GEOGRAPHICALLY SEXUAL?: ADVANCING LESBIAN AND GAY INTERESTS THROUGH PROPORTIONAL REPRESENTATION

*Darren Rosenblum**

Introduction

In the 1993 New York City School Board elections, a system of proportional representation[1] allowed lesbians and gay men[2] to elect representatives of their choice. In response to the School Board's plan to introduce the Children of the Rainbow Curriculum,[3] the New York City chapter of the Christian Coalition, an organization of the Christian Right,[4] began an opposition campaign with the slogan "No Sodom on the Hudson"[5] that pitted parents of color against so-called "rich white gays."[6]

---

* Associate, Flemming, Zulack & Williamson, L.L.P., New York, N.Y.; B.A., University of Pennsylvania, 1991; J.D., University of Pennsylvania, 1995. This Article was written with inspiration and encouragement from Professor Lani Guinier. Mary A. Inman provided guidance in the intricacies of proportional representation and voting rights law. Judith Reed served as my tutor in New York districting politics, as did Tom Duane, Robert Bailey, Dick Dadey, Alan Gartner, and George Waffle. I would also like to thank Alys I. Cohen, Scott B. Goldberg, Sarah Barringer Gordon, Jonathan Houlon, Marc Stein, Susan Sturm, and my parents, Edward and Susan Rosenblum. I dedicate this Article to Darren Kowitt, in admiration and love.

[1] A "proportional representation" system is an electoral system that accords representation to groups of voters in proportion to their voting strength. *Cf.* LANI GUINIER, TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 214 n.73 (1994). In such a system, an elected official represents those individuals who actually voted for her because her expressed views reflect their interests. Throughout this Article, proportional representation is contrasted to districting, a geographically based electoral system that currently predominates in the United States. *See infra* note 13. The form of proportional representation used in the School Board elections was the single transferable vote ("STV"), which is discussed at *infra* notes 122–124 and accompanying text.

[2] For the purposes of this Article, the terms "lesbians" and "gay men" include individuals who are attracted, exclusively or not exclusively, to the same sex and who identify, privately or publicly, with that attraction. Although lesbians and gay men constitute two distinct groups with potentially different interests, they are considered together in this Article unless otherwise specified.

[3] The Rainbow Curriculum included history and social science lessons about racial, ethnic, and sexual minorities. *See Teaching About Gays and Tolerance*, N.Y. TIMES, Sept. 27, 1992, § 4, at 16.

[4] In this Article, the term "Christian Right" encompasses a broad range of individuals and organizations—notably the Christian Coalition—that support reactionary policies that deprive women, lesbians, and gay men of their rights. *See generally* Glen Maxey, *Running Against the Right*, *in* GAY AND LESBIAN VICTORY FUND, OUT FOR OFFICE: CAMPAIGNING IN THE GAY NINETIES 159–63 (Kathleen DeBold ed., 1994) [hereinafter GAY AND LESBIAN VICTORY FUND]; Gail Shibley, *Coming Out on Every Doorstep*, *in* GAY AND LESBIAN VICTORY FUND 91–97.

[5] *See* N'Tanya Lee et al., *Whose Kids? Our Kids! Race, Sexuality and the Right in New York City's Curriculum Battles*, 25 RADICAL AM. 9, 17 (1991).

[6] *See id.* at 11–12.

Having succeeded in forcing the school chancellor's resignation, the Christian Coalition formulated a plan for the takeover of all New York City school boards.[7] The proportional system of the school board elections, however, provided lesbian and gay communities[8] with the opportunity to use their activism to defeat the homophobia of the Christian Right. By developing widely publicized endorsement slates based on questionnaires sent to all of the candidates, lesbian and gay communities attracted support from a wide range of voters.[9] And on election day—which occurred in the month following the highly successful 1993 Lesbian and Gay March on Washington[10]—lesbians and gay men went to the polls in an unprecedented fashion.[11] As a result, Jon Nalley, the leader of one lesbian and gay-supported slate, garnered the most votes of any school board candidate in the history of New York City, and the entire slate won.[12]

As the overwhelming victory of lesbian and gay interests in the school board elections demonstrates, a proportional representation system can effectively serve the interests of communities that have otherwise been unable to elect sufficient numbers of representatives. This Article focuses specifically on lesbian and gay communities because these communities have been among the least successful in getting their interests represented in the majority-rule districting system—the prevailing electoral system in the United States.[13] Although lesbian and gay communities have increased their political power, few elected officials represent lesbian and gay interests.[14] Furthermore, of the nearly half-million elected officials

---

[7] *See* Sam Dillon, *Lifting a Conservative Voice; Christian Group Views School Board Elections as a Test of Voter Support*, N.Y. TIMES, Apr. 10, 1993, § 1, at 23 (discussing political organizing by Christian activists for school board elections).

[8] A "lesbian and gay community" comprises lesbians and gay men who share a common culture and common political values. A lesbian and gay community may also be geographically based.

[9] *See* Interview with Richard Dadey, Executive Director of Empire State Pride Agenda, in New York, N.Y. (Jan. 16, 1994); *see also* Telephone Interview with Jon Nalley, New York City School Board Representative (Nov. 12, 1995).

[10] *See, e.g.*, Jeffrey Schmalz, *March for Gay Rights; Gay Marchers Throng Mall in Appeal for Rights*, N.Y. TIMES, Apr. 26, 1993, at A1.

[11] For instance, in the lesbian and gay West Village-Chelsea district, voter turnout quadrupled. *See* Sam Dillon, *Light New York School Board Vote Was Really the Heaviest Ever*, N.Y. TIMES, May 19, 1993, at A1.

[12] *See* Sam Dillon, *Supporters of Gay Rights Win More School Races*, N.Y. TIMES, May 18, 1993, at B3.

[13] A district is "[o]ne of the territorial areas into which an entire state or country, county, municipality, or other political subdivision is divided, for . . . electoral . . . purposes." BLACK'S LAW DICTIONARY 476 (6th ed. 1990). A single-member district exists when a district is represented by one person. A multimember district exists when a district elects a group of people to represent it. These concepts are detailed in part II. The only current alternative to districting is at-large voting, where "[e]lected officials [are] chosen by the voters of the State [or other political subdivision] as a whole rather than from separate congressional or legislative districts." *Id.* at 125.

[14] For a description of "lesbian and gay interests," see *infra* part I.A.

in the United States, only seventy are openly lesbian or gay.[15] This dearth of representatives has occurred because in a district-based electoral system, only geographically defined lesbian and gay communities have the opportunity to elect officials who represent their interests. Although many lesbians and gay men choose to live in areas with large lesbian and gay populations, sexual orientation has no natural correlation to geography. This lack of a geographic correlation greatly decreases the ability of districting schemes to represent a broad base of lesbian and gay interests. Therefore, a districting system fails to ensure effective interest representation for lesbians and gay men.[16] By contrast, a proportional representation system would greatly expand possibilities for lesbian and gay interest representation.

Part I of this Article explores lesbian and gay interests and representational characteristics.[17] Part II highlights the inadequacies of a single-member districting system in representing the interests of lesbian and gay communities. It concludes with an examination of the New York City Council's 1991 redistricting, where the mobilization of strong lesbian and gay communities in a receptive environment nonetheless failed to lead to effective representation of lesbian and gay interests in the City Council. Part III describes proportional representation systems and reveals how such systems would better serve lesbian and gay communities. Part IV acknowledges the political and legal obstacles to achieving proportional representation. Finally, Part V asserts that both the increasing disenfranchisement of people of color from the electoral process and the high degree of discontent with the system that has been expressed by the general electorate in recent years might facilitate the conversion to a proportional system. To promote a proportional representation system, lesbian and gay communities must form coalitions with other minority communities that remain underrepresented in a districting system. By struggling with others to achieve interest representation, lesbians and gay men will be engaged in the furtherance of a much broader goal of pro-

---

[15] GAY AND LESBIAN VICTORY FUND, *supra* note 4, at xiii.

[16] "Interest representation" occurs when a representative advocates for the interests of a body of voters. Lani Guinier, *No Two Seats: The Quest for Political Equality*, 77 VA. L. REV. 1413, 1462 (1991) [hereinafter Guinier, *No Two Seats*]. In contrast to interest representation, "descriptive representation" occurs when a group is represented by one or more members of that group. Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1102 n.114 (1991) [hereinafter Guinier, *Tokenism*]. For example, lesbian and gay interest representation occurs when any elected official promotes a particular lesbian and gay interest; by contrast, only lesbian and gay elected officials can descriptively represent lesbians and gay men.

[17] For the purposes of this Article, the term "representational characteristics" means the characteristics of members of a group that shape the group's interaction with the electoral system.

portional representation—namely, the realization of a more complete democracy.

I. Lesbian and Gay Interests and Representational Characteristics

Despite the difficulty of defining lesbian and gay identity,[18] lesbians and gay men need to have their interests represented. After identifying the interests of lesbians and gay men, this Part will examine certain characteristics of lesbians and gay men that affect their representation. The purpose of this examination is to assess the ability of a single-member districting system to achieve effective lesbian and gay interest representation.

A. Lesbian and Gay Interests and the Need for Effective Interest Representation

Lesbian and gay interests arise from the wide array of legal issues facing lesbian and gay communities.[19] Anti-lesbian and gay violence victimizes a shockingly high percentage of lesbians and gay men, wreaking heavy damage individually and collectively.[20] As localities debate how to promote Acquired Immune Deficiency Syndrome ("AIDS") awareness and prevent the spread of the disease, Congress considers whether to curtail government funding for AIDS research and medical care.[21] Schools and child welfare agencies fail to meet the needs of lesbian and gay youth,[22] and employment discrimination plagues lesbians and gay men.[23] States use solicitation and sodomy statutes, which have been upheld by the

---

[18] *See, e.g.*, Eve Kosofsky Sedgwick, *Epistemology of the Closet*, *in* THE LESBIAN AND GAY STUDIES READER 45, 55 (Henry Abelove et al. eds., 1993) (discussing the "incoherence of modern ways of conceptualizing same-sex desire and, hence, gay identity").

[19] For an overview of the various forms of harassment and discrimination faced by lesbians and gay men and of the inadequate protections provided by the legal system, see LESBIANS, GAY MEN, AND THE LAW (William B. Rubenstein ed., 1993) (surveying cases, statutes, legal theory, and relevant fiction); *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508 (1989) (summarizing various legal areas as they affect lesbians and gay men).

[20] *See generally* GARY D. COMSTOCK, VIOLENCE AGAINST LESBIANS AND GAY MEN (1991).

[21] Bennett Roth, *AIDS Advocates Fear Brunt of Medicaid Cuts*, HOUS. CHRON., Nov. 4, 1995, at A1; *The Bottom Line is People are Dying, AIDS Funding is at Risk as Some in Congress Turn Penny-wise and Pound Foolish*, L.A. TIMES, July 21, 1995, at B8.

[22] *See, e.g.*, Donna Dennis & Ruth Harlow, *Gay Youth and the Right to Education*, 4 YALE L. & POL'Y REV. 446 (1986), *reprinted in* LESBIANS, GAY MEN AND THE LAW, *supra* note 19, at 156; Lori Nessel & Kevin Ryan, *Migrant Farmworkers, Homeless and Runaway Youth: Challenging the Barriers to Inclusion*, 13 LAW & INEQ. J. 99 (1994).

[23] *See generally* James Douglas, *I Sit and Look Out: Employment Discrimination Against Homosexuals and the New Law of Unjust Dismissal*, 33 WASH. U. J. URB. & CONTEMP. L. 73 (1988); Gail Heatherly, *Gay and Lesbian Rights: Employment Discrimination*, 4 ANN. SURV. AM. L. 901 (1986).

United States Supreme Court,[24] to harass and intimidate lesbians and gay men. Moreover, courts reinforce homophobia by excluding lesbians and gay men from family rights such as marriage,[25] adoption,[26] and child custody.[27] Lesbian and gay communities thus have a profound need for representation at all levels of government—though few voting rights scholars discuss lesbian and gay interests.[28]

In the face of anti-lesbian and gay discrimination, lesbians and gay men have become more politically active. Local controversies such as those concerning curricula in public schools and books in public libraries help build communities and coalitions that serve well for broader political issues. Additionally, communities and coalitions have organized in opposition to state anti-lesbian and gay referenda.[29] This political organizing in localities and states across the country presages the kind of organization needed to represent lesbian and gay interests in the legislative, executive, and even judicial branches of state and federal government.

Electing advocates of lesbian and gay interests serves several purposes. First, achieving lesbian and gay interest representation might sway lesbians and gay men to "keep the faith"[30] in the ability of the government

---

[24] Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding Georgia's sodomy law).

[25] *See, e.g.*, Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971) (holding that the Fourteenth Amendment's Equal Protection Clause is not violated by a prohibition of same-sex marriage); Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974), *review denied*, 84 Wash. 2d 1008 (1974) (holding that a prohibition of same-sex marriage did not constitute sex discrimination). *But see* Baehr v. Lewin, 853 P.2d 44 (Haw. 1993) (holding that the prohibition of same-sex marriage violated the privacy and equal protection guarantees of the Hawaiian constitution and that this prohibition constituted sex discrimination meriting strict scrutiny).

[26] *See generally* Julia F. Davies, *Two Moms and a Baby: Protecting the Nontraditional Family Through Second Parent Adoptions*, 29 NEW ENG. L. REV. 1055 (1995). *But see In re* Jacob, Nos. 195, 196, 1995 WL 643883 (N.Y. Nov. 2, 1995) (upholding the adoption by a lesbian of her partner's child).

[27] *See, e.g.*, Roberts v. Roberts, 489 N.E.2d 1067, 1070 (Ohio 1985) (denying a gay father visiting rights until the children were old enough not to be influenced by his "errant behavior"); Bottoms v. Bottoms, 457 S.E.2d 102 (Va. 1995) (reversing a lower court's decision that granted custody of a child to his lesbian mother, awarding custody to the child's grandmother).

[28] For some exceptions, see Mary A. Inman, *C.P.R. (Change Through Proportional Representation): Resuscitating a Federal Electoral System*, 141 U. PA. L. REV. 1991, 2005 (1993) and William H. Kysella, Jr., *Gerrymandering Against Gays?*, 4 LAW & SEXUALITY 249 (1994) (discussing representation of lesbians and gay men in California).

[29] Political organizing against such referenda has involved uniting and mobilizing progressive, urban parts of states against rural areas that have generally supported the referenda. The fight against Amendment 2, Colorado's anti-lesbian and gay referendum, gained national attention with widespread boycotts and support for the legal team opposing the amendment. *See, e.g.*, Dirk Johnson, *Colorado Faces Boycott Over Its Gay-Bias Vote*, N.Y. TIMES, Dec. 3, 1992, at A16. Oregon's anti-lesbian and gay referenda led to enormous efforts in and out of the state to defeat the two measures. *See, e.g.*, John Gallagher, *Taking the Initiative: Battles Over Gay Rights Intensify in Ohio, Colorado and Oregon*, ADVOCATE, Oct. 5, 1993, at 24.

[30] This slogan of Harlem's U.S. Representative Adam Clayton Powell, Jr., applies well

to respond to the needs of subjugated minorities. Second, the purpose of lesbian and gay interest representation is not merely to change the law, but, in the words of Justice Thurgood Marshall, to "expand and affect political debate."[31] Since lesbians and gay men constitute a minority of the population, even increased representation may not lead to the full realization of their interests. Nonetheless, visibility, awareness, and progress should follow from broader discussion of lesbian and gay interests.

B. The Representational Characteristics of Lesbians and Gay Men

Three characteristics of lesbians and gay men affect the representation of their interests: lesbians and gay men are officially unidentifiable, they have intersectional identities, and they are often geographically dispersed.[32] First, because lesbians and gay men can choose whether to identify publicly and politically with their sexual orientation, they constitute an "officially unidentifiable" group.[33] For districting purposes, simplistic notions of identity are used to locate racial minorities. Racial identity, for all its complexity, is officially quite fixed. In contrast, lesbians and gay men are able to pass as heterosexual, thus rendering the location of lesbian and gay communities difficult to ascertain. Furthermore, districts are drawn from census data, which do not include information on sexual orientation.[34] Alternative methods, such as through records of contributors to lesbian and gay organizations and the mapping of lesbian and gay businesses and institutions, also fail to identify accurately the location and size of lesbian and gay communities.[35]

---

to the tenuous relationship between lesbian and gay voters and the government. *See* Lani Guinier, *Keeping the Faith: Black Voters in the Post-Reagan Era*, 24 HARV. C.R.-C.L. L. REV. 393, 435 n.7 (1989).

[31] Munro v. Socialist Workers Party, 479 U.S. 189, 202 (1986) (Marshall, J., dissenting), *quoted in* Lani Guinier, *The Representation of Minority Interests: The Question of Single-Member Districts*, 14 CARDOZO L. REV. 1135, 1146 (1993) [hereinafter Guinier, *Single-Member Districts*].

[32] Barbara A. Weightman, *Commentary: Towards a Geography of the Gay Community*, 1 J. CULTURAL GEOGRAPHY 106, 107 (1981) ("The at-large gay community is not a community in the traditional sociological sense in that it lacks a broad definable territorial base with primary institutions serving a residential population."); *see also* Kysella, *supra* note 28, at 265.

[33] The term "officially unidentifiable" is used to indicate that political systems are unable to determine who is lesbian or gay.

[34] Although same-sex households, which the census does quantify, might indicate some lesbian and gay population, such statistics are overinclusive to the extent that they include college fraternities, sororities, and the many heterosexual men and women who live together. Similarly, many lesbians and gay men live with members of the opposite sex and would thus be undercounted if same-sex households were the only measures used to quantify lesbian and gay communities.

[35] *See infra* notes 99–101 and accompanying text.

The continuum of sexuality is another complicating factor that contributes to the unidentifiability of lesbians and gay men. Sexual identity and interests are fluid within individuals and over time.[36] The fact that general lesbian and gay population estimates vary greatly demonstrates the difficulty of locating and quantifying lesbian and gay communities.

The second representational characteristic of lesbians and gay men is that they have intersectional identities.[37] Lesbians and gay men comprise many racial, ethnic, class, and gender groups and, therefore, face multiple discriminations.[38] Respecting the unique ways in which women, racial minorities, poor people, and other disadvantaged and marginalized groups face anti-lesbian and gay discrimination requires consideration of their different interests as part of the overall need for lesbian and gay interest representation.[39]

The third characteristic of lesbians and gay men is related to intersectionality: lesbians and gay men are geographically dispersed. Although some lesbians and gay men live in identifiable urban "ghettos,"[40] many live in neighborhoods correlated with their class, race, or ethnicity rather

---

[36] The 10% figure cited in Alfred Kinsey's landmark studies of human sexuality serves as a common reference point for quantifying lesbian and gay communities, even for representation purposes. *See* ALFRED C. KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN FEMALE (1953); ALFRED C. KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN MALE (1948); *see also, The Case of the Missing Districts*, OUTWEEK, May 1, 1991, at 4 ("[L]esbians and gays, with at least 10% of the city's population, deserve at least five [of 51 seats on the City Council]."). *But see* Felicity Barringer, *Sex Survey of American Men Finds 1% Are Gay*, N.Y. TIMES, Apr. 15, 1993, at A1; Stuart Elliott, *A Sharper View of Gay Consumers*, N.Y. TIMES, June 9, 1994, at D1.

[37] The meaning of the term "intersectional" here follows that used by Professor Kimberlé Crenshaw, which refers to a person's multiple, oppressed identities. For example, African American women are oppressed as African Americans and as women, and have multiple identities as a result of the oppression that the two groups face. Crenshaw argues that this multiple discrimination is both heavier than and distinct from the sum of its parts. *See generally* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989). For a closer examination of intersectionality in lesbian and gay communities, see Darren Rosenblum, *Queer Intersectionality and the Failure of Lesbian and Gay Victories*, 4 LAW & SEXUALITY 83 (1994).

[38] The use of the plural "genders" indicates the multiplicity of genders that exist and acknowledges the important role of transgendered individuals in the lesbian and gay movement. For a powerful account of life at the borders of gender, see KATE BORNSTEIN, GENDER OUTLAW (1994).

[39] As a participant in Gay and Lesbian Youth of New York from 1984 to 1986, I observed the differing needs of white, African American, and Latino lesbian and gay youth. The white teenagers more often had their own rooms in their homes and thus greater privacy. In addition, they were better able to afford the cafés and restaurants to which the group retreated after meetings. The teenagers of color, by contrast, often had no private space and less disposable money. As a result, the teenagers of color "hung out" more in the street and thus may have faced more police and other homophobic harassment. These different perspectives could also affect political decisions. For example, although harsher policing of the streets would not seem to be a problematic issue for white lesbians and gay men, it would negatively affect lesbians and gay men of color.

[40] Many refer to lesbian and gay urban communities as "ghettos." *See, e.g.*, MANUEL

than their sexual orientation—either by choice or economic necessity.[41] Lesbians are particularly dispersed in that they "tend not to concentrate in a given territory, but establish social and interpersonal networks."[42] In addition, the increasing tendency among lesbians and gay men to move to the suburbs, which reflects the movement of the population as a whole, contributes to geographic dispersion.[43]

II. Subjugation of Lesbian and Gay Interest Representation Through Districting

Districting relies on two premises that render it an ineffective system of representation for lesbians and gay men—even in the absence of homophobic motivation on the part of district line drawers. First, for districting to ensure the representation of a community's interests, line drawers must be able to identify the community. Because lesbians and gay men are officially unidentifiable, representing their interests through a districting scheme would prove to be a challenge even for the most supportive of line drawers. Second, the community must be compact enough to fall into one district. Therefore, to the extent that lesbians and gay men are dispersed, a districting system cannot effectively or accurately represent lesbian and gay interests.

This Part addresses the barriers to achieving effective lesbian and gay interest representation in a districting system. First, it outlines districting guidelines and reveals how, despite such guidelines, all districting actually constitutes gerrymandering. Second, it analyzes the possible outcomes for lesbian and gay interest representation in a districting system. Third, it demonstrates that under each of these outcomes, problems exist that limit the potential for effective lesbian and gay interest representation. Fourth, it shows that even where effective lesbian and gay interest representation

---

CASTELLS, THE CITY AND THE GRASSROOTS: A CROSS-CULTURAL THEORY OF URBAN SOCIAL MOVEMENTS 137 (1982) (describing gay migration to coastal cities).

[41] There is some indication that lesbians and gay men of color more frequently remain in their families' neighborhoods instead of moving to predominantly lesbian or gay neighborhoods that are often white. Randy Kennedy, *Christopher Street: Changes Sweep the Gay Mecca*, N.Y. TIMES, June 19, 1994, § 14, at 6.

[42] *See* CASTELLS, *supra* note 40, at 140. ("On the whole they are poorer than gay men and have less choice in terms of work and location, and their politics is less directed towards the established political system.") (citations omitted). *But see* Sy Adler & Johanna Brenner, *Gender and Space: Lesbians and Gay Men in the City*, 16 INT'L J. URB. & REGIONAL RES. 24 (1992) (arguing that lesbians are more spatially concentrated than the general literature suggests).

[43] *See* Jane Gross, *A Milestone in the Fight for Gay Rights: A Quiet Suburban Life*, N.Y. TIMES, June 30, 1991, § 4, at 16. Further, suburban lesbians and gay men, because they lead a different lifestyle from their urban counterparts, may have different representational needs. *Cf.* Frederick R. Lynch, *Nonghetto Gays: An Ethnography of Suburban Homosexuals*, *in* GAY CULTURE IN AMERICA 165 (Gilbert Herdt ed., 1992).

is prevented by districting, lesbian and gay communities are unable to obtain Voting Rights Act remedies. Finally, it describes the 1991 redistricting for the New York City Council, which exemplifies the inadequacy of districting systems in representing lesbian and gay interests.

A. Districting Requirements

The act of districting is subject to constitutional and statutory guidelines. First, stemming from several 1964 Supreme Court cases[44] and their progeny,[45] population equality standards require strict equality of population among all districts in a jurisdiction. A second requirement is that apportionment not "minimize or eliminate" the power of a political group.[46]

The third criterion in apportionment—the prevention of racial discrimination—is the most contentious and has potentially the greatest impact on lesbian and gay interest representation because in urban spaces, racial, ethnic, and lesbian and gay communities often share a small geographic area.[47] The Voting Rights Act of 1965, its 1982 amendments, and subsequent Supreme Court decisions prohibit districting that is designed to weaken racial group voting potential.[48] The Voting Rights Act thereby increased the likelihood that racial minorities would elect representatives of their choice.[49] Section 2 of the Act permits racial and language minorities to challenge districting plans that dilute their voting power, which

---

[44] *See* Lucas v. Colorado Gen. Assembly, 377 U.S. 713 (1964) (overturning Colorado's state legislative apportionment plans because they were not sufficiently grounded on population); Reynolds v. Sims, 377 U.S. 533 (1964) (holding that the Equal Protection Clause requires that both houses of a bicameral state legislature must be apportioned on a population basis); Wesberry v. Sanders, 376 U.S. 1 (1964) (requiring congressional districts to represent equal numbers of people).

[45] *See* Karcher v. Daggett, 462 U.S. 725 (1983) (holding that there are no de minimis standards below which deviation from complete equality is constitutional); Mahan v. Howell, 410 U.S. 315 (1972) (upholding a Virginia state legislature apportionment plan with an average variance of 3.89%); Kirkpatrick v. Preisler, 394 U.S. 526 (1969) (holding that respecting political subdivisions cannot derail the strict requirement of a good faith effort to achieve mathematically precise equality).

[46] Gaffney v. Cummings, 412 U.S. 735 (1973) (holding a Connecticut apportionment that attempted to reflect the state's balance of party affiliation to be constitutional); *see also* Davis v. Bandemer, 478 U.S. 109 (1986) (holding that political gerrymandering violates the Equal Protection Clause and that a threshold showing of discriminatory vote dilution is required for a prima facie claim).

[47] In recent years, the Supreme Court has transformed the role that race may legitimately play in the districting process. *See, e.g.*, Miller v. Johnson, 115 S. Ct. 2475 (1995); Shaw v. Reno, 113 S. Ct. 2816 (1993). For more discussion of the impact of this change, see *infra* part IV.A.

[48] *See* White v. Register, 412 U.S. 757 (1993) (striking down multimember Texas House districts for diluting black and Hispanic votes); Thornburgh v. Gingles, 478 U.S. 30 (1985) (rejecting the use of multimember districts in North Carolina's legislative reapportionment for undermining the effectiveness of black votes).

[49] S. REP. No. 417, 97th Cong., 2d Sess. 4–7 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 182.

occurs when a plan reduces or excludes a minority's voice in the political process.[50] Section 5 is intended to protect minority voting rights in a jurisdiction that is specifically required to preclear its districting plans with the United States Justice Department.[51] The Voting Rights Act, however, does not require the creation of majority districts based on race or ethnicity.[52]

Ideally, these criteria would be used to guide redistricting. In practice, however, districting is not an objective process. As recognized by the Supreme Court in *Gaffney v. Cummings*, "[d]istrict lines are rarely neutral phenomena. They can well determine what district will be predominantly Democratic or predominantly Republican, or make a close race likely . . . . The reality is that districting inevitably has and is intended to have substantial political consequences."[53] In practice, districting must be performed by a group—either a legislature or an entity appointed by a legislature—that is necessarily minuscule relative to the population being divided. Any such group can attempt to engineer electoral politics by dividing the population into favorably constructed electorates. When the majority group has the power to draw distinct lines without any protections for minority groups, the majority can institutionalize its dominance. Such a representational system in a pervasively homophobic society directly impedes lesbian and gay interest representation.

B. Possible Outcomes for Lesbian and Gay Interest Representation in a Districting System

The Voting Rights Act permits lesbian and gay interest representation only when the creation of a lesbian and gay district would not interfere with the drawing of a majority-minority district.[54] Since the most visible and heretofore represented lesbian and gay communities have largely been located in urban areas, the three outcomes described in this Section presume an urban context. The first two possible outcomes for lesbian and gay interest representation under the Voting Rights Act involve a lesbian and gay community that is located entirely within one district, while the third involves a community split by two or more districts.

---

[50] Voting Rights Act of 1965 § 2, 42 U.S.C. § 1973 (1988).

[51] Voting Rights Act of 1965 § 5, 42 U.S.C. § 1973c (1988).

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

[53] 412 U.S. 735, 753 (1973).

[54] "Majority-minority" indicates a majority of racial, ethnic, or language minorities. *See* SUBMISSION UNDER SECTION 5 OF THE VOTING RIGHTS ACT FOR PRECLEARANCE OF THE 1991 REDISTRICTING PLAN FOR NEW YORK CITY COUNCIL (June 17, 1989) (on file with the New York Municipal Library) [hereinafter SUBMISSION]. The SUBMISSION did not include sexual minorities in this group.

The first possible outcome is the creation of a majority-lesbian and gay district.[55] This outcome occurs primarily in predominantly white districts when several adjacent majority-minority districts have left a concentrated white lesbian and gay community. Given that facilitating minority representation is the fundamental goal of the Voting Rights Act, cities tend to draw majority-minority districts first, thus subordinating the creation of lesbian and gay districts to Voting Rights Act requirements.[56]

A lesbian and gay community that is too small to form an entire single-member district might completely fall within the boundaries of a district. This second possible outcome, a lesbian and gay "influence district," could exist in a white, multicultural, or majority-minority district.[57] Such a district would permit voters in a lesbian and gay community to sway elections and would provide them with ample attention from candidates. One could well imagine a candidate who represented lesbian and gay interests succeeding in such a progressive district—although such a candidate necessarily would have to appeal to voters outside of the lesbian and gay community.

An influential lesbian and gay community is only possible, however, where the majority is not hostile to lesbian and gay interests. In a district where anti-lesbian and gay sentiment divided the population, candidates representing lesbian and gay interests could be consistently defeated—even if forty-nine percent of the district were lesbian and gay. In such a district, a lesbian and gay community could lose any influence that its size might otherwise afford it.

Although lesbian and gay majority and influence districts provide the best opportunity for lesbian and gay interest representation in a districting system, the third outcome—in which a lesbian and gay community is

---

[55] New York City Council District 3 is such a district. Between the West Harlem and Chinatown districts is an area that is approximately 75% white—more than 30 percentage points above the city average. Community pressure in this area led to the creation of a majority-lesbian and gay district. *See* Felicia R. Lee, *Plan for New City Council Passes in Praise and Anger*, N.Y. TIMES, June 4, 1991, at B1 [hereinafter *Plan Passes*]. It is less likely that a majority-minority district would be formed with a majority of lesbians and gay men of color, because well-known lesbian and gay "ghettos" are generally located in white neighborhoods. The statistics used to advocate for a lesbian and gay district, which are based on donor lists to lesbian and gay organizations, probably do not reflect the size of lesbian and gay communities of color because those communities may not participate as frequently in donor programs. *See* Testimony by Richard Dadey, Executive Director of Empire State Pride Agenda, before the New York City Districting Commission (Mar. 27, 1991) (on file with author).

[56] *See* Interview with Judith Reed, General Counsel for the 1991 New York City Districting Commission, in New York, N.Y. (Dec. 27, 1993).

[57] Robert Bailey argues that New York City Council District 25 (Jackson Heights, Queens) is an example of such a district. "All the Black, Latino (mostly Colombian), and gay communities agreed on a middle class majority-minority district with a white liberal minority." Interview with Robert Bailey, Consultant to the New York City Districting Commission, in New York, N.Y. (Dec. 30, 1993).

"fractured" between districts—frustrates the opportunity for a lesbian and gay community to elect an official who is responsive to the interests of its members. In this situation, members of a community that might be large enough to qualify as a majority in a hypothetical district, but that lacks the political power necessary to sway the process, would be unable to combine their votes for the representative of their choice because they would be split among two or more districts.[58]

C. Districting Problems that Limit the Potential for Effective Lesbian and Gay Interest Representation

Achieving some degree of lesbian and gay interest representation through a majority district or an influence district may be a worthy goal. Indeed, in the context of a seemingly unchangeable representational system, it may be essential in empowering lesbian and gay communities. Even when lesbian and gay interest representation is possible, however, its effectiveness is dampened by the problems of "virtual representation," "hierarchization of communities," and "tokenism."

1. Virtual Representation

First among these representational problems is "virtual representation," a situation in which an individual's interests are theoretically represented by officials elected by other districts.[59] In contrast, "direct representation" assumes that an individual is represented only by those elected representatives for whom the individual voted.[60] Professor Lani Guinier has observed that virtual representation is founded on the following misconceptions: indirect representation; representation of similar interests elsewhere; and top-down representation.[61] Each of these three assumptions misleads people into accepting the value of districting. Under the indirect representation assumption, for example, New York City Council District 3, which was created as a lesbian and gay district, indirectly represents lesbian and gay voters city-wide outside of that district. The "gay district"

---

[58] For example, fracturing occurred when Park Slope and neighboring areas in Brooklyn, collectively constituting the most concentrated lesbian and gay community in New York City, were split among adjacent majority-minority districts that had been drawn to satisfy the Voting Rights Act's requirement that racial minorities be protected. Interview with Robert Bailey, *supra* note 57.

[59] *See* Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589, 1607 n.79 (1993) [hereinafter Guinier, *Emperor's Clothes*]; *see also* JOHN P. REID, THE CONCEPT OF REPRESENTATION IN THE AGE OF THE AMERICAN REVOLUTION 50 (1989) (stating that the English claimed that the American colonies were represented in Parliament by virtual representation).

[60] Guinier, *Emperor's Clothes*, *supra* note 59, at 1612.

[61] *Id.* at 1607.

representative thus becomes the politician upon whom *all* lesbian and gay voters in the city depend.

The second assumption is that while lesbian and gay communities outside of the lesbian and gay district may not have direct representation, their interests are represented to the extent that they coincide with the interests of those directly represented elsewhere within the jurisdiction. Their votes are, therefore, not wasted, even though they were cast for the losing party in their district. The notion, however, that one representative can serve different, voiceless lesbian and gay communities in a jurisdiction ignores potentially profound distinctions among communities.[62]

The third assumption of virtual representation, top-down representation, leads to the conclusion that the lesbian and gay voters who opposed a homophobic representative are nonetheless represented by her because they live within her district. However, it is unlikely that a representative would vote based on the interests of those who opposed her. Top-down representation would prove particularly frustrating for a district influence group, which would see its community shut out of the political process despite its considerable size.

2. *Hierarchization in Communities*

Virtual representation, which excludes individual communities from the opportunity to elect their representatives of choice, creates a hierarchy between those communities that can choose representation and those for whom representation is chosen—even though the communities may share similar interests. The lesbian and gay communities that reside within lesbian and gay majority or influence districts attain greater prominence through their representation. By contrast, lesbians and gay men of color who choose to live in neighborhoods that reflect their racial or ethnic identity might forfeit direct representation of their lesbian or gay identity when their jurisdiction's only lesbian or gay district is majority-white. If the sole representative of lesbian and gay interests comes from a predominantly white district, lesbian and gay interests tend to be constructed around this whiteness.

The resulting hierarchy among lesbian and gay communities raises similar theoretical problems to those that confront race-based districting, including essentialism, isolation, and division.[63] Essentialist notions of identity, in which a set of characteristics is assumed to apply to all members of that group, are encouraged by the districting process. Districting accords directly represented lesbians and gay men an essentialist

---

[62] *Id.* at 1608.

[63] *See, e.g.*, T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After* Shaw v. Reno, 92 MICH. L. REV. 588, 634–39 (1993).

identity, whereby their characteristics and needs are imputed to all other lesbians and gay men.

San Francisco Supervisor Harry Britt's statement that "[w]hen gays are spatially scattered, they are not gay, because they are invisible,"[64] demonstrates the isolating effects of districting. Under a districting system, location means identity, and those lesbians and gay men either uninterested or unable to live in a represented area are, for political purposes, not gay. For example, if lesbians in Park Slope, Brooklyn, disagreed with gay men in the West Village, their disagreement would have little impact on the City Council; the "lesbian and gay" position would be that of the largely white and male West Village-Chelsea district. Similarly, the fact that lesbian and gay direct representation in California comes from San Francisco and West Hollywood transforms these communities into the lesbian and gay voice of the state.[65] As the directly represented community is both privileged with respect to and isolated from other local lesbian and gay communities, districting divides the interests of virtually represented communities from those that are directly represented.

3. Tokenism

"Tokenism" refers to the marginalization of a minority group's single representative within a majority space.[66] Tokenism assumes that all of the lesbian and gay communities in a jurisdiction can be represented adequately by a single representative. Although that one representative might provide effective representation in some respects, her abilities would be limited as the only direct representative of lesbian and gay interests in the jurisdiction. Therefore, tokenism can be construed as an attempt to silence calls for fuller representation of lesbian and gay interests.[67]

D. Exclusion of Lesbians and Gay Men from Remedies for Vote Dilution

The previous Section described the problems that occur when lesbian and gay communities achieve *some* interest representation through districting. This Section shows that where lesbian and gay communities are unable to attain any interest representation at all—a situation that may occur where a community is fractured or even in an influence district—

---

[64] CASTELLS, *supra* note 40, at 138.

[65] *See* Kysella, *supra* note 28, at 265–67.

[66] Guinier, *Tokenism*, *supra* note 16, at 1116.

[67] *See, e.g.*, *The Case of the Missing Districts*, OUTWEEK, May 1, 1991, at 4 (deriding the lesbian and gay district in the New York City Districting Commission's proposed redistricting plan as "an afterthought, a bone to throw to our community").

they are unlikely to achieve redress through either statutory or constitutional means.

The Voting Rights Act does not recognize lesbians and gay men as a protected group, nor does any other judicial remedy apply specifically to lesbian and gay "vote dilution."[68] According to the definitive Supreme Court case on vote dilution under the Voting Rights Act, *Thornburg v. Gingles*,[69] the central remedy for dilution is the creation of majority-minority single-member districts.[70] To satisfy the three prongs of the *Gingles* test, a minority group must demonstrate that it is both geographically concentrated and sufficiently numerous to constitute a majority of a single-member district, that it is politically cohesive, and that its electoral success is being impeded by majority bloc voting.[71] A minority group must therefore be sufficiently large and geographically compact to constitute a majority in a hypothetical single-member district.[72]

It would be difficult for lesbian and gay communities to meet the first prong of the *Gingles* test because of the geographic dispersion of lesbian and gay voters and because of their intersectional identities. This prong is more easily met by African American communities, which face far greater housing segregation—and thus geographic concentration—than do lesbians and gay men.[73] Although some lesbians and gay men rightfully claim that social and even housing discrimination leads them to live in predominantly lesbian and gay neighborhoods,[74] this "ghettoization" does not generally provide sufficient geographic concentration for a section 2 claim.

The second prong of the *Gingles* test is that the minority group must be politically cohesive.[75] Such cohesiveness is demonstrated by a high

---

[68] Vote dilution has been defined as "a process whereby election laws or practices, either singly or in concert, combine with systematic bloc voting among an identifiable group to diminish the voting strength of at least another group." Chandler Davidson, *Introduction*, *in* MINORITY VOTE DILUTION 4 (Chandler Davidson ed., 1989).

[69] 478 U.S. 30 (1986).

[70] *Id.* at 45–51.

[71] *Id.* at 48–51. It should be noted that the existence of the three *Gingles* factors is necessary, but not sufficient, proof of a section 2 violation under the Voting Rights Act. *See* Johnson v. De Grandy, 114 S. Ct. 2647, 2657 (1994). *See generally* BERNARD GROFMAN ET AL., MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 61–81 (1992) (tracing vote dilution standard after *Gingles*). However, this Article argues that lesbians and gay men cannot meet the burden of proof even for the threshold *Gingles* factors. More recent Supreme Court reformulation of vote dilution analysis is thus not particularly relevant here.

[72] *See Gingles*, 478 U.S. at 50.

[73] The "extreme spacial segregation" of African Americans lends some validity to the use of geography for the purpose of ensuring adequate group representation. *See* Lani Guinier, *(E)racing Democracy: The Voting Rights Cases*, 108 HARV. L. REV. 109, 127 n.119 (1994).

[74] *Cf.* CASTELLS, *supra* note 40, at 138–39.

[75] *See Gingles*, 478 U.S. at 52–73.

"correlation between the race of the voter and the voter's choice of certain candidates."[76] Lesbians and gay men might indeed vote alike on certain issues. Proving political cohesiveness, however, would require evidence that is unavailable for lesbians and gay men because they are officially unidentifiable. Furthermore, despite certain common lesbian and gay interests, the views of lesbians and gay men span the political spectrum.[77]

The third and final prong of the *Gingles* test requires that the minority group's preferred candidate be defeated by majority bloc voting.[78] The fact that lesbians and gay men, as well as heterosexual candidates supporting lesbian and gay interests, have been elected would make it difficult to prove that heterosexual bloc voting has excluded the "preferred candidates" of lesbians and gay men from public office.

Dilution might also be proven through fracturing and packing.[79] When minority voters are packed into a district beyond the numbers needed to assure a majority, their jurisdiction-wide influence is weakened. Conversely, when those votes are spread among districts at levels lower than those needed for a majority, they are unable to elect a representative, and their influence in the governing process is fractured.[80] Remedies exist for packing and fracturing, but they generally require "hard data," such as census data, that are largely available only for racial and ethnic minority communities.[81] Finding incontrovertible proof of lesbian and gay fracturing, by contrast, would be impossible because there is no possible baseline calculation of the voting potential of lesbians and gay men.

One writer has argued that, instead of bringing a claim under the Voting Rights Act, lesbians and gay men can challenge vote dilution under the Equal Protection Clause of the Fourteenth Amendment.[82] Even if such an argument were successful, however, the representational characteristics

---

[76] *Id.* at 53.

[77] The existence of gay Republican clubs as well as radical groups such as ACT-UP reflects the political diversity of lesbians and gay men. *See generally* FRANK BROWNING, THE CULTURE OF DESIRE (1993) (exploring the complex politics of gay male communities).

[78] *Gingles*, 478 U.S. at 51 ("[T]he minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate's running unopposed—usually to defeat the minority's preferred candidate.").

[79] *See* GROFMAN, *supra* note 71, at 114.

[80] *See* Guinier, *Emperor's Clothes*, *supra* note 59, at 1615; LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1075–76 (2d ed. 1988).

[81] Even where such numbers are lacking, name identification programs may help clarify the location of particular ethnic groups. *See* Peter Morrisson, *Using the Surname Method to Gauge Hispanic and Asian Voting Strength in Proposed Council Districts*, Ex. 12 of Exhibits Book 1 of SUBMISSION UNDER SECTION 5 OF THE VOTING RIGHTS ACT FOR PRECLEARANCE OF THE 1991 REDISTRICTING PLAN FOR NEW YORK CITY COUNCIL 6 (Feb. 20, 1991) (on file with the New York Municipal Library).

[82] *See* Kysella, *supra* note 28, at 262–74 (arguing that lesbian and gay communities in urban California could prevail under an equal protection cause of action).

of lesbians and gay men pose a remedial problem in any districting system. Therefore, an equal protection remedy—so long as it is district-based—does nothing to resolve the problems of virtual representation, hierarchization, and tokenism. Further, the lack of any census data dooms a lesbian or gay plaintiff seeking to prove discrimination in districting procedures. In any case, until the United States Supreme Court clarifies the constitutional status of lesbians and gay men, the ultimate success of any equal protection challenge to districting is highly questionable.[83]

In sum, it is unlikely that challenges under either the Voting Rights Act or the Equal Protection Clause will succeed in remedying the inadequate representation of lesbian and gay interests under our current districting system.

E. Redistricting the New York City Council

> *The gay and lesbian community, long a contributor to the life and spirit which is uniquely New York's, deserves a seat at the table.*[84]

Recent events in New York City provide an excellent example of districting's inadequacies with respect to lesbian and gay interest representation. In *Board of Estimate v. Morris*,[85] the United States Supreme Court declared a portion of New York City's government unconstitutional. The Court held that allowing all of the boroughs to have the same number of representatives despite their vast disparities in population violated the constitutional mandate of one-person, one-vote.[86] Remedying this unconstitutionality led to radical structural change that expanded the power and size of the City Council while spurring a complex interaction of interest group politics and mandated requirements.[87] In 1991, the combination of

---

[83] The Supreme Court may make its position on the constitutional rights of lesbians and gay men more explicit this Term in its decision regarding Colorado's Amendment 2. *See* Evans v. Romer, 882 P.2d 1335 (Colo. 1994) (striking down a Colorado constitutional amendment providing that lesbian or gay conduct, orientation, or practices could not provide the basis for protected class status), *cert. granted*, 115 S. Ct. 1092 (1995).

[84] Evelyn Hernandez, *Gays Launch Drive for Council*, N.Y. NEWSDAY, Apr. 7, 1991, at 7 (quoting Richard Dadey, Executive Director of Empire State Pride Agenda).

[85] 489 U.S. 688 (1989).

[86] *Id.*; *see* Reynolds v. Sims, 377 U.S. 533 (1964); *see also* Frank J. Macchiarola & Joseph G. Diaz, *The 1990 New York City Districting Commission: Renewed Opportunity for Participation in Local Government or Race-Based Gerrymandering?*, 14 CARDOZO L. REV. 1175, 1181 (1993).

[87] *See* Judith Reed, *Of Boroughs, Boundaries and Bullwinkles: The Limitations of Single-Member Districts in a Multiracial Context*, 19 FORDHAM URB. L.J. 759, 764 (1993). The New York City Charter Revision Commission considered several reforms to satisfy the constitutional requirements of *Board of Estimate v. Morris*. It considered bicameral legislatures. *Id.* It also contemplated adopting weighted voting and even proportional

the New York City Districting Commission's ("Commission") relatively open decision-making process, the Commission's independence from the City Council, and strong advocacy by lesbian and gay communities before the Commission created perhaps the best possible opportunity for lesbians and gay men to obtain effective interest representation through districting. While the Commission subsequently did create one majority-lesbian and gay district, the constraints of a districting system nonetheless left the interests of New York's lesbian and gay communities largely unrepresented.

The Commission's effort to empower minorities and reverse New York's decades-old record of weak minority representation was bolstered by the 1990 census.[88] That census revealed that New York City had become majority-minority, with 56.3% of its population identifying as African American, Latino, or Asian American. Although Judith Reed has noted that "[t]he work of the Commission was favorably affected by the presence of so many members of racial and language minority groups protected by the Voting Rights Act,"[89] it was still a small body that made fundamental decisions for the entire city's representation.[90]

The Commission conducted as open a process as could be imagined for a group appointed to draw the lines that would determine the representation of the entire population of the city. It held public hearings in all neighborhoods of the city, provided public access to its computer districting program,[91] and reviewed over thirty alternate plans submitted by community groups and other concerned parties.[92] Furthermore, the Commission delineated districts primarily by focusing on concentrations of racial and language minorities. Once districts were drawn around these areas, white districts filled in the remainder of the map.[93]

As part of the criteria for redistricting, the New York City Charter left open the possibility of representing the interests of lesbian and gay communities. "District lines," it read, "shall keep intact neighborhoods and communities with established ties of common interest and association, whether historical, racial, economic, ethnic, religious or other."[94] The

---

representation. *See* Interview with Judith Reed, *supra* note 56. The Commission ultimately supported overhauling the City Council. SUBMISSION, *supra* note 54.

[88] *See* Interview with Judith Reed, *supra* note 56; *see also* ALAN GARTNER, DRAWING THE LINES: REDISTRICTING AND THE POLITICS OF RACIAL SUCCESSION IN NEW YORK 55–56 n.72 (1993).

[89] Affidavit of Judith Reed at 1, Ravitch v. City of N.Y., No. 90 Civ. 5752 (S.D.N.Y. Aug. 3, 1992).

[90] The Commission comprised four African Americans, three Latinos, one Asian American, and seven whites. *Id.*

[91] *See* GARTNER, *supra* note 88, at 135.

[92] *See* Interview with Judith Reed, *supra* note 56.

[93] *See id.* This action was taken prior to the Supreme Court's decision in Miller v. Johnson, 115 S. Ct. 2475 (1995) (holding that a Georgia district drawn predominantly to empower African Americans violated the Equal Protection Clause).

[94] CHARTER OF THE CITY OF NEW YORK § 52(1)(c) (as amended Dec. 31, 1989).

term "other" was a subtle reference to sexual orientation,[95] thus giving consideration of lesbian and gay interest representation precedence in line drawing over such traditional but not constitutionally mandated considerations as compactness[96] and respect for neighborhood and borough boundaries.[97]

Lesbian and gay activists hoped to take advantage of the Charter's potentially inclusive language. The Empire State Pride Agenda ("ESPA"), the most prominent state-wide lesbian and gay political organization, worked to create a lesbian and gay district in the West Village-Chelsea area of Manhattan.[98] Returns from primaries and elections that included openly gay candidates formed the principal evidence for the creation of a West Village-Chelsea district by demonstrating the existence of an identifiable population of supporters.[99] Maps showing the locations of institutions such as bookstores, bars, and community organizations suggested the density of the lesbian and gay population.[100] An analysis of a 34,000-person mailing list of contributors to lesbian and gay institutions organized by zip code suggested that the concentration of lesbian and gay donors was five times higher in Chelsea and the West Village than in the rest of Manhattan.[101] Manhattan activists could thus draw a geographically compact line around this concentration of lesbians and gay men.

The creation of a gay and lesbian district in Manhattan thus required creative contortionism, as an amorphous lesbian and gay community was squeezed into district lines. This piecemeal pragmatism of alternate mapping illustrates a districting system's inherent inability to satisfy lesbian and gay electoral needs.

Ultimately, the Commission responded favorably by creating a lesbian and gay district in Manhattan.[102] The Commission was unable to

---

[95] *See* Hernandez, *supra* note 84. Both Robert Bailey, a consultant to the Commission, and Alan Gartner, the executive director of the Commission, confirmed this implication of the term. *See* Interview with Robert Bailey, *supra* note 57; GARTNER, *supra* note 88, at 167. *But cf.* Frank Lynn, *Seeking More Minority Council Members*, N.Y. TIMES, Mar. 24, 1991, § 1, at 32 (asserting that Republicans used the term "other" to base a claim to representation on the Council).

[96] A district is compact when its borders are as close as possible to a central point so that the shape is easily identifiable. Gerrymandering is often viewed as the opposite of compactness because gerrymandered districts often have bizarre shapes. *See* Dillard v. Baldwin County Bd. of Educ., 686 F. Supp. 1459, 1460 (M.D. Ala. 1988) (explaining the reasons for the emphasis on compactness).

[97] *See* CHARTER OF THE CITY OF NEW YORK § 52(1)(d)–(g) (as amended Dec. 31, 1989).

[98] *See* Lynn, *supra* note 95.

[99] *Id.*; *see* GARTNER, *supra* note 88, at 133.

[100] GARTNER, *supra* note 88, at 133. Accepting lesbian and gay institutions as an unmediated proxy for locating lesbian and gay communities, however, disserves lesbians and gay men who use these institutions without residing near them.

[101] *Id.*; testimony by Richard Dadey, *supra* note 55 (presenting data gathered by the media group Strub-Dawson).

[102] Initially, the district divided the community at Christopher Street. However, by

create a majority-minority district in the West Village-Chelsea area because of the relatively low percentage of African Americans and Latinos. It could therefore take "other" factors into consideration and fashion a district organized around sexual orientation.

The ability of Manhattan lesbian and gay advocates to develop a working relationship with other minority communities contributed greatly to the creation of a lesbian and gay district.[103] Lesbian and gay advocates met with leaders of other minority communities to assuage any fears that a lesbian and gay district would be created at the expense of an ethnic or racial minority district.[104] In particular, an alliance between lesbian and gay advocates and Asian American leaders ensured that district lines would be drawn in a way that empowered both communities.[105]

The West Village-Chelsea community is perhaps the most powerful lesbian and gay community in New York City.[106] It now provides the sole direct representation for lesbian and gay New Yorkers in the City Council and New York State Legislature, and it elects what many consider to be the most progressive seat in the United States House of Representatives.[107] Through a series of primary votes and the election of New York's first openly lesbian state representative, the lesbian and gay community in this area established itself as an organized, well-financed political constituency.[108]

Even though Manhattan advocates received a district resembling their goal, the process by which that district was achieved demonstrates the difficulties faced by lesbians and gay men in the circuitous, hierarchical districting process. Similar problems were faced by residents of Brooklyn, who had a far more difficult time convincing the Commission to create a lesbian and gay district. Brooklyn advocates supported a district centered in Park Slope, the heart of Brooklyn's lesbian and gay community.[109]

---

shifting boundaries increasingly southward, the Commission ultimately included the entire identifiable West Village-Chelsea lesbian and gay community.

[103] *See* GARTNER, *supra* note 88, at 132.

[104] *See* Interview with Alan Gartner, Executive Director of New York City Districting Commission, in New York, N.Y. (Jan. 6, 1994).

[105] *See* Richard Dadey, Address to the Districting Commission (Mar. 27, 1991) (on file with author). An alliance between gay and lesbian advocates and the Asian American community headed off a last-minute clash with the supporters of the multiethnic Chinatown proposal. GARTNER, *supra* note 88, at 134. *But cf.* Yoko Yoshikawa, *The Heat is On Miss Saigon Coalition: Organizing Across Race and Sexuality*, *in* THE STATE OF ASIAN AMERICA: ACTIVISM AND RESISTANCE IN THE 1990s 275 (Karin Aguillar-San Juan ed., 1994) (describing clash between gay and straight Asian American activists and Lambda Legal Defense and Education Fund).

[106] For an especially rich source of lesbian and gay history in New York, see GEORGE CHAUNCEY, GAY NEW YORK (1994).

[107] *See, e.g.*, Terry Golway, *Nadler, Duane in "Heartbreak" Race for Affections of West Side Liberals*, N.Y. OBSERVER, May 30, 1994, at 1 (describing West Side Democrats as "famed for sending the very purest of pure liberals to Capitol Hill").

[108] *See, e.g.*, Hernandez, *supra* note 84.

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

While nonelectoral information served merely as supporting evidence of the concentration of lesbians and gay men in Manhattan, it was the primary evidence relied on by activists in Brooklyn, who lacked the electoral records available to Manhattan advocates.[110] Further, the proposed lesbian and gay district cut through several incumbent strongholds and minority communities.[111] As a result, the Commission completely ignored the Brooklyn proposal and split Park Slope into three districts.[112] The Commission eliminated the opportunity for lesbians and gay men from this area to elect a representative of their choice by fracturing their voting strength among several districts.

Many lesbians and gay men focused on the apparent end of their electoral exile and lauded the Commission's work, despite the fact that only one district out of fifty-one was designed to elect a candidate supporting lesbian and gay interests. Pleased with the possibility that they would gain some representation, many lesbians and gay men ignored their unrealized potential. However, *Outweek*—then the largest circulation magazine for lesbian and gay readers in New York—criticized the Commission's efforts.[113] Another response to the plan noted that no one on the Commission was lesbian or gay and commented that the Commission's composition hurt the general lesbian and gay effort.[114]

The limitations of the redistricting process in New York City reveal the myriad problems that a districting system poses for the representation of lesbian and gay interests. The undemocratic, top-down representation fixed by the fifteen-member Commission, the distorting population determinations required by that Commission, and the ultimate disappointment of Brooklyn's lesbian and gay voters exposes the failures of districting for lesbian and gay communities in their search for representation.

---

[110] *See* Kysella, *supra* note 28, at 255–56; *see also* Testimony by George Waffle before the New York City Districting Commission (Feb. 20, 1991) (on file with author).

[111] Testimony by George Waffle before the Districting Commission (May 7, 1991) (on file with author). The fact that lesbians and gay men could not assert themselves in Brooklyn, where more blacks and Latinos lived, demonstrates lesbian and gay interest subordination to ethnic and racial minority interests.

[112] The division of Park Slope was intended, in part, to create a Latino district. However, Brooklyn's 20% Latino population was so dispersed that it only received one safe district out of 17. Brooklyn's Latinos, like Latinos citywide, are far less concentrated than African Americans in New York City. *See* Jack Newfield, *Hidden Agendas Ruled, Council Gerrymandered*, N.Y. TIMES, June 24, 1991, at 10.

[113] *The Case of the Missing Districts*, OUTWEEK, May 1, 1991, at 4 (arguing that since lesbians and gay men constituted 10% of New York's population, they deserved at least five seats on the City Council).

[114] *See, e.g.*, Testimony by George Waffle before the New York City Districting Commission (May 29, 1991) (on file with author).

III. Empowerment of Lesbian and Gay Interests Through Proportional Representation

A. An Overview of Proportional Representation

From 1937 to 1945, New York's City Council was elected proportionally by borough. Called by some the "Golden Age of the City Council,"[115] the diversity of political affiliation, from Communists to Republicans, fostered vigorous debate among the elected representatives.[116] By permitting people to unify around their interests rather than being divided by location, a proportional system could rekindle the kind of broad debate that once flourished and include lesbian and gay interests in that debate.

In proportional representation systems, seats are apportioned to candidates or parties in relation to the votes that the candidates or parties receive. Voters collectively elect several representatives on a jurisdiction-wide basis.[117] Since the winning candidates need only meet a threshold of votes to be elected—the size of which varies in inverse proportion to the number of representatives in a jurisdiction—a voter has more candidates from which to choose and is far more likely to actually elect a candidate with her vote.[118] Unlike in single-member districts, where the voters in one specific area elect one representative, voters in proportional systems can unite exclusively around interests.[119] With fewer geographic divisions, voters can choose how to form their constituencies within a jurisdiction.[120]

---

[115] Martin Gottlieb, *The 'Golden Age' of the City Council*, N.Y. TIMES, June 11, 1991, § 4, at 6.

[116] *Id.* While the last proportional election in 1945 led to the Council's 65% Democratic majority, the composition of the Council was skewed even more heavily in favor of Democrats in 1949—two years after the system was voted out by referendum. At that time, Democrats won 24 of the Council's 25 seats. *Id.*

[117] The fact that proportional representation is not a majority rule system distinguishes it from multimember, at-large districting—another jurisdiction-wide system. In a multimember, at-large jurisdiction, a group of representatives is elected by a majority of voters jurisdiction-wide. As in proportional representation, each voter in the jurisdiction votes for all of the seats. However, because multimember at-large contests are won by simple majorities, even significant minorities can be subjugated, unlike under proportional representation. Guinier, *No Two Seats*, *supra* note 16, at 1461–64.

[118] *See* Inman, *supra* note 28, at 2004. The threshold for election—that is, the minimum percentage of votes that a candidate must receive in order to win—differs depending on the proportional system and the number of seats, candidates, and voters. The crucial variable in all proportional systems is the number of seats: the higher the number of seats, the lower the threshold for election. *Id.* at 2001 n.38 ("With one vote for each voter in a nine-member district, for example, any candidate who receives at least one vote more than one-tenth of the votes cast is sure of election.").

[119] Even under proportional representation, some single-member jurisdictions would exist. For example, the six states that currently elect only one representative to the House of Representatives would remain single-member districts under a proportional system. *See* Inman, *supra* note 28, at 2005 n.60.

[120] Large jurisdictions would need to be subdivided to make elections manageable. *See id.* at 2005 n.59. California, for example, might be divided into three divisions, each

A representative is therefore bound by her constituency's beliefs rather than by its location.

One distinct advantage of proportional representation over districting is that the sharp increase in voting power for all individuals weakens majority rule and empowers minorities. In a direct election for a single candidate, the majority of votes may be wasted—that is, they may not lead to the election of a candidate—if several candidates split the vote.[121] Under a proportional system, if there are ten seats up for election, the threshold for election is the percentage of votes attained by the candidate who ranks tenth. Because the threshold for election is far smaller than that under majority rule, there are fewer wasted votes. Proportional representation translates a far greater number of votes into the election of a candidate.

Proportional representation also empowers minority communities to a greater extent than a districting system. Under districting, the support of a majority or even a plurality of voters suffices for complete victory. For example, if each of Texas's representatives in Congress were elected by slight majorities of 51%, a full 49% of voting Texans would constitute an unrepresented minority in a districting system. In a proportional system, however, the election would take place in multimember districts or statewide, with a far smaller population excluded from powersharing. Although a proportional system preserves the ability of a group that constitutes a majority to exercise its power, that majority does not succeed to the exclusion of minorities.

B. Forms of Proportional Representation

There are several types of proportional representation, the most significant of which are the single transferable vote ("STV"), list proportional representation, and cumulative voting.[122] Under the STV, the system currently used in the New York City School Board elections, each voter

---

electing 17 representatives to the U.S. House of Representatives. Such a system would still permit far broader representation than districting because the threshold for election would be under six percent of the vote.

[121] This situation occurred in the 1992 presidential election, when approximately 57% of the voters did not vote for the winning candidate. *See* Robin Toner, *Clinton Captures Presidency with Huge Electoral Margin; Wins a Democratic Congress*, N.Y. TIMES, Nov. 4, 1992, at A1 (stating that Bill Clinton garnered 43% of the vote; George Bush, 38%; and Ross Perot, 18%).

[122] Because other scholarship thoroughly describes these different systems, this Article will not explore differences in any great detail. *See, e.g.*, Edward Still, *Alternatives to Single-Member Districts*, *in* MINORITY VOTE DILUTION, *supra* note 68, at 249 (summarizing a broad range of voting systems that might substitute for a single-member district system). For a description of cumulative voting, see Guinier, *Emperor's Clothes*, *supra* note 59, at 1632–33 (advocating cumulative voting). *See also* Inman, *supra* note 28, at 1999–2002 (describing STV); John R. Low-Beer, *The Constitutional Imperative of Pro-*

ranks a list of candidates by preference. If a voter's first choice candidate has already received enough votes to win a seat, her vote is transferred to her second choice, or the following choice, until all seats are filled. This system wastes the fewest votes.[123] Because each voter chooses several candidates, the likelihood that a voter's vote will propel a candidate to victory is higher. However, the high number of candidates and the complexity of choice and vote calculation in an STV election can make the system highly confusing.[124]

The second type of proportional representation is list proportional representation. Under this system, which is commonly used in Europe, a party receives a number of seats relative to the percentage of votes received by the party.[125] The party in turn determines who will serve in the government. The principal drawback to this system is exemplified by its use in Italy, where shifting coalitions based on party loyalty have led to regular government collapses.[126] A second, often noted, disadvantage of this system is that it transfers power from the voter to the party, which can lead to the existence of a strengthened elite.

Under the third proportional representation system—cumulative voting—each voter receives one vote for each seat up for election.[127] For example, in a state with five congressional seats, each resident would have five votes to divide among the candidates seeking the seats.[128] Some voters might vote several times for one candidate, emphasizing their preference and permitting an underrepresented or unrepresented community to attain

---

portional Representation, 94 YALE L.J. 163, 186 n.107 (1984) (discussing list proportional representation).

[123] *See* Inman, *supra* note 28, at 2048; Alexander A. Yanos, Note, *Reconciling the Right to Vote with the Voting Rights Act*, 92 COLUM. L. REV. 1810, 1864–65 (1992).

[124] STV proportional representation is accused of fostering confusion because the voter does not know which of her votes will actually count. During the 1993 School Board elections in New York City, many remarked upon the complexity of the system. *See* Interview with Thomas K. Duane, New York City Council Member, in New York, N.Y. (Dec. 31, 1993).

[125] *See* Steven G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 U. PA. L. REV. 801, 846–47 n.151 (1993) (comparing the German, Israeli, and Italian proportional systems); Flora Lewis, *Europe Shops for a Ballot Box*, N.Y. TIMES, June 29, 1991, § 1, at 23 (describing the party-list system in Europe).

[126] Alan Cowell, *Italians Vote: Can They Start a Political Revival?*, N.Y. TIMES, Apr. 19, 1993, at A8.

[127] Cumulative voting is commonly used for corporate board elections. ROBERT C. CLARK, CORPORATE LAW 361–66 (1986) (explaining the use and mechanics of cumulative voting in corporate elections).

[128] The minimum number of votes needed to win a seat can be calculated using the formula $N = [V / (R+1)] + 1$, where N is the minimum number of necessary votes, V is the number of voters, and R is the number of available slots. *See* Guinier, *Emperor's Clothes*, *supra* note 59, at 1633 n.170. In states with large congressional delegations, smaller divisions might be created to simplify voters' choices. Although such multimember jurisdictions do insert some geographical interests into proportional systems, the influence of geography is weaker than in a single-member districting system.

representation. Cumulative voting thus provides for greater minority empowerment in comparison with other proportional systems by permitting even smaller minority groups to achieve representation through vote concentration. Under this system, lesbian and gay voters could elect larger numbers of representatives by concentrating their votes.

Although each of the above proportional representation systems addresses the key flaws of districting—that it is geographically based and majority-ruled—cumulative voting would be the most effective of the three systems in improving lesbian and gay interest representation. First, a voter in a cumulative system has the opportunity to vote for several candidates and can therefore give voice to her full range of political interests. This aspect of the system may improve minority interest representation, including that of lesbians and gay men, by permitting those with strong ties to a particular cause to vote several times for one candidate. Second, as it permits all voters to voice several political interests, cumulative voting would allow for the expression of lesbian and gay intersectionality. If an African American lesbian wanted to vote for an African American candidate as well as for a lesbian candidate, she could do so. Third, under districting and noncumulative proportional systems, lesbians and gay men who are politically committed to other issues might not vote for a lesbian or gay candidate, whereas a cumulative system would permit a marginally lesbian- or gay-identified person to exhibit some support for lesbian and gay interests. Expression of the full range of lesbian and gay identities would result.[129]

C. Effective Representation of Lesbian and Gay Interests Under Proportional Systems

> *Proportional representation would definitely consolidate our voting strength and be more representative of our true numbers.*[130]

Given the lesbian and gay representational characteristics already discussed,[131] lesbians and gay men would benefit from a proportional system. First, proportional representation does not require that a group be officially identifiable. Political positions rather than places of residence determine representation.[132] As a result, lesbian and gay voters jurisdiction-wide could vote for those candidates most suited to their needs;

---

[129] One might argue that an STV system, in which voters rank candidates by preference, would equally permit such intersectional voting. However, only one of the ranked candidates under such a system ultimately receives the voter's vote.

[130] Interview with Richard Dadey, *supra* note 9.

[131] *See supra* part I.B.

[132] *See, e.g.*, Guinier, *Emperor's Clothes*, *supra* note 59, at 1634.

identification and demographic difficulties would not impede effective interest representation.

Lesbians and gay men with intersectional identities would be especially well-represented under a proportional representation system. Poor lesbians and gay men would not be excluded from representation merely because they could not afford to live in expensive gay neighborhoods. Also, the more dispersed residential patterns of lesbians would not undercut the effective representation of lesbian interests. Proportional representation, by emphasizing the power of the vote over that of geography, would directly provide all lesbians and gay men with an incentive to engage in electoral politics.

For those lesbian and gay communities located outside of urban centers, proportional representation is the only effective way to represent the interests of their members. Under a districting system, such interests are not represented since their members are too dispersed to constitute a majority or even an influence district. Under proportional representation, however, even members of suburban lesbian and gay communities might attain interest representation. For example, if Florida adopted proportional representation for its congressional delegation, members of lesbian and gay communities from Key West, Miami, and Fort Lauderdale could unite to attain interest representation as part of that delegation.

Moreover, lesbians and gay men who exhibit a higher-than-average registration rate and voter turnout in their jurisdictions would be rewarded under a proportional representation system.[133] In such a system, voter turnout is the most relevant factor in a candidate's election. The 1993 New York City School Board elections, in which a proportional system enabled candidates representing lesbian and gay interests to achieve an overwhelming victory,[134] illustrate the power of the lesbian and gay community to vote when threatened.[135]

---

[133] Statistics from the early 1980s indicate that while 17% of San Francisco's population is lesbian and gay, "[b]ecause of their age, level of education, and militancy, gays represent about 25% of registered voters, and in decisive elections, their high turnout may approach 30% of the voters." CASTELLS, *supra* note 40, at 138. The opposite phenomenon afflicts communities of color, where 65% is often used as the minimum population necessary to constitute a majority-minority district because of low voter participation. *See* Ketchum v. Byrne, 740 F.2d 1398, 1415–16 (7th Cir. 1984) (explaining that the 65% rule results from the addition of 5% for lower registration, 5% for lower turnout at the polls, and 5% for the relative youth of the minority population to a simple 50% majority). Voting rights literature often addresses this "rule." *See, e.g.*, Kimball Brace et al., *Minority Voting Equality: The 65% Rule in Theory and Practice*, 10 LAW & POL'Y 43 (1988); Frank R. Parker, *Racial Gerrymandering and Legislative Reapportionment*, *in* MINORITY VOTE DILUTION, *supra* note 68, at 108–11. Without "hard data," it would be difficult to determine the electoral strength of lesbians and gay men of color.

[134] *See supra* pp. 1–4; *see also* Sam Dillon, *New York City's 32 School Boards Get New Faces but Not New Views*, N.Y. TIMES, May 22, 1993, at A1. The Board of Elections uses the single transferable vote. *See* Gottlieb, *supra* note 115.

[135] Sam Dillon, *"Light" School Board Vote Was Really the Heaviest Ever*, N.Y. TIMES,

Under a proportional system, the number of lesbian and gay representatives would still be small compared to that of heterosexual representatives. Furthermore, representatives would still face problems such as those confronting black and Latino legislators, whose voices have been weakened by procedural sleights of hand.[136] Nevertheless, proportional voting would advance lesbian and gay interest representation. Increased numbers and greater possibilities for coalition building would motivate other representatives to deal with lesbian and gay colleagues and interests on a daily basis.[137]

Perhaps most important, the symbolic value of lesbian and gay interest representation would provide lesbian and gay communities with political self-respect. Included in the political process, lesbians and gay men would feel less alienated and would express their interests within the system rather than through more radical means. Lesbian and gay electoral success under a proportional system might encourage other minorities to participate in the political process, especially under a cumulative voting system.

Under proportional representation, campaigns would face challenging transformations because they would be more geographically extensive than under districting. Broader coalition building among lesbian and gay communities would be necessary in order to win jurisdiction-wide elections. Well-heeled lesbian and gay urban communities might help fund candidates who could be elected with suburban as well as urban votes. The challenges to lesbian and gay political strategists would be great because they would have to determine both how to organize diverse communities to get out votes and how to conduct a jurisdiction-wide media campaign.[138] But even in a state like Florida, where lesbian and gay communities are less organized than those in New York and California, such a campaign might well succeed. Access to representation for lesbians and gay men from suburban and rural areas might increase their participation in the political process, bring them toward the center of lesbian and gay politics, and even motivate them to organize their own campaigns.[139]

May 19, 1993, at A1 (quoting Jon Nalley) ("The gay community felt very threatened by the Catholic Church's alliance with the Pat Robertson types, and gays felt really called upon to go to the polls."). In response to this call, total votes in the West Village-Chelsea district quadrupled. *Id.*

[136] *See generally* Guinier, *Single-Member Districts*, *supra* note 31, at 1152–53 (discussing third-generation voting rights cases, which center on discrimination against minority representatives designed to prevent them from significantly affecting legislatures).

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

[138] Strategists already balance the complexities of running for office as a lesbian or gay candidate. *See generally* GAY AND LESBIAN VICTORY FUND, *supra* note 4.

[139] For front-line perspectives on running for office as an openly lesbian or gay

D. Arguments Against Proportional Representation

Several objections are often raised in response to suggestions to implement proportional representation. First, proportional representation is often criticized for ignoring local interests.[140] However, under proportional representation, voters would still be able to organize and elect representatives based on local interests[141]—geography would be one among many possible proxies for interest. Defining the representative's constituency by interest would thus maintain activism around local issues.

Critics also argue that proportional representation would deprive the representative of the ability to consult a concrete constituency.[142] To the contrary, a representative would have a clearer political position because her supporters would be politically unified.[143] The legislator would be liberated from constant polling to determine which position appeals to the most voters. Rather, she would be compelled to vote consistently for positions taken during her campaign. In this respect, proportional representation would lead to fuller debates on all issues between legislators with unified political constituencies.

Another major criticism of proportional representation is that, by preventing simple majorities from ruling, it would subvert fundamental democratic principles. However, the government's legitimacy derives not simply from the consent of the majority but from that of *all* people. In addition, the lower percentage of wasted votes would make proportional

---

candidate outside of lesbian and gay population centers, see Dale McCormick, *Running in a Rural District*, *in* GAY AND LESBIAN VICTORY FUND, *supra* note 4, at 223 and Irene Rabinowitz, *Running in a Small Town*, *in* GAY AND LESBIAN VICTORY FUND, *supra* note 4, at 219.

[140] Alan Gartner, the executive director of the New York City Districting Commission, has stated:

> If there's any validity to geographic representation, it is in local government. I would be more interested in thinking about proportional representation for other than local government, federal or maybe state government. The kinds of issues that a congressmember deals with have really very little to do with basic geographic proximity . . . . [G]iven the size of districts except in minority areas, they cover such a diversity, that it's difficult to say that there's one interest.

Interview with Alan Gartner, *supra* note 104; *see also* Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1371–72 (1987). *But see* Inman, *supra* note 28, at 2016–18 (summarizing and countering geographic and local interest criticisms of proportional representation).

[141] *See* Guinier, *No Two Seats*, *supra* note 16, at 1473 ("[I]nterest representation generates incentives for community-based organizations to play a more active role in mobilizing the electorate and monitoring the legislature by both protecting and ratifying authentic representatives.").

[142] *Id.* (countering the arguments of opponents of proportional representation).

[143] *See* Guinier, *Emperor's Clothes*, *supra* note 59, at 1638 (arguing that proportional representation "restores the link between representation and voting by ensuring that legislators represent unanimous, not divided, constituencies").

representation an especially effective system for representative democracy.

Proportional representation would also enhance democracy because each vote in a jurisdiction would have equal weight. Although the Supreme Court has clearly required almost exact population equality among districts, vast inequalities in voting participation rates among districts significantly weaken the effectiveness of this requirement. For example, if District A has a 40% voting rate and District B has an 80% voting rate, the voters in District A have votes that are twice as powerful as those in District B—because fewer votes are required to win an election. Districts with lower participation rates receive as much representation as districts with high rates, leading to the same inequality that propelled the Supreme Court to reject Alabama's apportionment scheme in *Reynolds v. Sims*.[144] Under a proportional system, on the other hand, representation would depend on actual votes rather than on district lines that dilute some votes and fortify others.[145] Proportional representation would express democratic ideals by allowing an individual's level of interest to determine her own role in the political process.

Many critics contend that proportional representation would create instability by emphasizing minority interests.[146] Others assert that the two-party system, the bulwark of majority rule, is necessary for stability.[147] However, the current districting system itself encourages instability. The top-down organization of representation along racial and ethnic lines, required by the Voting Rights Act, has drawn fire for "balkanizing" legislatures.[148] Furthermore, districting divides many communities by drawing lines around and through them. The stability of majority rule is thus a false one based on the loss of voting power of a significant part of the electorate.[149] Proportional representation, by contrast, would embrace the opinions of a far broader population of voters. The incorporation of such diverse perspectives would increase voter participation, which would in turn discourage extrasystemic political actions such as terrorism and riot-

---

[144] 377 U.S. 533 (1964). The Court objected to the fact that districts varied in population, thus weighting the votes of some citizens over others. In a proportional system, the only inequity in the value of a vote occurs when a candidate has won by slightly passing the threshold, and the votes she received are more important to her than those received by a candidate who easily passed the threshold. However, such inequity exists in any election system.

[145] *Id.* at 535.

[146] *See, e.g.*, Inman, *supra* note 28, at 2020–21 (countering the arguments of a wide range of opponents of proportional representation); *see also* Peter J. Taylor, *The Case for Proportional Tenure: A Defense of the British Electoral System*, *in* CHOOSING AN ELECTORAL SYSTEM 53, 57 (Arend Lijphart & Bernard Grofman eds., 1984).

[147] *See, e.g.*, Davis v. Bandemer, 478 U.S. 109, 145 (1986) (O'Connor, J., concurring).

[148] *See Balkanizing the City Council*, N.Y. POST, June 7, 1991, at 34.

[149] *See* ROBERT G. DIXON, JR., DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 49 (1968).

ing. Thus, proportional representation would encourage stability without undermining local interests.

IV. The Legal and Political Challenges of Implementing a Proportional System

However clear it may be that proportional representation would greatly improve lesbian and gay interest representation—as well as that of all voters—such a change cannot be enacted without first overcoming legal and political obstacles.

A. The Questionable Legal Status of Proportional Representation

Those arguing for the institution of proportional representation face the ambivalence of the current law toward proportional remedies. The Voting Rights Act neither mandates nor prohibits such remedies.[150] Nonetheless, the legislative history of the 1982 amendments to the Voting Rights Act as well as subsequent Supreme Court cases indicate that proportional systems are disfavored.[151] Furthermore, even certain liberal Supreme Court Justices have conceded that an interpretation of the Voting Rights Act that required proportional representation would turn the Court into a super-legislature.[152]

Voting rights scholars, however, argue that the Court could interpret case law and statutes to require a remedy that institutes proportional representation.[153] Guinier has asserted that the requirements of sections 2 and 5 of the Voting Rights Act would be most effectively met by a system of proportional representation that allowed minority communities to have their interests represented.[154] Inman argues further that because the Su-

---

[150] 42 U.S.C. § 1973(b) ("[N]othing . . . establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.").

[151] Thornburg v. Gingles, 478 U.S. 30, 36 (1986) (recognizing that the Voting Rights Act does not provide for proportional remedies); S. REP. No. 417, 97th Cong., 2d Sess. 94 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 364 (additional views of Senator Robert Dole) ("It was generally agreed that the concept of certain identifiable groups having a right to be elected in proportion to their voting potential was repugnant to the democratic principles upon which our society is based.").

[152] *See, e.g.*, City of Mobile v. Bolden, 446 U.S. 55, 123 (Marshall, J., dissenting) (acknowledging the majority's criticism of a proportional representation requirement).

[153] In fact, at least one court has ordered a jurisdiction to adopt a proportional representation system as a remedy to a Voting Rights Act violation. *See* Cane v. Worcester County, 847 F. Supp. 369 (Md. 1994), *aff'd in part, rev'd in part*, 35 F.3d 921 (3d Cir. 1994) (remanding for consideration of county-proffered remedy).

[154] *See* Guinier, *No Two Seats*, *supra* note 16, at 1493–1513. Indeed, in *Holder v. Hall*, Justice Thomas, joined by Justice Scalia, argued that nothing in the Voting Rights Act affirmatively prohibits courts from instituting proportional representation systems as remedies to Voting Rights Act violations. Holder v. Hall, 114 S. Ct. 2581, 2601 (1994) (Thomas, J., concurring) (characterizing districting systems as "merely political choices"

preme Court has recognized that representation based on group identity already serves as a baseline for fair districting[155]—despite the cautionary language of the Voting Rights Act—proportional representation is a better solution for voting rights discrimination.[156] This recognition of group remedies for voting rights discrimination within the Court's jurisprudence suggests that proportional representation could obtain judicial approval.

B. The Inability of Lesbian and Gay Communities to Institute Proportional Representation Single-Handedly

The unprecedented leap by lesbians and gay men onto the American political stage has been accompanied by heterosexist reactionary forces that impede lesbian and gay progress. The inclusion of lesbian and gay interests in the Clinton campaign, the attempted reversal of the ban on lesbians and gay men in the military, and the appointment of an openly lesbian politician to an upper-level cabinet position demonstrate a heretofore unseen prominence of lesbian and gay interests.[157] Although widespread Republican victories in the 1994 congressional elections foreshadow continued congressional homophobia,[158] two antigay initiatives were defeated, and twenty-four lesbian or gay officials reelected or newly elected to office.[159] Nevertheless, as lesbian and gay community organizing has grown, so have antigay forces.[160] Where rights have been won by lesbian and gay men, referenda sponsored by the Christian Right have succeeded in limiting such victories.[161] In this climate, it seems highly unlikely that the nation—or any state or locality for that matter—would

---

that "may fall under suspicion of having a dilutive effect on minority voting strength" in violation of the Voting Rights Act).

[155] Gaffney v. Cummings, 412 U.S. 735, 754 (1973) ("[N]either we nor the district courts have a constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State.").

[156] *See generally* Inman, *supra* note 28.

[157] *See* Helen Dewar, *Senate Votes to Confirm Achtenberg; Californian Will Take HUD Post as First Openly Lesbian Official*, WASH. POST, May 25, 1993, at A7.

[158] *See, e.g.*, Jerry Gray, *Gingrich Criticized for Opposing Job Protection for Homosexuals*, N.Y. TIMES, Mar. 8, 1995, at A19. *But see* Frank Rich, *Closet Clout*, N.Y. TIMES, Feb. 2, 1995, at A23 (arguing that because it is unlikely that the Christian Right will vote for Democrats, the GOP should woo lesbian and gay swing voters).

[159] David W. Dunlap, *Gay Politicians Cite Gains Amid Losses*, N.Y. TIMES, Nov. 14, 1994, at B9 (quoting Sheila James Kuehl, newly elected California state representative).

[160] *See* Jeffrey Schmalz, *Homosexuals Wake to See a Referendum: It's on Them*, N.Y. TIMES, Jan. 31, 1993, § 4, at 1.

[161] In the wake of the passage of Colorado's referendum Amendment 2, which would prohibit the extension of civil rights protections to lesbians and gay men, many states and localities have already approved or will soon vote on similar antigay referenda. For the perspective of two openly gay and lesbian elected officials on opposing the Christian Right, see Glen Maxey, *Running Against the Right*, *in* GAY AND LESBIAN VICTORY FUND,

reform its electoral system for the express purpose of improving lesbian and gay interest representation. Attaining proportional representation will require a far broader political movement, one that includes other minority groups as well as the general electorate.

V. Realizing Proportional Representation

A. *The* Miller *(D)evolution: Erasing Minority Electoral Empowerment*

The 1995 Supreme Court decision in *Miller v. Johnson*[162] has profoundly transformed the law of districting. The Court based its holding on *Shaw v. Reno*,[163] in which it found that a majority-African American district in North Carolina "stigmatized" white people.[164] Adopting the *Shaw* Court's holding, the *Miller* Court held that "a plaintiff states a claim under the Equal Protection Clause by alleging that a state redistricting plan, on its face, has no rational explanation save as an effort to separate voters on the basis of race."[165] In *Miller*, the Court held that a Georgia congressional district created predominantly to empower African Americans was an unconstitutional racial gerrymander.[166]

With the establishment of a *Shaw* claim, the Court may have spawned a new generation of voting rights litigation unlike that of the previous three generations.[167] As Justice Stevens stated in his dissent in *Miller*, "[t]he Court attempts an explanation in these cases by equating the injury it imagines respondents have suffered with the injuries African Americans

---

supra note 4, at 159; Gail Shibley, *Coming Out on Every Doorstep*, *in* GAY AND LESBIAN VICTORY FUND, *supra* note 4, at 91.

[162] 115 S. Ct. 2475 (1995).

[163] 113 S. Ct. 2816 (1993).

[164] *Id.* at 2818, 2824.

[165] *Miller*, 115 S. Ct. at 2475.

[166] *Id.* The principal evidence for the majority was that race served as the only common characteristic among the residents of this not-so-irregular district. This lack of significant irregularity is noted by Justice Ginsburg in her dissent. *See id.* at 2502–03 (Ginsburg, J., dissenting).

[167] The term "generation" merely denotes the establishment of a new kind of voting rights litigation; it does not indicate progress. The first generation of voting rights litigation concerned the attempt to attain the right to vote for all African Americans. *See, e.g.*, Terry v. Adams, 345 U.S. 461 (1953) (holding that a Democratic primary that functioned as an election and excluded African Americans violated the Equal Protection Clause). The second generation focused on the right to representation in legislatures. *See, e.g.*, Thornburg v. Gingles, 478 U.S. 30 (1986) (holding that a North Carolina districting scheme violated section 2 of the Voting Rights Act). The third generation involved efforts to oppose legislative rule changes that were designed to prevent minority elected officials from affecting public policy. *See, e.g.*, Rojas v. Victoria Indep. Sch. Dist., No. V-87-16, 1988 U.S. Dist. LEXIS 11049 (S.D. Tex. Mar. 29, 1988), *aff'd*, 490 U.S. 1001 (1989) (holding that a school board's action did not violate the Voting Rights Act when, after a Mexican American woman was elected, the board changed its rules to require the support of two members to put an issue before the board).

suffered under segregation."[168] In this fourth generation of voting rights litigation, the goal, rather than preventing new forms of discrimination against minorities, would be to prevent "reverse discrimination" against whites in majority-African American districts. The harm against whites suggested by *Shaw* has developed into an equal protection claim before the Court, opening the door for all white residents in majority-minority districts to sue.[169] If the district's formation has been primarily based on race, white residents would likely win, forcing districting bodies across the country to weaken African American representation.

Justice Ginsburg's dissent reveals the potentially ironic results of the *Miller* decision:

> If Chinese Americans and Russian Americans may seek and secure group recognition in the delineation of voting districts, then African Americans should not be dissimilarly treated. Otherwise, in the name of equal protection, we would shut out "the very minority group whose history in the United States gave birth to the Equal Protection Clause."[170]

Had Justice Ginsburg added lesbians and gay men to the list of groups permitted to influence districting, she would have described a possible reversal of the power balance between the lesbian and gay communities and the African American communities during the New York redistricting process. *Miller* restricts the use of race in the redistricting process; the decision does not restrict the use of sexual orientation in drawing district lines.[171]

B. The Potential of Minority Coalition Building

Coalitions between lesbians and gay men and other minorities, who could benefit from the conversion to a proportional system in the wake of *Miller*, could serve as an effective path toward realizing proportional

---

[168] *Miller*, 115 S. Ct. at 2498 (Stevens, J., dissenting).

[169] Indeed, many such suits are already happening. *See, e.g.*, Peter Applebome, *Suits Challenging Redrawn Districts That Help Blacks*, N.Y. TIMES, Feb. 14, 1994, at A1 (discussing the wave of suits challenging majority-minority districts since *Shaw v. Reno*). The changes in this domain of the law are only beginning, as the Supreme Court seems poised to further consider the voting rights issues raised in *Shaw v. Reno*. *See* Linda Greenhouse, *Justices Plan to Delve Anew Into Race and Voting Rights*, N.Y. TIMES, July 11, 1993, § 1, at 1.

[170] *Miller*, 115 S. Ct. at 2506 (Ginsburg, J., dissenting) (quoting Shaw v. Reno, 113 S. Ct. 2816 (1993) (Stevens, J., dissenting)).

[171] For a further elaboration of the effect of *Miller* on racial and sexual minorities, see Darren Rosenblum, *Overcoming "Stigmas": Lesbian and Gay Districts and Black Electoral Empowerment*, 39 How. L.J. (forthcoming, 1996).

representation.[172] The *Miller* case and its interpretation of *Shaw v. Reno* are raising consciousness among African Americans and other minorities, who are now barely protected in a districting system by Voting Rights Act remedies. The ruling, which was handed down shortly after the 1994 Republican congressional victories, has led to further dissatisfaction with electoral politics among African Americans.[173] Rising opposition to the race-conscious districting that created the district overturned in *Shaw v. Reno* might propel civil rights activists to support broader electoral changes that would encourage minority interest representation. Confronting problems similar to those plaguing lesbians and gay men—packing and fracturing, virtual representation, tokenism, and an array of other electoral disempowerment phenomena—such minorities may conclude that districting itself is not ultimately in their interests.[174] Prominent African Americans have questioned the value of race-conscious districting for the advancement of African American interests.[175] Dissatisfaction among African Americans only increased with widespread Democratic party losses in the 1994 congressional elections[176] and might well lead to a reconsideration of electoral structures.[177] The new political realities indicate a profound exclusion of African Americans from the political system. Without hope

---

[172] Huey P. Newton, the minister of defense for the Black Panther Party, described the beginning of such a coalition. *See* Huey P. Newton, *A Letter from Huey P. Newton*, COME OUT!, Sept.-Oct. 1970, at 12 (reprinting an internal letter from Huey P. Newton to the other brothers of the Black Panther Party). For a discussion of lesbian and gay participation in minority movements, see MARTIN DUBERMAN, STONEWALL (1993) and JOHN D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES (1983).

[173] *See* Isabel Wilkerson, *Many Blacks See Betrayal in This Year's Campaign*, N.Y. TIMES, Nov. 10, 1994, at B4. Some politicians and scholars argue that the creation of minority districts divided African Americans from liberal whites, facilitating Republican victories. *See* Steven A. Holmes, *Did Racial Redistricting Undermine Democrats?*, N.Y. TIMES, Nov. 13, 1994, § 1, at 32; David Lublin, Letter to the Editor, N.Y. TIMES, Dec. 13, 1994, at A28.

[174] Indeed, as different minority communities grow and overlap geographically, they will find less protection in the Voting Rights Act and perhaps become more supportive of proportional representation alternatives. *See* Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Any More*, 47 STAN. L. REV. 957, 969–71, 975–77 (1995) (arguing that no remedy exists under the Voting Rights Act when concurrent remedies for two different racial minority groups within a jurisdiction are mutually exclusive and proposing cumulative voting as a solution).

[175] For example, Justice Clarence Thomas has criticized the enforcement of the Voting Rights Act, declaring that "we have devised a remedial mechanism that encourages federal courts to segregate voters into racially designated districts to ensure minority electoral success." Holder v. Hall, 114 S. Ct. 2581 (1994) (Thomas, J., concurring); Guinier, *Single-Member Districts*, *supra* note 31, at 1163 ("Where blacks and whites are geographically separate, race-conscious districting by definition isolates blacks from potential white allies such as white women who are not geographically concentrated.").

[176] *See* Wilkerson, *supra* note 173.

[177] "The sense of alienation has renewed the debate over alternatives to the two-party system and the need [for blacks] to reach out to Hispanic, gay and other minority groups." *Id.*

for improvement of the status quo, African Americans might support such "radical" changes as proportional representation.

The ability of lesbians and gay men to work with Asian Americans and other minorities in the New York redistricting process proves instructive. This movement would certainly be furthered by a broader recognition of the limitations placed on racial minority representation by white majorities within legislatures. Coalitions with racial, ethnic, and political minorities can occur locally in progressive jurisdictions and thereby expand political debate.[178] For example, lesbian and gay political activists might advocate for referenda or support litigation by protected minorities under the Voting Rights Act.[179] The benefits of proportional remedies would not only enhance minority interest representation but would also expand such representation in all segments of the electorate.

C. Eliminating Voter Discontent

Profound voter discontent in recent years might also help overcome popular skepticism about proportional representation. In both the 1992 and 1994 national elections, antigovernment discourse was a standard in both major parties and among independents.[180] Heightened interest in third-party or independent candidates reveals an electorate longing for alternatives,[181] yet no force bolsters incumbency's inertia more than districting. Discouraged from uniting with others who agree with them, voters instead demand pork-barrel favors from their representatives.

In a proportional system, all voters—not only lesbians and gay men—would be able to unite in dynamic ways. Proportional representation would liberate the political system from strongholds of incumbency fortified by each redistricting cycle. Tortured debate over third parties and independent candidates would become irrelevant, as candidates and parties would flourish to meet the demands of renewed voter activism.[182] Voters would unite around many issues, shifting their allegiances to meet the demands of

---

[178] For example, Republicans in New York City might gain from proportional representation, given their current minority position. *Cf.* Calvin Sims, *For Council Winner, A Sign of Hope for Republicans*, N.Y. TIMES, Nov. 7, 1991, at B7.

[179] *See* Guinier, *No Two Seats*, *supra* note 16, at 1418 (suggesting that protected minority groups' success in restructuring voting rules will have a salutary effect on the political influence of other dispersed minorities).

[180] Peter Applebome, *Ideas and Trends: How the Union Joined the South*, N.Y. TIMES, Nov. 20, 1994, § 4, at 1.

[181] *See* Keith D. Eisner, *Non-Major-Party Candidates and Televised Presidential Debates: The Merits of Legislative Inclusion*, 141 U. PA. L. REV. 973, 983 (1993) (discussing the role of third parties as policy innovators and their function generally in a two-party system); Bradley A. Smith, *Judicial Protection of Ballot-Access Rights: Third Parties Need Not Apply*, 28 HARV. J. ON LEGIS. 167, 169 (1991) (arguing that third parties play a vital role in American politics and deserve ballot access).

[182] Inman has argued that "by allowing more expression of the diverse components of

fresh political situations. A renaissance of democracy would result because many more individuals would vote for the elected candidates.

Conclusion

After Deborah Glick, a representative from the West Village, spoke before the New York State Assembly in favor of a lesbian and gay civil rights bill as "a Jew, a woman, and a lesbian," she received a standing ovation from her fellow legislators.[183] The Assembly subsequently passed the bill, supporting lesbian and gay rights legislation for the first time in its history.[184] This victory, however, proved pyrrhic. Despite intensive lobbying for the bill's passage, the bill died in the New York Senate.[185] The Republican majority leadership refused to allow the bill to reach the floor, preventing the pro-gay Republican minority from joining with the Democratic minority for its passage.

The frustration of lesbian and gay interests under districting not only heightens existing criticisms of the current system but also points toward an alternative system where representation will come from decision making by individual voters rather than from line drawing by political elites. In a proportional system, lesbians and gay men would form constituencies that candidates would court. In order to gain the votes of these active constituencies, representatives would advocate for the advancement of lesbian and gay interests. Neither party would be able to control the agenda or shut out vocal minorities completely. A broader range of interests would therefore be represented. Debate would flourish throughout the nation's legislatures, giving advocates of lesbian and gay interests "a fair chance to influence the political process."[186]

American society, a proportional representation system could lead to a significant renewal of political life within . . . election contests." Inman, *supra* note 28, at 2007.

[183] Kevin Sack, *Bill is Passed by Assembly on Gay Rights*, N.Y. TIMES, Feb. 2, 1993, at B1.

[184] *Id.*

[185] *See* Kevin Sack, *Republicans Kill Measure on Gay Rights*, N.Y. TIMES, July 3, 1993, § 1, at 21.

[186] Davis v. Bandemer, 478 U.S. 109, 133 (1986).