing trends in racial identity classifications).

207. Lee, *supra* note 161, at 460.

208. *Id.*

categories of Asians, Pacific Islanders, American Indians, Native Hawaiians, and Alaska Natives proliferated in the 1980 and 1990 census.[209] Starting in the 2000 census, all Americans were given the ability to choose more than one among these categories. [210] These changes—as is typically so with bureaucratic efforts to make societies legible through standardization and commensuration—both mirror the growing diversity of America's population and contribute to its making.[211]

We argue that it is precisely because the idea of group-based exclusion and group identity for Asian Americans *as Asian Americans* seems so thinly wrought—especially by comparison to that of African Americans—that Asian Americans represent an especially key test case for examining the identity-to-politics link. Of course, if it were true that Asian Americans *never* faced barriers to participation or mobilized collectively *as Asian Americans*, the test case would fade away as ephemera. In fact, there have been numerous well-documented cases in which Asian Americans have come together as a pan-ethnic collectivity to protest their unfair treatment and to act in concert on a political cause.[212] To be more specific, then, Asian Americans are a key test case because while prima facie expectations are weak, Asian Americans are a dynamic (that is, rapidly growing) population that, under the right circumstances, exhibits collective action on common interests. In this historical moment that we are in, fast-moving demographic changes coupled to pivotal events can often act as critical junctures that spur defining and durable shifts in group boundaries, intergroup relations, and their relevance to existing voting rights jurisprudence.

In addition, Asian Americans are also akin to a "most different" or a "negative case" as compared to African Americans.[213] Both groups, to varying degrees, are viewed by others in totalizing, homogenous terms despite a lived reality that is far richer.[214] Yet their histories of exclusion and their standing in the American racial order are distinct from one another. Claire Kim, for instance, argues that Asian Americans are uniquely situated in a position of "relative

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209. *Id.* at 461.

210. *Id.*

211. On commensuration generally, see Wendy Nelson Espeland & Mitchell L. Stevens, *Commensuration as a Social Process*, 24 ANN. REV. SOC. 313, 315 (1998) (defining commensuration as measuring characteristics usually represented by different units along a common metric), and IAN HACKING, THE TAMING OF CHANCE 161 (1990) (measuring the characteristics of human nature according to "normal people").

212. *See* YEN LE ESPIRITU, ASIAN AMERICAN PANETHNICITY: BRIDGING INSTITUTIONS AND IDENTITIES 134–60 (1992) (enumerating examples of pan-Asian organization in response to anti-Asian violence); Dina Okamoto & Kim Ebert, *Beyond the Ballot: Immigrant Collective Action in Gateways and New Destinations in the United States*, 57 SOC. PROBLEMS 529, 535 (2010) (explaining how the occupational segregation of Asian ethnic groups from whites fostered pan-ethnic interests and facilitated organizing efforts); Dina G. Okamoto, *Towards a Theory of Panethnicity: Explaining Asian American Collective Action,* 68 AM. SOC. REV. 811, 820 (2003) (noting that fifty-nine of 375 documented collective action events involving Asian Americans were pan-ethnic).

213. *See* Mahoney & Goertz, *supra* note 189.

214. *See* Chang, *supra* note 113, at 15–18 (discussing nativistic racism).

valorization" as a "model minority" vis-à-vis other minority groups like African Americans.[215] Thus, public discourse is rife with tropes of the exemplary rise of Asian Americans to socioeconomic success compared to the experiences of Latinos and African Americans. Yet at the same time, Kim also finds Asian Americans "civically ostracized" and subject to continued suspicions of being "perpetual foreigners" and "strangers in a strange land."[216] One implication here is the potential that the prevalence of narratives of relative valorization crowds out the presence and persistence of various modes of exclusion from civic, economic, and political life.

There is potential for discovering more shared interests in the context of a multiracial, multiethnic electorate by re-examining some of the weaker links as applied to nonblack minority groups such as Asian Americans. In the case of Asian Americans, additional difficulties are presented along the lines of group formation and mobilization. As Asian American and racial politics scholars have explained, group formation is a precursor to politics. For example, sociologists Michael Omi and Howard Winant have shown in influential work that racial formation, especially for a pan-ethnic group such as Asian Americans, is a complex social process rather than a given.[217] "The designation of racial categories and the determination of racial identity is no simple task."[218] "Although the concept of race invokes biologically based human characteristics (so-called phenotypes), selection of these particular human features for purposes of racial signification is always and necessarily a social and historical process . . . by which racial categories are created, inhabited, transformed, and destroyed."[219] The process is obscured by reductionist racial classifications traditionally used in law, government data, and social science scholarship that aggregate multi- or pan-ethnic subgroups.[220] To the extent that the social process of racial formation can be elucidated for Asian Americans, possibilities for enhancing group participation in politics can be identified.

Once a racial group has coalesced around a common identity, further mobilization is required to bolster representation in the electoral process. A key component of mobilization is the transformation of shared racial identity into a shared political identity, which in American politics means partisan identification.[221] "Decades of initiatives by the Democratic Party in support of the

215. Kim, *supra* note 115, at 117.

216. *Id.* at 126.

217. *See* OMI & WINANT, *supra* note 206, at 53–76 (1994) (discussing the historical aspects of racial formation and its ties to the evolution of hegemony).

218. *Id.* at 54.

219. *Id.* at 55–56.

220. *See* LÓPEZ, *supra* note 81, at 160 (discussing an individual's denial of citizenship on the basis of the racial identity assigned to him by the court).

221. *See* HAJNAL & LEE, *supra* note 175, at 16 (noting percentages of Latinos and Asians who are willing to place themselves along the political spectrum and voting rate).

civil rights movement and other causes important to the African American community have created a widely held perception that the Democratic Party is the party of minority interests."[222] However, Hajnal and Lee have demonstrated that growing numbers of Americans, including a majority of Asian Americans and Latinos, do not identify with either of the two parties.[223] One of the key implications of the majority of nonpartisans among Asian Americans vis-à-vis voting rights is that institutional barriers need not be as visible as poll taxes or literacy tests to have an exclusionary effect. Rather, institutional neglect can be every bit as effective. Moreover, the trend of partisan disaffiliation is neither inevitable nor irreversible. Outreach from the political parties can connect minority groups to electoral politics. But historic electoral neglect of Asian Americans from political parties thwarts possibilities for increased participation and, consequently, representation in a party-driven electoral system.[224] Building an institutional infrastructure to link Asian Americans with the party system can bolster resultant representation.

In the ensuing sections, we present a fresh look at the possibilities and extent to which Asian Americans constitute a community of common interest. As a requisite caveat, we first note that one persistent thorn in the side of the kind of analysis we have endeavored to present here is the incomplete and often unavailable data on Asian Americans. To start with the standard and typically authoritative source of individual-level data on voter registration and voter turnout, the CPS, conducts interviews in only two languages—English and Spanish.[225] Nearly two-thirds of Asian Americans are foreign born and one in three are limited in their English proficiency.[226] Within certain groups like Vietnamese, Hmong, Cambodians, Laotians, Taiwanese, Koreans, and Chinese, roughly half or more are classified as having "limited English proficiency."[227] Research on Latino Americans demonstrates that the language of the interview not only produces significant and substantive differences in what people say on surveys, but these differences are also quite persistent and pervasive.[228] Our

222. *Id.* at 4 (citation omitted).

223. *Id.* (citing *NAAS, 2008*, *supra* note 149, for the finding that only 46% of Asian Americans identify with either political party and the 2006 Latino Political Survey for a similar finding that only 44% of Latinos engage in partisan identification—these majorities are "non-identifiers" rather than Independents).

224. *See* April Chung, Comment, *Noncitizen Voting Rights and Alternatives: A Path Toward Greater Asian Pacific American and Latino Political Participation*, 4 UCLA ASIAN PAC. AM. L.J. 163, 172 (1996) (discussing neglect of Asian Pacific Americans and Latinos by political candidates and government officials).

225. *See* Lee et al., *supra* note 138 (discussing use of only English and Spanish for the Current Population Survey Behavioral Risk Factor Surveillance System).

226. SCHMIDLEY, *supra* note 139.

227. PRESIDENT'S ADVISORY COMM., *supra* note 140.

228. *See* Johnson et al., *supra* note 141.

approach below is to use the NAAS along with other relevant datasets—the best data available, when available, and with appropriate rejoinders on their limitations.

B. Measuring Shared Interests and Identities

Using more refined measures and broader sources of information will capture still other bases of shared political interest. One possibility is to look to attitudinal sources of evidence of emerging interests. Compared to U.S. census reporting and other forms of commonly used data, data from the three key surveys—the NPS, the LACSS, and the NAAS—provide some of the most comprehensive information about Asian American voting behavior. We highlight in this section a few among the many measures that indicate a basis for shared commonality:

- A solid majority of Asian Americans view their lot in life as linked to the fate of other Asians;
- Asian Americans are more likely than African Americans or Latinos (at least in Los Angeles County) to see political power as an important means to achieve group interests; and
- Asian Americans are more likely than blacks and Latinos (again, in Los Angeles County) to vote for a co-ethnic candidate, *ceteris paribus*.

These snapshots into Asian American common interests capture the key stages of polarization, politicization, and coordination that come at the end of the identity-to-politics chain. We start with the premise that polarization entails salient social group identities, with the activation of commonality within a group and the sharpened differentiation between groups.[229] In surveys, this is often glimpsed through measures of "linked fate" by asking respondents, "Do you think what happens generally to other Asians in this country affects what happens in your life?"[230] The underlying concept here is that individuals with an activated sense of collective identity engage in what political scientist Michael Dawson terms a "racial group calculus."[231] One's racial or ethnic group membership serves as a

229. Social identity theory, as a theory, argues that intergroup dynamics like group polarization can be explained through processes of social categorization, such as in-group favoritism, out-group differentiation, and inter-group competition. *See* Henri Tajfel, *Experiments in Intergroup Discrimination*, 223 SCI. AM. 96, 96 (1970); Tajfel & Turner, *supra* note 202. Identity here is thought of as "that part of an individual's self-concept which derives from his knowledge of his membership of a group (or groups) together with the value and emotional significance attached to the membership." HENRI TAJFEL, DIFFERENTIATION BETWEEN SOCIAL GROUPS: STUDIES IN THE SOCIAL PSYCHOLOGY OF INTERGROUP RELATIONS 63 (1978). Identity is thus the collective dimension of one's sense of self and it is both meaningful and cherished. Humans are wired to strive for a positive sense of their social self by endeavoring to optimize the distinctiveness between an in-group and relevant out-groups. As Tajfel famously shows, this striving is so ubiquitous that "groupness" can be defined and defended over boundaries as seemingly inconsequential and arbitrary as preferring the art of Kandinsky over Klee. *See* Tajfel, *supra*, at 107.

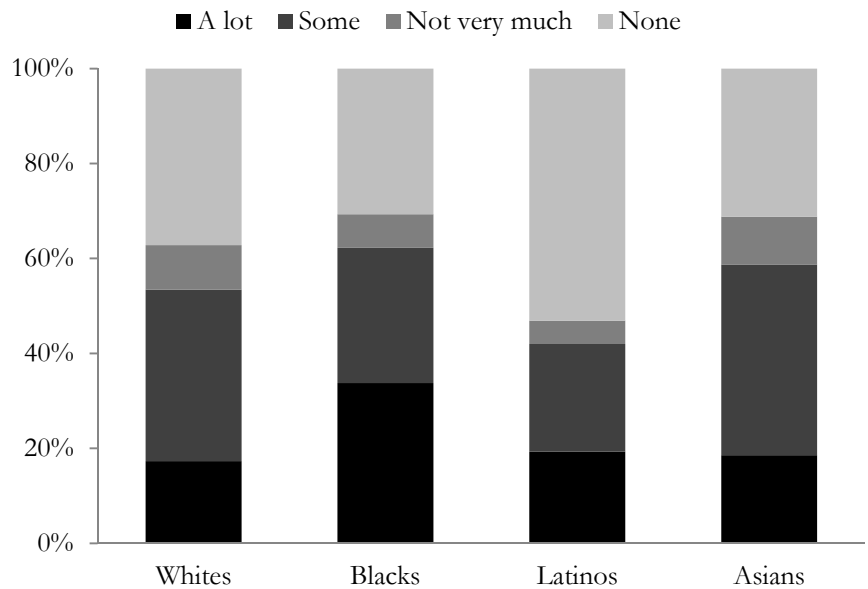
230. *See, e.g.*, Ramakrishnan et al., *supra* note 180, at 59.

231. *See* DAWSON, *supra* note 162, at 66–67 (discussing calculations of racial utility); *see also*

heuristic for one's interests such that in asking a question like, what is best for me?, individuals with a strong sense of linked fate will ask, as a short-cut, the question, what is best for *people like me?*

This measure of "linked fate" has been shown to be one of the most consistent and powerful predictors of black public opinion and voting behavior.[232] It has also been shown as a fairly robust predictor of the political attitudes and race relations of Latino Americans and, in some contexts, Asian Americans as well.[233]

Figure 2: Perceptions of Linked Fate, by Racial/Ethnic Group[234]



TATE, *supra* note 162, at 24–25, 45–49 (discussing effects of race identification among Blacks on policy choices).

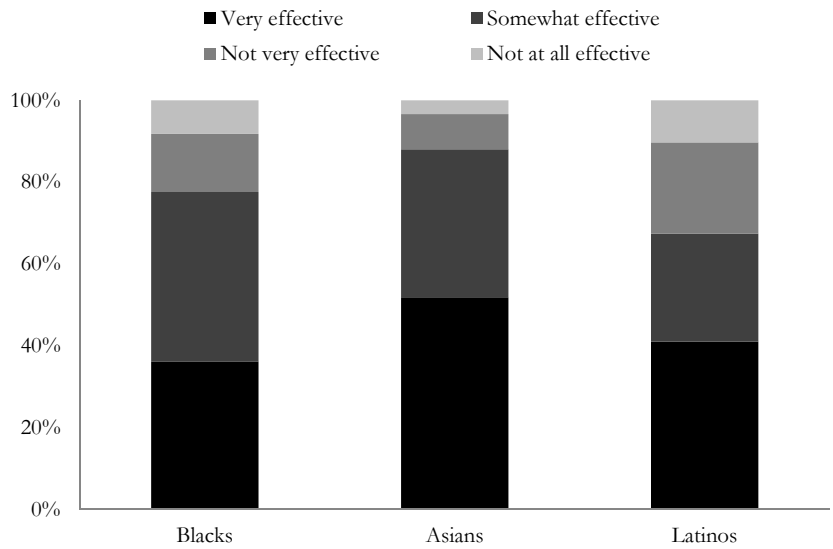
232. DAWSON, *supra* note 162, at 61.

233. On Latinos, see Paula D. McClain et al., *Racial Distancing in a Southern City: Latino Immigrants' Views of Black Americans*, 68 J. POL. 571, 577–82 (2006). *See also* Dennis Chong & Reuel Rogers, *Reviving Group Consciousness*, *in* THE POLITICS OF DEMOCRATIC INCLUSION, *supra* note 155, at 45, 48–49 (discussing the effects of group consciousness on Latinos and Asians); Gabriel R. Sanchez, *Latino Group Consciousness and Perceptions of Commonality with African Americans*, 89 SOC. SCI. Q. 428, 431–39 (2008). On Asian Americans, see Jane Junn & Natalie Masuoka, *Asian American Identity: Shared Racial Status and Political Context*, 6 PERSP. ON POL. 729, 731 (2008). *See also* Natalie Masuoka, *Together They Become One: Examining the Predictors of Panethnic Group Consciousness Among Asian Americans and Latinos*, 87 SOC. SCI. Q 993, 995–96 (2006).

234. *NPS, 2004*, *supra* note 147.

What is less well shared is the significant proportion of Asian Americans who also demonstrate a robust sense of shared destiny. Indeed, Figure 2 shows that a much higher proportion of African Americans believe that their fates are strongly linked to other African Americans than any other group; when the strength of that connection is expanded from "a lot" to include both "a lot" and "some," nearly 60% of Asian Americans report a sense of shared well-being. Notably, this proportion is comparable to that of African Americans (62%) and higher than that of Latinos (42%) and whites (52%).

Figure 3: Political Power as a Means to Group Interest, by Racial/Ethnic Group[235]

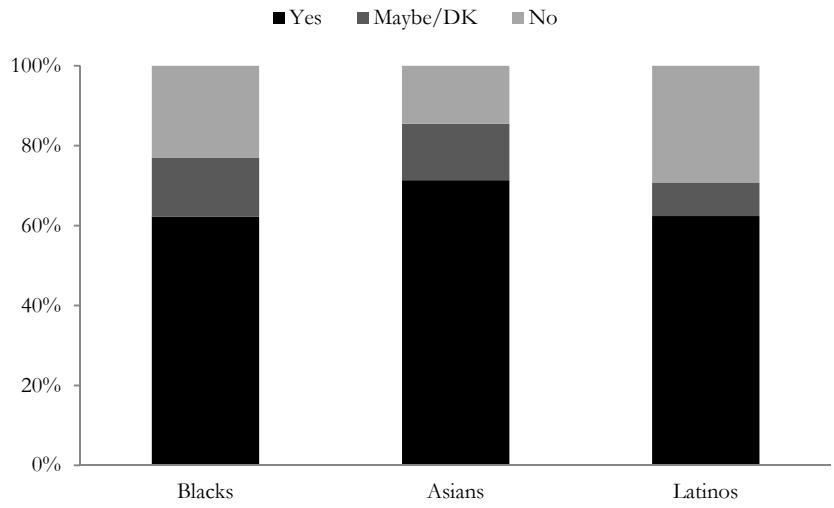


Second, it may be the case that Asian Americans, in high proportions, see their destinies as interconnected, but through other means than political. The 2007 LACSS asked respondents, "How effectively do you think elections and political power is as a means of pursuing" their racial group's interests?[236] At least among Angelenos, Asian Americans report in even higher measure that they view political power as a means to furthering their group interest. More than 80% of Asian Americans report that political power is either "somewhat effective" or "very

235. *LACSS, 2007*, *supra* note 148.
236. Sawyer et al., *supra* note 148, at 88.

effective."[237] This is higher than the combined totals for Latinos (65%) and even blacks (75%).[238]

Figure 4: Willingness to Vote for a Co-Ethnic Candidate, by Racial/Ethnic Group[239]



As a third cut into Asian American common political interests, we distinguish between a generalized sense of the relevance of political action and a direct willingness to act on the basis of that sentiment. The LACSS also asked its respondents, "Suppose you have an opportunity to decide on two candidates for political office, one of whom is [from the respondents' racial group]. Would you be more likely to vote for [that candidate]?"[240] Asian Americans report the highest willingness to vote for co-ethnic candidates. More than 70% said "yes" (compared to just over 60% of Latinos and blacks) and an additional 10% said "maybe" or "don't know," bringing the combined willingness to 80% (compared to 75% for blacks and 70% for Latinos).[241]

237. *See supra* Figure 3.

238. *See id.* To be candid, this measure is somewhat limited by the fact that responses are not calibrated by how effective Asian Americans might view other means of pursuing collective interests, such as in economic, social, cultural arenas. A better format for measuring politicization would be a question that requires trade-offs or contingent valuation between these various modes of pursuing a group's interests.

239. *LACSS, 2007*, *supra* note 148.

240. Sawyer et al., *supra* note 148, at 88.

241. *See supra* Figure 4. *See generally* CELINDA LAKE ET AL., LAKE RESEARCH PARTNERS, ASIAN AMERICAN SURVEY 14 (2012) (additional support for emerging partisan identification and coalescence).

Opinion surveys are admittedly only one among several ways of defining and observing communities of interest. There are well-researched limitations to the validity and reliability of information accessed through surveys, such as the bias in responses due to social desirability, the particularities of question wording and ordering, the language of an interview, the race and gender of an interviewer, the tendency to overreport civically valued behaviors such as voting and underreport socially proscribed beliefs such as stereotyping and the like.[242] On this point, we appreciate the contribution of the UCLA *Asian Americans Redistricting Project* in laying out other possible methodologies for observing a CCI.[243] They include both quantitative and qualitative techniques suitable for producing and analyzing a wide range of data sources. Some of these techniques include conducting stakeholder surveys (to ascertain media usage and non-electoral forms of electoral engagement), collecting official data on voting patterns from government sources, engaging in organizational analysis (to ascertain connections to economic institutions, social networks, and exposure to public safety risks), and performing secondary data analysis (to ascertain education, homeownership, mode of transportation, and language).[244]

242. For a general introduction to these biases, see ROBERT M. GROVES ET AL., SURVEY METHODOLOGY 269–98 (2d ed. 2009) (discussing survey interviewing and its potential biases). *See generally* Nora Cate Schaeffer & Stanley Presser, *The Science of Asking Questions*, 29 ANN. REV. SOC. 65 (2003) (discussing how the context and structure of survey questions can affect responses to those questions).

243. Bing He et al., *Asian Americans Redistricting Project: Accessing Secondary Data*, ASIAN AM. STUD. CENTER (2009), http://www.aasc.ucla.edu/policy/Secondary%20Data_Final(2).pdf; Ojeda-Kimbrough et al., *supra* note 166; Paul M. Ong et al., *Asian Americans Redistricting Project: Accessing Registration and Voting Data*, ASIAN AM. STUD. CENTER (2009), http://www.aasc.ucla.edu/policy/Voting_Final(2).pdf [hereinafter Ong et al., *Accessing Registration*]; Paul M. Ong et al., *Asian Americans Redistricting Project: Conducting Stakeholder Surveys*, ASIAN AM. STUD. CENTER (2009), http://www.aasc.ucla.edu/policy/Stakeholder_Final(2).pdf [hereinafter Ong et al., *Conducting Stakeholder Surveys*].

244. See sources cited *supra* note 243.

Figure 5: Methodologies for Ascertaining Communities of Common Interest Factors[245]

Criteria	Research Methodology			
	Stakeholder Survey	Voting Patterns	Organizational Analysis	Secondary Analysis
Socioeconomic Status				
Income/Economic Class/Occupation				x
Education				x
Homeownership				x
Mode of Travel				x
Media Usage	x			
Language				x
Connections to Economy (production & consumption)	x		x	
Political				
Voting (political stance)	x	x		
Other Forms of Engagement (protest, attend town hall or neighborhood meetings, etc.)	x		x	
Social Capital/Networks	x		x	
Information Network (ethnic media)	x		x	
Common Risks	x		x	
Environmental Risks (TRTs, Prop 65)	x		x	
Public Safety	x		x	

Secondary data is information attained from an external source such as the American Community Survey (ACS) or U.S. census. Secondary data contains information in the aggregate (summary data for a particular geographic area or population in the form of tabulations, percentages, and averages) or microdata (broken down to individual data points and responses) on issues like income, education, housing, and other demographics. The benefit of secondary data is that

245. Adapted from Table 1.1 from Ojeda-Kimbrough et al., *supra* note 167, at 12.

it has been collected according to widely accepted research methods and uses large sample sizes and extensive training that minimize bias. The information is relatively easily and inexpensively obtained by researchers as compared to the process of collecting of primary data.[246]

Political information about *voting patterns* complements U.S. census and ACS data when trying to determine whether a neighborhood should be considered a community of common interest. It might include information about partisan affiliation and election results by candidate or ballot initiative. In addition, voting data can be used to determine if a neighborhood is currently kept intact or fragmented by electoral districts drawn in a previous round of redistricting, indicating potential challenges to political power for the next round of redistricting.[247]

Organizational analysis involves the in-depth study of neighborhood institutions such as churches and community centers to obtain a sense of social networks. In the Koreatown example, UCLA researchers looked at the attendees of a neighborhood church and the users of a neighborhood social service. Two questions were asked: (1) What proportion of the church members or social service users reside in the hypothesized community of common interest? And (2) How does the organization define its activities and identity vis-à-vis the neighborhood?[248] Similar assessments of community needs have engaged public testimony through participatory forums such as the Independent Citizen Commission enacted by California voters under Propositions 11 and 20.[249]

Finally, the potential uses of *surveys* themselves are far from exhausted. While surveys are a relatively more labor-intensive means of gathering information than using pre-existing data, they allow researchers to design their data collection in ways that avoid the limitations of pre-existing data. So long as surveys are able to draw a representative sample of Asian Americans, researchers have close to carte blanche in their ability to use surveys to properly portray even as elusive and organic an entity as a "community of common interest." For example, the NAAS links up immigration status to naturalization, voter registration, electoral participation, participation in non-electoral politics, varieties of civic, religious, and transnational activism, reliance on ethnic media and ethnic institutions, self-reports of discrimination and hate crimes victimization, and mobilization by political parties and their candidates.

We close this section by describing a particularly promising example of the

246. He et al., *supra* note 243, at 2.

247. *See* Ong et al., *Accessing Registration*, *supra* note 243, at 2.

248. *See* E-mail from Paul Ong, Professor, UCLA Luskin Sch. of Pub. Affairs, to authors (Aug. 3, 2012, 09:57 PST) (on file with authors).

249. *See* Mac Donald & Cain, *supra* note 49 (manuscript at 6, 7). For more examples of Asian American CCI consideration, see Minnis, *supra* note 15, at 38–39 (describing 2011 redistricting challenges in California and Michigan).

kind of innovation possible through carefully designed surveys: a graded variable approach toward discerning racial identities.[250] The starting premise is this: the critical task for courts when taking race into account in vote dilution cases is disaggregating *relevant* interests that are correlated with political preferences and merit legal protection in voting law. Existing ways of measuring race (even in most previous surveys) fail to convey this information for Asian Americans because they are too blunt. In effect, there are two primary features of a person's racial identity that are relevant to assessing polarized voting: one is which group *or groups* one identifies with, and the other is how strongly one identifies with that group or groups. Most data collection previous to the 2000 decennial census was first limited by a "singularity constraint" in which individuals, no matter how multiracial their heritage, were expected to choose *just one* among a menu of racial identities. Since the introduction of the "mark one or more" response option with the 2000 census, most social and political surveys have followed suit with some means of allowing for individuals to identify with multiple races.

What is still missing in surveys is an accurate way of assessing the "equivalency constraint" in measurement. This constraint presumes that when two people choose, say, "Asian American" as a racial identity that defines them, the two people identify equally as "Asian American." Similarly, it presumes that when two people choose different categories (say, "Asian American" in one instance and "white" in another), they share nothing in common with respect to their "Asian-ness" or "whiteness." This constraint is not limited only to *how many* racial groups someone identifies with, but also limited to *how strongly* they identify with the groups that define them. The graded variables approach that one of the authors has developed allows for more granular information about group interests.[251] The intuition behind it is to allow not only for racial identities to be multiple—as the decennial census, ACS, and many post-2000 social surveys do—but to allow for those multiple attachments to vary in their intensity.

The approach here is directly analogous to Lani Guinier's proposal for "cumulative voting."[252] Both "one-person, one-vote" electoral systems and "one-person, one category" racial classification systems share the singularity and equivalence constraints. Just as it can limit electoral choice to require voters to choose just one candidate when they might hold measured positive valences for more than one candidate, so too it limits racial identification to require individuals to select one "race" when their history and current experience is more diverse. Similarly, just as cumulative voting allows citizens to vote for multiple candidates

250. For prior approaches to graded variables, see Lee, *supra* note 204, at 115–19 (listing some of the racial gradations used in past censuses).

251. *See id.*, at 119–28 (describing the graded variables approach to ethno-racial self-identification).

252. LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 14 (1994).

and weigh their votes according to their intensities of preference across candidates,[253] a graded approach to racial identities allows individuals to identify with multiple racial categories if they see fit and to weigh those identifications as they see fit.[254]

To the extent that one's membership in a racial group is, at least to an extent, volitional and interest-based, this graded approach allows us to more accurately assess how commonly those interests run across all members of a putative group. This approach notably has a potentially wide range of applications to our understanding of race/ethnicity and social divisions more broadly. It allows a potentially more nuanced measure within an identity class (for example, how the categories of "African American," "white," "Asian American," "Latino," and "Native American" are negotiated), across different identity classes (for example, between race, ethnicity, gender, class, sexuality, ideology, religiosity, partisanship) within a putative identity category (for example, between one's pan-ethnic identity as "Asian American" and one's ethnic/national origin attachments as "Filipino" or "Vietnamese"), and between the process of self-identification and external ascription of one's race. The approach was developed primarily for use in survey measurement, with striking results in our estimates of the prevalence of multiracial self-identification.[255]

For present purposes, this approach is especially promising as a means to better understand why some Asian Americans identify vigorously and consistently over time as Asian Americans qua a community of common interests while others do not do so. To what extent is such an organic, graded "sense of self" defined by factors such as Asian Americans' ethnic subgroups, the language they speak at home, their consumption of ethnic media, the neighborhood in which they live, their socioeconomic status, their access to basic social services, their political voice, and perhaps even their identification with attitudinal statements such as "I have experienced discrimination in voting"? If the search for relevant characteristics of discrete subsets within a heterogeneous multiracial voting population is seen as a valid enterprise,[256] this graded variables approach enables us to test "which identities matter and how much they matter *within* an identity class."[257] For example, a survey can illuminate the relevance of income level within the Latin communities of Rio Grande and Austin, Texas Latino communities (in *LULAC*)[258] or the extent to which ethnic media is consulted across Manhattan

253. *Id.*

254. Lee, *supra* note 204, at 113–14.

255. *See id.* at 128 (describing the 2003 Golden Bear Omnibus survey). In this context, simply allowing survey respondents to view their racial identity in more graded terms alters our statistical estimates of the proportion of Californians of multiracial descent from the 4.7% in the 2000 census to roughly 26%. *Id.* at 130, 130 n.14.

256. *See* Magpantay, *supra* note 167, at 765–69.

257. Lee, *supra* note 204, at 120 (emphasis added).

258. LULAC v. Perry, 548 U.S. 399, 423 (2006).

Chinatown and Brooklyn's Sunset Park Chinese communities (in *Diaz*).[259] It can help clarify which identities matter across identity classes (for example, between race, class, partisanship, and perceived challenges and opportunities within a neighborhood).[260] A survey might also help make the case for a coalition of Asian and Latino groups in Los Angeles who share a preference for a minority candidate that prioritizes immigration reform over other policy platforms. And it sorts out the relevance of pan-ethnic versus ethnic or national origin subgroups known to be important cleavages in the Asian American community.[261] Other possibilities might be developed that align with relevant political behaviors, at least some of which may be incorporated into legal doctrine.[262]

C. Reforming Legal Tests to Reflect Redefined Interests

The legal tests under the VRA should be modified or supplemented with the above-identified approaches to discerning whether a community of common interests exists and whether those interests are being defeated under currently defined jurisdictions. Minor improvements could be made to the *Gingles* factors to reflect changing patterns of minority politics and/or appropriate qualifications could be made about their relevance to other protected groups (who may require alternate or additional tests of vote dilution). One example is the notion of "cultural compactness" to modify prong one of *Gingles* in *LULAC*.[263]

Other possible modifications have been recognized by lower federal courts and state courts, including the requirement in *Bush v. Vera*[264] and *Diaz*[265] that defeating a claim of racial gerrymandering requires line drawers to consider evidence that a "community of common interest" existed at the time of district drawing (not merely afterwards, as a pretext for race-based districting). Often the claim will arise as a restraint on suspected gerrymandering, but sometimes it will arise as reason to permit redistricting where a minority group otherwise has difficulty remaining intact. While the Supreme Court has not defined communities of common interest in specific terms or tests, lower federal and state courts have recognized several factors as indicative of "communities of common interest."[266] Some of these factors include the following:

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259. Diaz v. Silver, 978 F. Supp. 96, 101 (E.D.N.Y. 1996), aff'd, 522 U.S. 801 (1997).

260. Lee, *supra* note 204, at 120.

261. *Id.*

262. *See id.* at 142 (discussing some possibilities for further developing the graded variables survey instrument).

263. *LULAC*, 548 U.S. at 430–35.

264. Bush v. Vera, 517 U.S. 952, 961–65 (1996).

265. Diaz v. Silver, 978 F. Supp. 96, 129 n.22 (E.D.N.Y. 1996), *aff'd*, 522 U.S. 801 (1997).

266. *See, e.g.*, *LULAC*, 548 U.S. at 426; *Diaz*, 978 F. Supp. at 102–26. In support of the exercise of identifying such criterion, Glenn Magpantay says, "Drawing districts on the basis of Asian American communities of interest is not simply a legal fiction nor a proxy for race. Asian American communities of interest may be viewed as smaller subsets of the Asian American community." Magpantay, *supra* note 167, at 768 (footnote omitted).

1. Common language and institutions. For instance, use of common Chinese dialect and Chinese-language newspapers, and school and church attendance;[267]
2. Homologous socioeconomic status. For instance, educational background, employment and economic patterns, housing patterns, and living conditions;[268]
3. Comparable immigration histories. For instance, being an immigrant or a naturalized citizen,[269] and refugee Cambodians;[270]
4. Shared social services and public goods. For instance, riding the same subway lines, using the same private and municipal health and social service agencies,[271] and sending children to the same schools; and
5. Parallel experiences of discrimination. For instance, the experience addressed in *U.S. v. City of Hamtramck*, in which claims were brought on behalf of Arab Americans and darker-skinned Asian Americans whose voting qualifications were challenged.[272]

As a "proof of concept" of this approach of reforming legal tests towards a more capacious view of factors that may predispose a population into emerging as a community of common interest, we conclude this section with some initial evidence from the NAAS. To foreshadow, we find that, to varying degrees, these CCI factors are in fact associated with survey-based measures of Asian American commonality. Not all five CCI factors above are equally well assessed using individual survey data, and so we are selective about the relationships we show, and these findings are intended for illustrative purposes only. More specifically, we focus on two factors that ought to resonate, *pari passu*, with the formation of an Asian American CCI: the extent to which they are linguistically isolated, and the degree to which they experience discrimination as Asian Americans. To assess common interests at the individual level, we rely on two items in the NAAS: respondents' perceptions that their fates are interconnected with that of the group

267. *Diaz*, 978 F. Supp. at 102.
268. *LULAC*, 548 U.S. at 426; *Diaz*, 978 F. Supp. at 124.
269. *Id.* at 126.
270. Magpantay, *supra* note 167, at 768.
271. *Diaz*, 978 F. Supp. at 126.
272. Complaint at 3, United States v. City of Hamtramck, No. 00-73541 (E.D. Mich. Aug. 4, 2000). It is also necessary to reckon with factors involved in the strategy of forging cross-racial or multi-racial coalition districts, for example, across Asian American subethnic groups and together with African American and Latino communities. The result might not be self-representation or descriptive representation, but could still satisfy the criterion of "candidate of choice" through substantive representation of interests. *See* Ramakrishnan et al., *supra* note 180, at 62–67. *See generally* Frank J. Macchirola & Joseph G. Diaz, *Minority Political Empowerment in New York City: Beyond the Voting Rights Act*, 108 POL. SCI. Q. 37, 50–52 (1993) (discussing the 1991 redistricting of New York City with regard to Asian Americans and Latinos). For further discussion of Asian Americans and minority coalitions, see Minnis, *supra* note 15, at 35 (describing a three-way coalition of Asian American, Latino, and African American voters in Prince Williams County, Virginia among other examples).

they identify with, and respondents' views about what basis of commonality Asian Americans share. The first measure of "linked fate," which we saw earlier in Figure 2, tells us whether Asian Americans see, cognitively, a basis for shared interests. In the 2008 NAAS, the specific question wording is, "Do you think what happens generally to other Asians in this country affects what happens in your life?"[273] If respondents concur, they are then asked whether the effect is "a lot," "some," or "not very much."[274] The second measure is how Asian Americans view their commonality to one another. Respondents are asked, "What, if anything do Asians in the United States share with one another? Would you say they share a common race, a common culture, common economic interests, common political interests?" Unlike the linked fate items, which ask directly about a person's own sense of solidarity with others, these measures are indirect and ask respondents to assess what they think bind Asian Americans together. These items cohere reasonably well together as an additive index (Cronbach's alpha = 0.68).[275]

How is linguistic isolation and unfair treatment to perceptions of Asian American commonality? To assess the association of language with group interests, we examined the extent to which respondents to the NAAS relied on ethnic (non-English language) media sources for their political information. Here, respondents are asked whether they rely on newspapers, radio, television, or online sources for their political information.[276] When the replies are affirmative, respondents are then asked whether the content of those media sources is in an Asian language or in English.[277] These items cohere fairly well as an additive scale (Cronbach's alpha = 0.72). Notably, this institutional measure of language isolation is positively associated with one's sense of shared interests by both measures of commonality, shown below in Figures 6 and 7.

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273. Ramakrishnan et al., *supra* note 180, at 59.

274. *Id.* at 60. The 2008 NAAS also asks respondents if "what happens generally" to other co-ethnics (for example, fellow Chinese, Filipinos, Vietnamese) affects their life. *Id.* Since the focus here is on pan-ethnic commonality, we use the more general item with "other Asians" as the referent. The two linked fate items are statistically very closely related, with a high correlation coefficient of 0.65. *See id.*

275. The Cronbach's alpha reliability coefficient is a statistic that captures the correlation between the scale that is measured and some "true" underlying scale if respondents could be asked about all possible measures of the underlying concept of interest; in this case the underlying concept would be something akin to "Asian American commonality." *See* Lee J. Cronbach, *Coefficient Alpha and the Internal Structure of Tests*, 16 PSYCHOMETRIKA 297 (1951). The more items you have that ask about the concept of interest, the higher this statistic; items that measure some other concept will bring down the value of the statistic. *See id.* To the extent that our additive index asks about commonality across four different venues—economic, politics, race, and culture—we should expect a lower alpha coefficient than if we asked about, say, cultural commonality in four different ways.

276. Ramakrishnan et al., *supra* note 180, at 18–21.

277. *Id.*

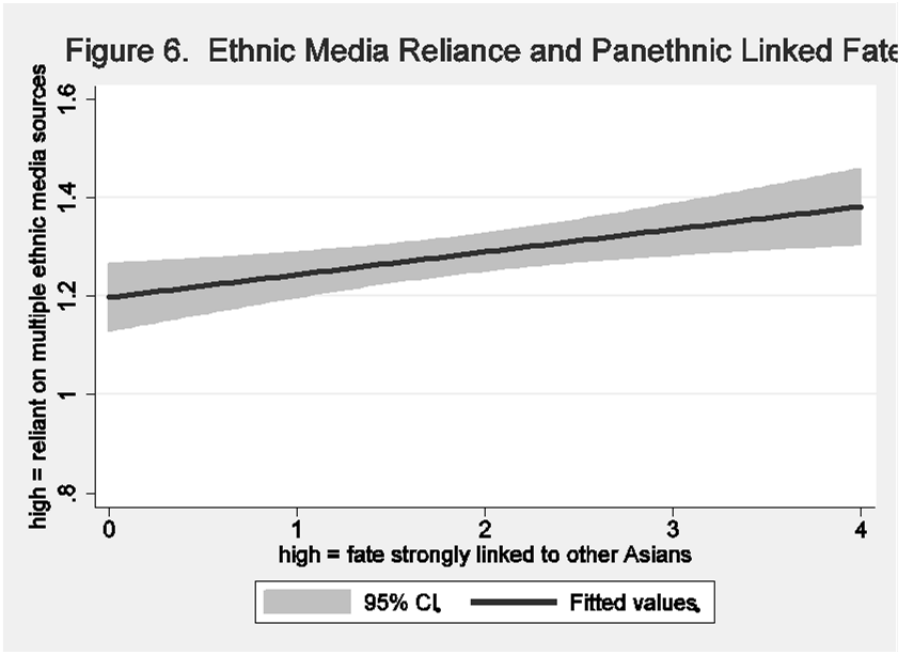


Figure 6. Ethnic Media Reliance and Panethnic Linked Fate
high = reliant on multiple ethnic media sources
.8
1
1.2
1.4
1.6
0
1
2
3
4
high = fate strongly linked to other Asians
95% CI
Fitted values

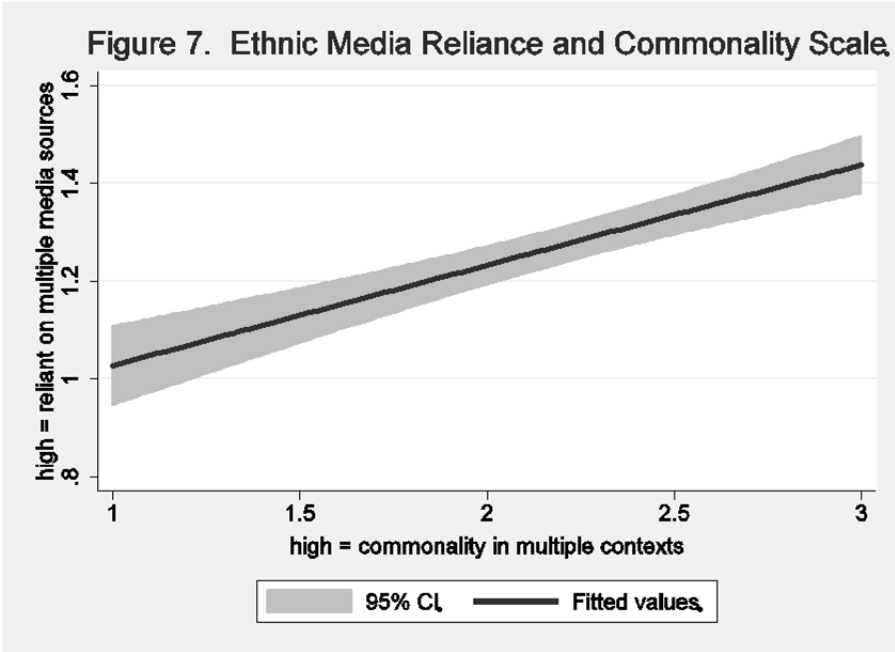
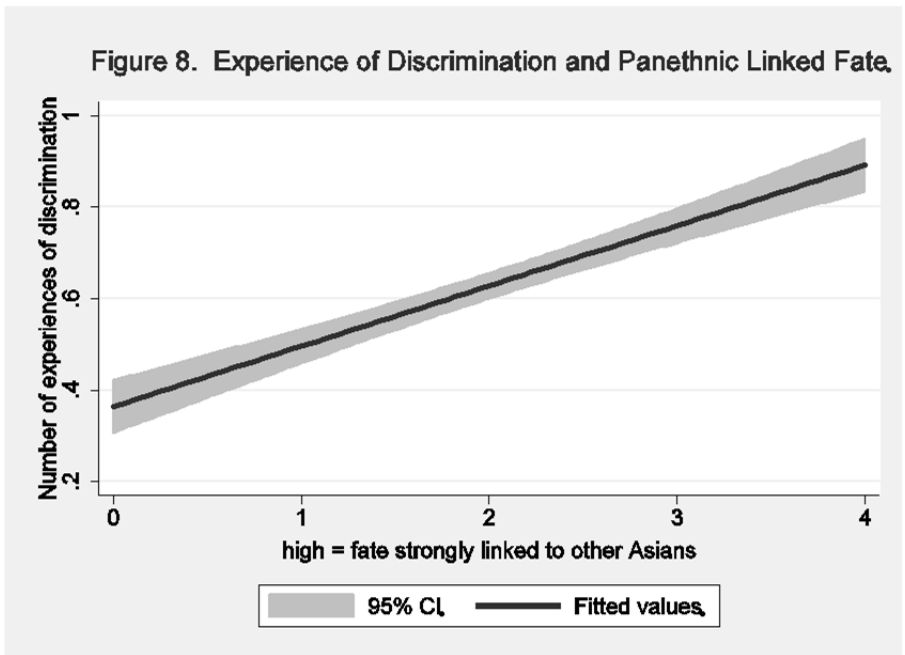


Figure 7. Ethnic Media Reliance and Commonality Scale
high = reliant on multiple media sources
.8
1
1.2
1.4
1.6
1
1.5
2
2.5
3
high = commonality in multiple contexts
95% CI
Fitted values

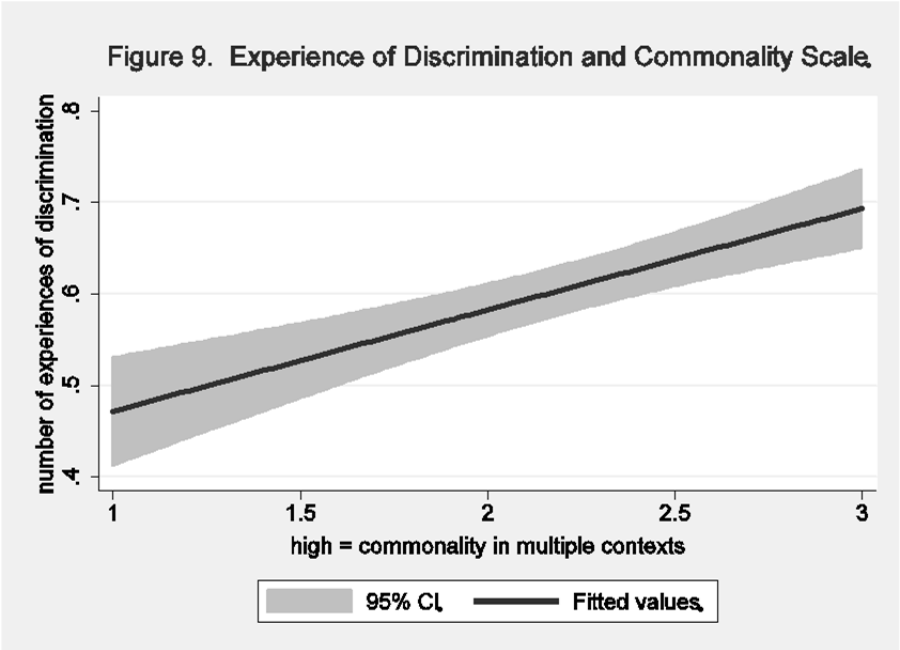
The relationship between a candidate CCI factor and individual measures of commonality is even more clear-cut when we turn to self-reports of discrimination. The specific item in the NAAS we examine here starts with the prompt, "We are interested in the way you have been treated in the United States, and whether you have ever been treated unfairly because of your race, ancestry, being an immigrant, or having an accent."[278] Respondents are then asked if they have ever been "unfairly denied a job or fired," "unfairly denied a promotion at work," "unfairly treated by police," "unfairly prevented from renting or buying a house or apartment," or "treated unfairly or badly at restaurants or stores."[279] In total, about 39% of NAAS respondents reported having experienced unfair treatment in at least one of these contexts. Figures 8 and 9 show the association between unfair treatment and commonality by adding up these contexts of discrimination.[280] In both cases of pan-ethnic linked fate and our constructed commonality scale, the relationship is very strong. It is clear from Figures 8 and 9 not only that Asian Americans report experiencing unfair treatment at high rates, but also that such experiences are formative of a greater sense that Asian Americans share a basis of commonality and a greater belief that their lot is intimately connected with that of other Asian Americans.



278. *Id.* at 62.

279. *Id.* at 62–66.

280. On average, if NAAS respondents reported experiencing discrimination, they reported experiencing it in more than one context (a mean level of 1.8 contexts of discrimination, to be precise). *See id.* at 62–67 (asking questions concerning discrimination).



The cumulative effect of this "first blush" check on the plausibility of broadening our legal tests to include CCI factors like language isolation and discrimination, while not probative, is certainly suggestive. Figures 8 and 9 suggest that these CCI factors might indeed set the conditions under which a population sharing a common racial label ("Asian American") emerges into a CCI that merits protection under the VRA. To recap this section of our Article, we have taken multiple measures of shared interests among Asian Americans and examined the extent of their association with politically and legally relevant factors. This largely empirical effort to build a positive case for VRA protection for Asian Americans is coupled to a normative defense in the next and final section.

V. RE-IMAGINING DEMOCRATIC INCLUSION

A. Summary of Argument

Voting rights scholar Pam Karlan calls on her fellow scholars to spell out an "affirmative vision" of the right to vote.[281] We have attempted to answer her call in this Article by re-imagining the meaning of democratic inclusion in the context of the complex, modern racial landscape. We have shown empirically that existing voting rights laws meant to prevent the dilution of minority voting preferences systematically fail to overcome barriers faced by Asian American voters.[282] We

281. Karlan, *supra* note 193, at 35.
282. *See supra* Part III.

have further shown that this failure excludes from consideration politically and legally relevant interests that are shared among Asian Americans, despite strong evidence of common interests along culturally defined lines.[283]

Prescriptions for the democratic exclusion of Asian Americans are usefully guided by the question of how democratic institutions should be designed to strike an appropriate balance between protection of minority interests and the extraordinary diversity of the modern United States[284] While our survey of the legal scholarship proposing to bolster political equality is certainly not exhaustive, we highlight the concept of "communities of common interests" as a promising one that could capture the culturally defined attributes that bind together Asian American subgroups of voters. This concept, which courts have selectively recognized and inadequately theorized, can be usefully appended to the legal analysis in section 2 minority voting dilution claims.

Although some federal courts have shown a willingness to recognize common interests, they have rarely explained how they would do it.[285] At the doctrinal level, we propose that culture-based analysis should regularly enter section 2 analysis of minority voting dilution. One possibility is that a CCI demonstration, perhaps by using survey data, could relax the *Gingles* requirements. For example, a CCI showing could be used to establish the requisite degree of political cohesion even if Asian Americans do not vote "as a bloc" using the more typical measures of bloc voting (for example, support for co-ethnic candidates as opposed to non-Asian candidates). This showing could serve as confirmation that a seemingly oddly shaped district drawn for the purpose of empowering Asian American voters indeed delineates a politically coherent community deserving of the special protections of the VRA, *even if* there are apparent failures on some of the *Gingles* prongs.[286]

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283. *See supra* Part IV.

284. *See generally* Richard H. Pildes, *Voting Rights: The Next Generation*, *in* RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS, *supra* note 192, at 17 (examining how to promote voting rights after the Voting Rights Act).

285. *See* LULAC v. Perry, 548 U.S. 399, 430–35 (2006); *see also* Bush v. Vera, 517 U.S. 952, 961–65 (1996); Diaz v. Silver, 978 F. Supp. at 124–26 (E.D.N.Y. 1996), *aff'd*, 522 U.S. 801 (1997).

286. A critic might respond that a CCI demonstration is irrelevant for purposes of representation unless Asian American voters also act on the basis of their ostensibly common interests when they vote. In this view, the commonality that matters for section 2 must be expressed in the voting booth, not a commonality that survey researchers ascribe based on interests or traditions that are not reflected in voting decisions. This is a strong objection. However, our notion of cohesion as a process indicates that there may be circumstances where a community with shared interests does not vote cohesively for reasons unrelated to their underlying commonalities. For example, electoral neglect of Asian Americans can mean that neither of the leading candidates or neither of the political parties seeks the community's support. Under these circumstances, relaxing the cohesion requirement can be justified normatively in terms of the U.S. Constitution's race-neutrality norm and the conception of political fairness implied by American electoral traditions. *See* HAJNAL & LEE, *supra* note 175. It can be justified doctrinally in terms of foundational voting dilution cases such as *Whitcomb*

The prior section hinted at ways that the legal concept of communities of common interest might be operationalized for Asian American voters, presenting multiple indicators of shared interests that speak to judicially recognized and culturally based attributes:

- Language and shared institutions;[287]
- Socioeconomic status—education, employment, housing;[288]
- Immigration history;[289]
- Use of social services and common goods;[290] and
- Experiences of discrimination.[291]

Another possibility is to rely on state law to supplement federal VRA compliance. Under state law, CCI assertions are arising with increasing frequency given the emergence of independent redistricting commissions that affirmatively solicit citizen input into the redistricting process.[292] The California Voting Rights Act, for example, relaxes some of the *Gingles* requirements where CCI can be established.[293] Article XXI of the California Constitution enumerates "local community of interest" alongside equal population and VRA compliance.[294] California Special Master's reports in 1973 and 1991 stated that "social and economic interests common to a population of an area which are probably subjects of legislative action . . . should be considered in determining whether the area should be included within or excluded from a proposed district."[295] Although the precise CCI factors remain difficult to identify *a priori*—due to the subjectivity of the interests and boundaries of given identity categories—and significant implementation details still need to be worked out, the California experiences illustrate a way forward for using CCI in conjunction with traditional VRA

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v. Chavis, 403 U.S. 124 (1971), and *White v. Regester*, 412 U.S. 755 (1973). We thank Chris Elmendorf for offering this critique and prompting our response.

287. *Diaz*, 978 F. Supp. at 102.

288. *LULAC*, 548 U.S. at 426; *Diaz*, 978 F. Supp. at 124.

289. *Diaz*, 978 F. Supp. at 126.

290. Magpantay, *supra* note 167, at 768.

291. *Diaz*, 978 F. Supp. at 126.

292. CCIs are recognized in five state constitutions and seven other state statutes. Nicholas O. Stephanopoulos, *Redistricting and Territorial Community*, 160 U. PA. L. REV. 1424–25 (2012). They also have been important in local government redistricting, the unit of government where Asian Americans are most likely to meet requirements related to size and territoriality. Mac Donald & Cain, *supra* note 49 (manuscript at 4–5).

293. *See* CAL. ELEC. CODE §§ 14025–14032 (West 2003 & Supp. 2013). Although nothing has been filed as of publication, there is some potential litigation brewing against the City of Santa Clara under the California Voting Rights Act which relaxes some of the *Gingles* requirement on similar theories. *See* E-mail from Angelo Ancheta, Member, Cal. Citizen's Redistricting Comm'n, to authors (Oct. 15, 2012, 07:15 PST) (on file with authors).

294. CAL. CONST. art. XXI, § 2(d).

295. Mac Donald & Cain, *supra* note 49 (manuscript at 5 n.15) (citing California Court Master's reports).

analysis.[296] Similar strategies to bolster CCI consideration have been adopted elsewhere at the local level where electoral districts are sufficiently small that intact Asian American neighborhoods can form a majority under section 2.[297]

Apropos to the heterogeneity of the Asian American voting population, a nuanced approach toward measuring these shared interests should be taken. Undertaking a variety of data collection methods appropriate to each indicator is an important undertaking, even if a labor intensive one. The UCLA *Asian Americans Redistricting Project*[298] and the California Citizens Redistricting Commission's public testimony on CCI[299] provide solid models for multimethod data gathering and yield qualitative data that complements the quantitative data currently used by federal courts in VRA cases. We also advocate the use of group-specific databases and survey techniques exemplified by the NAAS when engaging in more quantitative analyses of voting patterns and attempting to pin down subjective aspects of common interests that necessarily tap public perceptions. As well, the graded variables approach discussed in Part IV as a means of gathering quantitative data about Asian American voters takes seriously variations in ethnic self-identification along multiple dimensions rather than measuring race as a one-dimensional, fixed, categorical variable.

Based on the preliminary data we have presented about Asian American ingroup cohesion (linked fate, policy priorities, etc.)[300] and out-group differentiation (NAAS, UCLA, and original data analysis of CCI factors),[301] we think these approaches would be effective in strengthening the participation and representation of minority voters in places where greater democratic inclusion is needed and existing tests systematically fail. To make what may already be implicit more explicit, we think that bolstering Asian American participation and representation in electoral politics is normatively justified on grounds of democratic inclusion, even if that is not our guiding objective. The remainder of Part V elaborates on the normative justification of democratic inclusion. It then

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296. Some of the implementation details include ordering by priority the factors to be considered in redistricting when CCIs must be traded off with other formal criteria and fairness outcome measures. This is the approach taken under the California Constitution. *See* CAL. CONST. art. XXI, § 2(d)(1).

There is also the issue of how best to process the large volumes of public testimony that go along with establishing CCIs in independent redistricting commissions that vest line-drawing authority in citizens rather than politicians. Broader reforms could include clearer constitutional criteria for CCI that include nationality and coalition groups. E-mail from Bruce Cain, Professor, Stanford University, to author (Oct. 15, 2012, 04:02 PST) (on file with authors).

297. *See, e.g.*, Ojeda-Kimbrough et al., *supra* note 167, at 6 (reporting on San Gabriel and Koreatown in California); Susan French, *Making Common Interest Communities Work: The Next Step*, 37 URB. LAW. 359, 368 n.28 (2005) (reporting on Maryland state CCI analysis).

298. *See* sources cited *supra* note 243.

299. *See* Mac Donald & Cain, *supra* note 49 (manuscript at 16–21).

300. *See supra* Part IV, Figures 2–3.

301. *See supra* Part IV, Figure 4.

broaches possible objections to bolstering democratic inclusion for Asian Americans.

B. Justifications for Interest-Based Measures of CCI

The primary reason that we propose turning toward fine-grained notions of common interests as a measure of political cohesion is that it befits the complexity of modern racial politics. Our attempt in Part IV to define relevant political interests apart from broad-based generalizations derived from historical experience explains that isolating factors that legitimately unify voters within a district fits with goals of the VRA. Setting aside the many different articulations of what is and is not permissible in an increasingly convoluted VRA jurisprudence, the emerging consensus is on the need to search for authentic forms of representation that go beyond crude measures of racial classification.[302]

Shifting to interest-based factors also stands a better chance of being accepted by courts in the post-*Shaw* and post-*LULAC* era of deemphasizing overtly race-conscious classifications in redistricting and examining other bases of group affiliation.[303] That said, turning from race to "culture" and socioeconomic status by disaggregating attributes correlated with racial politics is not without its own risks. As we have seen in the context of affirmative action, culture can be used to displace race.[304] For example, the University of Texas's "Top Ten Percent Plan" was designed to base college admissions decisions to a greater extent on class.[305] By ensuring that the top 10% of students in each school district would be admitted, the plan surmised, the admission of a more socioeconomically diverse and more broadly representative set of students would result.[306] Although race is still considered as a factor in Texas admissions, the emphasis on class places decreasing emphasis on race.[307] The extent to which the inclusion of class implies that race no longer needs to be considered in higher education admissions is

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302. We also add that this pivot to a community of common interest approach does not imply or entail an abnegation of historical experience and criteria derived from it. We do, rather, hold a presumption that historically exclusionary laws and practices carry a silty residue into contemporary laws and practices. Furthermore, we presume that laws and practices—both past and present—give shape and stricture to the interests that individuals and groups hold.

303. *See* Lee, *supra* note 161, at 458 (discussing various processes for unpacking racial categories as an alternative to older methods).

304. *See* Kennedy, *supra* note 197.

305. *See* Jonathan D. Glater, *Diversity Plan Shaped in Texas Is Under Attack*, N.Y. TIMES, June 13, 2004, at N1.

306. *See id.*

307. For example, William Julius Wilson's *The Declining Significance of Race* (1978) was critiqued for this implication. His own purpose in writing the book was to highlight the importance of class and poverty, not to dismiss the ongoing relevance of race to issues of equality. WILLIAM JULIUS WILSON, THE DECLINING SIGNIFICANCE OF RACE: BLACKS AND CHANGING AMERICAN INSTITUTIONS, at ix–x (1978).

currently under review in *Fisher v. University of Texas at Austin*,[308] but it does render vulnerable race classification as we know it.

We are not arguing that race should be displaced as a legal consideration or that the totality of the interest-based factors we identify captures the fullness or complexity of racial politics. We are simply acknowledging the doctrinal reality that it is difficult to use these measures post-*Shaw*. By highlighting dimensions of race that relate to the formation of political interests and that serve the underlying goals of section 2, we endeavor to capture something of value to minority voters and acceptable to courts, even if there is sure to be a residual beyond what we can capture with even the most sophisticated data or techniques.

As well, culture and socioeconomic status-based conceptions of common interests can themselves be essentialized. Recall Ortiz's characterization in *Cultural Compactness* of the Supreme Court's minority voting dilution cases as raising objections on the basis of race essentialism.[309] He says that, if *Shaw* can be understood to say that we should not assume people of different racial groups do not necessarily think and act differently, *LULAC* expresses the opposite concern that we should not assume that people in the same racial group are all the same.[310] Switching from racial to interest-based factors associated with cultural pluralism[311] and group politics may avoid some of these overbroad stereotypes. However, similar errors in thinking can be applied to interest-based notions of shared interest that courts have so far recognized. For example, one could presume that all Chinese American voters are the same on the basis of a shared written language without taking into account differences in education and economic opportunities that derive from their immigration histories. In reality, some Chinese immigrants to America naturalized in the ethnic enclaves of the 1800s (for example, San Francisco Chinatown), while others entered the country following 1965 largely

308. Fisher v. Univ. of Tex. at Austin, 132 S. Ct. 1536 (2012) (mem.), *granting cert. to* 631 F.3d 213 (5th Cir. 2011). As Thomas Espenshade said in anticipation of the *Fisher* oral argument, supporters of race-conscious remedies are not optimistic that those remedies will survive in the Supreme Court. Thomas J. Espenshade, *Moving Beyond Affirmative Action*, N.Y. TIMES, Oct. 5, 2012, at A25. Nevertheless, he thinks they shouldn't despair. A ruling against race-conscious affirmative action or redistricting "might put ethnic and racial diversity on a firmer footing for the long term. It would spur Americans who care about racial inequality to seek alternatives to affirmative action by addressing the deeply entrenched disadvantages that lower-income and minority children face from the beginning of life." *Id.*

309. *See* Ortiz, *supra* note 63, at 52 ("[The] danger is that increased sensitivity to diversity within racial and gender groups might lead courts to question the salience of traditional racial and gender categories.").

310. *Id.* For more on in-group diversity as a justification for affirmative action, see Vinay Harpalani, *Diversity Within Racial Groups and the Constitutionality of Race-Conscious Admissions*, 15 U. PA. J. CONST. L. 463 (2012); *see also* Brief for Society of American Law Teachers as Amici Curiae Supporting Respondents, Fisher v. Univ. of Tex. at Austin, No. 11-345 (U.S. Aug. 13, 2012).

311. Duncan Kennedy concludes his piece on cultural pluralism with an "objections" section that addresses, *inter alia*, whether cultural pluralist understandings of American life derogate from the individuality of group members. Kennedy, *supra* note 197, at 752–56.

entered on student visas and high-skilled work visas that continue to shape their opportunities as citizen voters.[312] These two groups of Chinese American voters may be less politically cohesive than ethnically distinct refugee groups such as Vietnamese and Cambodians.

Mindful of these potential pitfalls, we contend with theoretical and empirical support that the kinds of interest-based factors courts have identified show promise as indicators that correlate with the political priorities of ethnic subgroups. Rather than throwing out the baby (guarding against minority vote dilution) with the bath water (race-conscious redistricting) because of concerns about the crudeness of racial categories, we aim to replace it with something "meaningful and workable."[313] It is in this spirit that we propose to refine the categories and suggest ways to gather and assess data against those categories that courts can readily administer.

C. Possible Objections

Even after being persuaded of the value of refining rather than dismissing racial classifications in efforts to staunch minority vote dilution, objections may remain. Three objections deserve particular attention, stemming from both principled and pragmatic concerns. First, as a matter of legislative intent (a crucial inquiry into the legitimacy of a proposal such as the one to focus on CCI factors), is there is a risk of straying from the historical objectives of the VRA? If so, will the CCI-related proposals that we endorse attract proceduralist objections?

Our starting point, to repeat, is that the current trajectory in federal courts is to eliminate race-conscious classifications in redistricting based on the conceptual, empirical, and doctrinal infirmities that have been described. If we cannot find ways to make race under the VRA work better, it is at serious risk of being eliminated and replaced with the colorblindness approach gaining favor in Supreme Court jurisprudence.[314] That, in our view, would be the greatest departure from legislative intent. Short of that harsh outcome, our contention is that the full legislative history of the VRA indicates Congress's desire to address equal opportunity in voting for multiple minority groups, including but not limited to African Americans.[315] Many of the justifications for including other racial

312. *See* IRIS CHANG, THE CHINESE IN AMERICA: A NARRATIVE HISTORY 33–34, 292–93 (2003) (discussing the differing circumstances under which generations of Chinese immigrants entered the United States).

313. *See* Ortiz, *supra* note 63.

314. *Id.* at 52 (speculating that courts might "lose their stomach" for the whole enterprise of racial analysis if forced to engage in detailed dissection of differences between groups).

315. As a matter of statutory interpretation, taking into account subsequent amendments to legislation is accepted as a valid consideration in weighing legislative history of Congress's intent. *See generally* LISA BRESSMAN, EDWARD RUBIN, & KEVIN STACK, THE REGULATORY STATE 285–89 (listing amendments as relevant legislative history on which courts can rely); WILLIAM ESKRIDGE,

minorities alongside black minority voters are shared: democratic theory cautions against the tyranny of the majority and favors judicial intervention in instances of political logjams, when the majority will cannot be accurately conveyed due to systematic distortions in democratic process.[316] Michael Kang and others have described the purpose of elections as maintaining political competition, which is thwarted when minority voters cannot effectively aggregate their votes.[317] *Baker v. Carr*'s principle of one person, one vote is violated when districting distorts the articulation and aggregation of those votes.[318]

There are also independent justifications for Asian American democratic inclusion. Part I indicated that language minorities and Asian Americans were among the protected groups contemplated in the VRA at its inception in 1965. That section included more background on Asian American political exclusion and involvement in the civil rights movement, which challenges perceptions that Asian Americans were not intended as beneficiaries of the VRA. The empirical data that we presented in Part III suggests a stark asymmetry of Asian American success in nonpolitical spheres of life versus rates of actual participation and representation in voting. The empirical data that we presented in Part IV suggests that there is both a common basis among Asian American voters and a shared willingness to use political power to advance the interests of the group. Yet presumably that willingness does not translate into action because of other obstacles (for example, ongoing societal discrimination, such as white discomfort with an Asian American political leader, problems with group formation and mobilizing Asian American voters, problems connecting Asian American voters with electoral and especially partisan politics, problems aggregating Asian American voters into districts that register their shared political interests, and problems overcoming structural obstacles by enabling Asian American voters to avail themselves of the VRA minority voting dilution provisions as interpreted under *Gingles*).[319]

Second, setting aside legislative history and congressional intent, what if our proposals simply do not work as well for black voters? Black voters have an unquestionably important place in voting rights law and have played a critical role in securing legal protections for all minority voters.[320] Historically, they held a key role in securing civil rights laws, such as the VRA, that helped move society past a

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PHILIP FRICKEY, & ELIZABETH GARRETT, LEGISLATION 937 (3d ed. 2001). *See also* text accompanying *supra* note 15.

316. *See* Michael S. Kang, *Race and Democratic Contestation*, 117 YALE L.J. 734, 794–800 (2008) (discussing how coalition districts can distort the democratic process).

317. *See id.* at 764–73 (describing the difficulties in coordinating like-minded minorities).

318. *See* Baker v. Carr, 369 U.S. 186, 207–08 (1962).

319. Thornberg v. Gingles, 478 U.S. 30, 50–51 (1986).

320. *See* Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 U. CIN. L. REV. 1345, 1348–58 (2003) (discussing Black enfranchisement from the time of the Civil War through the passage of the Voting Rights Act).

shameful period of democratic exclusion.[321] They continue to promote measures that enhance the democratic ideals of our nation for all voters.[322] Their success in these efforts is justly captured in impressive political participation rates (for example, the number of black voters who vote, and the election of black politicians to office relative to other racial minorities).[323]

To this second objection: we do not aspire to supplant these successes, but to build upon them. The CCI principles support application in cross-racial coalitions. Black voters may, in some cases, find common cause with Latino or other nonwhite racial minority voters such as Asian American voters, as was the case in Prince Williams County, Virginia.[324] There have also been several instances where blacks and Latinos have joined forces on the basis of shared socioeconomic status characteristics or common concerns about crime, poverty, and social welfare.[325] Similarly, Latino and Asian voters in a predominantly white district

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321. *See id.*

322. *See* TATE, *supra* note 162, at 109–50 (1994) (discussing black voter turnout in the 1984 and 1988 presidential elections).

323. *See id.*

324. *See* Minnis, *supra* note 15, at 35.

325. The Supreme Court has not resolved whether two or minority groups in close proximity can together form a district majority to surpass the *Gingles* test. In *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994), and *Growe v. Emison*, 507 U.S. 25, 41 (1993), the Court assumed, without deciding, that minority coalition groups may be used to establish a claim under the Voting Rights Act, while in *Bartlett v. Strickland*, 556 U.S. 1, 13–14 (2009), it declined to address the issue. Meanwhile, lower courts disagree, though the majority of circuits have resolved the issue in favor of minority plaintiffs. *See, e.g.*, Bridgeport Coal. for Fair Representation v. City of Bridgeport, 26 F.3d 271, 276 (2d Cir. 1994), *vacated*, 512 U.S. 1283 (1994); LULAC v. Clements, 999 F.2d 831, 864 (5th Cir. 1993) (en banc); Concerned Citizens v. Hardee Cnty. Bd. of Comm'rs, 906 F.2d 524, 525 (11th Cir. 1990); Campos v. City of Baytown, 840 F.2d 1240, 1241 (5th Cir. 1988); LULAC Council No. 4836 v. Midland Indep. Sch. Dist., 812 F.2d 1494, 1496 (5th Cir. 1986), *vacated on reh'g*, 829 F.2d 546 (5th Cir. 1987); Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cnty. of Albany, No. 03–cv–502, 2003 WL 21524820, at *5 (N.D.N.Y. July 7, 2003); France v. Pataki, 71 F. Supp. 2d 317, 327 (S.D.N.Y. 1999); LULAC v. N.E. Indep. Sch. Dist., 903 F. Supp. 1071 (W.D. Tex. 1995); Latino Political Action Comm., Inc. v. City of Boston, 609 F. Supp. 739, 746 (D. Mass. 1985), *aff'd*, 784 F.2d 409 (1st Cir. 1986). *But cf.* Nixon v. Kent Cnty., 76 F.3d 1381, 1393 (6th Cir. 1996) (precluding, specifically, the use of coalition minority groups to make out a section 2 claim); Debaca v. Cnty. of San Diego, No. 92-55661, 1993 WL 379838, at *4–5 (9th Cir. Sept. 27, 1993) (holding that appellants failed to show intentional discrimination against the entire multiethnic group on whose behalf the action was brought); NAACP v. Snyder, No. 11-15385, 2012 WL 1150989, at *4–10 (E.D. Mich. Apr. 6, 2012) (precluding the use of coalition minority groups to make out a section 2 claim); *see also* Badillo v. City of Stockton, 956 F.2d 884, 890 (9th Cir. 1992) (discussing the issue but ultimately concluding that "[w]hether a majority is required, or a dominant plurality is enough, makes no difference in the outcome of this case").

Even courts that approve of the idea of minority "coalition" districts, however, seem to be demanding a relatively high standard—by way of hard evidence, as opposed to anecdote and assertion—demonstrating the political cohesiveness of the coalition. *See, e.g.*, Broward Citizens for Fair Districts v. Broward Cnty., No. 12-60317-CIV, 2012 WL 1110053, at *7 (S.D. Fla. Apr. 3, 2012) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)) (granting motion to dismiss in part on grounds that "the Amended Complaint fails to adequately plead political cohesion on the part of African American and Hispanic voters, as required by *Gingles*'s second prong. The Amended Complaint

might find common cause on immigration, language, or other policy issues based on their recent immigration histories. Admittedly, it is possible to imagine that a district that maximizes the electoral opportunity of black voters under *Gingles* could be subsequently defeated under a CCI analysis. Usually, a valid grouping under *Gingles* would not be defeated under the second layer of CCI analysis because black voters share a history of racialization that shows itself in many dimensions, including CCI factors of socioeconomic status, ideological leanings, etc.[326] In the rare occasion when a district fails under the CCI analysis, we have to accept that the underlying grouping may not have been valid despite initial satisfaction of racial prerequisites under existing tests. For example, Afro-Caribbean immigrants and latter generation black voters who are slave descendants may show distinct patterns of voting, even if there is research showing the experience of racialization along the black-white color line is very strong. Latino communities may be subdivided by class (for example, Rio Grande versus Austin, Texas in *LULAC*)[327] or partisan affiliation (for example, Cuban Republicans and Mexican Democrats)[328] and consequently be unable to trigger the protections of CCI analysis. What these hypothetical scenarios show is that our

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contains merely a bare assertion that African American and Hispanic voters 'are politically cohesive,'" and "[a] bare assertion of an element of a cause of action does not present 'sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"); Texas v. United States, 831 F. Supp. 2d 244, 268 (D.D.C. 2011) ("[T]here must be discrete data, by way of election returns, to confirm the existence of a voting coalition's electoral power. . . . Proving the existence of a coalition district will require more exacting evidence than would be needed to prove the existence of a majority-minority district as demonstrating past election performance is vital to showing the existence of an actual coalition district. By contrast, a state creating a 'new' . . . coalition district simply anticipates, or hopes, that the minority population in the new district will align politically and coalesce with other groups of voters to elect its candidates of choice. It would be extremely difficult to confirm that minority voters would indeed have the ability to elect in the newly formed district. . . . [N]ew crossover-coalition districts . . . can rarely be deemed ability districts in a proposed plan."); Pope v. County of Albany, No. 1:11-CV-00736 (LEK/DRH), 2011 WL 3651114, at *4 (N.D.N.Y. Aug. 18, 2011) (holding that "[d]iverse minority groups such as blacks and Hispanics may under certain circumstances be combined to satisfy the *Gingles* precondition of political cohesiveness," but denying preliminary injunctive relief because "the Court cannot assume that blacks and Hispanics in Albany County are politically cohesive because courts have found them to be cohesive in other jurisdictions. Instead, the Court must make a local determination that blacks and Hispanics are politically cohesive in Albany County"), *aff'd*, 687 F.3d 565 (2d Cir. 2012); Romero v. City of Pomona, 665 F. Supp. 853, 857 (C.D. Cal. 1987) ("The defendants contend that the hispanics and blacks do not vote as one cohesive group and therefore must be considered separately in determining whether each is a sufficiently large and geographically compact group. As will be discussed, the Court finds that the hispanics and blacks do not vote as a cohesive group."), *aff'd*, 883 F.2d 1418 (9th Cir. 1989), *abrogated by* Townsend v. Holman Consulting Corp., 914 F.2d 1136 (9th Cir. 1990).

326. *See generally* MICHAEL DAWSON, BLACK VISIONS: THE ROOTS OF CONTEMPORARY AFRICAN-AMERICAN POLITICAL IDEOLOGIES (2001) (discussing a variety of ideological stances that continue to shape black opinions today).

327. LULAC v. Perry, 548 U.S. 399, 432 (2006).

328. *See* R. Michael Alvarez & Lisa García Bedolla, *The Foundations of Latino Voter Partisanship: Evidence from the 2000 Election*, 65 J. POL. 31, 37 (2003) (examining distribution of party identification among Cubans, Mexicans, and other Latino voters).

proposed supplementation of *Gingles* with a CCI analysis is not necessarily a formula for maximizing descriptive representation of minority voters. It is meant to support a more nuanced inquiry into the possibilities for representing the legitimate, shared interests of political subcommunities that might otherwise be missed under the existing VRA framework.

Third, does our proposal to supplement conventional VRA analysis with CCI comport with the purposes of the VRA section 2, or is it simply an attempt to stack the deck in favor of a singular minority group, particular party, or minority candidate that has been "losing" in politics? Achieving a fixed end or political outcome is not our goal. Our underlying theory resonates with Pam Karlan and Guy-Uriel Charles's contention that the VRA means to protect the representational rights of minorities who systematically lose in politics.[329] Charles writes:

> Is the *telos* of [s]ection 2 the removal of Jim Crow-like barriers to political participation? If the racism is defined as or limited to racial animus, then the conservatives are right that there is nothing left for voting rights policy to vindicate. The Voting Rights Act has largely achieved this purpose, and [s]ection 2 should only be preserved in the annals of history. . . . [But] [f]rom an altogether different vantage point, one could argue that the *telos* of voting rights policy is to ensure consequential political participation by voters of color. Put differently, maybe voting rights scholars need to articulate a right of political participation that is unmoored to any conception of racial discrimination. . . . This might kill the current [s]ection 2 framework, but we might have to kill [s]ection 2 to save it.[330]

So the harm we aim to remedy is that permanent minorities—notably, but not exclusively Asian Americans—systematically lose out on the opportunity to elect their candidate of choice, who will in turn be responsive to the community's needs and represent the community's interests, however defined. A right to a formally recognized and protected means of expressing one's political voice is surely a bedrock principle of any legal framework for democracy. As theorists of different stripes have persuasively argued, descriptive representation enables democratic ends that range from the advocacy of "over-looked interests," to the attentiveness to inequality and power, to the achievement of substantive representation, and to the aspiration to greater collective flourishing.[331] In the

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329. Charles, *supra* note 5, at 223, 226.

330. *Id.*

331. *See* Suzanne Dovi, *Preferable Descriptive Representatives: Will Just Any Woman, Black, or Latino Do?*, 96 AM. POL. SCI. REV. 729, 729 (2002) (explaining how democratic citizens should choose descriptive representatives); Jane Mansbridge, *Should Blacks Represent Blacks and Women Represent Women? A Contingent "Yes,"* 61 J. POL. 628, 628 (1999) (enumerating the various functions served by descriptive representation). *See generally* ANNE PHILLIPS, THE POLITICS OF PRESENCE (1995) (discussing descriptive representation in the context of women in politics); Jane Mansbridge,

absence of meaningful representation and the accountability one expects to accompany it, many issues do not even make the agenda let alone turn out the way that one group may hope.

CONCLUSION

In conclusion, we have argued that the current law demonstrates misunderstandings about "race," "politics," and how the two may be linked. Encoding these confusions in voting law compounds the structural barriers that keep minority voters from participating equally in politics. We attempt to redefine racial politics conceptually for the modern, multiracial context and in light of more nuanced and various data, more sophisticated methodologies, and measurement of the subjective components of CCI factors through surveys, public testimony, etc. While we based our examples around Asian Americans, a key constituent group and a weak case in both social scientific and legal terms, ultimately, our recommendations for greater democratic inclusion of Asian Americans have implications that extend to all protected groups under the VRA.

Rethinking Representation, 97 AM. POL. SCI. REV. 515 (2003) (examining alternative modes of representation).