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Divided and Conquered: Los Angeles Koreatown and the Inadequacies of Voting Law

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Divided and Conquered: Los Angeles Koreatown and the Inadequacies of Voting Law

Joseph Jung[†]

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INTRODUCTION

Commissioners, . . . I would like to welcome you to the political awakening of Koreatown. We're not going to be the quiet group anymore that just hands out money without political representation. To whom do you owe your civic duties?¹

Some have called the 1992 Los Angeles Riots a political awakening for Korean Americans.² During the riots, an estimated one billion dollars in

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1. David D. Kim, *Koreatown, 20 Years After the LA Riots*, YOUTUBE (May 2, 2012), <https://www.youtube.com/watch?v=LXMPEZ2IZ20#t=02m10s> [<https://perma.cc/9T3K-2Y7E>] (public testimony from a Koreatown resident at a 2012 Los Angeles Redistricting Commission hearing).

2. See, e.g., Karen Grigsby Bates, *How Koreatown Rose from the Ashes of L.A. Riots*, NPR (Apr. 27, 2012), <http://www.npr.org/2012/04/27/151524921/how-koreatown-rose-from-the-ashes-of-la-riots> [<https://perma.cc/QLQ9-WK2Y>] (claiming that after the 1992 Los Angeles riots, Korean Americans began to participate more in civic society and to see themselves as a permanent part of the

damage was inflicted primarily on immigrant-operated businesses in Koreatown.³ This awakening, however, was as much the result of the riots' aftermath as it was of the riots themselves. For days, police failed to provide security as the destruction ensued. Afterwards, when Koreatown residents approached their local officials for assistance with the cleanup and recovery effort, their requests fell on deaf ears.⁴ Officials had little incentive to respond to Koreatown residents due to the way that Los Angeles's electoral districts were drawn—in 1991, the Los Angeles Redistricting Commission had split the one-square-mile neighborhood into four City Council districts and five State Assembly districts.⁵ The result left no one official accountable to the Korean community in Los Angeles.

In a visceral way, the Los Angeles riots revealed to many Asian Americans the urgency of redistricting—the decennial process of drawing electoral district boundaries. Scholars have since pointed to redistricting as a major reason why Asian Americans remain so underrepresented in politics, whether at the ballot box or in elected office.⁶ Redistricting has become a rallying cause for Asian American groups, some of which have mounted legal challenges against allegedly discriminatory district maps.⁷ Los Angeles Koreatown itself is the subject of one of these legal challenges. In the ongoing *Lee v. City of Los Angeles*, Los Angeles Koreatown residents claim that local officials divided their neighborhood in two in an unconstitutional racial gerrymander.⁸ But despite this groundswell of awareness of redistricting, Asian American communities remain invisible to the drawers of electoral boundaries.⁹ The lower court ultimately rejected the *Lee* challenge,¹⁰ for one, and Los Angeles Koreatown remains divided.

At the heart of Asian Americans' struggles with political representation is a flawed voting rights jurisprudence. Specifically, *Lee* and

United States rather than as temporary residents).

3. Terry Ao Minnis, *Asian Americans & Redistricting: The Emerging Voice*, 13 J.L. SOC'Y 23, 25 (2011).

4. *Id.* at 25–26.

5. *Id.*

6. See, e.g., Ming Hsu Chen & Taeku Lee, *Reimagining Democratic Inclusion: Asian Americans and the Voting Rights Act*, 3 U.C. IRVINE L. REV. 359 (2013) (positing that Asian Americans remain underrepresented in politics in part due to their inability to seek redress under the VRA); Minnis, *supra* note 3, at 25–26 (highlighting instances of redistricting splitting Asian American communities); Paul Ong & Albert J. Lee, *Asian Americans and Redistricting: Empowering Through Electoral Boundaries*, 8 AAPI NEXUS 87, 88 (2010) (noting that Asian Americans face heightened challenges in redistricting compared to other racial minority groups).

7. See *Redistricting*, KOREAN AM. COAL.-LOS ANGELES, <http://www.kacla.org/redistricting.html> [<https://perma.cc/Z7XV-2JWC>] (last visited Nov. 24, 2015); *The Unity Map: Redistricting for Fair Representation*, ASIAN AM. LEGAL DEF. AND EDUC. FUND, <http://aaldef.org/unity-map.html> [<https://perma.cc/DMF5-88ZT>] (last visited Nov. 12, 2016).

8. *Lee v. City of Los Angeles*, 88 F. Supp. 3d 1140 (C.D. Cal. 2015).

9. See *infra* Part I.C.

10. *Lee*, 88 F. Supp. 3d at 1148–54.

the tumultuous history of Los Angeles Koreatown suggest that the major legal regimes responsible for checking redistricting abuses are becoming outdated. Regressive changes to voting rights law after the Civil Rights era, along with demographic shifts and new modes of discrimination, have made redistricting nearly immune to legal challenge today, particularly as applied to Asian Americans. As a result, the current voting rights jurisprudence is becoming increasingly inadequate at protecting minority groups against disenfranchisement.

This Note proceeds in several parts. Part I discusses the *Lee* case and provides a brief background on redistricting and how it has affected Asian Americans in the past. Part II then examines how the two major legal regimes governing redistricting—the Voting Rights Act (VRA) and Equal Protection doctrine—fail to reflect our pluralistic society and protect groups like Asian Americans. Part III argues that *Lee* was a missed opportunity to pursue the promising yet underdeveloped “communities of common interest” strategy. Part III also suggests that deeper changes to voting laws are required to truly protect racial minorities against political disenfranchisement.

I. REDISTRICTING: A RECURRING STRUGGLE FOR FAIR REPRESENTATION

Redistricting is a contentious process. Battles over district maps resurface in legislative halls after each census, with the makeup of the combatants’ constituencies at stake. These negotiations are more than mere administrative exercises, as district boundaries can affect legislators’ reelection chances and the allocation of government resources.¹¹ But the realpolitik associated with redistricting may obscure the practice’s original purpose—to apportion people equally across districts so that their votes are equally meaningful.¹² At its conceptual roots, redistricting is a mechanism for making government more responsive and representative.¹³

Recent events in Los Angeles Koreatown reveal that this democratic mechanism is becoming increasingly rusty. As discussed in the next Part,

11. See M. ELAINE NUGENT-BORAKOVE, JON GOULD & HOLLY STEVENS, THE JUSTICE MGMT. INST., TENNESSEE JUDICIAL REDISTRICTING STUDY: CONCLUSIONS & RECOMMENDATIONS (2009), http://www.tba2.org/tbatoday/news/2009/judicial_redistricting_study_052009.pdf [https://perma.cc/69N7-N69V]; *Redistricting for Fairness in the Latino and Minority Communities: Statement of Facts & Position*, LEAGUE OF UNITED LATIN AM. CITIZENS (LULAC) OF WIS., <http://www.lulac-wisconsin.org/redistrictingmilwaukee.html> [https://perma.cc/MYF9-MSRF] (last visited Feb. 6, 2017); *Update on Judicial Redistricting for the Trial Courts of Kentucky: Testimony Before Interim Joint Committee on State Government* (Ky. 2016) (statement of John D. Minton Jr., Chief Justice of Kentucky), <http://courts.ky.gov/Documents/Newsroom/CJremarksStateGovCmte102616.pdf> [https://perma.cc/HAL8-ANTQ].

12. See *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964) (“To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected ‘by the People.’”).

13. *Id.*

Koreatown residents are again contending that the city's redistricting scheme disenfranchised them; this time, they are voicing their frustration through the case *Lee v. City of Los Angeles*. The following places *Lee* within a larger history of Asian American struggles with redistricting and then makes the case that *Lee*—particularly its failure in the lower court—illustrates how Asian Americans' fight for political representation presents serious challenges to current voting rights law.

A. *Lee v. City of Los Angeles*

In 2012, large numbers of Koreatown residents appeared at public hearings to voice their demands regarding the city's redistricting process following the 2010 census.¹⁴ Cognizant of past district maps that left no official accountable to their community, Koreatown residents proposed a plan to keep their neighborhood whole within then-Councilman Eric Garcetti's 13th district, which contains Thai Town and Historic Filipinotown.¹⁵ But contrary to their wishes, the redistricting commission ultimately approved a scheme that split Koreatown between the 10th and 13th districts.¹⁶

These events gave rise to a legal challenge, *Lee v. City of Los Angeles*, in which plaintiffs alleged that the city's redistricting scheme violated the Equal Protection Clause as an unconstitutional racial gerrymander.¹⁷ Specifically, plaintiffs maintained that city councilmembers—particularly President Herb Wesson, whose 10th district encompasses part of Koreatown—explicitly worked to increase the percentage of African American voters within the borders of Wesson's district and thus diluted Korean voting power.¹⁸ But the Central District of California ultimately rejected these claims, finding that the Los Angeles City Council never violated the Equal Protection Clause.¹⁹ According to the court, neither the shape nor demographics of the newly created districts nor evidence of certain councilmembers' motivations evinced an attempt to create districts classified by race.²⁰ Rather, the City Council's redistricting scheme “served

14. Hillel Aron & Jill Stewart, *Koreatown Roars Against Gerrymander*, L.A. WKLY. (Feb. 9, 2012), <http://www.laweekly.com/news/koreatown-roars-against-gerrymander-2173928/> [<https://perma.cc/4ZFC-G2YL>].

15. David Zahniser, *Koreatown Redistricting Fight Moves to Federal Court*, L.A. TIMES (July 31, 2012), <http://latimesblogs.latimes.com/lanow/2012/07/los-angeles-redistricting-lawsuit-koreatown-wesson.html> [<https://perma.cc/N2R4-LRKD>].

16. *Lee v. City of Los Angeles*, 88 F. Supp. 3d 1140, 1145 (C.D. Cal. 2015) (explaining that Los Angeles City Council Redistricting Commission denied a motion by a vote of 17-4 to “move the southern portion of Wilshire Center Koreatown Neighborhood Council into [the 13th Congressional District] in order to unify the Wilshire Center Koreatown Neighborhood Council whole in one Council District.”).

17. *Id.* at 1148–54.

18. *Id.* at 1152.

19. *Id.* at 1148–54.

20. *Id.*

non-racial traditional redistricting purposes” and thus did not need to be redrawn.²¹ An appeal is currently pending in the Ninth Circuit.²²

Lee captured a greater concern among Asian Americans over their lack of representation in politics, particularly in Los Angeles. Los Angeles’s City Council just added its first Korean American councilmember David Ryu in early 2015,²³ but Ryu’s 4th district does not encompass Koreatown.²⁴ Ryu is only the second Asian American councilmember in Los Angeles’s history after councilmember Michael Woo, who vacated his seat in 1993 for an unsuccessful run for the mayoralty.²⁵ Asian Americans make up 11.3 percent of Los Angeles’s population,²⁶ and the Los Angeles metropolitan area is home to the largest number of ethnic Koreans outside of Korea.²⁷ While Koreatown actually contains a slight majority of Latinos, the neighborhood has among the highest concentration of Asian Americans in Los Angeles proper.²⁸ Such numbers, however, have not translated to meaningful representation in elected office. The Koreatown neighborhood, for one, has never been represented by an Asian American councilmember.²⁹

B. Redistricting and Asian Americans

Concerns over the dilution of voting power sparked today’s system of drawing district boundaries after every census. The Warren Court, recognizing that districts with wildly unequal population numbers were denying voters’ right to direct representation, ruled in several landmark cases that the Equal Protection Clause required all levels of government to

21. *Id.* at 1154.

22. *Lee v. City of Los Angeles*, 88 F. Supp. 3d 1140 (C.D. Cal. 2015), *appeal docketed*, No. 15–55478 & No. 15–55502 (9th Cir. Jan. 9, 2017).

23. Matt Hamilton, *David Ryu, L.A.’s First Korean American City Council Member, Is Sworn In*, L.A. TIMES (June 28, 2015), <http://www.latimes.com/local/lanow/la-me-ln-newly-elected-councilman-david-ryu-to-be-sworn-in-today-20150628-story.html> [https://perma.cc/MRA8-8XMN] (noting that David Ryu is the first Korean American City Councilmember in L.A.’s history).

24. Emily Alpert Reyes & Victoria Kim, *David Ryu’s L.A. City Council Campaign Energizes Korean American Voters*, L.A. TIMES (May 9, 2015), <http://www.latimes.com/local/cityhall/la-me-korean-voters-20150510-story.html> [https://perma.cc/8AWN-KJGS] (describing the southern tip of Ryu’s 4th district as “abutting Koreatown”).

25. *Id.*; Seth Mydans, *Los Angeles Elects a Conservative as Mayor and Turns to a New Era*, N.Y. TIMES (June 10, 1993), <http://www.nytimes.com/1993/06/10/us/los-angeles-elects-a-conservative-as-mayor-and-turns-to-a-new-era.html> [https://perma.cc/ESA4-44UY].

26. *QuickFacts*, U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts/table/RHI425215/0644000> [https://perma.cc/TRV3-ETZR] (search for “Los Angeles City, California” and select “Race and Hispanic Origin” filter) (last visited Nov. 5, 2016).

27. PYONG GAP MIN, ASIAN AMERICANS: CONTEMPORARY TRENDS AND ISSUES 236 (2d ed. 2006).

28. *Asian*, L.A. TIMES: MAPPING L.A., <http://maps.latimes.com/neighborhoods/ethnicity/asian/neighborhood/list> [https://perma.cc/SV5Y-468F] (last visited Nov. 5, 2016); *Koreatown*, L.A. TIMES: MAPPING L.A., <http://maps.latimes.com/neighborhoods/neighborhood/koreatown/> [https://perma.cc/2JRL-UHYX] (last visited Nov. 5, 2016).

29. See Reyes & Kim, *supra* note 24.

construct districts that represent populations as equally as possible.³⁰ This principle alone, however, has not been enough to eliminate claims of vote dilution. Despite the equal population requirement, a community's voting power may further be diluted through "packing" (the crowding of communities into a small number of districts) or "cracking" (stretching communities across a large number of districts).³¹ Since political incumbents are typically tasked with drawing district maps, the process is often criticized for serving partisan goals rather than helping achieve true direct representation.³² At its worst, redistricting—or more negatively, gerrymandering—entrenches incumbent advantages, reduces electoral competition, and limits the voices of certain constituencies.³³

While each state has its own standards for creating congressional and state legislative districts, in nearly all of them incumbents are responsible for the redistricting process. Thirty-seven state legislatures have primary control of their own district lines, and forty-two state legislatures have primary control of congressional district lines.³⁴ This self-directed nature of redistricting heightens the threat of gerrymandering and vote dilution.³⁵ To reduce the role that legislative politics might play, thirteen states, including California, determine state redistricting by an independent or bipartisan redistricting commission.³⁶ The redistricting process is similar in municipal governments, though cities are not necessarily bound by rules affecting state commissioners, such as the bipartisan commission requirement.³⁷ Although the City of Los Angeles uses an independent redistricting commission whose members are appointees of the city's councilmembers and other city officials,³⁸ *Lee* demonstrates that even governments that use

30. *Avery v. Midland County*, 390 U.S. 474 (1968) (finding that local government districts must be of approximately equal population); *Reynolds v. Sims*, 377 U.S. 533 (1964) (state legislature districts); *Wesberry v. Sanders*, 376 U.S. 1 (1964) (congressional districts); *Gray v. Sanders*, 372 U.S. 368 (1963) (state county districts).

31. *Minnis*, *supra* note 3, at 27.

32. *Brief for Amici Curiae Thomas Mann and Norman Ornstein in Support of Appellees* at 3, *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015) (No. 13–1314).

33. *Id.*

34. Justin Levitt, *All About Redistricting: Who Draws the Lines?*, ALL ABOUT REDISTRICTING, <http://redistricting.ils.edu/who.php> [<https://perma.cc/3EFH-GM46>] (last visited Feb. 23, 2017).

35. Justin Levitt, *All About Redistricting: Why Does It Matter?*, ALL ABOUT REDISTRICTING, <http://redistricting.ils.edu/why.php> [<https://perma.cc/96RQ-SCC8>] (last visited Feb. 23, 2017).

36. *Redistricting Commissions: State Legislative Plans*, NAT'L CONFERENCE OF STATE LEGISLATURES (NCSL) (Dec. 7, 2015), <http://www.ncsl.org/research/redistricting/2009-redistricting-commissions-table.aspx> [<https://perma.cc/XK8U-8ZYE>].

37. For example, the Californian Constitution requires the Citizens Redistricting Commission to adjust the boundary lines of congressional, State Senatorial, Assembly, and Board of Equalization districts, but does not mention local government. CAL. CONST. art. XXI, § 1; *see also* *FAQ, REDISTRICTING THE NATION*, <http://www.redistrictingthenation.com/whatis-who.aspx> [<https://perma.cc/HXF7-8GCV>] (last visited Feb. 23, 2017).

38. *Frequently Asked Questions*, CITY OF LOS ANGELES REDISTRICTING 2011, <http://redistricting2011.lacity.org/LACITY/faq.html> [<https://perma.cc/63FS-URH8>] (last visited Nov. 30, 2015).

independent commissions are not immune to accusations of vote dilution.

Since Asian Americans are so underrepresented in elected office nationwide,³⁹ they are often absent from the drawing board and are thus especially vulnerable to vote dilution. In Chicago, for example, a 2001 redistricting scheme divided the city's Chinatown from two Illinois Senate districts into three and from three House districts into four.⁴⁰ In New York City, which also has a poor record of Asian American representation in city politics, Asian American voters in Manhattan Chinatown and surrounding neighborhoods overwhelmingly supported the Asian American candidates in the 1990 city council election.⁴¹ However, the impact of those votes was limited due to their district's configuration, along with factors such as district population requirements and the 1990 census's undercount of immigrants and low-income residents.⁴² In part due to the barriers posed by the redistricting process, the fifty-one-member New York City Council has had very few Asian American councilmembers in its history.⁴³

C. The Inadequacies of Voting Law

Challenges to redistricting find their way to court every ten years, as

39. See Anh Do, *Asian Americans Enjoy Greater Representation in Congress*, L.A. TIMES (Nov. 19, 2012), <http://articles.latimes.com/2012/nov/19/local/la-me-asians-congress-20121120> [https://perma.cc/SF67-HWP8] (noting that Congress numerically should have thirty-one Asian Americans instead of twelve); see also Seth Masket, *Non-White Representation on America's City Councils*, WASH. POST (Aug. 21, 2014), <https://www.washingtonpost.com/news/monkey-cage/wp/2014/08/21/non-white-representation-on-americas-city-councils/> [https://perma.cc/U4Z2-T6WH] (noting that "each additional percent in the population [of Asian Americans] only translates to about 0.4 percent on the city council").

40. Minnis, *supra* note 3, at 25.

41. Leland T. Saito, *Asian Pacific Americans and Redistricting Challenges in 2001*, in NATIONAL ASIAN PACIFIC AMERICAN POLITICAL ALMANAC 130, 135 (Don T. Nakanishi & James S. Lai eds., 2001).

42. *Id.*

43. News reports suggest that there may be as few as three Asian Americans in the New York Council's history. Although there are no official tallies of New York City Councilmembers by race, John Liu is widely recognized as the first Asian American on the New York City Council. The councilmember who replaced Liu upon his departure in 2009, Peter Koo, is recognized as the Council's first Asian American Republican. Margaret Chin, also elected in 2009, is recognized as the first Asian American woman on the Council. The lack of mentions since the 2010 election cycle about such Asian "firsts" on the New York City Council suggests that these three are the only Asian Americans in the Council's history. See Larry Tung, *Asian Americans: A Growing Force in City Politics*, GOTHAM GAZETTE (Jan. 20, 2009), <http://www.gothamgazette.com/demographics/112-asian-americans-a-growing-force-in-city-politics> [https://perma.cc/3JZF-JTYX] (noting that John Liu is the first—and as of then, the only—Asian American on the New York City Council); Zhang Yang, *People's Choice*, CHINA DAILY (Jan. 23, 2014), <https://www.pressreader.com/china/china-daily-usa/20140123/281526518921627> (noting that Peter Koo, elected in November 2009, is the first Republican Asian American on the New York City Council); Chris Fuchs, *'I'm Not Afraid to Speak Out': How Margaret Chin Found Her Voice*, NBC NEWS (Mar. 13, 2015), <http://www.nbcnews.com/news/asian-america/margaret-chin-profile-n315671> [https://perma.cc/DQV5-2ZE7] (noting that Margaret Chin, elected in November 2009, is the first Asian American woman on the New York City Council).

each census spurs a new round of grievances from interest groups.⁴⁴ Viewed one way, *Lee* is just another of these routine political battles. But when viewed in context of the regressive changes to voting rights law since the Civil Rights Movement, *Lee* takes on a more far-reaching and troubling import.

Developments in the VRA and Equal Protection doctrine have made redistricting nearly immune to legal challenge today, particularly from Asian Americans. The VRA requires that a group constitutes a majority within a district to be granted protection against vote dilution.⁴⁵ This forecloses most voting rights claims from Asian Americans, whose residential patterns rarely result in such geographic majorities.⁴⁶ The Equal Protection doctrine and its presumed mandates of “colorblindness” and “discriminatory intent” further hamper such claims.⁴⁷ The colorblindness and intent rules severely restrict minorities’ efforts to protect their communities through race-conscious redistricting.⁴⁸ The VRA and Equal Protection doctrine embody assumptions about demographics and discrimination that fail to reflect reality, making them crude and ineffective tools for protecting minority electoral rights.

The *Lee* plaintiffs’ legal strategy—which avoided the VRA altogether in favor of a doomed Equal Protection claim—reflects the limitations of existing law at protecting groups like Asian Americans. The *Lee* plaintiffs might have been more successful in pursuing a “communities of common interest” (CCI) approach under the Equal Protection doctrine, which may not necessarily require that a group be large enough to constitute a majority within a district. Several courts have recognized that preserving “communities defined by actual shared interests” is a legitimate aim of redistricting.⁴⁹ Under this approach, minority groups can potentially argue that they are such a community and should thus be kept intact.⁵⁰ However, the CCI doctrine remains sorely underdeveloped and poses hurdles of its own when applied to Asian Americans.⁵¹ In this way, *Lee* is both a

44. See Minnis, *supra* note 3, at 23–26.

45. Thornburg v. Gingles, 478 U.S. 30, 49–51 (1986).

46. See JOHN ICELAND, DANIEL H. WEINBERG & ERIKA STEINMETZ, U.S. CENSUS BUREAU, CENSR-3, RACIAL AND ETHNIC RESIDENTIAL SEGREGATION IN THE UNITED STATES: 1980–2000, at 35–56 (2002).

47. See *infra* Part II.B.

48. *Id.*

49. Miller v. Johnson, 515 U.S. 900, 916 (1995) (recognizing that “respect for political subdivisions or communities defined by actual shared interests” is a permissible redistricting principle).

50. See, e.g., Sanchez v. Colorado, 97 F.3d 1303, 1328 (10th Cir. 1996) (invalidating the Colorado legislature’s redistricting plan on distinct VRA grounds but noted that the Latino community in question was a community of interest sharing agricultural and socioeconomic concerns); Diaz v. Silver, 978 F. Supp. 96, 101–02, 123–24 (E.D.N.Y. 1996), *aff’d*, 522 U.S. 801 (1997) (acknowledging that Chinese American residents of lower Manhattan’s Chinatown and Brooklyn’s Sunset Park share a community of interests defined by cultural, economic, political, and social ties).

51. Chen & Lee, *supra* note 6, at 369 (“[T]he meaning and purpose of the doctrine is under-

demonstration of the inadequacies of voting rights law as well as a missed opportunity to develop and strengthen such law in ways that could improve minority voting rights.

While fleshing out the CCI doctrine will help Asian Americans bolster their electoral power, deeper changes are required. The current voting rights jurisprudence is rusty and fails to address the needs of racial minorities today. Times have changed since the Civil Rights era, and reforms to immigration policy have dramatically transformed the profile of racial minorities in America.⁵² Meanwhile, discriminatory practices have evolved as well, as recent years have seen the rise of “second generation” electoral barriers such as redistricting that can be neutral on their face but have decidedly disparate effects on minorities.⁵³

The VRA and Equal Protection doctrine do not guarantee that a Korean American will sit on the Los Angeles City Council. But the residents of Koreatown never made such a demand; rather, they sought political accountability through elected officials who could be responsible for their community as a whole.⁵⁴ The existing law on redistricting, however, fails to provide Asian Americans the chance of securing such accountability. As will be discussed in Part II, the VRA and Equal Protection doctrine are becoming increasingly obsolete in the face of demographic shifts and new modes of discrimination. What we now need is a deeper rethinking of voting rights law that reflects some key realities: that certain barriers to political participation may require race-conscious action and that a truly representative government cannot be predicated on simple numerical majorities.

II. LIMITATIONS OF SECTION 2 OF THE VOTING RIGHTS ACT AND THE EQUAL PROTECTION CLAUSE

Since redistricting has the potential to disenfranchise whole constituencies, the legal system responsible for monitoring abuses of the process needs to be robust and effective. Unfortunately, our voting rights law is currently incapable of meeting these challenges, particularly with respect to Asian Americans. There are two major legal regimes governing the protection of minority electoral power through redistricting: the VRA (specifically, section 2) and Equal Protection doctrine. As explained below,

theorized and largely unsettled, [so] the effects of increased usage are hard to predict without greater clarity on CCI jurisprudence.”)

52. *Id.* at 376.

53. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109–246, 120 Stat. 577, § 2(b)(2) (codified as amended in scattered sections of 42 U.S.C. §§ 1972, 1973 (2006)) (“[V]estiges of discrimination in voting continue to exist as demonstrated by second generation barriers constructed to prevent minority voters from fully participating in the electoral process.”).

54. *See Redistricting*, *supra* note 7.

these laws contain outdated assumptions about minority demographics and electoral discrimination. Furthermore, recent developments in both legal regimes have largely eroded their initial emancipatory potential, and as a result, both are sorely unequipped to deal with the evolving threat of vote dilution.

A. The Voting Rights Act of 1965 and Section 2

The VRA was borne from the Civil Rights struggles of the 1950s and 1960s when discriminatory voting laws in formerly Confederate states were completely disenfranchising African American voters. The years following the Civil War saw a host of legislation intended to limit the African American vote. These laws took the form of poll taxes, literacy tests, vouchers for good moral character, disqualifications for crimes of moral turpitude, and white primaries.⁵⁵ Accompanying these formal barriers to registering and casting a ballot were more subtle practices like redistricting, which also reduced African American voting impact.⁵⁶ In the face of these discriminatory efforts, Congress passed the Voting Rights Act of 1965, which prohibited the enactment of voting practices and procedures designed to disenfranchise voters.⁵⁷ Specifically, section 2 of the VRA prohibits practices that deny or abridge the right to vote on the basis of race, color, or membership in a language minority group.⁵⁸ Section 2's broad prohibition against discrimination in voting extends to redistricting, and thus section 2 is one of the major avenues for claimants to raise challenges on the basis that district lines dilute minority voting power.⁵⁹ Section 2 applies nationwide, therefore allowing the Attorney General or private plaintiffs to challenge discriminatory practices in areas of the country not covered by section 5, a measure that only applies within "covered jurisdictions" with histories of discriminatory practices.⁶⁰

Generally, section 2 prohibits institutions and rules that result in protected minority group members having "less opportunity than . . . other residents in the district to participate in the political process and to elect legislators of their choice."⁶¹ Rather than guaranteeing proportional representation, section 2 instead requires only procedural fairness; that is, redistricting must give protected groups an equal opportunity to achieve

55. See Chen & Lee, *supra* note 6, at 362.

56. See *id.* at 363–64.

57. *Id.* at 364.

58. *Id.*

59. See *id.* at 363–64.

60. 42 U.S.C. § 1973c (2006); Chen & Lee, *supra* note 6, at 363. Section 5 of the VRA has received more scholarly attention, partially due to recurring court challenges over its constitutionality. Recently, the Supreme Court in *Shelby v. Holder* struck down the VRA's coverage formula for determining which states and subdivisions required their district boundaries to be "precleared" by the Department of Justice. *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013).

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

political representation.⁶² A redistricting plan is considered unfair if it leads to the systematic exclusion or severe underrepresentation of a protected group.⁶³ But it is considered fair if the group could plausibly elect its candidate of choice.⁶⁴

In order to determine whether a redistricting scheme violates section 2, a minority group must prove the following three prongs as set forth by the Supreme Court in *Thornburg v. Gingles*: (1) the minority group is sufficiently large and geographically compact to constitute a *majority* in a single-member district; (2) the group is politically cohesive, typically shown when a significant number of the group's members usually vote for the same candidate; and (3) the white majority sufficiently votes as a bloc to usually defeat the minority voters' preferred candidate.⁶⁵ Once these conditions are established, the minority group must then show that the redistricting has a discriminatory effect under "the totality of the circumstances."⁶⁶ Additionally, *Gingles* offers a non-exclusive list of seven factors that suggest the existence of electoral discrimination warranting a section 2 remedy.⁶⁷

African Americans and Latinos have found some success under the VRA in protecting their communities' interests during redistricting. For example, African Americans in Louisiana succeeded in challenging a 2001 Louisiana plan affecting a state district in the New Orleans area.⁶⁸ Louisiana's 2001 redistricting scheme had eliminated a majority-minority district near New Orleans and reduced the percentage of African Americans in several other districts where they otherwise had a reasonable opportunity to elect their candidate of choice.⁶⁹ In objecting to the plan under section 5, the Department of Justice (DOJ) found that officials adopted the plan despite the existence of more favorable alternative maps that had been presented during the redistricting process.⁷⁰ The DOJ further found evidence of discriminatory intent in recognizing that there had been consistent growth of the African American population over the preceding

62. Chen & Lee, *supra* note 6, at 364.

63. See S. REP. NO. 97-417, at 28-29 (1982), as reprinted in 1982 U.S.C.C.A.N. 177, 207.

64. *Id.*

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

66. *Id.* at 79.

67. See *id.* at 36-37.

68. NAACP LEGAL DEF. & EDUC. FUND, ASIAN AM. JUSTICE CTR. & MEXICAN AM. LEGAL DEF. & EDUC. FUND, THE IMPACT OF REDISTRICTING IN YOUR COMMUNITY: A GUIDE TO REDISTRICTING 2 (2010), <http://www.naacpldf.org/files/publications/Impact%20of%20Redistricting%20in%20YOUR%20Community%202010.pdf> [https://perma.cc/V4YN-3YCY].

69. See DEBO P. ADEGBILE, RENEWTHEVRA.ORG, VOTING RIGHTS IN LOUISIANA: 1982-2006 15 (2006), <http://www.protectcivilrights.org/pdf/voting/LouisianaVRA.pdf> [https://perma.cc/BY2N-X2K9] (citing *La. House of Representatives v. Ashcroft*, No. 02-CV00062 (D.D.C. 2002), which settled before trial); see also Minnis, *supra* note 3, at 24.

70. Minnis, *supra* note 3, at 25.

three decades and that the plan was adopted over concerns raised by the town's own hired demographer.⁷¹ Amidst mounting evidence of a VRA violation, the State withdrew the redistricting plan before trial and created a new one preserving African American voting strength.⁷²

Similarly, when Texas dismantled a Latino majority along the U.S.-Mexico border by moving over a hundred thousand Latinos out of a district, the Latino community was able to protect their district through a legal challenge under the VRA.⁷³ The Supreme Court found that the redistricting changes were made to protect the reelection chances of the incumbent, who was not the preferred candidate of Latinos, and thus violated section 2.⁷⁴

But while African Americans and Latinos have set important legal and strategic precedents concerning the VRA, Asian Americans mostly have had to chart a different path. As was evident in *Lee*, Asian Americans have found section 2 to be of little help when challenging redistricting schemes because of the restrictive *Gingles* test. Again, *Gingles* requires that a minority group: (1) be numerous enough to constitute a majority within a district; (2) be politically cohesive and vote as a bloc; and (3) have their preferred candidate be defeated by a bloc-voting white majority.⁷⁵ Asian Americans, however, have unique demographic patterns that tend to confound these restrictive *Gingles* prongs. Political scientists Ming Hsu Chen and Taeku Lee describe Asian Americans as a “negative case” that contradicts the VRA’s assumptions about racial discrimination—that is, the legal tests designed to identify and remedy political disempowerment fail to recognize the needs of Asian American voters.⁷⁶ As a result, Asian Americans are largely precluded from availing section 2 altogether and have had to employ niche arguments such as the CCI strategy, with limited success.

Chen and Lee note that the VRA was “intended primarily to address a specific group (African Americans), a specific dyadic relation (blacks and whites), and a specific set of historical and ongoing practices.”⁷⁷ However, the world that the VRA sought to address has changed, and the law has not been nimble enough to address newer challenges facing racial minorities, particularly Asian Americans. Embedded in the VRA are assumptions about minorities’ levels of cohesion, compactness, and bloc voting that fail to model reality. As a result, the law has become increasingly obsolete as a tool for advancing minority electoral rights. Rather than giving minorities

71. *Id.*

72. *Id.* at 24 n.4.

73. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 438–39, 441 (2006).

74. *Id.*

75. *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986).

76. Chen & Lee, *supra* note 6, at 362.

77. *Id.* at 376.

“the opportunity to participate in the political process and to elect legislators of their choice” as per its mission,⁷⁸ in practice the VRA utterly denies redress to minorities unless their circumstances conform to a vision of discrimination formulated by Congress in the 1960s.

Asian Americans have unique demographic and spatial patterns that usually preclude the construction of the majority districts necessary for protection under section 2. Perhaps the primary reason why Asian Americans have been unable to avail section 2 is their relatively small population. In 1980, Asian Americans constituted a numerically insignificant proportion of the nation’s population, comprising less than two percent of the total population in all metropolitan areas.⁷⁹ Although Asian Americans grew at a much faster rate than African Americans and Latinos over the 1990s and 2000s, their numbers remain proportionately small.⁸⁰ As of fall 2010, Asian Americans remain approximately one-third the size of each of the other minority groups.⁸¹

The relatively small size of Asian Americans is compounded by their lack of geographic concentration. The U.S. Census Bureau found that Asian Americans’ level of residential segregation was the lowest of all minority groups from 1980 to 2000.⁸² By contrast, although racial segregation has declined for all minority groups, African Americans and Latinos remain the most and second-most segregated groups, respectively.⁸³ In addition to greater residential integration, existing Asian American neighborhoods tend to be small and noncontiguous.⁸⁴ Census data for residential clustering—the degree to which minority group members live disproportionately in contiguous areas—show that while African Americans are most likely to be in close proximity to each other, Asian Americans tend to be spatially scattered.⁸⁵

Los Angeles’s particular demographic patterns illustrate the challenges facing Asian Americans with redistricting. Although the number of Asian Americans in Los Angeles surpassed that of African Americans during the early 1990s, Latinos continued to be the largest nonwhite population throughout this period.⁸⁶ As in other parts of the United States, Asian Americans in Los Angeles are less residentially segregated than other minorities. In 2000, only 17 percent of Asian Americans lived in census tracts where they were a majority, while the comparable figures for

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

79. Ong & Lee, *supra* note 6, at 97.

80. *Id.*

81. *Id.*

82. ICELAND, WEINBERG & STEINMETZ, *supra* note 46, at 95.

83. *Id.*

84. Chen & Lee, *supra* note 6, at 392.

85. *See* ICELAND, WEINBERG & STEINMETZ, *supra* note 46, at 118.

86. Ong & Lee, *supra* note 6, at 98.

African Americans and Latinos were 28 percent and 70 percent, respectively.⁸⁷ The demographics of Koreatown itself present further problems for Asian American residents seeking VRA protection, as the *Lee* plaintiffs found. The 2.7 square-mile neighborhood, as delineated by the *Los Angeles Times*, actually contains a majority Latino population of 53.5 percent.⁸⁸ Asian Americans constitute 32.2 percent of the neighborhood, while whites and African Americans constitute 7.4 percent and 4.8 percent, respectively.⁸⁹ It was probably for this reason that the plaintiffs in *Lee* ignored the VRA and focused instead on Equal Protection when challenging the city's redistricting.

Despite these demographic realities, the *Gingles* test wrongly assumes that minorities are uniformly clustered and segregated. Asian American VRA claims usually fail at the first *Gingles* prong, which limits section 2 protection to groups that are "sufficiently large and geographically compact to constitute a majority in a single-member district."⁹⁰ This is especially a problem for ethnic enclaves like Los Angeles Koreatown, which may have distinct political needs yet are too small and too racially integrated to prevent being split up by redistricting. The VRA also seems to limit section 2 protection to districts where there are significant numbers of whites; specifically, the third *Gingles* prong requires that "the white majority votes sufficiently as a block to enable it . . . usually to defeat the minority voters' preferred candidate."⁹¹ This would also have disqualified a VRA claim in *Lee*, as neither of the two districts into which Koreatown was divided contain white majorities.⁹² As a result, the VRA only legitimizes voting rights claims where whites constitute a majority within a district.

It may appear that the VRA's standards work reasonably well for minorities other than Asian Americans. African Americans and Latinos are more populous and more residentially segregated than Asian Americans, making section 2 claims a greater possibility. The fact that Asian Americans did not even represent a controlling majority in any of the challenged City Council districts loomed over *Lee*, and the court found it very persuasive.⁹³ In fact, Los Angeles Koreatown is a highly diverse neighborhood where Latinos constitute a slight majority. If Asian Americans are merely a "negative case" that confounds the VRA legal regime, as Chen and Lee argue, why should the regime change to

87. *Id.*

88. *Koreatown*, *supra* note 28.

89. *Id.*

90. *Thornburg v. Gingles*, 478 U.S. 30, 51 (1986).

91. *Id.* at 51.

92. The District Court for the Central District of California in *Lee* noted that in the 10th district, one of the districts encompassing Koreatown, no one group constitutes a majority. In the 9th district, the other district encompassing Koreatown, Latinos are a slight majority. *Lee v. City of Los Angeles*, 88 F. Supp. 3d 1140, 1150 (C.D. Cal. 2015).

93. *Id.*

accommodate them over the interests of other racial minorities?

While these criticisms are reasonable, they may overstate how unique the redistricting problem is to Asian Americans. Other minority groups are experiencing the same demographic shifts that are forcing Asian Americans to look beyond the VRA for redress. Levels of residential segregation have decreased for all minority groups since the VRA's enactment, when private and public housing discrimination were yet to be explicitly outlawed.⁹⁴ The racial makeup of the United States has changed dramatically as well since the VRA due largely to shifts in immigration policy, and this racial reshuffling is expected to continue.⁹⁵ The Census Bureau projects that by 2043 minorities will constitute the majority of the United States for the first time.⁹⁶ While majority-minority communities and racial clustering will still exist, the size and prevalence of such majority-minority communities may very well decline. The VRA's reliance on majority status as the basis for protection, along with its assumption that minorities face discrimination solely in the form of a bloc-voting "white majority,"⁹⁷ is becoming increasingly untenable. Asian Americans are somewhat unique in that they may be the minority group least capable of meeting the *Gingles* standards; however, Asian Americans' particular inability to avail the VRA suggests at least that the standards for determining whether a group needs protection should be expanded. An expanded VRA regime that is more responsive to Asian Americans need not come at the expense of other minorities.

The proposed redistricting map presented by Koreatown advocates in 2012 suggests that their concerns were more about political accountability than about electing a Korean American. The proposed map sought to move the southern portion of Koreatown into the larger, multiethnic 13th district.⁹⁸ Such a scheme would keep the Koreatown neighborhood whole within one district but would hardly guarantee an Asian American councilmember. The VRA, however, offers no remedy for such a situation and does not even recognize claims from groups without majority status.⁹⁹ Regardless of how the Los Angeles redistricting process should have been conducted and which group's interests should have been protected over another's, it is troubling that the VRA had no bearing whatsoever upon the

94. See ICELAND, WEINBERG & STEINMETZ, *supra* note 46, at 4; see also 42 U.S.C. §§ 3601–3619 (2012). The Fair Housing Act was enacted in 1968, three years after the VRA was enacted.

95. See Chen & Lee, *supra* note 6, at 376.

96. U.S. Census Bureau Projections Show a Slower Growing, Older, More Diverse Nation a Half Century from Now, U.S. CENSUS BUREAU (Dec. 12, 2012), <https://www.census.gov/newsroom/releases/archives/population/cb12-243.html> [<https://perma.cc/EN9C-K9XC>].

97. See *Thornburg v. Gingles*, 478 U.S. 30, 51 (1986).

98. See *Lee v. City of Los Angeles*, 88 F. Supp. 3d 1140, 1145 (C.D. Cal. 2015) (noting the February 15, 2012 motion, denied by a vote of 17-4, "to move the southern portion of Wilshire Center Koreatown Neighborhood Council into [the 13th Congressional District] in order to unify the Wilshire Center Koreatown Neighborhood Council whole in one Council District").

99. See Ong & Lee, *supra* note 6, at 98.

fates of Koreatown residents claiming longstanding exclusion from politics. The acute challenges of Asian Americans in redistricting expose the limitations of the VRA regime and urgently call for an update of its outmoded vision of voting rights.

B. Equal Protection

Since *Gingles*'s majority-minority requirement can halt VRA claims at the gate, minority groups have also turned to the Fourteenth Amendment's Equal Protection Clause to combat unfair redistricting. But so far, Equal Protection has proven to be an ineffective alternative. Whereas the traditional VRA section 2 claim alleges that a redistricting scheme improperly dilutes the voting strength of a minority group, an Equal Protection claim alleges that a voting scheme is unconstitutional under the Fourteenth Amendment because it separates voters into different districts based on race.¹⁰⁰ Despite the moniker, Equal Protection is hardly a more promising alternative at this point when it comes to protecting minority electoral power, a point that *Lee* recently demonstrated. As with the VRA, recent developments in the Equal Protection doctrine have severely weakened it as a tool for combating discriminatory redistricting.

The Fourteenth Amendment broadly guarantees all persons within the United States "the equal protection of the laws."¹⁰¹ The details of how such equality should protect, however, are controversial, particularly in the context of redistricting. Courts interpreting the Equal Protection Clause with respect to race have largely come to two conclusions: (1) that equality is achieved through *colorblind* rather than race-conscious rules, and (2) that the sole constitutional protection that Equal Protection provides is a prohibition on *intentional* discrimination.¹⁰²

Scholars have noted that the twin notions of colorblindness and discriminatory intent have put minority groups bringing redistricting claims in a dilemma. Laws that affirmatively seek to help minorities are presumptively invalid under current formulations of the Fourteenth Amendment, while laws that are facially neutral but have racially disparate effects are presumptively valid.¹⁰³ Put another way, any calls for race-conscious redistricting now raise Equal Protection concerns, and minority groups must be careful to shape their claims to avoid such a violation even if they might desire race-sensitive government action. In addition, developments in Equal Protection doctrine have even influenced the way

100. *Miller v. Johnson*, 515 U.S. 900, 911 (1995).

101. U.S. CONST. amend. XIV, § 1.

102. *See, e.g., Miller*, 515 U.S. at 911–12 (suggesting that the use of race in any form works injustice); *Washington v. Davis*, 426 U.S. 229, 240–41 (1976) (noting that equal protection violation requires intentional discrimination).

103. Henry L. Chambers, Jr., *Colorblindness, Race Neutrality, and Voting Rights*, 51 EMORY L.J. 1397, 1414 (2002).

that the seemingly distinct VRA is interpreted and enforced, “creating a tension between aggressive VRA enforcement and color-blind equal protection”¹⁰⁴ Thus Equal Protection doctrine and the VRA have moved in tandem to make it doubly more difficult for racial minorities—and particularly Asian Americans—to bring redistricting claims at all.

1. Colorblindness

The notion that the Fourteenth Amendment requires that government action be colorblind is a rather recent development.¹⁰⁵ Race-conscious laws were common during the Reconstruction era when the Amendment was adopted, and the attitudes of many of the Amendment’s supporters suggest that colorblindness with respect to all laws was not an assumed result of the Amendment.¹⁰⁶ But as the Fourteenth Amendment’s scope expanded to apply to newer problems, a choice arose between colorblindness and race consciousness. The courts chose the former over the latter, favoring procedural equality over race-conscious results.¹⁰⁷

The colorblindness doctrine arose from white challenges to affirmative action in Supreme Court cases such as *Regents of the University of California v. Bakke*.¹⁰⁸ In finding the University of California’s affirmative action program unconstitutional, the Court noted that “racial and ethnic distinctions of any sort”—even when employed towards racial justice goals—“are inherently suspect and thus call for the most exacting judicial examination.”¹⁰⁹ Later, the Court in *City of Richmond v. J.A. Croson Co.* invoked colorblindness to invalidate minority preferences in government construction contracts.¹¹⁰ And over time, these challenges to government minority assistance built an Equal Protection jurisprudence that views race-conscious programs with suspicion.¹¹¹ Now, race-conscious state action faces strict scrutiny and likely invalidation, while race-neutral action escapes such scrutiny even if it could lead to race-preferred results.¹¹²

Under an Equal Protection claim like in *Lee*, plaintiffs seeking to invalidate a districting scheme must show, whether through a district’s shape and demographics or more direct evidence of legislative intent, that

104. Chen & Lee, *supra* note 6, at 366.

105. See Chambers, *supra* note 103, at 1410.

106. See Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 784–85 (1985) (noting that many who supported the Fourteenth Amendment also supported the color-conscious aid limited specifically to blacks in Freedmen’s Bureau Act of 1866).

107. Chambers, *supra* note 103, at 1412.

108. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

109. *Id.* at 291.

110. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

111. See Chambers, *supra* note 103, at 1414.

112. *Id.*

race was the “predominant factor” motivating the legislature’s decision to place a significant number of voters within or without a district.¹¹³ This requirement offers a difficult line of argument for minority claimants who may in fact be seeking a race-conscious drawing of district lines to protect their voting power.¹¹⁴ Such a race-conscious remedy is highly unlikely to withstand strict scrutiny. *Shaw v. Reno* illustrates the perils of seeking such a remedy. That case presented the first application of Equal Protection doctrine to redistricting, where white voters successfully challenged a North Carolina redistricting plan that created two black-majority districts.¹¹⁵ The plan had been created in response to pressure from the DOJ, as not a single African American had been elected to Congress from North Carolina since 1901.¹¹⁶ But according to the Court, the plaintiffs stated a cognizable claim under the Fourteenth Amendment and remanded the case to determine whether the redistricting plan passed strict scrutiny.¹¹⁷ The Supreme Court reiterated its support for the colorblindness doctrine, even suggesting that colorblindness is the key to racial equality while race-conscious action is inherently harmful:

Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin. Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire.¹¹⁸

The Supreme Court in *Shaw* proclaimed racial classifications of any sort to be illegitimate and harmful to society. Contrary to the highly racialized lived experiences of minorities, the opinion in *Shaw* weakened race as an explicit basis for seeking government protection. After *Shaw*, redistricting claims like the one in *Lee* carry an inherent suspicion because the very thing that the plaintiffs may seek—the protection of a minority’s electoral power—is race-conscious and apparently unconstitutional.

Colorblindness looms large over redistricting claims raised by minorities, since efforts to draw boundary lines explicitly aiming to protect racial communities now raise Equal Protection concerns after *Shaw*.

113. *Miller v. Johnson*, 515 U.S. 900, 911–12 (1995).

114. *See Shaw v. Reno*, 509 U.S. 630 (1993) (finding that plaintiffs stated a cognizable claim that the creation of several black-majority districts was unconstitutional under the Fourteenth Amendment).

115. *Id.*

116. ACLU, REAFFIRMATION OR REQUIEM FOR THE VOTING RIGHTS ACT? (May 1995), http://racism.org/index.php?option=com_content&view=article&id=1229:voting03a-1&catid=70&Itemid=185&showall=1&limitstart= [https://perma.cc/B289-TFGJ].

117. *Shaw*, 509 U.S. at 658.

118. *Id.* at 657.

Colorblindness may have been workable in an era of more explicit racial discrimination, when practices such as white primaries, poll taxes, and vouchers for good moral character were still widespread.¹¹⁹ A colorblindness rule at least prohibits these outright discriminatory practices. But simultaneously, a colorblindness rule also handcuffs minorities by circumscribing the kinds of demands they can make to the government.

The evolution of this jurisprudence warrants concern from Asian Americans, who experience racial harms from the redistricting process that the government is now constitutionally unable to address directly. Asian Americans face steep barriers to meaningful participation in politics that might only be surmountable through remedial government action. But more broadly, the colorblindness rule severely limits the type of action and redress that any minority group can seek. Contrary to the Supreme Court's idealistic pronouncements about colorblindness, applying the doctrine to redistricting may in fact limit minority electoral power. A doctrine borne of white challenges to race-conscious action may inherently be averse to redistricting challenges brought by racial minorities.

2. *Discriminatory Intent*

Colorblindness is not the only consideration in determining whether a redistricting plan violates Equal Protection. As a threshold matter, a law is unconstitutional under the Fourteenth Amendment if officials enact it with discriminatory intent or enforce it in a discriminatory manner.¹²⁰ Courts presume discriminatory intent—the intent to treat people differently based on race—if the law is race-conscious.¹²¹ On the other hand, plaintiffs must prove discriminatory intent if the law is colorblind on its face.¹²² Although the intent requirement may protect minority groups from certain blatantly discriminatory laws, it also limits the scope of Equal Protection where discrimination may be subtle and facially neutral. The intent doctrine has found its way into redistricting law as well, resulting in even steeper barriers for minorities to successfully bring an Equal Protection redistricting claim.

The Supreme Court introduced the intent doctrine to redistricting two years after *Shaw* in *Miller v. Johnson*. In *Miller*, the Court held that race could not be a “predominant factor” behind redistricting schemes.¹²³ To show that race was a predominant factor, the Court majority said a plaintiff must prove that “the legislature subordinated traditional race-neutral

119. See Chen & Lee, *supra* note 3, at 362.

120. See *Washington v. Davis*, 426 U.S. 229, 239 (1976) (ruling that existence of discriminatory intent or purpose infecting the statute will yield relief under the Fourteenth Amendment); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (invalidating race-neutral law applied in discriminatory manner).

121. Chambers, *supra* note 103, at 1398–99.

122. *Id.*

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

districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations.”¹²⁴ While acknowledging that some communities can “have a particular racial makeup,” the Court stated that any attempt to protect such a group must be “directed toward some common thread of relevant interests” other than race.¹²⁵

Through this “race as a predominant factor” standard, *Miller* effectively introduced an intent requirement to redistricting claims. Even if a redistricting scheme divides a racial community like Los Angeles Koreatown, the scheme will not be unconstitutional under *Miller* unless plaintiffs show a predominating intent to separate voters by race, as evidenced by the districts’ particular configuration and even legislators’ personal motivations. This investigation into intent may have been sensible in an era of formal racial discrimination. But as *Lee* showed, demonstrating that legislators explicitly intended to divide communities by race is a steep task, particularly since the secretive nature of the redistricting process makes inquiring into legislators’ motivations especially difficult.¹²⁶ The “predominant factor” standard now functions as a high barrier to redistricting challenges, as it did in *Lee*, and it does little to address redistricting schemes that divide minority communities in the name of facially neutral redistricting principles.

Due to these developments in voting case law, there now exists a tension between aggressive VRA enforcement and colorblind Equal Protection jurisprudence. Minority claimants are forced to walk a tightrope to satisfy the VRA and Equal Protection’s competing directives—those seeking to boost minority electoral power must avoid the use of racial classifications altogether and instead focus on “traditional race-neutral districting principles.”¹²⁷ The result, Henry L. Chambers writes, is “a world in which laws that unintentionally harm racial minorities because of their position in society are presumptively valid while laws that affirmatively seek to help racial minorities attain an equal position in society are presumptively invalid.”¹²⁸ As it currently stands, the Equal Protection doctrine largely denies the legitimacy of race as a locus for common experience and ignores the history of redistricting as an often racially-driven process. Like the VRA, Equal Protection reflects problematic assumptions about discrimination and diversity and is thus a similarly poor

124. *Id.*

125. *Id.* at 920.

126. *Lee v. City of Los Angeles*, 88 F. Supp. 3d 1140, 1151–53 (C.D. Cal. 2015).

127. *See, e.g., Chambers, supra* note 103, at 1409 (“This leads to seemingly odd results. Race-conscious rules that may encourage race-neutral results are subject to strict scrutiny, but colorblind laws that have race-preferred effects are constitutional unless passed with the intent to discriminate.”); *Chen & Lee, supra* note 3, at 366.

128. *Chambers, supra* note 103, at 1414.

tool for protecting minority voting rights.

III. LOS ANGELES KOREAN AMERICANS AS A COMMUNITY OF COMMON INTEREST: A MISSED OPPORTUNITY

Because of these doctrinal barriers to redistricting claims, Asian Americans have largely turned to the “community of common interest” (CCI) strategy to protect their voting power.¹²⁹ Although Asian Americans and other racial groups cannot argue for districts that are drawn with race as the predominant factor, the majority opinion in *Miller* suggested that race remains a permissible consideration so long as it does not subordinate “traditional race-neutral redistricting principles,” including “communities defined by actual shared interests.”¹³⁰ By claiming that they constitute a community defined by actual shared interests, or CCI, minority groups can potentially argue that they should be kept intact within a district during the redistricting process.¹³¹ For groups like Asian Americans that often cannot form majority-minority districts by themselves, the CCI strategy seems to be the most, and perhaps only, viable one for preventing the division of their communities.

Since *Miller*, several courts have recognized the CCI doctrine in cases involving Latino and Asian American voters. However, these acknowledgements of the CCI doctrine have been rather tepid, and the restrictive *Gingles* factors still create a barrier to those pursuing such an argument. For example, in 1996 the Tenth Circuit in *Sanchez v. Colorado* found that Colorado legislators had failed to recognize a community of interest among Latino voters.¹³² Although it acknowledged the existence of a Latino CCI, the court expressed discomfort over grouping individuals “solely on the basis of race,” which would “rais[e] the specter of a new genre of political apartheid.”¹³³ The Tenth Circuit emphasized that the Latino voters were connected not only by race, but also by the fact that they “live[d] in geographically connected areas that share[d] the same agricultural and rural communities of interest, along with various socioeconomic concerns.”¹³⁴ Notably, the *Sanchez* court ultimately did not need to rely on the CCI argument, as it found that the Latino voters satisfied a traditional section 2 claim since they were numerous enough to

129. CAROL OJEDA-KIMBROUGH, EUGENE LEE & YEN LING SHEK, UCLA ASIAN AM. STUDIES CTR., THE ASIAN AMERICANS REDISTRICTING PROJECT: LEGAL BACKGROUND OF THE “COMMUNITY OF COMMON INTEREST” REQUIREMENT (2009), http://www.academia.edu/2381684/The_Asian_Americans_Redistricting_Project [https://perma.cc/MFZ3-KE4E].

130. *Miller*, 515 U.S. at 916.

131. Chen & Lee, *supra* note 3, at 369–70 (discussing various efforts by Asian Americans and Latino Americans to demonstrate that they constitute a CCI).

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

133. *Id.*

134. *Id.*

constitute a majority within their district.¹³⁵

Similarly, in *Diaz v. Silver*, a New York district court recognized that a CCI could exist in the Chinatowns of Manhattan and Brooklyn due to shared language, culture, travel patterns, and economic conditions.¹³⁶ But even though the *Diaz* court acknowledged the CCI argument, it ultimately rejected the redistricting plan backed by the Asian American Legal Defense and Education Fund (AALDEF) and other public interest organizations that attempted to preserve a minority coalition district.¹³⁷ The court found that the challenged district was unconstitutional since race was the “predominant factor” in its creation.¹³⁸ This finding may have been unsurprising, as the proposed district was the project of minority interest organizations.¹³⁹ The court also noted that the proposed district failed to warrant section 2 protection under the VRA, since the minority communities in question (including Asian Americans) failed to meet *Gingles*’s size and compactness requirements.¹⁴⁰

Perhaps due to the weakness of the CCI doctrine, the plaintiffs in *Lee* did not pursue such an argument. But *Lee* remains a missed opportunity to avail and further develop the CCI doctrine, particularly since the alternatives have become increasingly inhospitable to redistricting claims from Asian Americans. *Shaw* and *Miller* show that preserving “communities defined by shared interests” qualifies as a legitimate redistricting principle. Just by advancing the argument that Korean Americans in Koreatown are a “community of interest,” the *Lee* plaintiffs would have pushed the court to consider whether the Los Angeles City Council subordinated the principle of preserving such a community in favor of other impermissible considerations. A CCI argument would also have forced the court to reconsider the primacy of the majority-minority requirement, which seemingly should remain distinct from Equal Protection jurisprudence but has nevertheless been a consideration of the courts in Equal Protection cases.¹⁴¹ For example, the Central District of

135. See *id.* at 1314 (noting that the San Luis Valley Hispanic population constituted 48.82 percent of the challenged district and could constitute a majority of a newly drawn district, satisfying the first element of *Gingles*).

136. See *Diaz v. Silver*, 978 F. Supp. 96, 124 (E.D.N.Y. 1997) (“[S]ince the record indicates that the Asian-Americans in the 12th [Congressional District] are mostly of Chinese background, for purposes of these cross-motions for summary judgment we will assume that all Asian-Americans in the 12th [Congressional District] have a community of interest.”).

137. *Id.* at 99–104 (discussing intervenors AALDEF’s and the Puerto Rican Legal Defense and Education Fund’s arguments for the preservation of the Asian and Latino communities within New York’s 12th Congress District).

138. *Id.* at 130.

139. See *id.* at 99–103.

140. *Id.* at 129 n.22; *id.* at 130 (“[T]here was no legal justification for creating the 12th [Congressional District] to avoid a VRA § 2 violation . . . they have offered nothing of substance to support the claim that the minority population meets the first prong of the *Gingles* test.”).

141. *Id.* at 124, 129 n.22 (acknowledging the existence of an Asian American community of

California in *Lee* suggested that racial groups who do not form a majority within a district are barred from Equal Protection claims altogether:

The Supreme Court has never applied *Shaw* principles to invalidate a district in which the allegedly favored minority population does not represent a controlling electoral majority. The Plaintiffs in this case, therefore, ask this Court to do something that has never been done by the Supreme Court.¹⁴²

The district court, like the court in *Diaz*, found the *Gingles* criteria persuasive within the context of an Equal Protection claim.¹⁴³ The concept of CCI was introduced in *Miller*, an Equal Protection case, and thus should not have a majority-minority requirement like a VRA claim. CCI's roots in the conceptually distinct Equal Protection doctrine, however, have not prevented judges from seemingly "reading in" a majority-minority requirement.¹⁴⁴ A CCI challenge in *Lee* would have given the court an opportunity to clarify whether the doctrine actually extends to communities that are too small to constitute a majority within a district.

Of course, voting rights jurisprudence must improve as a whole if it is to truly protect minority electoral power. The CCI doctrine remains a flawed strategy itself—Chen and Lee note that "the meaning and purpose of the doctrine is under-theorized and largely unsettled, [so] the effects of increased usage are hard to predict without greater clarity on CCI jurisprudence."¹⁴⁵ *Diaz* showed that even if courts recognize a group of Asian American voters as a CCI, a district scheme that seeks to keep them whole on explicitly racial grounds may be unconstitutional.¹⁴⁶ Colorblindness principles ultimately hinder, and perhaps render unconstitutional, advocacy for the protection of a "community of interest" united by race. Moreover, the courts in *Lee*, *Diaz*, and *Sanchez* all invoked the *Gingles* criteria within the context of Equal Protection claims.¹⁴⁷ This infiltration of VRA concepts into Equal Protection jurisprudence suggests that CCI status may not be enough to protect communities that fail to constitute a majority within a district.

Ultimately, the *Lee* plaintiffs pursued what may have been the only established legal avenue available to them—showing that state officials made race a "predominant factor" when creating districts that divided them. But *Lee* demonstrates that this is a daunting standard to satisfy, particularly

interest in New York City, but invalidated the redistricting plan preserving such community on VRA § 2 grounds).

142. *Lee v. City of Los Angeles*, 88 F. Supp. 3d 1140, 1150 (C.D. Cal. 2015).

143. *See id.* at 1150–51; *Diaz*, 978 F. Supp. at 130.

144. Chen & Lee, *supra* note 6, at 391; Minnis, *supra* note 3, at 26.

145. *See* Chen & Lee, *supra* note 3, at 369.

146. *Diaz*, 978 F. Supp. at 130 (holding that New York City Council District 12 was unconstitutionally drawn since race was the predominant factor in its creation).

147. *Id.* at 129 n.22, 130; *Sanchez v. Colorado*, 97 F.3d 1303, 1328 (10th Cir. 1996); *Lee*, 88 F. Supp. 3d at 1151.

since the secretive nature of the redistricting process makes inquiring into legislators' motivations especially difficult. It is somewhat promising that the Equal Protection doctrine acknowledges the importance of "communities of interest," but the inconclusive case law on the subject prevents CCI from reaching its full emancipatory potential. On the other hand, while section 2 of the VRA offers a more straightforward remedy to minority vote dilution, it carries restrictive legal standards and outdated assumptions that effectively bar most claims from Asian Americans. Both the VRA and Equal Protection regimes may ultimately require a fundamental rethinking, as currently they are both working in tandem to suppress redistricting challenges from Asian Americans.

CONCLUSION

The *Lee* plaintiffs may have failed in the lower court, but the fates of Los Angeles Koreatown residents are far from settled. The *Lee* decision is currently pending in the Ninth Circuit, with the court having heard oral arguments on January 9, 2017.¹⁴⁸ Los Angeles Asian Americans are still hungry for representation in city government, and another political battle seems likely during the next round of redistricting in 2020. But even if the demands of Koreatown residents find their way to the courts again, *Lee* shows that redress under the law might continue to remain elusive.

Proponents of race-conscious redistricting could potentially pursue a CCI argument next time. This would give the courts another opportunity to reconcile some of the Equal Protection doctrine's ambiguities, which were made evident by the *Lee* court's mistaken emphasis on the fact that Korean Americans fail to constitute a numerical majority within a district.¹⁴⁹ The CCI doctrine may be key to future redistricting challenges. In particular, elected officials who represent diverse, multiethnic constituencies may have to take special note of the CCI doctrine and its developments over the years.

Yet however promising the CCI doctrine may be, the inherent inadequacies of voting law will continue to silence redistricting claims. Even if courts acknowledge that Los Angeles Koreatown is a CCI warranting protection, the greater Equal Protection doctrine will continue to prohibit the government from drawing lines that explicitly protect minorities, as well as shield elected officials who divide minority groups under the color of "race-neutral" redistricting principles. The VRA will continue to impose demographic and other requirements that function as today's new barriers to political participation, particularly for Asian

148. *Lee v. City of Los Angeles*, 88 F. Supp. 3d 1140 (C.D. Cal. 2015), *appeal docketed*, No. 15-55478 & No. 15-55502 (9th Cir. Jan. 9, 2017).

149. I was not able to access the plaintiff's brief, so as of this writing I do not know whether the plaintiffs pursued a CCI argument.

Americans. The voting rights jurisprudence upon which minorities rely has become increasingly hostile to them, and *Lee* alone cannot address all of these inadequacies.

Perhaps even more than a missed opportunity to improve the law, *Lee* is a reminder that our collective understanding of discrimination and disenfranchisement has not caught up to a changing America. Through their various prongs, tests, and requirements, the VRA and Equal Protection doctrines reflect a vision of society that is increasingly untethered from minorities' lived experiences. This vision promotes not only ineffective laws but also a democracy that is incredulous of modern-day electoral discrimination. The commitment to "equality" enshrined in the VRA and Equal Protection Clause is essentially empty if it remains a static ideal frozen in time. While the events in *Lee* certainly highlighted some serious shortcomings in voting law, they ultimately suggest that our thinking about "equality" and "voting rights" needs to evolve just as urgently as our laws.

