Failing Predictions in Pursuit of Proportional Representation: Assuring Asian American Voter Strength in San Francisco through 2 Litigation

Felicia Sze
Failing Predictions in Pursuit of Proportional Representation: Assuring Asian American Voter Strength in San Francisco Through § 2 Litigation

Felicia Sze†

I. INTRODUCTION

On election eve, November 3, 2000, Asian Americans and Pacific Islanders constituted three of the eleven supervisor seats in San Francisco County. Asian Americans in previous at-large supervisorial elections had fared well; in the last at-large supervisorial election of 1998, Mabel Teng had been the third highest vote-getter. However, with the change from at-large to district elections in 2000, the San Francisco political community had no idea what to expect. In drawing the districts, the liberal-leaning San Franciscans had predicted that Asian Americans and Pacific Islanders would fare well, possibly better than they had in at-large elections especially since the move from at-large elections to district elections generally has the effect of increasing the power of minority voters. When the final election results were released, Asian Americans and Pacific Islanders in San Francisco scratched their heads at a new batch of eleven supervisors, only one of whom was Asian American. As Asian Americans

† Class of 2004, University of California Boalt School of Law; B.A. 1996, University of California-Berkeley; M.P.H. 1998, University of California-Los Angeles. Thanks to Andrew Wong of JMPT Consulting for his knowledge, Prof. K. Abrams for her guidance and Steven Kam and the rest of the Notes and Comments team.

1. The ratio of 3/11 is not surprising considering that in 2000, Asian Americans and Pacific Islanders constituted 32.6% of the San Francisco population, the highest proportion out of any of the other twenty largest mainland United States cities. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, THE ASIAN POPULATION 2000 at 7 (2000) (referencing Table 3).
5. Id.
lost nearly all their supervisory advocates in one of the most Asian American cities in the nation, the question remained: what can Asian Americans in San Francisco do to better solidify the exercise of their vote?\(^6\)

Asian Americans have long shared a history of discrimination with other racial minority groups; this shared history of discrimination led to the adoption of the Civil War amendments, and eventually, the Voting Rights Act. Congress passed the Voting Rights Act of 1965 to force states to grant full voting rights to communities of color.\(^7\) Section 2 of the Voting Rights Act prohibits states and local governments from implementing any policy which has the effect of diluting the vote of communities of color.\(^8\) Communities of color have used Section 2 of the Voting Rights Act as a weapon to protect themselves from the "denial or abridgement of [the] right to vote on account of race or color through voter qualifications or prerequisites" and have also used Section 2 to combat racial gerrymandering.\(^9\) If a community of color chooses to litigate against a governmental body for violation of its member’s voting rights, the court is authorized to issue an injunction to stop the implementation of any policy which has the effect of diluting minority votes.\(^10\)

Despite these protections, Asian Americans have failed to achieve electoral strength in proportion to their numbers, as evidenced by their under-representation as elected officials at every governmental level.\(^11\) This arises, in part, because of demographic obstacles within the Asian American community, which weaken the voting power of Asian Americans. However, when forces external to the Asian American community negatively impact the ability of Asian Americans to elect Asian American officials, they find little remedy in the Voting Rights Act because Congress drafted the Voting Rights Act largely with African American elected officials in mind.\(^12\)

This comment assumes for purpose of its inquiry that Asian American elected officials best represent the interests of Asian Americans. The author acknowledges that elected officials of a given ethnic or racial background do not always represent their own ethnic or racial communities and elected officials from a different ethnic or racial background often do effectively represent ethnic or racial communities aside from their own. An example of this is Willie Brown in San Francisco who has long championed causes for Asian Americans in San Francisco. See, e.g., L.A. Chung, \textit{Chinese Americans Hear Willie Brown Talk of Coalitions}, S.F. CHRON., Aug. 1, 1992, at A16. However, the underlying presumption behind the Voting Rights Act and much voting rights jurisprudence is that the best indicator of the strength of a minority vote is the election of a minority elected official. See Bernard Grofman & Lisa Handley, \textit{1990s Issues in Voting Rights}, 65 MISS. LJ. 205, 247-249 (1995).

---

6. This comment assumes for purpose of its inquiry that Asian American elected officials best represent the interests of Asian Americans. The author acknowledges that elected officials of a given ethnic or racial background do not always represent their own ethnic or racial communities and elected officials from a different ethnic or racial background often do effectively represent ethnic or racial communities aside from their own. An example of this is Willie Brown in San Francisco who has long championed causes for Asian Americans in San Francisco. See, e.g., L.A. Chung, \textit{Chinese Americans Hear Willie Brown Talk of Coalitions}, S.F. CHRON., Aug. 1, 1992, at A16. However, the underlying presumption behind the Voting Rights Act and much voting rights jurisprudence is that the best indicator of the strength of a minority vote is the election of a minority elected official. See Bernard Grofman & Lisa Handley, \textit{1990s Issues in Voting Rights}, 65 MISS. LJ. 205, 247-249 (1995).


8. \textit{Id.}


10. \textit{Id.}

Americans in mind, and courts later developed the voting rights jurisprudence around predominantly African American demographics, history, and voting behavior.

This note contrasts the ability of Asian Americans, in light of their highly immigrant, ethnically diverse, and geographically dispersed populations, to access remedies under the Voting Rights Act both theoretically, on a national basis, and specifically, in the San Francisco 2000 Supervisorial elections. Nationally, most Asian American communities consist of an emerging immigrant and politically nascent voting base, each tending to be too small and diverse to constitute a sufficiently large or politically cohesive group to obtain remedy under the Voting Rights Act.12 In contrast to Asian Americans nationally, Chinese Americans in San Francisco constitute a high percentage of the local population and have a history of political involvement. However, after the significant degradation of Asian American political clout in San Francisco in 2000 with the shift from at-large districts to member districts, Chinese Americans, despite having a population that looks more like a typical voting rights case, still continue to face obstacles to legal remedies under Section 2 of the Voting Rights Act.

Rather than trying and failing to adapt a remedy tailored to another ethnic community, this note suggests that Asian Americans should find ways outside of litigation and legal remedies to solidify their voting strength. Such solutions include voter outreach and coalitions with other ethnic minorities.

II. THE VOTING RIGHTS ACT AND THE ASIAN AMERICAN COMMUNITY NATIONALLY

A. Asian Americans and the Civil War Amendments

The American Civil War amendments included the Thirteenth, Fourteenth, and Fifteenth Amendments, which provide protection for communities of color in private contracting, state discrimination and voting rights, respectively. The Thirteenth and Fourteenth Amendments gave birth to equal protection while the Fifteenth Amendment later gave birth to the Voting Rights Act. Although few cases deal directly with the protection of Asian Americans under the Voting Rights Act, the history of Asian Americans and the other Civil War amendments leave little doubt that Asian Americans were among those that Congress intended to protect when they drafted these amendments. Asian Americans have shared a history of racial discrimination with other racial minorities and, as such, deserve the full protections of their civil rights afforded other racial minorities.

The discriminatory experiences of Asian Americans were integrally woven into the history of equal protection. In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the Court invalidated a statute passed by the San Francisco County Board of Supervisors, which required supervisory consent for laundries operating in buildings constructed of any material other than brick or stone to continue operating in an as-applied challenge. Although race-neutral in law, San Francisco applied it unequally, approving no laundry permits for applicants of Chinese descent. The Court ruled that the facially neutral law violated Equal Protection because it was discriminatorily applied to non-citizens and to Asian Americans.

Another example of the historical racial discrimination Asian Americans have endured is the internment of Japanese Americans during World War II. The law of modern equal protection is rooted in the internment, through the Court's first application of the term "discrete and insular," from the famous *Carolene Products* footnote, by invoking strict scrutiny for a racial classification. The Court, in *Hirabayashi v. United States*, 320 U.S. 82, 100 (1943), declared that "distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." Yet, when the Court applied this "most rigid scrutiny" in *Korematsu v. United States*, 323 U.S. 214 (1944), it upheld the evacuation of Japanese Americans from the West Coast.

In addition to equal protection, the historical discrimination that Asian Americans have faced has been documented by the Second Circuit in its analysis of Section 16 of the Voting Rights Act of 1870, which enabled legislation for the Civil War amendments and was codified in Section 1981. The Second Circuit found that Section 1981 was passed out of consideration for the Chinese in California in addition to African Americans in the South, contrary to previous findings that these amendments were passed solely out of considerations for the latter. The Second Circuit stated that "the immediate purpose of Section 16 was to alleviate the plight of Chinese immigrants in California, who were burdened by state laws restricting their ability to work, removing their right to give testimony at trial, and otherwise discouraging them from immigrating to and living in California."

---

14. *Id.*
17. *Id.*
B. Asian Americans and the Voting Rights Act: Overview

Although the voting strength of Asian Americans falls far short of proportional representation,\textsuperscript{18} Asian Americans have rarely looked to the courts for a remedy. Within voting rights jurisprudence, a simple online legal search of the term “Asian” within the same paragraph as the term “voting rights” within the universe of published federal court cases retrieves fewer than thirty cases, most of which only mention Asian Americans peripherally.\textsuperscript{19}

One reason for this lack of cases may be the internal obstacles that Asian Americans face when attempting to coalesce as a voting bloc; another reason, not unrelated to the first, is the lack of ability of Asian Americans to fit structurally within the confines of Section 2 of the Voting Rights Act, which was created largely in response to discriminatory voting obstacles against African Americans in the South.

Congress added Asian Americans to the list of groups eligible for Section 2 protection as a “language minority” in 1975.\textsuperscript{20} The Senate report in 1975 found that “language minority citizens, like blacks throughout the South, must overcome the effects of discrimination as well as efforts to minimize the impact of their political participation.”\textsuperscript{21} The Senate analogized voting for Asian Americans to the bilingual educational setting in \textit{Lau v. Nichols}\textsuperscript{22}:

“We know that those who do not understand English are certain to find their classroom experiences wholly incomprehensible and in no way meaningful.” If we substitute the word ‘voting’ for the word ‘classroom’ in the Court’s opinion, we can appreciate the difficulties which Asian Americans face when they seek to engage in the political process.\textsuperscript{23}

Despite acknowledging that the means by which Asian Americans may face discrimination, e.g. language access, may differ from obstacles facing African Americans, Congress did not change the remedies authorized under Section 2 from the original Act that had been tailored to the experiences of African Americans within Section 2 of the Voting Rights Act. Without special consideration for the unique features of the Asian American community, a cause of action under Section 2 remains elusive for Asian Americans seeking remedies to vote dilution.

\textsuperscript{18} See discussion, \textit{infra} p. 102, on prevalence of Asian American elected officials.
\textsuperscript{19} Westlaw search Nov. 25, 2002.
\textsuperscript{20} U.S. Dep’t of Justice, \textit{supra} note 7.
\textsuperscript{22} 414 U.S. 563 (1974) (finding that the failure of the San Francisco Board of Education to provide instruction in Chinese to non-English speaking Chinese immigrant children deprived those children of a meaningful education).
\textsuperscript{23} S. REP. P.L. 94-73 at 29.
C. Asian American Elected Officials and Community Barriers to Voting

The 2000 Census estimated that approximately 4.2% of the U.S. population, or 11.9 million people, were Asian. The category of “Asian American” is broad, including individuals of Chinese, Japanese, Pilipino, Korean, Asian Indian, Pakistani, Vietnamese and approximately twenty-eight other countries of descent. The Asian American population is the fastest growing racial group, increasing 95% between 1980 and 1990 and another 48% since 1990.

However, Asian Americans are sorely underrepresented in elected office. Currently, Asian Americans serve as only three of the voting representatives in the House of Representatives and two senators, both from Hawaii. If Asian Americans were able to elect at the same rate as their population, they would elect eighteen Asian American representatives and four Asian American senators.

In terms of voting, however, the Asian American population has a number of obstacles to overcome within the community before it can secure a strong and unified vote. First, Asian Americans are more likely to be foreign-born and non-citizen than are whites. 56.4% (6,706,000) of Asian Americans are foreign born in contrast to 6.8% (19,261,000) of whites. Similarly, 30.6% (3,638,000) of Asian Americans are not citizens compared to 4.4% (12,642,000) of whites. As a result, a lower proportion of Asian Americans are eligible to vote than white Americans.

Second, the heterogeneity of the Asian American population obstructs unity within the community as a whole. While some Asian/Pacific Islander ethnic groups, such as Japanese Americans and Asian Indian Americans, arguably fare better than other racial groups in terms of economics, health, and educational attainment, other ethnic groups, such as Vietnamese Americans and Pacific Islander Americans, fare much worse. For example, while over 60% of Southeast Asian Americans (Hmong Americans, Cambodian Americans, Laotian Americans, and Vietnamese Americans) do not speak English “well” or at all, only 25% or less of Japanese Americans, Pilipino Americans, or Asian Indian Americans do not speak English “well” or at all. Although Asian Americans generally have a high median family income, 27% of Asian American families have

24. CENSUS BUREAU, supra note 1, at 1.
25. Id.
29. Id.
30. Id.
32. EPA, supra note 26, at 6.
an income approximately equal to only one-quarter of the poverty level for a family of four.\textsuperscript{33} Southeast Asian Americans have among the highest rates of poverty among Asian Americans (Cambodian Americans (47%), Hmong Americans (66%), Laotian Americans (34%), and Vietnamese Americans (34%)).\textsuperscript{34} These disparities cause differences in how different ethnic communities weigh and view different issues. See discussion of Asian American voting practices, infra.

\textbf{D. The Test to Qualify for § 2 Protection: Thornburg v. Gingles}

The first level of a Section 2 analysis is consideration of the three-prong test developed in \textit{Thornburg v. Gingles}.\textsuperscript{35} In order to establish a preliminary case for a Section 2 claim, a plaintiff must satisfy three preconditions:

First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority district in a single-member district . . . . Second, the minority group must be able to show that it is politically cohesive . . . . Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority’s preferred candidate.\textsuperscript{36}

Because Asian Americans as a group will often face serious obstacles to satisfying the first and second preconditions, \textit{Gingles} may effectively bar Section 2 claims by Asian Americans in most situations without cohesion with other minority groups.

Once past the \textit{Gingles} factors, plaintiffs attempting to prove minority vote dilution must still pass a totality of the circumstances test based on the recommendations of the Senate Judiciary Committee Majority Report.\textsuperscript{37} These factors are:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process; 2. the extent to which voting in the elections of the state or political subdivision is racially polarized; 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group; 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process; 5. the extent to which members of the minority group in the state or political subdivision bear the effects of

\begin{flushleft}
\textsuperscript{33} \textit{Id.} at 7.  \\
\textsuperscript{34} \textit{Id.} at 8.  \\
\textsuperscript{35} 478 U.S. 30 (1986).  \\
\textsuperscript{36} \textit{Id.} at 50-51.  \\
\end{flushleft}
discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process; 6. whether political campaigns have been characterized by overt or subtle racial appeals; 7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are: whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group [and] whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous. 38

E. Gingles Applied to Asian Americans Nationally

An assessment of the first two Gingles factors in reverse order illuminates obstacles that hinder Asian Americans' fulfillment of the Gingles test. Because Asian Americans nationally will rarely pass the Gingles test, this note will only assess the Senate factors for the San Francisco 2000 elections.

In regards to the second precondition, Asian Americans as an aggregate group share very little in common with one another, embodying a lack of cohesion under traditional Gingles standards. Despite hailing from the same continent, Asian American immigrants come from many different countries and speak many different languages. 39 As with any such diverse population, Asian Americans should not be expected to vote similarly given their diverse socioeconomic, linguistic, demographic and historical perspectives. In fact, politically, Asian ethnic groups share little in common with one another: while Japanese Americans and Pilipino Americans tend to vote Democratic, Vietnamese Americans tend to vote Republican, and Chinese Americans and Korean Americans tend not to favor either party. 40 For example, Asian American voters in California voted 48% for Gore in 2000 and 47% for Bush. 41 Under the Gingles standards, Asian Americans generally do not "look" like a cohesive population because of their ethnic and political diversity; this second precondition may prove to be a high bar for Asian Americans seeking legal remedy under Section 2. Arguably, some Asian American ethnic groups may be able to align their interests with one another or with other communities of color in order to create a cohesive group, but little research has been done thus far on Asian Americans in coalitions.

38. Gingles, 478 U.S. at 36-37.
39. CENSUS BUREAU, supra note 1, at 1.
The difficulty of achieving the second Gingles precondition raises an obstacle in proving the first Gingles condition, which requires that, in addition to geographic compactness, a community must be large enough numerically to support a minority candidate. Any single Asian American community, after disaggregation into separate ethnic groups to attain cohesion within each group, is likely to be too small to fulfill this condition. On the mainland, only four San Francisco Bay Area counties have Asian American concentrations over 20% (San Francisco (31%), Santa Clara (26%), Alameda (20%) and San Mateo (20%).42 Only thirty-nine counties in the United States have a concentration of Asian Americans greater than 8.4% and only 122 counties have a concentration of Asian Americans greater than 4.2%.43 By assuming a traditional county supervisor model of approximately five supervisors, Asian Americans at best comprise majority districts in less than forty districts in counties across the nation.44

For any situation where the aggregated Asian American community is too diverse to be cohesive under the second Gingles precondition, the disaggregation of the Asian American population into discrete ethnic groups potentially cohesive enough to satisfy the second Gingles precondition may cause the population size of that group to appear too small to fulfill the first Gingles precondition. For example, in San Mateo County, south of San Francisco County, Asian Americans alone (not including Asians in combination with one or more other races) constitute approximately 20% of the total population.45 However, the Asian American population in San Mateo County is split with 48,523 Chinese American alone, 58,152 Pilipino American alone, and the remainder divided predominately between Japanese American alone, Korean American alone, and Vietnamese American alone.46 Any disagreement, then, between Chinese American voters and Pilipino American voters significantly decreases the likelihood that an Asian American voting group in San Mateo County will be large enough to satisfy the first Gingles precondition. Therefore, the Gingles test, absent a stable framework that

42. EPA, supra note 26, at 5.
44. If a majority for a five member body is 10% of the population, and the majority for two districts is 20% split into two districts, Asian Americans have only 42 possible “districts” where their vote can be split into super-majority districts. See EPA, supra note 26, at 5.
46. Id. “Alone” in this circumstance denotes a full-blooded member of a given ethnicity, so as to differentiate such a member from a resident of mixed decent for the purposes of the census. Because the Census does not add “American” after ethnic qualifiers, for this data, the note will refrain from identifying communities as ethnic Americans, e.g., “Japanese American.”
allows coalitions among ethnic groups, may present insurmountable obstacles to many Asian American communities who may otherwise want to seek legal remedies under the Voting Rights Act. Demographically, San Francisco may be one of the few cities where an Asian American community may be sufficiently large, geographically compact, and cohesive to fulfill the Gingles factors, but still be unable to pursue a legal remedy under Section 2 of the Voting Rights Act.

III. ASSESSING ASIAN AMERICAN VOTING STRENGTH IN SAN FRANCISCO

A. Demographic Overview

San Francisco is a haven for Asian Americans relative to the rest of the nation. San Francisco County has the highest Asian American (alone) concentration (31%) of any county on the mainland.\textsuperscript{47} In 2000, San Francisco was approximately one-half white, one-third Asian, and one-sixth all other races combined.\textsuperscript{48} The Asian American population has increased by approximately 20% since 1990, the largest growth rate of any ethnic group in San Francisco.\textsuperscript{49} According to the 2000 Census, approximately 64% of the Asian Americans in San Francisco were of Chinese origin, making Chinese Americans nearly 20 percent of the population of San Francisco.\textsuperscript{50} Chinese Americans in San Francisco numerically dominate all other Asian American subgroups, with the next most populous group being Pilipino Americans, who constitute less than 17% of Asian Americans in San Francisco.\textsuperscript{51} Despite such a large population, the change from at-large elections to district elections decreased Asian American representation among the San Francisco Board of Supervisors from three of eleven (28%) to one of eleven (9%).\textsuperscript{52}

B. San Francisco's Decision to Change from At-Large to District Elections

The Supreme Court has "long recognized that multimember districts and at-large voting schemes may 'operate to minimize or cancel out the voting strength of racial [minorities in] the voting age population.'"\textsuperscript{53} In light of this presumption, the detrimental impact of San Francisco's shift

\textsuperscript{47} EPA, supra note 26, at 5.
\textsuperscript{48} 50% white, 31% Asian, 8% African American, 7% other race and 4% two or more races. See San Francisco Board of Supervisors, Legislative Analyst Report, available at http://sfgov.org/site/bdsupvrs_page.asp?id=4783 (Feb. 26, 2002).
\textsuperscript{49} Id.
\textsuperscript{51} Id.
\textsuperscript{52} Lelchuk, supra note 4.
from at-large to single-member districts on Asian American candidates was unexpected. Although one potential factor impacting Asian American candidacies may have been the voting choices of other communities of color in San Francisco, this paper will only focus on the impact of white and Asian American voters.

For most of the twentieth century, San Francisco residents have elected members of the San Francisco Board of Supervisors from staggered citywide (or at-large) elections. In every supervisorial at-large election, each San Francisco voter could select as many candidates as there were seats available on the Board. In this “winner take all” system, the top vote getters would be elected.

In 1994, San Francisco voters passed Proposition L, creating an Elections Task Force to recommend changes to the at-large supervisorial election system. The Elections Task Force consisted of three members appointed by the Board of Supervisors, three members appointed by the Mayor and three members appointed by the Registrar of Voters. Of these nine members, Eric Mar and Samson Wong represented Asian American interests. The Task Force originally explored four systems for voters to consider: eleven single-member districts elected by district, five multi-member districts with three supervisors from each district elected through preference voting, at-large elections using cumulative voting and at-large elections using preference voting. Generally, the most prevalent concern voiced by the public about the proportional voting systems was that they were too complicated. In contrast, advocates for district elections consistently and strongly voiced their support.

The Task Force considered the impact potential electoral changes might have on the ability of ethnic minority communities to elect minority candidates. The Task Force sought public input in nearly every step of the process, including publicizing community meetings in local ethnic newspapers. One Task Force member predicted that smaller minorities, such as Chinese Americans, Hispanics and African Americans, would have the potential of winning between five and seven seats on the Board with all of the voting systems except the proposed preference voting system. However, even given these predictions, Samson Wong warned that if San Francisco decided to use eleven districts they should be redrawn without regard to historical district lines, which would cut the traditionally Asian

55. Id. at 4.
56. Id.
57. Id. at 1.
58. Id.
59. Id.
60. Final Report, supra note 54 at 7.
61. Id.
62. Id. at 2-3
American Sunset District in half.64

In 1996, San Francisco voters adopted both the re-establishment of district elections for San Francisco supervisors and the boundaries of each of the eleven districts.65 Candidates running in each district had to receive at least 50% plus one of the votes cast in order to win; otherwise, run-off elections between the two highest vote-getters would determine the winner.66 The new districts included five districts where Asian Americans represented one-third or more of the population and one majority Asian American district, District 4.67 District 4 was drawn without the split to which Wong referred, maximizing the vote for a heavily populated Asian American community.68

Table 1. San Francisco Districts by Race69

<table>
<thead>
<tr>
<th>DISTRICT</th>
<th>Latino</th>
<th>% Latino</th>
<th>NL White</th>
<th>%NL White</th>
<th>NL Black</th>
<th>%NL Black</th>
<th>NL Asian</th>
<th>%NL Asian</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>3,105</td>
<td>4.6%</td>
<td>30,982</td>
<td>45.6%</td>
<td>1,089</td>
<td>1.6%</td>
<td>30,217</td>
<td>44.5%</td>
</tr>
<tr>
<td>2</td>
<td>3,095</td>
<td>4.4%</td>
<td>54,942</td>
<td>77.7%</td>
<td>1,063</td>
<td>1.5%</td>
<td>9,597</td>
<td>13.6%</td>
</tr>
<tr>
<td>3</td>
<td>2,664</td>
<td>4.1%</td>
<td>27,712</td>
<td>42.5%</td>
<td>1,037</td>
<td>1.6%</td>
<td>31,957</td>
<td>49.0%</td>
</tr>
<tr>
<td>4</td>
<td>3,351</td>
<td>4.7%</td>
<td>26,473</td>
<td>37.5%</td>
<td>821</td>
<td>1.2%</td>
<td>37,622</td>
<td>53.2%</td>
</tr>
<tr>
<td>5</td>
<td>4,817</td>
<td>7.0%</td>
<td>40,663</td>
<td>58.7%</td>
<td>11,211</td>
<td>16.2%</td>
<td>9,255</td>
<td>13.4%</td>
</tr>
<tr>
<td>6</td>
<td>13,757</td>
<td>18.3%</td>
<td>30,345</td>
<td>40.4%</td>
<td>7,673</td>
<td>10.2%</td>
<td>19,309</td>
<td>25.7%</td>
</tr>
<tr>
<td>7</td>
<td>5,387</td>
<td>7.6%</td>
<td>37,289</td>
<td>52.7%</td>
<td>2,513</td>
<td>3.6%</td>
<td>22,614</td>
<td>31.9%</td>
</tr>
<tr>
<td>8</td>
<td>7,047</td>
<td>11.5%</td>
<td>44,428</td>
<td>72.3%</td>
<td>2,024</td>
<td>3.3%</td>
<td>5,526</td>
<td>9.0%</td>
</tr>
<tr>
<td>9</td>
<td>32,297</td>
<td>48.0%</td>
<td>21,278</td>
<td>31.6%</td>
<td>2,513</td>
<td>3.7%</td>
<td>8,740</td>
<td>13.0%</td>
</tr>
<tr>
<td>10</td>
<td>13,206</td>
<td>17.0%</td>
<td>11,909</td>
<td>15.3%</td>
<td>22,100</td>
<td>28.4%</td>
<td>26,237</td>
<td>33.7%</td>
</tr>
<tr>
<td>11</td>
<td>20,778</td>
<td>25.9%</td>
<td>12,888</td>
<td>16.0%</td>
<td>6,747</td>
<td>8.4%</td>
<td>37,099</td>
<td>46.2%</td>
</tr>
</tbody>
</table>

C. Election 2000

In the 2000 San Francisco general supervisorial election, three incumbent Asian Americans ran again: Michael Yaki in District 1, Leland Yee in the majority-Asian District 4 and Mabel Teng in District 7.70 Other Asian American candidates ran in other districts, with the strongest

66. Id.
68. Id.
69. Id.
70. Lelchuk, supra note 4.
showing in District 3, which includes the historic Chinatown; in District 3, Lawrence Wong came in a strong second against Aaron Peskin, requiring a run-off election.\(^{71}\) In the general election, both Teng (District 7) and Yee (District 4) captured approximately double the votes of the next highest vote-getter.\(^{72}\) All three incumbents and Wong were forced into run-offs after strong showings in the general election. In the final results, however, all but Yee lost in their run-offs.\(^{73}\) Despite predictions, the new Board of Supervisors included seven white men and only one Asian American.\(^{74}\) The losses of incumbents Yaki and Teng, when they had fared so well in the general election, were particularly surprising.

<table>
<thead>
<tr>
<th>District Number</th>
<th>Runoff Candidates</th>
<th>Winner</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Michael Yaki v. Jake McGoldrick</td>
<td>Jake McGoldrick</td>
</tr>
<tr>
<td>3</td>
<td>Lawrence Wong v. Aaron Peskin</td>
<td>Aaron Peskin</td>
</tr>
<tr>
<td>4</td>
<td>Leland Yee v. John Shanley</td>
<td>Leland Yee</td>
</tr>
<tr>
<td>7</td>
<td>Mabel Teng v. Tony Hall</td>
<td>Tony Hall</td>
</tr>
</tbody>
</table>

Of all the candidates in the previous supervisorial pool, Mabel Teng in District 7 was considered the strongest Asian American candidate in San Francisco. In 2000, she stayed in District 7, which was 31.9% Asian American, 52.7% white, 7.6% Latino and 3.6% Black, rather than moving to a "safer," e.g., more densely Asian American, district.\(^{75}\) With over 40% of the vote, she trounced all of her five white competitors in the general election, nearly doubling the votes of the second-place vote-getter, Tony Hall.\(^{76}\) Having gathered less than a majority of the vote, however, Teng was forced into a run-off election against Hall that she lost by only 43 votes.\(^{77}\)

Michael Yaki was forced into a run-off election for District 1 when he ran against three white candidates and one Asian American candidate. After Rose Tsai, an Asian American activist, came in third in the general election, Yaki, the top vote-getter, ran and lost against Jake McGoldrick in a run-off election.\(^{78}\) Tsai publicly endorsed McGoldrick, splitting the Asian American vote away from Yaki.\(^{79}\) Exit polls suggested that this

---

71. Id.
73. Lelchuk, supra note 4.
74. Id.
75. See Department of Elections, City and County of San Francisco, at http://www.ci.sf.ca.us/redistricting/.
77. Lelchuk, supra note 4.
79. Id.
transfer of Asian American votes to McGoldrick may have had a significant impact on Yaki's loss in the run-off election.\textsuperscript{80}

After the election, Asian Americans searched for an answer to the election results. Some, like Ted Wang from Chinese for Affirmative Action, felt that Asian Americans still had to harness their electoral strength: "We have not been able to transform our population growth into an effective electorate."\textsuperscript{81} A contributing factor to the losses of so many Asian American candidates could have been that in the run-off election, Asian Americans turned out at a rate of 10 to 15\% in comparison to a city-wide turnout of 32\%.\textsuperscript{82} Others, such as David Lee from the Chinese American Voters Education Committee, felt that Asian American voters were too complacent from having had so many supervisors in the past and from the strong showings the three Asian American candidates made in the general election.\textsuperscript{83} A Section 2 analysis for Asian Americans in the San Francisco supervisorial elections shows the difficulties Asian Americans would face by pursuing a litigation strategy to remedy the dilution in Asian American voter strength in San Francisco. If Section 2 litigation proved fruitful, either San Francisco's supervisorial elections would revert back to city-wide elections or the district lines would have to be redrawn specifically to maintain Asian American voting strength.

\textbf{D. Voting Rights Act Analysis for San Francisco Supervisorial Elections}

Chinese Americans\textsuperscript{84} in San Francisco may serve as an illuminating case study on an Asian American community that may fulfill the \textit{Gingles} preconditions and possibly prevail in Section 2 litigation. Under the first \textit{Gingles} precondition, Chinese Americans in San Francisco are certainly numerous and geographically concentrated.\textsuperscript{85} Where most cities may brag one Chinatown, San Francisco boasts many.\textsuperscript{86} The Chinese American population traditionally clustered in the historic Chinatown, but Chinese Americans now populate the Richmond and Sunset Districts, such that these districts are often called the second and third Chinatowns.\textsuperscript{87} In addition, in the past ten years, an increasing number of Asian Americans

\begin{itemize}
  \item \textsuperscript{80} Interview with Andrew Wong, President, JMPT Consulting, in San Francisco, Cal. (Nov. 26, 2002) [hereinafter Wong Interview].
  \item \textsuperscript{81} Lelchuk, \textit{supra} note 4.
  \item \textsuperscript{82} \textit{Id.}
  \item \textsuperscript{83} \textit{Id.}
  \item \textsuperscript{84} Because such a large proportion of Asian Americans are Chinese Americans and electoral data for Chinese Americans is more readily available for San Francisco than for Asian Americans all whole do a part to the existence of Chinese-specific electoral organizations in San Francisco, the following \S\ 2 analysis will focus on Chinese Americans.
  \item \textsuperscript{85} Wong Interview, \textit{supra} note 80.
  \item \textsuperscript{86} Generally, the Sunset and Richmond districts are so heavily populated with Chinese that they are considered second and third Chinatowns of San Francisco. \textit{See} David Lee, Executive Director, Chinese American Voter Education Committee, Address to the Organization of Chinese Americans-San Francisco (2000).
  \item \textsuperscript{87} \textit{Id.}
have settled in the southern part of the city in Visitacion Valley, Portola, and Excelsior. A recent survey of Chinese surnames within the San Francisco rolls found that some precincts had proportions of Chinese voters as high as 89%. In addition, Asian Americans tend to be sufficiently concentrated to constitute a majority in District 4 and near-majorities in Districts 1, 3, and 11 (Table 1).

Verification of political cohesion fulfilling the second Gingles factor is difficult given the lack of public inquiry. Because such data collection is performed only by private organizations, such as the Chinese American Voter Education Committee through exit polling, data is neither complete nor perfectly accurate. The data that is available, however mixed, leans slightly toward a finding of political cohesion among Chinese American voters in San Francisco.

In national politics, Chinese Americans in San Francisco voted cohesively (82%) for Gore in the 2000 Presidential election. That same year, however, in the Yaki-Tsai split in District 1, the Chinese American community was divided between Yaki supporters and Tsai supporters who voted for McGoldrick. Other data suggests that Chinese Americans were a cohesive voting bloc in 2000. Chinese Americans in Chinatown overwhelmingly supported Wong over Peskin in District 3.

However, the most detailed analyses of the 2000 supervisorial elections and Chinese American voting cohesion centered around the hotly contested and controversial District 7 race against Mabel Teng and Tony Hall. One analysis of the Teng-Hall race by precinct showed that Teng won many of the Chinese precincts in District 7 while Hall won in more white precincts. For example, precincts in District 7 with high rates of Chinese surname registered voters had higher rates of voting for Teng over Hall than in those with low rates of Chinese surname registered voters.

88. Wong Interview, supra note 80.
89. Id. Note that the Chinese surname search was performed with the deletion of last names like “Lee” and “King” in traditionally African American communities.
90. Department of Elections, City and County of San Francisco, at http://www.ci.sf.ca.us/redistricting/.
92. Id. (exit polls varied in their findings; another exit poll reported that 62.3% of Chinese Americans voted for Gore).
93. Lelchuk, supra note 4.
95. Wong Interview, supra note 80; Lelchuk, supra note 4.
Table 2. Teng:Hall Votes In the Most and Least Chinese Precincts in District 7

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>2548</td>
<td>9.3%</td>
<td>32%:31%</td>
<td>53%</td>
<td>37%:63%</td>
<td>27%</td>
</tr>
<tr>
<td>2526</td>
<td>9.4%</td>
<td>32%:34%</td>
<td>51%</td>
<td>39%:61%</td>
<td>28%</td>
</tr>
<tr>
<td>2525</td>
<td>11.2%</td>
<td>32%:24%</td>
<td>56%</td>
<td>46%:54%</td>
<td>33%</td>
</tr>
<tr>
<td>2517</td>
<td>35.7%</td>
<td>41%:17%</td>
<td>50%</td>
<td>55%:45%</td>
<td>20.1%</td>
</tr>
<tr>
<td>2503</td>
<td>38.1%</td>
<td>47%:17%</td>
<td>50%</td>
<td>54%:46%</td>
<td>27%</td>
</tr>
<tr>
<td>2501</td>
<td>40.1%</td>
<td>46%:12.3%</td>
<td>45%</td>
<td>53%:47%</td>
<td>19.1%</td>
</tr>
</tbody>
</table>

Anecdotal evidence more strongly suggests cohesion among Chinese Americans. Before statistical advances in voting rights law, courts accepted anecdotal testimony in determining the rate at which minority voters voted cohesively. Andy Wong, from JMPT Consulting, recounts that Chinese American voters often vote for Chinese American candidates, and that Teng had strong support from the Chinese American community in the 2000 election. Wong avers that the drop-off in Teng’s relative votes is closely related to the lower rates of voting by Chinese Americans in the run-off election.

Although leaning toward cohesion in favor of the second Gingles factor, this data shows that voting in District 7 was not split purely along Chinese-surname and non-Chinese-surname voting, which may have an impact on the third Gingles factor. In order for Teng to have fared as well as she did in both elections, some non-Chinese-surname voters must have voted for her in Precincts 2548, 2526 and 2525. In fact, assuming the district-wide proportion of Latinos and African Americans in these precincts also voted for Teng, approximately 10% of the votes cast in each election were still whites voting for Teng. This scenario suggests that approximately 20% of the white population voted for a minority candidate.

Although this evidence may seem facially contrary to the third Gingles factor, which requires a showing that the white voters vote sufficiently as a voting bloc to prevent the election of a person of color, comparison to other cases shows that this rate of white crossover voting is not lethal to a claim. For example, an ecological regression case study in

---

96. Wong Interview, supra note 80.
97. Id.
98. Id.
99. Although not statistically accurate, actual data is not available.
Norfolk, Virginia, studied the patterns of voting between whites and blacks in councilmanic elections in 1980. Where the correlation coefficient was above 0.5, racial bloc voting was "real positive" while a correlation coefficient above 0.9 signified "extremely high" racial bloc voting. In the case study in Norfolk, VA, the correlation coefficient was .985, but individual precincts within the district would often vary 8% or 12% between the percentage of blacks in the precincts and the number of votes in favor of the minority candidate.

The facts of the Norfolk case study are more extreme than those of the original Gingles case where correlation coefficients ranged from .70 to .98. Therefore, accepted rates of crossover voting have been higher than they were in the Teng-Hall race; in order to ascertain the degree of voting polarization, a more statistically sophisticated analysis must be performed. A court could find either way on whether the white vote in District 7 was sufficiently polarized to satisfy the third Gingles factor of white racial bloc voting.

Overall, Chinese Americans in District 7 may have a claim of minority vote dilution that could pass the three factors required under Gingles. If Chinese Americans in District 7 were able to prove that they fulfilled the Gingles preconditions, a cursory look at the totality of the circumstances for Chinese Americans in San Francisco, i.e. the "Senate factors," suggests they may also be able to seek remedy under Section 2.

E. The Senate Judiciary Committee Majority Report Factors

Specific evidence may tip the totality of the circumstances toward finding dilution in Asian Americans' ability to elect candidates in San Francisco. The success of Asian Americans in other electoral races in San Francisco, both in subsequent supervisorial elections and elections for other offices, weigh against a finding of minority vote dilution. Asian Americans have not been denied access to slating and have had other successes in the political process. In the 2000 San Francisco supervisorial election, twelve Asian Americans ran for eleven supervisor positions, though mostly clustered in heavily Asian-populated districts. In 2002, three Asian Americans ran for District 4 supervisor. In addition, in 2002, Leland Yee won his bid for California State Assembly with 78% of the vote and Mabel Teng won her election against African American incumbent Doris Ward with nearly 60% of the vote. While Asian Americans may be losing in supervisorial races, they are starting to win

101. Id. at 774.
102. Id. at 775.
103. See, supra, Part II.
104. See Johnson v. De Grandy, 512 U.S. 997 (taking into consideration the ability of minorities to otherwise elect representatives).
other elected offices in San Francisco.

Despite these wins, the history of discrimination against Asian Americans in San Francisco, potential racial issues in the Teng-Hall race, and the use of majority requirements in the supervisorial elections favor a finding of minority vote dilution. Discrimination against Asian Americans in San Francisco has deep roots. In 1880, the San Francisco Board of Supervisors passed the statute that was invalidated in *Yick Wo* for its discriminatory impact on Chinese:

> No reason whatever, except the will of the supervisors, is assigned why [plaintiffs] should not be permitted to carry on [operating their laundries]. . . . [A]nd while this consent of the supervisors is withheld from them and from two hundred others who have also petitioned, all of whom happen to be Chinese subjects, eighty others, not Chinese subjects, are permitted to carry on the same business under similar conditions . . . [N]o reason for it exists except hostility to the race and nationality to which the petitioners belong . . . .

As discussed *supra*, Section 1981 was passed partly out of concern for discrimination against the Chinese in California: “[W]e must protect the Chinese against the local laws of California.”

More recent evidence also shows a pattern of discrimination in San Francisco against the Chinese in voting, education and employment. For example, Chinese for Affirmative Action alleged in 1978 that San Francisco had violated Chinese voting rights by not providing translated ballots required by the Voting Rights Act. In *Lau v. Nichols*, 414 U.S. 563 (1974), Chinese Americans alleged that San Francisco public schools had discriminated against Chinese American students by failing to provide bilingual education. In 1989, Chinese for Affirmative Action was one of the successful plaintiffs against the City and County of San Francisco in a claim regarding discriminatory hiring practices in the San Francisco Fire Department. In 1998, the Ninth Circuit stated that “given such a history of official bias in the public school system of San Francisco, it is specially hazardous to adopt racial classifications and racial caps that bear most heavily upon that class of plaintiff schoolchildren” where Chinese American students alleged that they were denied enrollment in public schools because of ethnically-based enrollment limitations.

Asian Americans in San Francisco continue to suffer adverse consequences from persisting discrimination. Twenty-nine percent of the Asian Americans in San Francisco live below the poverty line in

107. Chinese for Affirmative Action v. Leguennec, 580 F.2d 1006, 1009 (9th Cir. 1978) (case remanded to district court for finding on merits because the case, though moot, could constitute a continuing problem).
108. *Davis v. City and County of San Francisco*, 890 F.2d 1438 (9th Cir. 1989).
comparison to 11.3% of San Franciscans generally.\footnote{EPA, supra note 26; Census Bureau, U.S. Dep’t of Commerce, San Francisco Quick Facts, available at http://quickfacts.census.gov/qfd/states/06/06075.html.} In the 2000 election, Tony Hall made racially antagonistic remarks against Mabel Teng, implying that she had accepted money from overseas for her campaign.\footnote{Banerjee and Hong, supra note 94.} In addition, Hall had a campaign slogan that declared him as ‘‘one of us,’’ a declaration that some say hints of xenophobia.\footnote{Id.} These comments may have seemed innocuous in isolation, but against the backdrop of racism against Asian Americans in San Francisco and the racist tones of the Clinton campaign finance debacle regarding Asian donors, these comments led one Asian American community leader to infer that Hall was ‘‘thinking of our community . . . as foreigners.’’\footnote{Hong, supra note 76.} Even after the runoff election results had been tallied, Independent columnist Warren Hinckle alleged that hundreds of Asian American votes had not been counted.\footnote{Joseph Hong, Still No Clear Winner in District 7, ASIANWEEK, Jan. 5, 2001.}

Majority vote requirements have also impeded the ability of Asian Americans to elect Asian American supervisors. In 2000, Leland Yee, Michael Yaki, Mabel Teng and Lawrence Wong all went to run-off elections for failing to procure a majority vote in the general election, with only Yee arising victorious. In 2002, Fiona Ma ran against numerous Asian American candidates, most notably Andrew Lee, in Leland Yee’s former District 4, the only majority (53%) Asian American district. Again, Ma received the largest number of votes in the general election, but without an actual majority, Ma had to face Ron Dudum in a run-off in December 2002, which she won by 11 percentage points, thereby maintaining the only Asian American supervisor seat in San Francisco.\footnote{Rachel Gordon, Ma, Duffy Claim Victory in S.F. Runoffs; District 4 Winner Becomes Board’s Only Chinese American, S.F. CHRON., Dec. 11, 2002 at A19.} In response to her victory, Ma declared, ‘‘The Chinese American community didn’t want to lose their voice at City Hall.’’\footnote{Id.}

IV. CONCLUSION

Asian Americans are a difficult ‘‘discrete and insular minority’’ whose history and current demographics differ greatly from other ‘‘discrete and insular minority[ies],’’ specifically African Americans, for whom most of the civil rights legislation was targeted.\footnote{Recall the use of ‘‘discrete and insular minority’’ from Carolene Products footnote and Korematsu} Although Asian Americans have suffered a long history of invidious discrimination in California, the impacts of that history are not immediately apparent in the community, the majority of which had no ancestors in this hemisphere prior to forty years ago. The people who constitute the community may have changed but the
historical legacy of past discrimination remains.

Despite this continued discrimination, Asian Americans may not find the same legal remedies as larger "discrete and insular minorit[ies]." As repeat targets of exclusionary American immigration policies, their demographics today are very different than that of African Americans. Remedies tailored to fit African Americans in the 1960s do not fit Asian American communities well today.

However, a historical analogy exists between Chinese Americans in California and African Americans in the South. This analogy, though not perfect, is enough to give Asian Americans in San Francisco hope for remedy under Section 2 of the Voting Rights Act. In the wake of severe losses in Asian American supervisory representation in San Francisco, Asian Americans should undertake further statistical analysis to see whether they might be able to prove the second and third Gingles prongs. In addition, with a more complete record, they may be able to prove minority vote dilution under a totality of the circumstances test. If so, Section 2 litigation may force San Francisco to reexamine the change from citywide elections to district elections, and either revert to citywide elections or redraw the districts in a way that preserves Asian American voting strength.

Litigation is an expensive and time-consuming undertaking. Alternatively, Asian Americans in San Francisco should consider lobbying the elections board to change the election requirements so that supervisors can win a general election by garnering the most votes without requirement of a majority. In the end, however, Asian Americans in San Francisco hold their own key to elections: in many districts, the sheer number of Asian Americans is sufficient to elect Asian American representatives if its members naturalize, register, and vote in a unified manner. Teng's 2002 win for City Assessor is another example of how Asian Americans can win in San Francisco when they work in coalition with identity groups. Asian Americans were slowly finding their way through the political maze that was San Francisco in the late 1990s, only to have their footing taken away by a shakeup in the political rules. Asian Americans must now regain their footing, assess the situation, chart a path, and move forward.

118. Interestingly, in districts where Asian Americans are not close to a majority, Asian Americans have ceased running. In districts where Asian Americans are or are close to a majority, many Asian Americans run for the same seat.

119. Wong Interview, supra note 80.