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*Seventh Annual LatCrit  
Conference, LatCrit VII,  
Coalition Theory and Praxis:  
Social Justice Movements and  
LatCrit Community—Part II*

*Focusing the Electoral Lens*

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## The Latina/o and APIA Vote Post-2000: What Does It Mean to Move Beyond “Black and White” Politics?

LatCrit 2002 took place at an auspicious political juncture, a year and a half after the fateful *Bush v. Gore* decision,<sup>1</sup> which broke a virtual electoral tie in favor of the Republican presidential candidate, and six months prior to the 2002 November midterm elections, in which Republicans swept into power in both houses of Congress, breaking historical trends. LatCritVII was the first time that a LatCrit conference project convened a panel that focused on voting issues, *Focusing the Electoral Lens: Capturing Post-2000 Latina/o and APA Political Strength in the Redistricting Process*.<sup>2</sup> Chaired by Professor Keith Aoki, this concurrent panel focused on three themes. First, Professor Keith Aoki and Kathay Feng discussed the importance to Asian Pacific Islander Americans (APIAs) and Latinas/os of the redistricting battles unleashed in California as a consequence of the 2000 Census. Their contribution is memorialized in the first article of this cluster, *Voting Matters: APIAs, Latinas/os and Post-2000 Redistricting in California*,<sup>3</sup> summarizing the law of redistricting as it affects minority representation, and describing the strategy that APIA and Latina/o civil rights groups used in the 2000 redistricting battles in California. Associate Dean Kevin Johnson's presentation focused on the growing cleavages within the Latina/o community around representation issues. His contribution is memorialized in the second article of this cluster, *Latinas/os and the Political Process: The Need for Critical Inquiry*,<sup>4</sup> in which he thoughtfully presents a list of research issues on voting, redistricting, and representational theory. Finally, this author presented

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<sup>1</sup> 531 U.S. 98 (2000).

<sup>2</sup> See LatCrit VII Program Schedule, Saturday, May 4, 2002, Portland, Oregon, Concurrent Panel, *Focusing the Electoral Lens: Capturing Post-2000 Latina/o and APA Political Strength in the Redistricting Process*, available at <http://personal.law.miami.edu/~fvaldes/latcrit/lcvii/docs/lcviiinvitation.htm> [hereinafter LatCrit VII] (last visited July 10, 2003).

<sup>3</sup> Kathay Feng, Keith Aoki & Bryan Ikegami, *Voting Matters: APIAs, Latinas/os and Post-2000 Redistricting in California*, 81 OR. L. REV. 849 (2002).

<sup>4</sup> Kevin R. Johnson, *Latinas/os and the Political Process: The Need for Critical Inquiry*, 81 OR. L. REV. 917 (2002).

*Initiatives and Minority Rights*.<sup>5</sup> When minorities' civil rights are put to a vote in initiatives and referendums, minorities lose over eighty percent of the time.<sup>6</sup> As I explain in Part IV below, devising civil rights litigation strategies and applying LatCrit race analysis can counter errant majoritarian animus.

Voting matters very much. As Kevin Johnson remarks, the political process and electoral representation are now at the center of addressing Latina/o civil rights issues.<sup>7</sup> Kathay Feng, Keith Aoki, and Bryan Ikegami emphasize the importance of focusing on voting and the electoral process as part of the LatCrit scholarly and activist project stating that "meaningful political participation beginning (but not ending) with fair representation is an absolutely necessary and crucial precondition to achieving and implementing the substantive social justice and anti-subordination agenda of LatCrit."<sup>8</sup> Aoki, Feng, Ikegami and Johnson make the straightforward point that the post-Civil Rights movement cannot be sustained by the courts;<sup>9</sup> but rather, civil rights advances must come from legislatures and local governments. The Civil Rights Revolution of the 1960s and 1970s came from the federal bench, led by the Warren Court, and revolutionized race relations in the United States with cases like *Brown v. Board of Education*<sup>10</sup> and *Loving v. Virginia*.<sup>11</sup> Research has now shown that in the 1980s President Reagan and the Republicans deliberately set about to undermine the federal bench's support of civil rights, and systematically went about ensuring that judicial appointments would reverse civil rights gains.<sup>12</sup> The Bush plan, after the Republican Congressional midterm electoral sweep, is to put in place conservative Article III judges as quickly

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<sup>5</sup> My remarks were based on Sylvia R. Lazos Vargas, *Judicial Review of Initiatives and Referendums in which Majorities Vote on Minorities' Democratic Citizenship*, 60 OHIO ST. L.J. 399, 462-73 (1999) [hereinafter *Initiatives & Minorities*].

<sup>6</sup> *Id.* at Appendix A.

<sup>7</sup> Johnson, *supra* note 4.

<sup>8</sup> See Feng, Aoki, & Ikegami, *supra* note 3, at 855.

<sup>9</sup> This point is not new, *see, e.g.*, GIRARDEAU A. SPANN, *RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA* (1993) (arguing that the Supreme Court has been largely antagonistic to racial minority anti-subordination goals).

<sup>10</sup> 347 U.S. 483 (1954).

<sup>11</sup> 388 U.S. 1 (1967).

<sup>12</sup> Dawn Johnsen, *Tipping the Scale: President Bush picks judges based on ideology—so why shouldn't senators reject them for it?*, WASH. MONTHLY, July/Aug. 2002, at 15.

as possible.<sup>13</sup> The impending swift senatorial approval will solidify an already conservative federal bench.<sup>14</sup> According to an empirical study on judicial decision making, party affiliation is the most salient factor, even more so than gender or race, in predicting what kinds of rulings a judge will make.<sup>15</sup> Such research suggests that judges' decisions hinge more on their political attitudes, rather than the "plain meaning" of constitutional or statutory text.<sup>16</sup> The only way to counter impending restrictive interpretive decisions is through legislative action; in effect, to provide the opportunity for Congress and state legislatures to veto court decisions by rewriting statutes, as Kevin Johnson notes.<sup>17</sup>

Voting issues are also about pragmatic politics. As Feng, Aoki, and Ikegami point out, "Only when minorities are represented in local government—school boards, zoning boards, city councils—do the every day needs of minority communities become part of the local agenda."<sup>18</sup> The key to advancing a political anti-subordination agenda is how well Latinas/os and APIAs can make an impact at the ballot box.

My aim in this Article is to frame the challenges to LatCrit theory and activism posed by voting rights, electoral process, and minority politics.<sup>19</sup> In order to focus on the key challenges, I

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<sup>13</sup> Warren Richey, *After GOP Senate Sweep, Judiciary Is Set to Shift Right; Dozens of judicial nominees will likely get quick approval in 108th Congress*, CHRISTIAN SCI. MONITOR, Nov. 8, 2002, at 4.

<sup>14</sup> See also JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993). Susan B. Haire, Martha Anne Humphries & Donald R. Songer, *The Voting Behavior of Clinton's Courts of Appeals Appointees*, 84 JUDICATURE 274 (2001) (finding that Clinton appointments were "moderate" putting George W. Bush in a strong position to significantly add to conservative federal judges selected during the Reagan-Bush era).

<sup>15</sup> Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1388 (1998).

<sup>16</sup> See SEGAL & SPAETH, *supra* note 14, at 32-73.

<sup>17</sup> See Johnson, *supra* note 4, at 919. However, as Johnson indicates in his own prior work, it is the rare case where Congress actually vetoes the Supreme Court's handiwork, particularly in the area of immigration law. See Kevin R. Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement*, 1993 BYU L. REV. 1139 (1993) [hereinafter Johnson, *Political Power of Noncitizens*].

<sup>18</sup> Feng et al., *supra* note 3.

<sup>19</sup> LatCrit theorists and minority scholars have already assembled an impressive scholarship on voting rights and electoral law. See, e.g., LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* [hereinafter GUINIER, *TYRANNY*]; LANI GUINIER & GERALD TORRES, *THE*

pose this question: What does a LatCrit theorist mean when she proposes to move beyond the “Black-White” paradigm?<sup>20</sup> Part I discusses the changes in the U.S. electorate that in post-2000 have made the Latina/o and APIA vote the darling of both major parties. In the process of being perceived as an important electoral group, Latinas/os and APIAs are at times being depicted as “model minorities.” Part I concludes that going beyond the

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MINER'S CANARY (2002); Lani Guinier, *(E)racing Democracy: The Voting Rights Cases*, 108 HARV. L. REV. 109 (1994); Terry Smith, *Race and Money in Politics*, 79 N.C. L. REV. 1469 (2001) [hereinafter Smith, *Race and Money in Politics*]; Terry Smith, *A Black Party?* Timmons, *Black Backlash and the Endangered Two-Party Paradigm*, 48 DUKE L.J. 1 (1998) [hereinafter Smith, *A Black Party*]; Spencer Overton, *But Some Are More Equal: Race, Exclusion, and Campaign Finance*, 80 TEX. L. REV. 987, 1024-25 (2002) [hereinafter Overton, *But Some Are More Equal*]; Spencer Overton, *A Place at the Table: Bush v. Gore Through the Lens of Race*, 29 FLA. ST. U. L. REV. 469 (2001); Henry L. Chambers, Jr., *ColorBlindness, Race Neutrality, and Voting Rights*, 51 EMORY L.J. 1397 (2002); Henry L. Chambers, Jr., *Enclave Districting*, 8 WM. & MARY BILL RTS. J. 135 (1999); Audrey G. McFarlane, *When Inclusion Leads to Exclusion: The Uncharted Terrain of Community Participation in Economic Development*, 66 BROOK. L. REV. 861 (2001); Keith Aoki, *A Tale of Three Cities: Thoughts on Asian American Electoral and Political Power After 2000*, 8 ASIAN PAC. AM. L.J. 1 (2002); Luis Fuentes-Rohwer, *Doing Our Politics in Court: Gerrymandering, “Fair Representation” and an Exegesis into the Judicial Role*, 78 NOTRE DAME L. REV. 527 (2003); Luis Fuentes-Rohwer, *Baker's Promise, Equal Protection and the Modern Redistricting Revolution: A Plea for Rationality*, 80 N.C. L. REV. 1383 (2002); Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Challenges to Racial Redistricting in the New Millennium: Hunt v. Cromartie as a Case Study*, 58 WASH. & LEE L. REV. 227 (2001); Guy-Uriel E. Charles, *Constitutional Pluralism and Democratic Politics: Reflections on the Interpretive Approach of Baker v. Carr*, 80 N.C. L. REV. 1103 (2002); Richard Thompson Ford, *Geography and Sovereignty: Jurisdictional Formation and Racial Segregation*, 49 STAN. L. REV. 1365 (1997); Jerome M. Culp, *Edited Comments on Political Participation*, 1995 ANN. SURV. AM. L. 399 (1995).

<sup>20</sup> This is one of the central themes of LatCrit theory. See Devon W. Carbado, *Race to the Bottom*, 49 UCLA L. REV. 1283, 1305-12 (2002); Dorothy E. Roberts, *BlackCrit Theory and the Problem of Essentialism*, 53 U. MIAMI L. REV. 855 (1999); Berta Esperanza Hernández-Truyol, *Latina Multidimensionality and LatCrit Possibilities: Culture, Gender, and Sex*, 53 U. MIAMI L. REV. 811 (1999); Juan F. Perea, *The Black/White Binary Paradigm of Race: The “Normal Science” of American Racial Thought*, 10 LA RAZA L.J. 127 (1998); Richard Delgado, *Rodrigo's Fifteenth Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary*, 75 TEX. L. REV. 1181 (1997). APIA crits have also made significant contributions to rethinking the Black-White paradigm. See Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1267 (1993); Chris K. Iijima, *The Era of We-Construction: Reclaiming the Politics of Asian Pacific American Identity and Reflections on the Critique of the Black/White Paradigm*, 29 COLUM. HUM. RTS. L. REV. 47, 69 (1997); Frank H. Wu, *Neither Black nor White: Asian Americans and Affirmative Action* 15 B.C. THIRD WORLD L.J. 225, 248 (1995). See also sources cited *infra* n.135.

Black-White paradigm in this context is to deconstruct the model minority rhetoric, as APIA scholars have done in the affirmative action debate. In Part II, I discuss an important political issue to Latinas/os and APIAs that intersects with civil rights and anti-subordination analysis, the *de jure* denial of the voting franchise to more than ten million Latinas/os and APIAs because they are noncitizens or are citizens for the sole reason that they reside in Puerto Rico. Part II concludes that thinking beyond the Black-White paradigm in this context requires that LatCrit theorists continue to address this exclusion as both a civil rights and race issue. In Part III, I review the electoral successes of 2002. Even with Latina/o and APIAs' new found electoral influence, their gains in electing representatives to Congress were slim, particularly when compared to their strong population growth of over fifty percent from 1990 to 2000. There are four structural reasons that account for continued lack of influence in congressional representation: representational politics, the politics of redistricting, campaigning in racially polarized environments, and minority voter turnout. Finally, Part IV reviews direct democracy ballot where electors in states voted on English-only initiatives, and explains why the direct democracy ballot continues to be a bellwether for racial conflict that requires attuned judicial scrutiny.

## I

### ELECTORAL POLITICS: "NOT JUST BLACK AND WHITE ANYMORE"

The Black-White paradigm is no longer statistically accurate. The results of the 2000 Census revealed that Latinas/os now numerically surpass African Americans and Asian Americans.<sup>21</sup> APIAs and Latinas/os are the *fastest* growing racial minority groups in the country.<sup>22</sup> This demographic shift in no way dimin-

<sup>21</sup> The number of Latinas/os per the 2000 Census is 35.3 million, or thirteen percent of the total population of 281.4 million people. The number of African Americans or Blacks is 34.7 million. Bureau of Census, *Census 2000 Brief: Overview of Race and Hispanic Origin*, T.1 (Mar. 2001) available at <http://www.census.gov/prod/2001pubs/c2kbr01-1.pdf> [hereinafter *Census Hispanic Overview*]. Among Blacks and African Americans are 710,353 persons who identify as being of Latina/o or Hispanic ethnic origin. *Id.* at T.10.

<sup>22</sup> Asian growth jumped from 6,908,639 in 1990 to 10,252,906 in 2000, or 48%. See Bureau of Census, *Census: The Asian Population: 2000 Census Brief*, available at <http://www.census.gov/prod/2002pubs/c2kbr01-16.pdf> (Feb. 2002) [hereinafter *Asian*

ishes the importance of race in electoral politics. The only change that has emerged is that the experts who carefully count votes and monitor potential voters now talk about racial politics in ways that include Latinas/os, APIAs, and Native Americans. Part A discusses why the Latina/o and APIA vote has emerged as important to national electoral strategies. This may translate into some influence at a national level. The potential influence of an emerging electorate causes politicians from both parties to covet the marginal votes that might make the difference. As Part B discusses, meaningful minority representation continues to be checked by white voters' racial consciousness. As recent elections show, white voters continue to reject minority candidates when their racial consciousness has been aroused.

#### *A. The Shift from the Black-White Paradigm in Electoral Politics*

As a result of major structural changes in United States electoral politics, electoral contests have become very close. The 2000 and 2002 contests were so close that in a parliamentary system the results would have been ties. In 2000, Bush's presidency was decided by 537 votes cast in Florida.<sup>23</sup> In 2002, the Senate was decided by fewer than 70,000 votes cast in Minnesota and Missouri.<sup>24</sup> This is under one-tenth of one percent of the entire voting electorate.

The controversy over the Bush vote in Florida can be understood in terms of a crisis in legitimacy.<sup>25</sup> It is also the conse-

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*Population*]. The Latina/o population increased from 22,354,059 to 35,208,818, or 58%. *Census Hispanic Overview*, *supra* note 21, at T.4.

<sup>23</sup> The official state certified results were Bush 2,912,790 and Gore 2,912,253, a difference of 537 votes. Doyle McManus, Bob Drogin & Richard O'Reilly, *Election 2000: A Recount: Bush Still Had Votes to Win in a Recount, Study Finds*, L.A. TIMES, Nov. 12, 2001, at A1.

<sup>24</sup> In Missouri, just over 20,000 votes constituted the margin by which Democratic Senator Jean Carnahan lost her seat to the Republican challenger, Jim Talent. Kevin Murphy, *Talent Expects to Begin Some Senate Duties Next Week*, KAN. CITY STAR, Nov. 22, 2002, at B3. The Democratic incumbent in Minnesota, Senator Wellstone, was ahead in the polls when he, his wife, and daughter tragically died. His eleventh hour replacement, Fritz Mondale, lost by fewer than 50,000 votes. *Some Counties Fail to Report Wellstone Votes*, Associated Press (St. Paul), available at [http://www.wcco.com/campaign2002/local\\_story\\_324101428.html](http://www.wcco.com/campaign2002/local_story_324101428.html).

<sup>25</sup> See generally THE VOTE: BUSH, GORE & THE SUPREME COURT (Cass R. Sunstein & Richard A. Epstein eds., 2001). See Peter Gabel, *What It Really Means to Say "Law Is Politics": Political History and Legal Argument in Bush v. Gore*, 67 BROOK. L. REV. 1141, 1143 (2002) (arguing that all Americans "need to understand exactly how we allowed ourselves to be disempowered").

quence of winning advantages being so miniscule that they fall within margins of statistical error. When errors can decide a winner, it becomes clear that the victory claimed by either side is accidental. What is called into question is whether the result is the evinced will of the people, or just a manipulation of the vote counting apparatus.

Fundamental structural reasons explain the shift in national electoral politics to a game of such close margins.<sup>26</sup> Under the U.S. two-party system, the parties' stands on political issues has increasingly converged towards the middle. The choices are limited; the two parties' policy initiatives are difficult to distinguish.<sup>27</sup> Each party's base cannot go elsewhere to find a party that would accommodate its ideology or political agenda. With the base captive, party leaders and strategists concentrate on pitching their appeals to the marginal voter.<sup>28</sup> This strategy tends to obfuscate even more the differences between the parties.

Campaign finance has also played a role in this convergence. Each party's nominee must be a candidate who can raise hundreds of millions of dollars in contributions because campaign

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<sup>26</sup> See Bruce Cain, *The Contemporary Context of Racial and Ethnic Politics in California*, in RACIAL AND ETHNIC POLITICS IN CALIFORNIA (Byran O. Jackson & Michael B. Preston eds., 1991); Rodolfo O. de la Garza & Louis DeSipio, *Save the Baby, Change the Bathwater, and Scrub the Tub: Latino Electoral Participation after Seventeen Years of Voting Rights Act Coverage*, 71 TEX. L. REV. 1479, 1513-14 (1993). De la Garza and DeSipio identified seven structural changes:

1. The decline of political parties. . . .
2. The decline of partisan competition in many races. . . .
3. The rise of candidate-centered campaigns run by consultants independent of the parties.
4. The increase in VRA-produced, safe, uncompetitive, ethnically homogeneous districts.
5. The increasing reliance on campaign technology that allows candidates to target their message so that it reaches only those registered voters most likely to vote and reduces outreach to communities that have not voted at high rates in the past.
6. The use of direct-democracy ballot strategies such as initiatives, referenda. . . .
7. The increasing diversification of the electorate, accompanied by extended ethnic-specific voting protections, including bilingual electoral information and districting guarantees to traditionally excluded groups such as Asians, Native Americans, and Latinos.

*Id.*

<sup>27</sup> See generally JOHN H. ALDRICH, *WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA* (1995).

<sup>28</sup> Professor Terry Smith reports that eighty to ninety percent of campaign funds are invested in the ephemeral marginal votes. Smith, *Race and Money in Politics*, *supra* note 19, at 1488.

monies are the key to election victories. A 1998 study by the Center for Responsive Politics concluded that nine out of ten candidates who outspent their opponents won the election.<sup>29</sup> Incumbents do well in elections because they are able to raise more money than their opponents. According to one study, 240 of the 349 congressional incumbents won their respective elections because their challengers spent less than one-half as much money.<sup>30</sup> One implication of the importance of money in elections is that candidates must adopt positions aligned with the interests of potential donors. Such alignment will mute the differences between the parties. To be sure, the major donors for each major party are at odds on certain issues. For example, trial lawyers (usually Democratic donors) are at odds with large corporations and HMOs (usually Republican donors) on tort reform and plaintiffs' remedies for negligent actions; and unions (usually Democratic donors) are at odds with large corporations and business groups (usually Republican donors) over the right of labor to organize, and the composition of the National Labor Relations Board (NLRB) and Equal Employment Opportunity Commission (EEOC). These are true disagreements. However, campaign finance cuts down the *range* of disagreements and keeps unchallenged the major wealth creation and income distribution structures in our society. Social justice issues are never discussed because no politician finds it to her advantage to bring up such "hot topics" in her bid to be elected. Moreover, the pool of potential candidates is narrowed to those who can appeal to potential donors. Since most of the country's wealth is held by Whites, minority candidates are winnowed out.<sup>31</sup>

Redistricting for the protection of incumbents is another cul-

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<sup>29</sup> CAMPAIGN FINANCE REFORM 50 (1997) (Anthony Corrado et al. eds., 1997).

<sup>30</sup> *Id.* (reporting on Common Cause study).

<sup>31</sup> See Overton, *But Some Are More Equal*, *supra* note 19, at 1024-25 (stating that because of the financial dominance of the White donors, their contributions will form a large majority of the money received by the Brown incumbents, despite the fact that most contributions from Whites continue to go to Whites. Brown incumbents from Brown districts will face insignificant challenges from underfunded insurgents—who will usually be Browns. . . . Because of this trend, little democratic dialogue about policy will take place in Brown communities.);

Jamin Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL'Y REV. 273, 300-01 (1993) (stating that

When citizens of modest means go to the polls, they are voting for candidates whose political seriousness has been determined by a money-gathering process which, by definition, systematically demotes their interests. . . .

prits. Drawing districts has become a statistical fine art where parties can fine tune the voting electorate and make it more likely than not that a given district will elect a Democrat or Republican.<sup>32</sup> Even though *Davis v. Bandemer*<sup>33</sup> holds the promise that a plaintiff may challenge political gerrymandering if the district lines are drawn to “consistently degrade” the influence of a political minority,<sup>34</sup> successful challenges have been virtually non-existent.<sup>35</sup> Free to politically gerrymander, each party has been able to solidify gains, and minimize competition. As a result of artful redistricting, in the 2002 elections incumbents were winners. Only thirty-nine of the 435 House races were competitive, that is, decided by margins of less than fifty-five percent of the vote.<sup>36</sup> Only forty-nine House races involved a non-incumbent, and only thirty-five of these were competitive.<sup>37</sup>

Finally, geographically the country has become split in its party loyalties. The West Coast and Northeast have become Democratic, while the South is now mostly Republican. A few states, mostly in the Midwest, remain in play from election to election as “swing states.” In terms of electoral votes, this geographic split means that Republicans and Democrats are virtually tied. Neither party has gotten a majority of the popular vote in the last three presidential and House elections since 1996.<sup>38</sup> This has not happened since the early 1900s.

Even though electoral differences are now slimmer than ever before, in U.S. representative democracy, pluralities control the apparatus of government.<sup>39</sup> Post-2000, Republicans control both chambers of Congress and the executive branch. Republican ap-

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[T]hey are part of an electoral system “arranged in a manner that will consistently degrade” their influence “on the political process as a whole.”; Smith, *Race and Money in Politics*, *supra* note 19, at 1512 (citing studies showing racial discrimination in campaign fund-raising).

<sup>32</sup> See generally Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77 (1985).

<sup>33</sup> 478 U.S. 109 (1986).

<sup>34</sup> *Id.* at 132.

<sup>35</sup> See generally Pamela S. Karlan, *The Fire Next Time: Reapportionment after the 2000 Census*, 50 STANFORD L. REV. 731 (1998).

<sup>36</sup> David J. Garrow, *Ruining the House*, N.Y. TIMES, Nov. 13, 2002 at A29.

<sup>37</sup> *Id.*

<sup>38</sup> In 1996, 1998, and 2000, Republicans carried the popular vote for the House by 49-48.5, 49-48, and 49-48% margins. See Michael Barone, *The 49% Nation in THE ALMANAC OF AMERICAN POLITICS 2002* 21 (Michael Barone et al. eds., 2002); Michael Barone, *Whose Majority?*, 54 NAT'L REV. 30, Dec. 9, 2002.

<sup>39</sup> See generally GUINIER, TYRANNY *supra* note 19.

pointments also dominate the Supreme Court, and impending Court replacements will be made by a Republican president committed to a conservative federal bench.<sup>40</sup> This level of control of government has not been seen in the United States since 1929,<sup>41</sup> yet it was determined by less than the majority of the popular vote.<sup>42</sup>

However, all politicians know that their grip on electoral power is tenuous. Structurally, this was the design that the Founding Fathers followed when they put in play every seat in the House of Representatives, and one-third of the Senate seats every two years.<sup>43</sup> In the current environment of close electoral politics, control can shift from one party to another in one electoral cycle with what is a statistical “handful” of votes.

Accordingly, in this era of ultra-competitiveness, every vote does count. The new politics of close margins, plus the explosive demographic growth of Latinas/os and APIAs, has made them the new darlings of the major political parties. Both Democrats and Republicans covet their vote because they are now viewed as potential swing voters.<sup>44</sup> A recent book, *The Emerging Democratic Majority*, predicts that the current tie in electoral politics will be resolved in favor of Democrats, in part, because the Latina/o and APIA electorate is growing and the authors predict their vote to continue to lean Democratic, as it did in the Bush-

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<sup>40</sup> Johnsen, *supra* note 12.

<sup>41</sup> Joshua Green, *John Edwards, Esq.: Republicans believe that Americans will never elect a trial lawyer president. They're wrong*, WASH. MONTHLY, Oct. 2001, at 34.

<sup>42</sup> Paul Glastis, *How Democrats Could Have Won: Three ideas that might have changed the election*, WASH. MONTHLY, Dec. 2002, at 9.

<sup>43</sup> The key papers are Federalist No. 39, 52-77. James Madison explained that two year terms were sufficient in length for legislative business to be done, but brief enough so that Representatives would always have present the interests of the voters. The Federalist No. 52 (J. Madison). By contrast the Senate's six-year term allows Senators to provide a check against possible excesses that might spur the House to produce ill considered legislation. The Federalist No. 62 (J. Madison).

<sup>44</sup> See Stephen Dinan, *Parties Wooed Hispanics with Record Ad Spending*, WASH. TIMES, Nov. 22, 2002, at A4 (“Republicans and Democrats alike see Hispanics as a swing-vote population in future elections, particularly since they are such a fast-increasing segment of voters”); Tamar Jacoby, *A Voting Bloc Without a Party*, N.Y. TIMES, Oct. 28, 2002, at A25. (“The courtship by both parties can only intensify in coming elections”); Barone, *Whose Majority?*, *supra* note 38 (stating that

Latinos vote differently in different places, depending on where they came from and the politics they encountered in different parts of America. If no Latinos had voted in America, George W. Bush would have won a popular-vote plurality; but if no Latinos had voted in Florida, Al Gore would be president.)

Gore presidential contest.<sup>45</sup> But Republican analysts counter that this vote is very much in play, and is winnable by the right appeals.<sup>46</sup> Reportedly, Bush has directed the Republican National Committee to make inroads with Latina/o voters, as he views his reelection hinging on his ability to retain and increase his margin of thirty-five percent of Latina/o voters with which he won in 2000.<sup>47</sup> Interestingly, it is widely speculated the next U.S. Supreme Court appointment will be a Latina/o, in part because an “ethnically diverse” Supreme Court will appeal to the Latina/o electorate that President Bush believes he must capture for his reelection.<sup>48</sup>

The geographical dispersal of Latina/o settlement, their rapid increases, and their current perceived non-allegiance have made Latinas/os the focus of national strategies, even more so than the APIA vote. Eighty percent of all Latinas/os reside in nine “swing states,” which can decide a presidential election: California (31%), Florida (8%), Texas (19%), Illinois (4%), New York (8%), Arizona (4%), New Jersey (3%), New Mexico (2%), and Colorado (2%).<sup>49</sup> In Florida, Latinas/os represent the largest minority group, numbering close to 2.7 million or 16.8% of the total

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<sup>45</sup> JOHN B. JUDIS & RUY TEIXEIRA, *THE EMERGING DEMOCRATIC MAJORITY* (2002). Professor Terry Smith has suggested that African Americans might contemplate exit from an unsatisfactory two party system, but Supreme Court case law has undercut the possibility of such exit strategy. See Smith, *A Black Party*, *supra* note 19, at 70-72.

<sup>46</sup> Barone, *Whose Majority?*, *supra* note 38. “Why do liberal analysts, and many others, lump together Blacks, Latinos, and Asians—so many different peoples, with such different experiences and heritages?” *Id.* The point is, Latinos are never going to be anything like Blacks electorally. They will not be a 9-1 Democratic bloc. They will be voters for whom both parties will compete vigorously, with different proclivities in different states. And what will happen if George W. Bush appoints a Latino chief justice of the United States?

<sup>47</sup> Adam Segal, *Hispanic Voters Leave Imprint on 2001 Elections*, *JOHNS HOPKINS J. OF AM. POL.* (Feb. 2002), available at [http://www.wcjournal.org/hispanic\\_voters.htm](http://www.wcjournal.org/hispanic_voters.htm) (stating “President George W. Bush’s courting of the Hispanic community has increased in the year since his election. While Bush won a larger portion of the community’s vote nationally in 2000 than previous Republicans including his father, re-election could hinge on greater support from this community.”); Jacoby, *supra* note 44 (Bush carried 35% of the Latina/o vote compared to only 9% of African American voters.).

<sup>48</sup> Neil A. Lewis, *Expecting a Vacancy, Bush Aides Weigh Supreme Court Contenders*, *N.Y. TIMES*, Dec. 27, 2002, at A1.

<sup>49</sup> See Bureau of Census, *The Hispanic Population: Census 2000 Brief*, T.2 (May 2001) available at <http://www.census.gov/prod2001pubs/c2kbr01-3.pdf>.

Florida population.<sup>50</sup> In California, Latinas/os will represent the second most significant voting block.<sup>51</sup> The 2000 Census shows that Latinas/os have made aggressive gains in states outside of the Treaty of Guadalupe: North Carolina (393%), Arkansas (337%), and Tennessee (278%).<sup>52</sup> All midwestern states at least doubled the size of the Latina/o population.<sup>53</sup> Southwest and western states continue to show large numerical increases, particularly in Nevada, Arizona, and Utah.<sup>54</sup> There is no reason not to expect these current hyper-growth rates in non-Treaty of Guadalupe states to continue, as the factors that are drawing Latina/o settlement will continue into the near future.<sup>55</sup>

By comparison APIAs are more regionally concentrated, as eighty percent of all APIAs live in five solidly Democratic states: Hawaii (58% is APIA), along the west coast—California (12%) and Washington (7%), and on the east coast—New York (6%) and New Jersey (6%).<sup>56</sup> APIAs outside of Hawaii are residentially dispersed, which means that it is more difficult to identify districts where the APIA vote would dominate.<sup>57</sup> This difference in dispersal and residential concentration makes the APIA vote appear as less of a cohesive voting block and may explain why

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<sup>50</sup> Southwest Voter Registration Project, *SVREP's and PRLDEF's Redistricting Plan*, available at <http://www.svrep.org/redistricting.html>.

<sup>51</sup> Jack Citrin & Benjamin Highton, *How Race, Ethnicity and Immigration Shape the California Electorate*, CAL. J. OF THE PUB. POLICY INST. OF CAL. (Dec. 2002). The authors predict that Whites will continue to be the majority of the electorate, even though Latina/o population will outpace those of Whites in California. “[F]or every Latino who casts a ballot in 2040, there will be two Whites.” Jack Citrin & Benjamin Highton, *When the Sleeping Giant is Awake*, available at <http://www.ppic.org/main/commentary.asp?I=261> (commenting on the conclusion made by Citrin & Highton in their article, *How Race, Ethnicity and Immigration Shape the California Electorate*).

<sup>52</sup> See U.S. Census Bureau, *Demographic Profiles 2000* (2000), available at <http://censtats.census.gov/cgi-bin/pct/pctProfile.pl>.

<sup>53</sup> “Kansas’ Latina/o population doubled from 93,670 in 1990 to 188,252 in 2000 (100%); Nebraska’s Latino population grew from 36,969 to 94,425 (155%); Iowa’s population grew from 32,647 to 82,473 (152%); and Missouri’s Latinas/os doubled from 61,702 in 1990 to 118,592 in 2000 (92%).” Sylvia R. Lazos Vargas, *The “Latina/o-ization” of the Midwest: Cambio De Colores (Change of Colors) as Agromaquilas Expand into the Heartland*, 13 LA RAZA L.J. 343 (2002) (citing Census data).

<sup>54</sup> *The Hispanic Population: Census 2000 Brief*, *supra* note 49.

<sup>55</sup> See Lazos Vargas, *supra* note 53 (noting that the Latina/o immigrants are arriving because of plentiful jobs and settling outside of the Treaty states because they find other states to have living conditions that they find desirable).

<sup>56</sup> *Asian Population*, *supra* note 22.

<sup>57</sup> Kim Geron & James S. Lai, *Beyond Symbolic Representation: A Comparison of the Electoral Pathways and Policy Priorities of Asian American and Latino Elected Officials*, 9 ASIAN L.J. 41, 48 (2002).

APIAs are getting less attention as a potential electorate at a national level.<sup>58</sup>

Merchants of the minority vote<sup>59</sup> have been hard at work making arguments that minorities are relevant in two-party, winner take all, electoral politics. The Tomás Rivera Policy Institute reported that Latina/o voters were growing most rapidly in Southern California with 400,000 new Latina/o voters added to the rolls since 1996.<sup>60</sup> The William C. Velazquez Institute argued that Latina/o voter turnout in the 2002 elections in Texas was high with eighty-nine percent voting for Tony Sanchez.<sup>61</sup> National Association of Latino Elected and Appointed Officials (NALEO) suggested that the Latina/o vote made a difference in the runs for Congress in New Mexico, Nevada, and Colorado.<sup>62</sup> The Pew Hispanic Center's recent report on the Latina/o electorate concludes that Latinas/os are "emerging as a distinct presence on the political landscape."<sup>63</sup> Similarly, the National Asian Pacific American Legal Consortium (NAPALC) in Washington D.C. reported high turnout rates among APIA voters in California.<sup>64</sup> Groups such as MALDEF, the Southwest Voter Registration Project, the Puerto Rican Legal Defense and Education

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<sup>58</sup> The APIA vote is significant in states where APIAs are concentrated. *See, e.g.,* Aoki, *supra* note 19 (discussing the influence of the APIA vote in Monterey Park, California).

<sup>59</sup> *Cf.* DERRICK A. BELL, *FACES AT THE BOTTOM OF THE WELL* (1992) (describing the role of the merchant minority).

<sup>60</sup> *See* Tomás Rivera Policy Institute, *Presidential Politics & Voter Turnout*, available at <http://www.trpi.org/politics.html>.

<sup>61</sup> *See* Rebeca Rodriguez, *Hispanic Voting Profile Disputed*, SAN ANTONIO EXPRESS NEWS, Nov. 9, 2002, at 1B (reporting that the William C. Velazquez Institute is arguing that Latino voter turnout was high and eighty-nine percent voted for contender Tony Sanchez, while Republican pollsters report that only sixty-five percent voted for Sanchez).

<sup>62</sup> *See* Press Release, Latinos Capture Key Elected Offices (Nov. 6, 2002) available at [http://www.nalco.org/press\\_releases/latino\\_capture\\_key\\_elected\\_offices.pdf](http://www.nalco.org/press_releases/latino_capture_key_elected_offices.pdf) (suggesting that Latino vote would make a difference in the runs for congressional district in New Mexico, Nevada and Colorado and might determine the balance or power in Congress). *But see* William Schneider, *The Hispanic Power Outage*, Nat'l J., Dec. 7, 2002 (quoting political consultant Sergio Bendixen as stating that Latino turnout was down in California, Florida, and Colorado), available at <http://www.puertorico-herald.org/issues/2002/vol6n51/HispPowerOutage-en.shtml>.

<sup>63</sup> Pew Hispanic Center/Kaiser Family Foundation, National Survey of Latinos: The Latino Electorate (Oct. 2002) (available at <http://www.pewhispanic.org/page.jsp?page=report> [hereinafter *Latino Electorate*]).

<sup>64</sup> May Chow, *Exit Polls Show APA Dems and GOPs Equal in Southern California*, ASIAN WEEK, Nov. 29-Dec. 5, 2002, available at [http://www.asianweek.com/2002\\_11\\_29/bay\\_polls.html](http://www.asianweek.com/2002_11_29/bay_polls.html).

Fund, and the Hispanic Coalition on Reapportionment, among many others, lobbied and litigated to shape how state representative and congressional district boundary lines were drawn, which resulted in increased opportunities for Latinos to be elected to state and federal offices in many states.

In the 2002 campaign, Republican politicians assiduously courted the Latina/o vote.<sup>65</sup> The Republican party alone spent sixteen million, and both parties spent twenty million dollars in ads pitched to Latinas/os.<sup>66</sup> Latina/o media advertisers advised the party bosses that “feel good” messages rather than attack ads were more appropriate for the ethnic vote, and according to a study, nine out of ten ads pitched at Latinas/os in the 2002 ad campaign were positive.<sup>67</sup> The Republican party has been producing a TV news magazine, a half-hour program entitled *Abriendo Caminos*, which airs in Albuquerque, Denver, Fresno, Miami, Las Vegas, and Orlando, touting the Republican agenda and President Bush.<sup>68</sup> The Bush brothers campaign with Spanish snippets and pitches to their “amigos,” salsa and mariachi music.<sup>69</sup> They visibly court Latina/o community leaders.<sup>70</sup> Both are personally popular within the Latina/o community, and view the Latina/o vote as key to their electoral victories.<sup>71</sup>

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<sup>65</sup> Associated Press, Jonathan D. Salant, *GOP Aggressively Seeks Hispanic Vote* (Oct. 3, 2002), available at [http://www.como.org/gop\\_aggressively\\_seeks\\_hispanic\\_vote.htm](http://www.como.org/gop_aggressively_seeks_hispanic_vote.htm); Chuck Raasch, *Impact of growing Hispanic vote may be seen mostly in governor's races*, USA TODAY, Aug. 26, 2002; Deborah Kong, *Latino voters resist party loyalty; activists call for more diverse Democratic leadership*, LA PRENSA, Nov. 13, 2002, at 3, available at <http://laprensatoledo.com/PDF/Nov.%2013.pdf>.

<sup>66</sup> Adam Segal, *More Than \$16 Million Was Spent in 2002 on Spanish-Language Political Television Advertising, Setting Election-Year Record*, JOHNS HOPKINS J. OF AM. POL. (Nov 2002), available at <http://www.wjjournal.org/FinalSpanishTV.htm>.

<sup>67</sup> See *id.* (reporting that nine out of ten ads pitched to Latinas/os were positive).

<sup>68</sup> See Salant, *supra* note 65.

<sup>69</sup> See, e.g., M.E. Sprengelmeyer, *Playing 'mariachi politics'; Democrat chairman criticizes Bush, Calls Tancredo 'Extremist,'* ROCKY MOUNTAIN NEWS, Oct. 10, 2002, at 5A (reporting that Terry Maucaliffe (quoting Rep. Tom Tancredo (R-Col.)) accused President Bush of “mariachi politics” when Bush invited Hispanic leaders to the White House for a Hispanic Heritage Month event and peppered his remarks with Spanish); Associated Press, *Bush dances salsa and McBride claps to gospel at campaign stops* (Oct. 6, 2002), available at [http://www.firstcoastnews.com/politics/articles/2002-10-06/bush\\_mcbride.asp](http://www.firstcoastnews.com/politics/articles/2002-10-06/bush_mcbride.asp).

<sup>70</sup> A recent press report, for example, ventured that Bush increasingly wanted to be seen with Latin American Presidents, like Vicente Fox, in order to improve his standing and that of the Republican party with Latino voters. Andres Oppenheimer, *Bush's Latin American Trip Really aimed at US Latin Voters*, MIAMI HERALD, Mar. 22, 2002, at 5A.

<sup>71</sup> María T. Padilla, *Hispanics Get Involved on Election Day*, ORLANDO SENTI-

Recent political events indicate even more so that the major parties see their electoral victories as tied in part to their success in wooing the Latina/o and other minorities. In the recent Trent Lott controversy, the Bush White House was given credit for catapulting Lott quickly. Why? The Washington wisdom was that it was important to Bush to continue to remake the image of Republicans as minority friendly.<sup>72</sup>

*B. Latinas/os and APIAs: The Potential Electorate*

Latinas/os and APIAs are influential as *potential* electorates because of two factors: (1) Up to ten million Latinas/os and APIAs will become voters within the next decade and one-half; and, (2) Their party affiliation is not yet set.

*1. Crouching Jaguar, Hidden Dragon: The Soon-to-be Latina/o and APIA Voter*

The Latina/o and APIA vote is being valued more than before because much of this population currently cannot vote, but will be in a position to cast a ballot within the next decade and a half. The number of potential voters that could come on-line within the next decade and a half is up to seven million. As discussed below, this calculation is based on the present number of noncitizens and the proportion who eventually naturalize.<sup>73</sup>

Becoming a citizen and registering are prerequisites in every state to being able to vote in state and national elections. Upwards of fifty percent of Latina/o foreign-born residents who remain in the United States fifteen or more years become

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NEL, Nov. 13, 2002, at B1 (reporting that Gov. Jeb Bush sprinted to the finish line with sixty percent of the Hispanic vote, because he had worked "the Hispanic vote hard," and concluding that "Republicans are succeeding at wooing non-Cuban Hispanic voters."). See also Mark Schlueb and Kelly Brewington, *Bush wins Hispanic support; McBride fails to woo black voters*, ORLANDO SENTINEL, Nov. 7, 2002, at A1 (reporting that Jeb Bush won in all majority Latino/a precincts in Florida, including Central Florida where Puerto Ricans, Dominicans and Central Americans dominate); see also Dinan, *supra* note 44.

<sup>72</sup> Editorial, *Fire Trent Lott*, N.Y. TIMES, Dec. 12, 2002, at A38:

No one has put more effort than George W. Bush into ending the image of the Republican Party as a whites-only haven. For all the disagreement that many African-Americans have with his policies, few can doubt Mr. Bush's commitment to a multiracial America. But unless the president wants to spend his next campaign explaining the majority leader's behavior over and over, he should urge Senate Republicans to get somebody else for the job.

<sup>73</sup> See discussion *infra* note 74 & accompanying text.

U.S. citizens by naturalization.<sup>74</sup> APIAs naturalize at greater rates than Latinas/os.<sup>75</sup> Latinas/os, because of settlement factors such as proximity to their home countries, historically have been from one-half to two-thirds less likely to naturalize than other groups, regardless of length of time residing in the United States.<sup>76</sup> But recent studies indicate that this historical reluctance to naturalize is changing. The Pew Hispanic Trust's poll data reports that two-thirds of Latinas/os who are not presently eligible to vote are planning to or are currently applying for citizenship.<sup>77</sup> This is a rate fifty percent higher than the historical census data. Louis De Sipio reports that Latina/o immigrants are increasingly developing a psychological attachment to the United States, which spurs them to want to naturalize.<sup>78</sup> In a national survey, more than ninety-five percent of Latino immigrants indicated that they wanted to make the United States their home,<sup>79</sup> which signals naturalization rates increasing in the future. Perhaps more importantly Latinos have reacted to anti-immigration

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<sup>74</sup> According to census data, 51.2% of foreign born who have resided in the United States 15 to 19 years naturalize, and 71.1% of those who reside 20 or more years naturalize. Bureau of Census, *Profile of Foreign Born Population in the United States: 2000* (Dec. 2001) at 21 Fig. 7-2, available at <http://www.census.gov/prod/2002pubs/p23-206.pdf>. [hereinafter *Census of Foreign Born*].

<sup>75</sup> *Id.* at 20.

<sup>76</sup> For the foreign born residing in the United States 5 to 9 years the naturalization rates for the at-large population is 13.2% as compared to 6.2% for Mexican and Central Americans; for length of residency of 10 to 14 years, the rates are 29.4% vs. 14.2%; for length of residency of 15 to 19 years, 51.2% vs. 28.9%; for length of residency of 20 years or more, 71% vs. 47%. *Id.* at Fig. 7-2, 20-21. Latina/o low rates of naturalization are related to their continuing national identity with their country of origin. Because they enjoy closer proximity, Latin American foreign nationals can easily return "home" and cement their ties with their country of origin. They can thus tell themselves that their stay in the United States is temporary, while their true home (their national identity) remains with their country of origin. ALEJANDRO PORTES & RUBÉN B. RUMBAUT, *IMMIGRANT AMERICA: A PORTRAIT* 17-20 (1990). *But see infra* notes 79-82 (noting trends towards increasing naturalization).

<sup>77</sup> See *Latino Electorate*, *supra* note 63, at Chart 4.

<sup>78</sup> Louis DeSipio, *The Engine of Latino Growth: Latin American Immigration and Settlement in the United States in PURSUING POWER: LATINOS AND THE POLITICAL SYSTEM* 314-42 (F. Chris Garcia ed., 1997).

<sup>79</sup> There are currently 12.8 million Latinas/os who are foreign born and 74.3% of them are noncitizens, equalling 9.5 million noncitizen Latinas/os. See *Profile of Foreign Born*, *supra* note 74, at 24 & Fig. 9-2. If naturalization rates hold, approximately half after 7.3 years will naturalize and 4.9 million will become U.S. citizens if they remain 15 to 19 years. In the case of APIAs, there are currently 6.7 million who are foreign born, *id.* at 24, and 61.3% are noncitizens, *id.* at Fig. 9.2, equalling 4.1 million noncitizen APIAs. If naturalization rates hold, 47.1% or two million will become U.S. citizens. *Id.* See also *infra* notes 145-48 & accompanying text.

movements, like Proposition 187 and the Newt Gingrich “Contract with America,” which cut back social benefits available to permanent resident aliens, by perceiving great incentives towards naturalization.<sup>80</sup>

Based on such figures, Latinas/os and APIAs are the single most important future voting block in the United States. In the next fifteen years, there are five million new *potential* Latina/o voters and two million potential APIA voters—if current trends hold.<sup>81</sup> If naturalization rates increase for Latinas/os, per a new upward trend that social scientists are reporting, then the number of future Latina/o and APIA voters could increase even more. By contrast, growth rates in the voting electorate of African Americans, white men, and white women are stable.<sup>82</sup>

Latinas/os and APIAs must still register in order to vote. Current data indicate that registration of Latinas/os and APIAs has been growing. Over the last eighteen years, Latinas/os have become the fastest growing voting group in Florida.<sup>83</sup> Commentators view Jeb Bush’s ability to win the newly registered Latina/o voter—Cuban, Puerto Rican, and Central American—as the key to his gubernatorial victory.<sup>84</sup> In southern California, Latinas/os are the fastest growing voting block. According to the Tomás Rivera Policy Institute, between 1994 and 1998, the Latina/o vote in Los Angeles County grew by over 100,000 votes, which amounted to an increase of nearly fifty percent in just four years.<sup>85</sup> Over the same period, the non-Latina/o vote grew by just ten percent.<sup>86</sup> In California during the last decade, Latina/o voters began the 1990s as nine percent of the voting population and grew to fourteen percent by 2000.<sup>87</sup>

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<sup>80</sup> See JUDIS & TEIXEIRA, *supra* note 45.

<sup>81</sup> *Id.* at 330 (reporting on the National Latino Immigrant Survey conducted in 1989-90).

<sup>82</sup> Harry P. Pachon, *Latino Politics in the Golden State: Ready for the 21st Century?*, in RACIAL AND ETHNIC POLITICS IN CALIFORNIA, VOL. II 419 (Michael B. Preston et al. eds., 1998).

<sup>83</sup> *SVREP’s and PRLDEF’s Redistricting Plan*, *supra* note 50 (reporting “[Latina/o] registration at 241.8% from ’80-’96 and, from ’82-’98, the Gubernatorial election cycle, Latino participation grew 251.2%.”).

<sup>84</sup> See *supra* note 71.

<sup>85</sup> Tomás Rivera Policy Institute, *supra* note 60 (reporting on TRPI/*La Opinion* Poll, 1/28/00). See also Citrin & Highton, *supra* note 51.

<sup>86</sup> Tomás Rivera Policy Institute, *supra* note 60.

<sup>87</sup> Citrin & Highton, *supra* note 51. This report notes that the *LA Times* exit poll for November 2002 reflected that Latinas/os made up only ten percent of the electorate in California in this last cycle.

Nevertheless, Latina/o registration lags by as much as fourteen and fifteen percentage points behind the registration rates for Whites.<sup>88</sup> This is due primarily to class and age demographic factors; the Latina/o population overall is more youthful, less well-off, and has a lower educational attainment than the general population.<sup>89</sup> These are all factors that influence voting behavior. When these factors are controlled in White and Latina/o populations, these two groups vote at the same rates.<sup>90</sup> Moreover, there is also evidence that “the current maze of laws and administrative procedures . . . suppresses voter turnout. . . .”<sup>91</sup> Institutional “unfriendly” factors disproportionately affect Latinas/os, a group which overall has lower levels of educational attainment and unfamiliarity with the English language than the population at large.<sup>92</sup>

Changing registration propensity, given class and age background, is something that the Latina/o civil rights groups have been fighting hard to change, but that still requires further efforts.<sup>93</sup> The Latina/o “backlash” to anti-immigration propositions in California and the anti-bilingual education initiatives in Massachusetts have spurred greater political activism.<sup>94</sup>

Both Democrats and Republicans are trying to make inroads as these voters come on-line. Experts agree that with each elec-

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<sup>88</sup> De la Garza & DeSipio, *supra* note 26, at 1500 (reporting on 1993 data); John A. Garcia & Carlos Arce, *Political Orientation and Behaviors: Trying to Make Sense Out of Attitudes and Participation*, in *LATINOS AND THE POLITICAL SYSTEM* (F. Chris Garcia ed., 1988); John A. Garcia, *Political Participation: Resources and Improvement Among Latinos in the American Political System*, in *PURSuing POWER*, *supra* note 78 (finding same based on 1988 data), at 64-65; RODNEY E. HERO, *LATINOS AND THE U.S. POLITICAL SYSTEM: TWO-TIERED PLURALISM* 56-64 (1992).

<sup>89</sup> See Melissa Therrien & Roberto R. Ramirez, U.S. Census Bureau, *The Hispanic Population in the United States: March 2002* (2001), available at <http://www.census.gov/population/socdemo/hispanic/p20-535/p20-535.pdf>.

<sup>90</sup> De la Garza & DeSipio, *supra* note 26, at 1503-04 (also reporting on other studies); Citrin & Highton, *supra* note 51 (reporting that Latinas/os in California register at higher rates than their white counterparts given class, noncitizenship and age factors, but nevertheless in the aggregate still fall behind white registration).

<sup>91</sup> HERO, *supra* note 88, at 63 (quoting Maria A. Calvo and Steven J. Rosenstone, Southwest Voter Research Institute, *Hispanic Political Participation* (1989)).

<sup>92</sup> *Id.* at 79; Therrien & Ramirez, *supra* note 89.

<sup>93</sup> See de la Garza & DeSipio, *supra* note 26, at 1506 (reporting that fifty-six percent of all Latina/o respondents who had been contacted by voting drives had registered but also noting that the vast majority of respondents had not been reached by registration efforts); HERO, *supra* note 88, at 71-78.

<sup>94</sup> See *supra* note 76-80; Cindy Rodriguez, *Activists Encouraged by Turnout of Latinas/os*, *BOSTON GLOBE*, Nov. 9, 2002, at A1 (reporting very high turnout in Massachusetts because of Unz-sponsored anti-bilingual education initiative).

toral cycle, Latinas/os and APIAs will see more campaign advertisements pitched in their own languages and through ethnic media.<sup>95</sup>

## 2. *Not Yet Committed to a Major Political Party*

Rodolfo de la Garza and Louis DeSipio note that partisan affiliation takes years to develop.<sup>96</sup> Recent immigrants, those who are not yet citizens, do not consistently vote Democratic or Republican. Similar results are being documented in the APIA community. National Asian Pacific American Legal Consortium reported that in Orange County, California, the APIA vote was evenly split among Democrats and Republicans, and increasingly California APIAs identify themselves as “independents.”<sup>97</sup> Among Latinas/os who are not yet registered and those who are planning on becoming U.S. citizens, the number of independents and Republicans is greater than the number of Democrats.<sup>98</sup> This reflects that recent Latina/o immigrants are more conservative on religious and social issues than native-born Latinas/os,<sup>99</sup> making recent immigrants’ positions on these issues closely aligned to Republican party policies. On the other hand, Latinas/os who have been in the United States for several generations have more secure party affiliations. Party propensity by national origin groups shows that Puerto Ricans, Dominicans, and Mexican Americans have mostly voted Democratic, while Cuban Americans have mostly voted Republican.<sup>100</sup>

Rather than being party affiliated, the Latina/o and APIA vote is increasingly tied to issues. The Pew Hispanic Trust’s poll data

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<sup>95</sup> See Segal, *supra* note 66.

<sup>96</sup> De la Garza & DeSipio, *supra* note 26.

<sup>97</sup> Chow, *supra* note 64.

<sup>98</sup> *Latino Electorate*, *supra* note 63, at Chart 11. Among Latinas/os who are U.S. citizens but not registered voters, 10% report being Republican and 32% report being Independents, as compared to 31% who report being Democrats. Among Latinas/os who are planning on becoming U.S. citizens, 14% report being Republican and 35% report being Independents, as compared to 22% who report being Democrats.

<sup>99</sup> *Id.* at Chart 14. The social issues that Latinas/os were polled on were abortion, gay and lesbian relationships, having children outside of marriage, and divorce. U.S. born Latinas/os were less conservative on these issues (from ten to fifteen percentage points), but still more conservative than Whites (from five to fifteen percentage points).

<sup>100</sup> *Id.* at Chart 5 (reporting that 66% of Dominicans, 52% of Puerto Ricans and 49% of Mexican Americans were registered as Democrats, while 54% of Cuban Americans were registered as Republicans).

shows what was already common knowledge within the Latina/o community that Latinas/os base their votes on substantive policy, and that the most important issues to Latinas/os are immigration, education, the economy, and health care.<sup>101</sup> The NAPALC reports that APIA voters were concerned with policies that might have possible negative impacts on the immigrant community.<sup>102</sup> Thus, indications are that Latinas/os and APIAs judge candidates by substantive political proposals and initiatives.

Immigration and language are two key policy areas that have done much to galvanize political consciousness among Latinas/os and APIAs. As a group, Latinas/os favor immigration policies that would open up family reunification with Latin America and would provide amnesty to current undocumented workers.<sup>103</sup> APIA exit polls in the recent California elections, for example, show that although the vote went with Governor Davis this time around, APIAs remain watchful of future policies regarding treatment of recent immigrants and on immigration issues generally.<sup>104</sup> Language issues are also very important. Latinas/os have opposed laws that would make it more difficult for children to maintain their cultural language (i.e., rapid English immersion programs), although overwhelmingly, recent immigrants indicate that they believe it is important to speak English in order to succeed in the United States.<sup>105</sup>

### C. “Salsa” Appeal or Anti-Subordination Politics?

Does being courted translate into new direction in policy initiatives designed to better the social and economic conditions of racial and ethnic minorities? This may be a glass half-empty, half-full answer.

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<sup>101</sup> When registered Latina/o voters were asked to name the two most important issues in determining their vote, the top issue was education (58%), followed by the economy (39%), health care (23%), and Social Security (20%). Among foreign born Latina/o voters, 68% said that education was the most important issue deciding their vote. *Id.* at 9. See also HERO, *supra* note 88, at 155-72 (listing immigration, education, health, housing, and language as the key substantive policy areas impacting Latinas/os).

<sup>102</sup> Chow, *supra* note 64.

<sup>103</sup> *Latino Electorate*, *supra* note 63, at Chart 21 (eighty-five percent favor amnesty and sixty-eight percent favor guest worker program).

<sup>104</sup> Chow, *supra* note 64.

<sup>105</sup> See Part IV *infra*. Kaiser Family Foundation & Pew Hispanic Center, 2002 National Survey of Latinos (Dec. 2002) at Chart 3.4 [hereinafter *2002 Pew Latina/o Survey*].

Studies have shown that Latinas/os wield remarkably little influence on policies at the national level. Using regression analysis, political scientists Rodney Hero and Caroline Tolbert concluded that there was “little or no Latino substantive representation” on the House of Representatives individual voting patterns.<sup>106</sup> The tenor of the conversation has changed, however, as the major parties are incorporating initiatives calculated to stand them in good stead with the Latina/o and APIA electorate.<sup>107</sup> During the pre-election months of September and October 2002, Senator Orrin Hatch (Rep.-Utah) championed the DREAM bill, legislation important to Latinas/os since it would allow noncitizen children of undocumented workers to go to college by making them eligible for in-state tuition and federal grants.<sup>108</sup> This bill went no further than being reported favorably out of the Senate Judiciary committee.<sup>109</sup> The Republican controlled Congress has not made the DREAM bill part of their 2003-04 legislative package. On the Democratic side of the ledger, 2004 Democratic Party Presidential candidate, Dick Gephardt, four weeks before the November 2002 elections, introduced an amnesty bill that would legalize the status of undocumented workers who had lived for five consecutive years and worked for two years in the United States.<sup>110</sup>

Republicans and Democrats accuse each other of engaging in platitudes and not offering substantive policies which are likely to be sustained. For example, Gephardt’s proposal was attacked as “a naked public relations stunt . . . to counteract the slide in

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<sup>106</sup> HERO, *supra* note 88, at 194-206 (concluding that Latina/o influence is mainly restricted to local politics and that the more national the political environment, the less likely Latinas/os would be influential); Rodney E. Hero & Caroline J. Tolbert, *Latinos and Substantive Representation in the U.S. House of Representatives: Direct, Indirect, or Nonexistent?*, in PURSUING POWER, *supra* note 78, at 265.

<sup>107</sup> Hero & Tolbert, *supra* note 106, at 268 (using voting scores published by the Southwest Voters Registration Instate to measure alignment with substantive Latina/o policy).

<sup>108</sup> Development, Relief and Education for Alien Minors Act (DREAM) S.1291, 107th Congress (2002).

<sup>109</sup> DREAM Bill Summary & Status S.1291, 107th Congress (2002), available at <http://thomas.loc.gov/cgi-bin/bdquery/D?d107:1.:temp/~bd0iCo:@@@L&summ2=m&1/bss/d107query.html/>.

<sup>110</sup> Sergio Bustos, *Top Dem’s Immigration Move Shakes Up House*, GANNETT NEWS SERVICE, Oct. 11, 2002, available at <http://www.latinobeat.net/html/101.402bi.htm>. Under Gephardt’s proposal, undocumented immigrants would undergo background checks and would need to prove they lived continuously in the United States for at least five years and worked for at least two.

their popularity with Hispanic voters.”<sup>111</sup> It is true that, in the past, minorities have not been able to steer substantive policy initiatives in Congress.<sup>112</sup> Only the future will tell whether the Republicans and Democrats will commit political capital to make substantive policy changes, such as the DREAM bill and amnesty program, that are wanted by most of the Latina/o and APIA communities and would move national politics beyond mere “salsa” appeal platitudes.

Some have suggested that the potential Latina/o and APIA electorate, which is highly sensitive to anti-immigration policies and anti-nativistic sentiments, might play a moderating influence.<sup>113</sup> Latina/o and APIA voters remain wary of major party candidates and their positions on immigration, because they understand that anti-nativistic sentiments stirred up by nativistic rhetoric easily spills over to hostility toward Latina/o and APIA U.S. citizens.<sup>114</sup> The guest worker program, which Mexico’s President Vicente Fox pushed; a new amnesty program for undocumented workers, which is supported by eighty-five percent of all Latinas/os;<sup>115</sup> and immigration family reunification reform, which impacts “mixed” families, those with citizen and noncitizen children or parents, perhaps had a chance of being part of the Bush legislative agenda pre-9/11, but no more. Instead, anti-immigration groups have become more prominent as they link anti-

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<sup>111</sup> *Id.*

<sup>112</sup> See *supra* note 107 and accompanying text. Cf. DAVID LUBLIN, THE PARADOX OF REPRESENTATION: RACIAL GERRYMANDERING AND MINORITY INTERESTS IN CONGRESS 99-124 (1997) (concluding that post Voting Rights Act 1980 and 1990 elections increased Latina/o and African American descriptive representation (elected representatives) in Congress but harmed substantive representation (policies) because racially drawn districts had made it more likely that conservative Republicans be elected in the south rather than moderate Democrats).

<sup>113</sup> Jacoby, *supra* note 44.

<sup>114</sup> Following the enactment of Proposition 187, the Los Angeles County Commission of Human Relations (CHIRLA) indicated an increase of 23.5% in hate crimes against Latinas/os. Nancy Cervantes et al., *Hate Unleashed: Los Angeles in the Aftermath of Proposition 187*, 17 CHICANO-LATINO L. REV. 1, 8 (1995). It concluded that:

[Proposition] 187 [has] transformed everyday life for Latinos of every status, including those born here and those whose ancestors had lived in the U.S. for generations. The climate of hostility resulted in discrimination in business establishments, increased police abuse, heightened conflict among neighbors, and an increase in hate crimes and hate speech against Latinos. . . . There is abundant evidence of anti-Asian hate activity. . . .

*Id.* at 9. See also Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A “Magic Mirror” Into the Heart of Darkness*, 73 IND. L.J. 1111 (1998).

<sup>115</sup> See *supra* note 90.

immigration initiatives to homeland security goals.<sup>116</sup> Mark Krikorian, Executive Director for the Center for Immigration Studies, argues that strict immigration enforcement must be part of the post-9/11 homeland security effort because “Islamic terrorists have penetrated every aspect of our immigration system.”<sup>117</sup> The White House’s concerns with reelection might be keeping at bay the more extreme anti-noncitizen and anti-immigrant proposals. There have been reports that the Bush White House reined in Ashcroft’s Justice Department on an aggressive initiative inviting local law enforcement to become part of the immigration enforcement network.<sup>118</sup> However, the Ashcroft proposal has not been taken off the table; the only “moderating influence” that the White House’s concern with the Latina/o and APIA vote might have played is that the Ashcroft initiative has been downplayed. While it is true that the major parties’ perceived importance of the Latina/o and APIA vote has played *some* moderating influence, it is difficult to take comfort from knowing that only extreme actions have been halted while no progress has been made on so many other fronts calling for equity and justice reforms.

#### D. *Going Beyond the Black-White Paradigm*

In embarking on creating a meaningful scholarship in the electoral context, LatCrit must construct a concept of race that avoids the pitfalls of falling into Black-White bipolar analyses. Mainstream descriptions of APIA and Latina/o voters—generalizations about their characteristics as voter groups—often fall into the bipolar logic of the Black-White paradigm. These ascriptions and simplistic generalizations parallel the “model minority” pigeon-holing that Asian Americans have experienced in the context of the affirmative action debate. Following are three examples of these simplistic, racialized, generalizations.

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<sup>116</sup> See Marcelo Ballve, *Will Immigration Reform Help the U.S. Fight Terrorism?*, PACIFIC NEWS SERVICE, Oct. 31, 2002. Ballve reports that immigration expert Wayne Cornelius commented that 9/11 was a “godsend” to anti-immigrant groups; “they’ve been resuscitated,” available at <http://www.alternet.org/story.html?StoryID=14433>.

<sup>117</sup> Mark Krikorian, *Immigration Inaction*, NAT’L REV. ONLINE, Mar. 11, 2002, available at <http://www.nationalreviewonline.com/comment/comment-Krikorian031102.shtml>. Krikorian has also been quoted as saying that “[i]mmigrant communities provide the cover for bad guys from overseas.” Ballve, *supra* note 116.

<sup>118</sup> Eric Schmitt, *Administration Split on Local Role in Terror Fight*, N.Y. TIMES, Apr. 29, 2002, at A1.

### 1. *Ethnics not Racial Groups*

Professor Peter Schuck, a respected immigration scholar who teaches at Yale, commented on Latina/o and APIA voting power:

[A]liens and their ethnic compatriots who are citizens are concentrated in a handful of states. . . . In at least some of those states, such as California, Texas, and New York, these ethnic groups, sometimes even including the disenfranchised aliens themselves, exert considerable influence upon local, state, congressional, and even presidential politics.<sup>119</sup>

It is hard to understand on what basis Schuck asserts that Latinas/os and APIAs “exert considerable [electoral and political] influence,” since he cites no authority and the data indicates the contrary. The fact alone that Proposition 187 passed in California should be sufficient to show how specious Professor Schuck’s remark is. The conceptual heavy lifting for this comment comes with a deft rhetorical move, his categorizing Latinas/os and APIAs as “ethnic” rather than racial groups. With this re-labeling, Professor Schuck waves off the history of Jim Crow practices that Latinas/os and APIAs suffered in the very states where Professor Schuck claims their “ethnic” vote wields “considerable influence.” Congress extended the Voting Rights Act to Latinas/os and APIAs premised on its factual findings that Jim Crow practices against Latinas/os in Texas and APIAs in California were extensive, and required legal protections.<sup>120</sup> By classifying Latinas/os and APIAs as ethnic groups, Professor Schuck instead recalls the success of the Irish “becoming White” by capturing political machinery in major urban centers, like New York and Chicago, within one generation of their settlement during the Great Immigration of 1880-1892.<sup>121</sup> However, Irish Americans never suffered through legalized Jim Crow, and their success in making inroads to political power in urban centers at the turn of the century cannot be replicated given modern electoral

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<sup>119</sup> Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 23 (1984).

<sup>120</sup> De la Garza & DeSipio, *supra* note 26, at 1492-93; Robert Beischetto, David R. Richards, Chandler Davidson & Berard Grofman, *Texas, in QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT 1965-1990*, 235-37, 243 (Chandler Davidson & Bernard Grofman eds., 1994).

<sup>121</sup> See NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* (1995); DAVID R. ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* (1991).

structures.<sup>122</sup>

Professor Schuck's off-hand comment that the vote of "ethnic compatriots who are citizens" can offset noncitizen discrimination also misunderstands the complex relationship between Latina/o and APIA citizens and noncitizens. There is no identity of political interests between these two groups, and increasingly there is evidence of deep cleavages between the two.<sup>123</sup> Consolidating such diverse groups and homogenizing them into a monolithic coalition through rhetorical labeling is a form of essentializing that minimizes the American-ness of "ethnic compatriots," and erases the subordination of Latina/o noncitizens. Moreover, rhetorical labeling dismisses serious scholarly arguments that Latina/o and APIA noncitizens should be viewed as an insular minority.<sup>124</sup>

The manipulation of race versus ethnic ascriptions "whitens" Latinas/os and APIAs. Racial discrimination, structural subordination, and unconscious transactional stereotyping are erased. The ethnic ascription causes Latinas/os and APIAs to disappear in the context of discussions about Jim Crow laws.<sup>125</sup> They are converted from racial minorities worthy of more exacting judicial review under the theory of *Carolene Products* to just another interest group that is struggling for political power and influence and thus worthy of only rational basis scrutiny in judicial review.<sup>126</sup> The model minority rhetoric makes it possible for legal scholars and courts to minimize, and even ignore, Latinas/os and APIAs' civil rights and anti-subordination claims.

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<sup>122</sup> Cf. Deborah C. Malamud, *The Jew Taboo: Jewish Difference and the Affirmative Action Debate*, 59 OHIO ST L.J. 915 (1998) (making these points with respect to African American vis a vis Jews).

<sup>123</sup> See *Latino Electorate*, *supra* note 63 (noting cleavages in party affiliation, attitudes toward social sigues, party affiliation, etc); DAVID G. GUTIÉRREZ, WALLS AND MIRRORS: MEXICAN AMERICANS, MEXICAN IMMIGRANTS, AND THE POLITICS OF ETHNICITY 217 (1995) (noting fragmentation regarding support of Proposition 187).

<sup>124</sup> See discussion *infra* Pt. II.

<sup>125</sup> Pat Chew describes how Asian Americans "have been victims of lynching, race riots, and slavery," methods of subjugation that are widely known to have been used to oppress Blacks. Pat K. Chew, *Asian Americans: The "Reticent" Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 9 (1994); Carbado, *supra* note 20, at 1310-11.

<sup>126</sup> This is one way to understand Scalia's critique of the affirmative action set aside program invalidated in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520-38 (Scalia, J., concurring in judgment); see also Sylvia R. Lazos Vargas, *Deconstructing Homo[geneous] Americanus: The White Ethnic Immigrant Narrative and Its Exclusionary Effect*, 72 TULANE L. REV. 1493, 1529-30 (1998) (discussing Scalia concurrence) [hereinafter Lazos Vargas, *White Ethnic Immigrant Narrative*].

## 2. Racial Hierarchy and the White Ethnic Narrative

Michael Barone, a leading conservative columnist, recently criticized “liberal analysts . . . [who] lump together Blacks, Latinos, and Asians.” He explains that this occurs:

Because there is an underlying assumption that this is still a country full of white racists and that people whom we classify as being of a different race will share a common experience of racial discrimination. But this is not a racist country anymore, and the discrimination blacks and Latinos most commonly encounter is discrimination in their favor, thanks to racial quotas and preferences and to employers’ preferences for hardworking Latino and high-talent Asian workers.<sup>127</sup>

In this comment Barone flat out denies that there is any discrimination or racism in the United States, in spite of extensive social science findings to the contrary. In fact the only discrimination Barone believes is experienced in the United States is suffered by “innocent whites” who must withstand affirmative action.<sup>128</sup> Barone is deploying the *potential* electoral power that he ascribes to Latina/o and APIA voters to reinvigorate the claim of white racial innocence. Because Latinas/os and APIAs *may* exercise some erstwhile electoral power, “this is not a racist country anymore.”<sup>129</sup> Latinas/os and APIAs are not victims of any past or current racism, but instead are empowered because Latinas/os are “hardworking”<sup>130</sup> (But are they smart?) and APIAs are “high-talent”<sup>131</sup> (But are they socially clued in?). Racism exists only because “[White] liberal analysts”<sup>132</sup> want it to exist, not because it actually happens. Individuals suffer *individual* discrimination; it is a myth that “people whom we classify as being of a different race . . . share a common experience of racial discrimination.”<sup>133</sup> Under this logic, group claims regarding dis-

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<sup>127</sup> Barone, *Whose Majority?*, *supra* note 38.

<sup>128</sup> Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297 (1990) (explaining that the affirmative action debate is framed in the rhetoric of “white innocence” and that this avoids dealing with problems of unconscious racism); STEPHANIE M. WILDMAN ET AL., *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* (1996) (stating that ability to avoid consequences of racial power is a form of White privilege); Lazos Vargas, *White Ethnic Immigrant Narrative*, *supra* note 126, 1522-43 (describing how the White ethnic immigrant narrative is deployed in the affirmative action debate).

<sup>129</sup> Barone, *Whose Majority?*, *supra* note 38.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

crimination or lack of meaningful representation under the Voting Rights Act, should be invalid.

Barone's compliment to Latinas/os and APIAs as "hardworking" and "high-talent,"<sup>134</sup> although positive, recalls stereotypes, essentializes and positions Asian Americans and Latinas/os in the ambiguous ground of not being White, yet not being Black.<sup>135</sup> This narrative defines race and racial identity oppositionally. Latinas/os and APIAs are "ethnic" groups versus the "racial" group that African Americans undoubtedly compose. As opposed to Blacks, Latinas/os and APIAs do not vote monolithically or single-mindedly as Democrats. This positions Latinas/os and APIAs outside of a racial dialogue. As Professor Bob Chang has described, this is a "complimentary facade . . . [that] works a dual harm by (1) denying the existence of present-day discrimination against Asian Americans and the present-day effects of past discrimination, and (2) legitimizing the oppression of other racial minorities and poor Whites."<sup>136</sup> The immigrant narrative as applied to Latinas/os and APIAs brings them inside the value system of the white ethnic narrative, the dominant cultural narrative in our country,<sup>137</sup> but also hides some hard truths about racial politics and political inequities.

### 3. *Model Minorities: Stereotyping and Essentializing*

Feng, Aoki, and Ikegami's contribution expressly rejects any model minority stereotyping that might be ascribed to the activist efforts of the Coalition of Asian Pacific Americans for Fair Redistricting (CAPAFR) in the 2000 California redistricting effort,<sup>138</sup> which they document in their Symposium contribution. Their article captures a moment when California assemblyman John Longville complimented the APIA community's efforts in

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<sup>134</sup> *Id.*

<sup>135</sup> Lisa C. Ikemoto, *Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed "Los Angeles,"* 66 S. CAL. L. REV. 1581 (1993); Neil Gotanda, *Multiculturalism and Racial Stratification*, in *MAP-PING MULTICULTURALISM* 238, 246 (Avery F. Gordon & Christopher Newfield eds., 1996); Janine Young Kim, *Are Asians Black?*, 108 YALE L.J. 2385 (1999); William R. Tamayo, *When the "Coloreds" Are Neither Black nor Citizens: The United States Civil Rights Movement and Global Migration*, 2 ASIAN L.J. 1, 7-9 (1995); Frank H. Wu, *supra* note 20.

<sup>136</sup> Chang, *supra* note 20, at 1267.

<sup>137</sup> Lazos Vargas, *White Immigrant Narrative*, *supra* note 126.

<sup>138</sup> Feng, Aoki & Ikegami, *supra* note 3.

California's redistricting battle, which subtly alludes to APIAs as a model minority:

I must commend you for the extraordinary job that CAPAFR has done . . . there is no individual or organization that has come forward with such an extraordinarily well done amount of research and clear obvious efforts to reach out and work out problems . . . I want to commend you for the extraordinary effort. . . . Recognizing that lawyers will see different things, it's obvious you've done some extraordinary work. . . . We greatly appreciate the work you've done.<sup>139</sup>

CAPAFR might well have done extraordinary work in its political redistricting efforts. I am not disputing this. What I find striking about Longville's well-meaning statement is that in a 100-word compliment, Longville used the term "extraordinary" four times and "job," "work," or "effort" seven times. His choice of words conveys that CAPAFR and APIAs are extraordinarily hard workers who are conciliatory, not confrontative. These terms recall Asian American stereotypes that have in other conversations positioned them as a model minority.

Essentializing Asian Americans as helpful, hardworking, and consensus driven is a form of racial positioning. What this complimentary stereotyping leaves unsaid is that Asian Americans are more like Whites because of essentialized qualities, for Longville, "extraordinar[il]y" well-prepared and hard working, and for Barone, "high talent." The unstated comparison might be to African Americans, whose essentialized oppositional qualities in this context might be lazy and overly confrontative. This unstated comparison works only because "everyone knows" the stereotypes that are ascribed to African Americans. Hence, essentializing and over-complimentary rhetoric does the work of whitening Asian Americans. Placing Asian Americans as a group close to Whites, however, does not necessarily mean that they are beyond or outside of the Black-White paradigm, only that by placing them in proximity to White values and the meta-White ethnic narrative of hard work and success, African Americans and other groups are less worthy (i.e., unable to succeed by the rules that apply to all and that Asian Americans have been able to do well by playing by the rules).<sup>140</sup>

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<sup>139</sup> *Id.* at n.166 (quoting Feng and Ichinose).

<sup>140</sup> See Lazos Vargas, *White Immigrant Narrative*, *supra* note 126, at 1539-43 (discussing use of ethnic narrative in constructing white racial innocence); Ikemoto, *supra* note 135 (discussing racial positioning).

In sum, no context can escape conscious and unconscious race talk. The electoral context is no exception. These critiques point to the hard work that LatCrit faces in forming a rigorous scholarship around voting rights and electoral politics. Building a theoretical framework that moves beyond the Black-White paradigm<sup>141</sup> in the context of electoral process and voting rights might entail the following.

1. *Reconstructing Jim Crow*. As the civil rights era increasingly becomes a distant memory to young Americans, it becomes increasingly important for LatCrit scholars to document the Jim Crow practices against Latinas/os and APIAs in the electoral context.<sup>142</sup> As Juan Perea, Angela Harris, Richard Delgado, and Stephanie Wildman suggest in their *Race and Races* textbook,<sup>143</sup> documenting historical racist practices is a necessary project in order to find out just what is “looking to the bottom.” The Black-White paradigm erases Jim Crow practices against Latinas/os and APIAs.<sup>144</sup> However, historical research re-establishes historical and structural racism against Latinas/os and APIAs.

2. *Deconstructing the Model Minority Myth*. The ephemeral potential power of the Latina/o and APIA electorate has become a new political wisdom that is working mischief at various levels. From a racial analysis perspective, LatCrit must engage in the same activism that APIA crit colleagues, Bob Chang, Lisa Ikemoto, Frank Wu, Pat Chew, and Neil Gotanda have engaged in: publicly and vigorously critiquing the model minority myth as applied to APIAs in the affirmative action context.<sup>145</sup> Such rhetoric legitimizes and redeploys (thus re-legitimizing for modern

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<sup>141</sup> See also Carbado, *supra* note 20, at 1310-11 (suggesting possible avenues for the continuing development of the critique of the Black-White paradigm).

<sup>142</sup> Professors de la Garza and DeSipio note that the legislative history for the Voting Rights Act amendments consist of anecdotal testimony of Jim Crow practices suffered by Mexican Americans in Texas, and does not go beyond that. De la Garza & DeSipio, *supra* note 26, at 1492-93. Chicano and LatCrit scholarship have documented Jim Crow practices against Mexican Americans in Texas. See, e.g., David Montejano, *ANGLOS AND MEXICANS IN THE MAKING OF TEXAS, 1836-1986* (1987) (documenting social, political, and *de jure* White Supremacist practices); Jose Roberto Juarez, Jr., *The American Traditions of Language Rights: The Forgotten Right to Government in a “Known Tongue,”* 13 *LAW & INEQ.* 443 (1995) (documenting how Tejanos’ language rights were undermined in Anglo controlled Texas).

<sup>143</sup> See JUAN F. PEREA ET AL., *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* (2000).

<sup>144</sup> See Chew, *supra* note 125.

<sup>145</sup> See sources cited *supra* notes 111-12.

ears) White supremacist narratives. Latinas/os are not accustomed to being treated as a model minority. However, public commentary on the *potential* Latina/o electorate needs to be debunked as part of the LatCrit project.

From a civil rights perspective, the small victories gained by Latina/o and APIA political activism are being turned into “proof” that civil rights remedies for Latinas/os and APIsAs are no longer pressing or necessary.<sup>146</sup> The recent Voting Rights Act case, *Cano v. Davis*,<sup>147</sup> denied relief to the Mexican American Legal Defense and Educational Fund’s (MALDEF) claim that the new California districting plan underrepresented Latinas/os.<sup>148</sup> The court was persuaded that the requirements of the Voting Rights Act were not met because there has been increased representation of Latinas/os in California.<sup>149</sup> The court also found that the new districts were “remarkably diverse multi-racial and multi-ethnic.”<sup>150</sup>

The court seemed to view the small gains in Latina/o representation as evidence that further remedies under civil rights laws were not warranted. The court never referred to the higher (and more ephemeral) standard of *Reynolds v. Sims*,<sup>151</sup> whether Latinas/os were “meaningful[ly] represent[ed].” As Johnson, Feng, Aoki, and Ikegami note, *Cano v. Davis* raises important and pressing issues to which LatCrit scholarship must respond.<sup>152</sup>

3. *What’s in a name?* Pan-racial identities like Latina/o and APIA are a necessary shorthand that rhetorically concentrates claims for civil rights activism,<sup>153</sup> but nevertheless obscure the extent to which each individual group is “raced” or subordinated in the context of voting rights issues. A central tenet in LatCrit racial theory is its commitment to anti-essentialism. Fully explor-

<sup>146</sup> See discussion by Johnson, *supra* note 4; Feng, Aoki & Ikegami, *supra* note 3.

<sup>147</sup> 211 F.Supp.2d 1208 (2002).

<sup>148</sup> Mexican-American Legal Defense and Educational Fund challenged two districts, Congressional District 28, located in the San Fernando Valley of Los Angeles County, and State Senate District 27, comprised of Southeast Los Angeles County and Long Beach. See discussion by Feng, Aoki & Ikegami, *supra* note 3, & Part III *infra*; Johnson, *Latina/os and the Political Process*, *supra* note 4.

<sup>149</sup> 211 F.Supp.2d at 1235 (“SD 27 is a district in which Latino candidates and other candidates preferred by Latino voters can win. . . . [A]n exercise of negative voting power by the white majority . . . is wholly absent here.”).

<sup>150</sup> *Id.* at 1230 (finding that a *Shaw v. Reno* claim could not be met).

<sup>151</sup> 377 U.S. 533 (1964).

<sup>152</sup> See discussion by Johnson, *supra* note 4; Feng, Aoki & Ikegami, *supra* note 3.

<sup>153</sup> See generally Iijima, *supra* note 20.

ing how class, gender, sexual orientation, and race interweave and cross-construct racialization has been a key tool to balance the essentialist tendencies.

From a civil rights perspective, lumping various Latina/o and APIA subgroups into the pan-racial identity obscures valid civil rights claims. For example, in South Florida, Central Americans and Puerto Ricans have managed to elect only one representative to the state legislature. Until this year, Latina/o representation in Florida was all Cuban American.<sup>154</sup> Yet it cannot be assumed that one Latina/o national origin group will have an identity of interests with another. An overwhelming majority of Latinas/os (eighty-three percent) report that Latino-on-Latino discrimination occurs based on country of origin.<sup>155</sup> As Dean Kevin Johnson notes, a key area of scholarly inquiry should be whether Latinas/os and APIAs of different origin should be classified as monolithic for purposes of Voting Rights remedies and Equal Protection claims.<sup>156</sup>

## II

### JOINING ANTI-SUBORDINATION THEORY AND THE CIVIL RIGHTS AGENDA: EXCLUSION FROM POLITICAL PARTICIPATION

The denial of the vote in national elections to an estimated seventeen to twenty-two million Latinas/os and APIAs residing in this country is a key civil rights and anti-subordination issue.<sup>157</sup> There is no exact number of how many Latinas/os and APIAs who cannot vote but yet are long-term settled residents and citizens of the United States. This is because the U.S. Census Bureau has consistently undercounted minorities and also has been unable to come up with an exact count of undocumented workers. Nevertheless, estimates have shown consistently that the number of Latinas/os and APIAs who are settled in the United States and view the United States as their home<sup>158</sup> is far higher

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<sup>154</sup> See Padilla, *supra* note 71.

<sup>155</sup> 2002 *Pew Latina/o Survey*, *supra* note 105, at Chart 4.2. 91% of Central Americans, 96% of Colombians, 93% of Salvadorans, and 87% of Dominicans believed that Latinas/os discriminating against other Latinas/os was a problem. Three-quarters attributed discrimination to class and country of origin differences. *Id.* at T.4.6.

<sup>156</sup> See discussion by Johnson, *supra* note 4.

<sup>157</sup> *Id.* at 12. See also Johnson, *supra* note 17, at 1218-24.

<sup>158</sup> *Cf.* Dept. of Commerce v. U.S. House of Representatives, 525 U.S. 316 (1999)

than the number who actually vote in elections.<sup>159</sup>

The first component of the estimate are the thirteen to eighteen million Latinas/os and APIAs who cannot vote because they are foreign born and have not become U.S. citizens. Census data is not broken out for these categories. However, census data do reflect the proportion of Latinas/os (12.8 million or 39% of total) and APIAs (6.7 million or 61% of total) who are foreign born.<sup>160</sup> Of the total 33 million Latinas/os who reside in this country,<sup>161</sup> between 29% (Census)<sup>162</sup> and 42% (Pew estimate)<sup>163</sup> are noncitizens, equalling between 9.5 and 14 million Latinas/os. Among the 10.9 million APIAs, the percentage of foreign born noncitizens is 33% (Census),<sup>164</sup> or over 3.5 million. Noncitizens cannot vote since no state grants them the right of suffrage in state and national elections.<sup>165</sup>

The second component of this number are the four million Latina/o U.S. citizens who reside in Puerto Rico,<sup>166</sup> and the APIA citizens who reside in American Samoa,<sup>167</sup> Guam,<sup>168</sup> and North-

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(nullifying efforts by Census Bureau to eliminate undercount by implementing statistical sampling).

<sup>159</sup> See de la Garza & DeSipio, *supra* note 26, at 1511-13 (finding that this relationship held all during the 1980s and 1990s); Citrin & Highton, *supra* note 51 (reporting that in California due to noncitizenship of Latinas/os “whites would comprise about 35% of voting-age adults in 2040, but 53% of voters. . . . Latinos would comprise more than 40% of voting-age adults, but only 26% of the electorate.”).

<sup>160</sup> See *supra* note 72; *Census of Foreign Born*, *supra* note 74, at 24.

<sup>161</sup> *Census of Foreign Born*, *supra* note 74, at T.9-1 (not including Puerto Rico).

<sup>162</sup> According to Census data, 39.0% of Latinas/os are foreign born, of which 74.3% are noncitizens, equalling 29.0% of the total Latina/o population who are foreign born, noncitizens. *Id.* at 24, T.9-1 & Fig. 9.2. See also *supra* note 72.

<sup>163</sup> According to Pew Hispanic Trust data, forty-two percent of polled Latinas/os are noncitizens who cannot vote. See *Latino Electorate*, *supra* note 63, at Chart 4. The difference between the Census and Pew data is accounted for by different methodologies. The Census data is based on a complete decennial census that has routinely undercounted minorities and undocumented. The Pew data is based on telephone surveys.

<sup>164</sup> According to Census data, 61.5% of APIAs are foreign born, and of these 54.3% are noncitizens, that is, 33.4% of total APIAs are foreign born, noncitizens. *Census of Foreign Born*, *supra* note 74, at 24, Fig. 9-2. See also *supra* note 22.

<sup>165</sup> See *infra* notes 160-64.

<sup>166</sup> See U.S. Census Bureau, Population Div., *PR-99-1 Estimates of the Population of Puerto Rico Municipios*, July 1, 2000, available at <http://www.census.gov/population/www/estimates/puerto-rico.html>. Of the 3,808,610 persons who reside in Puerto Rico, 98.8% or 3,762,746 were Latina/o. See U.S. Census Bureau, *Census Data for Puerto Rico*, at T.DP-1. *Profile of General Demographic Characteristics: 2000, Puerto Rico*.

<sup>167</sup> In Guam there are 154,805 persons residing, of which 126,861 are U.S. citizens. About 90%, or 113,000 report being APIA. See U.S. Census Bureau, *Population*

ern Marianna Islands.<sup>169</sup> As the result of these areas' legal status as unincorporated territories,<sup>170</sup> U.S. citizens who reside there cannot vote in national elections.

This is not the sum total of persons of color in the United States who are disenfranchised because of various legal barriers. Most notably, about 600,000 residents of Washington, D.C., of which around 70%, or about 400,000, are African Americans and Latina/o,<sup>171</sup> have no representation in national elections. In *Adams v. Clinton*,<sup>172</sup> the district court concluded that only state citizens are accorded the right to representation in Congress and the right to vote for the President.<sup>173</sup> In addition, in most states felons cannot vote. Current estimates are that close to four million persons cannot vote because of felony convictions, which often include minor offenses like smoking marijuana, shoplifting, or passing bad checks; one-third of these disenfranchised voters are African American.<sup>174</sup>

#### A. Political Exclusion of Noncitizens

Latinas/os and APIAs work in, reside in, and contribute to the economy and welfare of this country. Their contributions fuel

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*and Housing Profile: 2000 Guam*, available at [www.census.gov/Press-Release/www/2002/Guamfullprofile.xls](http://www.census.gov/Press-Release/www/2002/Guamfullprofile.xls)

<sup>168</sup> In the Northern Mariana Islands there are 69,221 persons residing of which 68,774 are U.S. citizens; 97% report being APIA, or about 66,000. U.S. Census Bureau, *Population and Housing Profile: 2000, The Commonwealth of Northern Mariana Islands*, available at [www.census.gov/Press-Release/www/2002/cnmifullprofile.xls](http://www.census.gov/Press-Release/www/2002/cnmifullprofile.xls).

<sup>169</sup> See *infra* note 177 and accompanying text.

<sup>170</sup> There are 57,291 persons residing in American Samoa, and 37,040 are U.S. citizens. 96% of all American Samoa residents report being APIA. Accordingly, approximately 35,000 APIA U.S. citizens were denied a vote because they resided in American Samoa. See U.S. Census Bureau, *Population and Housing Profile: 2000 American Samoa*, available at [www.census.gov/Press-Release/www/2000/amsamstatelevel.pdf](http://www.census.gov/Press-Release/www/2000/amsamstatelevel.pdf).

<sup>171</sup> See U.S. Census Bureau, *Census 2000 Summary*, Profile of General Demographic Characteristics: 2000, at T.DP-1, available at [http://factfinder.census.gov/servlet/QTable?ds\\_name=DEC\\_2000\\_SF1\\_U&geo\\_id=04000US11&q\\_r\\_name=DEC\\_2000\\_SF1\\_U\\_DP1](http://factfinder.census.gov/servlet/QTable?ds_name=DEC_2000_SF1_U&geo_id=04000US11&q_r_name=DEC_2000_SF1_U_DP1). The census reports 572,059 persons living in Washington D.C., 61.3% or 350,455 are African American and 7.9% or 44,953 are Latina/o, for an approximate 70%.

<sup>172</sup> 90 F. Supp. 2d 35 (D. D.C. 2000) (per curiam), *judgment aff'd*, *Alexander v. Mineta*, 531 U.S. 940 (2000) (concluding that while D.C. residents may be federal citizens, federal citizenship does not accord them any right to representation in Congress).

<sup>173</sup> *Id.* at 55-56.

<sup>174</sup> *Developments in the Law: One Person No Vote*, 115 HARV. L. REV. 1939, 1940 (2002).

the economic engines of the most important states like California, Florida, and New York, where the percentage of foreign born is 26%, 18%, and 20%, respectively.<sup>175</sup> Associate Dean Chris Cameron has described how important the undocumented are to the economy of Southern California.<sup>176</sup> A recent study commissioned by the Business Round Table concludes that immigrant labor force accounts for eight of ten new male workers entering the American labor force, and fifteen percent of the American labor force in the decade of 1990 to 2000.<sup>177</sup> Without foreign born workers the U.S. economy would have faltered, and become stagnated during the boom 1990s.<sup>178</sup> Some of these new workers are documented; however, estimates show that between eight to ten million are undocumented immigrants.<sup>179</sup>

Foreign immigration is geographically skewed. In California, one in four residents are foreign born; in New York, one in five.<sup>180</sup> In the Northeast, had it not been for immigration, industries would not have been able to fill the jobs fueled by economic growth.<sup>181</sup>

The U.S. Constitution does not guarantee U.S. citizens the right to vote, neither does it bar noncitizens from voting. In *Reynolds v. Sims*, Chief Justice Warren emphasized that it was “state legislatures [that] are, historically, the fountainhead of rep-

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<sup>175</sup> *Census of Foreign Born*, *supra* note 74, at 14.

<sup>176</sup> Christopher David Ruiz Cameron, *The Labyrinth of Solidarity: Why the Future of the American Labor Movement Depends on Latino Workers*, 53 U. MIAMI L. REV. 1089, 1098-1103 (1999).

<sup>177</sup> Andrew Sum et al., *Immigrant Workers and the Great American Job Machine: The Contributions of New Foreign Immigration to National and Regional Labor Force Growth in the 1990s*, Business Roundtable (Dec. 2002) at T.1 available at <http://www.brtable.org/document.cfm/781> [hereinafter *Business Roundtable Study*].

<sup>178</sup> *Id.*

<sup>179</sup> According to the Bureau of the Census, the number of foreign born who are unauthorized according to their immigration status is 8,835,450. This estimate is part of a technical report reconciling the data gathered in the 2000 Census and Census estimation methods for the population of the United States prior to the 2000 decennial census. See J. Gregory Robinson, Bureau of the Census, ESCAP II, *Demographic Analysis Results*, at T.3-5 (2001). The Pew Foundation and the Urban Institute put the number of undocumented workers at close to eight million. Frank D. Bean, Jennifer Van Hook & Karen Woodrow-Lafield, The Pew Hispanic Center, *Estimates of Numbers of Unauthorized Migrants Residing in the United States: The Total, Mexican, and Non-Mexican Central American Unauthorized Populations in Mid-2001* (Nov. 2001); B. Lindsay Lowell & Roberto Suro, The Pew Hispanic Center, *How Many Undocumented: The Numbers Behind the U.S.-Mexico Migration Talks* (Mar. 21, 2002).

<sup>180</sup> *Census of Foreign Born*, *supra* note 74 at 14.

<sup>181</sup> *Business Roundtable Study*, *supra* note 177.

representative government in this country.”<sup>182</sup> In *Skaft v. Rorex*,<sup>183</sup> the Court rejected a claim that denial of the franchise to noncitizens violates the Equal Protection guarantee.

The choice to bar noncitizens from voting has been made by states. In 2003, no state permits noncitizens to vote in national or state elections; however, a handful of jurisdictions allow noncitizens to vote in local elections.<sup>184</sup> Scholarly work has documented that this has not always been the case. At the turn of the century, Midwestern states like Illinois, Missouri, Wisconsin, and Nebraska granted (male) noncitizen settlers the right to vote.<sup>185</sup>

The argument for the noncitizen vote is based on liberal and communitarian principles. Those who contribute to the polity and live within and form part of local communities should be treated as members of that community. Noncitizens who live and work in U.S. communities are subject to the U.S. sovereign’s authority. They contribute to the government by paying taxes (sales tax, property tax, and often social security tax). The right to self-determination, which informs the Declaration of Independence, dictates that those who are subject to U.S. sovereign authority should have a voice in determining their government through the election of their representatives. The exclusion of up to thirteen million noncitizen Latinas/os and APIAs from having a voice in representative government has little justification in liberal theory or in natural rights principles.<sup>186</sup> Rather, exclusion is how historically the legal system has perpetuated status inequality and subordination.<sup>187</sup>

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<sup>182</sup> 377 U.S. 533 (1964).

<sup>183</sup> 553 P.2d 830 (Colo. 1976).

<sup>184</sup> Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1461-63 (1993). Raskin documents that New York City grants noncitizens who are the parents of school children the right to vote and run for community school board, see N.Y. EDUC. LAW § 2590-c(3) (McKinney Supp. 1978-1979), as does Chicago, see ILL. ANN. STAT. § 122, ¶ 34-2.1(d)(ii) (1999). Various jurisdictions in Maryland, such as Takoma Park, Chevy Chase, Somerset, Barnesville, and Martin’s Additions extend the franchise in all local elections to residents who are not U.S. citizens.

<sup>185</sup> See Raskin, *supra* note 184, at 1417-41; *Minor v. Happersett*, 88 U.S. 162 (1874).

<sup>186</sup> Accord Gerald L. Neuman, “*We Are the People*”: *Alien Suffrage in German and American Perspective*, 13 MICH. J. INT’L L. 259, 291-310; T. ALEXANDER ALENIKOFF, *SEMBLANCES OF SOVEREIGNTY* 187 (2002).

<sup>187</sup> The documentation of this statement is one way to sum up the whole of Critical Race and LatCrit scholarship; in the context of noncitizens, see especially Johnson, *supra* note 17. Liberal scholars, however, have also made this their life work. See, e.g., JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION*

In a well-reasoned student note, April Chung has argued that the ongoing exclusion from the political sphere of so many noncitizen, local community members who work, reside, and contribute, distorts the political process and makes it unfair.<sup>188</sup> The self-interested impulse of current electorates is to preserve their power by fighting off expansion to the disenfranchised because this means dilution of their own vote.<sup>189</sup> As April Chung explains, “[b]ecause noncitizens cannot vote, citizens’ votes proportionately increase in value. Citizens then have greater power [by denying noncitizens any participation in the electoral process] to shift societal or economic burdens onto noncitizens.”<sup>190</sup> Professor de la Garza argues as well that granting immigrants the right to vote would empower their communities and encourage greater connection to American society.<sup>191</sup> Professor Alex Aleinikoff has argued that liberal principles militate for settled immigrants being able to vote, at the very least in local elections, to enhance local communities.<sup>192</sup> Professor Klarman would have courts police self-interested majoritarian actions when they entrench present majorities and do not reflect the changes in the current polis.<sup>193</sup>

Associate Dean Kevin Johnson<sup>194</sup> and Professor Klarman<sup>195</sup> have also argued that judicial intervention on behalf of disen-

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37-38 (1991) (explaining how Americans have historically used the exclusion from citizenship and the right to vote as a way of perpetuating racist, religious bigotry and sexist policies).

<sup>188</sup> April Chung, *Noncitizen Voting Rights and Alternatives: A Path Toward Greater Asian Pacific American and Latino Political Participation*, 4 *ASIAN PAC. AM. L.J.* 163, 174 (1996).

<sup>189</sup> Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 *GEO. L.J.* 491 (1997). “The current electoral majority in a particular political community plainly possesses some incentive to resist expanding participation in ways that might threaten its majority status . . .” *Id.* at 517. “[T]he current majority has a self-interested motive to perpetuate the status quo.” *Id.* at 519.

<sup>190</sup> Chung, *supra* note 188, at 175.

<sup>191</sup> LOUIS DESIPIO & RODOLFO O. DE LA GARZA, *MAKING AMERICANS, REMAKING AMERICA: IMMIGRATION AND IMMIGRANT POLICY* 96-98 (1998).

<sup>192</sup> ALEINIKOFF, *supra* note 186, at 187.

<sup>193</sup> Klarman, *supra* note 189, at 519 (“Since there is no right answer to the question of which majority is entitled to define the scope of the political community, and the present majority has self-interested reasons to resist expansion, anti-entrenchment theory counsels vesting decision making authority elsewhere.”). Other scholars have championed a similar market-based rationale to judicial scrutiny of the electoral process. See Samuel Issachacoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 *STAN. L. REV.* 643 (1998).

<sup>194</sup> See Johnson, *supra* note 17, at 1218-24.

<sup>195</sup> Klarman, *supra* note 189, at 520.

franchized noncitizens is justified based on the legal process rationale presented in *United States v. Carolene Products Co.*<sup>196</sup> Noncitizens are the classic case of a discrete and insular group because they do not have a political voice and yet are the target of legislative actions that subordinate their status or shift to them the costs of social programs enjoyed by citizens.

As Kevin Johnson notes, the theoretical arguments have remained just that, theoretical,<sup>197</sup> rather than prevailing through the inherent logic of American democratic principles, as Professor Shklar predicted more optimistically (and perhaps with a much longer time frame in mind).<sup>198</sup> Arbitrary legal constructions of citizenship have legitimized these exclusions and obfuscated that the judgments as to who has a political voice are in part made on race, gender, and class stratifications. This has led to the current state of affairs, that among Latinas/os, three in eight,<sup>199</sup> and among APIAs, one in three, are silenced electorally.<sup>200</sup> This is an astoundingly high proportion and a major component of the Latina/o and APIA community in the United States.

### B. *Puerto Rico: One Hundred Years of Standing Outside the Looking Glass*

Under the legal doctrine constructing the citizenship of Puerto Rico in the *Insular Cases* in the early 1900s,<sup>201</sup> Puerto Rican U.S.

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<sup>196</sup> 304 U.S. 144, 152 n.4 (1938) (justifying heightened scrutiny where statutes [are] directed at particular religious . . . or national . . . or racial minorities . . . ; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry).

<sup>197</sup> See Johnson, *supra* note 17, at 1222.

<sup>198</sup> See SHKLAR, *supra* note 187, at 38 (concluding hopefully that “after long and painful struggles the inherent political logic of American representative democracy, based on political equality, did prevail.”).

<sup>199</sup> Of the total 36.8 million Latinas/os who reside in the United States (including Puerto Rico) between 13.5 and 18 million cannot vote because they are noncitizens, *see supra* notes 147-49 and accompanying text, and because they live in Puerto Rico, *see supra* note 152.

<sup>200</sup> Of the total, 11.1 million APIAs who reside in the United States and its territories, about 3.7 million cannot vote because they are noncitizens, *see supra* note 148 and accompanying text, and they live in territories, *see supra* note 164.

<sup>201</sup> *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Ocampo v. United States*, 234 U.S. 91 (1914); *Dorr v. United States*, 195 U.S. 138 (1904); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *De Lima v. Bidwell*, 182 U.S. 1 (1901).

citizens cannot participate in the American democratic polity, but nonetheless are subject to U.S. sovereignty. As Judge Torruella explained in his concurrence to *Igartua De La Rosa v. United States*:

This anomalous situation arises primarily as a result of the decisions of the Supreme Court in the *Insular Cases*, which established as early as 1901 the plenary power of Congress over Puerto Rico under the so-called “territorial” clause of the Constitution. In a series of narrowly divided decisions, the Court held that Puerto Rico was an “unincorporated territory,” . . . and as a result part of the United States for some purposes and not for others. . . . [I]n *Balzac v. Porto Rico*, [the Supreme Court] established the inferior nature of the United States citizenship held by residents of Puerto Rico by concluding that the Constitution’s protection of these new citizens was limited to those rights deemed by the Court to be “fundamental.”<sup>202</sup>

Under this line of cases, a Puerto Rican citizen cannot renounce her U.S. citizenship,<sup>203</sup> yet her U.S. citizenship gives her no say in national elections.<sup>204</sup> This doctrine has survived for more than one hundred years.<sup>205</sup> Congress has at various times under both Republican and Democratic administrations considered Puerto Rico’s status, but the results have always been a stalemate. There are structural reasons for this. The theory of

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<sup>202</sup> 229 F.3d 80, 86-87 (1st Cir. 2000) (Torruella, J., concurring) (*Igartua II*) (citation omitted).

<sup>203</sup> *Ramírez de Ferrer v. Mari Brás*, 97 JTS 128, 143 PR Dec. \_\_\_ (1997).

<sup>204</sup> *Igartua De La Rosa v. United States*, 842 F. Supp. 607, 609 (D. P.R.), *aff’d*, 32 F.3d 8 (1st Cir. 1994) (“[G]ranting U.S. citizens residing in Puerto Rico the right to vote in presidential elections would require either that Puerto Rico become a state, or [the adoption of] a constitutional amendment. . . .”); *Igartua De La Rosa v. United States*, 229 F.3d 80, 84 (1st Cir. 2000) (citizens residing in Puerto Rico do not have a right to vote in presidential elections because Puerto Rico “is not entitled under Article II to choose electors for the President.”).

<sup>205</sup> See generally JOSÉ A. CABRANES, *CITIZENSHIP AND THE AMERICAN EMPIRE: NOTES ON THE LEGISLATIVE HISTORY OF THE UNITED STATES CITIZENSHIP OF PUERTO RICANS 7* (Yale University Press 1979) (1978); JOSÉ TRIÁS MONGE, *PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD 3* (1997); JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* (1985); José A. Cabranes, *Puerto Rico: Colonialism as Constitutional Doctrine*, 100 HARV. L. REV. 450, 455 (1986) (book review); Pedro A. Malavet, *Puerto Rico: Cultural Nation, American Colony*, 6 MICH. J. RACE & L. 1 (2000); Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901-1922)*, 65 REV. JUR. U.P.R. 225 (1996); Ediberto Roman, *The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism*, 26 FLA. ST. U. L. REV. 1 (1998); Ediberto Román, *Empire Forgotten: The United States’s Colonization of Puerto Rico*, 42 VILL. L. REV. 1119 (1997).

entrenchment,<sup>206</sup> for example, explains why Republicans have put up opposition, most often cast in the form of cultural arguments (i.e., “but Puerto Ricans speak Spanish, not English”). Republicans have tended to view Puerto Rico as a likely Democratic state, because Puerto Ricans in mainland elections have voted mostly Democratic.<sup>207</sup> If mainland political behavior were to hold true on the Island (this is not necessarily the case), Puerto Rico would have two Democratic Senators and would have voted Democratic in the Presidential elections, which means that the current Republican sweep would not have taken place. As well, process theory explains inaction. Puerto Ricans have no vote in Congress. Their interests are not represented in the give and take of political dealmaking. They therefore have been ignored in “one hundred years of solitude.”<sup>208</sup>

*Igartua II* challenged the electoral status quo in the 2000 elections based on constitutional grounds.<sup>209</sup> The plaintiffs and the Commonwealth of Puerto Rico, as intervenor, lost their constitutional arguments.<sup>210</sup> The concurring opinion, however, elicited from Judge Torruella, who was born in Puerto Rico and is a scholar of Puerto Rico’s territorial relationship with the United States, set forth an eloquent argument as to why this electoral lack of voice demands redress:

In this 211th year of the United States Constitution, and 102nd year of United States presence in Puerto Rico, United States citizenship must mean more than merely the freedom to travel to and from the United States. [Federal] citizenship should not, cannot, be devalued to such a low scale. . . . The national disenfranchisement of these citizens ensures that they will never be able, through the political processes, to rectify the denial of their civil rights in those very political processes. This uninterrupted condition clearly provides solid basis for

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<sup>206</sup> See *supra* note 174 and accompanying text.

<sup>207</sup> See *supra* note 89.

<sup>208</sup> GABRIEL GARCÍA MÁRQUEZ, *ONE HUNDRED YEARS OF SOLITUDE* (Gregory Rabarra trans., 1970).

<sup>209</sup> 229 F.3d at 81. The plaintiffs argued that denial of the vote violated constitutional privileges and immunities due process, and the equal protection guarantee. A similar challenge was staged in *Igartua De La Rosa v. United States*, 32 F.3d 8 (1st Cir. 1994) (*Igartua I*) (challenge to exclusion of Puerto Rico U.S. citizens in national elections was denied based on statutory interpretation of the Uniformed and Overseas Citizens Absentee Voting Act and the court’s reading of Article II of the Constitution, providing that the President shall be elected by electors from states).

<sup>210</sup> The per curiam opinion held that the controversy had already been decided in *Igartua I*. *Igartua II*, 229 F.3d at 83-84.

judicial intervention at some point, one for which there is resounding precedent. See *Brown v. Board of Education*. . . .

The perpetuation of this colonial condition runs against the very principles upon which this Nation was founded. *Indefinite* colonial rule by the United States is not something that was contemplated by the Founding Fathers nor authorized<sup>211</sup> . . . [I]t is time to serve notice upon the political branches of government that it is incumbent upon them, in the first instance, to take appropriate steps to correct what amounts to an outrageous disregard for the rights of a substantial segment of its citizenry.<sup>212</sup>

Unfortunately, at this time Judge Torruella is clearly a minority voice on the federal bench.

### C. *Moving Beyond the Black-White Paradigm*

In the context of exclusion of around twenty million Latinas/os and APIAs from the electoral process, moving beyond the Black-White paradigm means raising consciousness. First, LatCrit scholarship should continue to document the legalisms and racial history that give rise to such extensive exclusion. Second, LatCrit work should humanize the silencing of so many voices.

#### 1. *A “Non-starter” Conversation or a Scholarly Agenda?*

It is extremely important to both the LatCrit anti-subordination project and its activist agenda to make the electoral exclusion of millions of Latinas/os and APIAs part of an active conversation within LatCrit and the legal community that LatCrit inhabits. No single action would politically empower Latinas/os and APIAs more.

Professor Sanford Levinson has written that academic constitutional theorists skirt important structural issues that are viewed as “hard-wired,” because academics do not believe it is worth their time to make arguments that they believe will not eventually win out in courts.<sup>213</sup> As Levinson himself recognizes, ignoring “hard-wired” constitutional features is at “our peril,” and “risk[s] . . . betrayal of the very principles that we like to say that the Constitution espouses.”<sup>214</sup> The lack of electoral voice by noncitizens and Puerto Rico’s political exclusion as an “unincor-

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<sup>211</sup> *Id.* at 89.

<sup>212</sup> *Id.* at 90 (citation omitted).

<sup>213</sup> See Sanford Levinson, *Bush v. Gore and the French Revolution: A Tentative List of Some Early Lessons*, 65 LAW & CONTEMP. PROBS. 7, 30 (2002).

<sup>214</sup> *Id.*

porated territory” are examples of “hard-wired” structural issues that mainstream academics, with notable exceptions,<sup>215</sup> have ignored.

The anti-subordination mission of LatCrit places LatCrit scholars at the center of discussing the “hard-wired” features that perpetuate civil rights and political subordination of millions of Latinas/os and APIAs. Still, LatCrit scholarship has not fully turned its attention to the issue of noncitizen exclusion, with the notable exception of Kevin Johnson’s work.<sup>216</sup> This focus is important simply because of the sheer size of the excluded population—close to ten million as posited by this Article. Latinas/os and APIAs will remain a *potential* electoral voice unless structural issues are addressed. Judge Torruella and other LatCrit theorists have written eloquently as to why the legal doctrine of unincorporated territories, now over a century old and rooted in outmoded ideas of conquest and possession of the non-civilized by those who are “civilized,” should be repudiated.<sup>217</sup> The contributions to this Symposium by Pedro Malavet and Ediberto Roman testify that LatCrit scholarship maintains focused on Puerto Rico structural exclusion and racial constructions.<sup>218</sup> As well, as Pedro Malavet has encouraged, LatCrit conferences should continue to focus on Puerto Rico as part of its consciousness-raising and community building efforts.

## 2. *Humanizing Exclusion*

Associate Dean Kevin Johnson suggests that the route to political empowerment of noncitizens lies in humanizing them.<sup>219</sup> The term “illegal alien” makes it easy to demonize and make them the “other.” Johnson proposes that LatCrit scholars use narratives to show how difficult the life of undocumented and noncitizen workers are and yet show the common human predicaments that they share with the majority citizen population.<sup>220</sup>

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<sup>215</sup> See sources cited *supra* notes 166, 184. See also ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* (1997); Gerald L. Neuman, *Whose Constitution?*, 100 *YALE L.J.* 909, 959-60 (1991).

<sup>216</sup> See Johnson, *supra* note 17.

<sup>217</sup> See sources cited *supra* note 184. For commentary of LatCrit scholarship in this area, see Sylvia R. Lazos Vargas, *History, Legal Scholarship, and LatCrit Theory: The Case of Racial Transformations Circa the Spanish American War, 1896-1900*, 78 *DENV. U.L. REV.* 925 (2001).

<sup>218</sup> See *supra* note 2.

<sup>219</sup> See Johnson, *supra* note 17, at 1223-25.

<sup>220</sup> *Id.* For excellent journalistic portrayals of the immigrant experience, see

Elsewhere in this Symposium, I have suggested that organizing conferences around the issue of rapid immigration into areas like the Midwest and rural South, which are not accustomed to Latina/o settlements, is an important activist and scholarly tool that humanizes the Latina/o immigrant, noncitizen, and undocumented worker.<sup>221</sup> Local conferences can become outreach and community building loci for the very mission that Johnson proposes. Regardless of the method, the critical point is that Lat-Crit's consciousness-raising efforts must also involve community building.<sup>222</sup>

### III

#### LATINA/O AND APIA ELECTIONS IN 2002: A GLASS HALF-FULL OR HALF-EMPTY?

The jury is still out as to whether the 2002 elections empowered the Latina/o and APIA community or came up short of the anticipated "Crouching *Jaguar*, Hidden Dragon"<sup>223</sup> power that minority merchants foretell. This Part (1) sums up election results, (2) asks why progress has been so slow given redistricting activism, (3) reviews the experiences in key electoral campaigns, and (4) discusses minority voter turnout. The last Part of this section returns to the central question of this Article, what does it mean, in the context of the electoral results post 2000, to move beyond the Black-White paradigm.

#### A. *Summing Up Election Results: Is the glass half-full or half-empty? You be the judge.*

##### 1. *The Glass is Half-Full*

The 2002 elections saw important electoral gains for Latina/o elected representatives. Democrat Bill Richardson, a Mexican American, was elected governor of New Mexico; the prior Latino New Mexican governor had been elected two decades ago. In California, Lieutenant Governor Cruz Bustamante was re-elected. Sylvia Garcia became the first Latina elected to serve on

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RUBÉN MARTÍNEZ, *CROSSING OVER: A MEXICAN FAMILY ON THE MIGRANT TRAIL* (2001); JUAN GONZALEZ, *HARVEST OF EMPIRE: A HISTORY OF LATINOS IN AMERICA* (2000).

<sup>221</sup> Lazos Vargas, "*Latina/o-ization*" of the Midwest, *supra* note 53, at 365-66.

<sup>222</sup> See Francisco Valdes, *Under Construction: LatCrit Consciousness, Community, and Theory*, 85 CAL. L. REV. 1087, 1093-95 (1997) (foreword).

<sup>223</sup> See *supra* Part I.B.1.

the Commissioner's Court in Harris County (Houston), Texas. Christine Baca became the first Latina elected to the Colorado State Board of Education.<sup>224</sup> In Oregon, LatCrit keynote speaker Susan Castillo became Oregon's first Latina Superintendent of Schools.<sup>225</sup> In Nevada, Republican Brian Sandoval was elected state Attorney General.<sup>226</sup>

At a national level, representation in the U.S. Congress increased by four more representatives. There are now twenty-two Latinas/os in the House of Representatives. No additional APIA representative was elected to either the House or Senate, so APIA representatives in the House remains at four.<sup>227</sup> One additional African American was elected to the House of Representatives, for a total of thirty-seven.<sup>228</sup>

## 2. *The Glass is Half-Empty*

The 2002 elections for national office followed the historical pattern that a minority candidate cannot get elected to Congress unless the district in which she is competing is at least a majority minority.<sup>229</sup> In the four 2002 races where Latinas/os were elected to the House of Representatives, the district was a majority La-

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<sup>224</sup> Press Release, National Association of Latino Elected and Appointed Officials Educational Fund, Latinos Capture Key Elected Offices, at [http://www.naleo.org/press\\_releases/latino\\_capture\\_key\\_elected\\_offices.pdf](http://www.naleo.org/press_releases/latino_capture_key_elected_offices.pdf) (Nov. 6, 2002); *Hispanics Celebrate an Impressive 2002 Election Performance*, PUERTO RICO HERALD, at [http://www.puertorico\\_herald.org/issues/2002/vol6n45/GraphicHead-en.shtm](http://www.puertorico_herald.org/issues/2002/vol6n45/GraphicHead-en.shtm) (Nov. 8, 2002).

<sup>225</sup> Ana Radelat, *Breaking New Barriers*, HISP. MAG., Oct. 2002, at 16-18, available at <http://www.hispaniconline.com/magazine/2002/oct/Features/sanchez.html>.

<sup>226</sup> Ken Ellingwood, *Throughout the Country, Latinos See Their Clout Build in Political Arena*, L.A. TIMES, Nov. 17, 2002, at A30.

<sup>227</sup> This count does not include the non-voting representatives of Guam, American Samoa, and Northern Mariana Islands who do not vote. Also excluded is Rep. Patsy Mink, who was reelected although she died before the November elections. The four APIA officials elected to the House of Representatives are Rep. Robert Matsui (D-CA), Rep. Michael Honda (D-CA), Rep. Robert Scott (D-VA), and Rep. David Wu (D-OR). Rodney Jay C. Salinas, *On the Ballot: 2002 Mid-Term Election Results for Asian Pacific American Candidates*, at <http://www.rainmakerpolitical.com/index.html> (last visited July 1, 2003).

<sup>228</sup> *Clerk of the House of Representatives, Statistics of the Congressional Election of November 5, 2002*, available at [http://clerk.house.gov/members/election\\_information/2002/2002Stat.htm](http://clerk.house.gov/members/election_information/2002/2002Stat.htm) [hereinafter *Statistics of Election*].

<sup>229</sup> Professor David Lublin has calculated that the magical threshold required to elect an African American representative from a large district is fifty-five percent African American. LUBLIN, *supra* note 112, at 45-54, 133. As Lublin notes, this threshold does not always hold and depends on the politics and culture of each district, and for Latinas/os and APIAs in particular, the percentage in the district who are citizens and therefore eligible to vote. *Id.* at 51-52.

tina/o district. In California, the Democratic-controlled state legislature created a Latina/o majority 39th district that elected Linda Sanchez, and in a very close election, elected Dennis Cardoza in the 18th District to the House of Representatives.<sup>230</sup> In Florida, the Republican-controlled state legislature carved out a seat that went to Mario Diaz-Balart, a Cuban American Republican from south Florida.<sup>231</sup> Arizona created the 7th District seat that handily elected Democrat Raul Grijalva to the House.<sup>232</sup>

In California, where Latinas/os and APIAs together make up the majority population, their representation in state and local government remains marginal although great improvements have been made.<sup>233</sup> Only five APIAs have seats in the California state legislature.<sup>234</sup> In Los Angeles, one Latina/o gained a seat to the City Assembly, but only after Voting Rights Act litigation waged by MALDEF precipitated restructuring of the representational scheme.<sup>235</sup> As Feng, Aoki, and Ikegami note, some APIA communities, like Los Angeles' Koreatown, have been divided for generations and their state and national representation have been fragmented.<sup>236</sup>

The demographic explosion of Latinas/os and APIAs has not translated into greater representation by Latina/o and APIA elected representatives at the national level. The 2002 gains in elected representatives were small given the forty-eight percent and fifty-eight percent growth of Latinas/os and APIAs, respectively, since the last decennial redistricting.<sup>237</sup> According to a recent study compiled by Kim Geron and James Lai, the total number of Latina/o and APIA elected officials, at all levels of government stands at one percent of the nation's 513,200 elected officials.<sup>238</sup>

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<sup>230</sup> *Statistics of Election*, *supra* note 228.

<sup>231</sup> *Id.*

<sup>232</sup> Billy House, *Hispanic Inroads Fall Short of Predictions Arizona's Grijalva is an Exception*, ARIZ. REPUBLIC, NOV. 7, 2002, at A19, available at 2002 WL 102843845.

<sup>233</sup> In 1987, California had among the largest party deficits at .33—the difference between proportion of population Latina/o and number of elected state representatives—among states with high concentrations of Latinas/os, Arizona (.50), Colorado (.65), New Mexico (1.01). HERO, *supra* note 88, at 109.

<sup>234</sup> See discussion by Feng, Aoki & Ikegami, *supra* note 3; see also *infra* Part III.

<sup>235</sup> See discussion by Johnson, *supra* note 4.

<sup>236</sup> See Feng, Aoki & Ikegami, *supra* note 3, at 44.

<sup>237</sup> See *supra* note 21.

<sup>238</sup> Geron & Lai, *supra* note 57, at 48-49. According to the figures in this Article, in 2000, there were 309 APIA and 3,749 Latina/o elected officials out of a universe

*B. Why So Slow?: Drawing District Lines*

If fair representation of minority interests requires the election of ethnic and racial representatives,<sup>239</sup> then the 2002 elections presage a grim future.

Latinas/os and APIAs were better organized than in previous rounds, having gained experienced in litigating under the Voting Rights Acts and having been involved in the political redistricting battles of 1990s.<sup>240</sup> However, the net gain in electoral districts where a Latina/o or APIA can be elected remains small. While the Latina/o population grew by eighteen million since the last decennial census, there were only four more elected Latina/o representatives to Congress. APIAs, which grew by four million, did not increase their representation in Congress.<sup>241</sup>

The key to electing more minority representatives to Congress (descriptive representation) lies in drawing district lines that will favor minority candidates.<sup>242</sup> The key instrument to getting this done has been the Voting Rights Act.<sup>243</sup>

As Feng, Aoki, and Ikegami document, the Voting Rights Act has eliminated barriers to voting, like poll taxes, monolingual

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of 513,200 (compiled from the National Asian American Political Almanac and the Tomás Rivera Policy Institute, 1999 National Directory of Latino Elected Officials).

<sup>239</sup> This is the model of minority representation adopted by Feng, Aoki, & Ikegami. See Feng, Aoki & Ikegami, *supra* note 3, at 892-93. But see Johnson, *Latinas/os and the Political Process*, *supra* note 4 (raising question whether it is necessary to elect Latinas/os and APIAs for there to be minority representation in the political process).

<sup>240</sup> According to Professors de la Garza and DeSipio:

Between 1974 and 1984, there were 88 lawsuits filed in Texas by the Mexican American Legal Defense and Education Fund (MALDEF). Groups such as MALDEF, the Southwest Voter Registration Project, the Puerto Rican Legal Defense and Education Fund, and the Hispanic Coalition on Reapportionment, among many others, lobbied and litigated to shape how state representative and congressional district boundary lines were drawn, which resulted in increased opportunities for Latinos to be elected to state and federal offices in many states.

De la Garza & DeSipio, *supra* note 26.

<sup>241</sup> See *supra* Part III.A.1.

<sup>242</sup> This is the conclusion of Professor Lublin's study, that minority candidates are electable only in minority majority districts. See LUBLIN, *supra* note 112. But an increase in descriptive representation has a negative impact on substantive representation. More Republican conservatives will be electable once minorities are concentrated in majority-minority districts. *Id.* at 122-24. See *supra* note 112 and accompanying text.

<sup>243</sup> Voting Rights Act of 1965, 42 U.S.C.A. §§ 1971-1974C (1994). The Voting Rights Act proscribes voting practices that result in the denial of a minority group's ability to elect its representative of choice. 42 U.S.C.A. § 1973.

ballots, and racial gerrymandering. However, even though the Voting Rights Act has been instrumental in carrying out majority minority districts, it still has not resulted in a significant increase in the election of minority candidates.<sup>244</sup> The Voting Rights Act tests are difficult to meet and to show that a violation has occurred where minority voter power exists has been diluted. Increasingly, as the recent case of *Cano v. Davis* discussed in Part I.D. shows, the federal bench is applying logic about minority group representation that will make it even more difficult for minority groups to obtain judicial relief.<sup>245</sup> Finally the *Shaw v. Reno* doctrine nullifies districts that the court finds have been drawn with primarily color-consciousness motivation.<sup>246</sup>

The redistricting process in state legislatures is full of political and legal landmines. The effort to draw districts that have enough members of any one minority group to meet the threshold where they can directly elect a representative<sup>247</sup> and exert policy influence is tricky.<sup>248</sup> Districting has to balance between concentrating enough persons of a minority group so that it is sufficiently minority and other political interests, like ensuring that incumbents are re-elected or that Democrats/Republicans continue to hold on to electoral power, plus avoid legal restrictions, mainly the *Shaw v. Reno* prohibition against racial gerrymandering. Districting may set off an interracial and intergroup conflict in which one minority group vies against the other to further its claim to representation.<sup>249</sup>

In their Symposium contribution, Feng, Aoki, and Ikegami illustrate the difficulty of this process in California. They credit a strong alliance with MALDEF and close work with state Representative Judy Chu, for CAPAFR's ability to preserve Assembly District 49, which Ms. Chu represented. They also credit state Representative George Nakano's membership in the Committee for Elections and Reapportionment as key to their advocacy ef-

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<sup>244</sup> See Feng, Aoki & Ikegami, *supra* note 3, at 24-29.

<sup>245</sup> See discussion *supra* notes 134-39 and accompanying text.

<sup>246</sup> 509 U.S. 630 (1993). See Feng, Aoki & Ikegami, *supra* note 3, at 35-38.

<sup>247</sup> See *supra* note 226.

<sup>248</sup> Professor Lublin finds that the influence threshold for African Americans is forty percent. See LUBLIN, *supra* note 112, at 72. Lublin does not arrive at an influence threshold for Latinas/os, but does note how heavily threshold numbers are tied to the percent who are citizens in any given district. See *id.* at 48-50. See also note 226 and accompanying text.

<sup>249</sup> See Feng, Aoki & Ikegami, *supra* note 3, at 24-28; de la Garza & DeSipio, *supra* note 26, at 925-26.

forts.<sup>250</sup> CAPAFR worked closely with the four APIA state representatives. This stands in sharp contrast to the sharp rebuke suffered by MALDEF at the pen of Martha Escutia, who represented the 30th District and Gloria Romero, who represented the 24th District in the state senate. In an editorial in the *Los Angeles Times*, Representatives Escutia and Romero accused MALDEF of playing racial politics that were divisive, being single-mindedly focused on race and not broader “American values” (presumably voting for the most qualified candidate whether white, African American or Latina/o), sponsoring a plan that undermined the districts of Latina/o representatives, and being single-mindedly focused on numbers rather than broader coalitional justice-based goals.<sup>251</sup> These Latina representatives had reason to be irate, since in the redistricting process they found themselves in districts where their runs for reelection would be difficult.

At the same time that civil rights groups focused on increasing minority representation must navigate the treacherous sea of minority politics, they also must fight the entrenched interests in state houses. It is increasingly clear that the primary goal in redistricting is to ensure the continuing electability of incumbents, whether White, Brown, Yellow, or Black.<sup>252</sup> Such a system is closed to change, whether it is to turn out entrenched, ineffective, and self-interested representatives or to open up the electoral system to increase minority representation.

### C. *Why So Slow?: Campaigning in Racially Polarized Environments*

In *The Tyranny of the Majority*, Lani Guinier observes:

Where voting is racially polarized those [minorities] who support the winning candidate enjoy minimal influence as a swing vote. [Minority] voters may help determine which candidate gets elected, but the successful candidate must first be one who started out with white support. Moreover, once in office, [minority] voters' influence on that candidate's performance is

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<sup>250</sup> Feng, Aoki & Ikegami, *supra* note 3, at 898 (“[T]he presence of Nakano and the other APIA Assembly members proved vital in enhancing the strength and voice of the APIA community.”).

<sup>251</sup> Martha Escutia & Gloria Romero, *MALDEF's Lawsuit Is Racially Divisive*, L.A. TIMES, Nov. 1, 2001, at M1. See discussion by Johnson, *supra* note 4.

<sup>252</sup> See discussion *supra* notes 33-37 and accompanying text. Bernard Grofman's study of California's 1982 congressional plan found incumbent-centered partisan bias of striking magnitude. See Grofman, *supra* note 32, at 157.

questionable. In a racially polarized environment, white officials are often unaware of [minority] voters' decisive impact or deliberately ignore it because of even more decisive white support. As a consequence, it is hard to imagine a racially stigmatized minority, whatever its size, exercising genuine influence in a racially polarized winner-take-all [election].<sup>253</sup>

According to Guinier's theory, minority candidates will win so long as they are able to keep race nonsalient during their campaigns. This is a difficult task because race *is* salient by the very fact that the candidate is a person of color. As LatCrit keynote speaker Susan Castillo notes, "We're beginning to emerge on the political scene, but we're still the underdogs."<sup>254</sup> The 2002 elections bear this out.

1. *The Glass is Half-Full: Minority Candidates Win in Non-Treaty of Guadalupe States*

The good news in this electoral cycle was primarily in the state races where various Latina/o candidates won statewide office with White voter support. The bad news is that Republican opponents who had reason to worry about their candidacies were easily able to racially polarize the electorate, and handily defeat their minority challenges.

a. *Victories in Non-Treaty of Guadalupe States*

Nationwide, thirteen additional Latina/o state lawmakers were elected in 2002, an increase to 217 of about 6500 state lawmakers.<sup>255</sup> Georgia elected three Latinos, Sam Zamarripa, Pedro Marin, and David Casas to the state house of representatives. Maryland elected the first Latina/o lawmakers to the House of Delegates, including Democrat Ana Sol Gutierrez from Montgomery County who focused her campaign on getting out the vote of Latino voters.<sup>256</sup> Massachusetts elected former state Representative Jarrett Barrios as that state's first Latino state senator, and Jeffrey Sanchez to the state house in a new state legislative district that covers Jamaica Plain, Mission Hill, and part of Brookline.<sup>257</sup>

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<sup>253</sup> GUINIER, *supra* note 19, at 89.

<sup>254</sup> Radelat, *supra* note 225, at 17.

<sup>255</sup> Ellingwood, *supra* note 226.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*; Rodríguez, *supra* note 94.

*b. Oregon: A Predominantly White State Elects a Latina*

In May 2002, LatCrit keynote speaker Susan Castillo became Oregon's new school superintendent, garnering fifty-five percent of the vote and winning in nearly every Oregon county, with especially strong support in Eugene and Portland.<sup>258</sup> Susan Castillo attributed her win to her positive message about public schools, a well-thought program to revitalize school financing, and image recognition due to her former career as a local television reporter.<sup>259</sup> Nonetheless, Castillo bucked strong odds. Oregon is only eight percent Latina/o.<sup>260</sup> She was outspent by her Republican opponent, \$250,000 versus \$175,000, a record in what is purportedly a nonpartisan race.<sup>261</sup> Finally, she had to neutralize racist comments made by two conservative commentators on a local radio program who questioned whether she could be a U.S. citizen "with a name like Castillo."<sup>262</sup> The foreigner stereotype did not stick. Instead, her hard work garnered the support of school organizations, like the state teachers union, and the image she had built as a reporter countered the racial stereotype.<sup>263</sup>

*2. The Glass is Half-Empty: Minority Candidates in Racially Polarized Environments*

By contrast to these positive results, in closely watched races in Texas and California, Latina/o contestants lost big. Minority civil rights activists were hopeful that history would be made in two races, the 2000 Los Angeles Mayoral race where long time politician, Antonio Villaraigosa, was running for mayor, and the 2002 Senate and gubernatorial Texas race where the Democratic slate offered Tony Sanchez, a Latino businessman from El Paso, and Ron Kirk, Dallas' African American mayor, a candidacy position. In both contests the minority candidates lost because the race became racially polarized. Media campaigns were able to link the minority candidates to racial stereotypes and stirred up racial feelings among white voters. When politics becomes racially polarized, minority candidates and issues almost always

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<sup>258</sup> Steven Carter, *Castillo Avoids Runoff, Wins State Superintendent Post*, OREGONIAN (Portland), May 22, 2002, at E1; Radelat, *supra* note 225, at 17.

<sup>259</sup> Radelat, *supra* note 225, at 17.

<sup>260</sup> *Id.*

<sup>261</sup> Carter, *supra* note 258.

<sup>262</sup> Radelat, *supra* note 225, at 17.

<sup>263</sup> *Id.*

lose.<sup>264</sup>

a. *The “Dream Team” Goes Down*

In Texas, the dream team of Tony Sanchez and Ron Kirk was trounced. Sanchez, a blue-eyed, white-skinned, Latino businessman from the border area spent \$59 million on the campaign.<sup>265</sup> He lost to Governor Rick Perry by the widest margin of any Democratic candidate standing for statewide office, more than 800,000 votes for a seventeen point spread, fifty-eight percent to forty percent.<sup>266</sup> Ron Kirk fell to Republican John Cornyn, fifty-five percent to forty-three percent, a twelve point difference.<sup>267</sup> The (White) Republican sweep was so great that Texas Democrats, for the first time in four decades, lost control of the Texas House of Representatives.<sup>268</sup> In the ashes of defeat, the kindest commentary that could be mustered in favor of the “dream team” was that it “was a good idea but just premature.”<sup>269</sup>

The margin of seventeen points by which Sanchez lost to Rick Perry was a political trouncing. Rick Perry was a lackluster candidate, someone who had never managed to come out of George W. Bush’s shadow. But Rick Perry played the race card.<sup>270</sup> Perry managed to racially polarize Texas voters with hard hitting ads that raised the stereotype that Sanchez’s fortune was garnered through illegal activity.<sup>271</sup> Perry’s ads featured the follow-

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<sup>264</sup> See KEITH REEVES, *VOTING HOPES OR FEARS?: WHITE VOTERS, BLACK CANDIDATES & RACIAL POLITICS IN AMERICA* (1997) (discussing racial cues and electoral backlash among the white electorate); JEFF MANZA & CLEM BROOKS, *SOCIAL CLEAVAGES AND POLITICAL CHANGE: VOTER ALIGNMENTS AND U.S. PARTY COALITIONS* (1999) (discussing “subtle racism” in the white electorate); Smith, *Race and Money in Politics*, *supra* note 19, at 1486-88. See also Lazos Vargas, *Initiatives & Minorities*, *supra* note 5 (using social science research to detail the conditions that makes it likely that white voters will be influenced by anti-minority sentiments).

<sup>265</sup> Associated Press, David Koenig, *Democrats’ Multiethnic ‘Dream Team’ Falters in Texas* (Nov. 9, 2002), available at [http://www.amarillonet.com/stories/111002/tex\\_democratsmulti.shtml](http://www.amarillonet.com/stories/111002/tex_democratsmulti.shtml).

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> Clay Robison, Editorial, *Battered Texas Dems Still Have a Role*, HOUSTON CHRON., Nov. 10, 2002, available at 2002 WL 23236797.

<sup>269</sup> Koenig, *supra* note 265 (quoting Cal Jillson, a political science professor at Southern Methodist University).

<sup>270</sup> By this I mean that Governor Perry used racial cuing—“the articulation of racial meaning and identities in conflictual, albeit somewhat masked terms.” Smith, *Race and Money in Politics*, *supra* note 19, at 1486.

<sup>271</sup> Cf. Robison, *supra* note 268 (“Racially polarized voting also was a factor in the defeat of Kirk, an African-American, in the U.S. Senate race and of Sanchez, a Hispanic, in the brawl for governor.”); Koenig, *supra* note 265 (quoting Richard

ing narrative: “Tony Sanchez wants to run Texas like his businesses. But after Sanchez’s bank was used to launder drug money, his bank failed.”<sup>272</sup>

This ad suggesting that Sanchez’s savings and loan laundered money from Mexican drug lords ran repeatedly in the campaign’s final days.<sup>273</sup> Political analysts view the defection of fifteen percent of Texas white Democrats, who might have been racially influenced by the drug dealer stereotype, to Perry as key to Sanchez’s defeat.<sup>274</sup>

Ron Kirk, the Senate candidate, denies that race played a factor in his defeat, “Texas may not be ready to elect a black, but this year America didn’t like any Democrats—didn’t like them black, didn’t like them white . . . . We did not lose this race because of racism.”<sup>275</sup> But race did play a role, in both the White and Latina/o communities. Whites predictably reacted negatively to Sanchez when he was linked to the Latino criminal stereotype,<sup>276</sup> and Kirk’s linkage to Sanchez turned off the white liberal support he had enjoyed in the past. While Kirk managed to pull more white Democrats than Sanchez, he was unable to attract the Latina/o vote that came out in support of Sanchez.<sup>277</sup> Latinas/os in Texas supported one of their own, Tony Sanchez, but were not willing to engage in coalitional politics with African American voters, perhaps because Democrats and Kirk supporters failed to do the grassroots work that makes coalitions happen.<sup>278</sup>

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Murray, a political science professor at the University of Houston, stating that the Republican attack ads “polarized older Anglos and Republicans against Democrats. . . . There was very little ticket-splitting, and there weren’t any independents at the polls.”).

<sup>272</sup> Schneider, *supra* note 62.

<sup>273</sup> Koenig, *supra* note 265 (quoting Bob Stein, a Rice University political science professor, stating “a Sanchez-controlled savings and loan that failed in 1988 . . . required a \$161 million federal bailout.”).

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> See MANZA & BROOKS, *supra* note 264, at 157 (discussing that Whites’ political behavior can be manipulated by subtle racial cuing); DAVID C. ANDERSON, CRIME AND THE POLITICS OF HYSTERIA: HOW THE WILLIE HORTON STORY CHANGED AMERICAN JUSTICE (1995); JEREMY D. MAYER, RUNNING ON RACE: RACIAL POLITICS IN PRESIDENTIAL CAMPAIGNS, 1960-2000 (2002).

<sup>277</sup> Koenig, *supra* note 265.

<sup>278</sup> Cf. James A. Regalado, *The Political Incorporation of L.A.’s Communities of Color: A Critical Assessment*, in PURSUING POWER, *supra* note 78, at 169-85, 185. (“The real work to empower communities of color and build coalitions . . . has been taking place at . . . grassroots levels. . .”).

b. *Villaraigosa's 2000 Bid to Become Los Angeles' Mayor*

Kevin Johnson, in his Symposium contribution, describes the failure of Antonio Villaraigosa's historic run for mayor of Los Angeles in 2000.<sup>279</sup> As described by Kevin Johnson, a key factor in Villaraigosa's defeat were race-baiting ads run by his Republican opponent, James Hahn, which featured the image of a crack cocaine pipe, and the following narrative: "Fact: The father of a convicted crack cocaine dealer contributed money to Antonio Villaraigosa. Fact: Villaraigosa wrote the White House pardon office claiming [the man] was wrongly convicted."<sup>280</sup>

The suggestion of complicity with drug dealers machinating a Clinton pardon raised the drug dealing stereotype. In Villaraigosa's case, it stuck.

Villaraigosa was also the target of a campaign by conservative individuals and groups that denounced his "racist, anti-American" past,<sup>281</sup> that is, his association with nationalist Chicano student groups like Aztlán and MECHA. The anti-Villaraigosa websites featured pictures of Villaraigosa holding Mexican flags and marching in demonstrations.<sup>282</sup> A recorded telephone message targeting San Fernando Valley voters denounced Villaraigosa for "shocking un-American" activities.<sup>283</sup>

A minority candidate running in a racially polarized environment cannot win. White voters overwhelmingly went for Hahn. More importantly, as Johnson points out, the interracial coalition failed, as eighty percent of the African American vote opted for Hahn.<sup>284</sup> Coalitional alliances among white liberals, Latinas/os

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<sup>279</sup> Johnson, *supra* note 4, at 934.

<sup>280</sup> Schneider, *supra* note 62; see also Gregory Rodriguez, *Latino Pols Face a Double Standard; When Did You Last Hear of a Case of 'White Sleaze,'* L.A. TIMES, Nov. 24, 2002, at M1.

<sup>281</sup> See website at <http://www.mayorno.com/> (last visited Dec. 28, 2002).

<sup>282</sup> See *id.*; website at <http://www.americanpatrol.com/FEATURES/010406LABORTAKEOVER/FeatureTakeoverLA010406.html>.

<sup>283</sup> The claim made by the Hal Netkin website is that the following message was heard by over 40,000 over 1 1/2 months before the mayoral vote:

Before voting for mayor of Los Angeles, please learn the truth about candidate Antonio Villaraigosa, and his ties with racist organizations and shocking un-American activities. Mr. Villaraigosa now claims to be a Democrat, but our website [www.mayorno.com](http://www.mayorno.com) has DOCUMENTED evidence that he was affiliated with radical anti-American groups with anti-Semitic and racist overtones. PLEASE check out the evidence for yourself at [mayorno.com](http://www.mayorno.com) and make your own decision, or call 818-989-2348.

available at <http://www.mayorno.com/> (last visited Dec. 28, 2002).

<sup>284</sup> Johnson, *supra* note 4.

and African Americans failed to materialize,<sup>285</sup> instead, cleavages among these communities with common interests were exposed.

*D. Minority Vote Turnout and Two Party Doldrums*

In the *Miner's Canary*, Lani Guinier and Gerald Torres write:

[V]oting is . . . a meaningless ritual when it is not tied to power in any substantial way, when it simply signifies assent to choices others have engineered or arranged. Even assuming voting's efficacy as a means to civic engagement, it is rendered empty by voters' inability to have a voice in how their votes are allocated, or by any assurance that their vote will make a difference. Hollow promises that "every vote counts," incantations of "count every vote," and stories of extraordinary elections decided by a handful of votes merely function as exceptions that prove the rule in the face of overwhelming and lopsided reelection rates of state and local legislatures.<sup>286</sup>

In the close Senate contests in Missouri and Georgia, weak African American support meant a sweep by Republicans of the two Senate seats up for grabs, McClellan and Carnahan. The disaffection and the high turnout by increasingly staunchly Republican white males caused a complete turnover of the control of the Missouri and Georgia state legislature to Republicans, and a loss by Roy Barnes in his bid for reelection in the governor's race in Georgia.<sup>287</sup> In California, according to *Los Angeles Times* exit polls, Latinas/os share of the vote dropped to ten percent, the lowest since the early 1990s.<sup>288</sup> Meanwhile, the white share of the California vote went up, from sixty-four percent to seventy-six percent.<sup>289</sup> As a consequence, the margin of Governor Grey Davis' victory was much closer than expected.

Democrats have only themselves to blame. Governor Roy Barnes, who boasted of his bonds to the African American com-

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<sup>285</sup> There has been much scholarly work on the up-to-now successful coalitional politics in Los Angeles. See, e.g., Regalado, *supra* note 278. As James Regalado emphasizes, those who talk about coalitions may be only optimistic and do not sufficiently focus on grassroots, community level, and non-electoral efforts. *Id.* at 185.

<sup>286</sup> GUINIER & TORRES, *supra* note 19.

<sup>287</sup> The turnout in rural white counties in Missouri and Georgia was greater than expected. See Murphy, *supra* note 29; Jim Galloway, *Barnes Says He's Done with Politics*, ATL. J.-CONST., Nov. 13, 2002, at A1; Will Lester, *GOP Seeks to Build on Voter Turnout*, ASS'D PRESS, Dec. 6, 2002.

<sup>288</sup> Exit Poll California General Election, L.A. TIMES Poll, Nov. 5, 2002, available at <http://www.images.latimes.com/media/acrobat/2002-03/6236873.pdf> (last visited July 1, 2003).

<sup>289</sup> *Id.*

munity may have failed to sufficiently motivate his supporters to go vote.<sup>290</sup> According to recent surveys, African American voters turned out in the election at prior levels, but failed to detect major differences between the two parties' policy positions.<sup>291</sup> In Maryland, gubernatorial candidate Kathleen Kennedy Townsend did not tether her reelection to attractive minority candidates, but instead attacked her Republican opponent for choosing an African American running partner as lieutenant governor.<sup>292</sup> In Missouri, Senator Jean Carnahan, who won in 2000 by a slim margin thanks to the African American vote in St. Louis, portrayed herself to voters in White suburban middle-class terms, as someone who engineered the merger of a big corporation in St. Louis, deeply cared about Social Security for elders, and voted for the Bush tax cuts. Her ads were predominantly staffed by Whites from her home town, Rolla, who spoke of her rural Missouri values. Is it any wonder that these white candidates failed to energize black voters?

In California, Governor Gray Davis vetoed an important civil rights bill that would have given undocumented workers greater access to drivers licenses only weeks prior to the election. Latina/o state legislators had worked hard with Davis to craft a bill, but at the last moment, Davis vetoed it justifying his action on homeland security grounds.<sup>293</sup> Latina/o state legislators questioned Davis' support of the Latina/o community.<sup>294</sup> Nevertheless, during the last weeks Davis campaigned hard among Latina/o and APIA voters, attempting to reassure them that his veto was genuine due to his concern for security issues and did not

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<sup>290</sup> Governor Barnes and others ascribed his loss to high while conservative turnout spurred by his opponent making an issue of whether the Confederate flag should continue to be part of the symbolism of state governance. See Galloway *supra* note 287.

<sup>291</sup> Melanie Eversley, *Black Voter Turnout Up, Activists Say*, ATL. J.-CONST., Nov. 14, 2002, at C8 (reporting 40% African American voter turnout in November 2002, only down slightly from 2000); Alvin Williams, *Is Lack of Message Costing Democrats Black Vote?*, THE RECORD (Bergen, N.J.), Jan. 2, 2003, at L8 (reporting Barbara Arnwine, director of the Lawyer's Committee for Civil Rights, stating "African-Americans couldn't figure out what the Democratic candidates stood for").

<sup>292</sup> Williams, *supra* note 291 (reporting the "tactic that backfired" when Townsend unleashed negative ads focusing on her opponent's selection of Michael Steele, a black Republican, as lieutenant governor).

<sup>293</sup> John Marelius, *Davis Trying to Win Back Disillusioned Latino Legislatures: Competition From Green Party Seen*, SAN DIEGO UNION-TRIB., Oct. 18, 2002, at A4.

<sup>294</sup> Around October 2002 the State Latino Caucus sent Davis a letter informing him that the Latino Caucus would not support his bid for re-election. *Id.*

undermine his support of the community.<sup>295</sup> Latina/o voters, he pleaded, should consider his overall record.<sup>296</sup> The minority vote in California was crucial to Davis' reelection.<sup>297</sup> But minority voters remained skeptical, and his support was noticeably less enthusiastic than four years ago.<sup>298</sup> Exit polls showed that APIA voters supported Davis, but remained wary of his future stance on immigration issues.<sup>299</sup> Latina/o voters, like African American voters, are currently giving Davis overwhelming negative job ratings.<sup>300</sup>

The game of trying to appeal to the middle is fraught with danger. The cost to both parties, but particularly to Democrats, of continuing to play electoral politics as if it were a "White middle-class only" game<sup>301</sup> is that voter turnout becomes the equivalent of a huge snore, and voters become confused as to which party has their interests at heart.

### *E. Moving Beyond the Black-White Paradigm*

As discussed in Parts III.A through III.D, the post-2000 elections raise a catalog of issues on what it might mean to move beyond the Black-White paradigm in the context of electoral process and minority representation.

#### *1. (Minority) Representational Theory*

Law scholars talk about the political and legislative process using three principal models, deliberative or Madisonian process theory, public choice theory, and institutionalism.<sup>302</sup> Theoretical

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<sup>295</sup> *Id.*

<sup>296</sup> Gray Davis pointed to his support for California's DREAM Act, which allows children of undocumented workers to pay instate tuition, and his appointment of Latino Carlos Moreno to the California Supreme Court. *Id.*

<sup>297</sup> According to *L.A. Times* exit polls, among white voters, Davis lost to Simon 43% to 46%. Davis was able to retain a substantial lead among Latino/a voters (65% to 24%), APIA voters (making up 6% of all California voters) (54% to 37%), and African Americans (making up 4% of all California voters) (79% to 10%). *L.A. TIMES Poll, supra* note 288.

<sup>298</sup> Schneider, *supra* note 62 (quoting *L.A. TIMES* estimates that 350,000 fewer Hispanics voted for Davis in 2000 than four years ago).

<sup>299</sup> See discussion *supra* note 297 and accompanying text.

<sup>300</sup> Michael Finnegan, *The Times Poll; Davis' Job Rating Falls to All-Time Low of 27%*, *L.A. TIMES*, Mar. 9, 2003, at A1 (based on telephone poll of 1300 voters).

<sup>301</sup> For criticism of the two party duopoly from a racial perspective, see Fuentes-Rohwer, *supra* note 19, at 353-55; Smith, *Black Party, supra* note 19.

<sup>302</sup> WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY, & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* (3d ed. 2001).

work within LatCrit scholarship should focus on how each of these models explains (or do not) the underrepresentation of minority voices in the political system. This critical theory work has already begun<sup>303</sup> but because politics and the legal process are ever-changing, continuing critical inquiry is needed to further refine seminal work. In addition, empirical work by political scientists has brought out challenging paradoxes. Joining theory, empirical investigation and doctrinal critique should inform civil rights efforts. For example, issues that litigants must answer under Voting Rights Act claims, such as what might constitute a vote dilution claim and what it means for a minority group to have “meaningful representation,” can be informed by the critical work done in representational theory and the insights that political scientists have drawn from their empirical work.

Another area of inquiry that moves the conversation beyond the Black-and-White closed circle is signaled by the sobering questions raised in the Symposium contributions. First, Kevin Johnson asks whether it is necessary to have more elected minority representatives in order for racial minorities to achieve “meaningful representation.”<sup>304</sup> Second, Johnson, Feng, Aoki, and Ikegami trenchantly raise the specter that minority representatives might become another “cog” in the political machinery of entrenched incumbents who are consumed by self-interest and further political agendas that benefit only insiders.<sup>305</sup> Political scientists have raised other tough issues. Professor Lublin finds that the process of drawing district lines to assure greater minority representation, also undermines the likelihood of substantive policies that favor minority communities will be enacted.<sup>306</sup> Other works predict that a Latina/o and APIAs descriptive representation will continue to be minimal because, at this point, there are not many more potential majority-minority districts that can be carved out.<sup>307</sup> Hero and Tolbert find that Latina/o influence

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<sup>303</sup> See sources cited *supra* note 19.

<sup>304</sup> See Johnson, *supra* note 4, at 8.

<sup>305</sup> See Feng, Aoki & Ikegami, *supra* note 3, at 897; Johnson, *supra* note 4, at 926.

<sup>306</sup> See LUBLIN, *supra* note 112.

<sup>307</sup> Hero, *supra* note 88, at 89-92 (finding that the percent of Latinas/os in a non-Latina/o Representatives’ district had no impact on Representative voting on bills that pertained to Latino substantive policies in the 1988 Congress); Hero & Tolbert, *supra* note 106, at 272-73 (using data on the 100th Congress and concluding that with respect to individual bills Latinas/os continued to have virtually no influence on Representatives, but that collectively, U.S. Congress may have substantively represented Latina/o policies).

on non-Latina/o elected U.S. Representatives was virtually non-existent, however, on key issues important to the Latina/o community, such interests were well represented by a Democratically controlled Congress.<sup>308</sup> These questions and paradoxes raise issues of identity, agency, and authenticity, which have been at the center of critical race and LaCrit theory inquiry.<sup>309</sup> The intersection of identity theory and political process/representative theory promises insights useful to the kinds of question that courts, like in *Cano v. Davis*, are currently raising in Voting Rights Act litigation.<sup>310</sup>

Finally, both Symposium contributions raise a broader question, just how much does the minority vote matter if it is a “swing vote” for major party candidates, who as Professor Lanier notes, may be “unaware of [minority voters] decisive impact or deliberately ignore it because of even more decisive white support.”<sup>311</sup> Moreover, just how relevant can the Latina/o and APIA vote be in a two-party system that favors incumbents and neutralizes newcomers? These questions seem to be at odds with the civil rights activism of informing elected officials and the public that minority voters *are* playing a deciding role in elections. How does “swing voter” influence translate into progressive politics? These are difficult questions, but they should be answered since they bring into sharp focus the tension in critical inquiry and civil rights aspirations.

## 2. *The Politics of Redistricting*

### a. *Incumbency Protection Plans?*

Prior to the elections, the Congressional Hispanic Caucus Chairman, Rep. Silvestre Reyes, believed that there was a possibility of increasing the Latina/o representation by “about six to 10 possibilities.”<sup>312</sup> The actual net gain, post-2000 redistricting, was four. Larry Gonzalez, Washington director of NALEO,

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<sup>308</sup> See Maurilio E. Vigil, *Hispanics in the 103rd Congress: The 1990 Census, Reapportionment, Redistricting, and the 1992 Elections* in PURSUING POWER, *supra* note 78, at 234-64; Harry P. Pachon, *Hispanic Underrepresentation in the Federal Bureaucracy: The Missing Link in the Policy Process*, in LATINOS AND THE POLITICAL SYSTEM, *supra* note 78, at 306-27.

<sup>309</sup> See, e.g., [Symposium contributions]; George A. Martinez, *Philosophical Considerations and the Use of Narrative in Law* 30 RUTGERS L.J. 683, 692 (1999).

<sup>310</sup> See discussion *supra* notes 133-38 and accompanying text.

<sup>311</sup> GUINIER, *supra* note 19, at 89.

<sup>312</sup> House, *supra* note 232.

summed up this disappointing result by describing states' redistricting as "incumbent protection plans."<sup>313</sup> Incumbency,<sup>314</sup> in combination with campaign financing<sup>315</sup> and a two-party political system,<sup>316</sup> are major structural factors that militate against major changes in the status quo. Moving beyond "Black and White" politics means exploring these structural issues of entrenchment, as well as focusing on possible coalitions with the grassroots interests that oppose entrenchment politics and a decade ago passed term-limit initiatives in many states.

*b. The Hard Work of Coalition Politics*

Feng, Aoki, and Ikegami have made a significant contribution to understanding the law and politics of redistricting with their Symposium article. There are valuable lessons to be drawn for political activism that goes beyond Black and White politics. First, CAPAFR organized early and was focused on its objectives.<sup>317</sup> Although not lavishly funded, they expended resources to engage in high-level conversations necessary to represent the interests of APIA voters in California.<sup>318</sup> They were well-prepared with the requisite statistical studies and political experts.<sup>319</sup> Second, coalitional politics was not taken for granted. Frequent meetings, working together in fashioning agendas, and acquiring skills in groups were trust-building tools necessary for CAPAFR, MALDEF, and other groups to work together.<sup>320</sup> Third, CAPAFR worked closely with elected APIA officials. This contrasts sharply with the public riff between MALDEF and state Representatives Martha Escutia and Gloria Romero.<sup>321</sup> In contrast, CAPAFR built a solid relationship with state Representatives Judy Chu and George Nakano,<sup>322</sup> which should pay off in the future.

Moving beyond Black and White politics involves understanding that coalitional politics is not theoretical, but involves hard work, trust building, and careful nursing of individual relation-

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<sup>313</sup> *Id.*

<sup>314</sup> See *supra* notes 30-33 and accompanying text.

<sup>315</sup> See *supra* notes 29-31 and accompanying text.

<sup>316</sup> See *supra* notes 27-28 and accompanying text and discussion at Part IV.D.

<sup>317</sup> See Feng, Aoki & Ikegami, *supra* note 3 at 48.

<sup>318</sup> *Id.*

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> See discussion *supra* notes 251 and accompanying text.

<sup>322</sup> See Feng, Aoki & Ikegami, *supra* note 3 at 48.

ships. The words of Lani Guinier and Gerald Torres are helpful: “the hard work of democracy is really found in mobilizing, and engaging participation of ordinary people at the grassroots level.”<sup>323</sup>

*c. Campaigning in Racially Polarized Environments*

The most sobering lesson of post-2000 elections was how effective media campaigns in “Horton-izing”<sup>324</sup> competitive minority candidates, Arturo Villaraigosa and Tony Sanchez were. Sergio Bendixen, a political consultant, maintains that Republicans have found an effective way to run against competitive Latina/o candidates, “[w]hen a Latino gets close to being able to win a contest in a state or a district or a city where the majority of voters is not Hispanic, the common attack now is drugs. . . . That’s a sure way to destroy their candidacy.”<sup>325</sup> The 2002 elections reaffirm earlier work by political scientists that where a minority candidate’s race becomes salient by subtle racial cueing, the candidate will lose.<sup>326</sup> The practice remains widely used, as 2002 shows, even as those who profit deny that their ads are racial.

LatCrit research has already stepped beyond the Black-White paradigm by documenting the effectiveness of race-baiting media campaigns in the context of Proposition 187.<sup>327</sup> Post-2000 elections suggest that inquiry into this area should continue to be documented and studied. More specifically, racial stereotypes stuck to Arturo Villaraigosa and Tony Sanchez,<sup>328</sup> but did not stick in Susan Castillo’s race.<sup>329</sup> Arturo Villaraigosa has been an immigrant rights activist, Chicano youth leader, and unionist. The lesson of the 2002 elections is that a Latina/o candidate with a strong civil rights activist background is “dead meat” if he or she decides to run for office. By contrast, Susan Castillo’s profile

<sup>323</sup> GUINIER & TORRES, *supra* note 19. See also Regalado, *supra* note 278.

<sup>324</sup> The phrase refers to the Willie Horton ads that President George H.W. Bush used during his presidential race against Mike Dukakis. See generally MAYER, *supra* note 276; ANDERSON, *supra* note 276.

<sup>325</sup> Schneider, *supra* note 62.

<sup>326</sup> Smith, *Race and Money in Politics*, *supra* note 19, at 1486-88.

<sup>327</sup> See Kevin R. Johnson, *The New Nativism: Something Old, Something New, Something Borrowed, Something Blue*, in IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 169 (Juan F. Perea ed., 1997); Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California’s Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629, 650-61 (1995).

<sup>328</sup> See *supra* Part IV.C.2.a.

<sup>329</sup> See *supra* Part IV.C.1.b.

as a Latina professional in a White dominated TV media came through as “White,” even when nasty commentators tried to racialize her campaign. This suggests that LatCrit should develop a race theoretic explanation based on social science as to why racial baiting works in some cases and not in others.

Second, reformist scholars should pursue a project that singles out race-baiting ads for regulation. Professors Smith and Overton<sup>330</sup> have drawn a stark picture of the many obstacles that minority candidacies must overcome. Free speech regulation is unpopular in mainstream academia; the case should be made for regulation of racially of racially cued ads<sup>331</sup> since campaign race-baiting has proven so effective in squashing minority candidacies.

*d. Voter Turnout Doldrums*

Feng, Aoki, and Ikegami maintain that APIAs and Latinas/os must “flex their political muscle . . . by showing up in significant numbers at the polls.”<sup>332</sup> But this may be a naïve take on minority voter turnout, one that unnecessarily boxes the Latina/o and APIA electorate into a “no win” proposition. Lose if you turn out (because the choices are so unappealing) and lose if you do not turn out (because promises of the potential voting power of APIAs and Latinas/os did not pan out).

In California, Latinas/os and APIAs were disappointed with Gray Davis and did not go to the booths in the numbers that they had before.<sup>333</sup> Gray Davis “dissed” the Latina/o and APIA electorate,<sup>334</sup> and he was rewarded in kind. In Massachusetts, Latinas/os turned out to vote in record numbers because a clone of Proposition 227 was on the ballot.<sup>335</sup> The initiative that Latinas/os overwhelming opposed won, but breakthroughs were made in electing Latina/o state representatives.<sup>336</sup> Latinas/os and APIAs seem to have a great deal of innate common sense regarding when to go vote and when not to bother. Perhaps LatCrit theory should take on the task of explaining the innate good sense of

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<sup>330</sup> Smith, *Race and Money in Politics*, *supra* note 19; Overton, *supra* note 19.

<sup>331</sup> Cf. Evan Richman, Note, *Deception in Political Advertising: The Clash Between the First Amendment and Defamation Law*, 16 CARDOZO ARTS & ENT. L.J. 667 (1998) (arguing for regulatory scheme of political guidelines).

<sup>332</sup> See Feng, Aoki & Ikegami, *supra* note 3, at 901.

<sup>333</sup> See *supra* notes 296-98.

<sup>334</sup> See discussion *supra* note 264 and accompanying text.

<sup>335</sup> See discussion *supra* notes 299-300 and accompanying text.

<sup>336</sup> See discussion *supra* note 230 and accompanying text.

Latinas/os and APIAs, rather than repeat mainstream judgments that disembodiment and remove agency from ordinary people.

#### IV

##### THE POLITICS OF BACKLASH: INITIATIVES IN WHICH THE CONTENT OF MINORITIES' CIVIL RIGHTS ARE VOTED ON BY THE MAJORITY

In introducing the LatCrit voting rights panel, Professor Keith Aoki linked initiatives and referenda within a race theoretic vision of political process.<sup>337</sup> Historically, initiatives and referenda have been an important law-making mechanism that has decreased the content of, or staved off advances, in minority rights. When initiatives and referenda that address the content of civil rights of minorities are voted on by majorities, minorities lose over eighty percent of the time.<sup>338</sup> Why such a dismal record? Derrick Bell famously noted that initiatives “reflect[ ] all too accurately the conservative, even intolerant, attitudes citizens display when given the chance to vote their fears and prejudices . . . .”<sup>339</sup> My own work has argued that the dynamics are more complex. Undeniably, initiatives put in play majority-minority dominant group dynamics, racial feelings, but also involve legitimate differences over cultural symbolism and group identity.<sup>340</sup> A race centered discussion of political and electoral process cannot be complete without discussing this significant form of democracy and law-making.

##### A. 2002 Language Initiatives

In the November 2002 elections, Colorado and Massachusetts voters had an opportunity to vote on whether these states would continue bilingual education, or adopt the one-year English immersion plan championed by Silicon Valley millionaire Ronald Unz known in California as Proposition 227.<sup>341</sup> After his California success, Mr. Unz funded a foundation that has put a version of Proposition 227, known as “English for the Children,” on the ballots in Arizona, Massachusetts, and Colorado.<sup>342</sup> In 2002, vot-

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<sup>337</sup> See LatCrit VII, *supra* note 2.

<sup>338</sup> Lazos Vargas, *Initiatives & Minorities*, *supra* note 5, at 431.

<sup>339</sup> Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1, 20-21 (1978).

<sup>340</sup> Lazos Vargas, *Initiatives & Minorities*, *supra* note 5, at 431.

<sup>341</sup> See *id.* at 410, 420.

<sup>342</sup> Anand Vaishnav, *English Immersion Plan Wins Over Bilingual Ed*, BOSTON

ers in Massachusetts enacted the initiative, while voters in Colorado defeated it.

The Colorado defeat is historic because it is the first time that a language anti-minority initiative has been defeated at a state-wide level. The key difference was that in Colorado the anti-proposition forces were aided by millionaire heiress, Pat Stryker, who supported the “English Plus” anti-initiative campaign with \$3 million dollars.<sup>343</sup> These funds financed campaign ads that argued that the Unz one-year English immersion plan would cost Colorado school districts tens of millions of dollars to implement.<sup>344</sup> Colorado voters turned down the measure by a two-to-one vote, the proportion by which anti-minority language initiatives usually win.<sup>345</sup>

In Massachusetts, by contrast, the one-year immersion plan won by seventy percent of the vote.<sup>346</sup> The Latina/o community in Massachusetts turned out in record numbers; ninety two percent opposed the initiative.<sup>347</sup> However, the Massachusetts experience followed the typical pattern of language initiatives. The non-Latino, English speaking majority overpowered a cultural and language minority, even though the minority saw the initiative as substantially undermining their civil rights and standing within the civic community.

### *B. Moving Beyond the Black-White Paradigm*

A traditional civil rights reaction to initiatives that undermine minority civil rights is litigation. In the 1960s, successful litigation successfully neutralized anti-integration initiatives.<sup>348</sup> One might argue that 1960s courts were more friendly to minorities’ civil rights than post-2000 courts. However, the counterargument is that civil rights litigation has always relied on it being a long-run educative process.

Initiatives are harmful, not because minorities lose (they will

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GLOBE, Nov. 6, 2002, at A1; Eric Hubler, *Amendment 31 Bilingual-Ed Ban Fails; Wartgrow Hails Defeat*, DENVER POST, Nov. 6, 2002, at E2.

<sup>343</sup> Hubler, *supra* note 342.

<sup>344</sup> *Id.*

<sup>345</sup> Lazos Vargas, *Initiatives & Minorities*, *supra* note 5, at 430-47.

<sup>346</sup> Vaishnav, *supra* note 342.

<sup>347</sup> Rodriguez, *supra* note 94 (reporting a turnout increase by forty-one percent from the 1998 midterm election).

<sup>348</sup> Lazos Vargas, *Initiatives & Minorities*, *supra* note 5, at 542-43.

lose because of sheer mathematics).<sup>349</sup> Anti-minority initiatives are harmful because they undermine the content of minorities' citizenship in the political and civic community and undermine their ability to participate in the to-and-fro of democratic civic life. It is this vigorous exchange that allows majorities and minorities to fashion norms and conditions of co-existence.<sup>350</sup> I have argued elsewhere that the Equal Protection Clause should be understood as embodying this main guiding principle.<sup>351</sup> For example, in the case of language initiatives, a majority vote reaffirming the primacy or exclusivity of English rejects multi-lingual/cultural communities by "telling" them that there is no place within the public community for their culture or language.<sup>352</sup> The rejection of a minority's language and culture is seen by that group as a rejection of its place in that civic and political community. This kind of alienation harms the community as a whole and makes peaceful co-existence more difficult.

Moving beyond the Back-White paradigm in this context means adopting a civil rights litigation strategy where the case can be made that it is appropriate that courts intervene where a court finds that majorities are undermining the ability of minority groups to participate in the polity.<sup>353</sup> Courts' appropriate function is to preserve a political process where majorities and minorities can co-exist.<sup>354</sup> This does not mean that courts should always strike down initiatives where minority groups feel strongly and lose to the vote of a majority. Rather, the constitutional norm of Equal Protection dictates heightened court scrutiny and intervention in cases where the court has found that a minority's civic standing and ability to participate in the political process have been severely impinged.<sup>355</sup>

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<sup>349</sup> *Id.* at 444-45.

<sup>350</sup> *Id.* at 509-13.

<sup>351</sup> See Sylvia R. Lazos Vargas, *Democracy and Inclusion: Reconceptualizing the Role of the Judge in a Pluralist Polity*, 58 MD. L. REV. 150 (1999) [hereinafter Lazos Vargas, *Democracy & Inclusion*].

<sup>352</sup> Lazos Vargas, *Initiatives & Minorities*, *supra* note 5, at 445 ("[L]anguage is a symbol of heritage and identity. . . . For Latinos, even those who lose their ability to speak Spanish . . . [the] language . . . is related with affective attitudes of self-identity and self-worth.").

<sup>353</sup> *Id.* at 516-26.

<sup>354</sup> *Id.* at 511. See also Lazos Vargas, *Democracy & Inclusion*, *supra* note 351, at 160-83.

<sup>355</sup> Lazos Vargas, *Initiatives & Minorities*, *supra* note 5, at 517-27. The test that I have proposed is based on my reading of *Romer v. Evans*, 517 U.S. 620 (1996). A court should apply heightened review where the court has found that ability to par-

A LatCrit perspective that moves beyond the Black-White paradigm would fully explore the complexity of intergroup conflict that develops in the context of anti-minority initiatives. Not every successful anti-minority initiative is primarily motivated by racial animus; however, it is true that racial resentment and racial hostility do almost always play some role. Racial feelings are most likely to be salient where a media campaign has stirred up stereotypes and triggered the majority's anxiety over changes in a status quo where their view dominated.<sup>356</sup> Many initiatives also involve ideological disagreements. In the case of language initiatives, the ideological disagreement is over whether culturally different minorities should be able to preserve their own language or assimilate quickly, that is, the English-only, or one-language, proponents believe that to be an American requires a monolingual English speaking culture. Moving beyond the Black-White paradigm involves exploring the full complexity of sentiments that are involved, and then trying to frame these differences in a way that achieves a better understanding of racial, social, and ideological dynamics, but does not shy away from where and how racial animus animates the divisions within our political communities.

#### CONCLUSION

Kathay Feng, Keith Aoki, and Bryan Ikegami's essay sounds as a glass half-full, while Kevin Johnson's contribution sounds as a glass half-empty. Both are right. There is reason to be optimistic and pessimistic. Minorities are fighting a political structure of representation that resists change. They are confronted with paradoxes as to how best to promote their interests within a representative structure that favors the political status quo. Federal courts have promised "meaningful representation" but have been reluctant to enforce remedies. Coalition work is slow, difficult, and full of pitfalls.

A post-Civil Rights and LatCrit project must engage the unpleasant. Minorities with a distinct cultural ethos, political viewpoint, and socio-economic reality have been unable to have a

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ticipate in the political process becomes "more difficult for one group of citizens than for all others," *id.* at 633; the initiative singles out and stigmatizes an unpopular minority group, without any legitimate justification, *id.* at 635; and finally, exclusion from civil and political society occurs because of a disfavored group's status, *id.* at 631.

<sup>356</sup> *Id.* at 462-74.

meaningful voice in a two-party, winner-takes-all, political system that protects incumbents, freezes in the duopolistic power of an ossified two-party system, and over relies on money as speech. Does the avenue to meaningful minority empowerment lie in playing the merchant minority game, persuading the White political bosses that they should court minority voters, as swing voters, in specific elections? There is a role for this kind of negotiation, but the accompanying baggage is model minority rhetoric. This game must be carefully played.

Ultimately the problems of the minority community are conceptual and structural. The far reaching solutions proposed by Professor Lani Guinier in 1986 in her path-breaking work were viewed as so radical that her seminal work cost her the position of Attorney General in the Clinton White House. (We got Janet Reno instead for eight years). LatCrit provides an intellectual home base to form new far-reaching proposals that challenge mainstream academics and political pundits to rethink the very basic concepts of who votes, how they vote, and why they vote.

These are long-term projects that LatCrit adherents must take on in order that the theoretical anti-subordination “talk” lines up with the LatCrit activist “walk.” But as Feng, Aoki, and Ikegami warmly note, “the process of gaining political influence is a long one, fraught with setbacks and disappointments but not without concomitant successful moments.”<sup>357</sup>

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<sup>357</sup> See Feng, Aoki & Ikegami, *supra* note 3, at 903.