

# Overcoming “Stigmas”: Lesbian and Gay Districts and Black Electoral Empowerment

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## INTRODUCTION

In the United States, historically, members of racial and sexual minority groups<sup>1</sup> have been prevented from effectively participating in governmental decisionmaking because the political districting system denies them adequate representation in the political process. Follow-

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This article is dedicated to Judge Louis H. Pollak, who has enlightened so many with his insight and kindness.

1. “Sexual minority” is a term that covers the traditionally recognized categories of lesbians and gays, as well as bisexuals, transsexual and transgendered people, and others who define their identity based on radical sexualities. “Racial minority” is a controversial term as well: minorities are a contingent phenomenon since the majority of the world population is non-white. Even though blacks, Latinos and Asians collectively form the majority population of most major cities, they are a numerical minority in the United States. Because of the politically submerged nature of the political power of people of color, however, the term “racial minority” still has currency.

I use the terms “lesbian” and “gay” because of their currency. I will not use the term ‘bisexual’ alongside “lesbian” and “gay” because, although bisexuals participate integrally in lesbian and gay political life, they do not have representation needs different from those of heterosexuals, lesbians, and gays. The term “queer” has been used to describe a broad range of sexual and gender identities. See generally Darren Rosenblum, *Queer Intersectionality and the Failure of Recent Lesbian and Gay Victories*, 4 L. & SEXUALITY: A REVIEW OF LESBIAN & GAY LEGAL ISSUES 83 (1994). I will not, however, use the term “queer” in this article because its radicalism implies a more critical relationship toward electoral power.

ing the 1990 census, blacks,<sup>2</sup> in particular, saw significant gains in their political representation as a result of redistricting, only to suffer a sharp reduction of their voting rights with the U.S. Supreme Court's decisions in the *Shaw*<sup>3</sup> and *Miller*<sup>4</sup> cases. Whereas voting rights litigation once explored ways to prevent minority vote dilution, today's jurisprudence focuses on the ramifications of the "stigma"<sup>5</sup> faced by blacks in a majority-minority<sup>6</sup> district and the "constitutional right to participate in a 'colorblind' electoral process."<sup>7</sup>

Race-conscious districting provides blacks with some guarantee of political presence in a country defined by the odious oppression of black people. Legal scholars have challenged the putative virtue of racelessness<sup>8</sup> in a society fraught with racist political, economic, and cultural realities—realities that race-consciousness accurately reflects.<sup>9</sup> As one scholar phrases it, "[l]egal discourse uses the language of liberal 'colorblindness,' rather than that of racial inferiority, to undermine racial reform."<sup>10</sup> Even political boundaries, ostensibly raceless, anchor the political imbalance among the races.<sup>11</sup> "Color-blind" district lines can serve a similar function where the electorate is racially polarized, permitting whites to dominate political representation. Race-conscious districting reduces the systematic exclusion of blacks from political power by whites.

In contrast to past judicial activism on behalf of black communities, no laws or courts have attempted structurally to reverse the lack of representation of lesbian and gay interests. Today, only seventy of the nearly one-half million elected officials in the United States are

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2. This article employs the term "black" because unlike "African American," it does not exclude non-American peoples of African heritage who may make up important constituencies. Unfortunately, "black" lacks the potentially useful ethnic implications of "African American."

3. *Shaw v. Reno*, 113 S. Ct. 2816 (1993).

4. *Miller v. Johnson*, 115 S. Ct. 2475 (1995).

5. *Shaw*, 113 S. Ct. at 2829.

6. "Majority-minority" indicates a majority of racial, ethnic, and language minorities but does not include sexual minorities.

7. *Id.* at 2824.

8. Lani Guinier has coined the term "racelessness" to indicate the valorization of the absence of race.

9. See, e.g., Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 *Stan. L.J.* 1 (1991); Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 *MICH. L. REV.* 2128 (1989).

10. Jayne Chong-Soon Lee, *Navigating the Topology of Race*, 46 *STAN. L.J.* 747, 752 (1994) (reviewing KWAME ANTHONY APPIAH, *IN MY FATHER'S HOUSE: AFRICA IN THE PHILOSOPHY OF CULTURE* (1992)).

11. See Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 *HARV. L. REV.* 1841 (1994) (examining the racial implications of political boundaries).

openly lesbian or gay.<sup>12</sup> This underrepresentation is shocking even by the most conservative estimates of the size of the lesbian and gay population.<sup>13</sup> Despite the apparently systemic exclusion of lesbians and gays from political representation, advocates have mobilized to establish some access for lesbian and gay candidates within the current districting system.<sup>14</sup> Although no districting authority officially recognizes lesbian and gay people as a group whose interests must be met by districting schemes, lesbian and gay activists, using community-based evidence, have, to some extent, succeeded in asserting districting claims.

This Article argues that the renewed disenfranchisement of blacks from districting remedies may be curbed through the use of community-based evidence similar to that used by lesbian and gay activists. Section One will explore the current position of blacks in the districting system, scrutinizing recent changes in the law that deprive blacks of their previously "protected" status under the Voting Rights Act. In 1995, the *Miller v. Johnson*<sup>15</sup> decision notably held that race cannot be the predominant factor in the drawing of district lines. Blacks wishing to ensure that their interests are represented in the political process will therefore need to employ standards for creating electoral districts that do not violate *Miller*. A close reading of the *Miller* decision indicates that evidence of community cohesiveness, rather than mere "hard" population statistics, would satisfy the Court.

Section Two will address the use of community-based evidence to establish district lines reflecting lesbian and gay interests. An examination of the 1991 redistricting for the New York City council pro-

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12. GAY AND LESBIAN VICTORY FUND, *OUT FOR OFFICE: CAMPAIGNING IN THE GAY 90'S* xiii (Kathleen DeBold ed., 1994).

13. Estimates of the size of the lesbian and gay population in this country range from 1% to 10% of the nation's total population. The 10% figure is based on one of Kinsey's landmark studies of human sexuality. See generally ALFRED C. KINSEY ET AL., *SEX BEHAVIOR IN THE HUMAN MALE* (1948); ALFRED C. KINSEY ET AL., *SEX BEHAVIOR IN THE HUMAN FEMALE* (1953). This 10% figure serves as a common reference point for quantifying lesbian and gay communities. Others have used this figure as well for representation purposes. See, e.g., *The Case of the Missing Districts*, *OUTWEEK*, May 1, 1991, at 4 ("[L]esbians and gays, with at least 10 percent of the city's population, deserve at least five [of 51 seats on the City Council].").

One recent study by a prominent marketing firm revealed that approximately 6% of the population is lesbian or gay. See Stuart Elliot, *A Sharper View of Gay Consumers*, *N.Y. TIMES*, June 9, 1994, at D1. This study also confirmed that lesbian and gay populations are regionally concentrated. "[Lesbians and gays] are highly concentrated in the top 25 metropolitan markets." *Id.*

14. This Article does not posit that sexual orientation serves as a marker for political fidelity to lesbian and gay communities. On the contrary, many heterosexual representatives may serve lesbian and gay communities more responsibly than lesbian or gay representatives.

15. *Miller v. Johnson*, 115 S. Ct. 2475 (1995).

vides a close look at the forces weighing on lesbian and gay districting efforts. Lesbian and gay districting experiences in Texas and California further clarify districting issues. These examples demonstrate the critical role community-based evidence has played in lesbian and gay redistricting efforts. The representation attained by lesbian and gay communities depends upon both the jurisdiction's contextual homophobia and the community's own strength. Community-based statistics are generally extrapolated from evidence of three primary types: maps depicting lesbian and gay businesses and community groups; maps depicting the membership of community religious, political, and social groups; and maps depicting voter support for lesbian, gay, or supportive candidates.

Section Three of this article describes ways in which lesbian and gay districting experiences may prove useful for blacks involved in gaining greater representation in districting systems. In the wake of the *Miller* decision, the use of the community-based statistics typically employed in lesbian and gay districting efforts is a potentially effective strategy for racial minorities attempting to achieve electoral representation.

Districting is a deeply flawed representational system,<sup>16</sup> and scholars have argued that proportional representation would more effectively provide representation in a republican democracy.<sup>17</sup> Indeed, race-conscious districting has been necessary because the majority-

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16. For a critique of districting and an argument for proportional representation to further lesbian and gay interests, see Darren Rosenblum, *Geographically Sexual?: Advancing Lesbian and Gay Interests Through Proportional Representation*, 31 HARV. C.R.-C.L. L. REV. 119 (1996). Briefly, districting fails for many reasons. First, it requires a small group of people, dependent on the maintenance of the status quo, to draw lines that determine representation. Second, although districts have rigidly equal population numbers, the voting populace in each district may vary enormously, giving voters in some districts more power in determining the elected candidate. Third, the majority-rule aspect of a districting system represents minorities in an especially inadequate fashion.

17. See Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1493-1513 (1991) (arguing that a proportional system would comply with the Voting Rights Act's goals more effectively than districting); Mary A. Inman, *C.P.R. (Change Through Proportional Representation): Resuscitating a Federal Electoral System*, 141 U. PA. L. REV. 1991(1993) (arguing that a proportional system would revive political life in the United States, and would more honestly reflect the goals of voting rights jurisprudence). A proportional representation system in which voters elect representatives in jurisdiction-wide, non-majority rule contests, easily surpasses districting in answering not just the representational needs of minorities, but also those of the entire population. Candidates are elected once they pass a threshold that may be calculated approximately by dividing the vote by the number of legislative seats to be filled. In a jurisdiction with 10 representatives, that threshold will be around 10%, permitting some legislative voice for all organized. Liberating the legislatures from the choke hold of two-party incumbency would give rise to an active, interested electorate, spurred on by the potential for profound change in the political system.

rule districting system isolates minority groups with memberships that traverse districts. However effective proportional representation may be, it has been misconstrued as election-by-quota. Although the electorate may turn to proportional representation out of frustration with the current system, minority advocates cannot rely on this possibility when districting, which has dominated the American political landscape since the early Republic, remains so ubiquitous. With the survival and empowerment of minority communities within the democratic context as a fundamental goal, advocates for racial and sexual minorities are forced to presume districting's continued predominance, lest they risk losing any voice, however faint, in the current representational system.

I. (UN)CONSCIOUS RACISM: THE REMOVAL OF RACE-CONSCIOUSNESS FROM THE DISTRICTING EQUATION

A. The Supreme Court's Narrowing Interpretation of the Voting Rights Act Has Weakened the Voting Potential of Racial and Language Minorities

1. Black Electoral Empowerment Before *Shaw* and *Miller*

The Voting Rights Act of 1965, its 1982 Amendment, and its original interpretation by the Supreme Court prevent districting designed to weaken the voting potential of a racial or language minority.<sup>18</sup> The Voting Rights Act was designed specifically to allow racial minori-

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18. 42 U.S.C. § 1973 (1988). The two-fold process employed to protect the voting rights of minorities is set out in Sections 2 and 5 of the Voting Rights Act. Section 2 provides a basis for challenging all discriminatory election practices and procedures, focusing on the effects of the challenged practice instead of requiring the challenger to establish that the intent in imposing the requirement was to discriminate against a protected group. See 42 U.S.C. § 1973(b). Section 5 of the Voting Rights Act requires pre-clearance by the Attorney General or U.S. District Court for the District of Columbia of any proposed districting plan for those jurisdictions designated under Section 4 as having previously attempted to erect barriers to prevent blacks from participating in the political process (that is, literacy tests and similar devices). S. REP. NO. 417, 97th Cong., 2d Sess. 5 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 182. See, e.g., *United Jewish Orgs. v. Carey*, 430 U.S. 144 (1977) (upholding a race-based New York apportionment scheme challenged by the Hasidic minority in the jurisdiction).

Because multi-member districts have often been challenged as diluting minority votes, single-member districts are a preferred remedy. Senate Report Number 417 states:

In *Fortson v. Dorsey*, [379 U.S. 433 (1965)] the Supreme Court held that the use of multi-member districts was not unconstitutional *per se*, but warned: "It might well be that, *designedly or otherwise*, a multi-member constituency apportionment scheme, under the circumstances of a particular case *would operate to* minimize or cancel out the voting strength of racial or political elements of the voting population."

S. REP. NO. 417, 97th Cong., 2d Sess. 20 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 197.

ties<sup>19</sup> to elect representatives of their choice.<sup>20</sup> Cities in the United States, as well as the country as a whole, are becoming more racially and ethnically diverse, and accordingly, the Voting Rights Act has a weighty impact on the districting process. It appears to be common practice to draw black and Latino districts before drawing other districts simply to comply with the provisions of the Voting Rights Act.<sup>21</sup>

Sections 2 and 5 of the Voting Rights Act contain the most significant provisions for districting purposes. Section 2 permits racial and language minorities to challenge districting plans that dilute their voting power by either effectively reducing the minority's voice in, or excluding it from, participation in the political process.<sup>22</sup> Section 5 provisions protect minority voting rights in specific jurisdictions by requiring that the jurisdiction's districting plans be granted preclearance by the United States Department of Justice ("Justice Department") before the plan is implemented.<sup>23</sup> Although much of the voting rights litigation has focused on blacks and Latinos,<sup>24</sup> the legislative history of the Voting Rights Act<sup>25</sup> and its interpretation in case law<sup>26</sup> establish that other racial and language minorities are also intended to benefit

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19. The Voting Rights Act was designed to remedy racial discrimination in voting rights. S. REP. NO. 417, 97th Cong., 2d Sess. 4-7 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 182. To pursue this goal, "based on an extensive record filled with examples of the barriers to registration and effective voting encountered by language-minority citizens in the electoral process, Congress expanded the coverage of the Voting Rights Act to protect such citizens from effective disenfranchisement." *Id.* at 186.

20. "Men and women from racial and ethnic minorities now hold public office in places where that was once impossible." *Id.* at 181.

21. See Telephone Interview with Glen Maxey, State Representative from Austin, Texas (Sept. 29, 1995) (on file with author).

22. Section 2 of the Voting Rights Act is codified at 42 U.S.C. § 1973 (1988). For an analysis of Section 2 enforcement, see Laughlin McDonald, *The 1982 Amendments of Section 2 and Minority Representation*, in *CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE* 66 (Bernard Grofman and Chandler Davidson eds., 1992).

23. See Drew S. Days III, *Section 5 Enforcement and the Department of Justice*, in *CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE* 52 (Bernard Grofman & Chandler Davidson eds., 1992).

24. See Memorandum from Lani Guinier, Professor of Law, University of Pennsylvania, to Alan Gartner, Executive Director of the 1991 New York City Districting Commission, 12 (Aug. 20, 1990) (hereinafter "Memorandum") (on file with author) ("African Americans and Hispanics are the two groups on whose behalf most contested cases are filed.").

25. See Additional Views of Senator Orrin G. Hatch of Utah, S. REP. NO. 417, 97th Cong., 2d Sess. 94 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 267 (criticizing the proportional effects of the Amendment, stating: "That ultimately is what this so-called right to 'elect candidates of one's choice' amounts to—the right to have established racially homogeneous districts to ensure proportional representation through the election of specific numbers of Black, Hispanic, Indian, Aleutian and Asian-American officeholders.").

26. See, e.g., *Campos v. City of Baytown, Tex.*, 849 F.2d 943, 944 n.1 (5th Cir. 1988) (Higginbotham, J., dissenting) (explaining that "[l]anguage minority citizens' refers to those persons who are Asian-American, American Indian, Asian natives, or of Spanish heritage").

from the its provisions. Enforcement of the Voting Rights Act does not require the creation of racial or language majority-minority districts,<sup>27</sup> but the Voting Rights Act is primarily about race,<sup>28</sup> as districting practices demonstrate.

Regular enforcement of the Voting Rights Act through Section 2 and Section 5 interventions by the Justice Department has had a measurable impact on racial minority representation in the electoral process. Before the Voting Rights Act was passed, there were five black members of Congress. When the 1982 Amendment to the Voting Rights Act was enacted, that number had nearly quadrupled. Since the 1990 census-based redistricting, the number of blacks serving as members of Congress has risen to nearly forty.<sup>29</sup> This relatively rapid rise in political representation for blacks marks one of the few undeniable improvements in the black political condition since the Civil Rights Movement.<sup>30</sup> The presence of blacks in our national and state legislatures furthers the fundamental goal of the Voting Rights Act, insuring that blacks have some opportunity to participate in the nation's democratic system.

## 2. Lesbians, Gays, and the Voting Rights Act

Lesbians and gays, as a group, have not benefitted from the Voting Rights Act because its provisions are primarily race-based and do not address issues of gender, sexual orientation, or other potential voting rights claims. Some lesbians and gays, as members of racial or language minority groups, are protected under the Voting Rights Act. As a class, however, lesbians and gays are not generally protected under its provisions. Even if the language of the Voting Rights Act were overtly changed to include lesbian and gay people as a class,

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27. See John R. Dunne, *Remarks: Redistricting in the 1990s: The New York Example*, 14 *CARDOZO L. REV.* 1127, 1128-29 (1993).

28. But see Bernard Grofman, *Would Vince Lombardi Have Been Right If He Had Said: "When it comes to redistricting, race isn't everything, it's the only thing"?*, 14 *CARDOZO L. REV.* 1237, 1275-76 (1993) (concluding that Vince Lombardi would have been wrong because the Voting Rights Act's emphasis on race relates to its race-blind ideal). Although race may not be the only relevant consideration in the redistricting process, a racial-ethnic notion of minorities, one exclusive of sexual or political minorities, does define the Voting Rights Act and its interpretation. See *id.*

29. See Linda Greenhouse, *Justices, In 5-4 Vote, Reject Districts Drawn with Race as the 'Predominant Factor'*, *N.Y. TIMES*, June 30, 1995, at A1.

30. A notable example of the regression in the living conditions of blacks is the large percentage of black men who are imprisoned. For an elaboration of this problem, see Steve Rickman, *200 Years of the Penitentiary: Criminal, Social and Economic Justice: The Impact of the Prison System on the African Community*, 34 *How. L.J.* 524 (1991).

most of the theoretical districting constructs of the Voting Rights Act still would not apply effectively to lesbian and gay people.<sup>31</sup>

Although provisions of the Voting Rights Act do not specifically include lesbians and gays, the Voting Rights Act does affect their representational potential because people of color and people who are lesbian or gay often share overlapping urban spaces. Inasmuch as black and Latino districts are prioritized by the Voting Rights Act,<sup>32</sup> lesbian and gay districts are, by definition, almost an afterthought. Nonetheless, in certain jurisdictions lesbian and gay districts have been created, principally on the basis of demonstrating the existence of an identifiable lesbian and gay community. Given the Supreme Court's movement toward disenfranchising racial minorities from voting rights, advocates of black representation might benefit from an examination of the effectiveness of efforts by gay and lesbian advocates to gain representation for themselves in the political system.

#### B. Bogus Racial Blindness: *Shaw*, *Miller* and the Destruction of Black Voting Rights

The principal tension in voting rights cases in the 1990s centers on the role race should play in determining electoral districts and the ensuing representation. *Shaw v. Reno*<sup>33</sup> initiated a self-reflexive conversation within the Supreme Court about race and districting and, more broadly, about race and democracy.<sup>34</sup> In *Shaw*, the Court held that a black-majority North Carolina district violated the constitutional rights of the district's voters, who were forced to be part of a voting district plainly designed to be a black majority district. As one scholar commented, "[i]n *Shaw*, the notion of color blindness was used to undermine an electoral plan designed to benefit a racial group that had historically been deprived of their right to vote."<sup>35</sup> Justice O'Connor characterized the dilemma as one in which blacks had to suffer the "stigma" of being part of a district designed by race-conscious legislators to provide representation for them.<sup>36</sup> The *Shaw* decision also em-

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31. 42 U.S.C. §§ 1971-74. For a detailed critique of districting's inefficacy for lesbian and gay voters, see Rosenblum, *supra* note 16.

32. S. REP. NO. 417, *supra* note 18.

33. *Shaw v. Reno*, 113 S. Ct. 2816 (1993).

34. See Lani Guinier, (*E*)*racing Democracy: The Voting Rights Cases*, 108 HARV. L. REV. 109-110 (1994) [hereinafter Guinier, "*(E)rasing Democracy*"].

35. Chong-Soon Lee, *supra* note 10, at 779.

36. *Shaw*, 113 S.Ct at 2824. See *id.* at 2849 n.9 (1993) (Souter, J., dissenting) for an interestingly suggestive critique of the notion of "stigma."



phasized the bizarre geographic shape of the voting district as a factor in the Court's conclusion that the construction of the district violated the Equal Protection Clause.<sup>37</sup>

In the following Term, the Court decided two important districting cases: *Johnson v. De Grandy*<sup>38</sup> and *Holder v. Hall*.<sup>39</sup> In *De Grandy*, Latino and black voters sued the state of Florida on a claim of vote dilution. The plaintiffs argued that blacks and Latinos deserved higher numbers of majority-minority districts, that is, districts in which the majority consists of members of a language or racial minority. Justice Souter, writing for the Court, held that because the state already had roughly proportional numbers of majority-minority districts, it was not obliged to create another district in order to maximize minority representation.<sup>40</sup>

The *Holder* case involved a black community that was unable to achieve adequate representation because the county government consisted of a single-person commission.<sup>41</sup> The Court held that because the choice of the size of a particular governmental body is "inherently standardless" due to the "wide range of possibilities" available to the states in structuring governmental bodies, the size of a governmental body could not be a consideration for the Court when determining the validity of a Section 2 claim.<sup>42</sup>

Professor Lani Guinier has argued that both *De Grandy* and *Holder* implicitly accept the role that race-consciousness plays in voting rights issues,<sup>43</sup> observing that "if *Shaw v. Reno* marks the voting rights precipice, the Court blinked in its 1993 Term."<sup>44</sup> The 1995 *Miller v. Johnson*<sup>45</sup> decision, however, appears to fly headlong past the *Shaw* precipice. *Miller* has transformed the law of districting, and will continue to do so profoundly. In *Miller*, the Court reiterated that under the standard established in *Shaw*, "a plaintiff states a claim under the Equal Protection Clause by alleging that a state redistricting plan, on its face, has no rational explanation save as an effort to sepa-

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37. See Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 484 (1993).

38. *Johnson v. DeGrandy*, 114 S. Ct. 2647 (1994).

39. *Holder v. Hall*, 114 S. Ct. 2541 (1994).

40. *Johnson*, 114 S. Ct. at 2663.

41. *Holder*, 114 S. Ct. at 2584.

42. *Id.* at 2588.

43. Guinier, *(E)racing Democracy*, *supra* note 34, at 117-18.

44. *Id.* at 117.

45. *Miller v. Johnson*, 115 S. Ct. 2475 (1995).

rate voters on the basis of race.”<sup>46</sup> Following this brief explanation of the *Shaw* holding, the *Miller* Court went on to institute a new legal construct, labelled as a “*Shaw* claim”—one in which a white voter objects to a “racially gerrymandered” majority-minority district.

Georgia’s 1990 census population, 27% of which was black, entitled the state to increase its congressional delegation from ten to eleven seats in the 1990 reapportionment.<sup>47</sup> The Justice Department twice rejected Georgia’s redistricting plan, which provided for only two majority black districts. In the second rejection of the state’s redistricting plan, the Justice Department stated that the state had “failed to explain adequately” why it had not created a third majority-minority district.<sup>48</sup> In response to the Justice Department’s second rejection of its redistricting plan, Georgia added a third majority-minority district to its plan.<sup>49</sup> When the new plan was implemented, Miller and four other white residents of the newly created majority-minority Eleventh District challenged its constitutionality. The Court held that the white residents had successfully established a *Shaw* claim because the third district created by Georgia’s redistricting plan, created predominantly to empower blacks, constituted an unconstitutional racial gerrymander.

Unlike the district challenged in *Shaw*, the district Georgia created was quite regularly shaped;<sup>50</sup> however, the district included both rural and urban black voters with only one commonality of interest—race. The Court considered this factor to be a key element in its finding that Georgia’s effort to create a third majority-minority district represented an unconstitutional use of race.

The Supreme Court, contrary to the beliefs of many who accept that “race matters,”<sup>51</sup> apparently has determined that race cannot matter when voting districts are being drawn. As a result of the Court’s decision in *Miller*, blacks are now “protected” by the Voting Rights Act in only the very limited sense that Justice Thomas asserted in his *Holder* concurrence, leaving members of minority groups with-

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46. *Id.* at 2482

47. *Id.* at 2483.

48. *Id.* at 2484.

49. *Id.*

50. The lack of significant irregularity is demonstrated by Justice Ginsburg in her dissent. *See id.* at 2502-03.

51. *See, e.g.,* CORNEL WEST, RACE MATTERS (1993).

out any guarantee that their vote will secure their meaningful representation.<sup>52</sup>

A new era of voting rights litigation appears likely to follow *Shaw*. Previously, voting rights litigation has focused on different forms of voting discrimination, from restrictions on individuals, to districting, to anti-minority rule changes.<sup>53</sup> Justice Stevens hints at this new “mutant” generation of voting rights litigation, stating “[t]he Court attempts an explanation in these cases by equating the injury it imagines respondents have suffered with the injuries African-Americans suffered under segregation.”<sup>54</sup> In this fourth generation of voting rights litigation, the goal, rather than to prevent new forms of anti-minority behavior, would be to prevent “reverse discrimination” against whites in majority black districts. The harm against whites suggested by *Shaw* has taken full form as an equal protection claim before the Court, opening the door for white residents in majority-minority districts to challenge successfully the constitutionality of the district if race is the predominant factor in delineating the district shape.<sup>55</sup> If the lines of the district have been drawn predominantly on the basis of race, white residents within the district would likely win an equal protection challenge to the district, based on the constitutional right to a “colorblind” district. District-drawing bodies across the country will be forced to forego race as the predominant factor in their redistricting plans, weakening black representation. In the *Miller* decision, the Court completely abrogated any right blacks had under the Voting Rights Act to coalesce as a group for political empowerment purposes.

Between the majority and dissenting voices of the *Miller* decision lay Justice O’Connor’s concurrence, a brief piece of willfully naive delusion. In her two-paragraph interpretation, O’Connor attempts to

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52. See Guinier, (*E*)racing Democracy, *supra* note 34, at 118.

53. See Reynolds v. Sims, 377 U.S. 533 (1964) (stating that districts must reflect, as nearly as practicable, the “one person, one vote” standard); United Jewish Org. v. Carey, 430 U.S. 144 (1977) (upholding race-based New York apportionment scheme challenged by district’s Hasidic minority); Chisom v. Roemer, 501 U.S. 380 (1991) (holding that a change in districting to effect the selection of state supreme court justices which was achieved by combining a majority-minority parish with three white majority parishes required pre-approval under provisions of the Voting Rights Act).

54. Miller v. Johnson, 115 S. Ct 2475, 2498 (1995) (Stevens, J., dissenting).

55. Indeed, many such suits are already being filed. See, e.g., Peter Applebome, *Suits Challenging Redrawn Districts That Help Blacks*, N.Y. TIMES, Feb. 14, 1994, at A1 (discussing the wave of suits challenging majority-minority districts since *Shaw v. Reno*); Linda Greenhouse, *Court Questions Districts Drawn to Aid Minorities*, N.Y. TIMES, June 29, 1993, at A1 (describing the possible effects of the *Shaw v. Reno* decision).

limit the holding in *Miller* by asserting that it only bans racial gerrymandering in its extreme form.<sup>56</sup> O'Connor attempts to limit *Miller* by stating that it only applies to a small group of districts. In her mind, "[a]pplication of the Court's standard does not throw into doubt the vast majority of the Nation's 435 congressional districts, where presumably the States have drawn the boundaries in accordance with their customary districting principles. That is so even though race may well have been considered in the redistricting process."<sup>57</sup> Justice O'Connor relies on the presumption that most state legislatures employ primarily nonracial considerations in drawing district lines. But the very purpose of the Voting Rights Act is to make the process of creating voter districts a race-conscious process directed toward providing racial and language minorities a political voice.<sup>58</sup> Thus, most states do take minority representation into account in drawing electoral district lines. *Miller*, therefore, is a far more powerful regressive thrust than Justice O'Connor appears to be willing to acknowledge.

In an attempt to refute Justice Ginsburg's sharp criticism, Justice O'Connor asserts that efforts on behalf of racial minorities to achieve political representation certainly will not be treated "less favorably" than "similar efforts on behalf of other groups."<sup>59</sup> That, however, is precisely the unfortunate inference to be drawn from *Miller*. The majority stated: "[W]here the State assumes from a group of voters' race that they 'think alike, share the same political interests, and will prefer the same candidates at the polls,' it engages in racial stereotyping at odds with equal protection mandates."<sup>60</sup> Just as it is inaccurate to generalize that members of a particular race share universal characteristics, it is equally inaccurate to presume that members of a particular race share no common characteristics. This point is at the core of Justice Ginsburg's dissent, which builds on the commonplace nature of districting based on the strength of ethnic bonds and ethnic districts.<sup>61</sup>

Justice Ginsburg argues forcefully that the Court in *Miller* enforces a double standard against blacks: "If Chinese-Americans and Russian-Americans may seek and secure group recognition in the delineation of voting districts, then African-Americans should not be dissimilarly treated. Otherwise, in the name of equal protection, we

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56. *Miller*, 115 S. Ct. at 2497 (O'Connor, J., concurring).

57. *Id.*

58. See Guinier, (*E*)racing Democracy, *supra* note 34 at 134.

59. *Miller*, 115 S. Ct. at 2497.

60. *Id.* at 2490.

61. *Id.* at 2504 (Ginsburg, J., dissenting).

would shut out 'the very minority group whose history in the United States gave birth to the Equal Protection Clause'.<sup>62</sup>

C. Race and Ethnic Group-Conscious Districting after *Miller*

*"I don't want to draw nigger districts"*<sup>63</sup>

This subsection closely examines the Court's decision in *Miller* in an attempt to define objectionable race-conscious districting. It then briefly explores the implications of this definition on black communities and their representation in the political process.

1. Objectionable Race-Consciousness

The focus of the *Miller* majority centers on the distinction between rural and urban blacks. The Court constructed a narrative of the Georgian reverse-racist district, suggesting the parameters of unacceptable race-conscious districting:

The Eleventh District lost the black population of Macon, but picked up Savannah, thereby connecting the black neighborhoods of metropolitan Atlanta and the poor black populace of coastal Chatham County, though 260 miles apart in distance and worlds apart in culture. In short, the social, political and economic makeup of the Eleventh District tells a tale of disparity not community.<sup>64</sup>

The Court here details the racial gerrymandering that was initially cited by Justice O'Connor in the *Shaw* decision. Finding the basis for its "tale of disparity" in the district court's characterization of the Eleventh District, the Court states:

[t]he populations of the Eleventh are centered around four discrete, widely spaced urban centers that have absolutely nothing to do with each other, and stretch the district hundreds of miles across rural counties and narrow swamp corridors . . . .

Extending from Atlanta to the Atlantic, the Eleventh covered 6,784.2 square miles, splitting eight counties and five municipalities along the way.<sup>65</sup>

The Court described in detail its objections to Georgia's Eleventh District: the district traversed political subdivisions, stretching from one

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62. *Id.* at 2506 (Ginsburg, J., dissenting) (quoting *Shaw*, 113 S. Ct. at 2845).

63. Remark by Joe Mack Wilson, Georgia's 1981 Reapportionment Committee Chair. *Busbee v. Smith*, 549 F. Supp. 494, 501 (D.C. Cir. 1982), *quoted in Miller*, 115 S.Ct. at 2502 (Ginsburg, J., dissenting).

64. *Id.* at 2484.

65. *Id.* (citing *Miller v. Johnson*, 864 F. Supp. 1354, 1389 (S.D. Ga. 1994)).

part of the state to another; and, more fundamentally, the district's residents were too diverse, living as they did in different regions of the State, with different economies and, presumably, different electoral interests. The Court found that the sole unifying factor among the district's residents was their race.

Turning to a discussion of the role of community in the districting process, the Court rationalized that the residents of Georgia's Eleventh District did not constitute a community merely because they shared a commonality of race. According to Justice O'Connor, race alone cannot be a substitute for proving community by "customary" practices.<sup>66</sup> Thus, race may no longer itself constitute a political interest: "[i]t is true that redistricting in most cases will implicate a political calculus in which various interests compete for recognition, but it does not follow from this that individuals of the same race share a single political interest."<sup>67</sup> If race were still a political interest, the *Miller* Court would not have rejected Georgia's efforts to create a third majority-minority district that merged urban and rural blacks. The Court's flawed perspective is that constructing a voting district based on the racial characteristics of its members is racial stereotyping, and thus, violates of the Equal Protection Clause.

The Court's use of the construct of race-conscious districting, however, belies the racism underlying its rulings. As Professor Guinier argued shortly after *Shaw* was decided,

[C]ritics of race-conscious districting have misdirected their fire. Their emperor has no clothes. Their dissatisfaction with racial-group representation ignores the essentially group nature of political participation. In this regard, the critics fail to confront directly the group nature of representation itself, especially in a system of geographic districting. Perhaps unwittingly, *they also reveal a bias toward the representation of a particular racial group rather than their discomfort with group representation itself.* In a society as deeply cleaved by issues of racial identity as ours [is] . . . a system of representation that fails to provide group representation loses legitimacy.<sup>68</sup>

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66. *Id.* at 2497 (O'Connor, J., concurring).

67. *Id.* at 2487.

68. Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589, 1591-92 (1993) (emphasis added). Professor Guinier's commentary on this issue reveals the special prescience of her views in light of the Court's *Miller* decision.

The Court's insistence on viewing race-consciousness as an equal protection violation of whites demonstrates its bias against black representation. Professor Guinier's comments foreshadow Justice Ginsburg's rationale in her *Miller* dissent, where she observes that race, like ethnicity, is a highly prevalent form of identity, and thus should not be ignored in districting considerations.<sup>69</sup>

2. The Challenges of Black Electoral Empowerment after *Miller*

a. The *Miller* Community Standard

i. The Department of Justice and State Legislatures

The Justice Department's oversight role has been crucial to achieving black electoral empowerment. Under the provisions of the Voting Rights Act, the Justice Department oversees any state action that has the potential to negatively impact minority voting rights as it did in regards to Georgia's 1990 redistricting. The *Miller* Court rejected the Justice Department's interpretation of the Voting Rights Act's redistricting provisions as necessitating the creation of a third majority-minority district in Georgia. Consequently, according to the *Miller* Court, Georgia's reliance on the Justice Department's guidance regarding its redistricting efforts actually resulted in the state creating a redistricting plan that was constitutionally invalid. Thus, the *Miller* decision has sharply weakened the credibility of the Justice Department in its role as watch-dog over state voting rights actions.

Not content with merely chastising the state that obeying higher governmental officials does not justify actions that result in equal protection violations, the Court clearly and unequivocally emphasized its view that the Justice Department erred in forcing Georgia to create the Eleventh District. In *Miller*, the Court stated: "In utilizing § 5 to require States to create majority-minority districts wherever possible, the Department of Justice expanded its authority under the statute beyond what Congress intended and we have upheld."<sup>70</sup> The Court, however, misreads its own record, notably its decision in *Thornburg v. Gingles*,<sup>71</sup> in rejecting this role of the Justice Department.

In subverting the Justice Department's authority, the Court invites state legislatures to favor minority vote dilution. Facing the

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69. *Miller*, 115 S. Ct. at 2505.

70. *Id.*

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

threat of *Shaw* claims, state legislatures will undoubtedly confront very different considerations in redistricting after the next census in 2000. With an increasingly diverse society, there will be more pressure on state legislatures to provide representation to growing numbers of minorities. But with the diminished role of the Justice Department in the redistricting process as a result of the *Miller* decision, legislators who, like Joe Mack Wilson, do not want to create "nigger districts"<sup>72</sup> will have more opportunity to indulge their prejudices during the next reapportionment and redistricting effort following the 2000 census. As Justice Ginsberg points out:

The Court's disposition renders redistricting perilous work for state legislatures. Statutory mandates and political realities may require states to consider race when drawing district lines. But today's decision is a counterforce; it opens the way for federal litigation if "traditional . . . districting principles" arguably were accorded less weight than race.<sup>73</sup>

As Justice Ginsburg predicts in her dissent, wherever race is a consideration, parties may defeat a redistricting plan by arguing that race considerations played a greater role in the development of the plan than did traditional districting standards.<sup>74</sup> According to Ginsburg, in the war of minority representation, "[f]ederal judges in large numbers may be drawn into the fray. This enlargement of the judicial role is unwarranted."<sup>75</sup> Indeed, Justice Ginsburg's foresight proved accurate—unable to decide on a new plan for Georgia's eleven districts, the Georgia State Legislature ceded line drawing power to a three-judge panel of the Eleventh Circuit.<sup>76</sup> Ominously, the Supreme Court quickly approved the post-*Miller* Georgia plan, which cuts majority black districts from three to one.<sup>77</sup> The replication of this type of redistricting following the 2000 census would undoubtedly have disastrous consequences for black representation.

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72. See *Busbee v. Smith*, 549 F. Supp. 494, 501 (D.C. Cir. 1982).

73. *Miller*, 115 S. Ct. at 2507 (Ginsburg, J., dissenting).

74. See *id.*

75. *Id.*

76. *High Court Backs New Districts in Georgia*, N.Y. TIMES, Feb. 17, 1996, at A14. Kevin Sack, *Court Draws Georgia Map of Congressional Districts: 2 of 3 Black Majority Districts Scrapped*, N.Y. TIMES, Dec. 14, 1995, at A22.

77. *Id.*



## ii. The Community Standard

In the face of the reactionary turn that voting rights law has taken, black representation advocates will confront a far harsher world in future redistricting struggles. A district court facing a *Shaw* claim, for example, would probably be required to reject a districting scheme based exclusively on census data that indicates that the black population forms a particular pattern. Yet, as the Court disempowers blacks, it also provides some sense of what it considers to be judicially acceptable standards in establishing electoral districts. According to the Court, the principal standard for justifying a majority-black or majority-minority district is whether the communities involved share commonality of interests. As indicated above, the Court objected to Georgia's Eleventh District because it did not reflect a notion of community. Thus, the Court has provided legislatures with a fairly concise standard: "A State is free to recognize communities that have a particular racial makeup, provided its action is directed toward some common thread of relevant interests."<sup>78</sup> State legislatures will thus focus on the notion of "community" and commonality of interests when considering how to structure majority-minority districts. Although the community standard clashes with antidilution goals, it matches traditional standards such as "compactness, contiguity and respect for political subdivisions."<sup>79</sup>

Justice Ginsburg's dissent clarifies the "community" standard. The Court's move toward favoring ethnicity-based districting over race-based districting indicates the basic philosophy the Court has adopted regarding identity politics. Bound by a supposedly raceless vision of the Equal Protection Clause, the Court refuses to permit race to be the dominant factor in the districting process; yet the use of ethnicity, for example, Russian or Filipino heritage, as the dominant factor in the districting process would be acceptable. This dubious distinction invites the legal milieu to inquire what makes decisions based on ethnicity more palatable for the Court's equal protection jurisprudence than decisions based on race. It would appear that ethnicity, while generally inherited, is a characteristic that individuals can choose to recognize or ignore. In districting, ethnicity would be manifested by where individuals choose to live: a Russian-American in

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78. *Miller*, 115 S. Ct. at 2490.

79. These three examples are cited by Justice Ginsburg in her *Miller* dissent. *See id.* at 2507.

Brighton Beach could expect political representation of her ethnicity, but were she to live elsewhere, her ethnicity might not have districting implications. Evidence of ethnicity is thus not biological in nature, but rather social, cultural, and political. Reading *Miller* in this context leads to the conclusion that the Court would accept non-biological markers of self-identity. The *Miller* “community standard” thus encourages blacks and Asians to represent their racial identity as akin to ethnicity, emphasizing community and self-identification, those so-called “soft” statistical markers, while avoiding the exclusive use of “hard statistical” markers like census data.

The new community standard doctrine involves a fundamental shift for blacks. Application of the Equal Protection Clause since *Korematsu*<sup>80</sup> has centered on the immutability of race and, in particular, of blackness. Race’s centrality in equal protection analysis is evidenced by the arrangement of analytical tiers around immutability. In districting, data regarding immutable characteristics are translated into census statistics that provide the raw numbers necessary to effect a racial geography of the country.

For decades blacks have employed census data to advocate for electoral districts of their own. The creation of black majority districts has been at the heart of the federal government’s effort to enfranchise minorities through the Voting Rights Act. In the wake of *Miller*, however, blacks will be forced to advocate for representation by relying on community traits that do not explicitly put race behind other factors. This requirement removes an aspect of black identity from the districting equation—one that notably distinguished blacks from lesbians and gays. For districting purposes, blacks must move beyond the relatively fixed biological identity of race toward a cultural, social, and political definition of black identity.

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80. *Korematsu v. United States*, 321 U.S. 214 (1944) (upholding a wartime conviction for violation of a military order excluding Americans of Japanese ancestry from certain designated military areas on the West Coast).

b. Looking to Lesbian and Gay Representation as a Model of Districting Advocacy

*"[A] community is an idea as well as a group of people."*<sup>81</sup>

Like lesbians and gays, blacks are united by cultural, religious, and political institutions that could serve as markers to identify black communities for districting purposes. Lesbian and gay identity is beyond simple definition.<sup>82</sup> Although sexual orientation is considered by many to be, like race, an immutable characteristic, individuals generally can and do control the public presentation of their sexual orientation. Blacks, Latinos, Asians, and other minorities cannot, for the most part, avoid their racial and ethnic identities by modifying their behavior. The ability of lesbians and gays to "pass" as heterosexuals renders the demarcation of a lesbian and gay community a difficult task.<sup>83</sup> Another complicating factor is the continuum of sexuality. While some individuals may behave like lesbians or gays, but not identify as such, others may identify as lesbians or gays, but not behave as such. Fear of homophobia, which punishes those who are openly gay or lesbian with ostracism, violence, and discrimination leads many lesbians and gays to deny or conceal their identity.

The lesbian and gay population cannot be identified on the basis of census data or other official statistics. Even if completion of a census questionnaire required the respondent to reveal information about

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81. Barbara A. Weightman, *Commentary: Towards a Geography of the Gay Community*, 1 J. CULTURAL GEOGRAPHY 107 (1981). Weightman precedes this assertion with an analysis of lesbian and gay communities:

In order to understand the nature of gay spaces, it is necessary to know something of the central characteristics of the gay community. The at-large gay community is not a community in the traditional sociological sense in that it lacks a broad definable territorial base with primary institutions serving a residential population. However, many smaller sub-communities do possess these characteristics. *Id.*

82. For an exploration of the lesbian, gay, and queer identity as it relates to the law, see Rosenblum, *supra* note 1, at 83. For an analysis of the position of black lesbians and gays in the black community, see generally Angela Gilmore, *They're Just Funny That Way: Lesbians, Gay Men and African-American Communities as Viewed Through the Privacy Prism*, 38 HOW. L.J. 231 (1994). For an example of the complexity of the intersection of racial and sexual identities, see BELL HOOKS, *Is Paris Burning?*, in BLACK LOOKS: RACE AND REPRESENTATION 145 (1993) (criticizing the film "Paris Is Burning," which depicts a black gay subculture).

83. Race is not by any means a clear-cut identity either, given the fallacy of distinct biological races. However, the rule established seems to depend on appearance: if one appears to be black, one is black. Thus, black people who appear white can "pass" as white. Whereas passing, for blacks, is available to a relatively small number of people, many lesbian and gay people can pass as straight. And those who cannot pass as straight fail to do so primarily because of the public's confusion of gender and sexual identity, not because they are biologically required to be open. Given the ability of lesbians and gays to pass as straights, one can see how difficult an exercise it would be to count the lesbian and gay population, especially across culture.

one's sexual identity, the results of the census would be suspect.<sup>84</sup> Thus, "hard" population numbers used for districting purposes do not exist for lesbians and gays. Even general estimates of the percentage of the population that is lesbian or gay vary greatly.

This difficulty is aggravated by the fact that even though many lesbian and gay people do live in identifiable urban "ghettos,"<sup>85</sup> a substantial number of lesbians and gays, either by choice or because of economic necessity, live in neighborhoods identified by the class, race, or ethnicity of the population rather than the population's sexual orientation. This lack of incontrovertible, objective group boundaries plagues lesbian and gay districting activism.

For state and statistical purposes, membership in the class "black," of whatever socioeconomic background, political, or ideological affiliation, is a fairly straightforward matter. The statistical inquiry centers predominately on the question, "Do you have black ancestry?" and only negligibly deals with the thorny complex of self-identification. Gay and lesbian community membership, on the other hand, a maddeningly subjective phenomenon based principally upon self-identification, is not easily reduced to the clear-cut logic required for State and statistical purposes. Furthermore, because the national census does not gather information on sexual orientation, advocates attempting to demarcate lesbian and gay communities must rely on "soft" community statistics. These "soft" statistics lack the "hard" authority of official census data relied upon in racial minority districting.

Whereas census counts, voter registration, and even surnames may serve to delineate discrete minority populations, lesbian and gay population estimates, based on donor records and the number of lesbian- and gay-owned businesses and institutions, lack official imprimatur. The lesbian and gay community's ingenious strategy for overcoming the lack of hard data may be precisely the tool needed by advocates of black representation in the post-*Miller* era.<sup>86</sup>

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84. Although same sex households, which the census does quantify, might indicate the presence of a lesbian and gay population, such statistics also would include fraternities, sororities, and the many heterosexual men and women who live together.

85. Many refer to lesbian and gay urban communities as "ghettos." For an example of this use of the term, see MANUEL CASTELLS, *THE CITY AND THE GRASSROOTS: A CROSS-CULTURAL THEORY OF URBAN SOCIAL MOVEMENTS* 167 (1983) (stating: "For straight San Franciscans, the Castro ghetto . . . seemed to be from another world . . .").

86. Although lesbian and gay districting schemes have not faced the challenges in the federal courts that black representational schemes have had to face, it would appear that the methods lesbian and gay groups have employed to establish their right to representation as a group may fit well into the *Miller* standard.

## II. ATTAINING MAJORITY SEXUAL MINORITY DISTRICTS THROUGH COMMUNITY EVIDENCE

Several lesbian and gay communities have successfully utilized community-based evidence to support the creation of majority lesbian and gay districts. Three different scenarios theorize possibilities for representation of lesbian and gay communities.<sup>87</sup> The 1991 New York City Council Redistricting reveals most clearly the extent to which alternative methods fit into contemporary districting practice. Texas and California redistricting examples confirm the widespread use of such methods and elaborate upon the successes and failures of districting advocacy efforts. This section will conclude with a summary of community-based standards employed by activists in establishing lesbian and gay districts.

### A. Three Scenarios for Lesbian and Gay Districts

Under the Court's interpretation of the Voting Rights Act before *Miller*, lesbian and gay representation may exist under limited circumstances in urban areas when the location of the lesbian and gay community fits within the scope of a minority-based districting scheme. Like other minorities, lesbians and gay men face a wide range of representational prospects, from majority districts to fractured communities. The first two scenarios for lesbian and gay representation under the Voting Rights Act center around a whole lesbian and gay community in a district, while the third involves a district that splits a lesbian and gay community geographically. Where the lesbian and gay community is significant enough to constitute the majority in a single-member district, the first scenario would involve the creation of a majority-lesbian and gay district. This scenario could occur in either a predominantly white district where several adjacent majority-minority districts leave a concentrated white lesbian and/or gay community, or in a majority-minority district where racial and ethnic minorities constitute the majority population of a district. Another form of this scenario would be a single-member district with a majority of lesbians and gays of color, as part of a majority-minority district—a possibility in cities with large racial and sexual minority populations such as New York and Los Angeles. Well-known lesbian and gay communities,

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87. I use the word "communities" here because a fair number of lesbian and gay representatives have been elected to office in districts which do not have a significant concentration of lesbian and gay population.

however, are generally located within white neighborhoods, making this scenario the less likely possibility.

A lesbian and gay community too small to form a single-member district might fall completely within the boundaries of a larger district. In this second scenario, a lesbian and gay influence district could exist in a white, multicultural, or majority-minority district.<sup>88</sup> In a district such as this, electoral candidates are likely to be sensitive to issues of concern to the lesbian and gay community because its voters can sway election outcomes. Although not a voting majority, the strength of the lesbian and gay influence could result in a successful bid for office by a lesbian or gay candidate<sup>89</sup> whose position on issues appeals to both the homosexual and heterosexual communities. The same scenario could occur where a lesbian and gay community would be an influential part of a majority-minority or multicultural district. A lesbian and gay influence is only possible when the voting majority in the district is not hostile toward lesbian and gay issues. In a district in which anti-lesbian and anti-gay sentiment divides the population, efforts to promote lesbian and gay interests will likely fail—even when forty-nine percent of the district is lesbian or gay. Despite the size of its population, a lesbian and gay community in such a jurisdiction could consistently be outvoted by the conservative voters in the district, effectively depriving members of the lesbian and gay community of their political voice.

Lesbian and gay majority or influence districts assure that some degree of lesbian and gay representation will exist in the jurisdiction's legislature. In this third scenario, when a lesbian and gay community is fractured between or among districts, any potential lesbian and gay electoral voice is silenced. The primacy of constitutional and statutory mandates, as well as districting conventions over lesbian and gay representation, renders fracturing a common result in districting. In this situation, a lesbian and gay community that might be large enough to

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88. A notable example of this fracturing and its consequences occurred in the Brooklyn, New York, districting plan challenged in *United Jewish Orgs. v. Carey*, 430 U.S. 144 (1977), in which the Williamsburgh Hasidic Community of 60,000 people was split into two districts. For further discussion of this case, see Guinier, *supra* note 17, at 1454.

89. Many lesbian and gay candidates and politicians are community activists rather than party activists. For example, Thomas K. Duane was a housing activist and member of ACT-UP (The AIDS Coalition to Unleash Power). Interview with Thomas K. Duane, City Councilmember, in New York, N.Y. (Dec. 31, 1993). Karen Burstein, the openly lesbian candidate for New York State Attorney General in 1994, was not endorsed by the Democratic Party's convention. See Todd S. Purdum, *Democrats Pick New York State of Incumbents*, N.Y. TIMES, June 1, 1994, at A1.

qualify as a majority in a district but that lacks the power necessary to sway those involved in the districting process, would be split into inconsequentially small groups.

B. Representing Lesbians and Gays in the New York City Council

New York City, the largest city in the country, is filled with innumerable racial, ethnic, and other interest groups, and exemplifies the difficulties lesbians and gays encounter in their attempts to gain group representation in the political system. For the first time, in 1991, however, the New York City Districting Commission ("Commission") created one lesbian and gay "winnable" district, Manhattan's District 3.<sup>90</sup> However, efforts to create a proposed second district in Brooklyn failed. Manhattan's District 3 has been described as a district "which has been drawn to be winnable by a gay or lesbian candidate."<sup>91</sup> Strong evidence of the existence of a lesbian and gay community in Manhattan convinced the Commission to provide for representation of that particular community in the districting process. The comparative weakness of the evidence of a Brooklyn lesbian and gay community undoubtedly contributed to the Districting Commission's failure to create a lesbian and gay district in Brooklyn.

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90. Other scholarship has examined the New York City Council redistricting in depth. See generally Judith Reed, *Of Boroughs, Boundaries and Bullwinkles: The Limitations of Single-Member Districts in a Multiracial Context*, 19 *FORDHAM URB. L.J.* 759 (1993); Frank J. Macchiarola & Joseph G. Diaz, *The 1990 New York City Districting Commission: Renewed Opportunity for Participation in Local Government or Race-Based Gerrymandering?* 14 *CARDOZO L. REV.* 1175 (1993). See also, Alan Gartner, *Introduction*, 14 *CARDOZO L. REV.* 1119 (1993); Donne, *supra* note 27; Lani Guinier, *The Representation of Minority Interests: The Question of Single-Member Districts*, 14 *CARDOZO L. REV.* 1135 (1993); Grofman, *supra* note 28.

91. Frank Lombardi, *Scrambling for [a] Piece of New Council Pie*, *N.Y. DAILY NEWS*, June 5, 1991, at 33.

## 1. The Establishment of New York's Lesbian and Gay Constituency

In New York, the lesbian and gay constituency,<sup>92</sup> centered in West Village and Chelsea,<sup>93</sup> grew out of a series of primary votes and the election of New York's first openly lesbian state assemblyperson. Until 1991, when the Districting Commission's recommendations were implemented, Carol Greitzer, a heterosexual woman, represented the district which included the West Village and Chelsea lesbian and gay neighborhoods.<sup>94</sup> Gay candidates in New York City primary elections had relatively little success in their attempts to run for public office<sup>95</sup> until 1985, when David Rothenberg came close to winning the primary for this district.<sup>96</sup>

In 1989, benefiting from his broad reputation as a community activist, Tom Duane came even closer to winning the Democratic pri-

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92. "Constituency" indicates "[t]he inhabitants of an electoral district." BLACK'S LAW DICTIONARY 311 (6th ed. 1990). More broadly, "constituency" indicates a community whose members are constituents, "being those whom [a legislator] represents and whose interests he is to care for in public affairs." *Id.* Thus, a lesbian and gay constituency is a community whose interests are electorally represented. However, my purpose in supporting a proportional representation system is, in part, to support the enfranchisement of minorities that might not be considered constituencies under a districting system.

Because it would be beyond the scope of this paper to outline the establishment of a lesbian and gay community in New York, I only discuss the establishment of a lesbian and gay constituency, narrowly construed, as a group of people who elect a representative. For an especially rich source of New York lesbian and gay history, see GEORGE CHAUNCEY, *GAY NEW YORK* (1994).

93. The West Village and Chelsea neighborhoods cover approximately the area from Houston Street to 30th Street, following the south and north boundaries, and from 5th Avenue to the Hudson River, following the east and west boundaries. Brooklyn's Park Slope also is home to a strong lesbian and gay community. Park Slope's lack of lesbian and gay representation, however, renders its status as a constituency far more difficult to define.

94. See, e.g., Lombardi, *supra* note 91 ("Greitzer didn't want to run in her old district, which has been drawn to be winnable by a gay or lesbian candidate."); see also Interview with Robert Bailey, in New York, N.Y. (Dec. 30, 1993) (on file with the author) (discussing how Greitzer's incumbency prevented a gay candidate from winning the seat in 1985 and 1989, and her attempts to influence the districting process); Duane, *supra* note 89 (discussing the insignificance of the role Greitzer played in the 1991 campaign).

95. See Jessie Mangaliman, *Manhattan Closeup: Tough Challenge in a Loyal District*, N.Y. NEWSDAY, Aug. 25, 1989, at 23 (discussing the 1973 candidacy of Jim Owles and the 1985 candidacy of David Rothenberg as the precursors to Thomas K. Duane's 1989 council primary race); Bailey, *supra* note 94.

96. Rothenberg garnered 44% of the primary vote in 1985. See *Voting Totals in City Primary*, N.Y. TIMES, Sept. 12, 1985, at B6. See also Jeffrey Schmalz, *Liberals Split as Homosexual Seeks Council Seat in Manhattan*, N.Y. TIMES, Sept. 5, 1985, at B3 (describing the conflict for liberals in choosing between Carol Greitzer, an established progressive incumbent, and David Rothenberg, the openly gay, progressive challenger). Notably, in the following year, the political organizations that backed Rothenberg mobilized to pass the City's first lesbian and gay rights law. See Bailey, *supra* note 94.



mary.<sup>97</sup> Duane lost the primary election because the larger district, which was under the old City Council system, included areas where comparatively few lesbian and gay people lived.<sup>98</sup> In 1990, Deborah Glick became the first openly lesbian or gay elected official in New York State by winning the Greenwich Village seat in the New York State Assembly.<sup>99</sup>

Many other lesbian and gay communities exist throughout New York City, most notably in Jackson Heights, Queens,<sup>100</sup> and in Park Slope, Brooklyn, and adjacent areas. Although lacking the West Village-Chelsea community's prominence, these communities serve as centers of lesbian and gay populations in their respective boroughs.

## 2. The Districting Commission's Origin and Purpose Focused on Minority Empowerment

*New York City stands on the precipice of a golden era.  
For the first time we have the possibility of having a  
Council that is representative of all New York*<sup>101</sup>

*Board of Estimate v. Morris*,<sup>102</sup> in which the United States Supreme Court declared New York City's government unconstitutional, precipitated New York City's 1991 redistricting. Prior to this decision, the Board of Estimate, composed of three city-wide elected officials and the presidents of the five boroughs of New York City, performed many of the administrative and legislative functions of the city government.<sup>103</sup> Each of the five borough presidents had an equal vote on matters before the Board, without regard to the size of the

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97. Duane won 45% of the primary vote in 1989. See *Results in Tuesday's Primary Elections*, N.Y. TIMES, Sept. 14, 1989, at B2.

98. Neighborhoods other than Chelsea and West Village, such as Gramercy Park, are not home to large lesbian and gay populations. See Submission of Empire State Pride Agenda to the Districting Commission (Mar. 27, 1991) (on file with author).

99. Interview with Richard Dadey, Executive Director of Empire State Pride Agenda (ESPA), in New York, N.Y. (Jan. 6, 1994) (on file with author). See Kevin Sack, *First Openly Gay Legislator Brings Full Agenda to Albany*, N.Y. TIMES, Jan. 13, 1991, § 1, at 23.

100. See Norimitsu Onishi, *In a Gay Haven, a Sense of Community Builds*, N.Y. TIMES, Dec. 4, 1994, § 13, at 9.

Jackson Heights has been a gay mecca since the 1920's when the quick subway ride to Times Square drew vaudevillians here. And in recent years, as immigrants have transformed the neighborhood, the area has turned into New York City's epicenter for gay Hispanic people. It is a counterpoint to the Village or Chelsea, where the gay population of white, middle-class men share common histories.

*Id.*

101. Frank Lombardi, 'A New Day' for Minorities, THE DAILY NEWS, June 4, 1991, at 11 (quoting Esmeralda Simmons, member of the Districting Commission).

102. *Board of Estimate v. Morris*, 489 U.S. 688 (1989).

103. *Id.* See also CHARTER OF THE CITY OF NEW YORK § 61 (1986) [hereinafter CHARTER].

borough's population. Thus, although Brooklyn's population was more than six times greater than the population of Staten Island, a vote by the borough president of Staten Island was equal to the vote of Brooklyn's borough president. The Court held that this system violated the one-person, one-vote rule enunciated in *Reynolds v. Sims*.<sup>104</sup>

In response to the Court's decision, New York City appointed the Charter Revision Commission to investigate alternative forms of governmental bodies that could be adopted to replace the City's Board of Estimate. The Charter Revision Commission heard presentations on various alternatives ranging from simply replacing the offending "equal vote" with a "weighted vote" and leaving the current system intact,<sup>105</sup> to bicameral legislatures,<sup>106</sup> to proportional representation.<sup>107</sup> Ultimately, the Commission supported an increase in the size and power of the City Council.<sup>108</sup> This increase was pre-cleared by the Justice Department in a letter stating: "minority voters will likely have an increased opportunity to elect members of the enlarged and more powerful city council."<sup>109</sup>

Indeed, promoting minority empowerment by providing minorities with an opportunity to increase their representation on the City Council was the fundamental purpose of the Districting Commission. Decades of Justice Department challenges had exposed New York's weak record in districting for minority representation.<sup>110</sup> In a historical context, minority groups capitalized on the unique opportunities

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104. *Reynolds v. Sims*, 377 U.S. 533 (1964). Among the cases cited in *Morris* are *Reynolds'* "companion cases and progeny": *Abate v. Mundt*, 403 U.S. 182, 185 (1971) (holding that local governments are permitted greater population disparities among districts than higher levels of government); *Hadley v. Junior College Dist. of Metro. Kansas*, 397 U.S. 50, 56 (1970) ("[T]he Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in [popular] election[s], and . . . each district . . . must . . . insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials."); *Avery v. Midland County*, 390 U.S. 474, 479-81 (1968) (holding that *Reynolds* applied to local governments).

105. See Interview with Judith Reed, General Counsel for the 1991 New York City Districting Commission, in New York, N.Y. (Dec. 27, 1993) (on file with author).

106. See Reed, *supra* note 90, at 764.

107. See Reed, *supra* note 105; Bailey, *supra* note 94.

108. SUBMISSION UNDER SECTION 5 OF THE VOTING RIGHTS ACT FOR PRECLEARANCE OF PROPOSED AMENDMENTS TO THE NEW YORK CITY CHARTER 12-15 (Aug. 11, 1989) [hereinafter SUBMISSION] (on file at the New York Municipal Library, 55 Chambers St., New York, NY 10007).

109. *Id.* at 4; see also ALAN GARTNER, DRAWING THE LINES: REDISTRICTING AND THE POLITICS OF RACIAL SUCCESSION IN NEW YORK (1993) (noting that "[t]he simplest way to describe this new power is to note that the Council was granted the authority to approve the city's \$27 billion budget").

110. See Reed, *supra* note 105. See also GARTNER, *supra* note 109, at 55-56 n.72.

presented by the revision of districts to further minority empowerment. According to Judith Reed, General Counsel for the Districting Commission, “[t]he work of the Commission was favorably affected by the presence of so many members of racial and language minority groups protected by the Voting Rights Act.”<sup>111</sup> The results of the 1990 census reinforced the wisdom of the Commission’s emphasis on minority representation. According to the census data, New York City had become a majority-minority city, with 56.3% of its population composed of blacks, Latinos, and Asian Americans.<sup>112</sup>

The Charter Revision Commission ranked the standards to be used in districting the city, an action apparently unique to New York City.<sup>113</sup> Following the *Reynolds* “one person, one vote” standard, the first criterion required by electoral districts is that they be roughly equal in population size.<sup>114</sup> The second criterion, modeled on the Voting Rights Act of 1965, was to “ensure the fair and effective representation of the racial and language minority groups in New York City which are protected.”<sup>115</sup> The Commission, acting before the *Miller* decision, held firm to its credo—“[W]here a minority district *could* be created, it *must* be created.”<sup>116</sup>

### 3. District Lines Reflected the Goal of Minority Empowerment

The Commission’s work was conducted in as open a manner as possible considering the political nature of the group’s task. It held public hearings in all neighborhoods of the City, provided public access to a computer that housed files containing the districting program

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111. Aff. of Judith Reed at 4, *Ravitch v. City of New York*, No. 90-5752 (S.D.N.Y. 1992) (arguing that had the census results been released at the time the Commission was formed, there likely would have been one more Latino appointed to the Commission to reflect the nearly equal balance of the Black and Latino populations). “The Commission . . . consisted of four African Americans, three Latinos, one Asian-American, and seven whites.” *Id.* at 1. In order to ensure that its actions were in compliance with the Voting Rights Act, the Commission engaged Judith Reed, attorney for the NAACP Legal Defense Fund, as General Counsel. Reed, *supra* note 105.

112. See SUBMISSION, *supra* note 108 at 6. New York City’s majority-minority population consists of African Americans (25.2%), Latinos (24.4%), and Asian Americans (6.7%), collectively comprising 56.3% of the City’s total population. The voting-age population of people of color is, however, predictably smaller: 23.4% African American, 22% Latino, 6.7% Asian, totaling 52% of the voting-age population. *Id.*

113. See GARTNER, *supra* note 109, at 23 n.26.

114. See CHARTER, *supra* note 103, at § 52(1)(a) (as amended Dec. 31, 1989) (stating that the one-person, one-vote standard required that “the difference in population between the least populous and the most populous districts shall not exceed ten percentum of the average population for all districts.”).

115. *Id.* § 52(1)(b).

116. Reed, *supra* note 90, at 763.

the Commission was using,<sup>117</sup> and reviewed over thirty alternate districting plans submitted by community groups and other concerned parties.<sup>118</sup> The Commission began to create districts by first focusing on areas in which racial and language minorities were concentrated. Once districts were drawn around these areas, white districts were created to fill in the remainder of the map.<sup>119</sup> Although, according to the new census data, black and Latino populations were roughly equal in size, the dispersed Latino population made creating Latino districts more challenging.<sup>120</sup> This enabled the Commission to create more majority-black districts than it might otherwise have been able to do.<sup>121</sup>

Asian Americans, who comprised slightly more than seven percent of the City's population,<sup>122</sup> were not adequately represented in the redistricting process because of the low number of Asian Americans who responded to census data requests, low Asian-American voter registration,<sup>123</sup> and language barriers.<sup>124</sup> Even though the city-wide Asian-American population was sufficient to require the Commission to establish several Asian-American seats on the City Council, the dispersion of the Asian Americans, like that of Latinos, diluted their electoral strength.<sup>125</sup>

The most challenging issue faced by the Commission was to resolve competing claims between blacks, Latinos, and Asian Americans.<sup>126</sup> In some instances, inter-minority disagreements impacted on

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117. See GARTNER, *supra* note 109, at 135.

118. See Aff. of Judith Reed, *supra* note 111, at exhibit 23.

119. See Reed, *supra* note 105.

120. See SUBMISSION, *supra* note 108, at Appendix I (Report of 1990 Census Population Distributions and Densities (stating that 69% of the City's African Americans live in Voter Tabulation Districts (VTD), the smallest geographic area used in districting, and comprise at least 50% of the total VTD population, while only 48% of Hispanics reside in VTDs)).

121. *Id.*

122. Felicia R. Lee, *Blocs Battle to Draw Chinatown's New Council Map*, N.Y. TIMES, Apr. 30, 1991, at B1, B4 [hereinafter *Blocs Battle*].

123. See Reed, *supra* note 90, at 774; Bailey, *supra* note 94; see also Su Sun Bai, Comment, *Affirmative Pursuit of Political Equality for Asian Pacific Americans: Reclaiming the Voting Rights Act*, 139 U. PA. L. REV. 731, 736-38 (1991) (arguing that low voter registration afflicts Asian Pacific Americans generally).

124. See Reed, *supra* note 90, at 762-63.

125. This estimate is premised on groups' achieving representation on the Council proportionate to the percentage of the City's population which they represent. Thus, because each of the 51 City Council seats represent just under two percent of the City's population, Asian Americans, who comprise slightly more than seven percent of the City's population, would be entitled to just over three seats on the Council by a proportional calculation.

126. See generally Reed, *supra* note 105 (describing the inter-minority conflict that characterized decisions over some districts).

the representation of the five principal lesbian and gay neighborhoods, namely, Lower Manhattan, Park Slope, Boerum Hill, Brooklyn Heights, and Jackson Heights.

4. *Représentant l'Autre*: Lesbians and Gays Attaining Representation Through Community Evidence

a. The "Other" Minority

The Charter's third criterion for establishing an electoral district provided that "[d]istrict lines shall keep intact neighborhoods and communities with established ties of common interest and association, whether historical, racial, economic, ethnic, religious or other."<sup>127</sup> It was this clause that made representation in the political process possible for lesbian and gay communities. The word "other," intended to include sexual preference,<sup>128</sup> was a discreet, euphemistic reference that gave lesbian and gay representation precedence over traditional, but not constitutionally mandated, considerations such as compactness<sup>129</sup> and respect for neighborhood or borough boundaries.<sup>130</sup>

b. Community Evidence Fostered the District's Creation

Lesbian and gay activists, most notably the Empire State Pride Agenda ("ESPA"), which is the only state-wide lesbian and gay political organization, were among the most vocal groups lobbying for

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127. See CHARTER, *supra* note 103, at § 52(1)(c).

128. See, e.g., Hernandez, *Gays Launch Drive for Council*, N.Y. NEWSDAY, Apr. 7, 1991, at 7. Both Robert Bailey and Alan Gartner confirmed that this was the intent of the drafters in selecting the catch-all phrase "or other." See Bailey, *supra* note 94; GARTNER, *supra* note 109, at 167. The cloaking of lesbians and gays as "other[s]" is richly descriptive of the role the Districting Commission assigned to lesbian and gay people.

129. A district is compact when its borders are as close as possible to a central point, so that the shape is easily identifiable. Gerrymandering is often viewed as the opposite of compactness because gerrymandered districts often have bizarre shapes. The court in *Dillard v. Baldwin County Bd. of Educ.*, 686 F. Supp. 1459 (M.D. Ala. 1988) explored the reasons for the emphasis on compactness:

The court therefore believes, especially in light of § 2's strong national mandate, that a district is sufficiently geographically compact if it allows for effective representation. For example, a district would not be sufficiently compact if it was so spread out that there was no sense of community, that is, if its members and its representative could not effectively and efficiently stay in touch with each other; or if it was so convoluted that there was no sense of community, that is, if its members and its representative could not easily tell who actually lived within the district. Also of importance, of course, is the compactness of neighboring districts; obviously, if, because of the configuration of a district, its neighboring districts so lacked compactness that they could not be effectively represented, the *Thornburg* standard of compactness would not be met.

*Id.* at 1466.

130. CHARTER, *supra* note 103, at § 52(1)(d)-(g).

their own district before the Commission.<sup>131</sup> Their principal form of activism involved concerted preparation and presentation of evidence to support the claim that creation of a lesbian and gay district in Manhattan was warranted. According to Richard Dadey, Executive Director of ESPA, “[i]t could be best described as an insiders [sic] game, there were no protests, there weren’t mass letter campaigns, there weren’t hordes of lesbians and gays attending public hearings.”<sup>132</sup> As Alan Gartner, Executive Director of the Commission, stated: “[the Commissioners] were overwhelmed by the sophistication and subtlety of the Manhattan lesbian and gay presentation.”<sup>133</sup> ESPA presented statistics, drafted a district map, and organized concerted testimony before the Commission, prompting Gartner to note:

They [gay and lesbian community activists] had two cases to make: first, that gays and lesbians were a community, similar if not identical to the racial and language minority groups protected by the Voting Rights Act, that suffered from discrimination and were entitled to representation; and, second, that there were areas of the city in which sufficient concentrations of lesbians and gays (and their supporters) lived so as to form the basis of a district. [ESPA] marshaled extensive testimony on both topics.<sup>134</sup>

To demonstrate the discrimination faced by lesbians and gays, advocates pointed to rising violence and discrimination directed against members of the lesbian and gay community.<sup>135</sup> Unlike blacks, Latinos, and Asian Americans, however, lesbian and gay people were not identified as a group by “hard” census data.<sup>136</sup> Although some demographers of the lesbian and gay community contend that households headed by same-sex partners reveal a lesbian and gay pop-

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131. See Frank Lynn, *Seeking More Minority Council Members*, N.Y. TIMES, Mar. 24, 1991, at 32 (quoting Alan Gartner: “Asian-Americans, Dominicans, and gay groups have been the most vocal advocates of Council representation.”).

132. Dadey, *supra* note 99.

133. Interview with Alan Gartner, Executive Director of the 1991 New York City Districting Commission, in New York, N.Y. (Jan. 6, 1994).

134. GARTNER, *supra* note 109, at 133.

135. *Id.*

136. Although race is identified by the census, under-counting and non-identification led the Commission to use a computer program that identified names of Spanish and Asian origin. The use of this program provided the Commission with much of its information regarding these populations. See Peter Morrison, *Using the Surname Method to Gauge Hispanic and Asian Voting Strength in Proposed Council Districts*, SUBMISSION, *supra* note 108, Exhibits Book 1, Exhibit 12.

ulation,<sup>137</sup> supporting census data were not available to the community activists or to the Commission.<sup>138</sup>

c. Mapping the Lesbian and Gay Community

Lacking “hard” statistics on the lesbian and gay population, activists had to rely on “soft,” but ingenious statistics to locate lesbian and gay communities. ESPA presented a wide range of “soft” statistics about the lesbian and gay community of Chelsea-West Village extrapolated from data based on election returns, community institutions, and organizational mailing lists. According to Robert Bailey, “[a]n overlay of primaries and elections with various mailing lists from businesses to political groups to nightclub lists was used. When they combined lists, it was obvious where the district was.”<sup>139</sup>

i. Election Returns

The returns from three previous elections in which openly gay candidates had participated formed the principal evidence justifying the creation of a West Village-Chelsea district.<sup>140</sup> Combined maps of voting patterns for lesbian and gay candidates in past primaries and elections demonstrated the existence of an identifiable population of supporters for lesbian and gay candidates.<sup>141</sup> Admittedly, the credibility of voting patterns as evidence of the existence of lesbian and gay communities is tempered by the possibility of heterosexuals voting for lesbian and gay candidates. Moreover, the generally low turnout for local election contests can undermine this relatively “hard” statistical basis for lesbian and gay districting maps. Despite these inherent weaknesses, this evidence was the best that the lesbian and gay districting advocates could marshal and, apparently, the evidence persuaded the Commission.

ii. Lesbian and Gay Institutions

Other maps indirectly suggested the density of the lesbian and gay population through the locations of lesbian and gay institutions. Visible signs of the lesbian and gay community, such as book stores,

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137. See Bailey, *supra* note 94 (stating that Roderick Dial, consultant to the Commission, explored this possibility).

138. See Reed, *supra* note 90.

139. Bailey, *supra* note 94.

140. Lynn, *supra* note 131.

141. See GARTNER, *supra* note 109, at 133.

bars, and community and religious groups, suggested where the district lines should be drawn.<sup>142</sup> According to Richard Dadey, "The number of organizations serving the gay and lesbian community is also extremely high in the neighborhoods of Chelsea and the West Village . . . . Existing in the heart of the West Village is the Gay and Lesbian Community Center—a center of activity and connection for some 300 lesbian and gay groups."<sup>143</sup> ESPA drew a geographically compact map around this concentration of lesbian and gay institutions in predominantly white West Village and Chelsea. It should be noted that many lesbians and gays of color utilize these institutions but live elsewhere,<sup>144</sup> and therefore, forfeit the representation that might result from living within this lesbian and gay community.

### iii. Organizational Mailing Lists

An analysis of a mailing list containing the names of 34,000 contributors to lesbian and gay organizations, organized by zip code, suggested that the concentration of lesbian and gay donors was five times higher in Chelsea and the West Village than in the rest of Manhattan.<sup>145</sup> While this information served as supporting evidence in efforts to establish the presence of a lesbian and gay community in Manhattan, it was used as the primary evidence by activists attempting to gain a lesbian and gay district in Brooklyn, where activists lacked access to the kind of electoral records data which had been made available to Manhattan activists.

## 5. The Districting Process

The Commission responded favorably to the suggestion that it should create a lesbian and gay electoral district. Initially, however, the Commission did not follow ESPA's plan, which proposed that Houston Street be used as the southern boundary for the district, keeping the West Village and Chelsea lesbian and gay communities intact within one district. During the Commission's proceedings,

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142. *Id.*

143. Richard Dadey, Testimony before the Districting Commission (Mar. 27, 1991) (on file with author).

144. For a discussion of the historic significance of Christopher Street for the lesbian and gay community, see Randy Kennedy, *Christopher Street: Changes Sweep the Gay Mecca*, N.Y. TIMES, June 19, 1994, § 16, at 6 ("Since the mid-1970's, [Christopher] Street has been known virtually worldwide as the mecca of gay life in New York City and, indeed, in the United States, rivaled only by Polk Street in San Francisco.").

145. Dadey, *supra* note 143 (presenting data gathered by the media group Strub-Dawson).



Christopher Street, which is located in the heart of West Village, was designated as the southern boundary of District 3.<sup>146</sup> The area south of Christopher Street, extending to Houston Street, was initially designated for inclusion in an Asian-American district centered in Chinatown. John Magisano, President of Gay and Lesbian Independent Democrats, said, "We want the southern boundary at Houston. Margaret [Chin]'s people want to go north of that. Zip code area 10014 is one of the gayest neighborhoods in New York. We're not willing at this point to give up that area."<sup>147</sup> One newspaper reported that "Greenwich Village homosexuals contend that [the preliminary plan adopted] would take some constituents they need for a gay district."<sup>148</sup> The district proposed by the Commission was denounced by some gay leaders. Dick Dadey observed that a districting plan that included half of Christopher Street in another district would "slice the gay community in half," adding, "it goes right down the middle of the most well-known gay street in the city."<sup>149</sup> The Commission was under pressure from both the lesbian and gay community and parts of the Asian-American community, demonstrating how districting can pit one minority against another.

a. Potential Conflict between Asian Americans and Lesbians and Gay Men

Chinatown, the least dispersed Asian-American community in New York City,<sup>150</sup> was the focus of the Commission's efforts to provide for representation for Asian Americans. "The problem with the creation of a minority district on the Lower East Side was essentially one of population: no matter how the Commission drew a district, neither an Asian majority nor a Latino majority district could be created."<sup>151</sup> Two alternatives emerged: one that would create a multi-

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146. Except for the southern boundary, the preliminary proposal for District 3 followed the ESPA proposal. See Bailey, *supra* note 94.

147. Felicia R. Lee, *Blocs Battle*, *supra* note 122.

148. *Id.*

149. Felicia R. Lee, *Minority Districts Added for Council in New York Plan*, N.Y. TIMES, May 2, 1991, at A1.

150. While Queens had twice the Asian population of Manhattan (175,064 in Queens, 88,825 in Manhattan), Manhattan had nearly twice the number of VTDs with 50% or more Asian population. See Asian Population Report, in SUBMISSION, *supra* note 108, at Appendix I; Lee, *supra* note 122 ("Although there is a growing Korean population in the Flushing area of Queens, the largest Asian-American concentration is still in Chinatown.").

151. Reed, *supra* note 90, at 772.

ethnic district,<sup>152</sup> combining both the Latino and the Asian populations, and another that would combine the Asian population with the largely white, upper-middle class Battery Park City.<sup>153</sup> Various Chinese community leaders supported different plans.<sup>154</sup> Ken Chin, the Commission's Asian-American member, eventually favored the Battery Park plan, thereby deciding the issue for the Commission. The decision to connect working class Chinatown with affluent, white Battery Park City rather than with a working class Latino neighborhood suggests that strange bedfellows can be created by the districting process. Blatant power brokering led to a situation where one person's opinion determined Asian-American representation in the New York City Council, and also led to several ensuing complications for the Commission.<sup>155</sup> To maximize Asian-American votes, the district was crafted with a population close to the allowable minimum, leaving other Manhattan districts with disproportionately larger populations overall.<sup>156</sup>

b. Working Relationship between Lesbians and Gays and  
"Protected Minorities"

Lesbian and gay activists recognized their subordinate position in the districting process, and attempted to avert any competition with "protected" minorities. According to Gartner, "[the] understanding on the part of the lesbian and gay community [was] that . . . if they were in competition with [b]lack and Latinos that they would lose. Fortunately the spatial demographics made that not a problem,"<sup>157</sup> because blacks and Latinos made up a relatively low percentage of the population of the downtown West Side of Manhattan below Harlem. ESPA nonetheless developed a working relationship with minority

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152. The multi-ethnic proposal was supported by the Asian-American Legal Defense and Education Fund (AALDEF) and the Puerto Rican Legal Defense and Education Fund (PRLDEF), which based their arguments on the direction of growth of the Chinese community, the common class identity of Chinese and Puerto Rican communities in the area, and the belief that a minority representative would better address the needs of the minority population. *See id.* at 773-74.

153. *See id.* at 774.

154. *See* Margaret Fung, *A District Like a Mosaic*, N.Y. *NEWSDAY*, Apr. 12, 1991, at 68 ("Working class Asians and Latinos in this area have successfully united in the past to win affordable housing, health care, immigrant services, and bilingual education."). Asian-Americans for Equality (AAFE) and their candidate and ex-president, Margaret Chin, supported the latter plan. *Id.*

155. *See* Reed, *supra* note 90, at 775 n.68.

156. *Id.* at 775 n.69.

157. *See* Gartner, *supra* note 133.

communities that facilitated their efforts in two ways, according to Alan Gartner, Executive Director of the Commission. First, recognizing the primacy of the rights of statutorily protected groups to representation, ESPA met with minority community leaders<sup>158</sup> to assuage any fears that a lesbian and gay district would come at the expense of a minority district. ESPA primarily allied itself with the Asian community in an effort to defuse the tension between the two districts, and to advocate for both relatively uncertain districts.<sup>159</sup> This coalition-centered advocacy avoided last-minute “gay bashing” by the supporters of the multi-ethnic Chinatown proposal.<sup>160</sup> The fact that lesbians and gays and racial and language minorities had a working relationship was an encouraging sign. The two communities, facing the distinct possibility of no representation at all, recognized the need to work together and signaled the ability of oppressed groups to unite for structurally aligned projects and goals.

The Commission ultimately responded to lesbian and gay activists’ demands, and moved the southern boundary of District 3 to Houston Street, drawing population for the Chinatown district from other areas of the city. The formation of District 3 led to the election of an openly gay and HIV-positive candidate, Thomas K. Duane.<sup>161</sup>

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158. See GARTNER, *supra* note 109, at 132.

159. See Richard Dadey, Address to the Districting Commission (Mar. 27, 1991) (on file with author) (discussing the proposed lesbian and gay district in West Village and Chelsea: “It is important to note that this district is drawn with sensitivity to, and respect for, the efforts currently underway to create an Asian-American [d]istrict in lower Manhattan and a Latino district in the lower East Side.”); Richard Dadey, Address to the Districting Commission (May 8, 1991) (on file with author) (“[L]et me say that we remain committed to the idea of an Asian-American district in lower Manhattan.”).

160. GARTNER, *supra* note 109, at 134.

161. Thomas K. Duane, candidate for the seat in 1989, faced Liz Abzug in the primary. Ms. Abzug, the daughter of pioneer feminist politician Bella Abzug, was not known as a lesbian activist before her race. For a colorful description of this heated race to be the first city councilperson from the “gay district,” see Alessandra Stanley, *Race Is Likely to Yield First Gay Member of Council*, N.Y. TIMES, Sept. 10, 1991, at B1. *The New York Post*, a conservative tabloid, commented on the race:

There may be no more apt symbol of the direction of contemporary New York politics than Liz Abzug having to discuss her sexual orientation with newspaper reporters in the context of announcing her candidacy for the “gay seat” in the newly redistricted and enlarged City Council. In a saner political culture, what one does in one’s bedroom might be thought to have nothing to do with one’s suitability to serve in public office.

*Balkanizing the City Council*, N.Y. POST, June 7, 1991, at 34. Earlier, the *Post* accused Ms. Abzug of “coming out” for political expediency. See Joe Nicholson, *Abzug’s Daughter, in Bid for Council, Reveals: I’m Gay*, N.Y. POST, June 4, 1991, at 2 (reporting that “[Ms. Abzug] denied reports she delayed coming out until the new City Council districting plain joined Greenwich Village with heavily gay Chelsea. Sources said she had planned to run as a heterosexual if her district included Chinatown and TriBeCa [both non-gay neighborhoods].”). At the same time Ms. Abzug came out, Mr. Duane came out about his HIV status. Faced with the threat of being “outed” as such, Mr. Duane held a press conference to make his announcement, thus becoming

Conversely, Asian Americans for Equality, after winning the battle over boundaries for District 1 against those who supported a multi-ethnic district, watched their candidate and former leader lose to the white incumbent.<sup>162</sup>

## 6. The Nonexistent Brooklyn Lesbian and Gay District

While ESPA had a great deal of support for the creation of its district, Lambda Independent Democrats (LID), Brooklyn's lesbian and gay political club, did not fare as well. Lesbians and gays were unsuccessful in asserting their rights in Brooklyn, where more blacks and Latinos lived, indicating the underlying subordination of lesbian and gay interests to the interests of people of color in a districting system mandated by the Voting Rights Act. LID had a far more difficult time trying to convince the Commission to create a lesbian and gay district in Brooklyn, partially because their claim was bolstered by less convincing statistics than those ESPA had available to support its cause.<sup>163</sup> LID's proposal would have united the "Brownstone Belt" that surrounds downtown Brooklyn, Brooklyn Heights, Boerum Hill, and Park Slope. To support its assertion that a lesbian and gay community existed in Brooklyn, LID used statistics based on its own membership list, information concerning certain women's groups in Brooklyn, and data extracted from certain nightclub lists.<sup>164</sup> LID even employed mailing lists of some city-wide groups such as Frontrunners, a lesbian and gay joggers' club, and of local groups such as Brooklyn Lesbians Together.<sup>165</sup> These lists constituted the sole evidence presented in support of the proposed lesbian and gay district in Brooklyn.

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the first known seropositive candidate for elected office in New York. See Maurice Carroll, *Council Candidate: I'm HIV-Positive*, N.Y. NEWSDAY, Aug. 9, 1991, at 8; Alessandra Stanley, *Gay Candidate for City Council Says He Has AIDS Virus*, N.Y. TIMES, Aug. 8, 1991, at B1.

162. Although Asian Americans For Equality won the districting issue, their candidate, Margaret Chin, lost the primary and the election to the incumbent, Kathryn Freed. Judith Reed explains this defeat by pointing out that

[o]f the total population in this district, 37% is non-minority, 6% is African-American, 17% is Latino, and 39% is Asian-American. However, at the estimated registration level Asian-Americans are only 14% of the district while whites are 61.5%. Ironically, there was a greater percentage of Latino registered voters (15.5%) than Asian-American (14%) in this so-called Asian district.

See Reed, *supra* note 90, at 774 n.67.

163. For a description of the materials LID presented to the Commission, see George Waffle, Testimony before the New York City Districting Commission (Feb. 20, 1991) (on file with author).

164. See Bailey, *supra* note 94.

165. *Id.*

Unlike ESPA, LID had no institutional maps or electoral records to bolster their case. “The presentation was not as good in Brooklyn [as in Manhattan] largely because the facts are so different—there was no electoral evidence, just assertions on the part of community members that they were entitled to representation. It looked thin compared to the impressiveness of Manhattan[’s presentation].”<sup>166</sup> Another difficulty LID faced was that the proposed lesbian and gay district in Brooklyn traversed several incumbent fiefs<sup>167</sup> and minority communities. The plan adopted by the Commission split Park Slope, the center of Brooklyn’s lesbian and gay community, into three parts. One part joined progressive Brooklyn Heights and conservative Williamsburgh. Another part joined Sunset Park and Boerum Hill, while the central part of the lesbian and gay community was joined with Borough Park and conservative Carroll Gardens to form District 39.<sup>168</sup> The result of splitting the lesbian and gay community among three districts was the fracturing of the lesbian and gay community’s voting strength, effectively destroying any possibility that lesbians and gays from this area could elect a representative of their choice.

Lesbians and gays were not the only group to suffer from fracturing. Brooklyn’s twenty-percent Latino population was so dispersed that Latinos only received one safe district out of seventeen. The effort to create a second majority-Latino district in Brooklyn further split Park Slope’s lesbian and gay community. Although a *New York Times* commentator blamed the Brooklyn Democratic machine for this under-representation,<sup>169</sup> it seems clear that the dispersed nature of Brooklyn’s Latino population complicated efforts to achieve effective representation in the districting system. One LID member testified: “We have no intention of diluting any other minority districts

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166. Gartner, *supra* note 133.

167. Incumbency was a far thornier issue in Brooklyn where, in order to create a new white district, Orthodox Jewish-supported Councilperson Susan Alter was drawn into the district of the other Orthodox Jewish-supported Councilperson, Noach Dear. See Jack Newfield, *Hidden Agendas Ruled, Council Gerrymandered*, N.Y. TIMES, June 24, 1991, at 10. One Districting Commission member, Luther Blake, stated: “To claim discrimination when there are two Jews in the same district is absurd . . . . If we had drawn one of them [Noach Dear or Susan Alter] into Bed-Stuy [Bedford-Stuyvesant, an African-American neighborhood], they would have an argument.” Frank Lombardi & Ruth Landa, *Vallone is Crying Foul: Sees Anti-White District Push*, N.Y. DAILY NEWS, June 3, 1991, at 7. Ms. Alter challenged the lines on the basis of “reverse discrimination.” See Newfield, *supra*. Ms. Alter filed suit against the Commission and the Council, which led to the opening of all districts to all candidates residing in the jurisdiction, regardless of the district in which they resided. See Reed, *supra* note 105.

168. See Telephone Interview with George Waffle, Lambda Independent Democrats (May 7, 1994) (on file with author).

169. See Newfield, *supra* note 166.

. . . . We must also recognize that the gay and lesbian community includes people of all colors."<sup>170</sup>

The Commission essentially ignored the LID proposal, as one activist remarked, "The Commission seems to have created a new mandate—'one incumbent, one district'—at the expense of the lesbian and gay community."<sup>171</sup> Incumbency joined with competing interests of other minorities to fracture the Brooklyn lesbian and gay community.

Despite their lack of representation in the City Council, Brooklyn's lesbian and gay voters turned out at the polls to express their interests in the highly contested 1993 School Board elections.<sup>172</sup> As a result, openly lesbian and gay candidates, as well as candidates supportive of the lesbian and gay community overwhelmingly won the election.<sup>173</sup>

## 7. Representation Results

### a. Community Reaction

Many in the lesbian and gay community lauded the Commission's creation of a lesbian and gay district in Manhattan. Lesbian and gay satisfaction with the Commission's plan provided a counterpoint to widespread discontent among other community factions.<sup>174</sup> *Outweek*,<sup>175</sup> which then had the largest circulation of any New York lesbian and gay magazine, pointed out in an editorial entitled, *The Case of the Missing Districts*, that:

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170. George Waffle, Address to the Districting Commission (Feb. 20, 1991) (on file with author).

171. George Waffle, Address to the Districting Commission (May 7, 1991) (on file with author).

172. Indeed, the entire slate supported by ESPA in the elections won. Jon Nalley, who ran as the leader of a lesbian and gay slate in Chelsea and West Village, received the largest number of votes of any candidate in the City's history. See Sam Dillon, *New York City's 32 School Boards Get New Faces but Not New Views*, N.Y. TIMES, May 22, 1993, § 1, at 1. For a fuller discussion of this election, see Darren Rosenblum, *Geographically Sexual?: Advancing Lesbian and Gay Interests Through Proportional Representation*, 31 HARV. C.R.-C.L. L. REV. 119, 119-20 (1996).

173. The system used by the Board of Elections is the Single Transferable Vote (STV) system. See Martin Gottlieb, *The 'Golden Age' of the City Council*, N.Y. TIMES, June 11, 1991, § 4, at 6.

174. See Felicia R. Lee, *Plan for New City Council Passes in Praise and Anger*, N.Y. TIMES, June 4, 1991, at B1 ("Not everyone was displeased with the plan. [ESPA] . . . applauded a Manhattan Council district that includes the West Village and Chelsea, and that they said could be won by a gay candidate.").

175. *Outweek* gained national notoriety as the center of the "outing" wave practiced primarily by Michaelangelo Signorile, who penned the infamous article that "outed" Malcolm Forbes. See Michaelangelo Signorile, *The Other Side of Malcolm*, OUTWEEK, Mar. 18, 1990, at 40.

[L]esbians and gays, with at least ten percent of the city's population, deserve at least five [seats on the City Council] . . . . [T]he prevailing notion [is] that gay-winnable districts, having not been specifically mandated by the new charter, are an afterthought, a bone to throw our community. This leads commissioners to feel that if lesbians and gays are granted one such district, we should be more than satisfied. We should be grateful.

The commissioners should think again. The day is long since past when we thought of ourselves as beggars at the gate of municipal government. We are full voting members of the city, we pay more than our fair share of taxes, we demand at least our fair share of representation.<sup>176</sup>

Brooklyn advocates were certainly disappointed by the Commission's refusal to create the Brownstone Belt district.<sup>177</sup> One response to the plan pointed out that no one on the Commission was lesbian or gay, and that the Commission's composition hurt the general lesbian and gay effort.<sup>178</sup>

### C. California State Legislative Districting

California, like New York, is home to a sizeable number of lesbian and gay communities, most notably the one located in San Francisco. During the wave of lesbian and gay community building in the mid-1970's, Harvey Milk, leader of San Francisco's gay community, ran for the Board of Supervisors. In San Francisco's pre-1977 winner-takes-all at-large system, representatives were chosen by a city-wide majority. Although a sizable minority,<sup>179</sup> lesbians and gays were unable to elect a representative.<sup>180</sup> Here, as elsewhere in the country, at-large elections led to the systematic exclusion of minorities from government. A grassroots social reform movement led by racial and ethnic minorities, lesbian and gay people, and unions won a referendum

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176. *The Case of the Missing Districts*, OUTWEEK, May 1, 1991, at 4.

177. See, e.g., George Waffle, Address to the Districting Commission (May 29, 1991) (on file with author).

178. See *id.* ("We have also noticed that the Commission itself does not contain an openly lesbian or gay man. This we believe has hurt us in our attempts to receive adequate representation.").

179. At the time, the police chief estimated lesbian and gay San Franciscans to number 140,000, one-fifth of the city's population. See RANDY SHILTS, *THE MAYOR OF CASTRO STREET: THE LIFE AND TIMES OF HARVEY MILK* 225 (1982).

180. See CASTELLS, *supra* note 85, at 144.

to adopt a districting system.<sup>181</sup> Harvey Milk<sup>182</sup> easily won election as Supervisor for the first “gay district”<sup>183</sup> in the country.<sup>184</sup>

Today, the entire Bay Area and sections of Southern California are home to several prominent lesbian and gay communities; yet lesbians and gays, as a group, lack representation in the state legislature. WESPAC, the Western States Conference of Gay and Lesbian Political Action Committees, commissioned a study that documented the location of California’s lesbian and gay population.<sup>185</sup> The study used several of the methods being employed at that time in New York, adding one painful, yet accurate statistical marker for the gay population.<sup>186</sup> As the *San Francisco Chronicle* reported:

Finding gay voters is not an exact science, since the census doesn’t ask about sexual orientation. To locate their people, WESPAC used such factors as vote patterns in supervisor races where gay candidates were running and gay/lesbian mailing lists. But the WESPAC map that shows most clearly how a gay district would be drawn is one that shows the number of AIDS cases in each neighborhood . . . . There just might be enough voters . . . to form the heart of a 372,000-person State Assembly district, though probably not enough for a congressional seat or State Senate district, which take more people.<sup>187</sup>

In support of this statistical evidence, San Francisco Supervisor Carole Migden decried the lack of a lesbian and gay district before the State Assembly: “This under-representation—like that of other minority groups—is in large part due to district lines that, either intentionally or thoughtlessly, dilute our community’s voting power.”<sup>188</sup> San Diego’s City Council joined WESPAC in its effort to gain representation for the various lesbian and gay communities in the state legislature.<sup>189</sup>

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181. See SHILTS, *supra* note 178, at 152.

182. For an excellent biography of this lionized gay politician, who stated before his assassination: “If a bullet should enter my brain, let that bullet destroy every closet door,” see SHILTS, *supra* note 178.

183. A “gay” district is one whose representative could be chosen by lesbian and gay people alone, even if, for example, they constituted 51% of the district.

184. See SHILTS, *supra* note 178, at 152.

185. Vlae Kershner, *Cynical or Sincere?*, S.F. CHRON., Aug. 24, 1991, at A14.

186. *Id.*

187. *Id.*

188. *Hearing on Redistricting Identification of Communities of Interest in the Greater Bay Area, and Santa Clara and Monterey Counties Before the California State Assembly Committee on Elections, Reapportionment and Constitutional Amendments*, July 11, 1991 (testimony of Carole Migden), quoted in Tim Schreiner, *Gays, Lesbians Want United District: Supervisor Testifies at Assembly Hearing on Redistricting*, S.F. CHRON., July 12, 1991, at A17.

189. See Barry M. Horstman, *Political Map’s Challenge Is to Color It by the Numbers; Redistricting: Environmentalists, Gays and Ethnic Groups All Have Their Own Proposals for Redraw-*



In spite of the strong efforts of lesbian and gay rights advocates in California, no lesbian and gay district was created. California's failure to provide lesbians and gays with opportunities for representation when it created its state legislature districts was the subject of William Kysella's article, *Gerrymandering Against Gays*,<sup>190</sup> in which he argued:

[Gays] could not influence the political process effectively because the districts were drawn to split their influence, usually between two districts, leaving them with less influence in two or more districts rather than substantial influence in one district. This scenario was repeated in the gay communities in San Francisco, West Hollywood, Long Beach and San Diego. Furthermore, there is evidence that polarized voting has occurred in some of these districts in elections involving gay candidates and issues, plus there is evidence of continuing anti-gay sentiment in political campaigns throughout the state.<sup>191</sup>

Thus, despite the evidence gathered by lesbian and gay advocates in California, anti-gay forces prevented lesbians and gays from achieving the representation they deserve. Kysella argues that lesbians and gays have an Equal Protection claim in California. *Davis v. Bandemer*,<sup>192</sup> the definitive case on gerrymandering, recognizes that a constitutional issue exists when a districting plan "operate[s] to minimize or cancel out the voting strength of racial or political elements of the voting population."<sup>193</sup> Kysella argues that in order to qualify for equal protection coverage under *Davis*, three issues must be addressed and satisfied: (1) lesbians and gays must have a justiciable claim; (2) they must constitute a politically identifiable group; and (3) their population numbers must be significant enough to merit protection.<sup>194</sup>

To demonstrate the presence of justiciability, Kysella points to the fact that sexual orientation is immutable, subjecting lesbians and gays to the same or an essentially similar stigma faced by racial groups.<sup>195</sup> Using community-based statistics, Kysella points to the ap-

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*ing City Council District Boundaries*, L.A. TIMES, July 8, 1990, at B1 (quoting one gay activist as stating that the redistricting plan was a "homophobic effort . . . to divide and conquer" the lesbian and gay vote by fracturing it).

190. See William H. Kysella, *Gerrymandering Against Gays?*, 4 L. & SEXUALITY: A REV. OF LESBIAN AND GAY LEGAL ISSUES 249, 262-70 (1994).

191. *Id.*

192. *Davis v. Bandemer*, 478 U.S. 109 (1986).

193. *Id.* at 119.

194. Kysella, *supra* note 189.

195. *Id.*

parent concentration of lesbian and gays in San Francisco and Southern California as indicating that members of the lesbian and gay population constitute an identifiable political group in the state. Kysella builds on this by arguing that there is discriminatory intent and effect inherent in California's exclusion of lesbians and gays from representation in the state legislature, and that in order to withstand an equal protection challenge, this discrimination must survive a legitimate state-interest test. Kysella demonstrates discriminatory intent by showing that lesbian and gay voters were excluded from the districting process for California's state legislature. The polarization around lesbian and gay issues and candidates in California, and the resulting exclusion of lesbian and gay people from the political process, also signal discriminatory effect.<sup>196</sup>

#### D. Texas Lesbian and Gay Districting

Texas, like California, has two major concentrations of lesbians and gays, one located in Houston and the other located in Dallas. In Houston, lesbians and gays faced a situation similar to the one lesbians and gays encountered in Brooklyn, New York. The well-known lesbian and gay community, located predominantly in the Montrose section of Houston, was considered the center of "the bellweather gay vote."<sup>197</sup> Houston, like New York, accepted community redistricting plans from the public. The Houston Gay and Lesbian Political Caucus submitted a redistricting plan for the city which surpassed that of New York's Empire State Pride Agenda by including a complete redistricting plan for Houston that accounted for the Voting Rights Act Section 5 requirements,<sup>198</sup> a gesture of solidarity with other minorities.

Based on evidence similar to that used by ESPA in New York, the plan proposed by Houston's lesbian and gay community utilized both voting records on lesbian and gay issues and candidates and membership maps compiled from information obtained from various community groups.<sup>199</sup> In the mid-1980s, Houston held a referendum on lesbian and gay employment discrimination protection which failed to

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196. See generally *Davis*, 478 U.S. at 119. But see James Rainey & Greg Krikorian, *Voters Sweep Out Two Council Incumbents*, L.A. TIMES, June 9, 1993, at A1 (reporting that Tom LaBonge was elected as the Los Angeles City Council's first openly gay councilmember).

197. See Telephone Interview with Annise Parker, former candidate for Houston City Council (Oct. 10, 1995) (on file with author).

198. See Telephone Interview with Robert Bridges, consultant to the Houston Gay and Lesbian Political Caucus (Oct. 31, 1995) (on file with author).

199. See *id.*

gain voter support. Maps indicating areas of support for the referendum proved particularly helpful in establishing the existence of a lesbian and gay community.<sup>200</sup> Robert Bridges, a consultant to the Houston Gay and Lesbian Political Caucus, has asserted that “the plan was based primarily on election returns rather than mailing lists because you can have a pocket of lesbian and gay people on a list but that doesn’t necessarily show support for lesbian and gay candidates.”<sup>201</sup> The plan, the first submitted to the Council for consideration in effecting the 1990 census redistricting, received a great deal of notice and “support from other [Asian, Hispanic, and black] community groups looking to protect our interests as well as theirs.”<sup>202</sup>

Unfortunately, Houston’s City Council which, unlike New York, voted directly on redistricting, rejected all the proposed plans submitted, including the one proposed by the Houston Gay and Lesbian Political Caucus. The Montrose area, a progressive white area that is adjacent to black neighborhoods, provided district line drawers with a population that could be used to “unpack” black districts—that is, to reduce black percentages in districts to achieve effective black majorities in the greatest number of districts.<sup>203</sup> In unpacking its black districts, the City Council split the lesbian and gay Montrose area.

Unlike New York, which had an independent districting commission, Houston’s City Council drew the lines for its own districts, giving councilmembers free rein to draw districts in such a way as to protect their incumbencies.<sup>204</sup> In this regard, Montrose ended up like Park Slope, Brooklyn—divided into several districts designed to protect incumbencies and provide racial minorities with effective majorities.

Houston’s mixed districting and at-large system, in which five of the fourteen city councilmembers are elected by a city-wide vote, prevents the city council districts from being small enough to afford the lesbian and gay community a winnable district.<sup>205</sup> Furthermore, several local activists assert that the City Council knew Montrose was the most concentrated lesbian and gay area but ignored this fact to favor councilmembers’ incumbencies.<sup>206</sup> Here, self-serving political inter-

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200. *See id.*

201. *Id.*

202. *See id.*

203. *See id.*

204. *See id.*

205. *See id.*

206. *See id.*

ests conveniently ignored common knowledge of a community's existence.

According to Annise Parker, an openly lesbian former candidate for a seat on the Houston City Council:

The Councilmembers decided which district got swapped for which. We did all the lobbying and came up with alternative plans, but it wasn't a question of where the community was located but whether it was important to provide it with representation. Rather than acting out of homophobia, they were acting to protect their own incumbency.<sup>207</sup>

The failure of the lesbian and gay community to win a district in Houston demonstrates the limitations of community-based evidence when there is an absence of political will and leadership to represent the minority group. In situations such as that encountered by gay and lesbian advocates in Houston, gay and lesbian voters will be "cannibalized"<sup>208</sup> by incumbency, heterosexism, and other forces. Other Texans have had greater success in electing representatives supporting lesbian and gay interests. Voters in one Austin district have elected openly gay Representative Glen Maxey to the State Legislature.<sup>209</sup> Although the district has many lesbian and gay residents, Representative Maxey's supporters include the broader liberal population of Democrats and people associated with the University of Texas.<sup>210</sup> As a state legislator, Representative Maxey has advocated for same-sex marriage and the repeal of Texas' sodomy law.<sup>211</sup>

Dallas lesbians and gay men have helped to elect two gay men, Craig McDaniel and Chris Luna, to the fourteen-member Dallas City Council.<sup>212</sup> In Dallas' 1991 redistricting, black and Latino districts were drawn first.<sup>213</sup> Although lesbians and gay men constitute approximately 15-25% of Luna's district,<sup>214</sup> it was designed as a Latino-

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207. *Id.*

208. "The gay area in Houston was cannibalized by the districting process. Where they had a gay majority district, it was cut up by the City Council." Telephone Interview with Glen Maxey, State Representative from Austin, Texas (Sept. 29, 1995) (on file with author).

209. See e.g., Glen Maxey, *Running Against the Right*, in GAY AND LESBIAN VICTORY FUND, *supra* note 12, at 159; Maxey, *supra* note 207.

210. Maxey, *supra* note 207.

211. Sylvia Moreno, *Gay Legislator Seeks Sodomy Law Repeal*, DALLAS MORNING NEWS, Feb. 4, 1993, at 30A.

212. Telephone Interview with Dallas City Councilperson Craig McDaniel (Nov. 14, 1995) (on file with author); Telephone Interview with Dallas City Councilperson Chris Luna (Jan. 30, 1996) (on file with author).

213. McDaniel, *supra* note 211; Luna, *supra* note 211.

214. Luna's district incorporates part of Oak Lawn, the most well-known lesbian and gay neighborhood in Dallas, as well as East Dallas, another lesbian and gay neighborhood.

majority district, with 65% Latinos. In 1991, after the district was drawn, all three candidates for the office were Latino, including Luna.<sup>215</sup> Latinos did play an important role in electing Luna, but their low voter registration and low voter turnout permitted lesbian and gay voters to have a disproportionate influence on the election of the district's councilperson, helping to re-elect him in 1993 and 1995. Luna's district has a solid lesbian and gay influence, in which lesbians and gay men have important, if not exclusive, sway over their representation. This influence exists not only because of the disproportionate weight of the lesbian and gay vote, but because of the lack of hostility within the majority Latino population.<sup>216</sup>

McDaniel, elected in 1993, represents a district that incorporates some inner-city areas and Oak Lawn, Dallas' most well-known lesbian and gay area.<sup>217</sup> His district, whose population is estimated to be 15-20% lesbian and gay, was created after the 1990 census to elect a progressive, perhaps lesbian or gay, candidate.<sup>218</sup> Districting advocates developed and employed zip-code-based maps showing concentrations of membership in lesbian and gay political and social organizations, including the Dallas Lesbian and Gay Alliance, and the nation's largest Metropolitan Community church, which is a lesbian and gay church.<sup>219</sup> Because the lesbian and gay area, according to that map, was largely within the Democratic precincts, Democratic district lines specifically aided lesbian and gay representation. In 1993, in his first campaign, McDaniel's organization contacted lesbian and gay voters with specially tailored voting pitches to capitalize on the lesbian and gay population's political involvement.<sup>220</sup> With broad lesbian and gay and Democratic support, McDaniel easily won both the 1993 and 1995 elections.<sup>221</sup>

Having one-seventh of the council's representation, Dallas' lesbian and gay communities have an important voice in local politics. Council-appointed commissions are well-populated by lesbians and gays. This involvement by lesbians and gay men permits them a strong voice in current policy debates while further opening the way for lesbian and gay civic activism.

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215. Luna, *supra* note 211.

216. *Id.*

217. Lori Stahl, *Council Members Take Oath*, DALLAS MORNING NEWS, June 8, 1993, at 17A.

218. McDaniel, *supra* note 211.

219. *Id.*

220. *Id.*

221. *Id.*

Thus, in New York, Texas, and California, advocates for lesbian and gay representation have, with varying degrees of success, employed similar methods to identify their communities for districting purposes: maps depicting previous electoral support for lesbian and gay interests; maps reflecting community group member lists; and maps reflecting the locations of lesbian and gay businesses and community institutions. Although these techniques ultimately resulted in the creation of several districts representing lesbians and gay men, they did not always overcome the opposing forces—ranging from indifference to hostility—arrayed against lesbian and gay communities. While effective for their purpose, these techniques must be viewed as mere tools for use in overcoming the representational problems posed for minority groups by a districting system, rather than a solution to the problems themselves.

### III. REPRESENTING RACIAL MINORITIES THROUGH LESBIAN AND GAY DISTRICTING TECHNIQUES

*Miller* has in some sense reversed the situation described in the above examples. Where lesbian and gay districts were previously slated only after the “protected” minority districts were drawn, racial minorities will no longer have necessary primacy over “unprotected” groups such as lesbians and gays. Theoretically, unlike blacks, who can no longer rely on their race alone to attain primacy in the districting process, lesbian and gay community interests may be permitted to influence districting decisions without leading to a potentially successful *Shaw* claim.

Undoubtedly, blacks still face fundamental electoral challenges from the racist elements in our society and our governmental system. Despite *Miller* and the partial success of the effort to dismantle the Voting Rights Act, however, blacks and other racial and ethnic minorities are in a comparatively well-established position as far as the districting of their communities is concerned. Blacks will not likely confront the complete indifference lesbians and gays suffer in areas like Houston, because such egregious treatment of a racial minority likely would still constitute a basis for a successful Section 2 or Section 5 claim under the Voting Rights Act. In that regard, the difficulties lesbians and gays have encountered in their efforts to achieve districting rights through the use of community-based evidence would not plague blacks and other racial minorities.

As was argued in Section One, community statistics will most effectively meet the *Miller* standard. This Section will apply the lesbian and gay districting experience to black electoral questions. It will explore the non-biological, cultural nature of racial identity, a conception that fits well with the “community” standard of *Miller*. It then will suggest how evidence of black communities may meet the *Miller* standard.

#### A. The Utility of A Cultural Definition of Race

Many black theorists argue for a cultural definition of racial identity. Henry Louis Gates, Jr., points out that “[r]ace’ as a meaningful criterion within the biological sciences has long been recognized to be a fiction.”<sup>222</sup> Kwame Anthony Appiah also argues that the notion that race is a biological trait is merely a cultural construct, and that race is in fact a “metonym for culture.”<sup>223</sup> Having no relevant biological meaning, “race” is merely a substitute for “culture.”<sup>224</sup> The misperception that “race” is more than “culture” comes from an interest in the upholding power differentials: “[r]ace has become a trope of ultimate, irreducible difference between cultures, linguistic groups, or practitioners of specific belief systems, who more often than not have fundamentally opposed economic interests.”<sup>225</sup> The notion that race carries some real meaning apart from culture is thus rooted in social conflict. The theoretical presumption that “race” has greater meaning is accomplished in part by language: “we carelessly use language in such a way as to *will* this sense of *natural* difference into our formulations.”<sup>226</sup>

Appiah’s concept of race may be akin to ethnicity—both ethnic and racial identities have import because of their cultural content. Because racial community is really cultural community, “Appiah believes that culture can and should substitute for race.”<sup>227</sup> In addition to commonalities of cultural expression and social constructions, black cultural community stems from the perception by blacks and non-

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222. HENRY LOUIS GATES, JR., *LOOSE CANONS: NOTES ON THE CULTURE WARS* 48 (1992).

223. KWAME ANTHONY APPIAH, *IN MY FATHER’S HOUSE: AFRICA IN THE PHILOSOPHY OF CULTURE* 45 (1992).

224. The accuracy of Appiah’s concept is beyond the scope of this article. Regardless of the accuracy of his assessment of the nature of race, however, the concept is useful for the rhetoric of districting disputes.

225. GATES, *supra* note 221, at 53.

226. *Id.*

227. Chong-Soon Lee, *supra* note 10, at 771.

blacks that they are part of a common race, and that this commonality is used by others as a basis for discrimination.<sup>228</sup>

This vision of race as a fundamentally cultural rather than biological phenomenon would prove advantageous if it were adopted by the Supreme Court. Because the *Miller* ruling—according to Justice Ginsburg’s dissent—has placed blacks beneath ethnic groups for districting considerations, the recategorization of black identity as an ethnicity would permit blacks to skirt the Supreme Court’s latest demotion based on its misguided adherence to racelessness.

Yet black advocates have emphasized cultural identity in districting disputes without succeeding in changing the Court’s mind.<sup>229</sup> The Supreme Court has historically refused to recognize the cultural aspects of race, or to acknowledge that race may be a cultural construction.<sup>230</sup> Neil Gotanda discusses culture-race, which “includes, for example, the customs, beliefs, and intellectual and artistic traditions of Black America, and institutions such as Black churches and colleges.”<sup>231</sup> Gotanda points out that despite the applicability of “culture-race” to juridical discourse, “the Court has devalued or ignored Black culture, community, and consciousness. Its opinions use the same categorical name—Black—to designate reified systemic subordination . . . as well as the cultural richness that defines culture-race.”<sup>232</sup> Blindness toward the cultural aspects of race is typified by the Court’s rulings in *Shaw* and *Miller*, both of which presume that blacks living in similar contexts share no commonalities; shared identity must be proven as if race did not exist.

Despite convincing evidence that the Supreme Court “simply lack[s] the imagination”<sup>233</sup> to consider cultural aspects of race, its nearly absolute avoidance of such arguments may change. First, faced with the new ineffectiveness of census-based district drawing, renewed focus on cultural aspects of race may help persuade otherwise hostile courts to permit the creation of majority-black districts. Second, the Justices may be swayed that race’s cultural implications are determinative. In his *Shaw* dissent, Justice Souter indicates that for him, race has different meanings in different contexts, stating:

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228. *APPIAH*, *supra* note 222, at 17.

229. Chong-Soon Lee, *supra* note 10.

230. *Id.*

231. Gotanda, *supra* note 9, at 56.

232. *Id.*

233. *Id.* at 58.



[E]lectorate districting calls for decisions that nearly always require some consideration of race for legitimate reasons . . . [because] members of racial groups have the commonality of interest implicit in our ability to talk about concepts like “minority voting strength,” and “dilution of minority votes.”<sup>234</sup>

In his dissent, Justice Souter “implicitly acknowledges that there are affirmative definitions and uses of race.”<sup>235</sup> In addition, Justice O’Connor’s *Miller* concurrence argues that *Miller* should not destabilize the district lines of most jurisdictions. If other jurisdictions follow Georgia’s response to *Miller*—reducing black majority districts by two-thirds<sup>236</sup>—Justice O’Connor may well attempt some retreat from *Miller*’s impact, possibly incorporating a recognition of black cultural realities. Third, since the Court’s view of cultural aspects of race is more an attitude than a legal doctrine, District and Circuit courts—upon whom the bulk of districting enforcement relies—may be more responsive to litigants’ efforts to define race in a different fashion.

## B. Identifying Black Communities of Culture

Blacks and other racial minorities can take hope from the successes of lesbians and gays in attaining representation using community information that might be favored under the new *Miller* regime. Now minorities must prove the existence of a “community” interest within a majority-minority district to defeat a claim that race was the predominant factor in the districting process. In this sense, the Court now requires blacks to jump over higher hurdles than was required pre-*Miller*: they cannot just be black, they must also satisfy the Court’s notion of “community” in order to merit a majority-minority district. But what constitutes a “black community”? The presence of community markers such as black-owned businesses and black political groups and churches might serve to signal where a black district might be drawn without violating the *Miller* racelessness presumption, as would an emphasis on the various black ethnicities such as West Indian, Haitian, African-American, Hispanic blacks, etc. As mere argumentation before districting bodies, this method would not imply any disunity in black political activity.

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234. *Shaw v. Reno*, 113 S. Ct. 2816, 2845 (Souter, J., dissenting).

235. See Chong-Soon Lee, *supra* note 10, at 778.

236. Kevin Sack, *Court Draws Georgia Map of Congressional Districts: 2 of 3 Black-Majority Districts Scrapped*, N.Y. TIMES, Dec. 14, 1995, at A22.

The community-based districting evidence utilized by lesbian and gay groups to gain representation in the electoral districting system could be easily gathered for black communities. Given the historically and contemporarily important role black churches play in the lives of the members of black communities,<sup>237</sup> church membership could serve as the centerpiece of evidence for the creation of a district with a black majority. As church organizations played a key role in the battle in the movement for voting rights in Selma, Alabama that led to the passage of the Voting Rights Act,<sup>238</sup> so black churches now can serve to provide support for districting advocates.<sup>239</sup> Black political groups, such as local chapters of the NAACP, could provide membership lists to districting advocates to establish the location and existence of a black community, relieving the black community of the need to resort to census statistics. Further evidence of a black political community could be provided by maps detailing support for candidates from that particular black community or support for black-related issues. Community groups, such as block associations and other local groups, also might provide evidence of a particular community's existence. Finally, commercial information might serve as ammunition against those who would argue that the only commonality among voters in a black district is their race. Marketing surveys and other documentation of black consumers, along with the identification of black-owned businesses, would assist in proving the commonalities of black communities. Evidence of this type may prove to be the only remaining tool black communities have available to protect their hard-won representation from *Shaw-Miller* challenges.

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237. See, e.g., James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287, 348 (1990) (citing the role of a black church in the Civil Rights struggle of the 1960s); see also, Gary Peller, *Frontier of Legal Thought III: Race Consciousness*, 1990 DUKE L.J. 758, 792 (1990) (citing the difference between blacks and whites in their "different communities, neighborhoods, churches, families [and] histories").

238. See *Bridge to Freedom*, in THE EYES ON THE PRIZE CIVIL RIGHTS READER 204-28 (Carson, et al. eds., 1991).

239. For a discussion of the potential role of black churches in political questions, see CORNEL WEST, *On the Future of the Black Church*, in PROPHETIC REFLECTIONS: NOTES ON RACE AND POWER IN AMERICA 73 (1993).

CONCLUSION

*Let us march on ballot boxes, until we send to our city  
councils, state legislatures, and the United States  
Congress [people] who will not fear to do  
justice.<sup>240</sup>*

The Supreme Court's tortured notions of minority representation and equal protection reveal the depths of districting's evils: as a system, districting requires an elite group to draw districts, yet makes no provisions for, and provides no safeguards against, political horse-trading and the potential conflicts of interest that accrete around incumbency. As a result of the Supreme Court's latest interpretation of the Equal Protection Clause as requiring "colorblind" districting over the interests of blacks, such elites will be free of the self-perceived political shackles imposed by black representation. The Court has transformed itself from an institution that ostensibly guarantees just enforcement of constitutionally mandated protections for minorities to one that overtly enforces the rhetoric of racelessness to ensure the reality of racial exclusiveness.<sup>241</sup>

Both racial and sexual minorities come to the debate over political representation from positions of intense frustration with the legal and political systems of the United States. Both groups clearly merit far more representation in the political process than they currently command or are likely to gain in the near future. A fairer system of representation could be achieved by changing the system to allow proportional representation, which would enable all individuals to choose political identification regardless of where they live within a jurisdiction. Despite a profound lack of faith in this majority-rule republic's ability to respond to minority needs, the hope that minorities might someday achieve a fairer level of representation persists. Against the critical weaknesses of districting and its current jurisprudence, racial and sexual minorities must discover new methods that will allow them

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240. Martin Luther King, Jr., *OUR GOD IS MARCHING ON*, Speech to the Selma marchers in front of the Alabama State Capitol (March 25, 1965), reprinted in *THE EYES ON THE PRIZE CIVIL RIGHTS READER*, *supra* note 237, at 224.

241. For an analysis of the Court's 1994 Term and the disappearance of the Court's "center," see Linda Greenhouse, *Farewell to the Old Order in the Court*, N.Y. TIMES, July 2, 1995, § 4 at 1.

to participate in the political system, or risk being forced to withdraw from the American democratic experiment.<sup>242</sup>

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242. *See generally* HANNAH ARENDT, ON REVOLUTION (1963) (discussing the radical nature of the American Revolution and postulating that the institution of American government has prevented any further American revolutions).