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Claremont McKenna College

**The Legacies of Exclusion:
Asian Americans and the California Voting Rights Act**

submitted to
Professor John J. Pitney Jr.

by
Melinda Ximen

for
Senior Thesis
Spring 2023
April 24, 2023

Abstract

A quiet revolution has spread throughout California. Since the California Voting Rights Act became law in 2001, 170 cities have transitioned from at-large to by-district elections, where voters in a geographic district elect one city council member. This thesis evaluates the effectiveness of the California Voting Rights Act on Asian American political participation and representation in local elections. I begin by tracing the roots of discrimination against Asian immigrants and exploring the construction of the pan-Asian identity. I examine the legacies of exclusion on Asian political participation and representation in political offices. I analyze Section 2 of the Voting Rights Act and the impetus for the CVRA's enactment, which lowered the legal standards to prove a violation. The CVRA's legal remedies for minority vote dilution evolved to match California's unique demographics as a minority-majority state. I conduct one case study on the City of Santa Clara, which is the only city to go to trial against Asian American plaintiffs. I found data on seventy California cities with above a 20% Asian population and identified each city's electoral system and Asian city council members. I argue that the context matters when evaluating the effectiveness of the CVRA and by-district elections. While the CVRA has done significant work in dismantling the minority vote diluting effects of at-large elections, it employs too little discretion in switching from at-large to by-district elections. Switching from at-large to by-district elections should be done intentionally and deliberately while considering and preserving communities of interest. The CVRA remains important legislation for Asian communities as barriers to political empowerment persist. The California Voting Rights Act takes a significant step forward in the fight for Asian American representation and participation at the local level.

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Acknowledgements

To Professor Pitney, I could not have written this thesis without your endless guidance, reassurance, and support. I cannot thank you enough for patiently wading through drafts upon drafts and listening to me ramble on the topic. Taking your Congress course was formative and instilled in me the writing and research skills needed to take on this endeavor. And thank you for letting me take just about every class you've offered.

Thank you, Professor Sadhwani, for supporting my thesis topic and guiding me in the right direction. With your advice, I could tie together its various elements. Your expertise in California politics and Asian American studies inspired me tremendously.

This thesis was shaped largely by my interviews with Professor Kousser and Professor Levitt. Thank you both for sitting with me for over an hour discussing the topic. With your teachings, I could draw conclusions and refine my arguments. Thank you, Professor Kousser, for your tireless work on voting rights and first-hand knowledge of every case I read about. I am incredibly grateful for your detailed explanations, reports, and voting rights database, which furthered my research beyond expectation.

To Asian Law Alliance for cultivating my passion for law and politics. Thank you to Nick Kuwada for your mentorship and everlasting support. I can trace every idea in this thesis to the late nights sitting in Santa Clara city meetings trying to understand voting systems and the lawsuit's intricacies.

To my family—Mom, Dad, Sandra, and Yuki—thank you for always believing and trusting in me. To 范士荣 and 周立伟, every decision has been with you in mind. To my friends, who made college feel like the greatest adventure.

I dedicate this thesis to my mom, who has never doubted me. You are my North Star.

Introduction

I was born and raised in Cupertino, a small town in Silicon Valley with a majority Asian population. Mandarin was my first language. When I started elementary school, my teacher recommended me for an “English as a Second Language” class, which my parents refused. As I practiced English more in school, my Chinese began slipping away, and my parents enrolled me in Chinese language classes. On Saturday mornings, I cried while practicing the long-form narratives I had to recite later in class. At home, I taught my 奶奶 (grandmother) new English vocabulary and helped her practice for the United States citizenship test. Her journals were covered in English sentences written in perfect handwriting, and she attended classes with other Asian grandparents in our neighborhood.

On weekdays, I attended a Chinese after-school program until my parents got off work. I learned my mental multiplication tables in Chinese, which I still use today. I learned Chinese traditional dance on Friday nights and picked up a short stint learning the 笛子 (Chinese flute). On Sundays, I attended Bible study at a local Chinese church. As Cupertino developed, the Chinese supermarket next door changed to a new Chinese market and then to a Korean one. On every street corner, a new bubble tea shop opened. When one closed, another would take its place. On every block, there was no shortage of Asian restaurants or tutoring centers. As a child, I did not see myself as a foreigner. Ironically, my first experience as a “foreigner” was when I visited China, where my relatives would comment on how tan I was or how American I looked.

In middle school, I learned the term “white flight” when a Wall Street Journal article about our high school circulated among the students.¹ In the 1960s, “white flight” described the rapid departure of whites from big cities into the suburbs, which often resulted in the economic

¹ Suein Hwang, “The New White Flight,” The Wall Street Journal (Dow Jones & Company, November 20, 2005).

degradation of the inner cities.² Then, the growth of racial and ethnic minorities in city centers sparked the phenomenon. This modern incarnation in Cupertino, however, was different.³ Cupertino was almost indistinguishable from the suburbs around it.⁴ In “The New White Flight,” Suein Hwang wrote that “many white parents say they’re leaving because the schools are too academically driven and too narrowly invested in subjects such as math and science at the expense of liberal arts and extracurriculars like sports and other personal interests. The two schools, put another way that parents rarely articulate so bluntly, are too Asian.”⁵ As of 2023, 79% of my high school’s population is Asian.⁶ Instead of being only one of a handful of Asian students at a predominantly white high school, we were the majority.

Growing up in Cupertino was a sheltered and immensely privileged experience. Silicon Valley was our utopia, shielded from racial discrimination that Asian Americans⁷ typically face in the United States. It was unfathomable to me that there could be present-day, structural, and systemic discrimination against Asians in Silicon Valley. Cupertino is part of California’s 17th congressional district, the only Asian-majority district in the continental United States.⁸ The 17th congressional district is 58.9% Asian, 21.8% white, 15.4% Hispanic, and 1.9% Black.⁹ The district includes the cities of Sunnyvale, Cupertino, Santa Clara, Milpitas, Newark, and parts of Fremont and San Jose.¹⁰

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ “Monta Vista High School (2023 Ranking) - Cupertino, CA,” Public School Review, 2023.

⁷ The U.S. Census Bureau defines “Asian” as “A person having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent including, for example, India, China, the Philippine Islands, Japan, Korea, or Vietnam.” It defines “Native Hawaiian and Other Pacific Islander” as “A person having origins in any of the original people of Hawaii, Guam, Samoa, or other Pacific Islands.” I use “Asian American” throughout the thesis as a blanket term for Asian and Pacific Islanders as defined by the Census Bureau.

⁸ Hansi Lo Wang, “In Asian-Majority District, House Race Divides California Voters,” NPR (NPR, April 21, 2014).

⁹ “California’s 17th Congressional District,” Ballotpedia.

¹⁰ “Our District,” Congressman Ro Khanna.

The summer before my junior year of high school, I helped sue the City of Santa Clara. I interned at a non-profit law firm called Asian Law Alliance (ALA). I witnessed the birth and success of ALA's two-year lawsuit against the City of Santa Clara for violating the California Voting Rights Act. Although Santa Clara was 40% Asian, it had never elected an Asian American candidate to the city council.¹¹ I helped create educational presentations for Santa Clara residents detailing how the city's electoral system racially polarized minority voters. Racially polarized voting exists when white and minority voters are "polarized" from each other; the two groups vote against each other in their preferences for candidates, propositions, or measures.¹² In Santa Clara, the white majority voting bloc usually voted to defeat the Asian-preferred candidate. Santa Clara's lack of Asian electoral success and evidence of racially polarized voting led to a six-million-dollar settlement for the Asian and Latino plaintiffs.¹³

When I settled on the California Voting Rights Act (CVRA) as my thesis topic, I quickly realized the "quiet revolution" that had swept through California. Before the CVRA's enactment, 449 of California's 482 cities used at-large elections, where the entire city elects all city council members.¹⁴ Since then, 170 cities have transitioned to by-district elections, where voters in a geographic district elect one city council member. The CVRA is a relatively new change for California, as 142 of the 170 cities changed systems between 2018 and 2022. The act encourages a switch to by-district elections, which can increase minority representation if the city draws majority-minority districts.¹⁵

¹¹ *Wesley Kazuo Mukoyama v. City of Santa Clara* (17CV308056, 2017).

¹² Joanna Cuevas Ingram, "The Color of Change: Voting Rights in the 21st Century and the California Voting Rights Act," *Harvard Latino Law Review* 15 (April 1, 2012), 185.

¹³ Lloyd Alaban, "Santa Clara Settles in District Election Case," *San José Spotlight*, April 24, 2021.

¹⁴ Loren Collingwood and Sean Long, "Can States Promote Minority Representation? Assessing the Effects of the California Voting Rights Act," *Urban Affairs Review* 57, no. 3 (December 31, 2019), 732.

¹⁵ "Minority Majority Districts," *US Legal*.

My research focuses on Asian Americans because they are a largely unstudied group of the California Voting Rights Act. Asian Americans represent an emergent case within the study of the minority vote dilution and racially polarized voting. The Asian community has long faced barriers to citizenship and voting, but its relatively small size, heterogeneity, and geographic dispersion have not previously warranted examinations of vote cohesion. Most CVRA lawsuits have been filed on behalf of the Latino population, so there is limited research on the effects of the CVRA on Asian Americans, a diverse group consisting of twenty-one distinct ethnic groups with vastly different migration histories, cultures, and identities. In an interview with Professor J. Morgan Kousser, the chief expert witness in all CVRA lawsuits that have gone to trial, he said that discrimination against Asian Americans did not end with its history of exclusion.¹⁶ The California Voting Rights Act is the prime way to demonstrate the effects of this systemic injustice. The act and its resulting lawsuits prove that discrimination against Asian Americans is real and persists even in California, home to one-third of the U.S. Asian population.¹⁷ It is vital to study Asian Americans as a racially polarized pan-ethnic group in light of mass transitions to by-district elections in California cities.

This thesis evaluates the effectiveness of the California Voting Rights Act on Asian American political participation and representation in local city council elections. This thesis answers two questions. First, is the California Voting Rights Act an effective solution for Asian minority vote dilution in local elections? Second, does the switch from at-large to by-district elections increase Asian representation in city councils?

¹⁶ J. Morgan Kousser, Professor of History and Social Science, Emeritus, interview by author, interview notes, Claremont, CA, April 12, 2023.

¹⁷ Ming Hsu Chen and Taeku Lee, "Reimagining Democratic Inclusion: Asian Americans and the Voting Rights Act," *U.C. Irvine L. Rev.* 359 (2013), 392.

The first chapter examines the history of “Asian America,” the varying immigration histories of different ethnic groups, and the construction of the pan-Asian identity. It looks at the effects of discrimination on the political participation and voting patterns of Asian ethnic groups and Asian representation in political offices. The second chapter investigates Section 2 of the Voting Rights Act of 1965 (VRA) and Supreme Court interpretations of Section 2 lawsuits, most notably the landmark case *Thornburg v. Gingles* (1986). The third chapter analyzes the California Voting Rights Act of 2001 (CVRA), specifically its creation and the momentum for cities to switch to district elections. While the CVRA was modeled off Section 2 of the federal VRA, the act lowered the legal standards to prove a violation. Its legal remedies for minority disenfranchisement evolved to meet California’s unique demographics. The CVRA has increased the Asian American community’s political power and influence in local elections. The third chapter includes a case study on the lawsuit in Santa Clara, *Yumori Kaku v. City of Santa Clara* (2020). Santa Clara remains the only city to go to trial against Asian American plaintiffs. In the fifth chapter, I found data on 70 California cities with over 20% Asian population, information on their electoral system, transition year to by-district elections, and the number of Asian city council members. The fifth chapter looks closer into the politics behind switches to by-district elections, specifically in Monterey Park and Westminster, which sparked controversy after the transitions. It also evaluates the future of the CVRA as the California Supreme Court prepares oral arguments for the case against Santa Monica.

The answer to my research question is that the context matters. The California Voting Rights Act includes an updated test from the federal VRA, with broader coverage accounting for the competing interests of minority groups. It incorporates legal standards that acknowledge and protect the Latino and Asian American populations. The California Voting Rights Act has not

outgrown its usefulness. Minority groups in California still face disenfranchisement that has not been fully addressed or resolved. I argue that the obstacles to representation facing Asian Americans persist. Thus, the California Voting Rights Act continues to be an important and relevant legislation for Asian and Latino communities. My research aims to understand the implications of CVRA litigation in Asian American communities. While the CVRA has done significant work in dismantling the minority vote diluting effects of at-large elections, it employs too little discretion in switching from at-large to by-district elections. Out of fear of going to court, many cities have voluntarily transitioned to district elections without analyzing whether it would benefit the city's minority voters.

It is unclear when single-member districts stop being an effective tool for increasing descriptive representation. For single-member districts to benefit an ethnic minority, demographers must draw boundary lines to create majority-minority districts.¹⁸ These districts require the minority group to be geographically concentrated and compact. For groups with relatively low levels of segregation, such as Asian Americans, it is important to investigate the potential effects of a switch to by-district elections.¹⁹ The residential integration of Asian Americans has not yet translated into political and social integration.²⁰

Although evidence shows that districts can help minorities elect their preferred candidates, what proportion do minority groups need to reach before districts become a hindrance rather than an advantage to representation? The City of Cupertino is 69.4% Asian and uses at-large elections.²¹ As of 2023, Cupertino has three Asian city council members.²² With

¹⁸ “Minority Majority Districts,” US Legal.

¹⁹ Gordon H. Chang, *Asian Americans and Politics: Perspectives, Experiences, Prospects* (Washington, D.C.: Woodrow Wilson Center Press, 2001), 136.

²⁰ *Ibid.*

²¹ “U.S. Census Bureau Quickfacts: Cupertino City, California,” QuickFacts (U.S. Census Bureau, 2020).

²² “City of Cupertino, CA,” City Councilmembers.

such a sizable Asian population and a history of electing Asian council members, switching to by-district elections would not increase representation because it would split apart the Asian population. Although Santa Clara vehemently fought against the lawsuit, claiming that the Asian population was too geographically dispersed to form a majority-minority district, it still elected three Asian city council members after switching to by-district elections.²³ Whether cities can truly benefit from district elections instead of at-large systems should be determined on a case-by-case basis. Switching from at-large to by-district elections should be done intentionally and deliberately, while considering and preserving communities of interest.

²³ “City of Santa Clara Voting Rights Case: Historic Settlement Ends 70-Year Period of Asian American Empowerment ,” Asian Law Alliance, April 21, 2021.

Chapter One: Asian American Political Power and Participation

“Like the immigrants from Europe, many Asians saw America as a place for a fresh start. They came here, as Filipino immigrant Carlos Bulosan expressed it, searching for ‘a door into America’ and seeking ‘to build a new life with untried materials.’ ‘Would it be possible,’ he asked, ‘for an immigrant like me to become a part of the American dream?’ The hopeful question also contained deep doubt, for Bulosan and his fellow Asian immigrants knew they were ‘strangers from a different shore.’”

– Ronald Takaki, *Strangers from a Different Shore*, 1989²⁴

Strangers from a Different Shore

The first wave of Chinese immigrants came to America in the 1850s to work in California’s gold mines.²⁵ California’s elites welcomed them. Governor John McDougal praised the Chinese as “one of the most worthy classes of our newly adopted citizens” and remarked that “the further immigration and settlement of Chinese is desirable.”²⁶ San Francisco Mayor John Geary held a ceremony for the “China boys,” commending their work ethic.²⁷ The *Daily Alta California* wrote: “Scarcely a ship arrives that does not bring an increase to this worthy integer of our population. The China boys will yet vote at the same polls, study at the same schools, and bow at the same altar as our own countrymen.”²⁸ The newspaper’s reporting indicated a future equality for Chinese immigrants. The openness to Chinese immigration, however, did not last. Immigrants from Europe balked at Asians and non-white Californians, urging politicians to curb Chinese immigration and assimilation.²⁹

²⁴ Ronald T. Takaki, *Strangers from a Different Shore: A History of Asian Americans* (New York: Oxford University Press, 1994).

²⁵ “California NHT: Chinese Immigration,” National Parks Service (U.S. Department of the Interior).

²⁶ Mildred Wellborn, “The Events Leading to the Chinese Exclusion Acts,” *Annual Publication of the Historical Society of Southern California* 9, no. 1/2 (1912), 1.

²⁷ “The Story of Chinatown,” PBS (Public Broadcasting Service).

²⁸ Wellborn, 49.

²⁹ *Ibid.*

The first signs of dissatisfaction with the Chinese immigrants appeared in the mines.³⁰ One businessman argued, “If the Chinese immigration continues, we will have to leave or fight.”³¹ Manufacturers feared they would lose business because “Chinamen work cheaper for other Chinamen than they do for white men.”³² Employers used a dual-wage system to pay Asian laborers less than white workers, pitting the two groups against each other to lower wages further.³³ While the whites worked for \$16 or \$20 per day, the Chinese were satisfied with only five or eight dollars.³⁴ Labor tensions exacerbated xenophobia, leading the California Legislature to enact discriminatory laws against Chinese immigrants. State statutes banned Chinese immigrants from commercial fishing³⁵ and imposed a monthly police tax on Chinese mine workers.³⁶ The California Legislature enacted the Foreign Miners License Law in 1852, which charged non-U.S. citizens \$20 per month.³⁷ Although the Legislature voided the law in 1870, Chinese miners had already paid over \$5 million in taxes.³⁸ The Naturalization Act of 1790 limited access to U.S. citizenship to white immigrants, denying first-generation Asian immigrants’ citizenship and the right to vote.³⁹ Congress did not repeal this law until 1952.⁴⁰ Citizenship is a prerequisite for voting. With the act’s ban on non-white citizenship, the voting rights of Asian immigrants were nonexistent in the mid-1800s.

³⁰ Wellborn, 49.

³¹ Andrew Gyory, *Closing the Gate: Race, Politics, and the Chinese Exclusion Act* (Chapel Hill, NC: Univ. of North Carolina Press, 1998).

³² Ibid.

³³ Takaki, 13.

³⁴ Wellborn, 49.

³⁵ Elmer C. Sandmeyer, “California Anti-Chinese Legislation and the Federal Courts: A Study in Federal Relations,” *Pacific Historical Review* 5, no. 3 (1936), 206.

³⁶ “Ancestors in the Americas,” Chinese Police Tax Law.

³⁷ Ellen Terrell, “Chinese Americans and the Gold Rush: Inside Adams,” The Library of Congress, January 28, 2021.

³⁸ “California NHT: Chinese Immigration,” National Parks Service (U.S. Department of the Interior).

³⁹ Fraga, 24.

⁴⁰ Takaki, 14.

The first dominant depiction of Asian immigrants was their portrayal as foreign threats to America. In the 1870s, mob violence against Chinese Americans and arson within California Chinatowns was common.⁴¹ In 1871, rioters massacred nineteen Chinese Americans and looted Chinese-owned homes and businesses in Los Angeles.⁴² The mob leaders escaped punishment.⁴³ Amid the heightened anti-Chinese sentiment, 34 California towns harassed, attacked, or forcibly expelled their Chinese communities.⁴⁴ Fears culminated in the 1875 Page Act, the first federal immigration law to prohibit the entry of “undesirable” immigrants from Asia.⁴⁵ Section 3 of the Page Act barred the “importation” of women into the U.S. for prostitution.⁴⁶ It gave immigration officials the authority to determine whether an Asian woman was being trafficked.⁴⁷ The law denied Asian women entry into America, preventing Asian men from staying and building community.⁴⁸

The end of the Reconstruction era coincided with an increase in the size of the Asian immigrant population.⁴⁹ In 1880, the Chinese population reached over 100,000.⁵⁰ The Chinese Exclusion Act of 1882 set a “barred zone” in China, making Chinese immigrants ineligible for citizenship.⁵¹ This act was the first immigration law to limit the entry of a specific ethnic group into America.⁵² The passage of the 1917 Asiatic Barred Zone Act⁵³ and the Immigration Act of

⁴¹ “A History of Chinese Americans in California,” National Parks Service (U.S. Department of the Interior).

⁴² Ibid.

⁴³ Ibid.

⁴⁴ “Justice for the Chinese,” *The New York Times* (The New York Times).

⁴⁵ “Chinese Women, Immigration, and the First U.S. Exclusion Law: The Page Act of 1875,” National Parks Service (U.S. Department of the Interior).

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Fraga, 28.

⁵⁰ Ibid.

⁵¹ “Immigration and Relocation in U.S. History,” The Library of Congress.

⁵² Ibid.

⁵³ “Immigration Act of 1917 (Barred Zone Act),” Immigration History, February 1, 2020.

1924 expanded immigration restrictions beyond Chinese immigrants.⁵⁴ The 1924 Immigration Act cut off entry from the Middle East, India, Southeast Asia, Indonesia, and Japan, but permitted entry from Ireland, Italy, and Poland.⁵⁵ To prevent Asians from creating families and communities, the act barred the entry of women from Asia.⁵⁶ The 1924 Immigration Act did not apply to Filipinos because the Philippines was a U.S. territory.⁵⁷ After the Philippines gained independence, the Tydings-McDuffie Act of 1934 reclassified Filipino Americans as aliens and imposed an annual quota of fifty Filipino immigrants.⁵⁸ The U.S. also required Asian immigrants to follow strict immigration and naturalization screening procedures.⁵⁹ During this era, federal, state, and local laws banned immigrants from Asia and denied Asian immigrants their fundamental rights and privileges. Although national immigration policies eased in the mid-twentieth century, the legacies of exclusion continue to hinder Asian political engagement.

Many of the nation's anti-Asian laws originated in California. The Legislature passed the California School Law of 1860, segregating Black, Chinese, and Indian students into separate schools.⁶⁰ The *San Francisco Evening Bulletin* newspaper celebrated the law, writing:

“[The law] let us keep our public schools free from the intrusion of the inferior races. If we are compelled to have Negroes and Chinamen among us, it is better, of course, that they should be educated. But teach them separately from our own children. Let us preserve our Caucasian blood pure.”⁶¹

⁵⁴ Takaki, 14.

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Jun Xu, “The Political Behavior of Asian Americans: A Theoretical Approach,” *Journal of Political & Military Sociology* 30, no. 1 (2002), 84

⁶⁰ Joyce Kuo, “Excluded, Segregated and Forgotten: A Historical View of the Discrimination of Chinese Americans in Public Schools,” *Asian American Law Journal* 5, no. 1 (November 1998), 190.

⁶¹ Ibid.

The 1879 California Constitution declared that no Chinese native possessed the right of suffrage,⁶² despite passing the Fifteenth Amendment in 1870, which prohibited the state and federal government from denying or abridging a citizen's right to vote "on account of race, color, or previous condition of servitude."⁶³ California laws during the exclusion era denied Asian immigrants numerous legal rights and privileges. The 1913 Alien Land law barred Asian immigrants from owning land in California.⁶⁴ In 1920, the Legislature banned leasing and land ownership by American-born children of Asian immigrants.⁶⁵ California's anti-miscegenation law prohibited marriage between whites and individuals of "Mongolian" ancestry.⁶⁶

California courts frequently upheld anti-Asian laws and ordinances. In *People v. George Hall* (1854), the California Supreme Court vacated a white settler's murder conviction after declaring that a Chinese person could not testify against a white person in trial.⁶⁷ Chief Justice Hugh Murray warned that a rule allowing Chinese witness testimony "would admit [Chinese people] to all the equal rights of citizenship, and we might soon see them at the polls, in the jury box, upon the bench, and in our legislative halls."⁶⁸ Murray called this inconceivable future an "actual and present danger."⁶⁹ In *In re Ah Yup* (1878), the California Ninth Circuit Court ruled that Chinese-born Ah Yup could not naturalize because he was not Caucasian.⁷⁰ Similar cases

⁶² Ana Henderson, "Citizenship, Voting, and Asian American Political Engagement," *Reigniting Community: Strengthening the Asian Pacific American Identity* (UC Irvine Law Review, December 2013), 1079.

⁶³ "U.S. Constitution Fifteenth Amendment," *Constitution Annotated* (Congress).

⁶⁴ "May 3, 1913: California Law Prohibits Asian Immigrants from Owning Land," *A History of Racial Injustice* (Equal Justice Initiative).

⁶⁵ *Ibid.*

⁶⁶ "Perez v. Sharp," *Justia Law*.

⁶⁷ *People v. George Hall*, 4 Cal. 399 (1854). *California Supreme Court*.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ Claire Kim, "The Racial Triangulation of Asian Americans," *Asian Americans and Politics* 27, no. 1 (March 1999), 114.

barred Hawaiians, the Japanese, and those of mixed white-Asian ancestry.⁷¹ Regardless of how long they lived in America, Asian immigrants threatened American values and political life.

The effect of decades of racial bias and nativist suspicion culminated in the wartime internment of Japanese Americans. Following the Japanese military bombing of Pearl Harbor in 1942, President Roosevelt issued Executive Order 9066, forcibly evacuating all Japanese residents.⁷² Although Germany and Italy were wartime adversaries, the executive order did not apply to German or Italian Americans.⁷³ The executive order emphasized the notion that all Asian Americans were foreigners. The government ignored a federal intelligence report which concluded that Japanese Americans posed no threat to domestic security.⁷⁴ Through Executive Order 9066, the U.S. government confiscated the property of over 120,000 Japanese Americans and sent them to internment camps.⁷⁵ Two-thirds of those interned were native-born American citizens.⁷⁶ Here, Japanese immigrants realized that the legal distinction between citizen and alien was not as important as the difference between white and Asian. Fearing persecution, Chinese, Korean, and Filipino immigrants wore buttons and cards proclaiming, "I'm Chinese," "I am Korean," and "I am a Filipino."⁷⁷ It took over four decades after World War II for the U.S. government to issue an official apology and reparations to Japanese Americans.⁷⁸ In 1988, Public Law 100-383 acknowledged and apologized for the incarceration, and provided partial reparations of \$20,000 to each person incarcerated.⁷⁹

⁷¹ Ibid.

⁷² "Executive Order 9066: Resulting in Japanese-American Incarceration (1942)," National Archives and Records Administration.

⁷³ Takaki, 15.

⁷⁴ "Facts and Case Summary - Korematsu v. U.S.," United States Courts.

⁷⁵ Takaki, 15.

⁷⁶ Ibid.

⁷⁷ Espiritu, 23.

⁷⁸ "Executive Order 9066: Resulting in Japanese-American Incarceration (1942)," National Archives and Records Administration.

⁷⁹ Ibid.

Concurrently, restrictions on Asian immigration and citizenship loosened because of new geopolitical alliances. Japanese propaganda repeatedly cited the 1882 Chinese Exclusion Act to weaken ties between America and China.⁸⁰ In 1943, Congress repealed the 1882 Chinese Exclusion Act and established an annual quota of 105 Chinese immigrants.⁸¹ Roosevelt wrote in a letter to Congress that passing the bill was vital to correcting the “historic mistake” of banning Chinese immigration.⁸² He emphasized that the legislation was “important in the cause of winning the war and of establishing a secure peace.”⁸³ Congress expanded citizenship to Filipino and Asian Indian immigrants in 1946.⁸⁴ In 1952, Congress passed the McCarran-Walter Act, ending the ban on Asian immigration and eliminating Asian citizenship restrictions.⁸⁵ The 1965 Immigration and Nationality Act reopened immigration from Asia, setting a quota of 20,000 immigrants per country.⁸⁶ Though the federal government liberated U.S. immigration policy in the mid-1900s, they did not undo the profound legacies of racial exclusion.

In the 1960s, dominant portrayals of Asian immigrants shifted from the “yellow peril” stereotype to the “model minority” stereotype. During World War II, the Citizens Committee to Repeal Chinese Exclusion recast the Chinese in its promotional materials as “law-abiding, peace-loving, courteous people living quietly among us.”⁸⁷ The new racial stereotype of Asians as “model minorities” characterized them as “domestic exemplars, upwardly mobile, and politically docile.”⁸⁸ During the civil rights movement, whites used depictions of socioeconomically successful Asians to deny racial inequalities and blame African Americans for being culturally

⁸⁰ “Repeal of the Chinese Exclusion Act, 1943,” U.S. Department of State.

⁸¹ Ibid.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ “The Immigration and Nationality Act of 1952 (The McCarran-Walter Act).

⁸⁶ Ibid.

⁸⁷ Ellen Wu, “Asian Americans and the 'Model Minority' Myth,” Los Angeles Times, January 23, 2014.

⁸⁸ Ibid.

unfit or unwilling to attain success. Politicians and academics promoted the Chinese “model minority” to counter the demands of the civil rights movement.⁸⁹ Depictions of Asians as the “model minority” were linked to the “yellow peril” stereotype. Both stereotypes convey that Asian immigrants are desired for their work ethic and obedience, until they threaten the economic security of whites. Both of these racial characterizations used Asians to advance white interests, preventing them from assimilating.

Claire Kim, a professor of Asian American Studies at the University of California, Irvine, said these stereotypes falsely conflated anti-Asian racism with anti-Black racism. Kim said, “Racism that Asian Americans have experienced is not what black people have experienced... Asians have faced various forms of discrimination, but never the systematic dehumanization that black people have faced during slavery and continue to face today.”⁹⁰ Asian American scholars have critiqued the model minority myth for exaggerating Asian prosperity, generalizing the diverse experiences of Asians, and obscuring racial discrimination.⁹¹ The model minority myth’s portrayal of successful, apolitical Asian immigrants, simultaneously disparaged African Americans involved in the Black Power and civil rights movements and cautioned Asian from becoming politically active.⁹²

In “The Racial Triangulation of Asian Americans,” Claire Kim wrote that while Chinese immigrants were pit against Blacks, they were also “constructed as immutably foreign and ostracized from the body politic.”⁹³ The joint House-Senate committee investigation of the 1987 Iran-Contra scandal received racist telegrams and phone calls that told co-chair Senator Daniel

⁸⁹ Wu.

⁹⁰ Ibid.

⁹¹ Kim, 119.

⁹² Ibid.

⁹³ Ibid, 112.

Inouye (D-HI) that he should “go home to Japan where he belonged.”⁹⁴ Senator Inouye was born in the United States and was awarded a Distinguished Service Cross for his service as an American soldier during World War II.⁹⁵ Japanese American Congressman, Norman Mineta (D-13), observed, “one is often led to believe that all our forebearers came from Europe. When one hears stories about the pioneers going West to shape the land, the Asian immigrant is rarely mentioned.”⁹⁶

Although the pan-ethnic name, “Asian American,” originates in Asia, the history of immigration among Asian ethnic groups is far from uniform. Before the Immigration and Nationality Act of 1965, Asian immigrants were mainly from East Asia.⁹⁷ The first wave of immigrants arriving in the U.S. from China, Japan, and Korea, did not form alliances.⁹⁸ Immigrants from China, Japan, and Korea considered themselves politically and culturally distinct.⁹⁹ Because of anti-Asian exclusion laws and racial lumping, Asian immigrants disassociated from other ethnic groups. Current and past antagonistic histories also affected intergroup relations.¹⁰⁰ Japanese war crimes and atrocities in China and Korea haunted older generations of Chinese and Korean immigrants.¹⁰¹ Political differences between their home countries partially explain the initial lack of socialization and integration between the national-origin groups. It was not until the late-1960s when Asian activists started the Asian American movement and formed a pan-Asian consciousness.¹⁰²

⁹⁴ Takaki, 6.

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ Dina G. Okamoto, *Redefining Race: Asian American Panethnicity and Shifting Ethnic Boundaries* (New York: Russell Sage Foundation, 2014), 2.

⁹⁹ Espiritu, 19.

¹⁰⁰ Ibid, 27.

¹⁰¹ Ibid.

¹⁰² Ibid, 20.

During the civil rights movement, student activists, Emma Gee and Yuji Ichioka, named their student organization, Asian American Political Alliance (AAPA), which was the first public use of the phrase “Asian American.”¹⁰³ They coined the term “Asian American” to address racial inequalities and maximize their political power.¹⁰⁴ Ichioka said in an interview with Y  n L   Espiritu:

“There were so many Asians out there in the political demonstrations but we had no effectiveness. Everyone was lost in the larger rally. We figured that if we rallied behind our own banner, behind an Asian American banner, we would have an effect on the larger public. We could extend the influence beyond ourselves, to other Asian Americans.”¹⁰⁵

Through pan-Asian organizations, Asian American activists built pan-ethnic solidarity and spearheaded the Yellow Power movement to combat racial oppression.¹⁰⁶ AAPA brought together Chinese, Japanese, and Filipino American activists and spread the cause to other college campuses.¹⁰⁷ Asian professionals and activists used the pan-Asian term to lobby for Asian American health and welfare programs.¹⁰⁸

In 1994, California voters passed Proposition 187, a ballot initiative that restricted undocumented immigrants from public social services, non-emergency healthcare, and education.¹⁰⁹ Proposition 187 also required state and local agencies to report suspected undocumented immigrants.¹¹⁰ Communities of color rallied against its passage. The *Los Angeles*

¹⁰³ Anna Purna Kambhampaty, “AAPI History: Activist Origins of the Term 'Asian American',” *Time* (May 22, 2020).

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ Espiritu, 32.

¹⁰⁷ *Ibid.*, 34.

¹⁰⁸ *Ibid.*

¹⁰⁹ “Civil Rights Cases and Events in the United States: 1994: California's Proposition 187,” Library of Congress.

¹¹⁰ *Ibid.*

Times reported on the unprecedented grassroots movement in California's Asian American communities, as third-generation Chinese and Japanese Americans worked side-by-side with the newer Korean, Vietnamese, Thai, and Cambodian immigrants.¹¹¹ This movement was the first time a statewide ballot measure generated such involvement in the Asian American community.¹¹² Despite the outcry, the proposition passed by a large margin, with 59% of voters favoring the law.¹¹³ While Proposition 187 failed 78% to 22% among Latinos, it won among whites by 59% to 41%, Asian Americans 54% to 46%, and African Americans 46% to 44%.¹¹⁴ The state did not implement Prop. 187 after courts found it unconstitutional under the Fourteenth Amendment.¹¹⁵ The Equal Protection Clause of the 14th Amendment protects individuals regardless of citizenship status.¹¹⁶ Even still, Proposition 187 increased anti-immigrant rhetoric in California's public discourse.¹¹⁷

In 2012, the Pew Research Center issued a report titled "The Rise of Asian America" on the demographics and attitudes of the Asian population.¹¹⁸ The report noted that Asian Americans are the "highest income, best educated, and fastest growing racial group in the U.S."¹¹⁹ It highlighted Asian Americans' economic success and social assimilation, emphasizing that 75% of its population is foreign-born.¹²⁰ Within days of its release, Asian American advocacy organizations contested the report's portrayal of the Asian population as a monolithic

¹¹¹ K. Connie Kang, "Asian American Groups Organize to Fight Measure : Activists Say This Is the First Issue to Draw Such a Grass-Roots Response. Still, There Is Significant Support for Denying Services to Illegal Immigrants.," *Los Angeles Times* (Los Angeles Times, October 9, 1994).

¹¹² *Ibid.*

¹¹³ "Civil Rights Cases and Events in the United States: 1994: California's Proposition 187," Library of Congress.

¹¹⁴ Daniel M. Weintraub, "Crime, Immigration Issues Helped Wilson, Poll Finds: Election: Proposition 187 Wins among Whites, but Loses among All Other Ethnic Groups, Exit Survey Shows," *Los Angeles Times* (Los Angeles Times, November 9, 1994).

¹¹⁵ *Ibid.*

¹¹⁶ "U.S. Constitution Fourteenth Amendment," *Constitution Annotated* (Congress).

¹¹⁷ Kang.

¹¹⁸ Okamoto, 1.

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

“model minority.”¹²¹ The lack of attention to disparities within and between Asian ethnic groups misrepresented the Asian American community. The report did not discuss the role of immigration and foreign policies in selecting educated and high-skilled migrants from Asia. The selection bias for high-skilled workers within immigration policy produced an Asian American population with high formal education and social standing—perpetuating the “model minority” myth.¹²² The report neglected the continuing economic and social inequality experienced by Asian ethnic groups, particularly Southeast Asians, Filipinos, and South Asians.¹²³

The Asian American population is geographically diverse, with significant differences in income, citizenship status, and political preference. While the household incomes and educational attainment of Asians exceed the overall U.S. population, the two variables differ widely among Asian-origin groups in America.¹²⁴ Today, “Asian America” consists of different races, national origins, citizenship, and migration trajectories.

Asians are now the fastest growing of the nation’s four largest racial or ethnic groups.¹²⁵ The Asian population grew from 1% of the total population in the 1970 Census to 6% in the 2010 Census.¹²⁶ Asian Americans are the only major racial or ethnic group where most of the eligible voters are naturalized citizens.¹²⁷ Pew Research reported that 57% of Asian American eligible voters are naturalized citizens and 43% of Asian American eligible voters are native-

¹²¹ Ibid.

¹²² Jacqueline Thomsen, “Authors Discuss Reasoning behind High Levels of Asian American Achievement,” *Inside Higher Ed*, August 4, 2015. (Interview of Professor Jennifer Lee and Professor Min Zhou).

¹²³ Okamoto, 1.

¹²⁴ Robert Gebeloff, Denise Lu, and Miriam Jordan, “Inside the Diverse and Growing Asian Population in the U.S.,” *The New York Times* (The New York Times, August 21, 2021).

¹²⁵ Chen and Lee, 377.

¹²⁶ Ming Hsu Chen and Taeku Lee, “Reimagining Democratic Inclusion: Asian Americans and the Voting Rights Act,” *U.C. Irvine L. Rev.* 359 (2013), 377.

¹²⁷ Carolyne Im, “Key Facts about Asian American Eligible Voters in 2022,” Pew Research Center (Pew Research Center, October 12, 2022).

born citizens.¹²⁸ The Asian American political identity was forged from interactions between diverse ethnic groups, the American history of anti-Asian racism, and competing stereotypes of Asian immigrants as “model minorities” while remaining “forever foreigners.”

Creating a Pan-Asian Identity

The Asian population of the United States is complex, consisting of 20 million people who trace their roots to over 20 countries in East Asia, Southeast Asia, and the Indian subcontinent.¹²⁹ Pan-ethnicity occurs when ethnic groups relax and widen their boundaries to forge a broader coalition and identity.¹³⁰ In *Redefining Race: Asian American Panethnicity and Shifting Ethnic Boundaries*, Dina Okamoto demonstrated that pan-ethnicity is not a natural outcome, but a social achievement.¹³¹ The Asian American pan-ethnic identity comprises groups of different national origins divided along class, linguistic, and generational lines.¹³² David Lopez and Yén Lê Espiritu contend that pan-ethnic identities form in response to cultural, structural, and historical developments.¹³³ Despite their distinctive histories and separate identities, these ethnic groups can unite to protect and promote collective interests.

Given the diversity within Asian ethnic groups, concepts applied to African American political participation, such as racial group unity, may not apply to Asian Americans.¹³⁴ Despite their long histories in America, Asian immigrants of different racial or ethnic groups lack shared

¹²⁸ Im.

¹²⁹ Ibid.

¹³⁰ Okamoto, 2.

¹³¹ Ibid, 3.

¹³² Sara Sadhwani, “The Influence of Candidate Race and Ethnicity: The Case of Asian Americans,” *Politics, Groups, and Identities* 10, no. 4 (January 2021), 618.

¹³³ David Lopez and Yen Espiritu, “Panethnicity in the United States: A Theoretical Framework,” *Ethnic and Racial Studies* 13, no. 2 (1990): pp. 198-224.

¹³⁴ Natalie Masuoka, “Together They Become One: Examining the Predictors of Panethnic Group Consciousness among Asian Americans and Latinos,” *Social Science Quarterly* 87, no. 5 (2006), 993.

histories. One million people entered between the California gold rush of 1849 and the 1924 Immigration Act, which banned immigration from Asia.¹³⁵ Forty years later, a second group of three million immigrants entered between 1965 and 1985.¹³⁶ The differences in immigration waves and political history made it difficult for older Asian immigrants to feel socially connected with those from other Asian countries. For older generations of Asians, disenfranchisement, ostracization, and past racial conflict continue to influence their involvement with mainstream institutions today.¹³⁷ Studies found that group consciousness is not as strong for many Asians because of different levels of assimilation into American society, intergroup conflict, group size differences, and high levels of immigration.¹³⁸ Many immigrants may strongly identify with their home country. Distinct ethnic communities and identity-based organizations further reinforce this homeland loyalty.¹³⁹

Asian American pan-ethnicity developed after Asian immigrants had children born in America. No longer separated by their origin country's political conflicts, languages, and customs, second-generation Asian Americans saw the political necessity and social advantages of uniting. Historical animosity between their home countries receded in importance.¹⁴⁰ In *Strangers from a Different Shore*, Ronald Takaki wrote that second-generation Korean-Americans, "had difficulty feeling the painful loss of the homeland and understanding the indignity of Japanese domination."¹⁴¹ While the older Korean generation hated the Japanese, their children were less hostile.¹⁴²

¹³⁵ Takaki, 7.

¹³⁶ Ibid.

¹³⁷ Maria-Elena D. Diaz, "Asian Embeddedness and Political Participation: Social Integration and Asian-American Voting Behavior in the 2000 Presidential Election," *Sociological Perspectives* 55, no. 1 (2012), 144.

¹³⁸ Ibid, 147.

¹³⁹ Ibid.

¹⁴⁰ Espiritu, 27.

¹⁴¹ Takaki, 292.

¹⁴² Espiritu, 27.

Although cultural diversity and distinct immigration patterns may theoretically preclude Asian Americans from adopting pan-ethnic identities, studies have found cases of pan-ethnic mobilization for Asian Americans. Yén Lê Espiritu's case study of the 1960s Asian American movement found that youth from different Asian national-origin groups mobilized together to promote Asian American issues in both mainstream politics and university education.¹⁴³ Espiritu's explanatory variable for the 1960s movement was the increased education levels among Asian youth.¹⁴⁴ Asian college students spearheaded the Asian American movement.¹⁴⁵ The student activists, Emma Gee and Yuji Ichioka, who coined the term "Asian American," were a Chinese-American and Japanese-American couple.¹⁴⁶ Ichioka commented on his experience as a third-generation Japanese American:

"As far as our experiences in America, I have more things in common than differences with a Chinese American. Being born and raised here gives us something in common. We have more in common with each other than with a Japanese from Japan, or a Chinese from China."¹⁴⁷

Asian American student activists built pan-Asian solidarity by emphasizing their shared experiences.¹⁴⁸ Pan-ethnicity is a political instrument used to gain power through a larger group size.¹⁴⁹ Leland Saito, a professor of sociology at the University of Southern California, found Japanese and Chinese Americans working together in Monterey Park to protect the right to use

¹⁴³ Espiritu, 25.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid, 27.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid, 31.

¹⁴⁹ Jess Lee, "Many Dimensions of Asian American Pan-Ethnicity," *Sociology Compass* 13, no. 12 (2019).

Asian languages on business signs.¹⁵⁰ Pan-ethnicity helps bridge constituents through their collective experiences of discrimination and lack of political and economic power in America.¹⁵¹

In “Together They Become One: Examining the Predictors of Panethnic Group Consciousness Among Asian Americans and Latinos,” Natalie Masuoka examined pan-ethnic consciousness and the challenges of diversity and immigration faced by Asian Americans.¹⁵² The Asian American pan-ethnic group consists of national-origin groups with distinct cultures and languages.¹⁵³ She drew from data from the 2000 Pilot National Asian American Political Survey to determine predictors of pan-ethnic consciousness among Asian Americans.¹⁵⁴ The model confirmed that for Asian Americans, high income, involvement in Asian American politics, Democratic party affiliation, and the role of racial discrimination encouraged pan-ethnic consciousness.¹⁵⁵ Although recent immigration flows from Asia have expanded the Asian American community, Masuoka found that immigration did not play a role in perceptions of group consciousness.¹⁵⁶ Instead, experiencing discrimination increased perceptions of group consciousness.¹⁵⁷ Asian Americans grew closer to the pan-ethnic identity through social interaction or experiences with discrimination.¹⁵⁸ Shared experiences conceive pan-ethnic identity.

Pan-ethnic identity construction is unique across ethnic groups. Certain Asian national-origin groups were more likely to perceive pan-ethnic group consciousness than others.¹⁵⁹

¹⁵⁰ Leland T. Saito, *Race and Politics: Asian Americans, Latinos, and Whites in a Los Angeles Suburb* (Urbana: University of Illinois Press, 1998).

¹⁵¹ Lee.

¹⁵² Masuoka, 994.

¹⁵³ *Ibid.*, 995.

¹⁵⁴ *Ibid.*, 994.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*, 1005.

¹⁵⁷ *Ibid.*, 994.

¹⁵⁸ *Ibid.*, 999.

¹⁵⁹ *Ibid.*, 1005.

Masuoka found that socioeconomic status had a small positive effect on pan-ethnic consciousness.¹⁶⁰ While Espiritu stressed higher education as critical to pan-ethnic mobilization during the 1960s,¹⁶¹ Masuoka found that income was the key socioeconomic factor for Asian Americans.¹⁶² She found that high-income Asian Americans have stronger pan-ethnic perceptions.¹⁶³ In *Behind the Mule: Race and Class in African-American Politics*, Michael Dawson found that high-income levels indicate interactions in more competitive work environments.¹⁶⁴ Minorities in the skilled labor market are more likely to experience the glass-ceiling effect, making them acutely aware of their minority status.¹⁶⁵ The relative economic success of Asian Americans reduces the motivation to turn to government to improve group standing.¹⁶⁶ Asians, more than other groups, view economic mobility as the most effective path to individual and collective achievement.¹⁶⁷ Still, socioeconomic status may not uniformly affect all Asians because general socioeconomic characteristics vary by ethnic group.

Pan-ethnicity influences Asian American voting and non-voting activities. In the past, political parties considered Asians a negligible potential pool of voters.¹⁶⁸ They constituted a small proportion of voters in most communities and did not demonstrate strong party affiliation or vote cohesion.¹⁶⁹ Historically, Asians outside of Hawaii were perceived as passive, accommodating, and unsuited to democratic politics because of their cultural traits and

¹⁶⁰ Ibid, 1003.

¹⁶¹ Espiritu, 27.

¹⁶² Masuoka, 1003.

¹⁶³ Ibid, 1005.

¹⁶⁴ Michael C. Dawson, *Behind the Mule: Race and Class in African-American Politics* (Princeton University Press, 1994).

¹⁶⁵ Ibid.

¹⁶⁶ Jack Citrin and Benjamin Highton, *How Race, Ethnicity, and Immigration Shape the California Electorate* (San Francisco, CA: Public Policy Institute of California, 2002), 30.

¹⁶⁷ Ibid.

¹⁶⁸ Diaz, 144.

¹⁶⁹ Ibid.

unfamiliarity with democracy.¹⁷⁰ Asian Americans are less likely to be mobilized by political parties because of the costs and uncertain benefits of mobilizing them.¹⁷¹

Data from three surveys, National Park Service on AAPI behavior (NPS), Los Angeles County Social Survey (LACSS), and National Asian American Survey (NAAS), provided information about Asian American voting behavior.¹⁷² Many Asian Americans view their future outcomes as linked to the fate of other Asians. Ming Hsu Chen and Taeku Lee found that nearly 60% of Asian Americans report a shared sense of well-being.¹⁷³ “Linked fate” describes the idea that Asian Americans share a sense of collective destiny.¹⁷⁴ It is among the most consistent and powerful predictors of public opinion and voting behavior.¹⁷⁵ When Asian Americans believe in linked fate, it expresses solidarity.¹⁷⁶ Linked fate manifests through individual Asian Americans’ awareness of cooperating at the pan-ethnic level, regardless of whether this leads to political or social involvement.¹⁷⁷ It stems from the shared experiences and challenges faced by Asian Americans, such as discrimination, marginalization, and stereotyping.

Chen and Lee found that Asian Americans in Los Angeles County are more likely than African Americans or Latinos to see political power as an important means to achieve group interests.¹⁷⁸ The 2007 LACSS asked respondents, “How effectively do you think elections and political power is a means of pursuing” their racial group’s interests?¹⁷⁹ Among Los Angeles citizens, over 80% of Asian Americans reported that political power is either “somewhat

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

¹⁷² Chen and Lee, 387.

¹⁷³ Ibid, 407.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid.

¹⁷⁶ Tae Eun Min, “The Impact of Panethnicity on Asian American and Latino Political Participation,” *Ethnicities* 14, no. 5 (2014), 700.

¹⁷⁷ Ibid.

¹⁷⁸ Chen and Lee, 405.

¹⁷⁹ Ibid, 407.

effective” or “very effective” compared with 65% of Latinos and 75% of Blacks.¹⁸⁰ In Los Angeles County, Asian Americans are more likely than Blacks and Latinos to vote for a co-ethnic candidate.¹⁸¹ The LACSS asked its respondents, “Suppose you have an opportunity to decide on how two candidates for political office, one of whom is [from the respondents’ racial group]. Would you be more likely to vote for [that candidate]?”¹⁸² Asian Americans reported the highest willingness to vote for co-ethnic candidates.¹⁸³ The combined willingness was 80% for Asian Americans compared with 75% for Blacks and 70% for Latinos.¹⁸⁴ Chen and Lee concluded that Asian Americans may be more likely to vote based on the community’s collective interests rather than on their individual interests.

Naturalization, Registration, and Voting

For the largely foreign-born Asian population to participate in politics, they must complete three prerequisites: naturalization, voter registration, and voting. There are significant drop-offs at each stage.¹⁸⁵ The 2008 Current Population Survey Voting and Registration Supplements show that 67% of Asian American adults are naturalized, 37% are registered to vote, and 32% report voting.¹⁸⁶ Asian Americans are disproportionately underrepresented among active and registered voters.¹⁸⁷ Previous studies have analyzed Asian national origin groups together, focusing on the role of individual-level resources such as education and income.¹⁸⁸

¹⁸⁰ Ibid, 407-408.

¹⁸¹ Ibid, 405.

¹⁸² Ibid, 408.

¹⁸³ Ibid, 408.

¹⁸⁴ Ibid, 408.

¹⁸⁵ Ibid, 388.

¹⁸⁶ Ibid, 389.

¹⁸⁷ Ibid, 388-389.

¹⁸⁸ Natalie Masuoka, Kumar Ramanathan, and Jane Junn, “New Asian American Voters: Political Incorporation and Participation in 2016,” *Political Research Quarterly* 72, no. 4 (2019), 991.

These studies found that Asian Americans under-participate relative to their high socioeconomic status—reinforcing the characterization of Asians as apolitical non-voters.¹⁸⁹ This deficit in voter participation does not by itself prove lack of Asian interest in political participation.¹⁹⁰ Instead, studies miss institutional mechanisms that can disadvantage individuals from political participation.¹⁹¹ The two initial stages of political incorporation, naturalization and registration, contribute to low rates of Asian American voting.

Immigration and Naturalization

Asian American voters are not a monolith, and understanding the distinction between ethnic groups can explain the lagging impact of a growing Asian population on politics.¹⁹² Many issues can hinder citizenship for Asian immigrants, such as English language proficiency, knowledge of U.S. history, trust in the government, and national-origin ties.¹⁹³ Many Asian immigrants were socialized and educated abroad in countries lacking democratic traditions.¹⁹⁴ For a fast-growing community with continuous flows of new international migration, citizenship and registration requirements impede Asian American participation.¹⁹⁵

Differences in the need, motivation, and ability to immigrate and naturalize help explain variation in voting across ethnic groups.¹⁹⁶ In *How Race, Ethnicity, and Immigration Shape the California Electorate*, Jack Citrin and Benjamin Highton found that Filipino and Vietnamese

¹⁸⁹ Ibid.

¹⁹⁰ Pei-te Lien, “Asian Americans and Voting Participation: Comparing Racial and Ethnic Differences in Recent U.S. Elections,” *The International Migration Review* 38, no. 2 (2004), 497.

¹⁹¹ Ibid.

¹⁹² David de la Fuente, “Understanding the Diversity of Asian American Voters,” *Third Way*.

¹⁹³ Zachary Hertz, “Analyzing the Effects of a Switch to By-District Elections in California,” *Massachusetts Institute of Technology*, July 19, 2021, 6

¹⁹⁴ Citrin and Highton, 30.

¹⁹⁵ Lien, 497.

¹⁹⁶ Citrin and Highton, 4.

registered voters were more likely to vote even when accounting for socioeconomic status, partisanship attachments, and immigration generation.¹⁹⁷ Among Asian immigrants in California, those born in the Philippines and Vietnam have the highest citizenship and voting rates.¹⁹⁸ These gaps persist even after controlling for differences in socioeconomic status.¹⁹⁹ Those born in the Philippines constitute only 27% of the Asian immigrant population but 37% of the Asian immigrant *voting* population.²⁰⁰ Because of America's territorial past in the Philippines, Filipino immigrants may have an easier time becoming citizens and voters than those born in China, Korea, or Japan.²⁰¹ Immigrants from these countries find difficulty assimilating because of English proficiency barriers.²⁰² There is also a lower likelihood of naturalization for subgroups who perceive relatively low benefits of American citizenship.²⁰³

Political motivations for immigration can facilitate the rate of political integration.²⁰⁴ Vietnamese immigrants may be more likely to turn out than Chinese or Korean immigrants, whose immigration tends to be motivated by economic or family factors.²⁰⁵ Because many Vietnamese Americans immigrated immediately after the Vietnam War and are a refugee community, issues related to the homeland continue to influence their politics.²⁰⁶ Some Vietnamese American candidates appeal to their ethnic community by sending anti-communist messages.²⁰⁷ Still, Vietnamese immigrants face socioeconomic disadvantages coming from

¹⁹⁷ Ibid, ix.

¹⁹⁸ Ibid.

¹⁹⁹ Ibid.

²⁰⁰ Ibid.

²⁰¹ Lien, 500.

²⁰² Ibid.

²⁰³ Citrin and Highton, 4.

²⁰⁴ Lien, 500.

²⁰⁵ Ibid.

²⁰⁶ Ibid.

²⁰⁷ Seema Mehta and Anh Do, "In Tight California House Race, 'Red-Baiting' Mailers Accuse Candidate of Communist Ties," Los Angeles Times (Los Angeles Times, September 30, 2022).

refugee backgrounds.²⁰⁸ The histories and trauma inherited from their origin countries impose different political agendas on Asian ethnic groups.

It is important to compare the turnout gap among Asians of different national origins because of varying immigrant histories. The first Asian immigrants to come to California were Chinese immigrants who arrived during the California Gold Rush.²⁰⁹ The California Legislature enacted the Anti-Coolie Act of 1862 to “protect free white labor against competition with Chinese coolie labor, and to discourage the immigration of the Chinese into the state of California.”²¹⁰ By the late 1860s, “anti-coolie” clubs were widespread, and violence against Chinese immigrants increased.²¹¹ Domestic miners created these clubs to alienate Chinese workers. The 1882 Chinese Exclusion Act halted Chinese immigration and deported many Chinese laborers.²¹² After 1882, the number of Chinese residents fell dramatically because the Chinese population in California was heavily male.²¹³

Before the 1880s, few Japanese immigrants came to America. After the Chinese Exclusion Act, the Japanese were recruited as farm laborers in Hawaii and the West Coast.²¹⁴ Hostility toward the increasingly successful Japanese farmers rose in California in the early-1900s, leading to the Gentlemen’s Agreement.²¹⁵ This agreement halted the entry of Japanese laborers but allowed wives and “picture brides” to immigrate.²¹⁶ Matchmakers created a system where men reviewed pictures of single women seeking American husbands.²¹⁷ If a Japanese

²⁰⁸ Lien, 500.

²⁰⁹ Citrin and Highton, 44.

²¹⁰ “California’s Anti-Coolie Act of 1862,” San Diego State University.

²¹¹ Citrin and Highton, 44.

²¹² *Ibid.*

²¹³ *Ibid.*

²¹⁴ *Ibid.*, 45.

²¹⁵ *Ibid.*

²¹⁶ *Ibid.*

²¹⁷ “Picture Brides and Japanese Immigration,” *Women & the American Story*.

immigrant married a Japanese woman, he could legally bring his new wife into the country.²¹⁸ Picture brides made up the majority of Japanese immigrants from 1907 to 1924.²¹⁹ They played an important role in establishing the Japanese American community.²²⁰ Consequently, early Japanese residents built community and families over time.²²¹ When the 1965 Immigration and Nationality Act ended discrimination against Asian immigrants, Japan was already a prosperous society.²²² Japanese immigration after 1970 was limited.²²³ Unlike other Asian ethnicities in California, most Japanese Americans are native-born and come from families who lived in the state since before World War II.²²⁴

After 1920, Filipinos replaced the Japanese as a large source of agricultural labor in California.²²⁵ As non-citizen U.S. nationals since the Spanish American War, immigration bans did not include Filipinos.²²⁶ After the 1934 Tydings-McDuffie Act granted independence to the Philippines, the government reclassified Filipinos as aliens and restricted the annual quota to fifty Filipino visas.²²⁷ The Filipino residents in California constitute families who immigrated before 1935 and after 1965.²²⁸ Californians of Chinese, Korean, Vietnamese, or South Asian origins, by contrast, are almost all immigrants or the offspring of post-1965 immigrants.²²⁹ They were motivated to immigrate by political and economic crises in their native countries.²³⁰ These

²¹⁸ Ibid.

²¹⁹ Ibid.

²²⁰ Ibid.

²²¹ Citrin and Highton, 45.

²²² Ibid.

²²³ Ibid.

²²⁴ Ibid.

²²⁵ Ibid.

²²⁶ Ibid.

²²⁷ Takaki, 14.

²²⁸ Citrin and Highton, 45.

²²⁹ Ibid.

²³⁰ Ibid.

differences in the nativity and duration of residence in the U.S. help explain differences in the political participation of various Asian subgroups.²³¹

Like Latinos, Asians living in the U.S. have relatively low citizenship rates.²³² Among Californian immigrants who have lived in the U.S. for at least ten years, citizenship rates are highest among those from Vietnam (79%), the Philippines (78%), China (76%), and whites (75%).²³³ The citizenship rates of those from Korea and India lag at 57% and 60%.²³⁴ The longer foreign-born immigrants live in America, the likelier they are to become citizens.²³⁵ The longer they live in America, the more likely they are to vote.²³⁶ For immigrants, the minimum requirement for citizenship is five years of residence, but administrative delays prolong naturalization.²³⁷ Among all ethnic groups, age, formal education, and income are positively associated with naturalization.²³⁸ Older, wealthier, and better-educated immigrants naturalize more quickly.²³⁹ Both nativity and length of residence affect the political incorporation of immigrants.²⁴⁰

Because of the strong relationship between residence duration and citizenship status, differences in citizenship rates within the Asian population can result from different historical immigration patterns. Citizenship is strongly correlated with the year of entry for each immigrant group.²⁴¹ Among those who entered at roughly the same time, citizenship rates were higher for

²³¹ Ibid.

²³² Ibid, ix.

²³³ Ibid, 57.

²³⁴ Ibid.

²³⁵ Ibid.

²³⁶ Ibid, 7.

²³⁷ Ibid, 56.

²³⁸ Ibid, 6.

²³⁹ Ibid, 57.

²⁴⁰ Ibid, 45.

²⁴¹ Ibid, 47.

Filipino and Vietnamese immigrants.²⁴² Causal factors for naturalization include English proficiency, military service, status as a refugee-sending country, and homeland poverty.²⁴³ The Philippines and Vietnam score higher on these causal factors than Korea and Japan.²⁴⁴ The term “Asian American” is a racial designation made up of numerous subgroups such as Korean American, Chinese American, Filipino American, Vietnamese American, and Indian American.²⁴⁵ Government recognition of in-group cultural heterogeneity and cohesion may be a key component of increasing democratic inclusion for the group.²⁴⁶

Political Participation

Asian Americans constitute a large and growing group available for political mobilization in California. The Asian population surged between 1990 and 2000, growing by 48%.²⁴⁷ In 2010, Asians surpassed Latinos as the largest group contributing to America’s immigrant population.²⁴⁸ Only 27% of Asian residents are native-born.²⁴⁹ In California, the proportion is even lower at 20%.²⁵⁰ There are drastic differences in citizenship and turnout rates across the state’s major ethnic groups, but whites’ share of the electorate has remained significant despite demographic changes.²⁵¹ Variables such as immigration status, age, educational attainment, awareness of population size, and residual effects of discrimination disadvantage Asian voters.²⁵²

²⁴² Ibid, 47-48.

²⁴³ Philip Q. Yang, “Explaining Immigrant Naturalization,” *International Migration Review* 28, no. 3 (1994), 450.

²⁴⁴ Citrin and Highton, 48.

²⁴⁵ Chen and Lee, 375.

²⁴⁶ Ibid.

²⁴⁷ Citrin and Highton, 8.

²⁴⁸ Chen and Lee, 377.

²⁴⁹ Citrin and Highton, 8.

²⁵⁰ Ibid.

²⁵¹ Ibid, v.

²⁵² Xu, 77.

The Asian American population is concentrated in Hawaii and California.²⁵³ In the 2010 Census, six cities with over 100,000 residents had at least 40% Asian Americans. Urban Honolulu was 68% Asian American, Daly City was 58%, Fremont was 55%, Sunnyvale was 44%, and Irvine was 43%.²⁵⁴ One-third of the U.S. Asian population lives in California, but Asian Americans make up only 12% of California's electorate.²⁵⁵ There are only eleven congressional districts where Asian Americans make up 20% or more of the district's electorate.²⁵⁶ Of the eleven congressional districts, only one is not in California or Hawaii.²⁵⁷

Citrin and Highton studied turnout differences in California's white, Black, Latino, and Asian populations.²⁵⁸ They found low voter turnout among the state's Asian, Black, and Latino communities.²⁵⁹ They found that a relatively small set of background factors—age, educational attainment, income, and residential stability—account for most of these turnout differences.²⁶⁰ They estimated that if Blacks and Latinos had the same socioeconomic status as whites, their voting rates would be very similar.²⁶¹ These background factors, however, did not account for the low participation among the state's Asian Americans.²⁶² Asian turnout lagged behind whites by more than 20 percentage points between 1990 and 2000.²⁶³ Citrin and Highton estimated that whites would continue to make up the majority electorate through 2040 if trends persisted, even

²⁵³ Chen and Lee, 392.

²⁵⁴ *Ibid.*, 382.

²⁵⁵ *Ibid.*, 392.

²⁵⁶ *Ibid.*

²⁵⁷ *Ibid.*

²⁵⁸ Citrin and Highton.

²⁵⁹ *Ibid.*, iii.

²⁶⁰ *Ibid.*

²⁶¹ *Ibid.*

²⁶² *Ibid.*

²⁶³ *Ibid.*

if demographers projected that whites would only make up 30% of the population.²⁶⁴ Without higher naturalization rates, more immigration would only exacerbate the problem.

Citrin and Highton's study focused on the turnout gaps across California's largest racial and ethnic groups.²⁶⁵ They measured the effects of citizenship rates and voter mobilization to explain the turnout gap.²⁶⁶ Their most striking finding was the persistent difference between Latinos and Asians.²⁶⁷ Latinos' relatively low participation rates were a function of reduced citizenship and lower socioeconomic status.²⁶⁸ In contrast, socioeconomic status did not explain low participation among Asians.²⁶⁹ Asian American citizens vote less frequently than their socioeconomic status would predict. For Asian citizens, turnout gaps are rooted in cultural norms and beliefs about voting.²⁷⁰ This finding implies that different policies are required to foster participation among Asians and Latinos.

In 1998, when California voters decided on a bilingual education policy, Latino and Asian turnout was expected to increase, given group interest in the policy.²⁷¹ Latino turnout was 4.3% higher than the matched group of whites, a sharp deviation from the overall pattern between 1990 and 2000.²⁷² This mobilization occurred among Latinos of all ages and education levels.²⁷³ The pattern from 1990 to 2000 showed an average Latino turnout rate four percentage points lower than the matched whites.²⁷⁴ In contrast, Asian Americans in 1998 turned out at a

²⁶⁴ Ibid.

²⁶⁵ Ibid, v.

²⁶⁶ Ibid.

²⁶⁷ Ibid, vi.

²⁶⁸ Ibid.

²⁶⁹ Ibid.

²⁷⁰ Ibid, xi.

²⁷¹ Ibid, 31.

²⁷² Ibid.

²⁷³ Ibid.

²⁷⁴ Ibid.

rate twenty percentage points lower than the matched whites.²⁷⁵ This outcome did not deviate from the 22 percentage point gap over the 1990 to 2000 period.²⁷⁶

In California, where direct democracy through initiatives and referendums has become an important feature of the policy process, the question of “who votes?” carries particular significance.²⁷⁷ In *Who Votes Now? Demographics, Issues, Inequality, and Turnout in the United States*, Jan Leighley and Jonathan Nagler evaluated national survey data from 1972 to 2008 and found racial, class, and age bias in voting patterns.²⁷⁸ They found that minorities, low-income individuals, and young people are less likely to turnout.²⁷⁹ They emphasized that partisan preferences of African American, Latino, and Asian American voters indicate that low turnout for these groups may exacerbate the representational consequences of non-voting.²⁸⁰

In *The Turnout Gap: Race, Ethnicity, and Political Inequality in a Diversifying America*, Bernard Fraga leveraged survey data and voter file-based analyses to determine when, where, and why the turnout gap persists.²⁸¹ The turnout gap measures the difference in the turnout rate for the white voting age population subtracted from the turnout rate of the non-white voting age population.²⁸² Electoral representation does not reflect the increased racial and ethnic diversity in America. The turnout gap exacerbates this problem. Minority constituents are less likely to have their issues addressed by their elected officials. Candidates and political parties mobilize minority groups when it is politically advantageous.²⁸³ The empowerment theory explains that

²⁷⁵ Ibid.

²⁷⁶ Ibid.

²⁷⁷ Ibid.

²⁷⁸ Jan E. Leighley and Jonathan Nagler, *Who Votes Now?: Demographics, Issues, Inequality and Turnout in the United States* (Princeton, NJ: Princeton University Press, 2014).

²⁷⁹ Ibid.

²⁸⁰ Ibid.

²⁸¹ Bernard L. Fraga, *The Turnout Gap: Race, Ethnicity, and Political Inequality in a Diversifying America* (Cambridge: Cambridge University Press, 2019), 3.

²⁸² Ibid.

²⁸³ Ibid, 4.

individuals are more likely to vote when they can influence the political process.²⁸⁴ Voting is at the heart of democratic governance; political participation is empowering. A single vote usually does not alter an election outcome, but it affects the government's legitimacy and substance when many people do not vote.²⁸⁵ Immigrant electoral participation helps ensure responsive public policy and increases descriptive representation.

America is increasingly Black, Latino, and Asian, but the preferences of white voters drive political outcomes. Fraga found that African American, Latino, and Asian American turnout has almost always lagged behind non-Hispanic white turnout.²⁸⁶ Minority citizens are younger, lower income, and have lower educational attainment than the white population, leading many to suggest that these demographic characteristics worsen the turnout gap.²⁸⁷ Fraga found that income, age, and education effects are different for African Americans, Latinos, and Asian Americans compared with whites.²⁸⁸ Young, low-income, and less educated Black, Latino, and Asian American citizens often turnout at higher rates than their white counterparts.²⁸⁹ The opposite is true for older, high-income, and highly educated minorities.²⁹⁰ The gap between minority and white turnout is smaller in states and counties where minority groups make up a larger share of potential voters.²⁹¹ The theory of electoral influence predicts this finding. When any racial or ethnic group has greater electoral influence, they are more likely to be mobilized by

²⁸⁴ Lawrence Bobo and Franklin D. Gilliam, "Race, Sociopolitical Participation, and Black Empowerment," *American Political Science Review* 84, no. 2 (1990), 379.

²⁸⁵ Citrin and Highton, 1.

²⁸⁶ *Ibid.*

²⁸⁷ *Ibid.*, 16.

²⁸⁸ *Ibid.*, 16.

²⁸⁹ *Ibid.*

²⁹⁰ *Ibid.*

²⁹¹ *Ibid.*, 17.

elites and politically participate. Fraga found that the turnout gap has become worse in recent decades.²⁹²

Socioeconomic status and education do not predict participation among Asian Americans to the same degree as the broader U.S. population. Lien (2004) noted that income, gender, marital status, employment, and union membership did not significantly influence Asian American voting behavior.²⁹³ Only age, education, residence duration, and residence in Hawaii and California increased the likelihood of voting.²⁹⁴ Lien found that barriers to citizenship and registration diminish the overall voter participation rate of Asian Americans relative to other racial groups.²⁹⁵ Lien, Conway, and Wong (2004) found that income and education are not significantly related to the likelihood of an Asian registering to vote.²⁹⁶ Obstacles imposed by the voting system, such as residence length requirements and registration time restrictions, negatively affect the political psychology of Asians.²⁹⁷ These effects result in low-level political efficacy and exclusion.²⁹⁸

It is important to account for institutional, individual, and contextual factors to assess and understand Asian American political participation.²⁹⁹ Variables that are useful in predicting Asian American turnout did not perform consistently across ethnic groups.³⁰⁰ Although Asians with advanced degrees and good English skills appear to assimilate quickly into middle-class America, many Asians are either foreign-born with limited English skills or socioeconomically

²⁹² Fraga, 19.

²⁹³ Lien, 499.

²⁹⁴ Ibid, 508.

²⁹⁵ Masuoka, Ramanathan, and Junn, 992.

²⁹⁶ Maria-Elena D. Diaz, "Asian Embeddedness and Political Participation: Social Integration and Asian-American Voting Behavior in the 2000 Presidential Election," *Sociological Perspectives* 55, no. 1 (2012), 143.

²⁹⁷ Xu, 84.

²⁹⁸ Ibid.

²⁹⁹ Ibid, 493.

³⁰⁰ Diaz, 143.

disadvantaged.³⁰¹ The presence of ethnic gaps in registration and voting, despite controlling for institutional and confounding factors, underlines the importance of community-specific mobilization efforts in registering citizens and getting out the vote.³⁰² Voter participation among Asian immigrants differs based on proximity to Western democratic culture, English proficiency, immigration motivations, and economic adaptation.³⁰³ Wong (2011) found that home-country connections shape voter participation.³⁰⁴

For whites, Latinos, and Asians, political participation occurs over time. Duration of residence relates to voting.³⁰⁵ Those who have lived in the U.S. longer have higher turnout.³⁰⁶ Citrin and Highton found a strong relationship between citizenship and duration of residence in America.³⁰⁷ Like Latinos, Asians in California have a relatively low citizenship rate of 59%.³⁰⁸ Among foreign-born Asians, who made up around 80% of the Asian population, the figure was barely 50%.³⁰⁹ Some of these differences reflect socioeconomic factors, but there is a 12 percentage point difference between white immigrants who arrived in the U.S. before 1980 and those who came after.³¹⁰ Among immigrants, the electoral participation of those from Mexico, the Philippines, and Vietnam matches that of whites.³¹¹ In contrast, voting rates of immigrants born in China and Korea are substantially lower than white immigrant turnout.³¹² These rates remain lower even after controlling for socioeconomic factors.³¹³

³⁰¹ Diaz, 148.

³⁰² Lien, 513.

³⁰³ Lien, 500.

³⁰⁴ Janelle Wong et al., *Asian American Political Participation Emerging Constituents and Their Political Identities* (New York: Russell Sage Foundation, 2011).

³⁰⁵ Citrin and Highton, ix.

³⁰⁶ Ibid.

³⁰⁷ Ibid, viii.

³⁰⁸ Ibid, ix.

³⁰⁹ Ibid.

³¹⁰ Ibid.

³¹¹ Ibid, x.

³¹² Ibid.

³¹³ Ibid.

Demographic variables partially explain the relationship between national origin, length of residence in America, and voting. Among more recent arrivals from Asia, turnout is 11 percentage points lower than native-born Asian Americans in California and 15 percentage points lower than native-born Asian Americans in America.³¹⁴ Foreign-born Asians who have lived in the U.S. for longer are older, better educated, and wealthier than recent immigrants.³¹⁵ Among Asian immigrants who have lived in America for longer, turnout is higher, but it does not approach the turnout of American-born Asians with similar social backgrounds.³¹⁶ American-born Asians citizens are better educated and wealthier than their immigrant co-ethnic counterparts.³¹⁷ Even after controlling for socioeconomic status and age, recent Asian immigrants have lower turnout rates than native-born Asians.³¹⁸

Socialization also affects turnout among Asian immigrants.³¹⁹ After considering social factors, distinctively high turnout among Filipinos and Vietnamese in California persists.³²⁰ Within these two groups, these subgroup-specific differences counterbalance the negative effects of being foreign-born, especially for recent immigrants.³²¹ The turnout pattern across Asian subgroups reflects the citizenship pattern. The same social forces largely drive naturalization and voting.³²² Those born in the Philippines and Vietnam have the highest citizenship and turnout rates in California.³²³ Furthermore, the turnout of Filipino and Vietnamese Americans is not very different from the turnout of native-born Asians.³²⁴

³¹⁴ Ibid, 49.

³¹⁵ Ibid, 50.

³¹⁶ Ibid, 52.

³¹⁷ Ibid.

³¹⁸ Ibid, ix.

³¹⁹ Ibid.

³²⁰ Ibid.

³²¹ Ibid.

³²² Ibid, x.

³²³ Ibid.

³²⁴ Ibid, 50.

In 2016, the Asian American Legal Defense and Education Fund (AALDEF) conducted a nonpartisan, multilingual exit poll of Asian American voters in fourteen states: California, Florida, Georgia, Louisiana, Maryland, Massachusetts, Michigan, Nevada, New Jersey, New Mexico, New York, Pennsylvania, Texas, Virginia, and Washington D.C.³²⁵ AALDEF conducted the poll in English and eleven Asian languages.³²⁶ Multilingual exit polls provide a more comprehensive picture of Asian American voting.³²⁷ Asian Americans are a diverse community and speak different Asian languages and dialects.³²⁸ Thirty-two percent of Asian Americans polled had low English proficiency (LEP), and 24% said English was their native language.³²⁹ Asian Americans have encountered many voting barriers. Section 203 of the Voting Rights Act requires language assistance in certain jurisdictions.³³⁰ Yet, there are shortcomings in local compliance. Aggressive enforcement, interpreter recruitment, and bilingual poll workers help ensure that all Americans can exercise their right to vote.³³¹ Even still, mainstream media polls and politicians ignore Asian American voters.³³² Increasing language assistance and voter outreach is necessary, especially with older and LEP Asian Americans.³³³

The political consequences of the relatively low level of Asian American turnout are complex. Asian voters in California are less pro-Democratic than their Black or Latino counterparts.³³⁴ Vietnamese and Korean immigrants have balanced or even pro-Republican

³²⁵ “The Asian American Vote 2016: A Report by the Asian American Legal Defense and Education Fund,” Asian American Legal Defense and Education Fund, 1.

³²⁶ *Ibid.*

³²⁷ *Ibid.*

³²⁸ *Ibid.*

³²⁹ *Ibid.*, 2.

³³⁰ *Ibid.*, 23.

³³¹ *Ibid.*, 27.

³³² *Ibid.*, 1.

³³³ *Ibid.*, 27.

³³⁴ Citrin and Highton, 31.

partisan orientations.³³⁵ Japanese and Filipino Americans are as strongly tied to Democrats as Latinos.³³⁶ The partisan leanings of Chinese voters fall in the middle.³³⁷ The strength of party loyalty is weaker among Asian Americans than other ethnic groups.³³⁸ The citizenship gap means that the Latino and Asian shares of the electorate lag behind their white and Black counterparts, even as the number of Latino and Asian immigrants rises.³³⁹

Descriptive Representation

Asian Americans are underrepresented in federal, state, and local offices. In 2006, 0.9% of all Congress members and 1.1% of members in state legislatures were Asian American.³⁴⁰ Before the November 2012 election, Asian Americans represented only four congressional districts, Colleen Hanabusa (HI-1), Mike Honda (CA-15), Doris Matsui (CA-6), and Judy Chu (CA-32).³⁴¹ Descriptive representation is the presence of elected officials who reflect the characteristics of their constituents, such as race, ethnicity, and gender.³⁴² Among minority groups, descriptive representation fosters feelings of solidarity, familiarity, and self-esteem.³⁴³ Minority candidates improve political efficacy and trust levels among those of the same ethnicity.³⁴⁴ Seeing in-group candidates achieve political success can increase voter turnout and trust in the government.³⁴⁵ They mobilize their minority communities and increase voter

³³⁵ Ibid.

³³⁶ Ibid.

³³⁷ Ibid.

³³⁸ Ibid.

³³⁹ Ibid, 32.

³⁴⁰ Chen and Lee, 389.

³⁴¹ Ibid, 392.

³⁴² Jane Junn and Natalie Masuoka, "Asian American Identity: Shared Racial Status and Political Context," *Perspectives on Politics* 6, no. 4 (2008), 731.

³⁴³ Ibid.

³⁴⁴ Ibid.

³⁴⁵ Vivien Leung, "Asian American Candidate Preferences: Evidence from California," *Political Behavior*, 2022, 1760.

turnout.³⁴⁶ Theories of bloc voting assume that voters prefer in-group candidates because voters can make descriptive inferences about a candidate.³⁴⁷ Because of the lack of descriptive representation, Asian Americans are more likely to see the political process as an ineffective mode of group advancement.³⁴⁸

Wolfinger (1965) articulated a mobilization theory of ethnic voting, stating, “The strength of ethnic voting depends on both the intensity of ethnic identification and the level of ethnic relevance in the election. The most powerful and visible sign of ethnic political relevance is a fellow-ethnic’s name at the head of the ticket, evident to everyone who enters the voting booth.”³⁴⁹ The emphasis on race in descriptive representation is complicated for Asian Americans because of the diversity and heterogeneity of the population.³⁵⁰ Compared with their share of the population, Asian Americans are underrepresented in politics. Bowler and Segura’s empowerment hypothesis suggests that descriptive representation will likely increase voter turnout among ethnic minorities.³⁵¹ Descriptive representation makes it easier for minorities to gather information about elections and increases expectations about minority influence on government.³⁵² Empowerment makes civic engagement and political participation easier.³⁵³ Descriptive representation can also reduce levels of political alienation among minorities.³⁵⁴

³⁴⁶ Junn and Masuoka, 731.

³⁴⁷ Leung, 1760.

³⁴⁸ Min, 711.

³⁴⁹ Raymond E. Wolfinger, “The Development and Persistence of Ethnic Voting,” *American Political Science Review* 59, no. 4 (1965), 905.

³⁵⁰ Leung, 1760.

³⁵¹ Shaun Bowler and Gary M. Segura, *The Future Is Ours: Minority Politics, Political Behavior, and the Multiracial Era of American Politics* (Thousand Oaks, CA: CQ Press, 2012).

³⁵² Rene R. Rocha et al., “Race and Turnout: Does Descriptive Representation in State Legislatures Increase Minority Voting?,” *Political Research Quarterly* 63, no. 4 (2010), 890.

³⁵³ *Ibid.*

³⁵⁴ *Ibid.*, 891.

In “Redistricting and the Causal Impact of Race on Voter Turnout,” Bernard Fraga studied redistricting and the causal impact of race on voter turnout.³⁵⁵ He found that individuals who were assigned to majority-minority districts or had co-ethnic candidates were more likely to participate in the next election.³⁵⁶ African Americans were likelier to vote when assigned to majority-Black districts with Black candidates or incumbents.³⁵⁷ Whites and Asians also had higher turnout when a co-ethnic candidate was on the ballot.³⁵⁸ In contrast, Latinos are less likely to vote when assigned to majority-Latino districts (-1.26 percentage points) or when they had a Latino incumbent (-0.33 percentage points).³⁵⁹ Fraga found that minority legislators were more likely to be elected from majority-minority districts because racial bloc voting led to the majority group gaining descriptive representation.³⁶⁰ While Asian American voter turnout appears lower in contexts of descriptive representation, Fraga found a +0.54 percentage point increase in Asian voter turnout under conditions of co-ethnic candidacy.³⁶¹ Fraga found evidence that co-ethnic incumbency, candidacy, and assignment to a majority-minority district influence voter turnout.

Bobo and Gilliam analyzed Black political participation in mayoral elections.³⁶² Through the empowerment framework, Bobo and Gilliam assert that minority groups with “significant representation and influence in political decision making” should have increased sociopolitical participation.³⁶³ They found increased voter turnout for African Americans in the 1980 and 1984 elections with Black mayors relative to Black respondents without co-ethnic mayors.³⁶⁴ Though

³⁵⁵ Bernard L. Fraga, “Redistricting and the Causal Impact of Race on Voter Turnout,” *The Journal of Politics* 78, no. 1 (2016): pp. 19-34.

³⁵⁶ *Ibid.*, 21.

³⁵⁷ *Ibid.*, 30.

³⁵⁸ *Ibid.*, 31.

³⁵⁹ *Ibid.*

³⁶⁰ *Ibid.*, 21.

³⁶¹ *Ibid.*, 31.

³⁶² Bobo and Gilliam, 377.

³⁶³ *Ibid.*

³⁶⁴ *Ibid.*, 381.

their findings were rooted in African Americans' response to co-ethnic officeholding in large cities, Bobo and Gilliam suggested that their theory should apply to other groups, specifically Latinos.³⁶⁵ Voter turnout is a measure of minority group influence on election outcomes.³⁶⁶ The empowerment theory conceptualized by Bobo and Gilliam suggests that minority empowerment is a key determinant of minority voter turnout.

In "Asian American Mobilization: The Effects of Candidates and Districts on Asian American Voting Behavior," Sara Sadhwani found that for Indian and Japanese American voter turnout, as the size of the communities increased, there was no statistically significant increase in voter turnout.³⁶⁷ Filipino and Korean American voter turnout depended on the district's proportion of Filipinos or Koreans.³⁶⁸ Chinese Americans exhibited no significant rise in turnout for either pan-ethnic candidates or as their percentage share of the district increased.³⁶⁹ The difference in voter turnout between subgroups may rely on immigration pathways, unique histories, socioeconomic resources, and hierarchical racial and class positions.³⁷⁰ Examining district geographies with larger numbers of Asian Americans offers an opportunity to understand the role of community size and voter resources.³⁷¹

Subgroups of Asian Americans may favor distinct national origin groups over a pan-ethnic racial identity. Leung (2021) examined the candidate preferences of Asian American voters in the 2018 election cycle and found strong evidence of national-origin preferences among Asian voters.³⁷² When the candidate's national origin and vote did not align, voters relied on

³⁶⁵ Ibid, 389.

³⁶⁶ Hertz, 4.

³⁶⁷ Sara Sadhwani, "Asian American Mobilization: The Effect of Candidates and Districts on Asian American Voting Behavior," *Political Behavior* 44, no. 1 (June 2020), 120.

³⁶⁸ Ibid, 121.

³⁶⁹ Ibid, 122.

³⁷⁰ Ibid, 124.

³⁷¹ Ibid, 107.

³⁷² Leung, 1759.

partisan cues.³⁷³ Chong (2021) examined the effectiveness of identity appeals on Asian American candidate preferences.³⁷⁴ Chong found that pan-ethnic identity appeals did not unilaterally influence Asian American candidate choices.³⁷⁵ While national-origin appeals influence foreign-born individuals, pan-ethnic appeals affect American-born individuals.³⁷⁶

Similarly, in “The Influence of Candidate Race and Ethnicity: The Case of Asian Americans,” Sadhwani examined co-partisan elections from California’s open primary system.³⁷⁷ When two candidates from the same party compete, the candidate’s party no longer serves as a reliable cue for voters.³⁷⁸ Despite their linguistic, cultural, and experiential differences, an aggregated pan-ethnic group of Asian Americans exhibit behavioral similarities in political participation.³⁷⁹ Sadhwani found evidence of racial bloc voting in every case where an Asian American candidate ran against a non-Asian.³⁸⁰ When Asian American candidates compete, Sadhwani found evidence of polarization at the national origin level.³⁸¹ Support levels were enhanced between national-origin and pan-ethnic candidates and voters, supporting the claim that racial identity may be a driving mechanism for Asian American voters.³⁸²

The finding that Asian American identity is salient at the ballot box demonstrates the dynamics of pan-ethnicity and descriptive representation of Asian Americans. Studies on Asian

³⁷³ Ibid.

³⁷⁴ Nathan Chan, Chinbo Chong, and Tanika Raychaudhuri, “New Directions in the Study of Asian American Politics, Part II: Political Behavior: PS: Political Science & Politics,” Cambridge Core (Cambridge University Press, March 12, 2021), 244.

³⁷⁵ Ibid.

³⁷⁶ Ibid, 245.

³⁷⁷ Sadhwani, 616.

³⁷⁸ Ibid.

³⁷⁹ Ibid, 618.

³⁸⁰ Ibid, 616.

³⁸¹ Ibid.

³⁸² Ibid, 623.

American voting have practical implications for elections, racially polarized voting, and minority voting rights.

Chapter Two: The Voting Rights Act of 1965

“The vote is the most powerful instrument ever devised by man for breaking down injustice and destroying the terrible walls which imprison men because they are different from other men.” – President Lyndon B. Johnson, August 6, 1965³⁸³

The Voting Rights Act of 1965

In 1868, the Fourteenth Amendment to the U.S. Constitution was ratified by 28 of the 37 states.³⁸⁴ The 14th Amendment said that “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”³⁸⁵ A major provision of the 14th Amendment was to grant citizenship to “All persons born or naturalized in the United States.”³⁸⁶ This provision granted citizenship to formerly enslaved African Americans.³⁸⁷ Still, poll taxes, literacy tests, moral character vouchers, and white primaries eventually disenfranchised African American voters in formerly Confederate states.³⁸⁸ The 14th Amendment failed to protect the rights of Black citizens.³⁸⁹ Congress passed civil rights legislation in 1957, 1960, and 1964 containing voting-related provisions.³⁹⁰ These laws prevented states from disenfranchising their Black citizens, but case-by-case litigation was slow and ineffective.³⁹¹ Formal and informal

³⁸³ Lyndon B. Johnson, “Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act,” The American Presidency Project, August 6, 1965.

³⁸⁴ “14th Amendment to the U.S. Constitution: Civil Rights (1868),” National Archives and Records Administration (National Archives and Records Administration).

³⁸⁵ Ibid.

³⁸⁶ Ibid.

³⁸⁷ Ibid.

³⁸⁸ Chen and Lee, 362.

³⁸⁹ “14th Amendment to the U.S. Constitution: Civil Rights (1868),” National Archives and Records Administration (National Archives and Records Administration).

³⁹⁰ Chen and Lee, 362.

³⁹¹ Ibid.

practices suppressed Black registration and voting rates in southern states.³⁹² The Civil Rights Acts of 1957, 1960, and 1964 failed to end the systematic exclusion of Blacks from the political process.³⁹³

On March 7, 1965, state and local police brutally attacked peaceful protesters marching for voting rights as they crossed the Edmund Pettus Bridge in Selma, Alabama.³⁹⁴ This attack became known as “Bloody Sunday.”³⁹⁵ The increased national attention brought by Bloody Sunday pushed Congress and President Johnson to enact the Voting Rights Act of 1965.³⁹⁶ President Johnson said, “it is wrong—deadly wrong—to deny any of your fellow Americans the right to vote.”³⁹⁷ The Voting Rights Act (VRA) prohibited racial discrimination in voting, and included notable reforms and protections for minority voting rights.³⁹⁸ The legislation’s provisions established a legal framework to identify vote dilution and litigate solutions.³⁹⁹ The temporary features of the Voting Rights Act of 1965 were set to expire in five years.⁴⁰⁰ In 1970, Congress renewed the Act, applying it to several states outside of the South, including two western states: California and Arizona.⁴⁰¹ These extensions were necessary because white officials continued to resist the VRA’s reforms and protections.⁴⁰²

³⁹² Ibid, 362-363.

³⁹³ Chandler Davidson and Bernard Grofman, *Quiet Revolution in the South* (Ann Arbor, MI: Inter-University Consortium for Political and Social Research, 1996), 378-379.

³⁹⁴ Ibid, 363.

³⁹⁵ Ibid.

³⁹⁶ Bernard L. Fraga, *The Turnout Gap: Race, Ethnicity, and Political Inequality in a Diversifying America* (Cambridge: Cambridge University Press, 2019), 1.

³⁹⁷ Ibid.

³⁹⁸ Hertz, 2.

³⁹⁹ Ibid.

⁴⁰⁰ Davidson and Grofman, 3.

⁴⁰¹ Ari Berman, “The Lost Promise of the Voting Rights Act,” *The Atlantic* (Atlantic Media Company, August 5, 2015).

⁴⁰² Davidson and Grofman, 3.

In 1974, Willie Valezquez founded the Southwest Voter Registration and Education Project to fight for Latino voting rights and political participation.⁴⁰³ The 1975 renewal deadline of the VRA brought a surge of activism in the Latino community.⁴⁰⁴ When Congress renewed the Voting Rights Act in 1975, Latinos gained federal voting rights protections.⁴⁰⁵ Minority communities pressured Congress to expand the VRA to language minorities, including Alaska Natives, Native Americans, and Latinos.⁴⁰⁶ With the accelerated growth of the Latino population in California, the 1975 expansion of the VRA's provisions made it especially consequential in California. This renewal also protected Asian American voting rights, with Japanese American Citizens League Director, David Ushio, saying, "it was time now to look at the needs of all minorities. A citizen must be able to vote."⁴⁰⁷ Representative Jordan (D-18) became the national face for broadening the Voting Rights Act.⁴⁰⁸ She testified before the House:

"My political career was not assisted through the passage of the Voting Rights Act. I know firsthand the difficulty minorities have in participating in the political process as equals. The same discriminatory practices which moved the Congress to pass the Voting Rights Act in 1965, and renew it in 1970, are practiced in Texas today."⁴⁰⁹

Andrew Young, the first African American to serve on the House Rules Committee, also testified before the House in 1975, stating, "Extension of the Voting Rights Act is a matter of political life or death for me...The same kind of things that happened to us in 1965 are happening to people of

⁴⁰³ Fraga, 1.

⁴⁰⁴ Berman.

⁴⁰⁵ Ibid.

⁴⁰⁶ "Voting Rights Act," Legal Information Institute (Cornell Law School).

⁴⁰⁷ Fraga, 1.

⁴⁰⁸ Berman.

⁴⁰⁹ Ibid.

Spanish origin.”⁴¹⁰ The interconnected voting rights struggle of the mid-twentieth century shared a common goal: the promise of political equality in America.

Section 2 of the Voting Rights Act

Section 2 of the Voting Rights Act prohibits two forms of discrimination: vote denial, which prevents individuals from exercising their right to vote, and vote dilution, which weakens the effect of an individual’s vote.⁴¹¹ Vote dilution occurs when racially polarized voting submerges a minority voter’s choice.⁴¹² Racially polarized voting occurs when white and minority voters are “polarized” from each other.⁴¹³ The two groups vote against each other in their preferences for candidates, propositions, or measures.⁴¹⁴ In racially polarized jurisdictions, majority voters consistently drown out the voices of minority voters.⁴¹⁵ Section 2 prohibits institutions and rules that result in protected group members having “less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”⁴¹⁶ With a broad scope, Section 2 applies to most types of racial disenfranchisement, allowing minorities to sue for vote dilution.⁴¹⁷

The functional goal of Section 2 is to ensure procedural fairness, not guarantee a specific result.⁴¹⁸ Fairness is defined as equal opportunity to achieve political representation.⁴¹⁹

⁴¹⁰ Ibid.

⁴¹¹ “Section 2 of the Voting Rights Act,” The United States Department of Justice.

⁴¹² Joanna Cuevas Ingram, “The Color of Change: Voting Rights in the 21st Century and the California Voting Rights Act,” *Harvard Latino Law Review* 15 (April 1, 2012), 185.

⁴¹³ Ibid.

⁴¹⁴ Ibid.

⁴¹⁵ Ibid.

⁴¹⁶ “52 U.S. Code § 10301,” Legal Information Institute (Cornell Law School).

⁴¹⁷ Chelsea J. Hopkins, “The Minority Coalition’s Burden of Proof Under Section 2 of the Voting Rights Act,” *Santa Clara Law Review* 52, no. 2 (January 1, 2012), 627.

⁴¹⁸ Chen and Lee, 364.

⁴¹⁹ Ibid.

Proportionality is used as an indicator of fairness in redistricting.⁴²⁰ Many of the cases under Section 2 involve redistricting challenges because proposed district lines dilute minority voting power.⁴²¹ Redistricting plans are unfair if it leads to the systematic exclusion or underrepresentation of a protected group.⁴²² It is fair if a minority group can plausibly elect its preferred candidate.⁴²³

American cities have two traditional election systems: at-large elections, where the entire electorate chooses all members of the city council, and by-district elections, where candidates run and obtain a majority or plurality of votes in a district.⁴²⁴ Vote dilution claims under the Voting Rights Act center on at-large elections.⁴²⁵ Ideally, city council members from at-large systems are more likely to work for the whole city rather than focus on the specific demands of their districts.⁴²⁶ At-large elections should encourage impartial and community-wide attitudes.⁴²⁷ Reformers believed district constituencies encouraged parochial views, neighborhood interests, and log-rolling.⁴²⁸ In at-large elections with racially polarized voting, a cohesive majority group will win all available seats, disenfranchising the minority.⁴²⁹ In contrast, by-district elections divide the city into districts and grant each district a council seat.⁴³⁰ If minorities are

⁴²⁰ Ibid.

⁴²¹ Ibid.

⁴²² Ibid.

⁴²³ Ibid.

⁴²⁴ Francesco Trebbi, Philippe Aghion, and Alberto Alesina, "Electoral Rules and Minority Representation in U.S. Cities," *Quarterly Journal of Economics* 123, no. 1 (2008), 326.

⁴²⁵ Hertz, 2.

⁴²⁶ Scott Hofer, Cong Huang, and Richard Murray, "The Trade-Offs between At-Large and Single-Member Districts," *University of Houston* 14 (October 2018), 2.

⁴²⁷ Barbara L. Berry and Thomas R. Dye, "The Discriminatory Effects of At-Large Elections," *Florida State University Law Review* 7, no. 1 (1979), 92.

⁴²⁸ Ibid.

⁴²⁹ Hertz, 2.

⁴³⁰ Ibid.

geographically concentrated, cities can draw districts to give them a local majority and improve representation.⁴³¹

Minority vote dilution often occurs in large multi-member districts where voters elect several representatives.⁴³² At-large elections, particularly in areas with racially polarized voting, often result in minority candidates losing elections.⁴³³ Many cities—spurred by the Voting Rights Acts, its extensions and judicial interpretations, and the mobilization of civil rights groups—have replaced at-large elections with by-district or mixed systems.⁴³⁴

Variations in at-large elections may strongly affect the relative effectiveness of bloc voting.⁴³⁵ In cities using a simple at-large plan, racial minorities often use “single-shot” or “bullet ballot” voting to win representation on municipal councils.⁴³⁶ Single-shot voting occurs when an individual votes for only one candidate rather than six candidates for six open seats.⁴³⁷ Modifications of the basic at-large format, such as full-slate requirements or numbered posts, nullify the effectiveness of the single-shot tactic.⁴³⁸ A full-slate requirement requires voters to vote for as many candidates as there are vacancies.⁴³⁹ The rule requiring candidates to run for a specific seat or a “numbered post” on an at-large council and staggered terms for office reduce the effectiveness of single-shot voting by minority voters.⁴⁴⁰ These rules enhance the impact of white bloc voting against minority candidates, decreasing minority representation.⁴⁴¹

⁴³¹ Ibid, 6.

⁴³² Mary J. Kosterlitz, “Thornburg v. Gingles: The Supreme Court's New Test for Analyzing Minority Vote Dilution,” *Catholic University Law Review* 36, no. 2 (1987), 535.

⁴³³ Ibid.

⁴³⁴ Susan Welch, “The Impact of at-Large Elections on the Representation of Blacks and Hispanics,” *The Journal of Politics* 52, no. 4 (November 1990), 1050.

⁴³⁵ Timothy G. O'Rourke, “Constitutional and Statutory Challenges to Local At-Large Elections,” *University of Richmond Law Review* 17, no. 1 (1982), 42.

⁴³⁶ Ibid.

⁴³⁷ Ibid.

⁴³⁸ Ibid.

⁴³⁹ Ibid.

⁴⁴⁰ Ibid.

⁴⁴¹ Ibid.

The regular bloc voting of white citizens against minority candidates can minimize the influence of minority voters in at-large elections.⁴⁴² Historically, at-large elections were popular for local governments to ensure that a white majority could deny Black citizens the ability to influence elections.⁴⁴³ The Voting Rights Act helped racial minorities to enter the political arena.⁴⁴⁴ Anticipating an increase in Black votes, white majorities changed electoral systems within the boundaries of the VRA to minimize vote influence.⁴⁴⁵ For the white-majority population, leveraging its size in at-large elections was more effective.⁴⁴⁶ They adopted at-large systems in cities where the Black minority population was relatively small.⁴⁴⁷ If the minority population was large, the possibility of losing more council seats led the white majority to confine Black votes to minority-packed districts.⁴⁴⁸

The Voting Rights Act addressed discrimination against African Americans, but its authors did not write the law with the scale of modern diversity in mind.⁴⁴⁹ The passage of the 1965 Hart-Cellar Act eliminated immigration restrictions based on national origin and resulted in an unanticipated increase in diversity.⁴⁵⁰ Proponents of immigration reform in 1965 intended the Hart-Cellar provision to be primarily a symbolic gesture.⁴⁵¹ They did not see Asians as the primary beneficiary of the Hart-Cellar Act.⁴⁵² Commenting on Asian and Pacific Islanders in congressional testimony in 1964, Attorney General 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

⁴⁴² Ibid.

⁴⁴³ Hofer, Huang, and Murray, 3.

⁴⁴⁴ Trebbi, Aghion, and Alesina, 351.

⁴⁴⁵ Ibid, 326.

⁴⁴⁶ Ibid, 325.

⁴⁴⁷ Ibid, 326.

⁴⁴⁸ Ibid.

⁴⁴⁹ Chen and Lee, 378.

⁴⁵⁰ Ibid.

⁴⁵¹ Ibid.

⁴⁵² Ibid, 379.

there would be any great influx after that.”⁴⁵³ President Lyndon B. Johnson announced during the legislative debates leading to its enactment: “This is not a revolutionary bill. It will not reshape the structure of our daily lives.”⁴⁵⁴ President Johnson and Attorney General Kennedy were incorrect. With the Voting Rights Act's historical omission of Asian Americans and other racial minorities who migrated after 1965, the government struggled to keep pace with drastic demographic change.⁴⁵⁵

The Voting Rights Act was written under a Black-white paradigm, unprepared for changes to immigration policy that would dramatically change the profile of racial minorities.⁴⁵⁶ In 1965, 90% of the adult voting population was white.⁴⁵⁷ Only 0.5% of the total population was Asian American.⁴⁵⁸ The structure of voting behavior and the salience of race, class, and gender identities emerged when the VRA addressed inequalities faced by other racial minorities. The Black-white paradigm in voting rights failed to consider that Asian Americans occupy a different place in racial politics than African Americans.⁴⁵⁹ The VRA assumed that a protected group could demonstrate a persistent pattern of electoral defeat, as shown by intragroup cohesion and intergroup polarization.⁴⁶⁰ Asian Americans’ pan-ethnic groupings, which aggregate across multiple nationalities, interfere with political cohesion and racial polarization.⁴⁶¹ Although America is increasingly Latino and Asian American, white voter preferences continue to drive political outcomes.

⁴⁵³ Ibid.

⁴⁵⁴ Ibid, 378.

⁴⁵⁵ Ibid, 379.

⁴⁵⁶ Ibid, 376.

⁴⁵⁷ Fraga, 2.

⁴⁵⁸ Ibid.

⁴⁵⁹ Chen and Lee, 380.

⁴⁶⁰ Ibid, 382.

⁴⁶¹ Ibid, 382.

Supreme Court Interpretations

Legal challenges to at-large systems include civil suits alleging that at-large elections violate the constitutional guarantees of the 14th and 15th Amendments or statutory protections against vote denial or abridgment under Section 2 of the VRA.⁴⁶² Congressional efforts to amend the VRA created a statutory basis for challenging at-large systems.⁴⁶³ The Supreme Court sought to solve the vote dilution problem in at-large systems by replacing them with single-member districts.⁴⁶⁴ Through redistricting plans, states retained the power to dilute minority voting rights by drawing majority-white districts.⁴⁶⁵ Vote dilution claims under the VRA have been subject to varying proof requirements.⁴⁶⁶

In 1964, the Supreme Court case *Reynolds v. Sims* established that the equal protection clause guarantees equal participation by all voters through the “one man, one vote” principle.⁴⁶⁷ *Sims* was one of the first Supreme Court cases to find that the right to vote could be rendered ineffective by vote dilution just as effectively as suppressing a person's vote.⁴⁶⁸ In *Burns v. Richardson* (1966), the Supreme Court found that the potential dilutive effect was greatest where districts were large and candidates were not required to live in their districts.⁴⁶⁹ In *White v. Regester* (1973), the Court held that at-large elections were not “unconstitutional per se,” but could be if they limited minority access to the electoral process or diluted the minority vote.⁴⁷⁰ The Supreme Court decided that the “totality of circumstances” confirmed the existence of vote

⁴⁶² O'Rourke, 43.

⁴⁶³ *Ibid.*, 50.

⁴⁶⁴ Hopkins, 628.

⁴⁶⁵ *Ibid.*

⁴⁶⁶ *Ibid.*

⁴⁶⁷ Kosterlitz, 536.

⁴⁶⁸ *Ibid.*

⁴⁶⁹ *Ibid.*, 537.

⁴⁷⁰ *Ibid.*

dilution.⁴⁷¹ While the Supreme Court was reluctant to declare multi-member districts unconstitutional, the justices in the *Regester* case ruled directly on the ability of multi-member districts to dilute the African American vote.⁴⁷²

In *Zimmer v. McKeithen* (1973), the Fifth Circuit Court of Appeals rejected the claim that an at-large system did not dilute Black voting strength, where Blacks made up a majority of the population but a minority of registered voters.⁴⁷³ Black plaintiffs alleged that at-large elections for police jurors and school board members in a Louisiana parish of under 13,000 people diluted the African American vote.⁴⁷⁴ The Fifth Circuit rejected the claim that an at-large system did not dilute Black voting strength, where Blacks made up a majority of the population but a minority of registered voters.⁴⁷⁵ The Fifth Circuit created a legal foundation for suits attacking the constitutionality of at-large local elections.⁴⁷⁶

In *City of Mobile v. Bolden* (1980), the Supreme Court upheld the constitutionality of at-large elections for a three-member city commission in Mobile, Alabama.⁴⁷⁷ The Court reversed the judgment of the Fifth Circuit Court of Appeals that the city of Mobile's at-large system diluted the Black vote in violation of the 14th and 15th amendments to the Constitution.⁴⁷⁸ The Court ruled that a demonstration of unconstitutional vote dilution must include proof of discriminatory intent in adopting or maintaining an at-large system.⁴⁷⁹ Racial minorities must prove that the local government intentionally designed or maintained an at-large system to dilute

⁴⁷¹ O'Rourke, 53.

⁴⁷² Berry and Dye, 107.

⁴⁷³ O'Rourke, 51.

⁴⁷⁴ Ibid.

⁴⁷⁵ Ibid, 41.

⁴⁷⁶ Ibid.

⁴⁷⁷ Ibid, 39.

⁴⁷⁸ Ibid.

⁴⁷⁹ Ibid, 61.

minority votes.⁴⁸⁰ This decision altered the legal standard for adjudicating VRA cases and imposed a new discriminatory intent requirement.⁴⁸¹ The new requirement made it nearly impossible to bring claims under Section 2.⁴⁸²

In 1982, Congress amended Section 2 of the Voting Rights Act.⁴⁸³ The new language of Section 2 provided that a legal challenge to an at-large system did not need to prove discriminatory intent under the *Bolden* standard.⁴⁸⁴ The amendment required only a showing of discriminatory effect, detailing:

“No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision [to deny or abridge] in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2). The fact that members of a minority group have not been elected in numbers equal to the group’s proportion of the populations shall not, in and of itself, constitute a violation of this section.”⁴⁸⁵

The Senate Judiciary Committee issued a report to accompany the 1982 amendments.⁴⁸⁶ The Senate report created several factors for courts to consider when determining if the challenged electoral system violates Section 2. These factors included: a history of discrimination in the electoral process, majority vote requirements, lack of minority elected officials, a white-dominated political party, and the use of candidate slating and racial appeals in campaigns.⁴⁸⁷

⁴⁸⁰ Ibid.

⁴⁸¹ Hopkins, 629.

⁴⁸² Ibid.

⁴⁸³ Jennifer G. Presto, “The 1982 Amendments to Section 2 of the Voting Rights Act: Constitutionality After City of Boerne,” *NYU Annual Survey of American Law*, 2003, 614.

⁴⁸⁴ O’Rourke, 40.

⁴⁸⁵ Ibid, 68.

⁴⁸⁶ Ingram, 191.

⁴⁸⁷ Ibid.

These factors increased the likelihood of racial discrimination. The Senate Committee instructed that plaintiffs did not need to prove a specific number of factors to find evidence of vote dilution and discrimination.⁴⁸⁸

In *Rogers v. Lodge* (1982), the Supreme Court affirmed the Fifth Circuit's holding that the at-large system diluted the African American vote in violation of the 14th Amendment equal protection clause.⁴⁸⁹ Although African Americans made up a majority of Burke County's population, no African American had ever been elected to the county commission.⁴⁹⁰ Justice Byron White's majority opinion for the Supreme Court in the *Lodge* decision challenged the validity of the *Bolden* ruling.⁴⁹¹ The Supreme Court's decision in *Lodge* and amendments to Section 2 of the VRA reinstated most of the key elements of the *Zimmer* ruling.⁴⁹²

In *Thornburg v. Gingles* (1986), the Supreme Court unanimously found that five of the six contested North Carolina districts diluted the African American vote.⁴⁹³ The *Gingles* Court found that North Carolina's legislative redistricting plan created multi-member districts that violated Section 2 of the VRA.⁴⁹⁴ The North Carolina District Court analyzed data from three election cycles to determine that Black voters strongly supported Black candidates and white voters typically voted against Black candidates.⁴⁹⁵ In violation of the VRA, this plan damaged the ability of Black citizens "to participate equally in the political process and to elect candidates

⁴⁸⁸ Ibid, 192.

⁴⁸⁹ O'Rourke, 41.

⁴⁹⁰ Ibid.

⁴⁹¹ Ibid.

⁴⁹² Ibid, 51.

⁴⁹³ *Thornburg v. Gingles*, 478 U.S. 30 (1986).

⁴⁹⁴ Ibid.

⁴⁹⁵ Ibid.

of their choice.”⁴⁹⁶ The Supreme Court held that plaintiffs only need to establish a discriminatory effect—without intent to discriminate—to bring a valid minority vote dilution claim.⁴⁹⁷

The *Gingles* ruling created a more straightforward process for remedying vote dilution.⁴⁹⁸ The Supreme Court created a three-prong test to identify violations of Section 2 of the Voting Rights Act.⁴⁹⁹ First, minority groups must “demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district.”⁵⁰⁰ The Supreme Court required this showing to demonstrate that the voting system or practices affected the minority’s inability to elect a preferred candidate.⁵⁰¹ Second, the “minority group must be able to show that it is politically cohesive.”⁵⁰² The political cohesion requirement would prove that the multi-member structure consistently defeated minority interests.⁵⁰³ The first two requirements focused on the minority’s ability to elect a preferred candidate.⁵⁰⁴ Third, the Supreme Court required that the minority group show that “the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances...to defeat the minority’s preferred candidate.”⁵⁰⁵ The Court required minorities to prove that their inclusion in a “white multimember district” diminished their ability to elect their preferred candidate.⁵⁰⁶ The Court identified two additional factors as carrying “probative value in Section 2 claims:” whether the elected officials within the jurisdiction have been responsive to the needs of the minority

⁴⁹⁶ *Ibid.*

⁴⁹⁷ Ingram, 191.

⁴⁹⁸ Hofer, Huang, and Murray, 3.

⁴⁹⁹ Yishaiya Absoch, Matt A. Barreto, and Nathan D. Woods, “An Assessment of Racially Polarized Voting For and Against Latino Candidates in California,” *UC Berkeley School of Law*, 2007, 108.

⁵⁰⁰ *Ibid.*

⁵⁰¹ Hopkins, 630.

⁵⁰² Absoch, Barreto, and Woods, 108.

⁵⁰³ Hopkins, 630.

⁵⁰⁴ *Ibid.*

⁵⁰⁵ *Ibid.*

⁵⁰⁶ *Ibid.*

population; and whether the rationale for the underlying redistricting policy is legitimate in its context.⁵⁰⁷

After *Gingles*, a flurry of lawsuits challenged redistricting within at-large districts and expanded voter protections.⁵⁰⁸ In *Johnson v. De Grandy* (1994), the Supreme Court held that if a plaintiff met all three requirements, the Court must determine whether “under the ‘totality of the circumstances,’ the minority group has less opportunity than other members of the electorate to participate in the electoral process and to elect representatives of their choice.”⁵⁰⁹ The ruling required plaintiffs to provide qualitative and quantitative data to satisfy the burden of proof.⁵¹⁰

The expansion of voter protections stalled in *Shaw v. Reno* (1993) and *Miller v. Johnson* (1995).⁵¹¹ In *Shaw*, the Supreme Court held that race-conscious redistricting raises equality concerns under the 14th Amendment.⁵¹² The decision created tensions between aggressive VRA enforcement and the color-blind equal protection clause.⁵¹³ Before the *Shaw* decision, cities could address disenfranchisement by creating majority-minority districts.⁵¹⁴ The Supreme Court recognized that state legislatures are cognizant of race when they create districts, just as they are conscious of other characteristics such as age, socioeconomic status, religion, and political affiliation.⁵¹⁵ Post-*Shaw* and *Miller*, the Supreme Court moved away from using race to draw districts, thus decreasing the VRA's power.⁵¹⁶

⁵⁰⁷ Ingram, 191.

⁵⁰⁸ Chen and Lee, 365.

⁵⁰⁹ Hopkins, 630.

⁵¹⁰ *Ibid.*

⁵¹¹ *Ibid.*, 366.

⁵¹² *Ibid.*

⁵¹³ *Ibid.*

⁵¹⁴ Chen and Lee, 365.

⁵¹⁵ *Ibid.*, 366.

⁵¹⁶ *Ibid.*, 360.

The Supreme Court's concerns about using racial classifications in redistricting intensified after *Miller v. Johnson* (1995).⁵¹⁷ In *Miller*, the Court recognized the importance of race for fulfilling the VRA and that communities with “common threads of relevant interests” may have a distinct racial makeup.⁵¹⁸ But the Supreme Court limited the use of race so that race could not be a “predominant factor” motivating a legislature’s districting plan.⁵¹⁹ The Court's majority opinion declared that a plaintiff must prove that “the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect of political subdivisions or communities defined by actual shared interests, to racial considerations.”⁵²⁰ In contrast with the majority opinion's concern about racial stereotyping, Justice Ruth Bader Ginsburg argued in the dissenting opinion for the relevance of race in 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 diverging economic interests. For this reason, ethnicity is a significant force in political life.”⁵²¹

The Supreme Court decisions in *Miller* and *Shaw* destabilized the legal framework for protecting voting rights in America.⁵²² Congress created the Voting Rights Act to increase the political

⁵¹⁷ Ibid, 366.

⁵¹⁸ Ibid, 366.

⁵¹⁹ Ibid, 360.

⁵²⁰ Ibid, 366.

⁵²¹ Ibid, 367.

⁵²² Ibid, 360.

power of minority voters through majority-minority districts. While the *Miller* Court recognized the importance of acknowledging communities of interest in vote dilution claims, it also declared that race could not be a “predominant factor” in redistricting.⁵²³ Since the *Miller* opinion, the Supreme Court has offered little guidance to legislatures and lower courts regarding how much emphasis to place on race when adopting traditional redistricting principles that include communities of interest.⁵²⁴ Unlike *Miller*, few lower courts recognized communities of interest in vote dilution cases.⁵²⁵

In *League of United Latin American Citizens v. Perry* (2006), minority voters and interest groups alleged that the Texas State Legislature's redistricting plan after the 2000 Census violated Section 2 of the VRA.⁵²⁶ The Supreme Court found that all three *Gingles* requirements were satisfied.⁵²⁷ The first prong was satisfied by establishing that Latinos could make an opportunity district without altering lines.⁵²⁸ The *LULAC* Court acknowledged that Section 2 does not expressly forbid the creation of a non-compact majority-minority district if there is evidence of "communities of interest" that should be in the same district.⁵²⁹ The Supreme Court's reasoning on race in the *LULAC* decision indicates that the "community of interest" doctrine can have important effects on Latinos and Asian Americans.⁵³⁰

⁵²³ Ibid, 366.

⁵²⁴ Ibid, 367.

⁵²⁵ Ibid.

⁵²⁶ Ibid, 369.

⁵²⁷ Ibid, 370.

⁵²⁸ Ibid.

⁵²⁹ Ibid, 371.

⁵³⁰ Ibid.

Voting Rights Act Cases in California

In 1988, Latinos filed the first case in California against the city of Watsonville.⁵³¹ In *Gomez v. City of Watsonville* (1988), Joaquin G. Avila, an American voting rights attorney and activist, sued Watsonville under the 14th and 15th Amendments.⁵³² The plaintiffs claimed that the city's at-large mayoral and city council elections violated Section 2 of the Voting Rights Act.⁵³³ Though Watsonville was nearly half Latino, it had yet to elect a Latino candidate to the city council in its 120-year history.⁵³⁴ District Court Judge William Ingram rejected the lawsuit in 1987, finding no overt discrimination by the city council.⁵³⁵ Although Ingram found evidence of racially polarized voting and noted that none of the nine Latino candidates who ran for city council were elected, he asserted that the lack of Latino political success in Watsonville was due to low Latino voter turnout.⁵³⁶ Ingram emphasized socioeconomic differences within the Latino community as evidence that Latinos were insufficiently cohesive and dispersed to prove a Section 2 violation.⁵³⁷ He dismissed the fact that it was easy to draw two majority-Latino districts in a seven-district system.⁵³⁸ Instead, he emphasized that Latinos outside these two districts would be less able to elect their preferred candidates if they were submerged in majority-white districts.⁵³⁹

The Ninth Circuit Court of Appeals overruled the district court's decision because of Ingram's incorrect finding of insufficient geographical compactness and political

⁵³¹ Joaquin G. Avila, Terry M. Ao, and Eugene Lee, "Voting Rights in California: 1982-2006," *Southern California Review of Law and Social Justice* 17, no. 131 (2007), 148.

⁵³² *Gomez v. Watsonville*, 863 F.2d 1407 (9th Cir. 1988).

⁵³³ *Ibid.*

⁵³⁴ Mark A. Stein, "One Latino Wins, 3 Others Lose in Watsonville Vote," *Los Angeles Times* (Los Angeles Times, December 6, 1989).

⁵³⁵ *Ibid.*

⁵³⁶ *Ibid.*

⁵³⁷ *Gomez v. Watsonville*, 863 F.2d 1407 (9th Cir. 1988).

⁵³⁸ *Ibid.*

⁵³⁹ *Ibid.*

cohesiveness.⁵⁴⁰ The court found it erroneous for Ingram to uphold an at-large system just because Latinos lived outside the proposed majority-Latino districts.⁵⁴¹ The Court declared that Ingram’s observations on low voter turnout were unnecessary for determining the electoral system’s fairness. It dismissed Ingram’s contention that low Latino registration and turnout demonstrated that they were not politically cohesive. It found that based on the “totality of the circumstances,” Watsonville’s at-large system diluted Latino voting strength.⁵⁴² The U.S. Supreme Court refused to review the decision.

Avila believed this decision would increase Latino political mobilization and descriptive representation. Avila and other voting rights lawyers sued Salinas, Stockton, Pomona, San Diego, Chula Vista, and National City.⁵⁴³ He told *Monterey County Weekly*, “I thought after the city of Watsonville had won the appellate court level, all these other jurisdictions would voluntarily convert. They didn’t.”⁵⁴⁴ This period of Section 2 enforcement was short-lived.⁵⁴⁵ Two unsuccessful at-large challenges in El Centro School District and the City of Santa Maria discouraged further litigation by private attorneys.⁵⁴⁶ Because of the difficulties associated with filing at-large challenges under the federal VRA, Avila tried to create a state voting rights act in California.⁵⁴⁷ Avila was disappointed on both the judicial and legislative front.⁵⁴⁸ Republican

⁵⁴⁰ Ibid.

⁵⁴¹ Ibid.

⁵⁴² Ibid.

⁵⁴³ Avila, Ao, and Lee.

⁵⁴⁴ Sara Rubin, “Meet Voting Rights Champ and Genius Joaquin Avila,” *Monterey County Weekly*, August 22, 2015.

⁵⁴⁵ Avila, Ao, and Lee, 148.

⁵⁴⁶ Ibid, 149.

⁵⁴⁷ Ibid, 152.

⁵⁴⁸ J. Morgan Kousser, Professor of History and Social Science, Emeritus, interview by author, interview notes, Claremont, CA, April 12, 2023.

governors George Deukmejian and Pete Wilson vetoed election legislation for by-district systems that passed the California Legislature.⁵⁴⁹

In *Romero v. City of Pomona* (1987), District Court Judge James Ideman found that exit polls showed insufficient political cohesion between Black and Latino voters to prove racially polarized voting.⁵⁵⁰ He ruled that unless a single minority group could constitute a majority of voters—not just a majority of the population—it could not bring a lawsuit under the federal VRA.⁵⁵¹ The Ninth Circuit Court of Appeals Judge Alex Kozinski affirmed Ideman’s decision to create a bright-line 50% Citizen Voting Age Population (CVAP) prerequisite.⁵⁵² In a state like California, with many non-citizens and various ethnic groups, a 50% CVAP requirement would make it more difficult to win a CVRA case and increase lawsuit costs.⁵⁵³ Citizen Voting Age Population data by ethnic group was not gathered at the precinct level in the 1980 Census.⁵⁵⁴ The Census had widespread undercounts because it was difficult to count minority populations with limited English proficiency.⁵⁵⁵ It was also challenging to separate citizens and non-citizens at the precinct level.⁵⁵⁶

After spending one million dollars defending the *Romero* case, the Pomona City Council authorized a referendum switching to districts.⁵⁵⁷ Fifty-six percent of the city’s voters supported the switch in 1990. In Pomona’s first district elections, an African American candidate won a

⁵⁴⁹ Ibid.

⁵⁵⁰ *Romero v. City of Pomona*, 665 F. Supp. 853 (C.D. Cal. 1987).

⁵⁵¹ Ibid.

⁵⁵² Ibid.

⁵⁵³ J. Morgan Kousser, Professor of History and Social Science, Emeritus, interview by author, interview notes, Claremont, CA, April 12, 2023.

⁵⁵⁴ Ibid.

⁵⁵⁵ “About the 1980 Decennial Census,” United Census Bureau.

⁵⁵⁶ J. Morgan Kousser, Professor of History and Social Science, Emeritus, interview by author, interview notes, Claremont, CA, April 12, 2023.

⁵⁵⁷ “In the Neighborhood: Pomona: A Voting Change Shifts Political Power,” *Los Angeles Times* (Los Angeles Times, July 26, 1993).

district with a 33% Black and 25% Latino population, and a Latino candidate won a seat with a 42% Latino population.⁵⁵⁸ The 1991 election results highlighted the flaws of a 50% CVAP requirement. Councilmember Willie White, the first African American to serve on Pomona City Council said:

“I was one of the original plaintiffs in the suit filed against the city for district elections. District elections made it possible for me to get elected. With district elections I didn’t have to spend quite as much money and I could put my effort into the district, going door-to-door. I think people feel better when they have representation that reflects the population of the community.”⁵⁵⁹

In *Garza v. County of Los Angeles* (1988), Hispanics in Los Angeles County filed a federal voting rights action to redraw districts for the County Board of Supervisors.⁵⁶⁰ They argued that the redistricted boundaries were gerrymandered to dilute Hispanic voting strength.⁵⁶¹ They wanted to create a majority-Hispanic district for the 1990 Board of Supervisors election.⁵⁶² The court declared that the “unique demographic changes in Los Angeles County has undergone and continues to undergo coupled with the lingering effects and history of discrimination in the County against Hispanics, preclude the application of ‘a single, universally applicable standard for measuring undiluted minority voting strength.’”⁵⁶³ The facts and circumstances of this case precluded the application of *Romero*’s bright-line 50% CVAP standard.⁵⁶⁴ The court also found

⁵⁵⁸ Mike Ward, “Elections Pomona Council: New Balloting System Alters Race Strategies : Campaign: Candidates Say the Switch from Citywide to District Elections Will Enable More Door-to-Door Campaigning. Four Council Seats and the Mayor’s Job Are at Stake.,” *Los Angeles Times* (Los Angeles Times, February 10, 1991).

⁵⁵⁹ “In the Neighborhood: Pomona: A Voting Change Shifts Political Power,” *Los Angeles Times* (Los Angeles Times, July 26, 1993).

⁵⁶⁰ *Garza v. County of Los Angeles*, Cal., 756 F. Supp. 1298 (C.D. Cal. 1991).

⁵⁶¹ *Ibid.*

⁵⁶² *Ibid.*

⁵⁶³ *Ibid.*

⁵⁶⁴ *Ibid.*

evidence that the Board of Supervisors knowingly drew and adopted a plan to minimize Latino voting potential and fragmented the minority population.⁵⁶⁵ The court accepted a remedial district with a 45% Latino CVAP, which shortly after elected the county's first Latino supervisor in 116 years.⁵⁶⁶ The Ninth Circuit Court, including *Romero's* author, Judge Kozinski, agreed with Judge Kenyon that the 50% Latino CVAP standard should not apply to Los Angeles County.⁵⁶⁷

An Increasingly Diverse America

Minorities seeking protection under Section 2 of the VRA challenged the effectiveness of the *Gingles* test, arguing that a vote dilution claim could still exist without satisfying all three requirements.⁵⁶⁸ Many scholars viewed the size and compactness requirements of *Gingles* as a barrier to expanding voting rights.⁵⁶⁹ They argued that the under-inclusivity of the *Gingles* approach and the increasing diversity of America failed to address instances of vote dilution.⁵⁷⁰ Latinos surpassed African Americans as the largest minority group in America, making up 16.3% of the population in 2010.⁵⁷¹ Asian Americans increased to 4.8% of the total population.⁵⁷² Despite population growth, minority groups only won elections by narrow margins and lacked true political power.⁵⁷³

When Congress drafted the VRA and the Supreme Court created the *Gingles* requirements, neither Congress nor the Supreme Court foresaw the future diversity of America.

⁵⁶⁵ Ibid.

⁵⁶⁶ Ibid.

⁵⁶⁷ Ibid.

⁵⁶⁸ Hopkins, 646.

⁵⁶⁹ Ibid, 647,

⁵⁷⁰ Ibid, 625.

⁵⁷¹ Ibid, 624.

⁵⁷² Ibid.

⁵⁷³ Ibid.

While the VRA's language extended to large groups of minorities, the factors outlined in *Gingles* pose inherent limitations on small and geographically dispersed minority groups making Section 2 claims.⁵⁷⁴ Minority groups challenged the first *Gingles* prong, suggesting that the Supreme Court intended a less stringent requirement regarding minority population size.⁵⁷⁵ They indicated that *Gingles* did not require the ability to make up a majority in a single-member district.⁵⁷⁶ Based on a majority-minority district requirement promulgated by the lower courts, the *Gingles* standard precluded an entire portion of the minority population from making vote dilution claims.⁵⁷⁷ Requiring the minority population to reach a specific size limited the VRA's scope to protect smaller, geographically dispersed minority groups. Minority groups suggested that the compactness requirement reflected how the VRA's history is rooted in an African American model of disenfranchisement.⁵⁷⁸ While it may have been common for African Americans to be racially segregated in 1965, social scientists suggest that Asians and Latinos do not fit the compact model and would fail the *Gingles* requirement.⁵⁷⁹ Minorities seeking VRA protections argue that it is increasingly difficult to distinguish a white voting bloc.⁵⁸⁰ The Supreme Court stated that unless a challenged jurisdiction meets the three *Gingles* requirements, “there neither has been a wrong nor can be a remedy.”⁵⁸¹

Within the Asian American community, this requirement drew criticism based on the diversity of Asian subgroups. Asian Americans filing a Section 2 claim may not meet the political cohesion requirement. Given the group’s diversity, such as duration of residence, age,

⁵⁷⁴ Ibid, 642.

⁵⁷⁵ Ibid, 646.

⁵⁷⁶ Ibid, 647.

⁵⁷⁷ Ibid.

⁵⁷⁸ Ibid.

⁵⁷⁹ Ibid.

⁵⁸⁰ Ibid, 648.

⁵⁸¹ Ibid, 648-649.

and cultural differences, their politics may diverge in the absence of a co-ethnic candidate.⁵⁸² Further, the Asian American population is in a state of political transition based on the duration of residence and the growing population of young, first generation, American-born children.⁵⁸³ It is difficult for the Asian American community to seek and feel that they require VRA protections when they make up multiple, smaller communities.⁵⁸⁴ If the smaller fractioned groups attempt to bring Section 2 claims, they would have difficulty meeting the first *Gingles* requirement of geographical compactness.⁵⁸⁵

Ellen Katz, an American law professor at the University of Michigan, recorded eight Section 2 cases, including Asian American voters: *Grove v. Emison* (1993), *Debaca v. County of San Diego* (9th Circuit 1993), *Brewer v. Ham* (5th Circuit 1989), *Latino Political Action Comm. v. City of Boston* (1st Circuit 1986), *Common Cause v. Jones* (C.D. Cal. 2002), *Balderas v. State* (E.D. Tex. 2001), *West v. Clinton* (W.D. Ark. 1992), and *Texas v. United States* (D.D.C. 2012).⁵⁸⁶ These eight cases raised Section 2 challenges directly concerning Asian American voters.⁵⁸⁷ Asian Americans have been overwhelmingly unsuccessful at each stage of Section 2 vote dilution claims.⁵⁸⁸ The scarcity of Asian American-focused litigation on the federal Voting Rights Act makes analysis difficult. Still, it can be inferred from the judicial treatment of the Latino population that the vote dilution cases rest entirely on how well the facts fit the *Gingles* criteria.

⁵⁸² Ibid, 648.

⁵⁸³ Ibid.

⁵⁸⁴ Ibid.

⁵⁸⁵ Ibid.

⁵⁸⁶ Ellen D. Katz et al., "Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982," *University of Michigan Law School*, 2006, 656.

⁵⁸⁷ Ibid.

⁵⁸⁸ Chen and Lee, 390.

Chapter Three: California Voting Rights Act of 2001

“Political power is never given away, you have to take it. So that’s what I do.”

– Joaquin G. Avila, Monterey County Weekly, August, 22, 2015⁵⁸⁹

The Legacy of Joaquin G. Avila

In 2001, Democratic State Senator Richard Polanco (D-Los Angeles) introduced the California Voting Rights Act (CVRA) to address California’s history of electoral racial inequality.⁵⁹⁰ Joaquin Avila, the chief architect of the California Voting Rights Act, fought successfully for the reauthorization and extension of the federal Voting Rights Act, but he knew the weaknesses of the law and the Supreme Court.⁵⁹¹ He advocated the restoration of public confidence in the electoral process and looked for solutions to address formal and informal ways to disenfranchise, stating:

“After a while, people begin feeling that their votes don’t matter, and people will ‘choose’ not to vote. People will ‘choose’ not to vote because they become disheartened, because they feel that their rights are not being respected, that their efforts to participate in the political process will be thwarted, as they have been over and over, with the courts standing by, letting it happen and making excuses for why they do not step in.”⁵⁹²

Avila’s persistence led to the passage of the California Voting Rights Act. The CVRA can be read as Avila’s answers to the problems he experienced in federal VRA litigation in the 1980s

⁵⁸⁹ Rubin.

⁵⁹⁰ Loren Collingwood and Sean Long, “Can States Promote Minority Representation? Assessing the Effects of the California Voting Rights Act,” *Urban Affairs Review* 57, no. 3 (December 31, 2019), 736.

⁵⁹¹ Robert Chang, “Remembrance, One Person, One Vote: The Enduring Legacy of Joaquin Avila,” *Seattle Journal for Social Justice* 18, no. 1 (August 2019), 102.

⁵⁹² *Ibid*, 98-99.

and 1990s.⁵⁹³ Avila told *Monterey County Weekly*, “Political power is never given away, you have to take it.”⁵⁹⁴ In 2001, statistical projections showed that California was a majority-minority state, but only a small number of elected officials came from minority backgrounds.⁵⁹⁵ The American Civil Liberties Union and Mexican American Legal Defense and Education Fund endorsed the bill, and its strongest supporters were California’s Latino communities.⁵⁹⁶

Lawmakers designed the CVRA to ensure that city councils and other elected bodies represented minority voters’ interests. The CVRA targets cities that elect council members at-large, meaning each candidate runs city-wide instead of by-district. The CVRA required jurisdictions with racially polarized voting to transition away from at-large elections. Studies show that at-large elections deprive minority voters of electing their preferred candidates.⁵⁹⁷ This problem is historically driven by the refusal of white voters to vote for minority candidates. In 2002, Governor Davis signed the CVRA into law, which expanded on Section 2 of the federal Voting Rights Act.⁵⁹⁸

The 2001 California Voting Rights Act and Section 2 of the 1965 Voting Rights Act provide safeguards for minority voting rights. On the federal level, Section 2 of the VRA prohibits a state from using any “standard, practice, or procedure” that “results in denial or abridgment of the right of any citizen of the United States to vote on account of race or color.”⁵⁹⁹ Many federal VRA cases have failed because Latinos could not create majority-Latino districts

⁵⁹³ J. Morgan Kousser, Professor of History and Social Science, Emeritus, interview by author, interview notes, Claremont, CA, April 12, 2023.

⁵⁹⁴ Rubin.

⁵⁹⁵ Ingram, 216.

⁵⁹⁶ Collingwood and Long, 737.

⁵⁹⁷ Ingram, 186.

⁵⁹⁸ “Bill to Strengthen California Voting Rights Act Approved by State Assembly – SB 1365,” LCCRSF, August 11, 2014.

⁵⁹⁹ Hopkins, 626.

or at-large systems were more successful than by-district elections in electing Latino candidates.

The Assembly Committee on Judiciary analyzed the bill, writing:

“Restrictive interpretations given to the federal act, however, have put the cart before the horse by requiring that a plaintiff show that the protected class is geographically compact enough to permit the creation of a single-member district in which the protected class could elect its own candidate. This bill would avoid that problem... Thus, this bill puts the voting rights horse (the discrimination issue) back where it belongs in front of the cart (what type of remedy is appropriate once racially polarized voting has been shown).”⁶⁰⁰

The California Voting Rights Act is a unique state-based remedy that provides historically disenfranchised voter groups with greater voting rights protections. While the CVRA mirrors Section 2 of the VRA’s statutory language and the legal standards it promulgates, the two statutes are not entirely parallel. The CVRA does not require evidence that racially polarized voting defeats a group’s preferred candidate. The challenged jurisdiction violates the CVRA if it is shown that racially polarized voting occurs. The CVRA removed specific requirements under the VRA, making it easier to challenge at-large elections in California. Proof of intent is not required.⁶⁰¹ The protected class does not have to be geographically compact or concentrated to allege a CVRA violation.⁶⁰² The CVRA also eliminated the “totality of circumstances” outlined in the federal VRA.⁶⁰³ Eliminating the “totality of circumstances” factor made CVRA litigation purely a statistical exercise.⁶⁰⁴

⁶⁰⁰ Assembly Committee on Judiciary Bill Analysis of SB 976, June 4, 2002, 3.

⁶⁰¹ James L. Markman and Douglas Johnson, “The California Voting Rights Act: Recent Legislation & Litigation Outcomes,” League of California Cities, 2018, 3.

⁶⁰² Ibid.

⁶⁰³ Ibid.

⁶⁰⁴ Ibid.

The CVRA removed the threat of bankruptcy that discouraged private attorneys or civil rights organizations representing minority plaintiffs from filing legal actions. The law requires local jurisdictions to pay all legal fees for prevailing plaintiffs.⁶⁰⁵ Kevin Shenkman, a prominent CVRA attorney, told *Vice* that litigation “requires the expenditure of hours of work and hundreds of thousands of dollars in out-of-pocket costs. If there was not the potential for financial gain, we would not have been in a position to take that huge risk.”⁶⁰⁶ This provision, though controversial, was designed to encourage local jurisdictions to switch from at-large elections before a lawsuit was filed.⁶⁰⁷ Robert Rubin, Avila’s co-counsel in several early cases, told *Capitol Weekly* that “It’s our well-founded belief [that] we’re not going to have to sue every school district in the state to ensure compliance.”⁶⁰⁸ The high legal cost is a deterrent for cities, making it risky to fight against legal threats. The cost of switching to district elections is minimal, so many cities change voluntarily. Lacking an example of a successful defense and the enormous financial cost for cities defending against these claims, most cities that receive a demand letter switch to by-district elections without analyzing their election system to find evidence of racially polarized voting.⁶⁰⁹ A demand letter comes from a prospective plaintiff’s attorney alleging that the city’s election system violates the CVRA and threatens litigation if it does not voluntarily change its election systems.⁶¹⁰

The federal Voting Rights Act was designed to remedy discrimination against African Americans in the South.⁶¹¹ The CVRA addresses the multi-cultural demographics of California.

⁶⁰⁵ Carolyn Abott and Asya Magazinnik, “At-Large Elections and Minority Representation in Local Government,” *American Journal of Political Science* 64, no. 3 (July 18, 2020), 718.

⁶⁰⁶ Spencer Woodman, “How California Is Solving Its Voting Rights Problem,” *VICE*, May 26, 2016.

⁶⁰⁷ J. Morgan Kousser, Professor of History and Social Science, Emeritus, interview by author, interview notes, Claremont, CA, April 12, 2023.

⁶⁰⁸ Greg Lucas, “Voting Rights Act: A Fee-Generator for Lawyers?” *Capitol Weekly*, May 5, 2011.

⁶⁰⁹ Markman and Johnson, 3.

⁶¹⁰ *Ibid.*, 2.

⁶¹¹ Chen and Lee, 376.

The bill's sponsor, State Senator Polanco, said, "In California we face a unique situation where we are all minorities. We need statutes to ensure that our electoral system is fair and open. This measure gives us a tool to move us in that direction."⁶¹² The CVRA made at-large elections in California vulnerable to legal attack solely on proof of racially polarized voting.⁶¹³ Plaintiffs file CVRA lawsuits when minority groups can demonstrate that they have voted cohesively as a political bloc to influence the outcome of an election.⁶¹⁴ With a lower threshold of proof, no city has prevailed in a CVRA action.⁶¹⁵

A "Quiet Revolution" in California

When the CVRA became law in 2001, 449 of California's 476 cities used at-large systems to elect city council members.⁶¹⁶ The enactment of the CVRA did not result in the immediate mass transition away from at-large systems.⁶¹⁷ Numerous court challenges were leveled at the law, delaying implementation.⁶¹⁸ Initially, many cities responded with sustained legal defenses when challenged.

In *Sanchez v. City of Modesto* (2004), Mexican-Americans sued the city of Modesto under Section 2 of the Voting Rights Act.⁶¹⁹ Modesto used a numbered post, at-large election system.⁶²⁰ In a numbered post system, candidates for the city council run for individual seats.⁶²¹ To win, a candidate must receive a majority of the votes cast for their selected seat.⁶²² The

⁶¹² Assembly Committee on Judiciary Bill Analysis of SB 976, June 4, 2002, 2.

⁶¹³ John E. McDermott, "As Applied Challenges to the California Voting Rights Act," League of California Cities.

⁶¹⁴ Ingram, 192.

⁶¹⁵ Markman and Johnson, 3.

⁶¹⁶ Collingwood and Long, 732.

⁶¹⁷ *Ibid.*, 737.

⁶¹⁸ *Ibid.*

⁶¹⁹ *Sanchez v. City of Modesto*, 51 Cal. Rptr. 3d 821 (Cal. Ct. App. 2006).

⁶²⁰ *Ibid.*

⁶²¹ O'Rourke, 42.

⁶²² *Ibid.*

plaintiffs alleged that this system and racially polarized voting prevented Latino voters from electing their preferred candidate or influencing electoral outcomes.⁶²³ Although Latinos exceeded 25% of the city's population, only one Latino candidate had been elected to the city council since 1911.⁶²⁴

Modesto challenged the facial constitutionality of the CVRA.⁶²⁵ The city argued that the CVRA was unconstitutional because it used race to identify polarized voting.⁶²⁶ The city claimed that using race constituted reverse racial discrimination and was an unconstitutional affirmative action benefitting only certain racial groups.⁶²⁷ Superior Court Judge Roger Beauchesne ruled in favor of the city of Modesto and declared the CVRA unconstitutional.⁶²⁸ Judge Beauchesne argued that the law favored minorities without requiring them to demonstrate need.⁶²⁹ He ruled that the requirement for the city to pay attorney fees was an unconstitutional gift of public funds.⁶³⁰

The plaintiffs appealed the decision to the Fifth District Court of Appeals.⁶³¹ The Fifth District Court of Appeals upheld the CVRA against claims that it violated state and federal equal protection guarantees.⁶³² The appeals court reversed Judge Beauchesne, who ruled that the CVRA was facially invalid.⁶³³ The Court found that the CVRA was race-neutral and no racial group formed a majority in California.⁶³⁴ Appellate Justice Rebecca A. Wiseman applied a

⁶²³ *Sanchez v. City of Modesto*, 51 Cal. Rptr. 3d 821 (Cal. Ct. App. 2006).

⁶²⁴ Olivier Richomme, "‘Fair’ Minority Representation and the California Voting Rights Act," *National Political Science Review* 20, no. 2 (2019), 58.

⁶²⁵ McDermott, 2.

⁶²⁶ *Ibid.*

⁶²⁷ *Sanchez v. City of Modesto*, 51 Cal. Rptr. 3d 821 (Cal. Ct. App. 2006).

⁶²⁸ *Ibid.*

⁶²⁹ *Ibid.*

⁶³⁰ *Ibid.*

⁶³¹ *Ibid.*

⁶³² *Ibid.*

⁶³³ *Ibid.*

⁶³⁴ *Ibid.*

rational basis test and held the CVRA constitutional.⁶³⁵ She wrote, “Curing vote dilution is a legitimate government interest and creation of a private right to action like that in the CVRA is rationally related to it.”⁶³⁶ Wiseman disagreed with the city’s assertion that the CVRA favored one race. She declared the CVRA race-neutral, writing, “The reality in California is that no racial group forms a majority. As a result, any racial group can experience the kind of vote dilution the CVRA was designed to combat, including Whites. Just as non-Whites in majority-White cities may have a cause of action under the CVRA, so may Whites in majority-non-White cities.”⁶³⁷ The city paid three million dollars to the plaintiffs’ lawyers and \$1.7 million to its own lawyers.⁶³⁸

The *Sanchez* case dispelled myths that the CVRA provided an electoral advantage and proportional representation to racial minority groups over white voters.⁶³⁹ The city appealed the case to the California Supreme Court and the U.S. Supreme Court.⁶⁴⁰ The California Supreme Court denied review in May 2007 and the U.S. Supreme Court denied certiorari in October 2007. According to the Federal Reserve, the “Great Recession” began in December 2007. The affirmation of the *Sanchez* decision by the highest court of law, just as property, sales, and income tax revenues began to plummet, magnified the *Sanchez* decision.⁶⁴¹

A flurry of successful lawsuits spread throughout the state to break up at-large districts and amass millions of dollars in legal settlements.⁶⁴² Many of the CVRA’s effects did not emerge

⁶³⁵ Ibid.

⁶³⁶ Ibid.

⁶³⁷ Ibid.

⁶³⁸ Carolyn Schuk, “Council Has ‘Done Nothing’ in Response to Voting Rights Lawsuit Threatened for Six Years, Says Civil Rights Attorney,” *The Silicon Valley Voice*, May 24, 2017.

⁶³⁹ Ingram, 225.

⁶⁴⁰ Richomme, 58.

⁶⁴¹ J. Morgan Kousser, Professor of History and Social Science, Emeritus, interview by author, interview notes, Claremont, CA, April 12, 2023.

⁶⁴² Abott and Magazinnik, 718.

through lawsuits. The *Sanchez* decision led many school boards, community college boards, and cities to switch to districts before anyone filed suit.⁶⁴³ In over two-thirds of jurisdictions, transitions to by-district elections did not result from lawsuits or demand letters.⁶⁴⁴ The CVRA was specifically designed to spread case by case and settlement by settlement—to encourage jurisdictions to switch in anticipation of legal action.⁶⁴⁵ Districts quickly became the preferred method of remedying minority vote dilution experienced by Latinos. The *Sanchez* precedent caused many jurisdictions to move to districts simply because the threat of a costly legal process was enough to abandon at-large local elections.

Palmdale was another high-profile case of city resistance to the CVRA.⁶⁴⁶ Latinos sued the city of Palmdale, alleging that its system of electing four council members at-large was rigged against Latinos and other minorities.⁶⁴⁷ After being sued for non-compliance, Palmdale waged a three-year legal battle against the switch to by-district elections, eventually settling for \$4.5 million and creating four council districts, including two Latino majority-minority districts.⁶⁴⁸ The judge refused to certify the city’s 2013 council election, ordering the city to hold a special election.⁶⁴⁹ Before the system change, the city had one appointed Latino council member.⁶⁵⁰ After Palmdale settled for \$4.5 million, Kevin Shenkman declared, “That sends a message to other cities: Don’t do this.”⁶⁵¹

⁶⁴³ J. Morgan Kousser, Professor of History and Social Science, Emeritus, interview by author, interview notes, Claremont, CA, April 12, 2023.

⁶⁴⁴ “The California Voting Rights Act in 2018,” Asian Americans Advancing Justice, December 3, 2018.

⁶⁴⁵ J. Morgan Kousser, Professor of History and Social Science, Emeritus, interview by author, interview notes, Claremont, CA, April 12, 2023.

⁶⁴⁶ Collingwood and Long, 737.

⁶⁴⁷ Phil Willon, “A Voting Law Meant to Increase Minority Representation Has Generated Many More Lawsuits than Seats for People of Color,” Los Angeles Times (Los Angeles Times, April 10, 2017).

⁶⁴⁸ Collingwood and Long, 737.

⁶⁴⁹ Schuk.

⁶⁵⁰ Willon.

⁶⁵¹ Woodman.

Some city officials complain that election lawyers see CVRA cases as a way to collect hefty attorney fees.⁶⁵² Palmdale Mayor, Jim Ledford, said, “I didn’t think the lawsuit was about anything except making money.”⁶⁵³ Shenkman countered, saying he worked for years on the Palmdale case even though he was not sure of the victory.⁶⁵⁴ Shenkman said, “We did very well on the Palmdale case. But people who criticized us don’t realize the enormous risk we took.”

In the wake of high-profile lawsuits, a wave of transitions to by-district elections arose, encouraged by widespread legal threats. From 2002 to 2018, 335 local jurisdictions in California shifted from at-large elections to alternative voting systems.⁶⁵⁵ Before the CVRA, only 28 cities used by-district elections.⁶⁵⁶ Richard Hasen, professor of law and political science at the University of California, Irvine said, “These things are happening all over the state. Inertia is a powerful force, and people who benefit from the status quo don’t want to change the status quo. Sometimes it takes a lawsuit to force more equitable forms of representation.”⁶⁵⁷ The CVRA encouraged lawyers and activists to file legal actions because the law made it easier to win vote dilution cases. The constraint on the number of CVRA cases that civil rights groups can file is not the availability of at-large districts where a case can succeed but rather the willingness of plaintiffs to engage in legal action.⁶⁵⁸ The CVRA's enforcement places the burden of action on underrepresented minorities.⁶⁵⁹ Nevertheless, suing a California city with an at-large system for minority vote dilution in California has relatively little downside compared with federal cases.⁶⁶⁰

⁶⁵² Willon.

⁶⁵³ Ibid.

⁶⁵⁴ Ibid.

⁶⁵⁵ “The California Voting Rights Act in 2018,” Asian Americans Advancing Justice, December 3, 2018.

⁶⁵⁶ Markman and Johnson, 2.

⁶⁵⁷ Woodman.

⁶⁵⁸ Abott and Magazinnik, 721.

⁶⁵⁹ Collingwood and Long, 737.

⁶⁶⁰ Abott and Magazinnik, 721.

Unlike cases filed under federal law, the CVRA requires the local government to pay all legal fees to prevailing plaintiffs, even if the two parties settle out of court.⁶⁶¹

In creating a legal strategy, civil rights groups' primary obstacles are identifying jurisdictions with minority vote dilution and finding plaintiffs willing to pursue legal action. Civil rights groups can only initiate CVRA lawsuits for residents of contested jurisdictions.⁶⁶² The largest minority population in California is the Latino population, so lawyers first identified districts where the Latino population was not proportionate to elected representation. Although Hispanics are the largest racial/ethnic group in California, it is common to designate the term "minority" to African American, Hispanic, and AAPI communities. CVRA attorney, Kevin Shenkman, chose cities to target based on demographic features, current council demographics, and racial voting patterns.⁶⁶³ Once found, lawyers contacted local organizations within the identified districts and set up community engagement presentations to educate citizens about the CVRA.⁶⁶⁴ Through these meetings, they gauged if citizens thought that at-large elections impaired their interests; invariably, the answer was yes.⁶⁶⁵ Civil rights groups also hired statistical consultants to assess whether there was evidence of "racial polarization" in selected districts.⁶⁶⁶ Given the CVRA's low legal standard and California's demographic makeup, this step did not eliminate many candidates.⁶⁶⁷ Although lawyers had no difficulty demonstrating the value of legal action to these communities, they struggled to persuade individuals to shoulder the

⁶⁶¹ Ibid, 720.

⁶⁶² Ibid, 721.

⁶⁶³ Collingwood and Long, 736.

⁶⁶⁴ Abott and Magazinnik, 721.

⁶⁶⁵ Ibid.

⁶⁶⁶ Ibid.

⁶⁶⁷ Ibid.

legal burden.⁶⁶⁸ The most significant drop-off from initial identification to litigation occurred during plaintiff recruitment.⁶⁶⁹

In 2017, Don Higginson, a former Poway mayor, filed a lawsuit against Attorney General Xavier Becerra, challenging the CVRA's constitutionality after the city of Poway scrapped its at-large electoral system.⁶⁷⁰ In *Higginson v. Becerra* (2017), Higginson argued that the CVRA “frangrantly violates the Fourteenth Amendment” by instituting a “race-based sorting of voters.”⁶⁷¹ Under the equal protection clause of the 14th Amendment, courts must strictly scrutinize state laws that are based on race.⁶⁷² The plaintiff alleged that switching to district elections violated Higginson’s rights under the 14th Amendment and that the CVRA and the city’s adopted map violated the equal protection clause.⁶⁷³ The district court dismissed his complaint, finding that the plaintiff failed to demonstrate that his injury was fairly traceable to the CVRA-induced change to district elections.⁶⁷⁴ The Ninth Circuit Court of Appeals affirmed the dismissal.⁶⁷⁵

In 2014 and 2015, Anaheim and Santa Clarita settled CVRA lawsuits that cost the cities \$2 million each.⁶⁷⁶ Costa Mesa was among many cities that switched from at-large elections in 2018.⁶⁷⁷ In response to the lawsuit, Mayor Pro Tem Jim Righeimer said, “It’s a no-win situation for the council. The way the law is written, when you have a large enough population, you will

⁶⁶⁸ Ibid.

⁶⁶⁹ Ibid.

⁶⁷⁰ *Higginson v. Becerra*, No. 18-55455 (9th Cir. Jul. 31, 2018).

⁶⁷¹ Ibid.

⁶⁷² Ibid.

⁶⁷³ Ibid.

⁶⁷⁴ Ibid.

⁶⁷⁵ Ibid.

⁶⁷⁶ Schuk.

⁶⁷⁷ Ibid.

go to districts.”⁶⁷⁸ Voters elected three Latino council members after switching to district elections.⁶⁷⁹ Although over one-third of Costa Mesa’s residents are Latino, this was the first time Latinos were elected to Costa Mesa’s city council.⁶⁸⁰ Kim Barlow, Costa Mesa’s city attorney, told *Los Angeles Times* that, “Under the CVRA, at-large voting is sort of going the way of the dinosaur.”⁶⁸¹ Luis Bravo, an Eastside Costa Mesa resident, said that moving to districts could empower the Latino community.⁶⁸² Bravo said, “You want someone that lives around your area, that knows your area, to go up there and fight for your area.”⁶⁸³ Proponents for the CVRA argue that the system makes it easier for minority candidates to be elected because they only have to compete in a specific district, not across the whole city in the traditional at-large system.⁶⁸⁴ When a jurisdiction is split into districts, all neighborhoods are represented.⁶⁸⁵

Palm Springs transitioned to districts in 2019.⁶⁸⁶ Though it became the first city in the country with an all-LGBTQ+ council, every sitting council member was white.⁶⁸⁷ Latinos make up over a quarter of the population.⁶⁸⁸ Councilmember Lisa Middleton said, “In the 80 years that we have been a city, we’ve elected one African-American and one Latino to our city council. That is it for individuals of color.”⁶⁸⁹

⁶⁷⁸ Luke Money, “Costa Mesa to Ask Voters to Consider District-Based Elections,” *Los Angeles Times* (Los Angeles Times, April 21, 2016).

⁶⁷⁹ Mary Plummer, “The Massive Election Change in California You’ve Likely Never Heard Of,” *LAist*, May 7, 2019.

⁶⁸⁰ *Ibid.*

⁶⁸¹ Money.

⁶⁸² *Ibid.*

⁶⁸³ *Ibid.*

⁶⁸⁴ Gustavo Arellano, “Joaquin Avila Was a 'Lion' for Voting Rights. but Did His Efforts Actually Fix Ballot Box Discrimination?,” *Los Angeles Times* (Los Angeles Times, March 21, 2018).

⁶⁸⁵ *Ibid.*

⁶⁸⁶ Plummer.

⁶⁸⁷ *Ibid.*

⁶⁸⁸ *Ibid.*

⁶⁸⁹ *Ibid.*

In *Pico Neighborhood Association, et al. v. City of Santa Monica* (2016), the plaintiffs filed an action against Santa Monica, alleging that the city's at-large system violated the CVRA.⁶⁹⁰ In March 2018, Santa Monica filed a motion on the grounds that expert demographic analysis proved that no constitutionality or statutorily permissible remedy could enhance Latino voting strength in the city.⁶⁹¹ The city argued that the plaintiffs could not meet their burden of demonstrating that an electoral scheme other than at-large elections would enhance Latino voting power.⁶⁹² The city argued that its Latino population constitutes 13% of the city's citizen voting age population, and not a single voting precinct is majority-Latino.⁶⁹³ Santa Monica Mayor, Glean Davis, pointed out that the city's area is only 8.3 square miles.⁶⁹⁴ The city argued that any attempt to group the city's Latino population in one district would be highly irregular and constitute racial gerrymandering.⁶⁹⁵ The city argued that a district-based system would dilute, not enhance, Latino voting strength.⁶⁹⁶ The city also sought judgment on the plaintiffs' claim that Santa Monica violated the Equal Protection Clause because plaintiffs could not connect the city's at-large system with Latino voting power.⁶⁹⁷ Further, voters in Santa Monica twice rejected measures calling for the city to switch to district elections.⁶⁹⁸

The Second District Court of Appeal decided that the trial court made a legal error.⁶⁹⁹ It declared that plaintiffs alleging a CVRA violation had to prove racially polarized voting and

⁶⁹⁰ *Pico Neighborhood Association et al. v. City of Santa Monica*, No. B295935 (265 Cal.Rptr.3d 530).

⁶⁹¹ *Ibid.*

⁶⁹² *Ibid.*

⁶⁹³ *Ibid.*

⁶⁹⁴ Plummer.

⁶⁹⁵ Markman and Johnson, 12.

⁶⁹⁶ *Ibid.*

⁶⁹⁷ *Ibid.*

⁶⁹⁸ Plummer.

⁶⁹⁹ *Pico Neighborhood Association et al. v. City of Santa Monica*, No. B295935 (265 Cal.Rptr.3d 530).

minority vote dilution which affected Latino political power.⁷⁰⁰ If the city withstands future review in the California Supreme Court, it will likely lead more cities to resist CVRA lawsuits.

Amendments to the California Voting Rights Act

In 2014, State Senator Alex Padilla (D-Pacoima) introduced Senate Bill 1365 to expand the CVRA by prohibiting school boards, cities, and counties from gerrymandering districts that could weaken the ability of racial minorities to influence election outcomes.⁷⁰¹ The CVRA only allows a challenge to at-large elections.⁷⁰² Padilla argued that nothing in state law protects minority voters in gerrymandered districts that dilute their influence.⁷⁰³ He wrote that moving from at-large to district elections is only an improvement if new district boundaries are drawn fairly.⁷⁰⁴ Districts drawn inconsistent with the CVRA could have the same negative impact on voter turnout and representation as at-large elections.⁷⁰⁵ SB-1365 would create a process for the public to challenge poorly drawn district lines that undermine the influence of minority communities.⁷⁰⁶ Governor Edmund Brown vetoed the bill, writing that the federal Voting Rights Act and CVRA “already provide important safeguards to ensure that the voting strength of minority communities is not diluted.”⁷⁰⁷

⁷⁰⁰ Ibid.

⁷⁰¹ Christopher Simmons, “Bill to Strengthen California Voting Rights Act Approved by State Assembly - SB 1365,” California Newswire, August 11, 2014.

⁷⁰² Ibid.

⁷⁰³ Ibid.

⁷⁰⁴ Ibid.

⁷⁰⁵ Ibid.

⁷⁰⁶ Ibid.

⁷⁰⁷ “Governor Brown Issues Legislative Update,” Governor Edmund G Brown Jr (State of California, September 30, 2014).

From 2009 to 2016, CVRA lawsuits cost California cities \$20 million in attorney fees, not including cities' in-house costs for city attorneys.⁷⁰⁸ Former State Senator Richard Polanco, the Democrat who authored the CVRA, said the law included legal fee reimbursement in successful suits because lawmakers believed it was better to have local governments pay millions in settlements than deter minority citizens from filing claims because of legal costs.⁷⁰⁹ State lawmakers in 2016 moved to protect cities from massive legal bills, giving them time to avoid CVRA lawsuits.⁷¹⁰ In 2016, Governor Jerry Brown signed AB-2220 and AB-350.⁷¹¹

AB-2220 amended Government Code Section 34866, allowing cities of any size to switch to districts by passing an ordinance.⁷¹² Before AB-2220, Government Code Section 34886 only allowed cities with populations less than 100,000 to transition to district-based elections by ordinance.⁷¹³ Cities with populations over 100,000 were required to place the issue on the ballot for voter approval.⁷¹⁴ The population cutoff created a problem for larger cities that received demand letters.⁷¹⁵

In *Southwest Voter Registration Education Project v. City of Rancho Cucamonga* (2016), Rancho Cucamonga received a demand letter alleging a CVRA violation in December 2015.⁷¹⁶ Because Rancho Cucamonga's population was over 100,000, the city placed the measure on the ballot for voter approval.⁷¹⁷ Before it could put the issue on the November 2016 ballot, the

⁷⁰⁸ David C. Powell, "The California Voting Rights Act and Local Governments," *The California Journal of Politics & Policy*, 5.

⁷⁰⁹ Willon.

⁷¹⁰ James Getz, "Santa Clara Faces Lawsuit over Not Switching to District Elections," Daily Journal, April 6, 2017.

⁷¹¹ Ibid.

⁷¹² Markman and Johnson, 3.

⁷¹³ Ibid.

⁷¹⁴ Ibid.

⁷¹⁵ Ibid.

⁷¹⁶ Ibid, 11.

⁷¹⁷ Ibid.

plaintiffs filed a CVRA lawsuit against the city in March 2016.⁷¹⁸ In November 2017, the parties settled the legal action.⁷¹⁹ Eliminating the population cutoff through AB-2220 helped large cities avoid the scenario in Rancho Cucamonga by allowing them to adopt district systems by ordinance.⁷²⁰ If a city places the question of district elections on the ballot, there is a risk that the voters will turn it down, leaving the city to choose between litigation or acting against the voters' decision.⁷²¹

AB-350 amended Elections Code 10010 to include a 45-day "safe harbor" period for cities or school districts that received demand letters to pass a resolution outlining how they would transition from at-large elections.⁷²² If the city adopted this resolution, attorneys could not sue for 90 days.⁷²³ The new law allowed cities 135 days to switch to district elections through the ordinance process after being warned of a CVRA violation.⁷²⁴ In short, a jurisdiction receiving a CVRA demand letter has 45 days to declare its intent to change election systems and 90 days after the declaration to adopt the change.⁷²⁵ If the city misses either of those deadlines, plaintiffs can file a lawsuit.⁷²⁶ AB-350 also placed a \$30,000 limit on the amount that cities could reimburse attorneys or groups that challenged its at-large system if they did not file a lawsuit against the cities.⁷²⁷ If the jurisdiction meets the deadlines, the prospective plaintiff who sent the demand letter can only recover up to \$30,000 in attorney fees.⁷²⁸ If more than one plaintiff

⁷¹⁸ Ibid, 12.

⁷¹⁹ Ibid.

⁷²⁰ Ibid.

⁷²¹ Ibid.

⁷²² Ibid, 4.

⁷²³ Ibid.

⁷²⁴ Ibid.

⁷²⁵ Ibid.

⁷²⁶ Ibid.

⁷²⁷ Ibid, 5.

⁷²⁸ Ibid.

requests attorney fees, the cumulative reimbursement to all prospective plaintiffs is capped at \$30,000.⁷²⁹

Switching from At-Large to By-District Elections

Vote dilution claims in city council elections center on at-large systems. In at-large elections, every seat is decided by all the city's voters. If voting preferences are split along racial lines, a cohesive racial majority will win all available seats, disenfranchising the minority bloc. Reformers turned to by-district elections, which divide the city into single-member districts.⁷³⁰ By design, the CVRA encourages a switch to by-district elections in two ways: it eliminates attorney costs and lowers the legal threshold for winning a vote dilution case. City governments are responsible for plaintiffs' legal fees in city losses and settlements. Local governments are encouraged to adopt by-district elections to avoid costly legal battles preemptively. From 2018 to 2021, over eighty California cities began or completed a switch to by-district elections under the CVRA.⁷³¹

In the 1982 amendment of the Voting Rights Act, Congress declared that for protected groups to have equal opportunity to participate in the political process and elect representatives of their choice, cities and states must create majority-minority districts.⁷³² Creating majority-minority districts is the standard method for securing minority representation in local government.⁷³³ Majority-minority districts are electoral districts drawn with a sufficient minority

⁷²⁹ Ibid.

⁷³⁰ Zach Hertz, "Has a Switch to by-District City Council Elections in California Reduced the Minority Turnout Gap?" MIT Election Lab, December 7, 2021.

⁷³¹ Ibid.

⁷³² "Minority Majority Districts," US Legal.

⁷³³ Gary M. Segura and Nathan D. Woods, "Majority-Minority Districts, Co-Ethnic Candidates, and Mobilization Effects."

population so they can elect their preferred candidates.⁷³⁴ Bobo and Gilliam (1990) found that majority-minority districts mobilize minority voters.⁷³⁵ Creating majority-minority districts influences voters' ability to elect their preferred candidates, thus empowering excluded groups and increasing their incentives to vote. While incumbency may briefly impede success, majority-minority districts have generally led to successful attempts to elect preferred candidates.

Descriptive representation increases underrepresented groups' sense of political efficacy, trust in government, and legitimacy of the governing regime. Mansbridge (1999) found that descriptive representation produces substantive benefits for minority populations by increasing minority political participation.⁷³⁶ Barreto, Segura, and Woods (2004) found that descriptively similar candidates lead to increased turnout by the represented population.⁷³⁷ Barreto found that Latinos vote more in majority-Latino districts, contrary to those who expected or feared minority demobilization. Similarly, Segura and Woods (2006) found that majority-minority districts and co-ethnic representation increase the likelihood that Latino voters turn out on election day.⁷³⁸

Small district sizes can advantage political outsiders with less money and experience. They can gain support from their local communities through face-to-face contact rather than large-scale campaigns. Berry and Dye (1979) found a significant relationship between at-large elections and Black underrepresentation.⁷³⁹ Data showed that for African Americans in city elections, multi-member districts significantly reduce minority representation. They found that

⁷³⁴ Ibid.

⁷³⁵ Lawrence Bobo and Franklin D. Gilliam, "Race, Sociopolitical Participation, and Black Empowerment," *American Political Science Review* 84, no. 2 (1990): pp. 377-393.

⁷³⁶ Jane Mansbridge, "Should Blacks Represent Blacks and Women Represent Women? A Contingent 'Yes,'" *The Journal of Politics* 61, no. 3 (August 1999): pp. 628-657.

⁷³⁷ Matt A. Barreto, Gary M. Segura, and Nathan D. Woods, "The Mobilizing Effect of Majority–Minority Districts on Latino Turnout," *American Political Science Review* 98, no. 1 (2004): pp. 65-75.

⁷³⁸ Gary M. Segura and Nathan D. Woods, "Majority-Minority Districts, Co-Ethnic Candidates, and Mobilization Effects," *Pennsylvania State University*, 2006.

⁷³⁹ Barbara L. Berry and Thomas R. Dye, "The Discriminatory Effects of At-Large Elections," *Florida State University Law Review* 7, no. 1 (1979).

Black representation is significantly greater in cities with district elections than at-large elections. At-large elections were the most important variable in explaining Black underrepresentation on city councils and significantly reduced Black representation. Reforms lead to a closer alignment between the size of the minority population and its descriptive representation in large, segregated districts.

The shift to by-district elections has not come without controversy. The city attorney for Modesto argued that the CVRA failed to establish the benefits of a switch to by-district elections on minority populations.⁷⁴⁰ Critics suggest that adopting by-district elections has led to the election of fewer minority officials than expected.⁷⁴¹ These criticisms and the magnitude of this institutional reform raise a question: has a switch to by-district elections increased minority influence on election outcomes? Previous work investigating a link between by-district elections and increased descriptive representation fails to reach a definitive conclusion.⁷⁴² While substantial evidence has shown that by-district elections result in greater representation of Black and Latino populations, additional studies have found no effect, with others that posit a negative association between district elections and minority electoral success.⁷⁴³

If the CVRA aims to increase the ability of minorities to elect their preferred candidate, the law is a success. If the goal of the CVRA is to increase descriptive representation for minority voters proportionate to their electoral weight, the CVRA has been slow to produce results. Most cities have only recently transitioned to district elections, which makes it difficult to fully analyze the effects of the CVRA. Without community empowerment and mobilization,

⁷⁴⁰ Hertz.

⁷⁴¹ Ibid.

⁷⁴² Ibid.

⁷⁴³ Ibid.

switching to districts may not result in higher levels of descriptive representation.⁷⁴⁴ Even still, the recent proliferation of CVRA cases and legal threats sets the stage for work investigating whether the reform has led to a measurable improvement in minority representation.⁷⁴⁵

Collingwood and Long (2019) examined whether a CVRA-induced switch to by-district elections increases descriptive representation on city councils.⁷⁴⁶ They found that switches to by-district elections lead to a 10% improvement in minority representation and a 20% increase in cities with large Latino populations. City councils have a national average of six seats. A 10% treatment effect may be less than a seat and unmeasurable at the candidate level. Collingwood and Long reinforced previous findings about the importance of minority population share. They also highlighted another limitation of the literature, which exclusively uses descriptive representation as a metric for success. Because city council seats are all-or-nothing, if a CVRA-induced switch to district elections leads to a 10% increase, using descriptive representation to measure the CVRA's success will miss potential positive effects. Absent a minority electoral victory, the CVRA could still increase council responsiveness to minority concerns by creating districts where minority groups are a larger share of the electorate and have increased electoral influence.

As the Supreme Court predicted in *Thornburg v. Gingles*, Trounstine and Valdini (2008) found effects of a switch to by-district elections are most pronounced in cities with large, geographically concentrated minority populations.⁷⁴⁷ In cities where whites are a larger majority, the white population has greater electoral influence. Trounstine and Valdini noted that previous

⁷⁴⁴ Richomme, 56.

⁷⁴⁵ Hertz.

⁷⁴⁶ Collingwood and Long, 731-762.

⁷⁴⁷ Jessica Trounstine and Melody E. Valdini, "The Context Matters: The Effects of Single-Member versus at-Large Districts on City Council Diversity," *American Journal of Political Science* 52, no. 3 (2008).

studies failed to account for the city's racial composition. District elections led to increased co-ethnic candidates when a minority group was highly concentrated and constituted a large share of the population. In their study, the effect of the electoral system was not constant across all people of color, nor was it across gender. Race and gender interact to produce different results. Districts were a key factor in increasing ethnic diversity but hurt the chances of electing female council members. Minorities benefited from residential segregation and group size, whereas women benefited from the multi-candidate setting of at-large elections. If minorities are highly concentrated in particular areas, switching to districts can guarantee their seats where they constitute a local majority. Abott and Magazinnik (2020) identified a causal link between electoral institutions and Latino political success in local government.⁷⁴⁸ They found a positive effect of switching to district elections on Latinos' election chances in districts with high levels of residential segregation. Descriptive representation, while an important measure of representation, is not the only lens through which to evaluate the CVRA.

When analyzing congressional districts, Fraga (2018) found that minority turnout is higher when a minority group makes up a substantial portion of the potential electorate, even when controlling for co-ethnic candidates, electoral competition, or other demographic factors.⁷⁴⁹ He found a causal relationship between turnout increases and assignment to a majority-minority district. He established a causal link between districting and reducing the turnout gap. Turnout rate played a significant role in reducing disparities in minority representation. His findings suggest that voters' perceptions of their electoral environment and electoral influence shape their political behavior. Fraga found that the size of the minority population within a district was a

⁷⁴⁸ Carolyn Abott and Asya Magazinnik, "At-Large Elections and Minority Representation in Local Government," *American Journal of Political Science* 64, no. 3 (July 18, 2020).

⁷⁴⁹ Bernard L. Fraga, *The Turnout Gap: Race, Ethnicity, and Political Inequality in a Diversifying America* (Cambridge: Cambridge University Press, 2018).

stronger driver of minority turnout than shared candidate ethnicity. Asian American candidates increased pan-ethnic turnout, but the result was conditional on the percentage of Asian Americans in the district.

A switch from at-large to by-district elections may not immediately produce the intended result of descriptive representation. The head of MALDEF, Thomas Saenz, argued that the sluggish increase in minority representatives is not necessarily a failure.⁷⁵⁰ He said, “Latino voters get to elect a candidate of their choice. That’s not always a Latino candidate.”⁷⁵¹ Many CVRA suits have occurred in cities that lack the resources to immediately field minority candidates following the switch to by-district elections.⁷⁵² The conflation of candidates of a protected class’s choice with co-ethnic candidates fails to consider elections with no co-ethnic candidates and, therefore, no chance to measure descriptive representation. The CVRA was not just designed to elect minorities to local government. It was also created to increase geographical diversity and responsiveness on councils. Because minority turnout shapes local officials' behavior, non-coethnic candidates could still be responsive to an engaged minority group.

Hajnal and Trounstine (2007) identified voter turnout as a barrier to minority representation in local politics.⁷⁵³ They argued that switching to district elections would increase minority representation and participation. Fraga's (2018) theory of electoral influence found higher minority turnout in cities where they formed a substantial share of the population and could influence election outcomes. Fraga's model provides compelling evidence for using minority turnout to gauge minority electoral influence. Hajnal (2009) found that switching from

⁷⁵⁰ Willon.

⁷⁵¹ Ibid.

⁷⁵² Abott and Magizinnik, 721.

⁷⁵³ Zoltan Hajnal and Jessica Trounstine, “Transforming Votes into Victories: Turnout, Institutional Context, and Minority Representation in Local Politics.”

at-large to by-district elections decreased Hispanic-white and Asian-white turnout gaps.⁷⁵⁴

Hajnal suggested that differences in minority turnout at the city council level led to striking imbalances in minority representation and distribution of public goods. He found that the effects of uneven turnout are particularly pronounced at the city council level. His work provides a convincing argument for using minority turnout to measure the CVRA's efficacy in improving minority electoral influence. His findings proved that CVRA redistricting could address racial inequalities and lead to more responsive and equitable governance.

In his study on the effects of a switch from at-large to by-district elections, Zachary Hertz found evidence that a CVRA-induced switch to district elections reduces turnout disparities between Hispanics and Asians compared with whites.⁷⁵⁵ Hertz found that adopting districts decreased the turnout gap by 5.6 percentage points for Hispanic Americans and nearly 26 percentage points for Asian Americans. The switch to by-district elections did not have a statistically significant effect on the turnout gap for African Americans. Hertz expected the effects to be largest when minority groups constitute a sizeable population share. While he hypothesized that these effects would be stronger in cities where a minority group is a larger share of the total population, he found that switching to by-district elections is stronger in cities where minorities are a lower share of the population. Hertz found evidence that treatment effects are more pronounced in cities where Hispanics have a lower population share. Trounstein and Valdini found that district elections improve Hispanic representation when they are geographically concentrated. Hertz's data did not include measures of geographical

⁷⁵⁴ Zoltan L. Hajnal, "Who Loses in American Democracy? A Count of Votes Demonstrates the Limited Representation of African Americans," *American Political Science Review* 103, no. 01 (2009): pp. 37-57.

⁷⁵⁵ Zachary Hertz, "Analyzing the Effects of a Switch to By-District Elections in California," *Massachusetts Institute of Technology*, July 19, 2021.

concentration, so it is possible that cities with smaller Hispanic populations more easily create majority-minority districts.

California's city governments are diverse in size and demographics.⁷⁵⁶ Some argue that district elections are beneficial in some cities and detrimental in others. Switching to district elections can make it difficult to pass controversial measures that could benefit the whole city.⁷⁵⁷ For example, individual districts may oppose affordable housing in their neighborhoods. In less populated cities, a candidate could win with a small number of votes in district elections. Eric Dunn, an attorney for the city of Hesperia, said the demand letter was the main driver of Hesperia's switch to district elections.⁷⁵⁸ Hesperia, which is nearly 50% Latino, had an all-white city council when they received the legal threat.⁷⁵⁹ Dunn argued that Hesperia is well-integrated, making it difficult to create a Latino majority-minority district.⁷⁶⁰

Douglas Johnson of National Demographics Corporation, which has advised dozens of cities in voting rights cases, argued that Latinos made the most gains in cities where grassroots efforts rather than legal threats drove the switch to district elections.⁷⁶¹ Many factors affect the influence of district elections. These factors include the presence of other communities of color, district boundaries, quality of candidates, presence of several minority candidates, and willingness of the city council to appoint minority candidates in the case of vacancy.⁷⁶² Most local elections have notoriously low turnout rates.⁷⁶³ Without strong candidates, higher turnout, or voter registration, district elections do not necessarily guarantee minority descriptive

⁷⁵⁶ Plummer.

⁷⁵⁷ Ibid.

⁷⁵⁸ Willon.

⁷⁵⁹ Ibid.

⁷⁶⁰ Ibid.

⁷⁶¹ Ibid.

⁷⁶² Richomme, 64.

⁷⁶³ Ibid.

representation in proportion to the community's demographics.⁷⁶⁴ If grassroots efforts and community mobilization do not supplement the work of voting rights attorneys, the results may be more modest than anticipated.⁷⁶⁵

Switching to district elections has its limits. When cities are well integrated, drawing majority-minority districts may not be feasible. The language of the CVRA does not limit remedies to district systems. Alternative voting systems, such as cumulative or ranked choice voting, can supplement plurality elections when it is difficult to draw majority-minority districts.⁷⁶⁶ In Mission Viejo, the city imposed a cumulative voting system in which voters can cast as many as five votes for a single candidate.⁷⁶⁷ Alternative voting systems could be the next step for electoral reform. The CVRA remedies at-large systems in cities with racially polarized voting patterns that dilute the minority vote. These election systems generally feature bloc voting, but not all at-large systems feature bloc voting. At-large elections that provide proportional representation, such as those with cumulative or ranked-choice voting, can remedy vote dilution.

Asian Americans represent an emergent case within the study of minority vote dilution and the CVRA. The Asian American community has long faced barriers to voting, but its relatively small size and heterogeneity have not previously warranted examinations of vote cohesion. It is important to study Asian Americans as a racially polarized pan-ethnic group in light of mass transitions to by-district elections in California cities. The residential integration of Asian Americans has not yet translated into political and social integration. Asian Americans are the least likely among other racial groups within California to reside in a majority-Asian

⁷⁶⁴ Ibid, 64.

⁷⁶⁵ Ibid, 68.

⁷⁶⁶ Jennifer Pae, "The California Voting Rights Act: Constitutional, Flexible, Powerful," FairVote, June 14, 2018.

⁷⁶⁷ Richomme, 56.

neighborhood.⁷⁶⁸ Three percent of the state’s Asian American population lives in these neighborhoods.⁷⁶⁹ In comparison, 85% of whites reside in majority-white areas, 29% of Blacks live in majority-Black areas, and 44% of Latinos live in majority-Latino areas.⁷⁷⁰ Wendy Cho and Bruce Cain write that the “Asian American experience is unusually multiracial and almost evenly divided between those who live in predominantly white neighborhoods and those who live in more heavily Latino and/or black neighborhoods.”⁷⁷¹ The Legislature incorporated flexibility into the CVRA to provide minority communities with voting rights protections despite integrated residential patterns.

⁷⁶⁸ Gordon H. Chang, *Asian Americans and Politics: Perspectives, Experiences, Prospects* (Washington, D.C.: Woodrow Wilson Center Press, 2001), 136.

⁷⁶⁹ *Ibid.*

⁷⁷⁰ *Ibid.*

⁷⁷¹ *Ibid.*

Chapter Four: *Yumori-Kaku. v. City of Santa Clara*

“The existence of the town of Santa Clara is virtually coeval with California’s statehood. In many ways Santa Clara’s story can be viewed as a microcosm of the history of the Golden State, a reflection of its diversity, growth and maturation. Like its home state, Santa Clara continues to be ‘a place of promise.’”

– Lorie Garcia, George Giacomini, and Geoffrey Goodfellow, *A Place of Promise: The City of Santa Clara (1852-2992)*, December 1, 2002⁷⁷²

The City of Santa Clara

The City of Santa Clara adopted its charter in 1951, establishing a council-manager form of government.⁷⁷³ The charter included a numbered-post at-large system of elections for the city council, whose members held four-year terms.⁷⁷⁴ In a numbered post system, each seat has a number: Council Member Seat No. 1, Council Member Seat No. 2, and so on. The city council comprised seven members, including the mayor.⁷⁷⁵ Candidates running for local office would choose individual seats with no geographical restrictions, and the citywide plurality would pick the winner of each seat.

Over the past three Census counts of Santa Clara, data reveals that the city has become more diverse. The non-Hispanic white share of Santa Clara’s population fell from 48% in 2000 to 36% in 2010 to 30% in 2020.⁷⁷⁶ From 2000 to 2010, the number of Asians grew by 48%, Hispanics grew by 38%, and African Americans/Blacks grew by 37%.⁷⁷⁷ In the 2010 Census,

⁷⁷² Lorie Garcia, George Giacomini, and Geoffrey Goodfellow, *A Place of Promise: The City of Santa Clara, 1852-2002* (Santa Clara, CA: City of Santa Clara, 2002).

⁷⁷³ Getz.

⁷⁷⁴ *Wesley Kazuo Mukoyama v. City of Santa Clara* (17CV308056, 2017).

⁷⁷⁵ *Ibid.*

⁷⁷⁶ Shelley Lapkoff and Jeanne Gobalet, “Report on Demographic Characteristics and Voting Patterns of Residents of the City of Santa Clara, California,” Demographers (Lapkoff & Gobalet Demographic Research, Inc., September 12, 2011), 1-2.

⁷⁷⁷ *Ibid.*, 2.

these groups made up 39%, 19%, and 3% of the total population in Santa Clara.⁷⁷⁸ In the 2020 Census, the Asian population in Santa Clara grew to 46%, while the Hispanic share fell to 16%, and the Black share stayed at 3%.⁷⁷⁹ The federal and California Voting Rights Acts label these populations “protected groups.”

Despite the growth in numbers, Asian Americans exhibit relatively low citizenship rates, which reduces their potential political influence. While 93% of Santa Clara whites were citizens in 2010, only 53% of Asians and 68% of Hispanics were citizens.⁷⁸⁰ The relatively low Asian and Hispanic citizenship rates suggest that many of these people could be recent immigrants or temporary residents. As a result, among the Citizen Voting Age Population (CVAP), 53% were non-Hispanic White, 26% were Asian, and 15% were Hispanic.⁷⁸¹ Asian and Hispanics shares of the potential electorate in 2010 were far smaller than their shares of the total population. Low Asian and Hispanic citizenship rates mean fewer members of these groups are eligible to run for office.

The City of Santa Clara provided election data from 1979 to 2010 that identified candidates who were Asian and Hispanic.⁷⁸² During this period, 157 candidates ran for office. Of those 157 candidates, four were Asian American (Nam Nguyen ran twice, Gap Kim once, and Mohammed Nadeem once), and one was Hispanic (Mike Rodriguez ran once).⁷⁸³ This election history made Santa Clara vulnerable to challenges under the California Voting Rights Act for two reasons: minority candidates never won city council elections from 2000 to 2010, and few minority candidates had ever run for office.

⁷⁷⁸ Ibid.

⁷⁷⁹ “U.S. Census Bureau Quickfacts: Santa Clara City, California,” QuickFacts (U.S. Census Bureau, 2020).

⁷⁸⁰ Lapkoff and Gobalet, 4.

⁷⁸¹ Ibid.

⁷⁸² Ibid, 7.

⁷⁸³ Ibid.

Lawsuit Background

In 2011, Robert Rubin, a civil rights attorney who previously resolved a dozen CVRA cases, sent a demand letter to the City of Santa Clara, citing the city's potential violations of the California Voting Rights Act.⁷⁸⁴ After receiving the letter, Santa Clara began to consider changes to its electoral system, and the city convened a Charter Review Committee to analyze demographic evidence and election history.⁷⁸⁵ The Committee solicited proposals to study Santa Clara's election system and find evidence of racially polarized voting.⁷⁸⁶ A demographic research firm provided several reports to the Committee on election demographics and voting patterns.⁷⁸⁷ Based on such evidence, the Committee acknowledged that Santa Clara appeared to violate the Act, given its large number of protected members and their lack of representation on the city council.⁷⁸⁸ The Committee recommended the city abandon its numbered-post system and move to a pure at-large system.⁷⁸⁹ The city council did not adopt the Committee's proposal, despite the Committee's concerns that if the city were sued under the CVRA, it would be challenging to defend its election system.⁷⁹⁰

In March 2017, Santa Clara resident Wesley Mukoyama, represented by Robert Rubin, the Asian Law Alliance, and Goldstein, Borgen, Dardarian & Ho, filed a voting rights lawsuit against the Santa Clara.⁷⁹¹ The suit charged that minority voters could not influence city elections because the at-large system diluted the minority vote.⁷⁹² They noted that not a single

⁷⁸⁴ Getz.

⁷⁸⁵ Ibid.

⁷⁸⁶ *Wesley Kazuo Mukoyama v. City of Santa Clara* (17CV308056, 2017).

⁷⁸⁷ Ibid.

⁷⁸⁸ Ibid.

⁷⁸⁹ Ibid.

⁷⁹⁰ Ibid.

⁷⁹¹ Schuk.

⁷⁹² Ibid.

Asian American had won a seat on the city council since 1951.⁷⁹³ The complaint alleged that racially polarized voting existed in the city, as evidenced by the difference between Asian American voter choices (who tend to prefer candidates of their ethnic background) and non-Asian American voter choices.⁷⁹⁴

At the time of the trial in 2018, Santa Clara had a population of 125,000.⁷⁹⁵ Asian Americans accounted for 39.5% of the total population and 30.5% of its Citizen Voting Age Population.⁷⁹⁶ Latinos made up 16.9% of the total population and 15% of eligible voters.⁷⁹⁷ Non-Hispanic whites and Blacks constituted 46.3% of Santa Clara residents and 51% of eligible voters.⁷⁹⁸

Table 1: Percentage of Santa Clara Residents by Race⁷⁹⁹

	NHWB	Asian	Latino
Residents	46.3%	39.5%	16.9%
Eligible Voters	51.0%	30.5%	15.0%
Actual Voters	64.1%	21.2%	14.7%

In the 2016 city council election, five Asian Americans ran for seats on the council, yet none were elected.⁸⁰⁰ Several of these candidates were the preferred choice of Asian American voters as found in voting rights analysis conducted by the plaintiffs' expert, Dr. Kousser.⁸⁰¹ Co-counsel Laura Ho of Goldstein, Borgen, Dardarian & Ho stated, "This lack of representation is exactly why California has outlawed at-large voting systems where there is racially polarized

⁷⁹³ Robert Rubin and Richard Konda, "Voting Rights Suit Charges That Santa Clara's Voting System Discriminates against Asian American Voters," Asian Law Alliance, March 30, 2017.

⁷⁹⁴ *Wesley Kazuo Mukoyama v. City of Santa Clara* (17CV308056, 2017).

⁷⁹⁵ Ibid.

⁷⁹⁶ Ibid.

⁷⁹⁷ Ibid.

⁷⁹⁸ Ibid.

⁷⁹⁹ Ibid.

⁸⁰⁰ Robert Rubin and Richard Konda, "Voting Rights Suit Charges That Santa Clara's Voting System Discriminates against Asian American Voters," Asian Law Alliance, March 30, 2017.

⁸⁰¹ Ibid.

voting.”⁸⁰² Co-counsel Richard Konda, Executive Director of the Asian Law Alliance, stated, “It is well past time for the Asian American community to be able to have its voice at the table in the City of Santa Clara. Given the racially polarized voting we have found, district-based elections will be the first step in the right direction.”⁸⁰³ The plaintiff’s counsel also cited that every voting rights case filed under the CVRA successfully changed the targeted city’s election system from at-large to by-district elections.⁸⁰⁴

New laws allowing elected bodies to “self-correct” CVRA violations without penalty did not affect Santa Clara’s case because Rubin advised the city of its possible CVRA violation 161 days before filing the lawsuit.⁸⁰⁵ After filing the complaint, Rubin said, “The new law certainly didn’t affect us because it was a longstanding issue. I wrote a letter to them in 2011, and the city failed to respond. What we allege goes back over 50 years since an Asian-American has never been elected to the city council.”⁸⁰⁶ After Rubin filed the lawsuit, the city created a new Charter Review Committee to explore election changes in 2017.⁸⁰⁷ The city pushed back against the case, to which Rubin responded, “I always give the jurisdiction a chance. A demand letter, and then at least several weeks or even months before taking action. I think six years is long enough to remedy the position. If they want to come forward with a more straightforward process, that’s fine, but I don’t want to hear about commissions as a way to hold up litigation.”⁸⁰⁸

Brian Doyle, Santa Clara’s interim city attorney, said he spoke to Rubin shortly after he filed the lawsuit.⁸⁰⁹ Doyle said, “I’m a little bit confused about the timing of this because we’re

⁸⁰² Ibid.

⁸⁰³ Ibid.

⁸⁰⁴ Ibid.

⁸⁰⁵ Schuk.

⁸⁰⁶ Getz.

⁸⁰⁷ Ibid.

⁸⁰⁸ Ibid.

⁸⁰⁹ Ibid.

already in the process of amending our charter to allow district elections. I'm not sure what a lawsuit would produce."⁸¹⁰ In July 2017, the city council adopted recommendations from the 2017 Charter Review Committee to amend the city charter by splitting the city into two districts and allowing voters to rank their preferences.⁸¹¹ Rubin argued the commission was inadequate because "there's no promise the commission will even address the issue. They had a similar problem in 2011. They met and didn't even consider the issue."⁸¹² To further emphasize the time that had passed without action, Rubin stated, "Santa Clara has had an inordinate amount of time to consider election systems. We have had conversations with the City Attorney going back to Elizabeth Silver, Ren Nosky, and now Brian Dole."⁸¹³ Richard Konda of Asian Law Alliance said this fact motivated the plaintiff, Wesley Mukoyama, explaining, "When he saw the commission failed to reach any consensus, he was not happy. He was hoping they would do what was necessary through the charter process, but they didn't."⁸¹⁴ The city created Charter Review Committees that convened in 2011, 2012, and 2017 to address this problem. Each year, the Committee recognized the growing Asian and Latino populations but failed to recommend successful changes to the City's election methods, ignoring the protected groups' lack of political power.

Legal Framework

The trial court considered the city's at-large method of electing city council members and analyzed evidence of racially polarized voting.⁸¹⁵ The federal and California Voting Rights Acts

⁸¹⁰ Ibid.

⁸¹¹ *Wesley Kazuo Mukoyama v. City of Santa Clara* (17CV308056, 2017).

⁸¹² Getz.

⁸¹³ Schuk.

⁸¹⁴ Getz.

⁸¹⁵ Ibid,

both disfavor at-large election systems because such election systems can dilute the minority vote (*Thornburg v. Gingles*, 1986); *Sanchez v. City of Modesto*, 2006).⁸¹⁶ The California Voting Rights Act declares that “an at-large method of election may not be imposed or applied in a manner that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the dilution or the abridgment of the rights of voters who are members of a protected class, as defined pursuant to Section 14026.”⁸¹⁷ The term “protected class” means “a class of voters who are members of a race, color, or language minority group, as this class is referenced and defined in the federal Voting Rights Act of 1965.”⁸¹⁸ A city’s election system violates the CVRA if there is evidence of racially polarized voting, which means voting where there is a difference “in the choice of candidates or other electoral choices that are preferred by voters in a protected class, and in the choice of candidates and electoral choices that are preferred by voters in the rest of the electorate.”⁸¹⁹

To determine if cities violate the federal Voting Rights Act, the landmark Supreme Court case *Thornburg v. Gingles* (1986) instructs courts to determine if cities meet three “preconditions.”⁸²⁰ If the cities meet the three preconditions, *Gingles* requires courts to consider the “totality of the circumstances” in deciding if the challenged electoral process impairs the minority group’s ability to elect representatives of its choice or influence election outcomes.⁸²¹

Though the CVRA is modeled after the federal VRA and incorporates federal case law interpreting provisions of the federal VRA, the laws differ in four respects. Under the CVRA, the first *Gingles* precondition—if there is a compact majority-minority district —is not considered

⁸¹⁶ Ibid.

⁸¹⁷ *Wesley Kazuo Mukoyama v. City of Santa Clara* (17CV308056, 2017).

⁸¹⁸ Ibid.

⁸¹⁹ Ibid.

⁸²⁰ Ibid.

⁸²¹ Ibid.

until the remedies phase of the trial.⁸²² The CVRA adds express circumstances and factors to *Gingles*' "totality of the circumstances" analysis.⁸²³ Further, the CVRA does not consider "proof of intent on the part of the voters or elected officials to discriminate against a protected class," as defined in the federal Voting Rights Act.⁸²⁴ The CVRA protects the rights of minority groups to elect their preferred candidates or influence election outcomes. These differences are consistent with the legislative intent for the CVRA to "provide a broader cause of action for vote dilution than was provided for by federal law" (*Sanchez v. Modesto*, 2006).⁸²⁵

CVRA cases have two phases: liability and remedies. In the liability phase, the court determines whether an at-large election system violates the CVRA. If the court finds that the system dilutes the minority vote, the case proceeds to the remedies phase. In the remedies phase, the court considers how the city should remedy the violation. Remedies can include a variety of alternative election methods. The liabilities phase of the trial considers the second and third *Gingles* preconditions, which are "the minority group must be able to show it is politically cohesive" and "the minority must be able to demonstrate that the white majority sufficiently votes as a bloc to enable it – in the absence of special circumstances, such as the minority candidate running unopposed – to defeat the minority's preferred candidate" (*Gingles*).⁸²⁶ *Gingles* states that racially polarized voting exists where "there is a consistent relationship between the race of the voter and the way in which the voter votes, or to put it differently, where [minority] voters and [nonminority] voters vote differently."⁸²⁷ This "consistent relationship" between race and voting may be established by the evidence of statistically significant

⁸²² Ibid.

⁸²³ Ibid.

⁸²⁴ Ibid.

⁸²⁵ Ibid.

⁸²⁶ Ibid.

⁸²⁷ Ibid.

differences between the voting patterns of the minority and nonminority group.⁸²⁸ Individual elections can be given more or less weight depending on the circumstances, which include the absence of an opponent, incumbency, or the use of bullet voting. Bullet voting is a tactic used in multi-seat elections where a voter can vote for more than one candidate, but instead votes for only one candidate.⁸²⁹

To find evidence of impaired voting rights, the CVRA states, “The methodologies for estimating group voting behavior as approved in applicable federal cases to enforce the federal Voting Rights Act of 1965 to establish racially polarized voting may be used for purposes of this section to prove that elections are characterized by racially polarized voting.”⁸³⁰ Federal courts have approved two standard methods for identifying racially polarized voting. These methods clarify why the geographical integration of minorities affects the measurement of RPV. The first method is the homogeneous precinct analysis or “the neighborhood model,” which analyzes voting patterns at the precinct level.⁸³¹ The results are compared across homogeneous precincts containing at least a 90% concentration of a single racial or ethnic group. This comparison determines if there are substantial differences in voting patterns between minority precincts and nonminority precincts. The premise of the neighborhood model is that racially polarized voting is more pronounced in homogeneous precincts than in heterogeneous precincts. If voting patterns in a homogeneous precinct are significantly different from those in other homogeneous precincts or the entire city, it can indicate the presence of racially polarized voting.⁸³²

⁸²⁸ Ibid.

⁸²⁹ Ibid.

⁸³⁰ Ibid.

⁸³¹ Ibid.

⁸³² Ibid.

The second method that courts use for voting analysis is ecological regression (ER), which studies the relationship between election outcomes and demographic or socioeconomic factors at the aggregate level rather than at the individual level.⁸³³ This model assesses whether minority candidates can elect their preferred candidates equally and assumes that relationships observed at the aggregate level also hold at the individual level. This assumption can be problematic because it ignores the potential for ecological fallacy, which occurs when conclusions about individual-level relationships are drawn from aggregate-level data.⁸³⁴ By examining the relationship between minority concentration and election outcomes at the aggregate level, ER can provide evidence of vote dilution, which supports a CVRA challenge. When applied to heterogeneous districts, however, ecological regression may not accurately reflect the relationship between covariates and election outcomes because it aggregates data across precincts within a city, which can mask demographic or socioeconomic differences.⁸³⁵

Surname analysis is used in voting rights cases to determine whether a “protected class” of voters has been subjected to minority vote dilution.⁸³⁶ This method analyzes the last names of voters in a jurisdiction to determine the racial or ethnic makeup of the voting population. The California Statewide Database (SWDB) reports the results of surname analysis by registered voters in precincts.⁸³⁷ The SWDB identifies voters with Spanish, Korean, Japanese, Chinese, Vietnamese, Filipino, and Indian surnames.⁸³⁸ While surname analysis can be a useful tool for uncovering evidence of vote dilution, it has several drawbacks such as inaccuracy where a person’s last name does not accurately reflect their background, unreliability when some last

⁸³³ Ibid.

⁸³⁴ Ibid.

⁸³⁵ Ibid.

⁸³⁶ Ibid.

⁸³⁷ Ibid.

⁸³⁸ Ibid.

names may be associated with multiple groups, bias, and limited scope. Even still, surname analysis can be a useful tool for identifying the racial makeup of a jurisdiction or uncovering evidence of vote dilution. Surname analysis found that in Santa Clara, minority populations are not concentrated enough to make up “homogeneous precincts.”⁸³⁹ There are no precincts with more than 39% of voters with Asian surnames and no precincts with more than 29% with Spanish surnames.⁸⁴⁰ The SWDB data reveals that minority voters are geographically integrated in Santa Clara, residing in heterogeneous precincts. Based on data collected from the 2010 Census and the 2012 to 2016 American Community Survey, Santa Clara’s AAPI population is highly heterogeneous.⁸⁴¹

Heterogeneous precincts can challenge ecological regression because the relationship between covariates and election outcomes may vary across communities.⁸⁴² For example, the relationship between minority concentration and election outcomes may be positive in one precinct but negative in another, leading to a null relationship when aggregated across the city.⁸⁴³ Although it may be inappropriate to use ecological regression analysis in a residentially integrated city like Santa Clara, federal courts have accepted ER as a statistical method for determining racially polarized voting.⁸⁴⁴ There has been no ruling on whether this method can apply to integrated communities.⁸⁴⁵

Cases interpreting the federal Voting Rights Act hold that plaintiffs must prove all three *Gingles* preconditions by a “preponderance of the evidence” (*League of United Latin Am.*

⁸³⁹ Ibid.

⁸⁴⁰ Ibid.

⁸⁴¹ Ibid.

⁸⁴² Ibid.

⁸⁴³ Ibid.

⁸⁴⁴ Ibid.

⁸⁴⁵ Ibid.

Citizens v. Perry, 2006).⁸⁴⁶ The “preponderance of the evidence” means that plaintiffs must prove that a significant number of minority group members “usually” vote for the same candidate and that a white bloc vote will “usually” defeat the combined strength of minority support (*Gingles*).⁸⁴⁷ *Gingles* recognizes that “the degree to a racial bloc voting that is cognizable as an element of a vote dilution claim will vary according to a variety of factual circumstances.”⁸⁴⁸ Because courts must consider various factual circumstances, the Voting Rights Act does not require mathematical certainty. As ruled in *United States v. City of Euclid* (2008), an approach may find an inexact mathematical result but “could still be correlative, probative, and sufficiently accurate to bear on the ultimate issue of racial bloc voting.”⁸⁴⁹

The California Legislature enacted the CVRA while considering California’s racial and ethnic diversity (*Sanchez v. Modesto*, 2006).⁸⁵⁰ The CVRA states that many other factors may be probative of a violation; therefore, they can also be considered in determining whether a plaintiff has met their burden. The lens through which courts evaluate voting patterns under the CVRA is broader than what federal courts use. While the CVRA was enacted in 2002 and has been amended several times since then, only three published cases interpret its provisions: *Sanchez v. City of Modesto* (2006), *Rey v. Madera Unified School District* (2012), and *Jauregui v. City of Palmdale* (2014).⁸⁵¹

Santa Clara was vulnerable to a CVRA lawsuit because of its election history. Very few minority candidates ran for office, and those that ran were defeated. While heterogeneous precincts in Santa Clara may render ecological regression inappropriate, the courts have

⁸⁴⁶ Ibid.

⁸⁴⁷ Ibid.

⁸⁴⁸ Ibid.

⁸⁴⁹ Ibid.

⁸⁵⁰ Ibid.

⁸⁵¹ Ibid.

approved this statistical method to prove racially polarized voting. The ecological regression performed by demographic researchers found racially polarized voting in the city, thus rendering Santa Clara vulnerable to charges that its at-large election system violated the California Voting Rights Act.

Trial Court Arguments

In *Wesley Mukoyama v. City of Santa Clara*, the plaintiffs claimed that racially polarized voting patterns systematically blocked the city's Asian American population from electing their candidates of choice.⁸⁵² The plaintiffs noted that Santa Clara has never had an Asian American city councilmember, although nearly 40% of the city's population is Asian American compared with 36% white, and Asian candidates regularly run for city council seats.⁸⁵³ Since adopting the city charter in 1951, only one council member has been Latino, and no council members have been Asian American.⁸⁵⁴ The sole Latino councilmember was Roger Martinez, who served on the city council from 1981 to 1983.⁸⁵⁵ The plaintiffs argued that racially polarized voting existed in city council elections because Asian Americans tended to vote for Asian American candidates, non-Latino whites and Blacks tended to vote for non-Latino whites and Blacks, and Spanish-surnamed voters tended to vote for Latino candidates.⁸⁵⁶ Because of these differences and the city's at-large election system, minority voters could not elect their preferred candidates or influence the outcome of city council elections.

⁸⁵² Ibid.

⁸⁵³ Ibid.

⁸⁵⁴ Ibid.

⁸⁵⁵ Ibid.

⁸⁵⁶ Ibid.

Furthermore, the plaintiffs attempted to avoid litigation without success. In June 2011, the plaintiffs' counsel notified the city that its at-large election system violated the California Voting Rights Act.⁸⁵⁷ Despite creating a Charter Review Committee in 2011, the city did not remedy its election method.⁸⁵⁸ Instead, it continued to hold numbered-post at-large city council elections. When the plaintiffs' counsel notified the city again in October 2016 that they would file a lawsuit unless they changed the election system, the city made no changes to its election method.⁸⁵⁹ In the November 2016 election, no non-white city councilmember was elected.⁸⁶⁰

In the 2012 city council election, two minority candidates ran for open seats: Mohammed Nadeem (Asian American) and Alma Jiminez (Latino), who were both defeated by white candidates.⁸⁶¹ In the 2014 election, two minority candidates ran for open seats: Mohammed Nadeem and Kevin Park (both Asian American), who both lost to white candidates.⁸⁶² In the 2016 election, seven minority candidates ran for open seats (two Latinos and five Asian Americans), and white candidates defeated all the minority candidates.⁸⁶³ The plaintiffs argued that at least some of these minority candidates were the preferred choice of minority city voters and would have been elected to the city council under a district-based system. The plaintiffs proposed district-based elections as a remedy, allowing the ethnic minority population to elect its chosen candidates to the city council. The plaintiffs sought a declaration that the city's at-large method violated the CVRA.⁸⁶⁴ In addition, the plaintiffs sought injunctive relief enjoining the

⁸⁵⁷ Ibid.

⁸⁵⁸ Ibid.

⁸⁵⁹ Ibid.

⁸⁶⁰ Ibid.

⁸⁶¹ Ibid.

⁸⁶² Ibid.

⁸⁶³ Ibid.

⁸⁶⁴ Ibid.

city from using its numbered-post at-large election system and requiring the city to remedy its violation of the CVRA.⁸⁶⁵

The plaintiffs brought two expert witnesses: Dr. Morgan Kousser and Dr. S. Ramakrishnan, to provide evidence of racially polarized voting in Santa Clara City Council elections and testify on past Asian American discrimination and political power.⁸⁶⁶ Dr. Kousser is a professor of history and social science at the California Institute of Technology.⁸⁶⁷ Dr. Ramakrishnan is a professor of public policy and political science at the University of California, Riverside.⁸⁶⁸ Dr. Jeffrey B. Lewis, a professor of political science at the University of California, Los Angeles, testified for the city.⁸⁶⁹

The plaintiffs argued that the at-large election system for city council seats violated the CVRA. They argued that Kousser applied standard statistical methods to relevant election results, which revealed racially polarized voting.⁸⁷⁰ The plaintiffs added that the CVRA allows consideration of other factors, including historical discrimination against Asians and the city's refusal to remedy minority vote dilution.⁸⁷¹ The plaintiffs argued that the evidence of racially polarized voting includes the city's failure to elect an Asian to a city council seat.⁸⁷²

The city argued that plaintiffs failed, by a wide margin, to carry their burden of proof in proving a CVRA violation.⁸⁷³ The city started by explaining that the usual statistical methods used in CVRA cases cannot produce reliable results in Santa Clara because there is not a high

⁸⁶⁵ Ibid.

⁸⁶⁶ Ibid.

⁸⁶⁷ Ibid.

⁸⁶⁸ Ibid.

⁸⁶⁹ Ibid.

⁸⁷⁰ Ibid.

⁸⁷¹ Ibid.

⁸⁷² Ibid.

⁸⁷³ Ibid.

enough concentration of Asians in any precinct.⁸⁷⁴ Even if statistical methods have some probative value, the city argued they showed an absence of racially polarized voting.⁸⁷⁵

Argument 1: Bivariate or Trivariate Analysis

California collects voters' names in each precinct, and precinct-level voting results are public record. To determine voter ethnicity in particular precincts, California has a database of surnames that likely correspond with a specific ethnicity.⁸⁷⁶ In 2010, the Census reported that Santa Clara had approximately 115,000 residents.⁸⁷⁷ Expert witnesses relied on surnames as a proxy for race and ethnicity classifications. Kousser separated the city's population into three groups: non-Hispanic whites and Blacks (NHWBs), Latinos, and Asian Americans.⁸⁷⁸ While the city was made up of 46.3% NHWBs and 39.5% Asian Americans, the percentage of actual voters is different at 64.1% NHWBs and 21.2% Asian Americans.⁸⁷⁹ This discrepancy raises the possibility that NHWBs bloc voting could impair the ability of Asian Americans to elect their preferred candidates.

Kousser's analysis grouped Santa Clara's population into NHWBs, Latinos, and Asians and focused on the voting patterns between NHWBs and Asian Americans.⁸⁸⁰ The city challenged Kousser's decision to divide the electorate into NHWBs, Latinos, and Asian Americans. Kousser used a trivariate analysis to compare the voting patterns of Asian Americans to the voting patterns of NHWBs without considering the voting patterns of Latinos. The city

⁸⁷⁴ Ibid.

⁸⁷⁵ Ibid.

⁸⁷⁶ Ibid.

⁸⁷⁷ Ibid.

⁸⁷⁸ Ibid.

⁸⁷⁹ Ibid.

⁸⁸⁰ Ibid.

critiqued the plaintiffs' interpretation of "voters in the rest of the electorate" as stated in the CVRA's definition of "racially polarized voting."⁸⁸¹ The city argued that since Kousser did not compare Asian voting with all "voters in the rest of the electorate," his analysis could not support a CVRA violation. The city noted that the California Legislature recognized that California "faces a unique situation where we are all minorities" (*Sanchez*).⁸⁸² Despite this acknowledgement, the city argued that the CVRA is race-neutral and does not allocate burdens or benefits to groups based on race.⁸⁸³

The plaintiffs argued that the methodologies approved in federal Voting Rights Act case law include "trivariate" analysis like the one performed by Kousser (*Rodriguez v. Harris County*, 2013, *Aldasaro v. Kennington*, 1995).⁸⁸⁴ The plaintiffs argued that because Latinos vote more often for Asian-preferred candidates than NHWB voters, combining Latinos and NHWB voters into a single "non-Asian" group masks differences in voting patterns.⁸⁸⁵ Kousser stated that his trivariate analysis produced more accurate results. In defense of a trivariate analysis, the plaintiffs argued that the plain language in Section 14026 (e) of the CVRA does not require a comparison of candidates preferred by Asians to candidates preferred by all other voters.⁸⁸⁶ The plaintiffs stated that the CVRA only requires a comparison of the voting patterns of Asian Americans to "voters in the rest of the electorate."⁸⁸⁷

⁸⁸¹ Ibid.

⁸⁸² Ibid.

⁸⁸³ Ibid.

⁸⁸⁴ Ibid.

⁸⁸⁵ Ibid.

⁸⁸⁶ Ibid.

⁸⁸⁷ Ibid.

Argument 2: Ecological Inference in Heterogeneous Precincts

Kousser analyzed geography, demographics, and voting patterns in Santa Clara to compare the likely performance of various election systems.⁸⁸⁸ This analysis allowed experts to calculate the number of votes cast for each candidate and the percentage of voters of each ethnicity. The ecological regression method correlated precinct-level election results with the racial or ethnic composition of the broader electorate. Kousser examined city council elections from 2002 to 2016 in which there were Asian American candidates. This analysis is consistent with CVRA requirements. In single-seat elections, the CVRA states that “the occurrence of racially polarized voting shall be determined from examining results of elections in which at least one candidate is a member of a protected class” (14028 subdivision e).⁸⁸⁹

Kousser’s inclusion of elections over fourteen years is important because *Gingles* declared that “a pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences legally significant polarization than are the results of a single election” (*Gingles*).⁸⁹⁰ In addition to city council elections, Kousser examined Santa Clara County School Board (CSB) and Santa Clara Unified School District Board (SCUSD) elections.⁸⁹¹ These “exogenous” elections can be considered when assessing racially polarized voting, though they are not nearly as probative as endogenous elections regarding whether the minority group is politically cohesive (*Luna v. County of Kern*, 2018).⁸⁹² The two candidates who receive the most votes in SCUSD elections win. The CVRA provides that in multi-seat

⁸⁸⁸ Ibid.

⁸⁸⁹ Ibid.

⁸⁹⁰ Ibid.

⁸⁹¹ Ibid.

⁸⁹² Ibid.

elections, “the relative groupwide support received by candidates from members of a protected class shall be the basis for the racial polarization analysis” (14028 subdivision b).⁸⁹³

The city argued that an even more serious problem in applying ecological inference to Santa Clara is that no precinct has a population of Asians greater than 42%.⁸⁹⁴ The city brought in Lewis to testify on behalf of Santa Clara’s at-large election system. His direct testimony focused on the methodological shortcomings of using ecological inference to analyze city council elections. He testified that the reliability of ecological inference depends on the degree of racial and ethnic homogeneity of precincts. He argued that cities analyzed in most federal VRA and CVRA actions include at least some precincts with a high degree of racial and ethnic homogeneity. In Santa Clara, however, Asian Americans at most make up 42% of a precinct’s population.⁸⁹⁵ Lewis concluded that the low level of homogeneity in the city “precludes reliable inferences about the support for various candidates for City Council among Asian voters.”⁸⁹⁶ Kousser argued that the city’s precincts were “sufficiently homogeneous for Asians to permit reliable analysis using ecological techniques.”⁸⁹⁷ Kousser also stated that using ecological inference in the absence of racially homogeneous precincts is consistent with cases involving cities with comparable levels of homogeneity, such as Palmdale and Kern County.⁸⁹⁸

Lewis noted that the level of support for a candidate within homogeneous precincts and the level of candidate support works on a sliding scale—the higher the support, the more accurate the estimates of voting patterns.⁸⁹⁹ Lewis argued the statistical methods lacked tight, informative bounds and produced unreliable estimates if there was both a lack of homogeneous precincts and

⁸⁹³ Ibid.

⁸⁹⁴ Ibid.

⁸⁹⁵ Ibid.

⁸⁹⁶ Ibid.

⁸⁹⁷ Ibid.

⁸⁹⁸ Ibid.

⁸⁹⁹ Ibid.

low levels of candidate support. He testified that the lack of a relatively homogeneous Asian precinct in Santa Clara precluded an analysis from estimating the support for Asian-preferred candidates. In addition, Lewis noted that ecological inference models combine aggregate-level data and apply assumptions about how the support for candidates among members of each ethnic group varies across precincts at the individual level. He said that this process creates “aggregation bias,” where the relationship observed at the aggregate level is not representative of the individual level.⁹⁰⁰

To illustrate how aggregation bias might warp the results of an ecological inference model, Lewis estimated Democratic Party registration using Asians and non-Asians in the city. His ecological inference model estimated the percentages to be 15% and 59%, respectively, but the actual registration numbers were 44% and 51%.⁹⁰¹ He found that the predictions using ecological inference were substantially different from the registration data, thus casting doubt on whether ecological inference could provide any useful output. Lewis testified that this discrepancy might mean something different for city council elections. He testified that the problem with applying ecological inference where there is a low degree of homogeneity make it challenging to establish “cohesion in voting across the diverse national-origin communities that exist within the City of Santa Clara’s broader Asian community.”⁹⁰²

On cross-examination, Lewis stated that he was unaware of how voting behavior in the city’s nonpartisan city elections would be affected by the political party registration of Asians or any other race or ethnicity.⁹⁰³ He also stated that he did not run the ecological inference model to determine registration figures for Republicans, which could have been more accurate than the

⁹⁰⁰ Ibid.

⁹⁰¹ Ibid.

⁹⁰² Ibid.

⁹⁰³ Ibid.

estimates for Asians registered as Democrats. While Lewis only applied ecological inference to the 2016 city council elections as a “proof of concept,” he testified that evidence of racially polarized voting was weak.⁹⁰⁴ Kousser testified that Lewis’s analysis of the Democratic registration of Asians in the city was flawed because significant numbers of Asians express no party preference. Furthermore, Kousser stated that any party affiliation analysis is questionable when the group of interest has no party preference and the elections analyzed are nonpartisan.

Kousser analyzed ten city council elections between 2002 and 2016. Kousser’s ecological inference analysis showed that voting in five of ten city council elections was racially polarized, and the Asian-preferred candidates lost. The parties agreed that there was racially polarized voting in three of these elections: Seat 2 in 2002, Seat 3 in 2004, and Seat 5 in 2014.⁹⁰⁵ The parties agreed that there was no racially polarized voting in five of these elections: Seat 4 in 2004, Seat 2 in 2010, Seat 3 in 2012, Seat 2 in 2014, and Seat 6 in 2016.⁹⁰⁶ The parties disagreed on whether there was racially polarized voting in two elections: Seat 4 in 2016 and Seat 7 in 2016.⁹⁰⁷ Kousser also analyzed nine CSB and SCUSD elections between 2000 and 2016, considering only the votes cast by city residents.⁹⁰⁸ His analysis showed that in six of nine CSB and SCUSD elections, voting was racially polarized, and the Asian-preferred candidates lost. The parties agreed there was racially polarized voting in two elections: 2004 (SCUSD) and 2016 (CSB).⁹⁰⁹ The parties agreed there was no racially polarized voting in three elections: 2000,

⁹⁰⁴ Ibid.

⁹⁰⁵ Ibid.

⁹⁰⁶ Ibid.

⁹⁰⁷ Ibid.

⁹⁰⁸ Ibid.

⁹⁰⁹ Ibid.

2008, and 2012 (CSB).⁹¹⁰ The parties disputed whether there was racially polarized voting in four SCUSD elections: 2008, 2010, 2012, and 2014.⁹¹¹

In cross-examination of Kousser, the city presented tables from his report that showed the support Asian American voters gave to various candidates. Output from Kousser's ecological inference model included the most likely "point estimate" along with a "standard error" associated with the point estimate.⁹¹² The standard error is a measure of the accuracy of the point estimate and can be converted into "confidence intervals" that represent a range within which there is a certain degree of confidence.⁹¹³ The city created graphs illustrating the confidence intervals in Kousser's voting analysis. While the point estimates indicated distinct levels of support by Asian Americans for a given candidate, in some instances, the confidence intervals did not. The city argued that because the 95% confidence intervals overlapped in some cases, Kousser's data showed that the Asian American preferred candidate was indistinguishable. A 95% confidence interval technically "means that if the null hypothesis is that there is no difference between one point estimate and the other point estimate, then five times out of 100 we would say that there was a difference at some level."⁹¹⁴ Without an Asian American preferred candidate, the city argued, the plaintiffs could not show minority vote cohesion.

There was some common ground between the city and the plaintiffs regarding this issue. Lewis and Kousser acknowledged that there is no fixed standard or "bright line" to apply in determining what level of homogeneity is sufficient to permit reliable analysis.⁹¹⁵ Kousser acknowledged that the relatively homogeneous precincts in the city created greater uncertainty,

⁹¹⁰ Ibid.

⁹¹¹ Ibid.

⁹¹² Ibid.

⁹¹³ Ibid.

⁹¹⁴ Ibid.

⁹¹⁵ Ibid.

which was reflected in larger confidence intervals for Asian American voting estimates. Lewis agreed that ecological inference produces results with low levels of reliability, greater uncertainty, and the possibility of significant bias.⁹¹⁶

In the post-trial brief, the plaintiffs cited cases that addressed the use of point estimates and confidence intervals. The plaintiffs asserted that federal VRA court cases regularly exercise flexibility in reviewing statistical evidence. In *Fabela v. City of Farmers Branch* (2012), the court relied on point estimates to find cohesion because there were wide confidence intervals.⁹¹⁷ The broad confidence intervals were because the City of Farmers Branch lacked highly concentrated Hispanic precincts. The court relied on point estimates to find cohesion because it was “undisputed that a point estimate is the ‘best estimate’ for the data.”⁹¹⁸ The court found cohesion despite large confidence intervals in *Benavidez v. City of Irving* (2009) because “the figures produced by an accurate calculation of ecological regression and ecological inference suggest Hispanic political cohesion.”⁹¹⁹

The plaintiffs also cited cases addressing the meaning of “preponderance of the evidence” in the context of statistical analyses.⁹²⁰ They argued that statistical significance could not be conflated with the plaintiffs’ burden to show cohesive voting. In *Turpin v. Merrell Dow Pharms. Inc.* (1992), the court found that “While scientists’ use of confidence intervals is a common-sense device to give professional weight to their results, such confidence intervals are not the same as the preponderance of the evidence standard of proof. This requires proving one’s case by the greater weight of the evidence.”⁹²¹ Plaintiffs also cited the Federal Judicial Center’s

⁹¹⁶ Ibid.

⁹¹⁷ Ibid.

⁹¹⁸ Ibid.

⁹¹⁹ Ibid.

⁹²⁰ Ibid.

⁹²¹ Ibid.

Reference Manual on Scientific Evidence (2011), which cautions equating statistical significance levels, measured by “p-values” of 0.05 and 0.10, and plaintiffs’ burden of proof.⁹²² The manual states, “in some cases, the p-value has been interpreted as the probability that defendants are innocent of discrimination. However, as noted earlier, such an interpretation is wrong.”⁹²³ The plaintiffs noted that the Reference Manual explains why a p-value is an inappropriate stand-in for burden of proof and describes this as a “common error made by lawyers, judges, and academics.”⁹²⁴

Argument 3: Effects of Past Discrimination

The CVRA calls out factors beyond statistical analysis that are probative “to establish a violation of Section 14027.”⁹²⁵ This list includes “the extent to which members of a protected class bear the effects of past discrimination in areas such as education, employment, and health which hinder the ability to participate effectively in the political process.”⁹²⁶ This inclusion is because the CVRA was enacted “to provide a broader cause of action for vote dilution than was provided for by federal law” (*Sanchez*).⁹²⁷

⁹²² Ibid.

⁹²³ Ibid.

⁹²⁴ Ibid.

⁹²⁵ Ibid.

⁹²⁶ Ibid.

⁹²⁷ Ibid.

Table 2: Population, Voting-Age Population, Registration, and Turnout among Ethnic Groups in Santa Clara⁹²⁸

Ethnic Group	Population, 2000	Population, 2016	VAP, 2012-2016	CVAP, 2012-2016	Registration, 2016	Voted, 2016
Non-Hispanic White	48.3	42.8	37.4	47.0	64.0 (includes Black)	64.1 (includes Black)
Asian	30.3	39.5	40.8	30.5	20.9	21.2
Black	2.4	3.5	3.5	4.0	-	-
Latino	16.0	16.9	15.6	15.0	15.0	14.7

The plaintiffs brought Ramakrishnan, an expert on immigrant political and civic participation who testified in three areas. First, he testified on the historical patterns of discrimination and political exclusion of Asians in California that inform present-day disparities in political outreach and participation.⁹²⁹ Second, he testified on the extent to which Asians of different national origins hold similar policy and political preferences.⁹³⁰ Third, he testified on the barriers that Asians face with respect to local political participation, including language barriers and a lack of outreach by political campaigns.⁹³¹

Ramakrishnan detailed how Asians endured continuous discrimination from federal and state laws from the 1850s until at least 1965.⁹³² This discrimination included curtailment of fundamental rights, nationality-based immigration quotas, Japanese internment camps during World War II, and limitations on renting houses and owning land.⁹³³ Ramakrishnan testified that between $\frac{2}{3}$ and $\frac{3}{4}$ of the Asian American residents in Santa Clara are first-generation immigrants.⁹³⁴ He also reviewed documents related to the failed attempt in 2007 to name a

⁹²⁸ Ibid.

⁹²⁹ Ibid.

⁹³⁰ Ibid.

⁹³¹ Ibid.

⁹³² Ibid.

⁹³³ Ibid.

⁹³⁴ Ibid.

business district in Santa Clara “Korea Town,” when citizens submitted inflammatory nationality-based public comments to the city.⁹³⁵ This testimony was relevant to many issues the CVRA instructed the courts to consider.⁹³⁶

Besides his summary of the “Korea Town” events that occurred over a decade ago, the city argued that Ramakrishnan did not focus on any unique circumstances that explained Asian American voting patterns in Santa Clara’s elections.⁹³⁷ The city argued that most Asian American residents were not directly affected by the discriminatory laws and policies before 1965.⁹³⁸ Ramakrishnan conceded that “in the last 20 years... California is very welcoming and integrating towards its immigrant populations.”⁹³⁹ The city also presented evidence showing that Asian Americans have higher levels of education and higher job earnings.⁹⁴⁰ The city argued that this evidence weakened the argument that “discrimination in areas such as education, employment, and health” hinders the ability of some Asians to participate effectively in the political process,” as iterated in Section 14028 (e) of the CVRA.⁹⁴¹

Trial Phase I: Liabilities

On June 6, 2018, the trial court issued its final decision after considering the parties’ written objections and comments. Judge Thomas Kuhnle stated that the four plaintiffs proved by a “preponderance of the evidence” that Santa Clara’s numbered-post at-large election method diluted the Asian American vote.⁹⁴² Judge Kuhnle stated that he went through the statistical data

⁹³⁵ Ibid.

⁹³⁶ Ibid.

⁹³⁷ Ibid.

⁹³⁸ Ibid.

⁹³⁹ Ibid.

⁹⁴⁰ Ibid.

⁹⁴¹ Ibid.

⁹⁴² Ibid.

provided by the plaintiffs' expert, Kousser, and found proof of racially polarized voting in five of ten city council elections from 2002 to 2016. He also considered the historical discrimination of the Asian American community while making his decision, noting that they had suffered because of past discrimination in areas such as education, employment, and health, which hindered their ability to participate effectively in the political process.⁹⁴³

The trial court placed the evidence admitted at trial into four categories: statistical analysis of election results, city election outcomes, practices enhancing vote dilution, and past discrimination.

Trivariate Analysis

The court observed that while the percentage of Santa Clara residents who are non-Hispanic white and Black (46.3%) is not very different from the percentage who are Asian American (39.5%), the percentage of the Citizen Voting Age Population is different, at 64.1% NHWBs to 21.2% Asian American.⁹⁴⁴ The court noted that this disparity "raises the possibility that [non-Hispanic whites and Blacks] bloc voting could impair the ability of Asians to elect preferred candidates."⁹⁴⁵

The court found that the language in Section 14026 (e) of the CVRA permits the use of trivariate analysis in assessing whether there is racially polarized voting in Santa Clara.⁹⁴⁶ The court rejected the city's interpretation of the statutory language as requiring a bivariate analysis comparing Asian American voting patterns with all other voters in the electorate. The plain language, "voters in the rest of the electorate," includes all or part of the other voters, including

⁹⁴³ Ibid.

⁹⁴⁴ Ibid.

⁹⁴⁵ Ibid.

⁹⁴⁶ Ibid.

NHWBs, either alone or combined with Latinos.⁹⁴⁷ The plain language does not require comparison to “all” voters in the rest of the electorate, just “voters in the rest of the electorate.”⁹⁴⁸ The court decided against the city’s argument that the phrase “rest of the electorate” stands alone.⁹⁴⁹

There were two reasons why the court allowed trivariate analysis. First, the CVRA seeks to overcome bloc voting.⁹⁵⁰ Therefore, plaintiffs should be allowed to compare voting patterns between Asian Americans and NHWBs because that difference allegedly causes vote dilution. The court agreed that requiring a comparison of Asian Americans, on the one hand, and NHWBs and Latinos, on the other, could hide evidence of bloc voting. Section 14026 (e) in the CVRA expressly references the federal VRA, and federal cases under the law have endorsed trivariate analysis.⁹⁵¹ In *Aldasoro v. Kennington (1995)*, the court stated, “Plaintiffs’ expert then developed a multivariate analysis that divided the electorate into three groups: (1) Hispanics, (2) Blacks and (3) Anglos and all others (Asians, Native Americans – everyone not Hispanic or Black).⁹⁵² Plaintiffs’ experts regarded multivariate analysis as more accurate than bivariate analysis for El Centro elections. Defense expert Dr. Klein also agreed that “if one relies on ecological regression, multivariate is better than bivariate.”⁹⁵³ Unless the city showed that NHWBs and Latinos voted together cohesively, it would be improper under the federal VRA to include them together in a majority bloc. In *Aldasoro*, the court stated that “numerous cases have refused to

⁹⁴⁷ Ibid.

⁹⁴⁸ Ibid.

⁹⁴⁹ Ibid.

⁹⁵⁰ Ibid.

⁹⁵¹ Ibid.

⁹⁵² Ibid.

⁹⁵³ Ibid.

combine groups that were shown not to be politically cohesive.”⁹⁵⁴ For these reasons, the court found Kousser’s trivariate analysis appropriate for assessing whether the CVRA was violated.

Methodological Disputes

The plaintiffs and the city disputed methodologically in measuring minority vote cohesion in Santa Clara. *Gingles* requires a minority group to be politically cohesive. Political cohesion may be established by “showing that a significant number of minority group members usually vote for the same candidates” (*Gingles*).⁹⁵⁵ In *Monroe v. City of Woodville* (1989), the Mississippi court stated that “statistical proof of political cohesion is likely to be the most persuasive form of evidence, although other evidence may also establish this phenomenon.”⁹⁵⁶ The parties agreed that ecological inference is the best practice for modeling candidate support among voters of a racial group. While ecological inference is considered the best method for analyzing election results, the parties disagreed on whether it was useful for assessing political cohesion in Santa Clara. The issues that the parties debated at trial included: surname error, effects of homogeneity, aggregation bias, and confidence intervals.

The court acknowledged the problem of using surnames as proxies for ethnicities. In most instances, however, the court stated that the correlation between name and ethnicity would likely be correct.⁹⁵⁷ The city did not offer any study or analysis that measured the error level of surname analysis or suggested that surname error could disqualify the use of ecological inference. The court concluded that it should be mindful of this source of potential unreliability but that it was not a basis for rejecting Kousser’s ecological inference results.

⁹⁵⁴ Ibid.

⁹⁵⁵ Ibid.

⁹⁵⁶ Ibid.

⁹⁵⁷ Ibid.

The court also understood the city’s argument that the relative homogeneity of Asians in city precincts makes ecological inference results less reliable. The plaintiffs conceded this point and explained it was the reason for large confidence intervals. Lewis stated that although the lack of reliability precludes its use in this case, he also agreed that there is no bright line at which ecological inference must be ignored.⁹⁵⁸ He also conceded that there are no better statistical methods for determining the voting behavior of different racial groups within Santa Clara, and some information is better than none. In debating the “bright line” standard, the court cited previous decisions in *Luna v. Court of Kern* (2018) and *Rodriguez v. Harris County* (2013). In *Luna v. County of Kern* (2018), “The court need not insist on mathematical exactitude in assessing racial polarization.”⁹⁵⁹ In *Rodriguez v. Harris County* (2013), “The Court finds the ecological inference data imprecise...but the data is nevertheless probative on the question of racial bloc voting.”⁹⁶⁰ The court concluded that the ecological inference results presented by Kousser were less reliable than those generated in more segregated communities, but his ecological inference results were still probative.

Like the methodological difficulties posed by homogeneity, the court understood the city’s concerns that aggregation bias may compromise ecological inference results. The court found that Lewis’s analysis of party registration to illustrate aggregation bias, however, was “fraught with uncertainties” and did not predict voting preferences in nonpartisan candidate races.⁹⁶¹ The court reached the same conclusion as another California district court where this argument was presented: “The court acknowledges the disparity between the estimates produced by ecological regression and ecological inference in Dr. Katz’s analysis of Latino Democratic

⁹⁵⁸ Ibid.

⁹⁵⁹ Ibid.

⁹⁶⁰ Ibid.

⁹⁶¹ Ibid.

registration compared to the known values, but is not persuaded as to the implications that defendants would have the court draw therefrom” (*Luna v. County of Kern*, 2018).⁹⁶² In this case, Katz was unable to explain the relationship between party registration and voting—only to say that they were related—while also acknowledging that they were different and may have distinct geographical distributions.⁹⁶³ The court had no reason to believe that the cause of inflated estimates of Latino Democratic registration was due to insufficient homogeneous precincts, as suggested by Katz.

The court found that ecological inference provided a useful tool to assess political cohesion among Asian American voters in Santa Clara despite the uncertainty and aggregation bias highlighted by the city. The court rejected the city’s claim that potential correlation errors undermined the reliability of ecological inference results. It recognized that the distribution of Asian American voters across precincts would impact statistical results but noted that plaintiffs conceded this as a reason for larger confidence intervals. The court reasoned that although the ecological inference results presented by Kousser were less reliable than those generated in more segregated communities, they were “nonetheless probative.”⁹⁶⁴

Confidence Intervals

The primary argument made by the city was that the 95% confidence interval overlaps among Asian-supported candidates; therefore, the plaintiffs could not show that Asian voters preferred any candidate.⁹⁶⁵ This argument was necessary to prove minority vote cohesion as

⁹⁶² Ibid.

⁹⁶³ Ibid.

⁹⁶⁴ Ibid.

⁹⁶⁵ Ibid.

specified in the CVRA's Section 14026 (e).⁹⁶⁶ The court agreed with two related points made by the plaintiffs regarding confidence intervals: that they were not equivalent to the "preponderance of the evidence" standard, and confidence intervals less than 95% may be sufficient.⁹⁶⁷ The court was comfortable applying 80% confidence intervals to assess whether Asians preferred a candidate.⁹⁶⁸ Given surname error and aggregation bias identified by the city, the court did not believe it appropriate to use a lower confidence interval than 80%.⁹⁶⁹ The city raised many arguments challenging Kousser's ecological inference results as defective, and the court agreed that there was some uncertainty.

The court found that Kousser's ecological inference was probative, and along with the other probative factors outlined in the CVRA, the court still considered the results. In *United States v. Euclid* (2007), the decision stated, "the Court is to employ statistical analysis in aid of its own fact-finding, not to adhere slavishly to it."⁹⁷⁰ In *Fabela v. City of Farmers Branch* (2012), the Texas court used point estimates, which opposed the city's argument.⁹⁷¹ At the 80% confidence interval supported by the plaintiffs in the post-trial brief, there was an Asian American preferred in both contested city council elections. The court agreed that an 80% confidence interval provided sufficiently reliable results. Because there was an Asian American preferred candidate, NHWBs voted differently from Asians, and the NHWB preferred candidate won, the court found racially polarized voting in the two contested elections. Therefore, based on Kousser's analysis of the city council elections, five of ten exhibited racially polarized voting,

⁹⁶⁶ Ibid.

⁹⁶⁷ Ibid.

⁹⁶⁸ Ibid.

⁹⁶⁹ Ibid.

⁹⁷⁰ Ibid.

⁹⁷¹ Ibid.

and five had no racially polarized voting. In all five elections with racially polarized voting, there was also Asian American vote cohesion.

The court similarly evaluated the County School Board and Santa Clara Union School District Board election evidence.⁹⁷² The parties agreed that two of the nine elections were racially polarized, and three were not.⁹⁷³ Of the four elections in dispute, the trial court acknowledged that the plaintiffs could not show a preferred candidate among Asian American voters at 95% confidence intervals.⁹⁷⁴ It could find that there was an Asian American preferred candidate in two elections at the 80% confidence intervals.⁹⁷⁵ Based on these calculations, the trial court found racially polarized voting in four of nine elections between 2000 and 2016.⁹⁷⁶

The city argued that the court “created its own tables” and assumed it was “acceptable” for it “to create its own evidence.”⁹⁷⁷ The court disagreed, asserting that it performed mathematical calculations based entirely on trial evidence.⁹⁷⁸ The court rejected the city’s argument that plaintiffs could not show an Asian American preferred candidate due to overlapping confidence intervals. The court found racially polarized voting in four County School Board elections and no racially polarized voting in five CSB elections.⁹⁷⁹ In each of the four CSB elections with racially polarized voting, there was voting cohesion among Asian American voters.⁹⁸⁰ The court declared, however, that these exogenous elections were not as probative as city council election results.⁹⁸¹

⁹⁷² Ibid.

⁹⁷³ Ibid.

⁹⁷⁴ Ibid.

⁹⁷⁵ Ibid.

⁹⁷⁶ Ibid.

⁹⁷⁷ Ibid.

⁹⁷⁸ Ibid.

⁹⁷⁹ Ibid.

⁹⁸⁰ Ibid.

⁹⁸¹ Ibid.

Special Circumstances

Gingles states that individual elections can be given more or less weight depending on “special circumstances,” including “the absence of an opponent, incumbency, or the utilization of bullet voting.”⁹⁸² *Gingles* advises courts to consider whether a particular election result is representative because “there is no simple doctrinal test for the existence of legally significant racial bloc voting.”⁹⁸³ In *Ruiz v. City of Santa Maria* (1998), the California District Court stated that “unusual circumstances must demonstrate that the election was not representative of the typical way in which the electoral process functions.”⁹⁸⁴

Kousser suggested that the four city council elections in which Dr. Mohammed Nadeem, an Asian American, ran and lost might be considered “special circumstances.”⁹⁸⁵ He argued that the court should disregard or give less weight to the results of these elections. Nadeem lost in the 2010, 2012, 2014, and 2016 city council elections, and the parties agreed that racially polarized voting was not present in these elections.⁹⁸⁶ Kousser noted that in 2011, Nadeem served on the Charter Review Committee and rejected proposals to modify Santa Clara’s election system after the city received a demand letter from Robert Rubin.⁹⁸⁷ Kousser noted further that Nadeem went back and forth on various issues concerning the San Francisco 49ers football team, a contentious issue for Santa Clara voters.⁹⁸⁸

The court did not adopt Kousser’s interpretation of Asian American candidate Nadeem’s four election losses as the likely result of special circumstances.⁹⁸⁹ Judge Kuhnle found the

⁹⁸² Ibid.

⁹⁸³ Ibid.

⁹⁸⁴ Ibid.

⁹⁸⁵ Ibid.

⁹⁸⁶ Ibid.

⁹⁸⁷ Ibid.

⁹⁸⁸ Ibid.

⁹⁸⁹ Ibid.

evidence too speculative to warrant disregarding those elections, four of the five city council elections in which the parties agreed there was no racially polarized voting present.⁹⁹⁰ While the court did not believe Kousser's speculation about Nadeem's voting record rose to the level of "special circumstances," that warranted disregarding Nadeem's election losses, the court agreed that Nadeem's election results in 2012, 2014 and 2016 should be given less weight.⁹⁹¹ The election results revealed that Nadeem's candidate attractiveness diminished over the years among Asian Americans and other voters. In 2010, Nadeem received 46% of the votes. In the next elections, he received 38%, 29%, and then 20% of the vote.⁹⁹² The court decided that Nadeem's poor track record as a candidate was a "reasonable explanation for the lack of Asian American support."⁹⁹³

The court found that Kousser's analysis of election results support a finding that RPV occurred in city council elections from 2002 to 2016. Kousser examined ten elections "in which at least one candidate is a member of a protected class" (14028 subdivision b).⁹⁹⁴ The court found that the results of five of the ten city council elections analyzed show racially polarized voting, and six of the ten elections show cohesive Asian American voting. Nadeem ran in four elections with no racially polarized voting, so the court applied less weight to those elections.

City Election Outcomes

It is undisputed that no Asian American has ever been elected to the city council since the founding of Santa Clara's charter. From 2002 to 2016, Asian American candidates ran ten times

⁹⁹⁰ Ibid.

⁹⁹¹ Ibid.

⁹⁹² Ibid.

⁹⁹³ Ibid.

⁹⁹⁴ Ibid.

and lost each time. The CVRA requires the court to consider the extent to which candidates who are members of a protected class and are preferred by voters of the protected class, as determined by voting behavior analysis, have been elected in a city subject to legal action. Here, the answer is none.

Practices Enhancing Vote Dilution

Courts may also consider the city's electoral system or other voting practices that enhance the dilutive effects of at-large elections. The court found that using numbered seats in city council elections was evidence of "electoral devices or other voting practices or procedures that may enhance the dilutive effects of at-large elections" (14028 subdivision e).⁹⁹⁵ It is widely recognized that numbered posts increase the difficulty that minority groups face in winning at-large elections (*Gingles*).⁹⁹⁶ Numbered posts disadvantage minority voters by preventing them from using a single-shot strategy. This strategy allows voters to concentrate their votes behind a single minority-preferred candidate and withhold votes from less-preferred candidates.

Numerous cases have recognized the potential for discriminatory impact in at-large elections: *City of Rome v. United States* (1980), *League of United Latin American Citizens v. Perry* (2006), *Council No. 4434 v. Clements* (1993).⁹⁹⁷ The failure to address the source of voting dilution is also a factor in *Gingles*. The city was notified in 2011 that its numbered-post, at-large system diluted Asian American votes. In 2011, most of the city's Charter Review Committee voted to abandon numbered seats, but the city council never adopted that recommendation. Instead of addressing the issue, the city's interim general counsel asked that

⁹⁹⁵ Ibid.

⁹⁹⁶ Ibid.

⁹⁹⁷ Ibid.

the demographer's report be "stripped" of "the information about the council election history and the charts...showing racial polarization" before it was distributed to members of the city council and Charter Review Committee.⁹⁹⁸ The city did not change its "electoral devices or other voting practices or procedures" despite having two charter review committees examine the issue, first in 2011 and then in 2015.⁹⁹⁹ It was not until 2017 that it appointed a new charter review committee to examine Santa Clara's voting procedures. In 2017, the Charter Review Committee concluded again that the city should change its electoral system.

Past Discrimination

The court considered the other factors that the CVRA considers probative, including the history of discrimination and the extent to which members of a protected class bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process. The court agreed that America's history of racial discrimination against Asians and overt public comments in Santa Clara exhibiting racial prejudice hindered the ability of many Asian Americans to participate in the city's election process.¹⁰⁰⁰ Measuring the extent to which past discrimination affected city voting, however, was difficult. Judge Kuhnle concluded that the trial evidence did not suggest unique circumstances affecting Asian American voting patterns in Santa Clara elections.¹⁰⁰¹ The court found the evidence of historical discrimination had few measurable effects but still supported a finding that the city's at-large system violated the Act.

⁹⁹⁸ Ibid.

⁹⁹⁹ Ibid.

¹⁰⁰⁰ Ibid.

¹⁰⁰¹ Ibid.

Conclusion

Based on the evidence presented at trial, the trial court found that plaintiffs showed by a “preponderance of the evidence” that the at-large election method impaired the ability of Asian Americans to elect candidates due to minority vote dilution and abridgment of voting rights.¹⁰⁰² The trial court found that the statistical analyses showed racially polarized voting in five of ten city council elections and cohesive voting among Asians in six of those races. It also found racially polarized voting in four of nine school elections, though those had lower probative value than city elections. The court found that no Asian American candidates had been elected to Santa Clara’s city council and that the city’s response was inaction despite an “overwhelming majority” of Charter Review Committee members voting in 2011 to modify the numbered-post system.¹⁰⁰³

Study of Santa Clara’s Voting System

The Metric Geometry and Gerrymandering Group (MGGG) studied voting systems for Santa Clara.¹⁰⁰⁴ It argued that district systems are difficult because they require line drawing, which can be delicate, time-consuming, and easily manipulated.¹⁰⁰⁵ If the city redraws lines to produce desirable outcomes, the boundaries are unstable as demographics shift over time.¹⁰⁰⁶ Santa Clara’s unique geography hinders division into two, three, or six districts.¹⁰⁰⁷ There is a large swath of non-residential areas cutting through the middle of Santa Clara, which divides the

¹⁰⁰² Ibid.

¹⁰⁰³ Ibid.

¹⁰⁰⁴ “Study of Voting Systems for Santa Clara, CA,” Metric Geometry and Gerrymandering Group.

¹⁰⁰⁵ Ibid, 3.

¹⁰⁰⁶ Ibid.

¹⁰⁰⁷ Ibid.

city into two residential areas that are disconnected: North and South Santa Clara.¹⁰⁰⁸ Because North Santa Clara has one-fifth of the city's population, any districting plan must combine populations separated by several miles.¹⁰⁰⁹ This plan clashes with traditional redistricting principles such as compactness and respect for communities.

The MGGG argued that the moderate level of Asian American clustering in Santa Clara, as opposed to housing and racial segregation, meant that districts worked poorly in the standard remedy. The standard remedy for districting is single-member districts, where voters elect council members by plurality vote. The Santa Clara Charter Review Committee expressed similar reservations about single-member districts.¹⁰¹⁰ The committee was concerned about splitting the city into six districts; requiring candidates from each geographic district to reside there would limit talent and candidacy since voters could not elect two candidates from the same neighborhood.¹⁰¹¹

Several single-member districts conducting plurality elections is the most common remedy when a city's at-large elections violate the CVRA. The first challenge to this remedy is that Santa Clara's population is too dispersed to make a comfortable Asian majority in any district.¹⁰¹² North Santa Clara only has a 47% Asian voting age population, which is uniform across precincts.¹⁰¹³ The MGGG's sampling analysis struggled to create one district with a 50% Asian voting age population, even within North Santa Clara.¹⁰¹⁴

¹⁰⁰⁸ Ibid, 2.

¹⁰⁰⁹ Ibid, 3.

¹⁰¹⁰ Ibid, 4.

¹⁰¹¹ Ibid.

¹⁰¹² Ibid, 8.

¹⁰¹³ Ibid, 2.

¹⁰¹⁴ Ibid, 8.

Table 3: Asian Population in Santa Clara¹⁰¹⁵

Census Population by API subgroup	North Santa Clara	South Santa Clara	Entire City
Indian	21%	11%	13%
East Asian	36%	22%	25%
Pacific Islander	0.2%	0.3%	0.3%

Still, districts may offer Asian Americans an opportunity to elect their preferred candidate even without a numerical majority. In two 2014 city council elections, the preferred candidates of Asian voters were defeated.¹⁰¹⁶ In both cases, however, the preferred candidates of Asian voters carried North Santa Clara.¹⁰¹⁷ The MGGG argued that drawing a district in North Santa Clara was straightforward.¹⁰¹⁸ While this evidence can reveal the ineffectiveness of a six-district by one-seat remedy, it does not solve the vote splitting problem if multiple Asian candidates run in the most Asian district. Plurality systems can shut out communities that split their votes among ethnic subgroups, which may prove the two districts by three seats system's ineffectiveness.¹⁰¹⁹

The MGGG proposed a transferable vote system that requires voters to rank candidates in order of preference so that winner selection accounts for second and third choices.¹⁰²⁰ This system can give voters a greater say in election outcomes. FairVote, a non-profit organization advocating electoral reform, argued that ranked choice voting is a proven way to increase representation for Asian Americans.¹⁰²¹ Several California cities in the Bay Area, including San Francisco, Oakland, Berkeley, and San Leandro, use a transferable vote system.¹⁰²² People of

¹⁰¹⁵ Ibid, 3.

¹⁰¹⁶ Ibid.

¹⁰¹⁷ Ibid.

¹⁰¹⁸ Ibid.

¹⁰¹⁹ Ibid.

¹⁰²⁰ Ibid, 4.

¹⁰²¹ Matthew Oberstaedt, "Asian Americans Win with Ranked Choice Voting," FairVote, May 7, 2022.

¹⁰²² "Study of Voting Systems for Santa Clara, CA," Metric Geometry and Gerrymandering Group.

color won 38% of elections before the cities adopted ranked choice voting. After its adoption, people of color won 62% of elections.¹⁰²³ In Oakland's first ranked choice voting election, voters elected Jean Quan, the city's first Asian American and female mayor.¹⁰²⁴ Quan was behind in first choice votes but rose in standing by appealing to voters as a second and third choice.¹⁰²⁵ Her ability and willingness to connect with voters who already selected their first choice was crucial to her success.¹⁰²⁶ In a 2021 report, FairVote identified ways that ranked choice voting can increase descriptive representation.¹⁰²⁷ It argued that voters of color tend to rank more candidates than white voters and eliminate vote splitting when candidates run against opponents of the same race or ethnicity.¹⁰²⁸ Such systems can provide cities with more democratic and representative outcomes. With racially polarized voting, a transferable vote system can significantly improve minority representation.¹⁰²⁹

Researchers compared the effectiveness of single transferable vote systems (STV) to single-member districts for increasing minority representation in local government.¹⁰³⁰ In STV elections, candidates must receive a threshold level of support to be elected.¹⁰³¹ After candidates are elected by passing the threshold or eliminated, the votes for these candidates are transferred to the second or third options on the ballots.¹⁰³² The MGGG found that STV provides proportional or slightly better representation for minority groups, while district systems vary in effectiveness depending on local circumstances.¹⁰³³ The range of representational outcomes in a

¹⁰²³ Oberstaedt.

¹⁰²⁴ Ibid.

¹⁰²⁵ Ibid.

¹⁰²⁶ Ibid.

¹⁰²⁷ Ibid.

¹⁰²⁸ Ibid.

¹⁰²⁹ "Study of Voting Systems for Santa Clara, CA," Metric Geometry and Gerrymandering Group, 4.

¹⁰³⁰ Ibid, 4.

¹⁰³¹ Ibid.

¹⁰³² Ibid.

¹⁰³³ Ibid.

district system is sensitive to the size and distribution of the minority group.¹⁰³⁴ By contrast, STV is predicted to secure a roughly proportional result and is independent of the level of minority geographical concentration.¹⁰³⁵ Majority-minority districts can be ineffective if the minority group has low relative turnout.¹⁰³⁶ Drawing effective districts requires a good understanding of turnout in different parts of the jurisdiction. At-large STV avoids some drawbacks of district systems. It is immune to gerrymandering and can represent both dispersed and non-ranked elections.¹⁰³⁷

Ranked choice voting, however, can be confusing and burden voters. Jason McDaniel, professor of political science from San Francisco State University, examined whether the expanded preference choices associated with ranked choice voting (RCV) reduces the level of racially polarized voting in mayoral elections.¹⁰³⁸ The results indicate that racially polarized voting did not decrease after implementing ranked choice voting.¹⁰³⁹ Rather, the results showed that RCV contributed to higher levels of racially polarized voting between white and Asian voters.¹⁰⁴⁰ A frequent finding in public opinion research is that American voters prefer familiar voting systems.¹⁰⁴¹ Neilson (2017) found that those who used ranked choice voting did not prefer it over plurality or majoritarian systems.¹⁰⁴² The surveyed voters expressed doubts about the

¹⁰³⁴ Gerdus Benade et al., “Ranked Choice Voting and Minority Representation,” *SSRN Electronic Journal*, February 2, 2021, 26.

¹⁰³⁵ *Ibid.*, 1.

¹⁰³⁶ *Ibid.*, 6.

¹⁰³⁷ *Ibid.*

¹⁰³⁸ Jason McDaniel, “Does More Choice Lead to Reduced Racially Polarized Voting? Assessing the Impact of Ranked-Choice Voting in Mayoral Elections,” *California Journal of Politics and Policy* 10, no. 2 (December 2018).

¹⁰³⁹ *Ibid.*, 1.

¹⁰⁴⁰ *Ibid.*

¹⁰⁴¹ *Ibid.*, 5.

¹⁰⁴² *Ibid.*

fairness of RCV election outcomes.¹⁰⁴³ Cities can mitigate this problem with educational campaigns and a careful transition period.¹⁰⁴⁴

Political scientists, John Carey and Simon Hix, wrote that voters' ability to rank candidates diminishes when the number of elected seats is too large.¹⁰⁴⁵ They argue that voter behavior in districts with up to six elected seats can resemble behavior in single-member districts.¹⁰⁴⁶ They conclude that asking voters to rank choices for six seats at once is feasible, but just barely.¹⁰⁴⁷ McDaniel writes that expanded preference can encourage candidates to campaign on the basis of cooperation rather than conflict.¹⁰⁴⁸ Because of preference swapping, when voters select their second and third choice preferences, campaigns will try to broaden their base of appeal and attempt to moderate group conflict campaigning.¹⁰⁴⁹ Donovan, Tolbert, and Gracey (2016) found that the implementation of RCV can reduce voter perception of campaign negativity.¹⁰⁵⁰ Ranked-choice voting can offset the moderation of political conflict along partisan or racial-ethnic lines. McDaniel assessed whether ranked-choice voting could lead to a reduction in racially polarized voting.¹⁰⁵¹ Rather than reduce racial divisions, he finds that RCV resulted in greater racial divisions at the ballot box between white and Asian voters.¹⁰⁵² The implementation of RCV did not substantially change racial group competition through voting in local mayoral elections.¹⁰⁵³ While there are prospects of using RCV to moderate racial cleavages in local

¹⁰⁴³ Ibid.

¹⁰⁴⁴ "Study of Voting Systems for Santa Clara, CA," Metric Geometry and Gerrymandering Group, 4.

¹⁰⁴⁵ Ibid, 5.

¹⁰⁴⁶ Ibid.

¹⁰⁴⁷ Ibid.

¹⁰⁴⁸ McDaniel, 5.

¹⁰⁴⁹ Ibid.

¹⁰⁵⁰ Ibid.

¹⁰⁵¹ Ibid, 19.

¹⁰⁵² Ibid.

¹⁰⁵³ Ibid.

elections, McDaniel cautions reformers with his findings that racial competition at the ballot box persisted and voters continued to use their vote to express racial group interests.¹⁰⁵⁴

Absent ranked choice voting, it is difficult to collect data on second choices.¹⁰⁵⁵ It is impossible to infer rankings from past non-ranked elections. Contests where voters choose a single candidate explain nothing about second choices. A candidate could be a second or third choice without ever appearing in a vote. Past Santa Clara elections reported one vote per voter, making it impossible to infer voters' second choices, which is essential to any predictive analysis of transferable vote systems.¹⁰⁵⁶ One hypothesis is that voters from different Asian subgroups are likely to rank candidates from their subgroups first, followed by candidates from other Asian subgroups and white and Hispanic candidates.¹⁰⁵⁷ The second hypothesis is that white candidates would be the frequent second choice for Korean voters, for example, rather than Chinese or Filipino candidates.¹⁰⁵⁸ If Hispanic voters are likely to prefer Hispanic, Asian, then white candidates, this would help Asian electoral performance in transferable vote systems.¹⁰⁵⁹

The MGGG separated East Asian and Indian subgroups by country of origin provided in the Census and surname data from the California Statewide Database.¹⁰⁶⁰ It found that there is not a monolithic Asian voting bloc.¹⁰⁶¹ Indian voters supported Indian candidates whenever possible, but in no case was an Indian candidate the preferred choice of East Asian voters, even in the absence of East Asian alternatives.¹⁰⁶² In three of the four elections with an Indian

¹⁰⁵⁴ *Ibid.*, 2.

¹⁰⁵⁵ "Study of Voting Systems for Santa Clara, CA," Metric Geometry and Gerrymandering Group, 5.

¹⁰⁵⁶ *Ibid.*,

¹⁰⁵⁷ *Ibid.*

¹⁰⁵⁸ *Ibid.*

¹⁰⁵⁹ *Ibid.*

¹⁰⁶⁰ *Ibid.*, 7.

¹⁰⁶¹ *Ibid.*

¹⁰⁶² *Ibid.*

candidate, East Asian voters supported the Indian candidates at a definitively lower rate than non-Asian voters.¹⁰⁶³

Table 4: Voter Choices¹⁰⁶⁴

Election	Candidate Race	First Choice, Indian Voters	First Choice, EA Voters	First Choice, Non-Asian voters (Winner)
Seat 2, 2014	2 W, 1 Ind	Nadeem (Ind)	Hardy (W)	Kolstad (W)
Seat 5, 2014	2 W, 1 EA	Park (EA)	Park (EA)	Caserta (W)
Seat 3, 2016	2 W	Davis (W)	Davis (W)	Davis (W)
Seat 4, 2016	2 W, 1 Ind, 1 H	Chahal (Ind)	Mahan (W)	Mahan (W)
Seat 6, 2016	2 W, 2 Ind, 1 H	Nadeem (Ind)/Watanabe (W)	Watanabe (W)	Watanabe (W)
Seat 7, 2016	1 W, 1 Ind, 1 EA	Rafah (Ind)/O’Neill (W)	Park (EA)/O’Neill (W)	O’Neill (W)

The Asian American Legal Defense and Education Fund (AALDEF) conducted a nonpartisan multilingual exit poll of Asian American voters in the New York City 2021 primary elections.¹⁰⁶⁵ In the 2021 election, ranked choice voting was used for the first time. Asian American (primarily Chinese and Koreans) favored Andrew Yang as their first-choice candidate and Kathryn Garcia as their second-choice.¹⁰⁶⁶ Bangladeshi American voters favored Eric Adams as their first choice while Asian Indian voters favored Maya Wiley as their first choice.¹⁰⁶⁷ These exit poll results provide further evidence that there is no monolithic Asian voting bloc.¹⁰⁶⁸

Trial Phase II: Remedies

The California Voting Rights Act requires remedies that address the dilution and abridgment of voting rights. It directs courts to “implement appropriate remedies, including the

¹⁰⁶³ Ibid.

¹⁰⁶⁴ Ibid. (W = White, Ind = Indian, EA = East Asian, H = Hispanic)

¹⁰⁶⁵ “Aaldef Asian American Exit Poll Results in the NYC June 2021 Primary Elections,” AALDEF, June 30, 2021.

¹⁰⁶⁶ Ibid.

¹⁰⁶⁷ Ibid.

¹⁰⁶⁸ Ibid.

imposition of district-based elections, that are tailored to remedy the violation.”¹⁰⁶⁹ The CVRA defines district-based elections as a “method of electing members to the governing body of a political subdivision in which the candidate must reside within an election district that is a divisible part of the political subdivision and is elected only by voters residing within the district.”¹⁰⁷⁰ The remedies must address election practices that impair the ability of minority groups to elect candidates of their choice or influence election outcomes. District-based elections are allowed even if “members of a protected class are not geographically compact or concentrated.”¹⁰⁷¹ Lines drawn to form voting districts may also account for “(a) topography, (b) geography, (c) cohesiveness, contiguity, integrity, and compactness of territory, and (d) community of interests of the council districts.”¹⁰⁷²

The plaintiffs requested a remedy that created six single-member districts, each holding plurality elections. The city proposed an alternative remedy of cutting Santa Clara into two districts and electing three candidates in each district by transferable vote. The city argued that Santa Clara’s racially polarized voting and racial integration made transferable voting a better remedy than by-district plurality elections.

The plaintiffs presented four witnesses during the remedies phase: Wesley Kazuo Mukoyama, Dr. Jose Moreno, Shannon Bushey, and David Ely.¹⁰⁷³ The city presented one witness: Dr. Jeanne Gobalet.¹⁰⁷⁴ Ely and Gobalet were tendered and accepted by the court as expert witnesses.¹⁰⁷⁵ Wesley Mukoyama, one of the Asian American plaintiffs in the legal action,

¹⁰⁶⁹ *Wesley Kazuo Mukoyama v. City of Santa Clara* (17CV308056, 2017).

¹⁰⁷⁰ *Ibid.*

¹⁰⁷¹ *Ibid.*

¹⁰⁷² *Ibid.*

¹⁰⁷³ *Ibid.*

¹⁰⁷⁴ *Ibid.*

¹⁰⁷⁵ *Ibid.*

had lived in Santa Clara for over four decades.¹⁰⁷⁶ He testified he had never witnessed Asian Americans being elected or appointed to the city council. He said that candidates for city council rarely knocked on his door, called him, or asked for his input on city matters. Mukoyama said he supported the plaintiffs' proposal to adopt six plurality districts.

Dr. Jose Moreno, a Latino serving on the Anaheim City Council, testified on the effectiveness of by-district elections for Anaheim.¹⁰⁷⁷ In 2014, he ran for an at-large system on the city council and lost.¹⁰⁷⁸ He participated in a lawsuit that alleged Anaheim's at-large system violated the CVRA.¹⁰⁷⁹ Anaheim settled the CVRA lawsuit and adopted a system with an at-large mayor and by-district council members.¹⁰⁸⁰ In 2016, Moreno was elected to represent District 3 in North Anaheim. Moreno testified that before 2016, many city council members lived in the Anaheim hills, while few lived in the western parts of Anaheim. He testified that only three Latino candidates had ever been elected to the Anaheim city council. He said that at-large campaigns were costly and that most candidates only focused on "high propensity" voters.¹⁰⁸¹ High propensity voters are most likely to turn out on election day. In his 2016 district campaign, Moreno said he knocked on the doors of nearly all his district's residents.¹⁰⁸² Voters in his district appeared more energized.¹⁰⁸³ Moreno testified that district-based elections would allow council members to address the needs of all residents.¹⁰⁸⁴

¹⁰⁷⁶ Ibid.

¹⁰⁷⁷ Ibid.

¹⁰⁷⁸ Ibid.

¹⁰⁷⁹ Ibid.

¹⁰⁸⁰ Ibid.

¹⁰⁸¹ Ibid.

¹⁰⁸² Ibid.

¹⁰⁸³ Ibid.

¹⁰⁸⁴ Ibid.

Shannon Bushey, from the Santa Clara County Registrar of Voters, testified about the steps the Registrar takes to provide timely and accurate voting materials.¹⁰⁸⁵ She created a day-to-day timetable for tasks leading to the November 2018 election.¹⁰⁸⁶ She testified that her office could create timely and accurate election materials for Santa Clara voters—even with newly formed districts.¹⁰⁸⁷ Bushey testified that ranked choice voting proposed by the city could not be implemented without the California Secretary of State approving the voting technology, which could take six to eighteen months.¹⁰⁸⁸ The city asked if district-based elections were more complicated and could lead to more errors.¹⁰⁸⁹ While Bushey agreed that district-based elections were more complex, she said they did not necessarily lead to more errors.

David Ely, an expert demographer with decades of experience working for cities and attorneys to draw district boundaries, presented two maps with seven districts and two maps with six districts.¹⁰⁹⁰ Ely collected, organized, and reviewed data from the 2010 Census to prepare his proposed district maps.¹⁰⁹¹ He analyzed data generated through the Census Bureau’s American Community Survey, State of California ethnicity reports, voter turnout reports, voting data, Google Maps, Google Earth, and city maps.¹⁰⁹² He drove around Santa Clara and met with residents to hear their comments about voting methods and processes.¹⁰⁹³ Ely testified that when drawing districts, he brought together residents with similar community interests.¹⁰⁹⁴ He examined major thoroughfares to determine if they divided or pulled together residents, assessed

¹⁰⁸⁵ Ibid.

¹⁰⁸⁶ Ibid.

¹⁰⁸⁷ Ibid.

¹⁰⁸⁸ Ibid.

¹⁰⁸⁹ Ibid.

¹⁰⁹⁰ Ibid.

¹⁰⁹¹ Ibid.

¹⁰⁹² Ibid.

¹⁰⁹³ Ibid.

¹⁰⁹⁴ Ibid.

socioeconomic conditions, identified city infrastructure, and reviewed materials prepared by the city's expert, Dr. Gobalet.¹⁰⁹⁵ To address the remedial requirements of the CVRA, Ely calculated CVAP percentages by district and accounted for the concentration of Asian, Latino, Black, and white residents.¹⁰⁹⁶

Dr. Jeanne Gobalet, the city's expert demographer, used an approach to create districts that reflected city neighborhoods and other communities with common interests.¹⁰⁹⁷ Gobalet identified neighborhoods and drew district lines around them using geographic features.¹⁰⁹⁸ She created Draft Plan 3, which resulted in six district-based elections for city council members and an at-large mayoral election.¹⁰⁹⁹ Draft Plan 3's districts reflected communities of interest, topography, geography, and cohesiveness.¹¹⁰⁰ Statistical analysis for District Plan 3 indicated it would remedy the vote dilution and abridgement of Asian American voting rights. The Asian citizen voting age population for District 1 was 51%.¹¹⁰¹ Lines drawn for District 2 enhanced the voting power of Latino citizens. Latino CVAP percentage in District 2 was 27%, which allowed for greater influence and cohesion to elect Latino-preferred candidates.¹¹⁰² The court deemed this district plan as a proper remedy under the CVRA and federal VRA.

The court was initially concerned that an at-large mayor would not provide enough remediation. The court also recognized the rights of California citizens to form charter cities and charter city plenary authority. The "home rule" provision of the California Constitution allows charter cities to exercise plenary authority over municipal affairs—free from constraints imposed

¹⁰⁹⁵ Ibid.

¹⁰⁹⁶ Ibid.

¹⁰⁹⁷ Ibid.

¹⁰⁹⁸ Ibid.

¹⁰⁹⁹ Ibid.

¹¹⁰⁰ Ibid.

¹¹⁰¹ Ibid.

¹¹⁰² Ibid.

by general law and subject only to constitutional limitations.¹¹⁰³ At trial, the city’s attorney acknowledged that eliminating the at-large mayor would provide additional CVRA remediation.¹¹⁰⁴ He noted, however, that Draft Plan 3 provided sufficient remediation to comply with the law, even with an at-large mayoral election.¹¹⁰⁵ This finding, combined with public commentary expressing a preference for an at-large mayor, caused the court to decide on at-large mayoral elections.¹¹⁰⁶

The court ordered Santa Clara to adopt a by-district system for six city council seats and retain the at-large mayoral election. It mandated the Santa Clara Registrar of Voters to immediately implement the district-based system for the upcoming November 2018 elections.¹¹⁰⁷ The court ordered the city to pay \$3,164,955.61 in attorney fees and costs.¹¹⁰⁸ The November 2018 elections resulted in the election of Raj Chahal for District 2, making him the first Asian American candidate elected to the city council in Santa Clara’s history.¹¹⁰⁹ In the November 2020 election, Districts 4 and 5 elected two more Asian American candidates to Santa Clara’s city council.¹¹¹⁰

Santa Clara’s Appeal

On appeal, the city argued that the trial court incorrectly concluded that racially polarized voting in five of ten city council elections satisfied the standard for a voting rights claim.¹¹¹¹ It

¹¹⁰³ *Ibid.*

¹¹⁰⁴ *Ibid.*

¹¹⁰⁵ *Ibid.*

¹¹⁰⁶ *Ibid.*

¹¹⁰⁷ *Ibid.*

¹¹⁰⁸ *Ibid.*

¹¹⁰⁹ Katie Lauer, “Santa Clara Settles \$4.5 Million Lawsuit over Districted Elections,” San Jose Inside, April 22, 2021.

¹¹¹⁰ *Ibid.*

¹¹¹¹ *Yumori-Kaku v. City of Santa Clara*, 59 Cal.App.5th 385, 273 Cal. Rptr. 3d 437 (Cal. Ct. App. 2020).

argued that voting rights claims require evidence that the majority voting bloc “usually” voted to defeat the Asian-preferred candidate.¹¹¹² The city contended that the trial court stretched the meaning of the word, “usually,” beyond its judicial interpretation to find racially polarized voting in 50% of city council elections.¹¹¹³ Dr. Lewis, the city’s expert witness, concluded that the plaintiffs’ ecological inference method provided “little evidence of cohesive voting by either Asians or non-Asians in the City of Santa Clara” and no evidence of racial polarization.¹¹¹⁴ The city claimed the plaintiffs failed to establish legally cognizable voting under the CVRA.

The city challenged the trial court’s statistical analysis to support its findings of racially polarized voting. It contended that the trial court improperly conducted its own statistical analysis to find liability rather than rely on the expert testimony presented in trial. The city argued that the trial court’s imposition of “race-based districts” based on legally incorrect findings of RPV violated the Equal Protection Clause of the U.S. Constitution.¹¹¹⁵ It also defended Santa Clara’s plenary authority as a charter city to control the manner and method of electing its officers.¹¹¹⁶

Plaintiffs’ Response

The Santa Clara plaintiffs cited the creation of the California Voting Rights Act and the California Legislature’s intention with the Act. The Legislature intended the CVRA to apply widely and flexibly, with decreased financial risk for plaintiffs. Before its enactment, minority communities in California achieved little success in addressing vote dilution. The Legislature

¹¹¹² Ibid.

¹¹¹³ Ibid.

¹¹¹⁴ Ibid.

¹¹¹⁵ Ibid.

¹¹¹⁶ Ibid.

crafted the CVRA to account for California’s racially integrated, multiethnic demographics. The Legislature’s reworking of federal voting rights protections worked to combat minority vote dilution in California’s multiethnic cities. State Senator Polanco explained, “[The CVRA] is necessary because the federal Voting Rights Act’s remedy fails to redress California’s problem of racial bloc voting.”¹¹¹⁷ He said that the artificial threshold of 49% to create majority-minority districts “often served to deny minority voting rights in California simply because the minority community is not sufficiently compact.”¹¹¹⁸ Since the 1980s, the Bay Area—which includes Santa Clara—has been less segregated by race or ethnicity than the nation, and segregation steadily declined as the region became more diverse.¹¹¹⁹ Segregation is lower in Los Angeles, Orange County, Sacramento, and Fresno than in the nation.¹¹²⁰ Despite the state’s racial diversity and integration, minority groups remained underrepresented in California’s local government following the federal VRA’s enactment. Steven Reyes, a civil rights attorney at MALDEF, said, “In 2000, Latinos comprised 33% of California’s population...[but] Latinos represented only 2.8% of the total number of county elected officials in California.”¹¹²¹

As voting rights advocates experienced, litigation under the federal VRA was an insufficient safeguard against discrimination.¹¹²² California’s diverse and integrated demographics made it challenging to satisfy the federal VRA’s “compactness” requirement. In *Romero v. City of Pomona* (1989), the Ninth Circuit’s decision revealed the consequences of

¹¹¹⁷ “Application for Leave to File Amici Curiae Brief and Brief of Asian Americans Advancing Justice - Asian Law Caucus, Asian Americans Advancing Justice - Los Angeles, and Other Asian American Community Organizations in Support of Respondents,” Asian Americans Advancing Justice (California 6th District Court of Appeal, 2020), 23.

¹¹¹⁸ *Ibid.*, 23-24.

¹¹¹⁹ *Ibid.*, 20.

¹¹²⁰ *Ibid.*, 20-21.

¹¹²¹ *Ibid.*, 21.

¹¹²² *Ibid.*

applying the “compactness” requirement to California.¹¹²³ Despite Pomona’s sizable African American and Latino populations, the court dismissed the plaintiffs’ claims upon finding that “Pomona is so integrated that it is impossible to construct a single-member district with a majority of black or Hispanic eligible voters.”¹¹²⁴ In *Aldasaro v. Kennerson* (1995), the plaintiffs drew a single-member district with a Hispanic CVAP exceeding 50%, but the court still concluded that the plaintiffs failed to satisfy the first *Gingles* precondition, reasoning that the “eligible voting majority [was] not a registration or turnout majority.”¹¹²⁵ Drafters tailored the CVRA to the state’s needs by removing the “geographical compactness” requirement.

In *Gomez v. City of Watsonville* (1988), the plaintiffs found uncontested statistical evidence that city council elections were racially polarized, drew two-majority Latino districts, and established that Latinos had less opportunity to participate in the political process.¹¹²⁶ The trial court still ruled against the plaintiffs, finding based on non-statistical evidence that Latinos were not politically cohesive.¹¹²⁷ The court hypothesized that Latino turnout in a majority-Latino district would not likely elect a Latino-preferred candidate.¹¹²⁸ The court ruled that the plaintiffs would have to pay the city’s attorney costs, which threatened to bankrupt the plaintiffs.¹¹²⁹ The plaintiffs sought and obtained a reversal by the Ninth Circuit Court of Appeals, but the time-consuming battle became a powerful deterrent to all but the most resilient and well-financed plaintiffs.¹¹³⁰ The Legislature also assured that cost-shifting mechanisms would not deter plaintiffs by authorizing the court to award winning plaintiffs their attorney fees.¹¹³¹ It also

¹¹²³ *Ibid.*, 22.

¹¹²⁴ *Ibid.*

¹¹²⁵ *Ibid.*

¹¹²⁶ *Ibid.*

¹¹²⁷ *Ibid.*, 23.

¹¹²⁸ *Ibid.*

¹¹²⁹ *Ibid.*

¹¹³⁰ *Ibid.*

¹¹³¹ *Ibid.*, 24-25.

forbade prevailing local governments from recouping costs from the plaintiffs, unless the lawsuit was “frivolous, unreasonable, or without foundation.”¹¹³²

Given the CVRA’s text, purpose, and legislative history, the Santa Clara plaintiffs argued that courts should not apply bright line rules when evaluating evidence in CVRA cases.¹¹³³ They argued that courts should not require statistical evidence to exhibit a specific degree of precision.¹¹³⁴ Courts adjudicating the CVRA possess substantial discretion to weigh the probative value of evidence and adopt a “flexible” approach without evidentiary “bright lines.”¹¹³⁵ The Santa Clara plaintiffs urged the court to assign statistical evidence probative value depending on the data’s quality or limitations.¹¹³⁶ Federal voting rights cases have not required statistical evidence to achieve a specific level of mathematical precision. In *United States v. City of Euclid* (2006), the Supreme Court found that “no decision...requires the use of a particular statistical methodology or demands a particular statistical outcome before a court may conclude that racial bloc voting exists.”¹¹³⁷ This finding is because “the court’s job is to assess the broader legal principles described in *Gingles*.”¹¹³⁸ An inexact result, for example, “could still be correlative, probative, and sufficiently accurate to bear on the ultimate issue of racial bloc voting.”¹¹³⁹ Therefore, the standard of proof “is preponderance, not mathematical certainty.”¹¹⁴⁰

One statistical method used to estimate voting behavior is ecological regression.¹¹⁴¹

Ecological regression correlates precinct-by-precinct election results with each precinct’s racial

¹¹³² *Ibid.*

¹¹³³ *Yumori-Kaku v. City of Santa Clara*, Rptr. 3d 437.

¹¹³⁴ Asian Americans Advancing Justice, 16.

¹¹³⁵ *Ibid.*, 29.

¹¹³⁶ *Yumori-Kaku v. City of Santa Clara*, Rptr. 3d 437.

¹¹³⁷ Asian Americans Advancing Justice, 30.

¹¹³⁸ *Ibid.*

¹¹³⁹ *Ibid.*

¹¹⁴⁰ *Ibid.*

¹¹⁴¹ *Ibid.*

composition.¹¹⁴² It generates estimates of the voting behavior of minority and majority voters within the city.¹¹⁴³ Ecological inference is a more sophisticated version of ER that keeps estimates within interpretable limits.¹¹⁴⁴ When precincts are more racially homogeneous, the estimates are more accurate because it is easier to correlate the precinct’s racial composition with the precinct’s election results.¹¹⁴⁵ Conversely, racially integrated precincts may produce less exact estimates.¹¹⁴⁶ Even still, the Santa Clara plaintiffs argued that there is no fixed standard or “bright line” in determining what homogeneity level is sufficient to produce reliable voting analysis.¹¹⁴⁷ Courts have weighed the probative value of statistical evidence on a case-by-case basis, guided by a city’s circumstances.¹¹⁴⁸ The CVRA purposefully allows this analysis to address more subtle vote dilution in California’s integrated, multiethnic cities. The Santa Clara plaintiffs concluded that judicial insistence on statistical precision would be inconsistent with the CVRA’s legislative purpose and federal precedents.¹¹⁴⁹

Asian American Advancing Justice’s Amicus Brief

Asian American Advancing Justice (AAJC), a non-profit legal aid and civil rights organization, filed an amicus curiae brief supporting the plaintiffs.¹¹⁵⁰ Several legal services and community-based organizations joined them.¹¹⁵¹ They emphasized the historical foundations for the Act and reasons that the city’s attempt to establish a bright line threshold for legally

¹¹⁴² Ibid.

¹¹⁴³ Ibid, 31.

¹¹⁴⁴ Ibid.

¹¹⁴⁵ Ibid.

¹¹⁴⁶ Ibid.

¹¹⁴⁷ Ibid, 32.

¹¹⁴⁸ Ibid.

¹¹⁴⁹ *Yumori-Kaku v. City of Santa Clara*, Rptr. 3d 437.

¹¹⁵⁰ Asian Americans Advancing Justice, 9.

¹¹⁵¹ Ibid.

cognizable RPV violated the Act's purpose. They wrote that the CVRA is tailored to address California's unique voting rights challenges and to remedy racial discrimination in local elections.

The California Legislature intended the CVRA to apply widely across the state's diverse cities because minority communities had achieved little success before the CVRA's enactment. For the CVRA to live up to its potential, the AAJC urged the court to consider the full context of the alleged vote dilution.¹¹⁵² The city sought to arbitrarily limit the trial court's discretion to weigh contextual evidence and advocated for restrictions on the CVRA's flexible analysis.¹¹⁵³ AAJC urged the appellate court to reject this attempt to weaken the CVRA's protections against discrimination.¹¹⁵⁴ It argued that the court conducted a fact-intensive examination of prior Santa Clara city council elections.¹¹⁵⁵

AAJC also argued that courts have avoided rigid rules when evaluating statistical evidence. Courts adjudicating CVRA claims have adopted a flexible approach in the evidentiary examination.¹¹⁵⁶ Judges possess substantial discretion in weighing factors probative to a violation.¹¹⁵⁷ AAJC concluded that there are "no bright line absolutes" when courts assess evidence in CVRA cases, as established in *United States v. City of Euclid* (2006).¹¹⁵⁸ This flexible approach is fundamental to Asian Americans in California. Despite living in racially integrated cities, political and social integration is difficult for Asian Americans.

While some formal barriers to political participation have dissolved, the legacies of exclusion impede Asian American electoral participation and social integration. AAJC argued

¹¹⁵² Ibid, 15.

¹¹⁵³ Ibid.

¹¹⁵⁴ Ibid.

¹¹⁵⁵ Ibid, 17.

¹¹⁵⁶ Ibid, 16.

¹¹⁵⁷ Ibid.

¹¹⁵⁸ Ibid.

that Asian American political opportunities in California are shaped by past immigration bans and denials of fundamental rights. AAJC cited the book, *Asian American Political Participation: Emerging Constituents and Their Political Identities*, where Wong, Ramakrishnan, and Lee write that due to anti-Asian immigration policies that endured for several generations, Asian Americans are a “remarkably recently arrived population.”¹¹⁵⁹ They found that nearly two in three Asians in America are foreign-born, and roughly 90% are immigrants or children of immigrants.¹¹⁶⁰ The effects of racial exclusion manifest in subtle ways, such as insufficient language assistance in voting and decreased voter outreach by political parties and civic organizations.¹¹⁶¹ A Harvard School of Public Health poll found that a quarter or more of Asian Americans reported being racially discriminated against in applying for jobs, being paid equally or considered for promotion, or when trying to rent or buy a home.¹¹⁶² As Dr. Ramakrishnan testified in trial court, the history of racial discrimination against Asian Americans has political ramifications.¹¹⁶³ Childhood socialization and parental influence have substantial effects on political participation. The lack of parental political engagement impedes political involvement among Asian Americans. Depending on the political climates of their origin countries, Asian immigrants may hold deep-seated views of political inefficacy, political alienation, and mistrust of government that can deter civic engagement.¹¹⁶⁴ In a 2019 Census survey report, 41% of Asian Americans reported that they were “extremely concerned” or “very concerned” that their census responses would be used against them.¹¹⁶⁵

¹¹⁵⁹ Ibid, 42.

¹¹⁶⁰ Ibid.

¹¹⁶¹ Ibid, 17.

¹¹⁶² Ibid, 41-42.

¹¹⁶³ Ibid, 42.

¹¹⁶⁴ Ibid.

¹¹⁶⁵ Ibid, 43.

Given that Asian Americans have a higher proportion of foreign-born residents than any other racial group in the United States, a lack of English proficiency impedes Asian American political participation.¹¹⁶⁶ In the 2013 to 2017 American Community Survey, researchers found that 75% of Asian Americans speak a language other than English.¹¹⁶⁷ Of those, 47% have limited English proficiency (LEP).¹¹⁶⁸ AAJC examined language proficiency in the 2012 elections and found that LEP varies among ethnic groups.¹¹⁶⁹ Over half of Vietnamese Americans and nearly half of Bangladeshi Americans have limited English proficiency.¹¹⁷⁰ More than 40% of Cambodian, Chinese, Hmong, Korean, Laotian, and Taiwanese Americans have limited English proficiency.¹¹⁷¹ Even for groups with higher rates of English proficiency, such as Japanese and Filipino Americans, almost 20% have limited English proficiency.¹¹⁷² Pew Research wrote that 72% of all Asian Americans were “proficient” in English as of 2019.¹¹⁷³ Proficiency means they speak only English or speak English very well. Nearly all American-born Asians were proficient in English, compared with 57% of foreign-born Asians.¹¹⁷⁴ In contrast, higher shares of whites (99%) and Blacks (98%) eligible voters say they are “proficient” in English.¹¹⁷⁵ Researchers found that English language proficiency directly correlates with voting and civic participation.¹¹⁷⁶ California’s local governments often do not accommodate the needs of LEP residents, even when legally ordered to comply.¹¹⁷⁷

¹¹⁶⁶ Ibid.

¹¹⁶⁷ Ibid.

¹¹⁶⁸ Ibid.

¹¹⁶⁹ Ibid.

¹¹⁷⁰ Ibid.

¹¹⁷¹ Ibid.

¹¹⁷² Ibid.

¹¹⁷³ Abby Budiman and Neil Ruiz, “Key Facts about Asian Americans, a Diverse and Growing Population,” Pew Research Center (Pew Research Center, April 29, 2021).

¹¹⁷⁴ Ibid.

¹¹⁷⁵ Ibid.

¹¹⁷⁶ Asian Americans Advancing Justice, 43.

¹¹⁷⁷ Ibid, 44.

In *United States v. Alameda County* (2011), the Department of Justice brought legal action against several California cities and counties under Section 203 of the federal Voting Rights Act for the cities' failure to provide voting materials translated into Asian languages.¹¹⁷⁸ The court ordered Alameda County to provide bilingual language assistance at the polls and election materials in Spanish and English.¹¹⁷⁹ In *United States v. City of Walnut* (2007), the court required Walnut to translate election materials and assist LEP Chinese and Korean American voters.¹¹⁸⁰

AAJC wrote that political outreach to Asian American and Latino voters falls behind outreach to other ethnic groups.¹¹⁸¹ A national survey on AAPI voting patterns found that 71% of Asian Americans and 74% of Latinos across the country received no contact about the 2016 election, compared with 58% of African Americans and 56% of whites who were not contacted.¹¹⁸² In 2020, Pew Research Center conducted a survey after the presidential election. Lower shares of Latino and Asian citizens reported being contacted by campaigns than U.S. adult citizens overall.¹¹⁸³ Political parties and campaigns make limited outreach to Asian Americans in California. Barriers preventing Asian Americans from being elected create a feedback loop, reinforcing stereotypes of Asian Americans as not fully belonging to America's democracy.¹¹⁸⁴ AAJC argued that robust voting rights protections are crucial to ending this cycle.¹¹⁸⁵ With proper judicial application, as supported in the trial court proceedings, AAJC

¹¹⁷⁸ Ibid.

¹¹⁷⁹ Ibid.

¹¹⁸⁰ Ibid.

¹¹⁸¹ Ibid.

¹¹⁸² Ibid.

¹¹⁸³ Jens Manuel Manuel Krogstad and Luis Noe-Bustamante, "Most U.S. Citizens Report a Campaign Contacted Them in 2020, but Latinos and Asians Less Likely to Say So," Pew Research Center (Pew Research Center, January 29, 2021).

¹¹⁸⁴ Asian Americans Advancing Justice, 45.

¹¹⁸⁵ Ibid.

wrote that the CVRA helps ensure that Asian Americans and other minority populations can elect candidates of their choice and influence California's democracy.¹¹⁸⁶

Appellate Court Decision

The Sixth District Court of Appeal upheld that Santa Clara's method of electing city council members at-large violated the California Voting Rights Act.¹¹⁸⁷ The Sixth District found no reversible error in the trial court's interpretation of the governing legal principles and its legal application of the trial evidence.¹¹⁸⁸

The city had challenged the trial court's use of statistical evidence to support its finding of racially polarized voting.¹¹⁸⁹ On appeal, the city argued that the statistics did not demonstrate racially polarized voting.¹¹⁹⁰ Racially polarized voting occurs when the majority voting bloc "usually" votes to defeat the Asian-preferred candidate.¹¹⁹¹ The city argued that "usually" means more than half the time.¹¹⁹² The Sixth District held that the plaintiffs' showing of RPV in five of ten city council elections was sufficient.¹¹⁹³ The court held that under the CVRA, when the factual findings show an equal number of polarized and non-polarized elections over time, a trial court may find that racially polarized voting occurred.¹¹⁹⁴ In rejecting a strict mathematical test, the court reasoned that this legal standard requires considering local circumstances and a weighing of factors.

¹¹⁸⁶ *Ibid.*

¹¹⁸⁷ *Yumori-Kaku v. City of Santa Clara*, Rptr. 3d 437.

¹¹⁸⁸ *Ibid.*

¹¹⁸⁹ *Ibid.*

¹¹⁹⁰ *Ibid.*

¹¹⁹¹ *Ibid.*

¹¹⁹² *Ibid.*

¹¹⁹³ *Ibid.*

¹¹⁹⁴ *Ibid.*

The court found that the remedy requiring the city to shift to district-based city council elections did not violate the Equal Protection Clause.¹¹⁹⁵ The court cited the *Sanchez v. City of Modesto* (2006) finding that only rational basis review was the applicable standard.¹¹⁹⁶ Therefore, the remedy did not violate the Equal Protection Clause. The rational basis review holds that most government regulations, including the CVRA, pass equal protection challenges.¹¹⁹⁷

The city argued that a charter city has plenary authority under the California Constitution to decide its local electoral system. The court declined to part from the *Jauregui v. City of Palmdale* (2014) decision, which held that the CVRA preempts charter provisions.¹¹⁹⁸ The court determined that the CVRA continues to apply to charter cities and does not impede on their plenary authority. The court held that the Legislature intended to codify the holding in *Palmdale* to make charter provisions subject to the CVRA. In finding that the trial court had not erred, the Sixth District affirmed the award of over \$3 million in attorneys' fees and costs to the plaintiffs.¹¹⁹⁹

The Sixth District Court of Appeal's decision in Santa Clara makes it more challenging for cities to defend against CVRA challenges to their at-large systems—particularly in disproving the third *Gingles* factor.¹²⁰⁰ The court rejected a strict quantitative threshold to measure whether a majority voting bloc “usually” defeated the minority-preferred candidate.

¹¹⁹⁵ *Ibid.*

¹¹⁹⁶ *Ibid.*

¹¹⁹⁷ *Ibid.*

¹¹⁹⁸ *Ibid.*

¹¹⁹⁹ *Ibid.*

¹²⁰⁰ *Ibid.*

Evidence of Racially Polarized Voting

The appellate court decided whether the trial court erred in finding racially polarized voting in five of ten city elections sufficient to satisfy the “usually” requirement of the third *Gingles* precondition.¹²⁰¹ The issue on appeal was whether an equal ratio of polarized to non-polarized elections precludes liability for RPV and vote dilution. The appellate court analyzed whether findings of racially polarized voting are legally cognizable under California voting rights law if they do not meet the “usually” standard.¹²⁰² This issue requires the application of law to facts.

The district court’s findings of fact were reviewed for error because determining vote dilution “is peculiarly dependent upon the facts of each case” and requires “an intensely local appraisal of the design and impact of the contested electoral mechanisms.”¹²⁰³ Under the federal standard, appellate courts defer to the district court’s “superior fact-finding abilities” and review the ultimate finding of vote dilution “only for clear error” (*Smith v. Salt River Project Agriculture Improvement*, 1997).¹²⁰⁴ As the Supreme Court recognized in *Gingles*, deferential review of ultimate fact findings “does not inhibit an appellate court’s power to correct errors of law, including those that may infect a so-called mixed finding of law and fact or a finding of fact that is predicated on a misunderstanding of the governing rule of law.”¹²⁰⁵

The city admitted that despite articulating correct standards of proof at the liability phase, the trial court never applied the “usually” requirement of the third *Gingles* factor to its findings of fact on the number of racially polarized elections.¹²⁰⁶ Carolyn Schuk of the Silicon Valley

¹²⁰¹ Ibid.

¹²⁰² Ibid.

¹²⁰³ Ibid.

¹²⁰⁴ Ibid.

¹²⁰⁵ Ibid.

¹²⁰⁶ Ibid.

Voice wrote that the city argued that Judge Thomas Kuhnle used the wrong definition of “usually” in his finding that Santa Clara’s election system violated the CVRA.¹²⁰⁷ The city argued that having failed to prove “that the white majority votes sufficiently as a bloc to enable it...usually to defeat the minority’s preferred candidate,” plaintiffs could not establish legally cognizable racially polarized voting.¹²⁰⁸ The plaintiffs argued that the third *Gingles* factor does not impose a strict mathematical formula and that they proved occurrences of RPV sufficient to support the trial court’s judgment.¹²⁰⁹

The city, despite criticizing the statistical evidence behind the trial court’s finding of Asian American political cohesion in the disputed elections, did not challenge the second *Gingles* factor, which requires showing that the minority group is politically cohesive.¹²¹⁰ Instead, it focused on the third factor—that the majority voting bloc enables it to “usually” defeat the minority’s preferred candidate—and whether the trial court misapplied it.¹²¹¹ The Supreme Court expanded on this principle by explaining whether a political subdivision “experiences legally significant racially polarized voting requires discrete inquiries into minority and white voting practices.”¹²¹² The Supreme Court emphasized the significance of “a pattern of racial bloc voting that expands over a period of time” to distinguish between the “loss of political power through vote dilution” and the “mere inability to win a particular election.”¹²¹³ The Court wrote, “the usual predictability of the majority’s success distinguishes structural dilution from the mere loss of an occasional election.”¹²¹⁴

¹²⁰⁷ Schuk.

¹²⁰⁸ *Yumori-Kaku v. City of Santa Clara*, Rptr. 3d 437.

¹²⁰⁹ *Ibid.*

¹²¹⁰ *Ibid.*

¹²¹¹ *Ibid.*

¹²¹² *Ibid.*

¹²¹³ *Ibid.*

¹²¹⁴ *Ibid.*

The city pointed to federal appellate decisions supporting its “more-than-50-percent” proposition of proving that a majority voting bloc “usually” defeats the minority’s preferred candidate.¹²¹⁵ The Ninth Circuit in *Earl Old Person v. Brown* (2002) endorsed the definition of “usually” as “more than half the time.”¹²¹⁶ They argued that other federal circuits have required a greater showing to satisfy the “usually” requirement. The trial court reasoned that the Supreme Court’s use of the term “usually” to describe the third *Gingles* factor means “something more than just 51%.”¹²¹⁷ The city argued that apart from case law, simple logic defies the trial court’s application of the third factor. The city asserted that Santa Clara’s city council elections were not “usually” characterized by RPV because the trial court found this true in only five of ten elections.¹²¹⁸

The appellate court found that the third factor did not preclude the trial court’s finding of RPV.¹²¹⁹ The court found the city’s reasoning sound in theory but flawed in practice. This decision was because the city ignored that whether a majority voting bloc is “usually” able to defeat a cohesive minority group’s preferred candidate is not measured by a mathematical formula but by the trial court’s assessment of statistical and contextual evidence. The city ignored that the legal standard requires considering local circumstances and weighing factors, not just a simple arithmetic exercise.¹²²⁰ The appellate court determined that whether repeated occurrences of racially polarized voting crossed the “usually” threshold depends on the context. The context entails “the extent to which voting in the elections of the state of political subdivision is racially polarized...that is relevant to a vote dilution claim.”¹²²¹ As the Supreme

¹²¹⁵ Ibid.

¹²¹⁶ Ibid.

¹²¹⁷ Ibid.

¹²¹⁸ Ibid.

¹²¹⁹ Ibid.

¹²²⁰ Ibid.

¹²²¹ Ibid.

Court explained, the extent of bloc voting necessary to demonstrate racially polarized voting varies based on factual circumstances. The degree of bloc voting, which constitutes the threshold of legal significance, varies in cities.

The appellate court found that cases referred by the city were not consistent with their “usually” argument. In *Earl Old Person v. Brown* (2002), the Ninth Circuit found that the district court erred in applying the third factor to conclude that white bloc voting did not usually vote to defeat the preferred candidate of American Indian voters.¹²²² In this case “usually” meant more than half the time. The Ninth Circuit’s decision, however, was not based on the number of occurrences of white bloc voting but on the district court’s erroneous failure to distinguish electoral success in majority-American Indian jurisdictions from the results in majority-white jurisdictions.¹²²³ The court rejected the suggestion of a “bright line test” regarding the standard for determining legally significant white bloc voting when “white voters ‘cross over’ and vote for the minority-preferred candidate.”¹²²⁴ Instead, the court reiterated the *Gingles* observation that “there is no simple doctrinal test for the existence of legally significant racial bloc voting.”¹²²⁵ The appellate court believed it would be inappropriate to use a bright line rule for the minimum frequency of legally significant RPV based on the “usually” standard iterated in *Earl Old Person*.¹²²⁶ As emphasized in the evidence, the analysis of the third factor did not lend itself to a “simple doctrinal test” because “the degree of racial bloc voting that is cognizable as an element of a...vote dilution claim will vary according to a variety of factual circumstances.”¹²²⁷

¹²²² Ibid.

¹²²³ Ibid.

¹²²⁴ Ibid.

¹²²⁵ Ibid.

¹²²⁶ Ibid.

¹²²⁷ Ibid.

The appellate court agreed with the plaintiffs that federal decisions consistently use a flexible approach for the third factor.

In *Vecinos De Barrio Uno v. City of Holyoke* (1997), the First Circuit promoted a rigorous yet flexible approach to assess a vote dilution claim.¹²²⁸ The court compared racially polarized voting to “a silent, shadowy thief” of minority voting rights whose “process of detection typically resort to a multifaceted array of evidence including demographics, election results, voting patterns, campaign conduct, and the like.”¹²²⁹ *Uno* explained that “the question whether a given electoral district experiences racially polarized voting to a legally significant extend demands a series of discrete inquiries not only into election results but also into minority and white voting practices over time.”¹²³⁰ The court used similar language to describe the third factor, which it said, “embodies a showing that the majority votes sufficiently as a bloc to enable it, in the ordinary course, to trounce minority-preferred candidates most of the time.”¹²³¹ The court emphasized that “determining whether racial bloc voting exists is merely an arithmetic exercise of toting up columns of numbers, and nothing more. To the contrary, the district court should not confine itself to raw numbers, but make a practical, commonsense assay of all the evidence.”¹²³² The court concluded, however, that the district court’s factual findings “reflecting racially polarized voting in at most three or four elections (out of eleven)” did not justify a finding of vote dilution, particularly where the district court “offered no explanation of this seeming contradiction.”¹²³³

¹²²⁸ *Ibid.*

¹²²⁹ *Ibid.*

¹²³⁰ *Ibid.*

¹²³¹ *Ibid.*

¹²³² *Ibid.*

¹²³³ *Ibid.*

In *Gomez v. City of Watsonville* (1988), Hispanic residents challenged Watsonville’s at-large system of mayoral and city council elections under the federal Voting Rights Act.¹²³⁴ The Ninth Circuit did not use a formulaic approach to assess the third factor. They accepted the trial court’s factual finding “that Hispanics and Anglos supported different candidates” based on average support for Hispanic candidates by voters in predominantly white precincts compared to heavily Hispanic precincts.¹²³⁵ They noted that a “pattern over time of minority electoral failure” was probative under *Gingles*.¹²³⁶ These combined facts supported the district court’s determination that “the non-Hispanic majority in Watsonville usually vote sufficiently as a bloc to defeat the minority votes plus any crossover votes.”¹²³⁷

In *Pope v. County of Albany* (2011), the Second Circuit explained that the third factor “recognizes the need for some flexibility.”¹²³⁸ In *Flores v. Town of Islip* (2019), the district court relied on *Pope* for deciding whether evidence of white bloc voting that satisfies the third factor “is largely a fact-driven inquiry” that requires flexibility.¹²³⁹ With this decision, they found reason for why “courts have deviated from the bright-line rule.”¹²⁴⁰ The court explained that while white voter cohesion may have been weaker than in other cases, “the particular percentage of bloc voting is sufficiently less important than whether the white bloc regularly defeats the minority-preferred candidate.”¹²⁴¹

The cases used a flexible approach to decide on the third factor. These decisions recognized that legally significant racial bloc voting varies depending on factual circumstances.

¹²³⁴ *Ibid.*

¹²³⁵ *Ibid.*

¹²³⁶ *Ibid.*

¹²³⁷ *Ibid.*

¹²³⁸ *Ibid.*

¹²³⁹ *Ibid.*

¹²⁴⁰ *Ibid.*

¹²⁴¹ *Ibid.*

Whether majority bloc voting usually defeated the minority preferred candidate cannot be reduced to a simple mathematical or doctrinal test. The courts followed that the “usually” threshold in the third factor did not, as a matter of law, preclude a finding of RPV when the factual findings revealed an equal number of polarized and non-polarized elections over time.

Equal Protection Clause

The city contended that the trial court’s judgment violated the Equal Protection Clause of the 14th Amendment to the Constitution by imposing a “draconian race-conscious remedy” without showing that structural vote dilution existed in the city.¹²⁴² It argued that abolishing at-large elections for Santa Clara would not remedy minority vote dilution. The city’s constitutional claim was that without enforcing the “usually” requirement in the liability phase, the trial court imposed a race-conscious remedy. The city asserted that the Act used race-based classifications to authorize legal action against at-large systems and to grant liability based on racially polarized voting. The city contended that racially polarized voting under the Act distinguished between individuals on racial grounds and “falls within the core prohibition of the Equal Protection Clause.”¹²⁴³ They claimed that because the “usually” test allowed courts to “distinguish structural dilution from the mere loss of an occasional election,” its enforcement by courts serve as a crucial safeguard to the Act’s constitutional application.¹²⁴⁴ The city argued that without the “usually” test, the trial court’s imposition of a district-based remedy that accounts for race cannot survive strict scrutiny review. A strict scrutiny review is a form of judicial review that courts use to determine the constitutionality of specific laws.¹²⁴⁵

¹²⁴² Ibid.

¹²⁴³ Ibid.

¹²⁴⁴ Ibid.

¹²⁴⁵ “Strict Scrutiny,” Legal Information Institute (Cornell Law School).

The Sixth District Court decided that the city’s equal protection argument failed.¹²⁴⁶ The city invoked strict scrutiny review without addressing settled California authority holding that race-conscious provisions of the Act did not trigger strict scrutiny. In *Sanchez v. City of Modesto* (2006), the Fifth District rejected Modesto’s attempt to show the Act was facially invalid.¹²⁴⁷ The city of Modesto argued that the CVRA’s application would involve unconstitutional racial discrimination by using “race” to identify that polarized voting caused vote dilution. *Sanchez* found that race-related provisions of the Act did not trigger strict scrutiny because the Act did not favor any race over others, allocate benefits, or impose burdens based on race.¹²⁴⁸ Having rejected the argument of strict scrutiny, *Sanchez* held that the Act “readily passes” rational basis review.¹²⁴⁹ Accordingly, the appellate court rejected Santa Clara’s attempt to revive the rejected arguments in *Sanchez*.

The city did not suggest case arguments that would lead the court to part from the *Sanchez* ruling. The city did not explain how the Act “distributes burdens or benefits on the basis of individual race classifications” that would trigger strict scrutiny review, as detailed in *Parents Involved in Community School v. Seattle School District No. 1* (2007).¹²⁵⁰ Instead, the city attempted to frame its equal protection argument as an “as-applied” challenge based on the alleged race-conscious remedy.¹²⁵¹ In theory, the city had a reasonable basis for trying to raise an “as-applied” challenge.¹²⁵² The ruling in *Sanchez* addressed only the facial validity of the Act, leaving room for a defendant in a vote dilution case “to attempt to show as-applied invalidity... if liability is proven and a specific application or remedy is considered that warrants the

¹²⁴⁶ *Yumori-Kaku v. City of Santa Clara*, Rptr. 3d 437.

¹²⁴⁷ *Ibid.*

¹²⁴⁸ *Ibid.*

¹²⁴⁹ *Ibid.*

¹²⁵⁰ *Ibid.*

¹²⁵¹ *Ibid.*

¹²⁵² *Ibid.*

attempt.”¹²⁵³ In *Sanchez*, the court stated that a defendant faced with “a remedy that uses race, such as a district-based election system in which race is a factor in establishing district boundaries... may again assert the meaty constitutional issues.”¹²⁵⁴ In this case, however, the city’s “as-applied” attempt failed.

The city argued that the trial court forced the city to adopt a district-based system and to choose “among proposed maps that all took race into account in drawing the proposed boundaries between districts.”¹²⁵⁵ In *Shaw v. Reno* (1993), the Supreme Court decided that “race-conscious redistricting is not always unconstitutional.”¹²⁵⁶ In *Bush v. Vera* (1996), the Supreme Court wrote, “strict scrutiny does not apply merely because redistricting is performed with consciousness of race.”¹²⁵⁷ The city failed to show evidence of cases where the trial court’s selection of a district-based remedy made race “the predominant factor motivating the... [redistricting] decision.”¹²⁵⁸ In *Higginson v. Becerra* (2019), the Ninth District Court held that a plaintiff seeking to make “a racial gerrymandering claim subject to strict scrutiny under the Equal Protection Clause... must allege facts to support the inference that a districting decision was made ‘on the basis of race.’”¹²⁵⁹ In *Higginson*, the district court dismissed a challenge like Santa Clara’s—that the Act’s implementation through the City of Poway’s ordinance changing to district-based elections “classified [the plaintiff] into a district because of his membership in a particular racial group.”¹²⁶⁰ Based on these principles, the court found that the unsupported reference to race-based considerations did not support the city’s call for strict scrutiny review. Its

¹²⁵³ Ibid.

¹²⁵⁴ Ibid.

¹²⁵⁵ Ibid.

¹²⁵⁶ Ibid.

¹²⁵⁷ Ibid.

¹²⁵⁸ Ibid.

¹²⁵⁹ Ibid.

¹²⁶⁰ Ibid.

arguments based on the “usually” test did not apply because the appellate court upheld the trial court’s finding of racially polarized voting.

Assigning Weight to Elections with “Special Circumstances”

The plaintiffs’ expert, Dr. Kousser, performed a series of trivariate statistical analyses to estimate voting patterns among Asian American, Latino, and non-Hispanic white and Black voters in Santa Clara.¹²⁶¹ He noted that for three of the five city council elections in which voting was not polarized, Asian American support for Asian candidate Mohammed Nadeem dwindled each time.¹²⁶² Based on the ecological inference method, he estimated that Nadeem’s percentage of the Asian American vote was 63.2% in 2010, 47.2% in 2012, 19.8% in 2014, and 16.7% in 2016.¹²⁶³ He observed that Nadeem’s declining popularity could be attributed to his shifting allegiance on controversial issues dominating Santa Clara politics at the time. Kousser posited that Nadeem’s inconsistent stance on issues in city politics seemed to be a “special circumstance” that accounted for the lack of racial polarization in his elections.¹²⁶⁴ Yet, Kousser pointed that the last three city council elections he analyzed (Seat 5 in 2014, Seats 4 and 7 in 2016) were racially polarized regardless of the candidates’ preferences on controversial issues.¹²⁶⁵ This finding suggested that Asian American candidate losses could not be attributed to political stance. He asserted, “whichever factional white candidate they opposed, the Asian candidates always lost.”¹²⁶⁶

¹²⁶¹ Ibid.

¹²⁶² Ibid.

¹²⁶³ Ibid.

¹²⁶⁴ Ibid.

¹²⁶⁵ Ibid.

¹²⁶⁶ Ibid.

In the statement of decision, the trial court discounted Kousser’s explanation for Nadeem’s poor performance with Asian American voters as “speculative.”¹²⁶⁷ Still, Judge Kuhnle found that Nadeem’s track record for losing Asian American support justified giving his elections less weight.¹²⁶⁸ This decision was supported by 2012, 2014, and 2016 election data. The city contended that the trial court misconstrued the “special circumstances” doctrine—which under *Gingles*, could explain instances of minority electoral success in polarized environments, not electoral failure.¹²⁶⁹

The Sixth District Court agreed that the city was correct that the Supreme Court in *Gingles* framed “special circumstances, such as the absence of an opponent, incumbency, or the utilization of bullet voting” to explain instances of minority candidate electoral success in a polarized context.¹²⁷⁰ The city pointed out that neither plaintiffs nor the trial court cited a single case in which “special circumstances” applied to a non-polarized election involving an unsuccessful minority candidate. The appellate court found this point moot because the trial court rejected Dr. Kousser’s suggestion to treat the Nadeem races as “special circumstances.”¹²⁷¹ The trial court found that Kousser’s speculation about Dr. Nadeem’s controversial voting record did not “rise to the level of ‘special circumstances’ that would warrant disregarding Dr. Nadeem’s election losses.”¹²⁷² This finding did not preclude the trial court from deciding to give those elections less weight because an Asian American candidate lost support from Asian voters in each subsequent race. The trial court correctly applied its broader fact-finding ability to give less weight to those elections.

¹²⁶⁷ *Ibid.*

¹²⁶⁸ *Ibid.*

¹²⁶⁹ *Ibid.*

¹²⁷⁰ *Ibid.*

¹²⁷¹ *Ibid.*

¹²⁷² *Ibid.*

The appellate court found that the trial court properly considered the ten city council elections in which Asian American candidates ran. By its plain language, Section 14028 suggests that courts look to “the extent to which candidates who are members of a protected class and who are preferred by voters of the protected class, as determined by an analysis of voting behavior, have been elected to the governing body of a political subdivision that is the subject of” action for vote dilution.¹²⁷³ The appellate court determined that the trial court did not err in assigning less weight to certain elections. That one of those Asian candidates lost ground each time as the Asian-preferred candidate was a valid circumstance to consider. *Gingles* explained that the court performs “discrete inquiries into minority and white voting practices” to ascertain whether a city experiences legally significant racially polarized voting.¹²⁷⁴ The extent to which racially polarized voting impairs the minority group’s political power depends on case-specific circumstances. At times, the court can extend its inquiry to consider factors likely to have influenced elections. These factors include local features affecting cohesion levels and election results that deviate from the dominant polarization pattern due to “special circumstances.”¹²⁷⁵ For each case in which the Supreme Court listed such factors, it noted they were “illustrative” and not comprehensive or exclusive. Even though *Gingles* defined “special circumstances” as atypical instances of minority electoral success, it expressed a broad view of factors relevant to assessing racially polarized voting. The appellate court supported its conclusion by looking at federal cases in which courts gave more or less weight to certain elections based on factors other than “special circumstances.”¹²⁷⁶

¹²⁷³ Ibid.

¹²⁷⁴ Ibid.

¹²⁷⁵ Ibid.

¹²⁷⁶ Ibid.

In *Ruiz v. City of Santa Maria* (1988), the Ninth Circuit considered whether the district court “should have placed less evidentiary weight on Hispanic voters’ ability to elect... a white candidate than their inability to elect a Hispanic candidate.”¹²⁷⁷ After reviewing how circuit courts addressed similar arguments, the court reasoned that “the inability of Hispanic voters to elect a Hispanic candidate is more probative in a *Gingles* three-prong analysis than the ability of Hispanic voters to elect a non-minority candidate.”¹²⁷⁸ The court held that the minority groups’ ability to elect a non-minority candidate warranted less weight in a *Gingles* three-prong analysis. It explained that the district court’s “mechanical approach” to analyzing election data failed “to make ‘a searching practical evaluation of the past and present reality’ which a ‘functional view of the political process.’”¹²⁷⁹

In the *League of United Latin American Citizens v. Clements* (1993), the Fifth Circuit wrote that a court “may properly give more weight to elections in which the minority-preferred candidate is a member of the minority group.”¹²⁸⁰ The Fifth Circuit accepted the district court’s weighting of certain elections, noting that district courts must be flexible when faced with sparse data. The court cited that cases have limited applicability to factual circumstances—what they provide is direction for legal principles that guide the trial court’s analysis. These cases are driven by the facts.

The Sixth District decided that a trial court’s analysis of racially polarized voting depends on its ability to weigh the usefulness of the election evidence presented and to assign probative value where appropriate.¹²⁸¹ The court declined to penalize the trial court for giving less

¹²⁷⁷ Ibid.

¹²⁷⁸ Ibid.

¹²⁷⁹ Ibid.

¹²⁸⁰ Ibid.

¹²⁸¹ Ibid.

evidentiary significance to the Nadeem races. Imposing an overly restrictive interpretation of the trial court's reasonable discretion to assign probative value would contradict the flexible, fact-finding approach used in cases enforcing the federal VRA and suggested by the language of Section 14028.¹²⁸²

Statistical Methods

The application and interpretation of confidence intervals was thoroughly litigated. The trial court found that applying an 80% confidence interval was sufficient in identifying an Asian-preferred candidate and provided "sufficiently reliable results."¹²⁸³ The city attacked the trial court's use of lower confidence intervals to determine an Asian-preferred candidate and its use of point estimates to bolster its findings. The city argued that because the trial court's calculations were not supported by evidence on the record or vetted through the cross-examination process, they could not support the finding that five of ten city council elections and four of nine school elections involved RPV.¹²⁸⁴ The plaintiffs argued that federal case law following *Gingles* did not require showing political cohesion through a statistically significant preference for a single candidate. They argued that it was incorrect for the city to conflate statistical significance with the plaintiffs' burden to prove politically cohesive voting at the "preponderance of the evidence" standard.¹²⁸⁵ Further, the plaintiffs argued that in any event, a confidence interval of 80% was probative to show a correlation between Asian American voters and their preferred candidate.¹²⁸⁶ The trial court credited Dr. Kousser's analysis of preferred candidates and found that in the

¹²⁸² Ibid.

¹²⁸³ Ibid.

¹²⁸⁴ Ibid.

¹²⁸⁵ Ibid.

¹²⁸⁶ Ibid.

disputed elections where the preferred candidate could not be confirmed at 95% confidence, it could be confirmed at 80%.¹²⁸⁷

The city contended that the trial court stepped outside of its gatekeeping role by substituting its methodology for the analyses offered by expert witnesses at trial. The city argued that the trial court arrived at a result unsupported by evidence and inadequate to satisfy the third *Gingles* factor. The city relied on case authority that addressed admitting and evaluating expert testimony procedures. In *Sargon Enterprises Inc. v. University of Southern California* (2013), the court found that “under California law, trial courts have a substantial ‘gatekeeping’ responsibility.”¹²⁸⁸ Consistent with statutory and decisional law, the trial court determined whether the expert witness testimony was admissible. The court at the admissibility stage did “not weigh an opinion’s probative value or substitute its own opinion for the expert’s opinion.”¹²⁸⁹ Its gatekeeping responsibility “is simply to exclude ‘clearly invalid and unreliable’ expert opinion.”¹²⁹⁰ In a bench trial, the court, as “trier of fact,” also weighs the evidence.¹²⁹¹ The city contended, however, that the judge’s role as the “trier of fact” in a bench trial did not allow the court to conduct an independent “expert” analysis.¹²⁹² The city argued that expert opinion must be vetted through the adversarial process, especially in complex matters dependent on statistical methods such as estimating group voting behavior.¹²⁹³

The Sixth District Court determined that the trial court did not abuse its discretion in considering a lower confidence interval for the racially polarized voting analysis. The city contended that the trial court abused its discretion by conducting an independent, post-trial

¹²⁸⁷ Ibid.

¹²⁸⁸ Ibid.

¹²⁸⁹ Ibid.

¹²⁹⁰ Ibid.

¹²⁹¹ Ibid.

¹²⁹² Ibid.

¹²⁹³ Ibid.

statistical analysis to find racially polarized voting in five of ten city council elections.¹²⁹⁴ The trial court credited Kousser’s analytical methodology and found his ecological inference results “probative” despite the uncertainties highlighted by the city’s expert, Dr. Lewis.¹²⁹⁵ The court rejected the city’s contention that overlapping 95% confidence intervals made it impossible to identify the Asian-preferred candidate in the disputed 2016 city council elections.¹²⁹⁶

The Sixth District determined that the trial court’s decision to adopt an 80% confidence interval could not be compared to creating its own statistical model. The appellate court found this was a valid exercise of discretion by the trial court as a “fact-finder” when faced with competing opinions on confidence intervals.¹²⁹⁷ The appellate court found evidentiary support for the trial court’s use of a lower confidence interval in assessing evidence of vote cohesion. If the outcome depends on statistical evidence, courts must exercise discretion in weighing probative value against the uncertainties and limitations of statistical methods. The appellate court found that the trial court’s decision to use 80% confidence intervals to find Asian American cohesion behind a preferred candidate fell within the bounds of discretion.¹²⁹⁸ The appellate court concluded that statistical tools for expressing degrees of certainty should not overtake the “fact-finder’s” ability to weigh evidence and decide whether it meets the legal standard of proof.¹²⁹⁹

¹²⁹⁴ *Ibid.*

¹²⁹⁵ *Ibid.*

¹²⁹⁶ *Ibid.*

¹²⁹⁷ *Ibid.*

¹²⁹⁸ *Ibid.*

¹²⁹⁹ *Ibid.*

Charter City’s Plenary Authority

The city’s final argument was based on Article XI, Section 5 (b) of the California Constitution, which grants charter cities “plenary authority” to decide “the manner in which” their municipal officers are elected.¹³⁰⁰ The city acknowledged that its charter was subject to the Act’s equal protection guarantees in securing minority voting rights. The city “agrees that its charter must yield if the City’s method of holding elections violated a protected class’s right to equal protection of the laws, as implemented” in the Act.¹³⁰¹ The city asserted, however, that there “can be no such violation unless” the at-large system of elections met the “usually” standard for racially polarized voting.¹³⁰² The city asked the appellate court to consider its plenary authority argument only in that “limited and specific context.”¹³⁰³

In *Jauregui v. City of Palmdale* (2014), the Second District held that the driving forces behind adopting the CVRA—including the implementation of equal protection, voting rights, and integrity of local election systems—constituted an issue of statewide concern.¹³⁰⁴ These driving forces allowed the Act to override the charter city’s plenary power over its municipal elections. On appeal, Santa Clara claimed that the *Jauregui* decision focused only on the CVRA’s statewide interest in preventing race-based voter dilution as justification to supersede the charter city’s plenary authority.¹³⁰⁵ The city argued that the *Jauregui* decision failed to consider the charter city’s plenary authority under the California Constitution.¹³⁰⁶

¹³⁰⁰ Ibid.

¹³⁰¹ Ibid.

¹³⁰² Ibid.

¹³⁰³ Ibid.

¹³⁰⁴ Ibid.

¹³⁰⁵ Ibid.

¹³⁰⁶ Ibid.

John K. Haggerty, a resident of Santa Clara, filed an amicus curiae brief which expanded on the city’s “plenary authority” arguments and urged the court to part ways with the *Jauregui* decision.¹³⁰⁷ Haggerty argued that the Second District in *Jauregui* did not adequately weigh the statewide interest held by California’s citizens to protect charter cities’ exclusive control over their municipal affairs.¹³⁰⁸ He asserted that the *Jauregui* decision failed to consider the “plenary authority” language in the California Constitution.¹³⁰⁹ He argued against using a state-authorized electoral remedy for a charter city’s local election system. He also raised an “as-applied” equal protection argument.¹³¹⁰ He wrote that the trial court’s race-conscious remedy of imposing district-based elections should be reviewed for impeding on equal protection guarantees.¹³¹¹

The plaintiffs defended the trial court’s remedy and *Jauregui*’s interpretation of statewide interest. Contrary to Haggerty’s depiction of the unwanted imposition of a district-based remedy on voters, the plaintiffs argued that most Santa Clara voters supported a switch to district elections.¹³¹² Santa Clara voter support was evidenced by an advisory ballot measure in Santa Clara’s November 2018 election.¹³¹³ This ballot measure engaged citizens in drafting a charter amendment to elect council members by district. Advisory Measure N asked, “Shall the city of Santa Clara engage the voters in a public process to draft a Charter Amendment ballot measure to elect its Council Members, other than the Mayor, by district?”¹³¹⁴ The vote on Measure N took place after the trial court decision. During the 2018 election, 70.4% of Santa Clara voters voted “Yes” on Advisory Measure N.¹³¹⁵ In 2019, a city-administered survey revealed that over 60% of

¹³⁰⁷ Ibid.

¹³⁰⁸ Ibid.

¹³⁰⁹ Ibid.

¹³¹⁰ Ibid.

¹³¹¹ Ibid.

¹³¹² Ibid.

¹³¹³ Ibid.

¹³¹⁴ Ibid.

¹³¹⁵ Ibid.

voters preferred a six-district election system for city council.¹³¹⁶ The plaintiffs asserted that the ballot measure and city survey results were “facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resorting to sources of reasonably indisputable accuracy.”¹³¹⁷

The *Jauregui* decision addressed the “plenary authority” provision.¹³¹⁸ The appellate court concluded that a statewide law could preempt the plenary authority identified in the California Constitution “after engaging in the four-step evaluation process specified by our Supreme Court.”¹³¹⁹ This evaluation process would decide whether the CVRA was of statewide concern. Although Haggerty contended that *Jauregui* erroneously determined that the Act’s treatment of minority vote dilution was a statewide concern, the city’s appeal did not challenge this point.¹³²⁰ The California Legislature also declared its intent to codify the holding in *Jauregui* in amendments in 2015. The Legislature declared that minority vote dilution is “a matter of statewide concern” for which the provisions of the Act “constitute a narrowly-drawn remedy that does not unnecessarily interfere with municipal governance” and stated the intent to apply the Act to charter cities.¹³²¹ As amended, the Act expressly included charter cities among the “political subdivision[s]” subject to the Act in Section 14026.¹³²² These legislative declarations of statewide concern were not determinative but were relevant for the appellate court in deciding whether general law supersedes charter authority.

The Sixth District decided that the trial court satisfied the applicable standard in determining racially polarized voting resulting in vote dilution, which rendered the city’s

¹³¹⁶ *Ibid.*

¹³¹⁷ *Ibid.*

¹³¹⁸ *Ibid.*

¹³¹⁹ *Ibid.*

¹³²⁰ *Ibid.*

¹³²¹ *Ibid.*

¹³²² *Ibid.*

“plenary authority” argument moot.¹³²³ The court concluded that the application of the CVRA to Santa Clara did not violate charter city plenary authority under the California Constitution.

Attorney Fees and Costs

The city premised its appeal of the trial court’s award of attorney fees and costs solely on the anticipated reversal of the trial court’s judgment. The appellate court found no error requiring reversing the liability judgment under the Act, so it affirmed the award of attorney fees and costs.¹³²⁴

Conclusion

The California Legislature enacted the California Voting Rights Act to eliminate racially discriminatory at-large election systems. The 2020 decision of the Sixth District Court of Appeals affirmed the trial court decision that struck down Santa Clara’s discriminatory at-large election system. This decision meant that Santa Clara would maintain its current voting system, which split the city into six single-member districts. In the 2018 and 2020 district-based elections, three of six candidates elected to city council were Asian American.¹³²⁵

Wesley Mukoyama, one of the plaintiffs, said, “the settlement agreement puts an end to the discriminatory ‘at-large’ system and ensures that district elections are here to stay.”¹³²⁶ Laura Ho, one of the plaintiffs’ attorneys, said, “the settlement agreement will avoid further costly litigation and allows the City to move on from fighting its voters in this case to more fairly

¹³²³ Ibid.

¹³²⁴ Ibid.

¹³²⁵ “City of Santa Clara Voting Rights Case: Historic Settlement Ends 70-Year Period of Asian American Empowerment,” Asian Law Alliance, April 21, 2021.

¹³²⁶ Ibid.

representing all of its residents.”¹³²⁷ Robert Rubin, the civil rights attorney who initiated and led the case, said, “after years of resistance to the implementation of a District election system, the City is now required to adopt a voting procedure that will ensure the full and fair participation of the Asian-American community in the political process.”¹³²⁸ Richard Konda of Asian Law Alliance said, “the right to vote is the most fundamental right in our democracy and the elimination of the discriminatory at-large system removes a significant barrier to the meaningful participation of Asian Americans in the city of Santa Clara’s election system.”¹³²⁹

Santa Clara paid \$5.8 million in awards, attorney costs, interest, and legal bills to settle the voting rights lawsuit it lost in trial court and on appeal.¹³³⁰ The original award in 2018 was \$3.16 million in legal fees, and the accrued interest from 2018 to 2020 was \$490,000.¹³³¹ The additional legal costs for the appeal were \$712,000.¹³³² The city paid its attorney, Steve Churchwell, \$1.37 million.¹³³³ Santa Clara had many opportunities to prevent the high legal fees, starting with the first time it was warned in 2011 that its at-large system likely violated the CVRA. Instead, the city told their hired demographer to change the report, a detail revealed in the eventual complaint.¹³³⁴ If the city transitioned to a single-member district system after it received the warning letter, the change would have capped the city’s costs at \$30,000.¹³³⁵ Instead, it went to court and lost. When the city lost the trial court case, and Judge Kuhnle imposed six single-member districts, it could have settled and capped its costs at \$4 million.¹³³⁶

¹³²⁷ Ibid.

¹³²⁸ Ibid.

¹³²⁹ Ibid.

¹³³⁰ Schuk.

¹³³¹ Ibid.

¹³³² Ibid.

¹³³³ Ibid.

¹³³⁴ Ibid.

¹³³⁵ Ibid.

¹³³⁶ Ibid.

Despite costly and unsuccessful efforts from previous CVRA cases, the city appealed the decision.¹³³⁷ The Sixth District Court of Appeals dismissed the appeal.¹³³⁸

The \$5.8 million reward did not include the costs of two failed ballot measures proposing multi-member districts that could have brought more legal action.¹³³⁹ Other city officials, including Mayor Lisa Gillmore, City Attorney Brian Doyle, and former council members who opposed the district ruling, argued that such a change required a vote to legally amend the city's charter.¹³⁴⁰ Measure A, proposed in 2018, would have divided the city into two three-member city council districts and instituted ranked-choice voting for all city elections.¹³⁴¹ FairVote supported Measure A, arguing that RCV would provide better representation for Santa Clara's diverse population.¹³⁴² It projected the likely election of two Asian American candidates of choice and one Latino candidate of choice by 2022.¹³⁴³ Measure A failed by a narrow margin.¹³⁴⁴ The plaintiffs' attorneys opposed the measure, saying they preferred single-member districts because it would give minority voters a better chance of electing minority candidates.¹³⁴⁵ Measure C, proposed in 2020, asked voters if the city should cut the court-ordered number of districts from six to three.¹³⁴⁶ Voters responded with "No," with over 60% of voters rejecting the measure.¹³⁴⁷ The city's attorney, Brian Doyle, argued that the two measures honored the city's

¹³³⁷ Ibid.

¹³³⁸ Ibid.

¹³³⁹ Ibid.

¹³⁴⁰ Lloyd Alaban, "Santa Clara Settles in District Election Case," San José Spotlight, April 24, 2021.

¹³⁴¹ Katie Lauer, "Santa Clara Settles \$4.5 Million Lawsuit over Districted Elections," San Jose Inside, April 22, 2021.

¹³⁴² "Santa Clara's Measure A and Impacts on Communities of Color: An Analysis of Racial Minority Voting Rights and Ranked Choice Voting," ProGov21, May 2018, 1.

¹³⁴³ Ibid.

¹³⁴⁴ Joseph Geha, "Santa Clara Settles Voting Rights Lawsuit after Spending \$6 Million, Four Years on Legal Battles," The Mercury News (The Mercury News, April 25, 2021).

¹³⁴⁵ Ibid.

¹³⁴⁶ Ibid.

¹³⁴⁷ Ibid.

charter by allowing voters to decide their election system.¹³⁴⁸ He noted that Palm Springs adopted a similar two-district system with ranked choice voting after being forced to switch to district systems.¹³⁴⁹ He said, “If Measure A had passed, we would have avoided the vast majority of litigation, and the lawsuit would have been moot.”¹³⁵⁰ He also said the plaintiffs’ attorneys opposing Measure A and Measure C led to their failure.¹³⁵¹ Mayor Lisa Gillmore supported both measures.¹³⁵²

Suds Jain, the Indian American councilmember elected in 2020, said he thought city leaders “got bad advice” from “a number of people” on responding to the original lawsuit.¹³⁵³ He said, “the previous system of at-large elections preserved the status quo, and for 70 years, it prevented less connected or minority candidates from getting elected.”¹³⁵⁴ Jain said it was “unfortunate” that Santa Clara felt it had to fight the case, which used millions of taxpayer money.¹³⁵⁵ Even still, he was pleased with the court’s decision, which would make future city councils more descriptively representative.¹³⁵⁶ Jain said, “People come to council with their history and they have a lot of ideas of how the city should be run. If you had only one racial group, you might only get one sort of thinking. If they’re not representative of what the people are in Santa Clara, you’re not really going to get in what everyone is thinking.”¹³⁵⁷ He added, “I think it was a terrible mistake to have fought the case in the first place. It’s pretty well understood that nobody has ever won a CVRA lawsuit.”¹³⁵⁸ Raj Chahal, the first Asian American

¹³⁴⁸ Ibid.

¹³⁴⁹ Ibid.

¹³⁵⁰ Ibid.

¹³⁵¹ Ibid.

¹³⁵² Ibid.

¹³⁵³ Ibid.

¹³⁵⁴ Ibid.

¹³⁵⁵ Alaban.

¹³⁵⁶ Ibid.

¹³⁵⁷ Ibid.

¹³⁵⁸ Geha.

elected to city council, pointed to how the judgment brought three Asian minority council members.¹³⁵⁹ He said, “I am glad this is over and, finally, Santa Clara has abided with the CVRA and settled this unnecessary lawsuit. Santa Clara taxpayers have lost more than \$6 million because of this lawsuit, I wish we had done it better and saved these much needed city funds.”¹³⁶⁰ Richard Konda said the settlement was a victory for the plaintiffs and disenfranchised voters in one of the most diverse cities in the region.¹³⁶¹ Konda and the plaintiffs hoped that the city’s redistricting process, which would draw new districts based on the 2020 Census results, would not introduce new issues of disenfranchisement.¹³⁶²

Kate Bradshaw from San Jose Spotlight reported on the 2020 Census results for Santa Clara.¹³⁶³ Bradshaw wrote that Santa Clara's population increased by 10% over the past decade.¹³⁶⁴ The results showed that Asians in Santa Clara rose by 37% in the past decade.¹³⁶⁵ As of 2020, Asians alone make up 45.9% of Santa Clara’s population.¹³⁶⁶ The 2020 Census found that 60,000 Santa Clara residents identified as Asian or Asian American compared with 36,000 white residents, the next-largest racial group.¹³⁶⁷

¹³⁵⁹ Alaban.

¹³⁶⁰ Ibid.

¹³⁶¹ Ibid.

¹³⁶² Ibid.

¹³⁶³ Kate Bradshaw, “Census Shows Santa Clara's Asian Population Grew over the Last Decade,” San José Spotlight, April 7, 2022.

¹³⁶⁴ Ibid.

¹³⁶⁵ Ibid.

¹³⁶⁶ Ibid.

¹³⁶⁷ Ibid.

Chapter Five: Silver Bullet for California Voting Rights?

“In California, we face a unique situation where we are all minorities. We need statutes to ensure that our electoral system is fair and open. This measure gives us a tool to move us in that direction: it identifies the problem, gives tools to deal with the problem and provides a solution.”

– State Senator Richard Polanco, 2002¹³⁶⁸

Breaking Down the Numbers

Before the California Voting Rights Act became law, 449 of California’s 482 cities used an at-large election system.¹³⁶⁹ Since then, 170 cities have transitioned to by-district systems. The CVRA is a relatively new change for California; 142 of the 170 cities changed systems between 2018 and 2022.

I identified 70 cities with above a 20% Asian population from the 2020 U.S. Census.¹³⁷⁰ I found electoral systems through city council websites. Thirty-eight cities use at-large systems, and thirty-two use by-district systems. Of the thirty-two cities that elect their council members by district, twenty-eight cities transitioned after the CVRA’s enactment. Only four cities used by-district elections before 2001: San Jose, San Leandro, San Francisco, and Berkeley. San Francisco, Berkeley, and San Leandro were early adopters of ranked choice voting.¹³⁷¹

¹³⁶⁸ Assembly Committee on Elections, Reapportionment and Constitutional Amendments Bill Analysis of SB 976, April 9, 2002, 3.

¹³⁶⁹ Loren Collingwood and Sean Long, “Can States Promote Minority Representation? Assessing the Effects of the California Voting Rights Act,” *Urban Affairs Review* 57, no. 3 (December 31, 2019), 732.

¹³⁷⁰ “U.S. Census Bureau Quickfacts: United States,” U.S. Census Bureau, 2020.

¹³⁷¹ Jose Feroso and Darwin BondGraham, “How Ranked-Choice Voting Works in Oakland Elections,” *The Oaklandside*, October 19, 2022.

Table 5: California City Electoral Systems¹³⁷²

City/Town Name	Electoral System (AL, BD)	If BD, what is the transition year?	% Asian American	# of Asian Americans on the City Council
Cupertino	AL	-	69.40%	3
Milpitas	AL	-	67.50%	4
San Marino	AL	-	66.50%	3
Walnut	AL	-	65.60%	3
Monterey Park	BD	2020	65.10%	4
Temple City	AL	-	64.90%	2
Rosemead	AL	-	64.40%	3
Fremont	BD	2018	61.40%	4
Diamond Bar	BD	2022	61.00%	4
San Gabriel	AL	-	60.70%	3
Cerritos	AL	-	58.80%	4
Daly City	AL	-	57.30%	3
Arcadia	BD	2018	56.90%	4
Union City	BD	2020	55.50%	3
Saratoga	AL	-	53.70%	3
Dublin	AL	-	53.00%	1
Foster City	AL	-	51.90%	1
Westminster	BD	2020	50.90%	4
Alhambra	BD	2022	50.70%	1
La Palma	AL	-	48.10%	3
Millbrae	BD	2022	48.00%	1
Sunnyvale	BD	2020	48.00%	2
San Ramon	BD	2019	47.80%	1
Santa Clara	BD	2018	45.90%	3
South San Francisco	BD	2018	43.40%	2
Irvine	AL	-	42.90%	2
Hercules	AL	-	42.70%	0
Garden Grove	BD	2016	41.90%	3
Artesia	AL	-	39.10%	2
Pleasanton	AL	-	39.10%	0
Newark	AL	-	38.80%	0
Chino Hills	BD	2018	38.60%	0

¹³⁷² I identified 70 cities with an Asian population above 20% using data from the 2020 Census and Census QuickFacts. I found their electoral system and transition year to by-district elections through the city council website. I identified the number of Asian Americans on the city council through visual identification or verification through member biographies.

Cypress	AL	-	38.10%	0
San Jose	BD	1998	37.50%	3
Fountain Valley	AL	-	37.30%	1
Torrance	BD	2018	37.10%	3
Palo Alto	AL	-	35.10%	2
Los Altos Hills	AL	-	34.70%	2
San Leandro	BD	1998	34.40%	1
San Bruno	BD	2022	34.40%	1
San Francisco	BD	1998	34.30%	1
Los Altos	AL	-	33.80%	1
American Canyon	AL	-	33.70%	2
Mountain View	AL	-	33.30%	3
South Pasadena	BD	2018	32.60%	1
Buena Park	BD	2016	32.50%	2
Hillsborough	AL	-	31.90%	1
Alameda	AL	-	31.30%	2
Rancho Palos Verdes	AL	-	30.90%	1
La Cañada Flintridge	AL	-	30.30%	0
West Covina	BD	2017	29.90%	3
El Monte	BD	2022	29.90%	0
Belmont	BD	2022	29.90%	1
Elk Grove	BD	2019	29.50%	1
Emeryville	AL	-	29.20%	1
Albany	AL	-	29.00%	1
Hayward	AL	-	28.90%	0
El Cerrito	AL	-	28.60%	2
Eastvale	BD	2016	28.30%	1
Carson	BD	2020	27.70%	1
Colma	AL	-	27.60%	2
Burlingame	BD	2022	27.30%	0
Stanton	BD	2018	26.50%	1
Pinole	AL	-	26.40%	1
Lathrop	AL	-	26.10%	1
Rolling Hills Estates	AL	-	25.40%	0
Campbell	BD	2020	25%	0
Fullerton	BD	2018	24.10%	2
Signal Hill	AL	-	22.30%	0
Berkeley	BD	1998	20.50%	2

In at-large cities, the average number of Asian American city council members is 1.66. Eight cities have zero Asian city council members. These eight cities have an Asian population below 43%. Cypress, with a 38.1% Asian population, received a legal demand letter in September 2021, alleging that the city’s at-large system diluted the Asian American vote.¹³⁷³ The city had not elected an Asian American candidate in the past ten years.¹³⁷⁴ In the past twenty years, very few Asian Americans ran for Cypress city council.¹³⁷⁵ In 2020, Carrie Katsumata Hayashida was a candidate.¹³⁷⁶ Despite significant support from Asian American voters, she lost, coming in third in a race for two seats.¹³⁷⁷ Less than a year after the election, the city council did not appoint her for a council vacancy. Instead, the council chose a different applicant who they believed would work more cooperatively.¹³⁷⁸ In 2014 and 2022, Jay Sondhi ran and lost his campaigns for Cypress City Council despite substantial support from the Asian American community.¹³⁷⁹ Even with evidence of Asian American electoral defeat, Cypress refused to switch to district elections.¹³⁸⁰ On July 20, 2022, attorney Kevin Shenkman sued Cypress alleging that the city’s at-large system violated the California Voting Rights Act.¹³⁸¹

In by-district cities, the average number of Asian American city council members is 1.88, slightly higher than at-large cities. Four cities have zero Asian city council members. These four cities have an Asian population below 39%. Chino Hills, with a 38.6% Asian population, received a legal threat on behalf of the Latino population.¹³⁸² El Monte, with a 29.9% Asian

¹³⁷³ Kevin I. Shenkman, “Violation of California Voting Rights Act,” City of Cypress, September 20, 2021.

¹³⁷⁴ Susan Christian Goulding, “Cypress Faces a Potentially Expensive Lawsuit after Declining to Switch to District Elections,” Orange County Register (Orange County Register, July 20, 2022).

¹³⁷⁵ *Ibid.*

¹³⁷⁶ Shenkman.

¹³⁷⁷ *Ibid.*

¹³⁷⁸ *Ibid.*

¹³⁷⁹ *Ibid.*

¹³⁸⁰ *Ibid.*

¹³⁸¹ Goulding.

¹³⁸² “District-Based City Council Elections,” Chino Hills, CA.

population, switched in 2022 and has four Latino city council members out of four council seats.¹³⁸³ Burlingame, with a 27.3% Asian population, received a legal threat in 2022 on behalf of the Asian population, but it may be too soon to tell its effects on Asian representation.¹³⁸⁴ Campbell, with a 25% Asian population, received the legal threat on behalf of the Latino population.¹³⁸⁵

While the results in Chino Hills, El Monte, Burlingame, and Campbell did not show an increase in Asian American representation, the results are positive for Latino council members. Furthermore, the relatively short period during which CVRA-induced switches to district elections have been implemented limits analysis. Within the last four years, 142 cities have transitioned to district elections. Increases in by-district systems across the state and additional election cycles will provide more definitive answers for the effects on descriptive representation.

One potential source of error in my research is that I identified Asian city council members by visual identification or verification through member profiles. Some Filipino council members have last names like Hernandez or Gonzalez. For local voters who may not do their research and rely on surname identification on the ballot, there may not be as strong of support for Filipino candidates as East Asian candidates with easily identifiable last names. This finding makes by-district elections advantageous for Filipino candidates. District elections allow for more personalized, grassroots campaigns that target everyone within a geographic district.

¹³⁸³ “City Council Election Districting,” El Monte, CA.

¹³⁸⁴ “District Election,” Burlingame, CA.

¹³⁸⁵ “District-Based Elections,” Campbell, CA.

Recalls: An Unintended Consequence of District Elections

City of Monterey Park

The switch to by-district elections has been controversial. In a 2018 Monterey Park City Council report, the city council preemptively began the process for switching to by-district elections to avoid legal threats and attorney fees.¹³⁸⁶ The reason was not because of a failure to elect Asian city council members, but the potential litigation cost of not switching.¹³⁸⁷ The report declared that “the city’s money is better spent on repairing and improving infrastructure or other projects that benefit its residents.”¹³⁸⁸ The city council cited U.S. Census data revealing that the majority of Monterey Park’s residents were Asian, followed by Latinos as the second largest ethnic group, and Caucasians as the third largest.¹³⁸⁹ The ethnic groups, however, were not evenly integrated throughout the city.¹³⁹⁰ Census data confirmed that residents were geographically segregated.¹³⁹¹ Thus, transitioning from at-large to district elections could help ensure the representation of different geographic areas in Monterey Park’s local government.¹³⁹²

In April 2019, Mayor Hans Liang proposed setting the 2020 election for Districts 2, 3, and 4, which excluded Council Members Mitchell Ing and Teresa Real Sebastian, who lived in Districts 1 and 5.¹³⁹³ Liang explained that his priority was ensuring that District 3, with a predominantly Latino neighborhood, could elect a council member as soon as possible.¹³⁹⁴ On May 1, 2019, the Monterey Park City Council adopted Ordinance No. 2160 to change from at-

¹³⁸⁶ “District Elections,” Monterey Park, CA.

¹³⁸⁷ *Ibid.*

¹³⁸⁸ *Ibid.*

¹³⁸⁹ *Ibid.*

¹³⁹⁰ *Ibid.*

¹³⁹¹ *Ibid.*

¹³⁹² *Ibid.*

¹³⁹³ Christopher Yee, “After Furor, Monterey Park to Reconsider District Elections for 2020,” Pasadena Star News (Pasadena Star News, October 22, 2019).

¹³⁹⁴ Crystal Duan, “‘Just Shut up’: Monterey Park Councilman Says to Public as He Moves Ahead with New Election Plan,” Pasadena Star News (Pasadena Star News, May 9, 2019).

large to by-district elections, established district boundaries, and staggered re-election terms.¹³⁹⁵ Mayor Liang and Council Members Peter Chan and Stephen Lam approved the voting sequence, which allowed Lam to run for re-election in District 2.¹³⁹⁶ By a 3 to 2 vote, the City Council adopted an election sequencing that would remove Council Members Ing and Real Sebastian in 2020.¹³⁹⁷ If their districts were chosen for the 2020 ballot, they could have run as incumbents with the possibility of serving consecutive terms.¹³⁹⁸ Council Member Real Sebastian won a seat on the city council in 2011.¹³⁹⁹ As a first-time candidate and the only woman on the ballot, she received more votes than Monterey Park's mayor.¹⁴⁰⁰ She served consecutive terms until 2020 and was elected Mayor in 2017. Council Member Ing served as the City Treasurer from 2001 to 2007.¹⁴⁰¹ He was elected to the city council in 2007, became Mayor in 2009, and served consecutive terms until 2020.¹⁴⁰² In 2011, Ing won re-election with more votes than any other candidate.¹⁴⁰³

In October 2019, residents wore red to Monterey Park's city council meeting to protest the controversial election sequence.¹⁴⁰⁴ Residents fought to change the voting sequence to allow Ing and Real Sebastian to run for re-election in 2020.¹⁴⁰⁵ Monterey Park resident Maychelle Yee was one of several public commenters who said that almost all resident-submitted district maps

¹³⁹⁵ "District Elections," Monterey Park, CA.

¹³⁹⁶ Yee, October 2019.

¹³⁹⁷ Christopher Yee, "Monterey Park Residents Serve Recall Notices to Two City Councilmen," Pasadena Star News (Pasadena Star News, June 18, 2019).

¹³⁹⁸ Ibid.

¹³⁹⁹ Thomas Himes, "First-Time Council Candidate Garners More Votes than Monterey Park's Mayor," Pasadena Star News (Pasadena Star News, August 29, 2017).

¹⁴⁰⁰ Ibid.

¹⁴⁰¹ "Mitchell Ing," LinkedIn, accessed April 22, 2023, <https://www.linkedin.com/in/ing-s-3162a2b0>.

¹⁴⁰² Ibid.

¹⁴⁰³ Thomas Himes, "First-Time Council Candidate Garners More Votes than Monterey Park's Mayor," Pasadena Star News (Pasadena Star News, August 29, 2017).

¹⁴⁰⁴ Yee, June 2019.

¹⁴⁰⁵ Ibid.

set the voting sequence to allow Ing, Lam, and Real Sebastian to run for re-election in 2020.¹⁴⁰⁶ Yee said, “You purposely twisted the very law here to protect our minimized groups to maliciously get rid of other council members, including the lone female Hispanic member of the council.”¹⁴⁰⁷ In response, the City Council considered opening March’s three seats to an at-large election, pushing by-district voting to 2022.¹⁴⁰⁸

In June 2019, Monterey Park residents served recall notices to Mayor Liang and Council Member Chan.¹⁴⁰⁹ The petitions alleged that Chan and Liang were “unethical, untrustworthy, without honor and unfit to represent the people of Monterey Park.”¹⁴¹⁰ Christopher Yee, a reporter in Monterey Park, wrote that the city’s move to by-district elections led to the recall.¹⁴¹¹

In May 2019, the City Council officially passed the law dividing the city into districts— at the expense of Ing and Real Sebastian.¹⁴¹² The ordinance created a majority-Latino district on the south side of the city.¹⁴¹³ Despite public disapproval, Monterey Park elected three council members by district in March 2020, leaving the two incumbents unable to seek re-election.¹⁴¹⁴ As the only woman and Latino on the council, Real Sebastian said, “I’m extremely offended when people say we need to vote this district (3) in to have a Latino represent the community to have diversity on the dais. What am I?”¹⁴¹⁵ As of the November 2022 election, Monterey Park

¹⁴⁰⁶ Ibid.

¹⁴⁰⁷ Ibid.

¹⁴⁰⁸ Ibid.

¹⁴⁰⁹ Ibid.

¹⁴¹⁰ Christopher Yee, “Monterey Park Residents Serve Recall Notices to Two City Councilmen,” Pasadena Star News (Pasadena Star News, June 18, 2019).

¹⁴¹¹ Ibid.

¹⁴¹² Christopher Yee, “Despite Support for One More at-Large Election, Monterey Park Will Vote by District in March for City Council,” San Gabriel Valley Tribune (San Gabriel Valley Tribune, November 13, 2019).

¹⁴¹³ Ibid.

¹⁴¹⁴ Ibid.

¹⁴¹⁵ Ibid.

has replaced all five council members involved in this election controversy.¹⁴¹⁶ Four Asian Americans and one Latino member now serve on the Monterey Park City Council.¹⁴¹⁷

City of Westminster

The City of Westminster adopted an ordinance for district-based elections in 2019.¹⁴¹⁸ In November 2020, Carlos Manzo was elected to the City Council representing District 2.¹⁴¹⁹ Eight months after his election, a group of residents moved to recall him and Council Member Kimberly Ho in District 3.¹⁴²⁰ Community organizers initiated the recall campaign after Ho and Manzo voted to postpone the construction of a war monument commemorating the 1972 Battle of Quang Tri at Freedom Park in Little Saigon.¹⁴²¹ Manzo said he fully expected the recall election to end up on the ballot, which would cost the city hundreds of thousands of dollars for signature verification.¹⁴²² Small districts can make it easier to gather enough signatures for a special election. The transition to district elections in 2020 meant that residents only needed a fraction of the signatures required for an at-large recall. Though districts make campaigns geographically contained and cost-effective, districts can increase recall efforts and substantial expenses for signature verification. Not only is it easier to run for office in a district system, but it is also easier to mount a recall effort.

¹⁴¹⁶ “City Council,” Monterey Park, CA.

¹⁴¹⁷ Ibid.

¹⁴¹⁸ “Westminster, CA,” 2019 Districting Archive.

¹⁴¹⁹ Susan Christian Goulding, “Westminster Recall Effort Could Test Whether by-District Voting Escalates Costly Special Elections,” Orange County Register (Orange County Register, August 24, 2021).

¹⁴²⁰ Ibid.

¹⁴²¹ Susan Christian Goulding, “In Emotional 7-Hour Meeting, Westminster City Council Puts Moratorium on All New Monuments,” Orange County Register (Orange County Register, July 16, 2021).

¹⁴²² Goulding, August 2021.

Before the 2022 recall of Manzo and Ho, Westminster’s 2020 recall election involved Mayor Tri Ta and Council Members Kimberly Ho and Chi Charlie Nguyen.¹⁴²³ Like the Monterey Park controversy, Ta, Ho, and Nguyen voted as a unit, often in controversial 3 to 2 decisions.¹⁴²⁴ Westminster United, a group of community organizers who spearheaded the recall effort, accused the members of “unethical actions, corruption, nepotism, favoritism, lack of critical thinking and incompetence.”¹⁴²⁵ The trio was elected at-large and needed to be recalled at-large. To get the recall on the ballot, petitioners had to gather signatures from 20% of the voters—California’s requirement for jurisdictions with 10,000 to 50,000 registered voters.¹⁴²⁶ Westminster community organizers reached the minimum goal of 8,736 signatures and more.¹⁴²⁷ The city paid the Orange County Registrar of Voters \$119,000 for signature verification.¹⁴²⁸ Westminster City Clerk said, “Recall elections are a function of our democracy, and we absorb the cost.”¹⁴²⁹ The recall lost decisively.¹⁴³⁰ Nguyen, a first-time council member, said he “barely served six months when this recall election was initiated.”¹⁴³¹

In the recall efforts of Manzo and Ho, however, petitioners only needed to amass valid signatures for 20% of registered voters in their respective districts.¹⁴³² District 2 required 2,140 signatures and District 3 required 2,660.¹⁴³³ Districts can pose obstacles in recall efforts. Justin Levitt, a demographer hired for Westminster’s redistricting process, said, “A mitigating factor

¹⁴²³ Susan Christian Goulding, “Recall of Westminster Mayor, Two Council Members Headed to Failure,” Orange County Register (Orange County Register, April 8, 2020).

¹⁴²⁴ Ibid.

¹⁴²⁵ Ibid.

¹⁴²⁶ Ibid.

¹⁴²⁷ “Mayor and City Council Recall, Westminster, California,” Ballotpedia, 2020.

¹⁴²⁸ Goulding, August 2021.

¹⁴²⁹ Ibid.

¹⁴³⁰ “Mayor and City Council Recall, Westminster, California,” Ballotpedia, 2020.

¹⁴³¹ Goulding, April 2020.

¹⁴³² Goulding, August 2021.

¹⁴³³ Ibid.

may be that if you were elected by district, you are more likely to have a core of avid supporters within that small community. It's like on the national level—people tend to like their own Congress member but hate everyone else's choices.”¹⁴³⁴ The recall effort to recall Council Members Ho and Manzo did not qualify for the ballot.¹⁴³⁵ Community organizers submitted 2,381 valid signatures against Ho, which fell short of the 2,660 needed in District 3.¹⁴³⁶ They later submitted 2,878 signatures against Manzo, but the recall election did not proceed because the Registrar of Voters only verified 1,907 signatures.¹⁴³⁷ The Registrar billed Westminster \$16,635 for authenticating signatures for Ho's recall and \$9,785 for Manzo's recall.¹⁴³⁸ If the two districts' recall attempts resulted in two separate special elections, the costs could reach over \$100,000.

The Future of the California Voting Rights Act

In *Pico Neighborhood Association v. City of Santa Monica* (2020), Maria Loya and Advocates for Malibu Public Schools alleged that Santa Monica's at-large election system diluted Latino voting power in violation of the California Voting Rights Act and discriminated against Latino voters in violation of the Equal Protection Clause of the California Constitution.¹⁴³⁹ On February 15, 2019, Los Angeles Superior Court Judge Yvette M. Palazuelos ordered a switch to by-district elections.¹⁴⁴⁰ The remedial seven-district map included a 30% Latino district.¹⁴⁴¹ The trial court held that Santa Monica violated the California Voting Rights

¹⁴³⁴ Ibid.

¹⁴³⁵ Susan Christian Goulding, “Effort to Recall Second Westminster Council Member Falls Flat,” Orange County Register (Orange County Register, March 22, 2022).

¹⁴³⁶ Ibid.

¹⁴³⁷ Ibid.

¹⁴³⁸ Ibid.

¹⁴³⁹ *Pico Neighborhood Association et al. v. City of Santa Clara*, Cal.App.2nd. B295935 (Cal. Ct. App. 2020).

¹⁴⁴⁰ Ibid.

¹⁴⁴¹ Ibid.

Act and the California Constitution by continuing to use at-large elections.¹⁴⁴² The court found the CVRA violation because of evidence of racially polarized voting and that the city enacted its at-large law in an intentionally discriminatory way, violating the California Constitution’s equal protection clause.¹⁴⁴³ The court ordered new district elections, which the appeals court temporarily stayed as the appeal progressed.¹⁴⁴⁴

The city appealed this decision. On July 9, 2020, the Second District Court of Appeal ruled in favor of the city. It argued that Latinos, who made up 14% of Santa Monica’s electorate, lacked the numbers to win an election in a 30% Latino district.¹⁴⁴⁵ The appeals court declared that the trial court made a legal error. It said that plaintiffs alleging a CVRA violation had to prove racially polarized voting and that this vote dilution affected the minority group’s political power.¹⁴⁴⁶ The CVRA does not require this proof, only requiring that plaintiffs prove “the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the dilution or the abridgement of the rights of voters” who belong to a protected class.¹⁴⁴⁷ The dilution of the ability to influence an election sets a low bar, but the appeal court found no evidence of vote dilution.¹⁴⁴⁸

The plaintiffs filed their case with the California Supreme Court. In October 2020, the California Supreme Court took the case, depublishing the Appellate Court ruling.¹⁴⁴⁹ A depublished decision means that the court’s decision is not available as precedent because the

¹⁴⁴² Ibid.

¹⁴⁴³ Ibid.

¹⁴⁴⁴ Ibid.

¹⁴⁴⁵ Ibid.

¹⁴⁴⁶ Ibid.

¹⁴⁴⁷ Ibid.

¹⁴⁴⁸ Ibid.

¹⁴⁴⁹ Jorge Casuso, “Supreme Court Takes up Voting Rights Lawsuit,” Santa Monica Lookout, October 21, 2020.

court deems the case to have insufficient precedential value.¹⁴⁵⁰ While the appeals decision cannot be cited as authority in California, depublishing does not mean that the Supreme Court has overruled or disagreed with the Court of Appeal’s ruling.¹⁴⁵¹ The Court wrote:

“The petition for review is granted. The parties are ordered to brief the following issue: What must a plaintiff prove in order to establish vote dilution under the California Voting Rights Act? On the Court’s own motion, the Court of Appeal’s Opinion is ordered depublished.”¹⁴⁵²

Professor Richard Hasen, a professor of law and political science at the University of California, Los Angeles School of Law, said that if the opinion withstands further review at the California Supreme Court, it will likely to lead more California cities to resist CVRA lawsuits.¹⁴⁵³ Cities that use at-large systems fight against CVRA lawsuits because individuals in power want to stay in control, and maintaining at-large elections maintains the status quo. Though it agreed to take the case in October 2020, the California Supreme Court has only just prepared to hear oral arguments in March 2023.¹⁴⁵⁴

The California Supreme Court hoped that Santa Monica would settle, but the city has invested too many resources to concede. Council Member Phil Brock said that he would not vote to settle the six-year CVRA lawsuit before the California Supreme Court. Though he supported district elections, Brock emphasized that “We have no money to settle the CVRA. I can’t see any

¹⁴⁵⁰ “Depublication of California Court of Appeal Decisions: Rules for Publishing and Citing to Appellate Cases,” Rules for Publishing and Citing to Appellate Cases (LibGuides at UCLA School of Law - Hugh & Hazel Darling Law Library).

¹⁴⁵¹ *Ibid.*

¹⁴⁵² “PICO NEIGHBORHOOD ASSOCIATION v. CITY OF SANTA MONICA,” Appellate Court Case Information.

¹⁴⁵³ Rick Hasen, “Breaking: California State Appeals Court Sides with City of Santa Monica in Reversing in California Voting Rights Act Case, with Potentially Big Implications,” Election Law Blog, July 10, 2020.

¹⁴⁵⁴ Jorge Casuso, “After 7 Years, Voting Rights Lawsuit Could Be Decided Soon,” Santa Monica Lookout, March 14, 2023.

justification for a settlement before a decision by the Supreme Court.”¹⁴⁵⁵ In response, Kevin Shenkman who represents the Santa Monica plaintiffs said, “As Councilmember Brock knows well, had the City of Santa Monica brought its elections into compliance with the California Voting Rights Act when we first raised the issue in 2015, or even in 2016, it could have done so for \$0.00. Instead, past city councils decided to spend a reported \$15 million on expensive attorneys to protect their own power at the expense of the voting rights of minorities throughout California.”¹⁴⁵⁶ If the Supreme Court rules in favor of the plaintiffs, Santa Monica will lose tens of millions of dollars in the highest CVRA settlement yet.¹⁴⁵⁷ In 2019, the plaintiffs’ attorneys made the first request for attorney fees and expenses for \$22.3 million.¹⁴⁵⁸ Shenkman estimated that Santa Monica had spent over \$10 million on the law firm Gibson Dunn & Crutcher and offered to help implement district elections and “be reasonable in accommodating the City’s payment of our attorneys’ fees.”¹⁴⁵⁹

Hasen said that this appeals decision was a significant loss for voting rights plaintiffs under the CVRA. If the appeals decision holds, CVRA cases will become more like federal Voting Rights Act cases that have been difficult for Asian Americans to win.¹⁴⁶⁰ In an interview, Professor Justin Levitt of California State University Long Beach, said that the California Supreme Court’s decision will likely not affect the CVRA.¹⁴⁶¹ Even if the Supreme Court rules in favor of Santa Monica, the California Legislature can easily amend the act to create a carve-

¹⁴⁵⁵ Jorge Casuso, “Brock Drops Support for Voting Rights Settlement,” Santa Monica Lookout, November 7, 2022.

¹⁴⁵⁶ *Ibid.*

¹⁴⁵⁷ *Ibid.*

¹⁴⁵⁸ Jorge Casuso, “Voting Rights Attorneys Seek More than \$22 Million in Legal Costs,” Santa Monica Lookout, June 4, 2019.

¹⁴⁵⁹ Casuso, 2022.

¹⁴⁶⁰ Hasen.

¹⁴⁶¹ Justin Levitt, Professor of Political Science at California State University, Long Beach and Vice President of National Demographics Corporation, interview by author, interview notes, Claremont, CA, March 31, 2023.

out exception for the ruling.¹⁴⁶² Similarly, Hasen said that the California Supreme Court decision could cause the California Legislature to rework part of the statute to make it even easier for plaintiffs to win CVRA cases.¹⁴⁶³ This is because the CVRA, despite its jurisdiction over non-partisan city council elections, has far-reaching partisan effects.

Though California has been a Democratic stronghold for over 25 years,¹⁴⁶⁴ Republicans have had substantial success at the local level.¹⁴⁶⁵ All local elections in California are non-partisan, so Republicans do not run with the party affiliation. Steve Cooley won three non-partisan elections for District Attorney of Los Angeles County.¹⁴⁶⁶ When he ran for Attorney General in a 2010 partisan election, he lost the election to Kamala Harris by 0.5% of the vote.¹⁴⁶⁷ Republicans also have policy advantages at the local level on suburb-wide policies like affordable housing, public safety, and local law enforcement.¹⁴⁶⁸

One of the biggest changes from the California Voting Rights Act is partisan.¹⁴⁶⁹ The CVRA has helped more Democrats of color win local elections.¹⁴⁷⁰ The California Legislature has upheld the CVRA for twenty years because Democrats are the clear winners in by-district local elections.¹⁴⁷¹ Electing Democrats at the city council level creates a leadership pipeline to higher office in the California Legislature.¹⁴⁷² Joaquin Avila, the chief architect of the California

¹⁴⁶² Ibid.

¹⁴⁶³ Hasen.

¹⁴⁶⁴ Marie Tae Mcdermott, “Why Is California a Blue State?,” *The New York Times* (The New York Times, November 6, 2020).

¹⁴⁶⁵ Justin Levitt, Professor of Political Science at California State University, Long Beach and Vice President of National Demographics Corporation, interview by author, interview notes, Claremont, CA, March 31, 2023.

¹⁴⁶⁶ “Steve Cooley,” Ballotpedia.

¹⁴⁶⁷ Ibid.

¹⁴⁶⁸ Justin Levitt, Professor of Political Science at California State University, Long Beach and Vice President of National Demographics Corporation, interview by author, interview notes, Claremont, CA, March 31, 2023.

¹⁴⁶⁹ Ibid.

¹⁴⁷⁰ Ibid.

¹⁴⁷¹ Ibid.

¹⁴⁷² Ibid.

Voting Rights Act, explained that representatives, senators, governors, and presidents “don’t just appear magically.”¹⁴⁷³ He said:

“Somebody like Obama—he didn’t just appear magically. He started somewhere. He started at the local level. He succeeded. He failed. He worked to overcome failure. He succeeded again... A person’s involvement in politics often begins early—someone who participated in school government in middle or high school, who continues in college and after. They get experience, they get a taste for the political process, they get a taste for the difference that they can make, and they persist. But it starts somewhere.”¹⁴⁷⁴

Even if Santa Monica prevails, this case is unlikely to have as large of a statewide impact as some hope.¹⁴⁷⁵ The city could win on the Santa Monica-specific elements of the case.¹⁴⁷⁶ As the League of Women Voters of Santa Monica suggests in an “Opposition to Motion to Strike,” in Santa Monica, a ruling for the plaintiffs could hurt diverse representation in the city.¹⁴⁷⁷ Even if the Court rules in favor of Santa Monica and finds a fundamental flaw in the CVRA, it is very likely that the California Legislature will amend the act.¹⁴⁷⁸ Given the Legislature’s resistance to anything perceived as weakening the law over the last twenty years, there is strong evidence that such legislation could be quickly written and enacted.¹⁴⁷⁹ The California Legislature has upheld the CVRA for over twenty years because by-district city council elections benefit Democrats and create a leadership pipeline to higher office.

¹⁴⁷³ Robert Chang, “Remembrance, One Person, One Vote: The Enduring Legacy of Joaquin Avila,” *Seattle Journal for Social Justice* 18, no. 1 (August 2019).

¹⁴⁷⁴ *Ibid.*

¹⁴⁷⁵ “California’s Voting Rights Act Continues to Force More Local Governments into by-District Elections,” *PublicCEO*, November 9, 2022.

¹⁴⁷⁶ *Ibid.*

¹⁴⁷⁷ *Ibid.*

¹⁴⁷⁸ *Ibid.*

¹⁴⁷⁹ *Ibid.*

Though Santa Monica may or may not be forced into district elections, the CVRA is very likely to remain.¹⁴⁸⁰ While Santa Monica council members may hope for a favorable ruling in fear of losing millions of dollars in the settlement, they should not count on the ruling to change the course of the widespread shift to districts in California.¹⁴⁸¹

¹⁴⁸⁰ “California's Voting Rights Act Continues to Force More Local Governments into by-District Elections,” PublicCEO, November 9, 2022.

¹⁴⁸¹ *Ibid.*

Conclusion

Though California is home to the largest Asian population, Asian Americans are underrepresented in city councils.¹⁴⁸² My thesis evaluates the effectiveness of the California Voting Rights Act on Asian American political participation and representation in local city council elections. This thesis addresses two questions. First, is the California Voting Rights Act an effective solution for Asian American vote dilution in local elections? The answer is that the context matters. The California Voting Rights Act is modeled on Section 2 of the Voting Rights Act and encourages a switch from at-large to by-district elections. It incorporates legal standards that acknowledge and protect the diverse Asian American population. Twenty-two million Asian Americans trace their roots to over 20 countries in East and Southeast Asia and the Indian subcontinent.¹⁴⁸³ Each Asian ethnic group has unique histories, cultures, and languages. I examined the legal implications of the California Voting Rights Act on the Asian population. The CVRA has not outgrown its usefulness. Asian Americans in California still face disenfranchisement at the local level. The California Voting Rights Act continues to be important legislation for the Asian American community.

While the CVRA has dismantled the minority vote diluting effects of at-large elections, it employs too little discretion in switching from at-large to by-district elections. Out of fear of significant legal costs, many cities have voluntarily transitioned to district elections without analyzing whether it would benefit the city's minority populations. Switching from at-large to by-district elections should be done intentionally and deliberately, while considering and preserving communities of interest. My second research question asks if the switch from at-large to by-district elections increases Asian representation in city councils. I found data on seventy

¹⁴⁸² Budiman and Ruiz.

¹⁴⁸³ Ibid.

California cities with over 20% Asian population from the 2020 Census. I found each city's electoral system, transition year to by-district elections, and the number of Asian city council members through city websites. I found that switching to district elections increases descriptive representation for Asian Americans in city council elections. Descriptive representation is only one measure of the CVRA's effectiveness. Future research should look at the effects on Asian turnout gaps or the ability of Asians to influence election outcomes. An Asian candidate may not always be the Asian population's preferred candidate. As more cities complete a switch to by-district elections under the CVRA, future researchers should incorporate measures of geographic dispersion and turnout rates. In doing so, scholars can clarify the CVRA's role in improving racial representation and inform states considering similar election policies.

My research is limited by the low numbers of CVRA litigation on behalf of Asian Americans. I only performed one case study because Santa Clara is the only city that has gone to trial against Asian Americans. Even in Chino Hills (38.6% Asian) and Campbell (25% Asian), demand letters were sent on behalf of Latino vote dilution. Chino Hills and Campbell use district-based systems and currently have zero Asian city council members. Increases in by-district systems across the state and additional election cycles will provide more definitive answers for the effects on descriptive representation.

It is unclear when districts stop being effective for increasing descriptive representation. Demographers must create majority-minority districts to increase minority representation.¹⁴⁸⁴ Majority-minority districts require ethnic groups to be geographically concentrated and compact. Asian Americans have relatively low levels of segregation, so it is important to investigate the

¹⁴⁸⁴ "Minority Majority Districts," US Legal.

effects of a switch to by-district elections.¹⁴⁸⁵ Though Asian Americans are residentially integrated in cities, I found that this assimilation has not translated into political and social integration, as evidenced by Asian underrepresentation in city councils.

While districts can help Asians elect their preferred candidates, future research should investigate the proportion minority groups need to reach before districts become a hindrance rather than an advantage to representation. As the Latino and Asian populations grow in California, will districts still be the best solution? It will be important to review the effectiveness of alternative voting systems, such as ranked choice voting or mixed systems, if districts which rely on racial segregation are no longer applicable. Cupertino, Milpitas, San Marino, and Walnut all have Asian populations above 65%. Each city has three or more Asian city council members. With such a high Asian population and a history of electing Asian council members, switching to district elections would not increase representation. Instead, district elections would split the Asian population and communities of interest. Santa Clara, the subject of my case study, has a 40% Asian population that is residentially integrated in the city. Before switching to district elections, Santa Clara had never elected an Asian city council member. After the court-ordered transition, the city elected its first Asian city council member, Raj Chahal. In the next election, two more Asian city council members were elected. I argue that whether cities can benefit from district elections instead of at-large systems should be determined case-by-case. It can be harmful for cities to voluntarily switch as in the case of Monterey Park. Though the city had no issue in electing Asian and Latino council members, the council voluntarily switched to district elections out of fear of a costly lawsuit. This switch and controversial election sequencing led to a recall effort of the Monterey Park mayor and a city council member.

¹⁴⁸⁵ Gordon H. Chang, *Asian Americans and Politics: Perspectives, Experiences, Prospects* (Washington, D.C.: Woodrow Wilson Center Press, 2001), 136.

The California Voting Rights Act has been a critical tool in combating the historical exclusion of Asian Americans from city councils. Through its provisions encouraging district-based elections, the Act has helped empower Asian communities by giving them a greater voice in local politics. The Act has increased representation for Asian Americans on school boards, city councils, and other elected bodies in California. In 2011, fewer than 160 California cities, counties, school districts, and special districts held district-based elections.¹⁴⁸⁶ In 2021, the number increased to over 500.¹⁴⁸⁷ Over 170 cities, 300 school and community college boards, and over 50 hospital, fire, airport, and water districts shifted from at-large to by-district elections since the CVRA became law.¹⁴⁸⁸ As financial payouts from settlements increase, more and more local governments will switch to by-district elections.¹⁴⁸⁹ Future research should analyze the effects of the CVRA on Asian American representation in school and community college boards and other special districts.

The CVRA takes a significant step forward in the fight for Asian American political representation and participation. By continuing to advocate fair and equitable electoral processes, Asian Americans can continue to make progress toward dismantling the legacies of exclusion in California.

¹⁴⁸⁶ “California’s Voting Rights Act Continues to Force More Local Governments into by-District Elections,” PublicCEO, November 9, 2022.

¹⁴⁸⁷ *Ibid.*

¹⁴⁸⁸ *Ibid.*

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