

# Citizenship, Voting, and Asian American Political Engagement

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*A significant issue for Asian American’s civic engagement and political empowerment is access to the ballot and to electoral schemes that allow Asian Pacific Islander American (API) voters to elect representatives of their choice. Because voting in nearly all U.S. jurisdictions is limited to citizens, questions about Asian American voters’ citizenship—both real and imagined—can impact electoral access in ways that decrease electoral strength and participation. This Symposium Article will focus on two contemporary areas where citizenship issues may affect API voter access and electoral success: (1) new state laws requiring verification of citizenship for registration and voting and (2) data requirements for Voting Rights Act (VRA) compliance in electoral districts. In the citizenship verification context, API voters may face additional challenges to registering to vote and casting a ballot, both because of disparate rates of citizenship compared to other groups as well as election worker and poll watchers’ suspicions about voters’ citizenship and therefore eligibility to cast a ballot. In the VRA context, case law requiring that voters of color seeking to dismantle at-large election systems that dilute their voting strength use citizenship data to state a prima facie claim of discrimination may make it impossible for API voters in many areas to pursue VRA remedies to discriminatory electoral systems.*

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## INTRODUCTION: THE INTIMATE RELATIONSHIP BETWEEN VOTING AND CITIZENSHIP

Voting in the United States is an important right, not just because, as the U.S. Supreme Court has recognized, it is “preservative of all rights,”<sup>1</sup> but also because access to the vote is a key expression of citizenship and a symbol of national membership. National membership validates that an individual is entitled to the full benefit of legal rights and protections as well as public goods and services. Access to the ballot box has been contentious since the country’s founding, leaving various portions of the populace without political voice—and outside the circle of authentic citizens—throughout U.S. history and even today.

At the country’s founding, despite appeals to equality in our founding documents, whole populations were excluded from the franchise due to their race, ethnicity, gender, or economic status. Voting was limited to white, land-owning males,<sup>2</sup> and representation in the U.S. House of Representatives was apportioned with racial stratification (excluding all Indians not taxed and counting the slave (black) population as only three-fifths of its actual size).<sup>3</sup> In the antebellum period, when voting was generally open to free males, free black men were often denied their right to vote, even in the North.<sup>4</sup> Voting rights were denied to American Indians who paid taxes and had abandoned their tribal affiliation,<sup>5</sup> but granted to Mexican Americans, at least formally, who through treaty were declared to be white.<sup>6</sup>

Even after the Fifteenth Amendment to the Constitution prohibited denying the right to vote on the basis of race or color, voting rights were regularly denied to citizens of color.<sup>7</sup> States adopted laws that limited access to the franchise

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1. *Reynolds v. Sims*, 377 U.S. 533, 562 (1964); *see also* *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

2. *See* ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 5 (2009).

3. U.S. CONST. art. I, § 2, cl. 3.

4. *See, e.g.*, *Hobbs v. Fogg*, 6 Watts 553, 560 (Pa. 1837); *see also* A. LEON HIGGINBOTHAM, JR., *SHADES OF FREEDOM* 170–72 (1996).

5. *See, e.g.*, *Elk v. Wilkins*, 112 U.S. 94, 109 (1884).

6. *See* *People v. de la Guerra*, 40 Cal. 311, 338–39 (1866).

7. Immediately after the Civil War and passage of the Fifteenth Amendment, black

through a variety of means including voter registration requirements, literacy tests, poll taxes, English-only elections, and more, which were often applied in a discriminatory manner. API voters were affected by state and national policies. Some states overtly excluded certain groups. For example, California's 1879 Constitution prohibited "natives of China" from voting, despite the Fifteenth Amendment's passage just nine years earlier.<sup>8</sup> Many Asian Americans who were immigrants were disenfranchised by citizenship requirements for voting, which states started adopting in the late nineteenth century.<sup>9</sup> Since naturalization was limited to whites and those of African descent at the time,<sup>10</sup> immigrants from Asian countries were largely prohibited from becoming naturalized citizens.<sup>11</sup> Accordingly, being "alien[s] ineligible to citizenship,"<sup>12</sup> Asian immigrants could not participate in elections when the right to vote was restricted to citizens.

This disenfranchisement continued until the civil rights movement of the mid-twentieth century. New laws and aggressive enforcement cajoled several states into removing bars to the franchise. Revisions to immigration and

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registration, participation, and representation skyrocketed to levels not seen since through a combination of federal protection and intensive black mobilization. However, state governments soon began to restrict black voting rights by instituting a variety of new eligibility and registration requirements, which were often waived for whites. Coupled with violent retribution against blacks who sought to exercise their voting rights and withdrawal of federal protections, these state laws had a devastating effect: within thirty years, blacks in the South were forced out of the political system. See RICHARD M. VALELLY, *THE TWO RECONSTRUCTIONS: THE STRUGGLE FOR BLACK ENFRANCHISEMENT* 128 (2004). Latinos were similarly disenfranchised by eligibility requirements, such as English language abilities, as well as extralegal efforts to disenfranchise them. See MORGAN KOUSSER, *COLORBLIND JUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION* 69–70 (1999). Native Americans were regularly disenfranchised, even into the 1950s, by state constitutions that refused to grant them the vote. See, e.g., *WE THE PEOPLE*, <http://research.history.org/pf/weThePeople> (last visited Jan. 13, 2013) (noting that New Mexico was last to grant suffrage to Native Americans in state elections in 1962).

8. CAL. CONST. art. II, § 1 (1879). This section also designated that only male citizens could vote and further stated that "no native of China, no idiot, insane person, or person convicted of any infamous crime, and no person hereafter convicted of the embezzlement or misappropriation of public money" possessed the right of suffrage. *Id.*

9. See KEYSSAR, *supra* note 2, at 315–19 tbl.A.4.

10. See MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF AMERICA* 38 (2004).

11. See IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 31 (2006).

12. See Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 OR. L. REV. 261, 271 n.36 (1997) (noting that the origins of the term "alien ineligible to citizenship" came from several state and federal laws in the late nineteenth and early twentieth centuries that made distinctions on an individual immigrant's ability to naturalize or lack thereof); see, e.g., The California Alien Land Law of 1913, 1913 Cal. Stat. 40–41. At the time, naturalization was restricted to whites and individuals of African descent. Through a series of cases regarding naturalization, which Ian Haney López has called "the prerequisite cases," the courts deemed Asian immigrants as ineligible to naturalize since they were not white (and not of African descent); see HANEY LÓPEZ, *supra* note 11 *passim*. By drafting laws prohibiting land ownership, for example, by aliens ineligible to citizenship, states were able to legislate against Asian immigrants without overtly naming race or national origin. See NGAI, *supra* note 10, at 39–40.

naturalization laws opened Asian immigration to the United States as well as removed bars to Asian immigrant naturalization.<sup>13</sup> The Voting Rights Act of 1965 and substantial federal attention and enforcement helped open the political system to black citizens again. The 1975 amendments to the VRA extended its protections to certain language minorities—Asian, Native American/Alaska Native, and Spanish heritage.<sup>14</sup> In the process, it banned discrimination and required certain jurisdictions to provide election related information in languages other than English, opening up the electoral process for meaningful participation by limited English proficient Asian American, Native American, and Latino citizens.<sup>15</sup>

While the VRA and other federal provisions, coupled with vigorous enforcement by federal officials as well as private parties, expanded formal membership in the electorate to more groups than ever, they did not throw the circle of membership open to all. Today, laws remain on the books in several states that exclude various classes of individuals: citizens who have been convicted of a felony,<sup>16</sup> citizens who are not registered to vote,<sup>17</sup> and/or citizens who have been deemed mentally incompetent, among others. Moreover, in nearly all jurisdictions, access to the ballot is limited to U.S. citizens, although in the past non-citizens were allowed to vote in many elections.<sup>18</sup>

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13. Immigration of Asian nationals had been severely restricted, and in some cases barred, for many years. The change in immigration policies removed these race-based restrictions. For a discussion of exclusion of Asians from immigration and naturalization, see generally NGAI, *supra* note 10.

14. The 1975 amendments also included non-English language assistance requirements, allowing the meaningful participation of limited English proficient citizens. See 42 U.S.C. § 1973aa-1a (2006).

15. See 42 U.S.C. § 1973. In addition, the Twenty-Fourth Amendment to the Constitution, in turn, banned poll taxes, eradicating another mode of disenfranchisement. U.S. CONST. amend. XXIV.

16. These “felon disenfranchisement” laws vary from state to state. In the most extreme, individuals convicted of a felony lose their right to vote for life; in other states, civil rights may be restored. See *Map of Felony Disenfranchisement Laws Around the Country*, BRENNAN CTR. FOR JUSTICE, [http://www.brennancenter.org/content/resource/map\\_felony\\_disenfranchisement\\_laws\\_around\\_country](http://www.brennancenter.org/content/resource/map_felony_disenfranchisement_laws_around_country) (last visited Jan. 13, 2013); see also THE SENTENCING PROJECT, <http://www.sentencingproject.org/template/page.cfm?id=133> (last visited Jan. 13, 2013).

17. Nearly all states limit voting to registered voters, and most states require voters to register up to thirty days before an election in order to cast a ballot. See *National Mail Voter Registration Form*, U.S. ELECTION ASSISTANCE COMM’N (Mar. 1, 2006), <http://www.eac.gov/assets/1/Page/National%20Mail%20Voter%20Registration%20Form%20-%20English.pdf>. The waiting period between registration and voting used to be significantly longer, barring many new arrivals from participation, ostensibly because individuals needed more time living in a jurisdiction before they could make intelligent decisions about its government. The thirty-day maximum waiting period was established in the NVRA. 42 U.S.C. § 1973aa-1(d).

18. This was not always the case. Earlier in U.S. history, non-citizen residents were permitted to vote in many states and territories. See KEYSSAR, *supra* note 2, at 315–19 tbl.A.4; Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1397 (1993) (citing Leon E. Aylsworth, *The Passing of Alien Suffrage*, 25 AM. POL. SCI. REV. 114, 114 (1931)).

## I. MODERN DAY PREOCCUPATION WITH CITIZENSHIP IN VOTING

The issue of citizenship and voting has become increasingly contentious in recent years, with laws, policies, legal opinions, and public debate focusing on whether and how non-citizens can or should be involved with U.S. elections. In the registration context, we see a push to verify that citizens—and only citizens—register to vote in the form of new requirements and questioning of citizenship status, even of already registered voters. In the Voting Rights Act districting context, we see data requirements that attempt to limit any potential influence or “counting” of non-citizens in districting decisions. Both of these issues may affect API participation and representation.

*A. Citizenship Verification in Voter Registration*

As noted above, U.S. citizenship is a requirement for voting in nearly all jurisdictions and elections in the United States. During much of the late twentieth century, citizens “proved” their citizenship eligibility<sup>19</sup> by affirming or swearing to it, under penalty of perjury. In 1993, the National Voter Registration Act (NVRA),<sup>20</sup> streamlined the registration process for federal elections to increase voter access and participation, requiring the creation of voter registration forms that could be submitted by mail and directing the states to provide opportunities to register to vote when individuals obtained driver’s licenses or other social services provided by the state.<sup>21</sup> The federally mandated forms provide a space for registrants to swear they are citizens, eighteen or over, and otherwise eligible to vote.<sup>22</sup>

In 2004, this began to change. Instead of accepting a sworn statement as to citizenship, states started requiring more—verification of citizenship status. In a growing number of states and among some pundits, an individual’s word and the penalty of perjury were no longer sufficient to ensure that aliens did not gain access to the ballot. Voter rolls and authentic citizens had to be protected from non-citizen infiltration.<sup>23</sup> As of December 2013, five states had passed laws,<sup>24</sup> and

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19. Other criteria such as age and residency were also “proven” through attestation.

20. While the NVRA places a variety of restrictions and requirements on states’ voter registration practices, it is most well known for the “motor voter” provisions. Indeed, it is often referred to as the “motor voter law,” thanks to a provision requiring states to offer individuals the ability to register to vote when applying for a driver’s license. The NVRA also requires states to provide the opportunity to register to vote at social services offices, mandates the acceptance of a federal registration form, and places certain requirements on states regarding the maintenance of their voter registration rolls. This includes requirements that they maintain accurate rolls and prohibits the purging of voters within ninety days of an election. *See* 42 U.S.C. § 1973gg.

21. *Id.*

22. *Id.* § 1973gg-3(c)(2)(C).

23. *See infra* notes 56–58 and accompanying text.

24. States that had adopted citizenship verification requirements for voter registration included Arizona, Georgia, Kansas, Alabama and West Virginia. *See* Ana Henderson, *Web Special:*

several other states had recently considered legislation, requiring some kind of citizenship verification in order to register to vote.<sup>25</sup> These citizenship verification laws fall into two general categories: (1) verification through documentary proof of citizenship and (2) verification by database cross-reference. In addition, in the run up to the 2012 elections, some states instituted administrative actions to verify voter citizenship. State administrative action included cross-referencing voter rolls and other databases to determine citizenship status with the ultimate goal of purging them from voter rolls.

### 1. State Laws Requiring Documentary Proof of Citizenship in Order to Register

Three states have passed, and several others have considered, laws requiring applicants to present documentary proof of citizenship in order to register to vote. These laws signal a departure from the prior practice of accepting a sworn statement of citizenship as sufficient proof of citizenship to register to vote. Each of the laws adopted thus far apply only to new registrants, so voters who are currently registered do not need to prove their citizenship.

The first citizenship verification law was Arizona's Proposition 200 in 2004. Proposition 200, known as the "Protect Arizona Now" initiative, was a ballot initiative approved by Arizona voters that addressed a variety of citizenship based issues. Among other things, Proposition 200 required documentary proof of citizenship in order to register to vote.<sup>26</sup> Proposition 200 revised Arizona election

*Citizenship Verification, Obstacle to Voter Registration and Participation*, URBAN HABITAT, <http://urbanhabitat.org/19-1/henderson> (last visited Nov. 1, 2013).

25. Citizenship verification for voter registration was a particularly hot issue in the states during 2012, with at least seven states considering legislation that would add additional citizenship requirements to the right to register to vote. Seventeen states introduced such legislation in 2012: Alabama, California, Colorado, Connecticut, Kansas, Maine, Massachusetts, Michigan, Missouri, New Hampshire, Nevada, Oregon, South Carolina, Tennessee, Texas, Virginia, and Washington. *See Election 2012: Voting Laws Roundup*, BRENNAN CTR. FOR JUSTICE (Oct. 11, 2012), [http://www.brennancenter.org/analysis/election-2012-voting-laws-roundup#\\_edn2](http://www.brennancenter.org/analysis/election-2012-voting-laws-roundup#_edn2). In August 2012, seven states were actively considering numerous pieces of legislation on this issue: California, Massachusetts, New Hampshire, South Carolina, Missouri, Michigan, and Virginia. H.B. 2109, 2011 Gen. Assemb., Reg. Sess. (Mo. 2011), available at <http://www.house.mo.gov/billtracking/bills121/sumpdf/HB2109L.pdf>; H.B. 515, 162nd Gen. Court, Reg. Sess. (N.H. 2011), available at <http://www.gencourt.state.nh.us/legislation/2012/HB0515.html>; Assemb. B. 2497, 2011–2012 State Assemb., Reg. Sess. (Cal. 2012), available at [http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab\\_2451-2500/ab\\_2479\\_bill\\_20120224\\_introduced.pdf](http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_2451-2500/ab_2479_bill_20120224_introduced.pdf); H.B. 569, 2012 Gen. Assemb., Reg. Sess. (Va. 2012), available at <http://lis.virginia.gov/cgi-bin/leqp604.exe?121+ful+HB569H1+pdf>; H.B. 194, 187th Gen. Court, Reg. Sess. (Mass. 2011), available at <https://malegislature.gov/Bills/187/House/H194>; S.B. 304, 119th Leg., Reg. Sess. (S.C. 2011), available at [http://www.scstatehouse.gov/sess119\\_2011-2012/bills/304.htm](http://www.scstatehouse.gov/sess119_2011-2012/bills/304.htm); H.B. 828, 2012 Gen. Assemb., Reg. Sess. (Va. 2012), available at <http://lis.virginia.gov/cgi-bin/leqp604.exe?121+ful+HB828+pdf>; H.B. 895, 2012 Gen. Assemb., Reg. Sess. (Va. 2012), available at <http://lis.virginia.gov/cgi-bin/leqp604.exe?121+ful+HB895+pdf>; H.B. 5221, 2011–12 Leg., Reg. Sess. (Mi. 2011), available at <http://www.legislature.mi.gov/documents/2011-2012/billintroduced/House/pdf/2011-HIB-5221.pdf>. In Virginia, three bills were pending. H.B. 569, *supra*; H.B. 828, *supra*; H.B. 895, *supra*.

26. It also required identification in order to cast a ballot, proof of eligibility for non-federal public benefits, and that local officials report suspected undocumented immigrants to federal officials.

law to require that county registrars reject any application for registration that did not contain or come accompanied with acceptable proof of citizenship. Accepted documents include an Arizona driver's license issued after 1996, a passport, a birth certificate, or naturalization papers.<sup>27</sup> While a citizen could register by mail and provide a copy of a passport or birth certificate, naturalized citizens using their naturalization papers were required to present original documents *in person* for inspection at their county registrar's office, and an individual supplying only a naturalization number would not be registered until the number is verified with U.S. Immigration and Customs Enforcement (ICE).<sup>28</sup>

In 2011, the Kansas legislature passed the Kansas Secure and Fair Elections Act, which required photo identification at the polls starting January 1, 2012 and proof of citizenship to register to vote starting January 1, 2013.<sup>29</sup> The Kansas law designates the following as proof of citizenship: a U.S. passport, a birth certificate showing U.S. citizenship, a driver's license from a state that requires citizenship for licensing, a Bureau of Indian Affairs identification card or number, and naturalization papers or numbers (but numbers must be verified with ICE before an applicant is added to the rolls).<sup>30</sup>

In 2011, Alabama passed HB 56, the "Alabama Taxpayer and Citizen Protection Act." HB 56 was arguably the strictest state immigration law in the nation and has garnered international attention and several lawsuits. However, the law's voter registration provisions (section 29) garnered relatively little attention. Section 29 of the Act requires proof of citizenship prior to being added to the voter rolls. The law accepts the same documentation as Kansas.<sup>31</sup>

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*See* ARIZ. REV. STAT. ANN. §16-166(F) (2010), *preempted by* *Gonzalez v. Ariz.*, 677 F.3d 383 (9th Cir. 2012) (holding that Arizona's citizenship requirement was a violation of the NVRA since it places additional requirements on voters' ability to register to vote beyond what the NVRA mandates).

27. *Id.*

28. *Id.*

29. In January 2012, Kansas's secretary of state asked the legislature to move the implementation date of citizenship verification procedures up to June 1, 2012, so that it would be in effect for what Kansas secretary of state has called, "the spike in registrations" associated with the 2012 presidential election. *See* John Hanna, *Kansas Voter ID Laws: Kris Kobach, Kansas Secretary of State, Seeks Citizenship Proof*, HUFFINGTON POST (Jan. 10, 2012 9:07 PM), [http://www.huffingtonpost.com/2012/01/10/kansas-voter-id-laws-kris-kobach\\_n\\_1198172.html](http://www.huffingtonpost.com/2012/01/10/kansas-voter-id-laws-kris-kobach_n_1198172.html). Legislation to effectuate this request ultimately died in committee. *See* John Celock, *Kris Kobach, Kansas Secretary of State, Defends Voter ID Law*, HUFFINGTON POST (June 2, 2012 2:59 PM), [http://www.huffingtonpost.com/2012/06/02/kris-kobach-kansas-voter-id-law\\_n\\_1564740.html](http://www.huffingtonpost.com/2012/06/02/kris-kobach-kansas-voter-id-law_n_1564740.html).

30. *Proof of U.S. Citizenship for Voter Registration*, GOT VOTER ID?, <http://www.gotvoterid.com/proof-of-citizenship.html#evidence> (last visited Jan. 13, 2013).

31. In Kansas and Alabama, the names and sex on the birth certificate much match that on the voter registration form. For some populations, such as married women, for example, there is likely to be an inconsistency between their birth certificate name and voter registration name, requiring them to take the additional step of completing a form explaining the reason for the inconsistency under penalty of perjury. Interestingly, while these laws allow a voter to attest to their identity, they disallow the attestation of citizenship. *See* ALA. CODE § 31-13-27(a)(5) (2011), *declared unconstitutional by* *United States v. Alabama*, 691 F.3d 1269 (11th Cir. 2012) (challenging portions of

## 2. *State Laws Requiring Citizenship Verification by Cross-Reference*

Two states have addressed citizenship verification through legislation requiring cross-referencing with a citizenship database. Rather than require the voter to provide additional documentation or proof with his registration, these states cross-reference applicant information with other state databases to try to determine citizenship status. If questions about citizenship arise, the voter is provided an opportunity to prove her citizenship status. A voter who does not produce sufficient proof will not be permitted to register or remain registered to vote.

In 2008, the Georgia legislature passed legislation requiring verification of registrants' citizenship before they may be added to the voter rolls. Under the Georgia regime, registrants are cross-referenced with the state's driver's license database to determine citizenship. If an individual appears as a non-citizen in drivers' records, her citizenship must be verified, either through documentation or communication with ICE, before her registration may be processed and she may be registered as a voter. Like the Arizona, Alabama, and Kansas laws, Georgia's law only applies to new registrants.

In 2011, Tennessee legislators passed a statute requiring that the state's voter rolls be cross-referenced with other state and federal databases to identify potential non-citizens who are registered to vote.<sup>32</sup> When cross-referencing raises a question about a voter's citizenship status, county officials must send the voter a notice requiring him to produce proof of citizenship within thirty days or be removed from the voter rolls. Acceptable proof of citizenship includes a birth certificate, passport, naturalization papers, or other documentation accepted by the Immigration Control and Reform Act of 1986. Unlike Arizona, Kansas, and Georgia, Tennessee will apparently not limit citizenship verification to new registrations, but rather will check the citizenship of all registered voters.

## 3. *State Administrative Action on Citizenship Verification*

In addition to these statutes and constitutional provisions, in 2011 and into the summer of 2012, several states instituted administrative processes to attempt to identify and purge non-citizens who were registered to vote. Similar to the Tennessee law, officials in these states cross-referenced voter information with other state databases that might indicate citizenship status.<sup>33</sup> In addition, some states requested access to the federal Systematic Alien Verification and

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the Beason-Hammon Alabama Taxpayer and Citizen Protection Act, 2011 Ala. Laws 535); K.S.A. § 25-2309 (2012).

32. S.B. 352, 107th Gen. Assemb., Reg. Sess. (Tenn. 2011).

33. In addition, in 2012 Michigan adopted administrative policies requiring voters to verify their citizenship at the polling place in order to receive a ballot. A federal court issued a preliminary injunction of the application of this requirement prior to the November 2012 Presidential Elections. *See Bryanton v. Johnson*, 902 F. Supp. 2d 983, 986 (E. D. Mich. 2012).



Entitlement (SAVE) database.<sup>34</sup> The SAVE program, administered by the Department of Homeland Security, is a web-based “service that helps federal, state and local benefit-issuing agencies, institutions, and licensing agencies determine the immigration status of benefit applicants so only those entitled to benefits receive them.”<sup>35</sup> States sought access to the SAVE database to check the citizenship status of registered voters.

Registered voters identified as suspected non-citizens were to be informed of discrepancies and required to verify their citizenship or be removed from the voter rolls. Failure to prove citizenship could result in a voter being purged from voter rolls or subject to challenge in the polling place. Because these administrative processes were not public, complete information about them is not readily available for analysis. Press accounts and limited public statements from officials provide the bulk of information about these administrative processes.

In Florida, the secretary of state instituted an administrative initiative to purge voter rolls of non-citizens. In spring 2011, Florida officials claimed that cross-referencing driver’s license and voter roll information revealed more than 180,000 non-citizens were registered to vote.<sup>36</sup> That initial figure was revised to approximately 2600 potential registered non-citizens.<sup>37</sup> The state instructed county supervisors to contact identified voters requesting proof of citizenship and to purge those who did not comply. However, Florida’s actions made news when many county registrars refused to follow the state’s orders to question or purge

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34. According to U.S. Citizenship and Immigration Services:

In 1986, Congress passed the Immigration Reform and Control Act of 1986 (IRCA), which required the creation and implementation of a verification system that confirms immigration statuses of individuals applying for certain federally-funded benefits. This system originally came under the jurisdictional purview of legacy Immigration and Naturalization Service (INS). To successfully accommodate this federal mandate, legacy INS created the Systematic Alien Verification for Entitlements (SAVE) Program in 1987 to develop the verification system. With the creation of the Department of Homeland Security in 2003, jurisdiction is now under the United States Citizenship and Immigration Services (USCIS), Verification Division.

*About the SAVE Program*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=40fabff1bc0ca110VgnVCM1000004718190aRCRD&vgnnextchannel=2af29c7755cb9010VgnVCM10000045f3d6a1RCRD> (last visited Jan. 13, 2013).

35. *SAVE*, U.S. CITIZENSHIP AND IMMIGRATION SERVS., <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=1721c2ec0c7c8110VgnVCM1000004718190aRCRD&vgnnextchannel=1721c2ec0c7c8110VgnVCM1000004718190aRCRD> (last visited Jan. 13, 2013).

36. Gary Fineout & Brendan Farrington, *Fla. Voter-Roll Screening Yields Few Non-Citizens*, ASSOCIATED PRESS (Sept. 12, 2012, 10:48 PM), <http://bigstory.ap.org/article/fla-voter-roll-screening-yields-few-non-citizens>.

37. Michael C. Bender, *Florida to Continue Hunt for Illegal Voters as Election Nears*, BLOOMBERG BUSINESSWEEK (Sept. 17, 2012), <http://www.businessweek.com/news/2012-09-17/florida-to-continuc-hunt-for-illegal-voters-as-election-nears>.

identified voters after more than five hundred voters on it turned out to be citizens.<sup>38</sup>

As part of its administrative efforts, Florida requested access to the federal SAVE database for voter citizenship registration,<sup>39</sup> and sued the United States Department of Homeland Security when access was not provided.<sup>40</sup> Florida argued that federal records would allow it to verify citizenship of voters in question.<sup>41</sup> In June 2012, the federal government granted Florida officials access to the SAVE database. After Florida cross-referenced the 2625 suspected non-citizen voters with the SAVE database, it reported that its “Voter Eligibility Initiative” ultimately found 207 non-citizens on state voter rolls.<sup>42</sup> The secretary of state proclaimed in its announcement that “The Voter Eligibility Initiative is already proving to be a successful process to identify illegally registered voters on Florida’s voter rolls.”<sup>43</sup>

In Colorado, the secretary of state compared voter rolls with individuals who had used documents to obtain driver’s licenses that indicated they were not citizens, such as a U.S. Permanent Resident Card.<sup>44</sup> Colorado officials initially estimated that 11,805 non-citizens might be registered statewide.<sup>45</sup> The state eventually sent letters to 3903 suspected non-citizens<sup>46</sup> notifying them to withdraw their registration voluntarily or prove their U.S. citizenship.<sup>47</sup> Voters who did not

38. See Fineout & Farrington, *supra* note 36.

39. See Letter from Ken Detzner, Fla. Sec’y of State, to Janet Napolitano, Sec’y of U.S. Dep’t of Homeland Sec. (May 31, 2012), *available at* [http://www.dos.state.fl.us/news/communications/pressRelease/pdf/Letter\\_to\\_DHS\\_Secretary\\_Napolitano\\_5-31-2012.pdf](http://www.dos.state.fl.us/news/communications/pressRelease/pdf/Letter_to_DHS_Secretary_Napolitano_5-31-2012.pdf).

40. See Complaint, Fla. Dep’t of State v. U.S. Dep’t of Homeland Sec. (No. 1:12-cv-00960), *available at* [http://www.dos.state.fl.us/news/communications/pressRelease/pdf/6-11-2012\\_DOS\\_vs\\_DHS\\_re\\_SAVE\\_Database.pdf](http://www.dos.state.fl.us/news/communications/pressRelease/pdf/6-11-2012_DOS_vs_DHS_re_SAVE_Database.pdf).

41. See Letter from Ken Detzner to Janet Napolitano, *supra* note 39.

42. Press Release, Fla. Dep’t of State, Florida’s Voter Eligibility Initiative Confirms 207 Non-Citizens on Voter Rolls Using SAVE Database, Around 8 Percent of Voters Checked (Sept. 12, 2012) [hereinafter Voter Eligibility Initiative], *available at* <http://www.dos.state.fl.us/news/communications/pressRelease/pressRelease.aspx?id=604>; *see also* Bender, *supra* note 37.

43. See Voter Eligibility Initiative, *supra* note 42. It is unknown how many voters were erroneously purged, perhaps for not affirmatively proving their citizenship or for not responding to requests for confirmation. However, the state settled a lawsuit challenging the citizenship purges, and agreed to reinstate voters and notify affected voters of their continued eligibility to vote. *See* Fineout & Farrington, *supra* note 36.

44. Ivan Moreno, *Colorado Voter Purge: Many Suspected Ineligible Voters Actually U.S. Citizens*, HUFFINGTON POST (Aug. 29, 2012, 10:50 PM), [http://www.huffingtonpost.com/2012/08/29/colorado-voter-purge-list\\_n\\_1841731.html](http://www.huffingtonpost.com/2012/08/29/colorado-voter-purge-list_n_1841731.html).

45. Ivan Moreno, *Republicans Look for Voter Fraud, Find Little*, YAHOO! NEWS (Sept. 24, 2012, 1:26 PM), <http://news.yahoo.com/republicans-look-voter-fraud-little-172327169--election.html>.

46. Some have expressed concern that voters were targeted for partisan purposes. Ivan Moreno, *Gessler Says 141 Illegally Registered to Vote*, AURORA SENTINEL (Sept. 10, 2012, 7:37 AM), <http://www.aurorasentinel.com/news/gessler-says-141-illegally-registered-to-vote> (“In Colorado, the majority of the letters questioning citizenship went to Democrats, 1,566, and independents, 1,794. Gessler’s office said they didn’t look at party affiliation before sending the letters.”).

47. *Id.*

respond would be purged from voter rolls and unable to vote. State officials received 482 responses affirming citizenship, and sixteen voluntary withdrawals of registration.<sup>48</sup>

Subsequently, Colorado officials were able to cross-reference 1416 of the questionable registrants with the federal SAVE database. The SAVE database confirmed the U.S. citizenship status of all but 141.<sup>49</sup> In September 2012, the secretary of state, citing limited time before the election to conduct eligibility hearings of these 141 individuals, stated that the only action he would take against them was to provide their names to county election officials for challenging as needed.<sup>50</sup>

In 2011, New Mexico's<sup>51</sup> secretary of state cross-referenced voter rolls with driver's license and other records to look for non-citizens registered to vote. As a result, she referred sixty-four thousand voter files to state police due to "irregularities."<sup>52</sup> She later reported that 117 "foreign nationals" had been identified on the voter rolls, and thirty-seven had voted.<sup>53</sup> However, it was unclear whether those suspected of being non-citizens were in fact not citizens since the secretary of state refused to release information leading to their identification and because the list of "foreign nationals" upon which she relied apparently also contained citizens who had used an alternate form of identification to prove their identity when applying for a driver's license.<sup>54</sup>

Iowa's secretary of state launched a similar effort in 2012.<sup>55</sup> He instituted special emergency rules to implement a plan to check voter rolls for non-citizens, bypassing the normal rulemaking procedure as well as public comment.<sup>56</sup> He claimed that cross-referencing with state transportation records revealed that 3582 non-citizens were registered to vote.<sup>57</sup> Iowa sought access to the SAVE database to run further investigation of these registered voters, but before gaining such access, an Iowa judge enjoined the state's plans to question and purge voters on

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48. *Id.*

49. *Id.*

50. *Id.*

51. Steve Terrell, *Duran Joins Effort Asking Feds to Help Stop Voter Fraud*, THE NEW MEXICAN (July 11, 2012), <http://www.santafenewmexican.com/Local%20News/071212VOTERS>.

52. Michael Haederle, *New Mexico Roiled by Voter Fraud Claims*, L.A. TIMES, July 31, 2011, at A11, available at <http://articles.latimes.com/2011/jul/31/nation/la-na-voter-fraud-20110731>.

53. *Id.*

54. Milan Simonich, *ACLU Sues Secretary of State over Voter Registration*, ALAMOGORDO DAILY NEWS (July 20, 2011, 1:11 PM), [http://www.alamogordonews.com/ci\\_18514986](http://www.alamogordonews.com/ci_18514986).

55. Jason Noble, *Schultz Blames Feds for Delay in Removal of Ineligible Voters*, THE DES MOINES REGISTER, Sept. 15, 2012, at 1B.

56. Rod Boshart, *Iowa Voting Rule Changes on Hold in Wake of Judge's Ruling, Schultz Says*, THE GAZETTE (Sept. 18, 2012, 2:00 PM), <http://thegazette.com/2012/09/18/iowa-voting-rule-changes-on-hold-in-wake-of-judges-ruling-schultz-says>.

57. Noble, *supra* note 55. This is out of 1,881,145 active and 2,114,408 total registered voters as of August 2012. *Monthly Voter Registration Totals: August 2012*, IOWA SEC'Y OF STATE 4, <http://sos.iowa.gov/elections/pdf/VRStatsArchive/2012/CoAug12.pdf>.

the basis that the emergency rulemaking had not been necessary.<sup>58</sup> Moreover, the court found that concerns about voter eligibility could be sufficiently addressed by the voter challenge provisions in effect before the special rulemaking.

Proponents of citizenship verification argue that it is necessary to safeguard the electoral process from fraudulent non-citizen voting and protect the votes of legal citizens. They argue that due to lax registration requirements in the NVRA, particularly the lack of any requirement to prove eligibility, non-citizens can and are registering to vote and even voting.<sup>59</sup> Arguments for requiring proof of citizenship generally follow some incarnation of the following formula: (1) registering to vote is very easy, with no safeguards or requirements to prevent fraudulent registration; (2) there are many non-citizens in the country, including millions of “illegals”; (3) such non-citizens could register to vote if they lie about their citizenship and could then cast illegal ballots; and (4) several recent elections have been decided by small margins, so illegal non-citizen votes could affect electoral outcomes.<sup>60</sup> Although some pundits admit “there is no reliable method to determine the number of non-citizens registered or actually voting,” they warn that “[t]housands of non-citizens are registered in some states, and tens if not hundreds of thousands may be present on the voter rolls nationwide.”<sup>61</sup>

Given the fervor of advocacy for anti-fraud provisions and intensity of claims of non-citizen voting, one would expect ample evidence of widespread non-citizen participation. However, there is very little evidence of non-citizen voting fraud, that is non-citizens who intentionally register and vote despite knowing they are not eligible to do so. For example, an analysis of voting crime records in California between 1994 and 2006 found 161 complaints about non-citizen registration.<sup>62</sup> Of the 104 cases where state officials determined there was a criminal violation, 101 resulted in no action because the defendant lacked intent to commit fraud, and only two resulted in a criminal conviction or guilty plea.<sup>63</sup>

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58. Boshart, *supra* note 56.

59. See Hearing on “You Don’t Need Papers to Vote?” *Non-Citizen Voting and ID Requirements in U.S. Elections: Hearing Before the H. Comm. on H. Admin.*, 109th Cong. 118–23 (2006) (statement of Dan Stein, President, Fed’n for American Immigration Reform); HANS A. VON SPAKOVSKY, THE HERITAGE FOUND., THE THREAT OF NON-CITIZEN VOTING 8–9 (2008), available at <http://www.heritage.org/Research/LegalIssues/lm28.cfm>.

60. VON SPAKOVSKY, *supra* note 59, at 1.

61. *Id.*

62. LORRAINE C. MINNITE, THE MYTH OF VOTER FRAUD 59–61 (2010). Similarly, an investigation of “illegal voting” in the 2004 gubernatorial election in Washington State found only two non-citizens, both university students, voted in the election, out of 2.9 million votes cast. See Stephanie Rice, *Illegal Residents Could be Voting: Officials Say Most Noncitizens Wouldn’t Take Such a Risk*, THE COLUMBIAN (Aug. 17, 2010, 6:00 AM), <http://www.columbian.com/news/2010/aug/17/illegal-residents-could-be-voting>. The vast majority of the 1678 “illegal votes” were cast by felons. *Id.*

63. MINNITE, *supra* note 62, at 59 tbl.4.2.

During this same period, more than seventy-five million votes were cast in California.<sup>64</sup>

The administrative actions in Florida, New Mexico, and Colorado confirm that the incidence of non-citizen registration and voting is very small. In each state, initially large estimates of non-citizen voter registration were winnowed down to a very small fraction of registered voters, meaning the overwhelming majority of those originally identified were erroneously suspected of being non-citizens. Colorado's claimed 11,805 non-citizens resulted in only 141 remaining under suspicion (out of 3,491,088 registered voters),<sup>65</sup> New Mexico's 64,000 irregularities reduced to 117 (out of 1,216,654 registered voters),<sup>66</sup> and Florida's original claim of over 180,000 registered non-citizens boiled down to just 207 (out of 11,483,461 registered voters).<sup>67</sup> In addition, the ultimate numbers may be even smaller since some of these individuals turned out to be naturalized citizens whose records had not been updated.<sup>68</sup> While non-citizens should not register to vote or vote in jurisdictions where they are not eligible, initial large claims of non-citizen registration as well as the large amount of resources dedicated to investigating voter rolls suggest to the media, election workers, and the public that non-citizens pose a threat to election security.

### *B. Citizenship, Electoral Districts, and the Voting Rights Act*

In some Voting Rights Act cases dealing with electoral systems and districts, citizenship has also become an issue. The VRA prohibits, inter alia, electoral practices that have the purpose or effect of making the electoral process less open to some citizens than others based on race, color, or protected language minority status.<sup>69</sup> It has been interpreted as prohibiting electoral schemes, such as at-large elections or districting plans, that do not provide minority voters with an opportunity to elect a representative of their choice.<sup>70</sup> In these cases, both the remedy of choice, and the legal standard for making a prima facie case, focus on the ability to create one or more single-member districts in which the minority group in question forms a majority.

The citizenship case law has also affected redistricting. A key requirement for

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64. *Id.* at 61.

65. COLO. SEC'Y OF STATE, TOTAL VOTERS REGISTERED BY STATUS: AUGUST 2012, at 1, 2 (2012), available at <http://www.sos.state.co.us/pubs/elections/VoterRegNumbers/2012/August/VoterCountsByStatus.pdf>. This is total registration. A smaller number (2,330,000) were active voters. *Id.*

66. N.M. SEC'Y OF STATE, NEW MEXICO VOTER REGISTRATION STATISTICS REPORT BY JURISDICTION: AUGUST 2012, at 1 (2012), available at <http://www.sos.state.nm.us/uploads/FileLinks/2966cef424224c59b1abaf5b30a91116/STATEWIDEAUG312012.PDF>.

67. FLA. DIV. OF ELECTIONS, VOTER REGISTRATION MONTHLY REPORT: JULY 2012, at 1, 2 (2012), available at <http://election.dos.state.fl.us/voter-registration/archives/2012/July/Monthly.pdf>.

68. See Moreno, *supra* note 45.

69. 42 U.S.C. § 1973 (2006). Section 2 also prohibits purposeful discrimination on the basis of race, color, or protected language minority status in voting. *Id.*

70. See Thornburg v. Gingles, 478 U.S. 30, 55–61 (1986).

jurisdictions that use election districts is that districts contain roughly the same number of people. Since the 1960s, jurisdictions have been required to redraw districts, usually subsequent to the release of decennial census data, to address inequalities in population and effectuate the goal of “one person, one vote.” The idea behind “one person, one vote” was that malapportioned districts—districts with unequal populations—led to inequities in voter power, with the votes of individuals in overpopulated districts diluted or carrying less weight compared with those of voters living in less populated districts. The U.S. Supreme Court found that such malapportioned districts violated Fourteenth Amendment’s equal protection guarantees.<sup>71</sup>

In the context of section 2 of the Voting Rights Act,<sup>72</sup> vote dilution refers to the ability to elect a representative of choice. That is, does the method of electing make it more difficult or impossible for minority voters to elect a representative of choice?<sup>73</sup> An electoral system can dilute minority voting strength in a variety of ways. First, at-large election systems can submerge minority voting strength if the majority votes against minority interests. For example, API voters will have great difficulty mustering enough votes to elect a representative of choice to a city council in an at-large election if they constitute only forty percent of the population and the majority sixty percent always vote against their interests. Second, districting schemes that divide or “crack” minority populations into several districts rather than drawing them together into a district where they constitute the majority limit the ability to elect a representative of choice. For example, if a city’s API population were concentrated in one area and were large enough to be a majority in a single district, dividing it between two or more districts in which Asian Americans do not constitute a majority would “crack” the API vote.

71. See *Reynolds v. Sims*, 377 U.S. 533 (1964); see also *Wesberry v. Sanders*, 376 U.S. 1 (1964) (holding that U.S. House of Representatives districts must have roughly equal populations pursuant to Article I, Section 2 of the U.S. Constitution).

72. No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) . . . .

42 U.S.C. § 1973(a). Although some jurists dispute that section 2 applies to electoral districts, see *Bartlett v. Strickland*, 556 U.S. 1, 26 (2009) (Thomas, J., dissenting), the Supreme Court has consistently applied it in cases challenging electoral systems and districts. See, e.g., *id.*; *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006).

73. A violation . . . is established if, based on the totality of circumstances, it is shown that the *political processes leading to nomination or election in the State or political subdivision are not equally open to participation* by members of a class of citizens protected by subsection (a) [race or language minority] in that its members *have less opportunity than other members* of the electorate to participate in the political process *and to elect representatives of their choice*. . . . [N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973(b) (emphasis added).

Finally, districting schemes that over concentrate or “pack” a minority community in a way that reduces the number of districts in which they can elect a representative of choice. A packing scenario would include a city where Asian American voters could comprise a majority in two districts, but instead are “packed” into one district where they constitute a supermajority of the voters and perhaps others where they are less than the majority. These forms of minority vote dilution have been recognized to violate the Voting Rights Act, when certain other conditions exist.<sup>74</sup>

Geographic and demographic distribution of populations has become a paramount concern in VRA litigation and redistricting discussions. In addition, since single-member electoral districts drawn with a majority of minority voters have proven a powerful tool to minority electoral success and political participation,<sup>75</sup> the manner in which such districts are drawn and redrawn is a key consideration for minority voter empowerment. As a result, a key question in litigation to dismantle at-large systems of election or rectify districting systems that dilute minority voting strength, as well as in constructing redistricting plans to avoid violating the VRA, is the location and concentration of minority groups within a jurisdiction.

The preoccupation with population distribution stems from the U.S. Supreme Court’s 1986 *Thornburg v. Gingles*<sup>76</sup> opinion. The Court laid out a three-part test that voters challenging multimember districts must prove in order to state a claim: (1) the minority population is sufficiently large and compact to constitute a majority in a single member district; (2) the minority group is politically cohesive in that they tend to vote the same in elections; and (3) the majority group tends to vote as a bloc against the interests of the minority group so that they usually are able to defeat candidates supported by the minority group.

This three-part test has come to be known as the “*Gingles* preconditions,” and is a necessary first step in challenging an electoral scheme with an alleged

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74. *Bartlett*, 556 U.S. at 6.

75. Some research also suggests a potential energizing effect on minority voter participation as well. The presence of a co-ethnic candidate tends to increase participation, e.g., the presence of an API candidate tends to correlate with increased voting among API voters. Accordingly, the construction of majority-minority districts where minority candidates are more likely to run for office can have collateral effects of increasing civic participation among traditionally disenfranchised communities that tend to vote at lower rates than non-Latino whites. *See, e.g.*, Matt A. Barreto et al., *The Mobilizing Effect of Majority-Minority Districts in Latino Turnout*, 98 AM. POL. SCI. REV. 65, 74 (2004).

The reason that a minority group making such a challenge must show, as a threshold matter, that it is sufficiently large and geographically compact to constitute a majority in a single-member district is this: Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice.

*Thornburg v. Gingles*, 478 U.S. 30, 50 n.17.

76. *Gingles* dealt with a challenge to the 1982 North Carolina legislative redistricting plan that alleged that the plan “impaired black citizens’ ability to elect representatives of their choice.” *See Gingles*, 478 U.S. at 35.

dilutive effect under the VRA using a results test.<sup>77</sup> In addition, the *Gingles* preconditions have become a litmus test for jurisdictions drawing district lines to determine whether they are in minimal compliance with the VRA since they set forth the minimum information needed for results test VRA litigation.

The *Gingles* court did not specify whether the majority showing required in the first precondition referred to total population (POP), voting age population (VAP), or something else.<sup>78</sup> Many early cases dealt with African American populations, and many lower courts rested on voting age population as the correct population of interest. That is, in order to satisfy the first *Gingles* precondition, African American plaintiffs had to demonstrate their voting age population was sufficiently large and compact to constitute a majority in a single member district.

However, in section 2 litigation brought by Latinos, some defendant-jurisdictions argued that majority-minority districts were impossible or not required because of the higher proportion of voting age Latinos who were not citizens. Rather than simply prove a potential single member district with a majority Latino POP or VAP to satisfy the first *Gingles* precondition, they argued that Latino plaintiffs should have to clear an additional hurdle—that its citizen voting age population (CVAP) was sufficient to constitute a majority of adult citizens in a potential district.

To date, four U.S. courts of appeal have held that when citizenship rates differ for minority and majority populations, plaintiffs must take citizenship into account when trying to satisfy the first *Gingles* precondition. Due to the citizenship profile of major racial/ethnic groups in the United States, the CVAP requirement is likely to affect API populations.<sup>79</sup>

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77. Section 2 of the Voting Rights Act prohibits practices enacted with a discriminatory purpose or intent as well as those that have a discriminatory result or disparate impact. 42 U.S.C. § 1973. The *Gingles* preconditions guide analysis in disparate impact cases, where a court is asked to determine whether an electoral scheme, such as at-large elections or districts, dilute minority voting strength, making it more difficult for voters of color to elect a representative of their choice. *See Gingles*, 478 U.S. at 50.

78. *Gingles*, 478 U.S. at 50. In addition, the *Gingles* Court did not specify whether the first precondition had a numerical requirement. Did it mean a numerical majority, i.e., 50.01% or more? Or something else? *Id.* Twenty-three years after *Gingles*, the U.S. Supreme Court confronted this question in a case dealing with a district that was less than fifty percent black. *Bartlett*, 556 U.S. at 6. In *Bartlett*, a North Carolina county sued the state of North Carolina alleging that the state's legislative redistricting violated a provision of the state constitution that legislative districts should refrain from splitting counties. *Id.* As a defense, the state argued that splitting counties was required to comply with the VRA. *Id.* A group of three judges stated that a minority group must be at least fifty percent of a district in order to satisfy the first *Gingles* precondition and trigger VRA protection. *Id.* at 19–20. This has generally been accepted as a new standard that litigants and line-drawing jurisdictions must satisfy when drawing electoral districts. *See, e.g.,* *Lowery v. Deal*, 850 F. Supp. 2d 1326, 1335 n.3 (S.D. Ga. 2012) (quoting *Bartlett*, 556 U.S. at 19–20); *Comm. for a Fair and Balanced Map v. Ill. State Bd. of Elections*, 835 F. Supp. 2d 563, 581 (N.D. Ill. 2011) (quoting *Bartlett*, 556 U.S. at 19–20).

79. In addition, Latinos are likely to be affected. Most API and Latino populations have higher rates of adult non-citizenship compared with non-Latino white, black, and Native American populations. *See infra* Chart 1. Note, however, that this is not true of all API or Latino subgroups. For



Ninth Circuit: The first circuit to confront this issue, the Ninth Circuit's 1989 opinion in *Romero v. City of Pomona*<sup>80</sup> set the stage for future cases. In this challenge to the at-large method of electing the city council in the city of Pomona, California, the Court approved defining the Latino population in terms of citizenship, noting that *Gingles* "repeatedly makes reference to effective voting majorities, rather than raw population totals, as the touchstone for determining geographical compactness."<sup>81</sup>

Eleventh Circuit: In 1997, the Eleventh Circuit Court of Appeals addressed the issue in a section 2 challenge by Latino voters concerning the at-large election of city commissioners in Miami Beach City, Florida.<sup>82</sup> Plaintiffs presented evidence that three majority Latino districts could be drawn. However, the court found that when using citizenship data, rather than VAP or POP, the plaintiffs' potential districts were not actually majority Latino and therefore did not satisfy the first *Gingles* precondition.<sup>83</sup>

Fifth Circuit: Also in 1997, the Fifth Circuit ruled on "the relevance of citizenship to a vote dilution claim" in a challenge to Houston's city council districting plan.<sup>84</sup> The defendant city argued that, after taking disparate citizenship rates<sup>85</sup> into account, Latinos were actually overrepresented on the council.<sup>86</sup> The court agreed, finding that citizenship was a key consideration of section 2.<sup>87</sup>

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example, a higher proportion of Japanese Americans are born in the United States and therefore a higher proportion are citizens by birth compared to other Asian American population groups. See *The Rise of Asian Americans*, PEW RESEARCH CENTER (April 4, 2013), <http://www.pewsocialtrends.org/2012/06/19/the-rise-of-asian-americans>.

80. *Romero v. City of Pomona*, 883 F.2d 1418 (9th Cir. 1989), *overruled on other grounds by* *Townsend v. Holman Consulting Corp.*, 914 F.2d 1136 (9th Cir. 1990). On appeal, plaintiff black and Latino voters argued, among other things, that the district court erred by interpreting the first *Gingles* precondition as requiring a geographically compact majority of eligible voters rather than raw population, as the district court had found that after taking age and citizenship into account, neither blacks nor Hispanics could constitute a majority in a single-member district. *Id.* at 1421, 1425. The court also rejected a claim that black and Latino voters could be considered a single minority. *See id.* at 1420–21.

81. *Romero*, 883 F.2d at 1425. However, the court also notes that raw population figures were relevant for establishing whether a minority population was high enough, citing with approval cases that had required a total minority proportion of sixty-five percent or more to establish a voting population majority. *See id.* at 1425 n.13.

82. *Negrón v. City of Miami Beach*, 113 F.3d 1563, 1565 (11th Cir. 1997).

83. *Id.* at 1568–69.

84. *Campos v. City of Houston*, 113 F.3d 544, 545, 547 (5th Cir. 1997).

85. The court noted that 1990 census data showed that 45.8% of voting age Latinos, 2.2% of voting age non-Hispanic Anglos, and 1.6% of voting age non-Hispanic blacks were non-citizens and ineligible to vote. *Id.* at 547.

86. *Id.*

87. *Id.* at 548 ("[W]e decline to reject citizenship as a relevant factor in the *Gingles* analysis. The plain language of section 2 of the Voting Rights Act makes clear that its protections apply to United States citizens.") Because only citizens of voting age can vote, the court stated that "[i]t would be a Pyrrhic victory for a court to create a single-member district in which a minority population dominant in the absolute, but not in voting age [citizen] numbers, continued to be defeated at the

Seventh Circuit: In 1998, the Seventh Circuit ruled on citizenship data in a section 2 challenged to Chicago's 1982 aldermanic districting plan.<sup>88</sup> Although the city's plan appeared to underrepresent blacks and Latinos as a whole, the court found that after taking citizenship data into account, the plan underrepresented blacks by one district but overrepresented Latinos.<sup>89</sup> Arguing that the VRA only protects citizens,<sup>90</sup> the court determined that such dilution is outside the purview of the VRA.

Most line-drawing bodies and lawyers assume that they must use CVAP numbers to determine VRA compliance, especially when dealing with API or Latino communities. API voters seeking to dismantle electoral systems that dilute their voting strength will have to work with CVAP data, which may pose challenges, as described further below. In addition, it may make it harder to draw majority-Asian American districts through redistricting processes. In the 2011 round of redistricting, many jurisdictions, including jurisdictions outside the four circuits listed above, interpreted these cases as requiring that a majority-minority district be drawn only when a minority population's citizen voting age population was greater than fifty percent.

## II. PRACTICAL IMPACTS: CHALLENGES FOR API VOTERS

The CVAP and citizenship verification requirements discussed above are not merely academic curiosities. They pose potentially serious ramifications on Asian American political involvement and empowerment. Citizenship verification policies may make it difficult for Asian Americans to register to vote, and may cast doubt on Asian American voters who turn up on voter registration rolls and at the polls. CVAP requirements may make it harder for Asian Americans to challenge discriminatory electoral schemes and gain electoral representation. Since API citizens already register and vote at lower rates than other population groups,<sup>91</sup>

polls." *Id.* (quoting *Brewer v. Ham*, 876 F.2d 448, 452 (5th Cir. 1989)).

88. *Barnett v. City of Chicago*, 141 F.3d 699, 701 (7th Cir. 1998).

89. *Id.* at 705. In addition, the court engaged in a brief discussion of virtual representation (the idea that ineligible voters' (children, non-citizens, etc.) interests can be protected/executed via voters), and found that such representational ideals were not within Congress's mandate in the VRA. *Id.* at 704–05. Indeed, it found that "[n]either the census nor any other policy or practice suggests that Congress wants noncitizens to participate in the electoral system as fully as the concept of virtual representation would allow." *Id.* at 704.

90. *Id.* ("The right to vote is one of the badges of citizenship. The dignity and very concept of citizenship are diluted if noncitizens are allowed to vote either directly or by the conferral of additional voting power on citizens believed to have a community of interest with the noncitizens—that being the very premise of the Latinos' claim in this litigation.")

91. See *Voting and Registration in the Election of November 2008 – Detailed Table 1: Reported Voting & Registration, by Sex and Single Years of Age: November 2008*, U.S. CENSUS BUREAU, available at <http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2008/table02-1.xls> (last visited Jan. 13, 2013) [hereinafter *Voting and Registration 2008*]; *Voting and Registration in the Election of November 2010*, U.S. CENSUS BUREAU, [http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2010/Table1\\_2010.xls](http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2010/Table1_2010.xls) (last visited Jan. 13, 2013) [hereinafter *Voting and Registration 2010*].

requirements that may chill or hinder political participation or prospects are even more problematic.

*A. Citizenship Verification: Hurdle to Registration and Voting?*

As noted above, several states have adopted laws, constitutional provisions, and administrative policies that aim to ferret out and remove non-citizens from voting and registration. These actions do not impose a new citizenship requirement, since U.S. citizenship was already required in order to register and vote. Individuals seeking to register already had to swear under penalty of perjury that they were citizens, and all states had provisions to challenge and remove voters believed to be ineligible. Rather, these laws and policies constitute novel additional measures put in place to police registration rolls and access to the ballot. The laws and policies, as well as the arguments supporting them, suggest to the public that non-citizen registration and voting is a real threat to the integrity of U.S. elections.

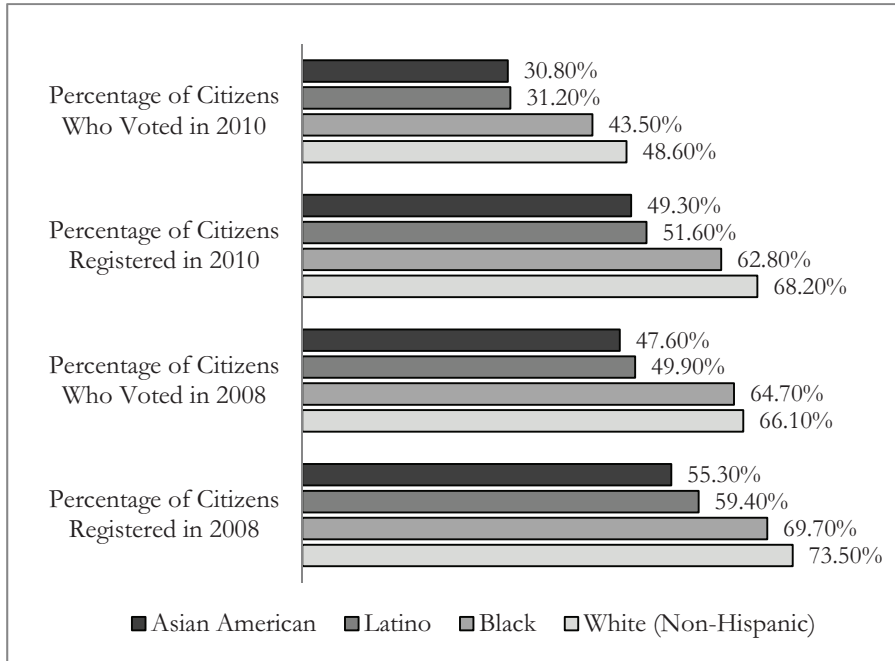
Laws and policies requiring citizenship verification in order to register or remain registered to vote are potentially harmful to API political engagement. First, due to registration disparities, citizenship verification laws may impose a greater burden on API citizens than others. Second, database and matching inaccuracies may lead to erroneous identification of API voters as non-citizens. Third, assumptions about foreignness may subject API voters to unwarranted challenges in registration and/or at the polls.

*1. Registration Disparities*

As noted above, citizenship verification laws such as those in Arizona, Georgia, Kansas, and Alabama apply only to new registrants and not existing voters. Since API citizens are registered at lower rates than other groups, laws that affect only new registrants will likely affect APIs at higher rates than other groups. Chart 1 shows the percentage of voting age citizens for various racial groups who reported being registered to vote in 2008 and 2010. API registration lags behind that of non-Latino whites and African Americans. Since these laws exempt currently registered individuals, fewer whites and African Americans will have to produce proof of citizenship than APIs.

**Chart 1:** Proportion of Citizens Reporting Voting and Registration by Race<sup>92</sup>

Additional verification requirements for new registrants can have effects on political participation. First, since rates of participation are roughly equal between



registered voters of different racial/ethnic groups, the registration gap is one of the principal causes of the participation gap. Laws and policies that make it harder to register to vote may help maintain the registration gap and therefore the participation gap. In addition, laws that place additional hurdles on new voters may dissuade them from entering the political process. The specter of having one's citizenship challenged can intimidate potential voters, especially newly naturalized citizens or citizens with limited English proficiency.

## 2. Database Problems

The databases utilized raise serious concerns for API citizens seeking to vote.<sup>93</sup> Citizenship and naturalization data in state and even federal databases is

92. *Voting and Registration 2008*, *supra* note 91; *Voting and Registration 2010*, *supra* note 91.

93. In addition to inaccuracies in government databases, the process of cross-referencing and matching datafiles can produce erroneous identifications. Voters may be erroneously matched with another individual's information in a driver's license file, for example. The personal information often used for matching, such as name and birthdate, is not as unique as one might think, so erroneous matches are possible. *See, e.g.*, Justin Levitt & Michael McDonald, *Seeing Double Voting: An Extension of the Birthday Problem*, 7 *ELECTION L.J.* 111, 121 (2008).

often outdated.<sup>94</sup> Even if the matching is perfect, it is quite possible for someone who appears as a non-citizen in one government database to in fact be a citizen. Since databases often contain old information, they may not contain information about naturalization. This was apparently the case for several challenged voters in Florida and Colorado. These voters appeared as non-citizens in state and federal databases, but were actually newly naturalized citizens and fully eligible to vote.<sup>95</sup>

Since more API adults are immigrants than other groups, they are more likely to appear in a government database about immigrants or to appear in a database with information indicating they are not citizens. For example, the federal SAVE database contains information about immigrants, and not information about native-born citizens. The same is true for state driver's license databases that collect citizenship information. It appears from news reports that the New Mexico secretary of state used a separate database for individuals who used an "alternate identification" as the source of her "foreign national" voters.<sup>96</sup>

### 3. Perceived "Foreignness"

When citizenship becomes a contested issue and fears about non-citizens defrauding the electoral system abound, those perceived to be foreign are at higher risk of being targeted for enforcement. Due to a confluence of factors beyond the scope of this Article, concepts of who is "American" and who is "foreign" have been racialized, leading to assumptions that non-Latino whites are "American" while Asian Americans are "foreign."<sup>97</sup> The perceived foreignness of API individuals often bears no relation to their actual citizenship status, leading to what some call the "perpetual foreigner" status of Asian Americans.<sup>98</sup> Particularly when foreignness is racialized, suggesting that phenotype or appearance (as well as other markers such as name, or accent) provide sufficient information to divine who is and is not a citizen, laws and policies directed at citizenship are most likely to affect individuals believed to be foreign.<sup>99</sup> Citizenship verification for voter registration has been justified by claims that non-citizens threaten election integrity through illegal registration and voting. Although these laws appear to be

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94. In addition, databases contain errors, such as those caused by errors in data input. Because most voter registration forms are completed by hand and input into a database by hand, human error is a real risk in voter files. See, e.g., COMM. ON STATE VOTER REGISTRATION DATABASES, NAT'L RESEARCH COUNCIL, STATE VOTER REGISTRATION DATABASES: IMMEDIATE ACTIONS AND FUTURE IMPROVEMENTS, INTERIM REPORT 41–44 (2008) (describing the various kinds of errors that can occur in the voter registration process that lead to errors in voter registration files).

95. See Moreno, *supra* note 45.

96. See Simonich, *supra* note 54.

97. See, e.g., Saito, *supra* note 12; see also Claire Jean Kim, *The Racial Triangulation of Asian Americans*, 27 POL. & SOC'Y 105 (1999). For a more general discussion of race and national identity, see HANEY LÓPEZ, *supra* note 11.

98. See, e.g., ANGELO N. ANCHETA, RACE, RIGHTS, AND THE ASIAN AMERICAN EXPERIENCE 62–65 (1998).

99. See *id.*

neutral in that they target “non-citizens” and not any particular racial or national origin group, those perceived to be foreign are most likely to be subject to challenge.

Experiences in past election cycles bare out that citizenship-based challenges are not uniformly and neutrally applied, but rather target individuals and groups believed to be foreign. In the 1999 elections in Hamtramck, Michigan, poll watchers selectively challenged certain voters on the basis of citizenship even though they did not have individualized evidence to support these challenges.<sup>100</sup> Poll watchers in the polls challenged voters who were Arab American, but did not challenge white voters.<sup>101</sup> Challenges were based on dark skinned Arab appearance or having an Arab sounding name.<sup>102</sup> Some challenged voters were made to take oaths of citizenship even though they presented U.S. passports.<sup>103</sup> Moreover, one election official allegedly informed poll workers to require any voter who appeared to be Arab to present an identification card or voter registration card.<sup>104</sup> White voters were not subject to challenges, were not made to take oaths of citizenship, and were not targeted for additional identification.<sup>105</sup>

In the 2004 election cycle, one Georgia county registrar required voters with Latino surnames to appear in court to prove their citizenship and eligibility to vote.<sup>106</sup> In 2005, an individual in Washington State challenged the citizenship eligibility of several voters who had registered to vote when they got their driver’s licenses, on the basis that they had names “that appear to be from outside the United States.”<sup>107</sup> In the run up to the 2012 elections, organizers rallying poll watchers to challenge ineligible voters, including suspected non-citizens, justified their efforts with reports that busloads of people “who [do] not appear to be from this country”<sup>108</sup> are brought in to vote. In these cases, names deemed to be “foreign” were the sole basis for accusing individuals of being non-citizens and illegally registered to vote.

In a context where citizenship is challenged based on appearance or name, citizenship verification for voter registration laws may make it more difficult for API citizens to register and vote. The “perpetual foreigner” stereotype—that

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100. See Consent Decree, *United States v. City of Hamtramck*, No. 00-73541, available at [http://www.justice.gov/crt/about/vot/sec\\_2/hamtramck\\_cd.pdf](http://www.justice.gov/crt/about/vot/sec_2/hamtramck_cd.pdf).

101. *Id.*

102. *Id.* ¶ 8.

103. *Id.* ¶ 10.

104. *See id.* ¶ 16.

105. *Id.*

106. Complaint at 2, *United States v. Long County*, (No. CV206-040) (S.D. Ga. 2006).

107. Jim Camden, *Man Says Votes from Illegal Immigrants*, THE SPOKESMAN-REVIEW (Spokane), Mar. 31, 2005, at B1, available at <http://www.spokesman.com/stories/2005/mar/31/man-says-votes-from-illegal-immigrants>.

108. Stephanie Saul, *Looking, Very Closely, for Voter Fraud*, N.Y. TIMES, Sept. 16, 2012, at A1, available at <http://www.nytimes.com/2012/09/17/us/politics/groups-like-true-the-vote-are-looking-very-closely-for-voter-fraud.html>.

Asian Americans are foreign regardless of their actual citizenship—places API voters at higher risk for citizenship challenges. While proponents for citizenship verification laws might argue that these are race-blind policies that will affect all and counteract discrimination or stereotyping of certain groups, these laws also institute an atmosphere of suspicion among poll workers and poll watchers, and fear among voters. In the 1999 Hamtramck case discussed above, some Arab American citizens who heard about the citizenship challenges at the polls were too intimidated by the prospect of being challenged to go to the polls and attempt to vote. Laws and policies that make it harder for Asian Americans to register and vote pose an additional hurdle to Asian American civic engagement and representation. This is of particular concern since API registration and voting is already relatively low.

### *B. Citizenship Data and Districting*

Citizenship data requirements may hinder API efforts to increase representation and dismantle discriminatory districts and electoral schemes. Requirements that API voters prove the possibility of a district that is over fifty percent API CVAP and/or that redistricting officials can only draw a district to help API empowerment if the API population is over fifty percent CVAP may disadvantage API communities, largely because of problems with the data they must use to make these determinations.

As noted above, the principle data questions in *Gingles* and most other cases dealing with African Americans or Native Americans dealt with share of the total population and/or voting age population. These figures are easily derived from decennial census data.<sup>109</sup> The census is an enumeration of the U.S. population conducted every ten years.<sup>110</sup> While serious questions about undercounts exist, the census produces highly reliable data available at the smallest geographic units (census blocks) often needed for district drawing.

The census asks about residency, birth date, gender, race, and Hispanic ethnicity. Age data can be derived from the birth date question to determine residents over age eighteen—voting age population. These data can be cross-

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109. The census is an enumeration of the population to effectuate the requirements of Article I, Section 2 of the U.S. Constitution. The census asks ten questions for each individual in a household. *The Questions on the Form*, U.S. CENSUS BUREAU, <http://www.census.gov/2010census/text/text-form.php> (last visited Jan. 13, 2013).

110. The census also provides the data used for reapportionment of U.S. House of Representative seats among the states as well as in the distribution of federal funds to local communities. *Congressional Apportionment*, U.S. CENSUS BUREAU, <http://www.census.gov/prod/cen2010/briefs/c2010br-08.pdf> (last visited Jan. 13, 2013). The data used for redistricting are “apportionment data,” which differ from “resident data” also released from the census. Apportionment data include the resident population as well as U.S. residents and U.S. military and civilian government workers living abroad at the time of the census, less the population of the District of Columbia. *Questions and Answers - 2010*, U.S. CENSUS BUREAU, <http://www.census.gov/2010census/about/answers.php> (last visited Jan. 13, 2013).

referenced with the race or Hispanic question to derive VAP figures for each racial/ethnic group. These data allow line drawers, interested parties, litigators, courts, and others to draw districts that contain equal populations and to determine if and where the Voting Rights Act may require majority-minority districts to avoid diluting minority voting strength.<sup>111</sup> However, the census does not ask about citizenship.

The principle source of data for citizenship is a sample-based survey administered by the Census Bureau—the American Community Survey (ACS). The ACS asks many more social and economic questions than the decennial census, one of which pertains to citizenship. Cross-referencing age and citizenship data produce CVAP figures. Further cross-referencing with race/Hispanic data produces CVAP figures for various racial/ethnic groups.

While the ACS is an excellent source of data for many uses, it is not an optimal data source for district drawing and VRA enforcement.<sup>112</sup> Unlike the census, the ACS does not provide “counts” of the population; it provides estimates of the population.<sup>113</sup> Because of sample size issues, ACS data are not available on the smallest geographical units used in redistricting. While the ACS is designed to provide reliable estimates using one year of data for areas with populations over sixty-five thousand, which includes all states and many counties, multiple years of data must be aggregated in order to obtain data for smaller areas.<sup>114</sup> However, even aggregating five years of answers, the data are still not available at the census block level. This is problematic because district drawing often requires precise population calculations which can even go down to the census block level.

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111. In the redistricting context, these data are often referred to as “PL data” or “PL 94-171 data” in reference to the federal law that requires the Census Bureau to provide them to the states for use in redistricting. This law also requires that tabulations of redistricting data be provided to the states within one year of the collection of the census. Act of Dec. 23, 1975, Pub. L. No. 94-171, 89 Stat. 1023.

112. For a more in depth discussion of issues with the ACS and redistricting, see generally JORGE CHAPA ET AL., THE CHIEF JUSTICE EARL WARREN INST. ON LAW AND SOC. POLICY, REDISTRICTING: ESTIMATING CITIZEN VOTING AGE POPULATION (2011), available at [http://www.law.berkeley.edu/files/Redistricting\\_PolicyBrief4\\_forWeb.pdf](http://www.law.berkeley.edu/files/Redistricting_PolicyBrief4_forWeb.pdf).

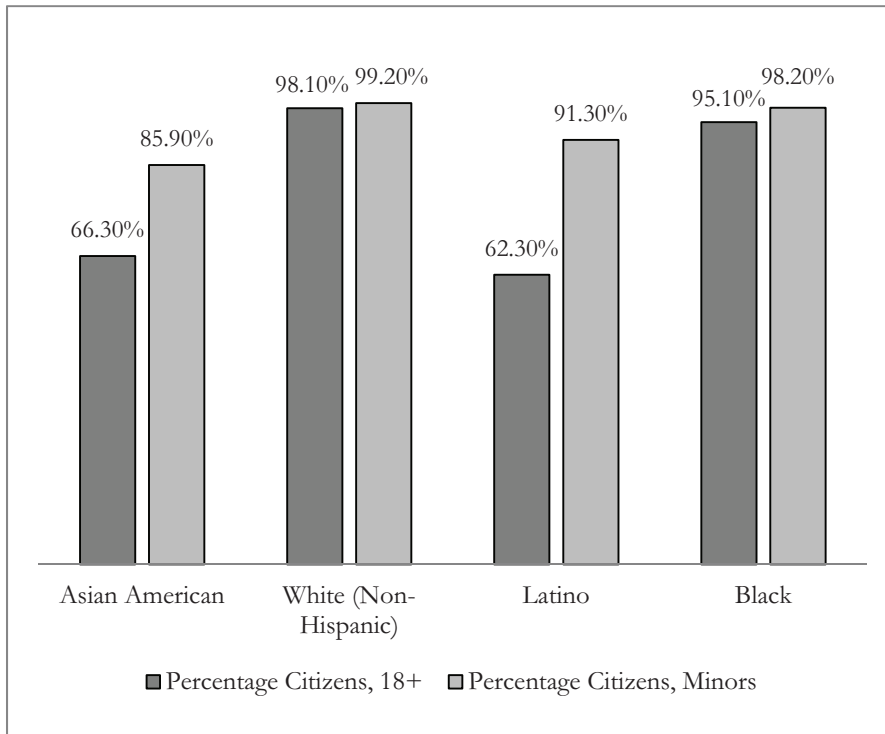
113. The ACS report estimates in the form of point estimates and margins of error, making the estimates area actually a range of values. *Id.* at 9.

114. See U.S. DEP’T OF COMMERCE, A COMPASS FOR UNDERSTANDING AND USING AMERICAN COMMUNITY SURVEY DATA: WHAT RESEARCHERS NEED TO KNOW 3 (2009), available at <http://www.census.gov/acs/www/Downloads/handbooks/ACSResearch.pdf>. Three years of data are aggregated to produce estimates for places with populations greater than 20,000, and five years of data are aggregated to produce estimates for all units of geography down to the census block group level. *Id.* Five-year aggregated data are the only source available as close to the small levels of geography needed for drawing electoral districts. *Id.* at 7. However, where the population in a block group or other area is very small, the Census Bureau suppresses and does not release an estimate in order to protect individual respondents’ privacy. *Id.* at 8. For the 2011 round of redistricting, CVAP estimates came from the first release of five-year aggregated; this dataset included responses from surveys administered between 2005 and 2009. *Id.* at app.2, tbl.2.



More importantly for Asian American voters, the aggregation process may lead to data estimates that underestimate Asian American CVAP. Since five years of answers are combined, some of the data will be old. This is of particular concern for Asian Americans because it may lead to an underestimate of their citizen voting age populations. When the Census Bureau aggregates answers collected over five years, it does not “correct” the data for intervening changes, even for aging. Accordingly, an Asian American citizen who was thirteen years old at the beginning of the aggregation period still appears as a minor despite the passage of time. Since she is not included as being eighteen in the aggregated dataset, she does not count as an Asian American voting age citizen but rather as a minor despite her actual age of majority status. This is true for minor citizens of all groups, but is a key issue for Asian Americans, because the citizenship rate among minor APIs is significantly higher than that of adult APIs. A similar disparity does not exist between black, white, or Native American youths and adults.

Accordingly, the coming of age of API minors will increase the citizenship rate of adult APIs as well as the proportion of adult citizens who are API. Chart 2 shows the estimated citizenship rate among minors and adults for various groups in the Special Tabulation derived from the 2005–2009 aggregated ACS data. Because of the significant disparity in citizenship rates between Asian American minors and adults demonstrated in Chart 2, the aggregated data’s failure to “age up” minor API citizens can have profound and disparate results on their reported proportion of a given area, since there is not a corresponding disparity in citizenship rates between minor and adult non-Latino whites (or blacks or Native Americans). Especially when forced to comply with a fifty percent CVAP bright line requirement, this quirk in the ACS data can disenfranchise API voters since although their CVAP may actually be over fifty percent, the data do not yet reflect it.

**Chart 2:** Comparison of Citizenship Rates Among Minors and Adults by Race<sup>115</sup>

Some have opined that the CVAP issue is not likely to have a significant effect on the voting rights of people of color.<sup>116</sup> While it is true that the fifty percent threshold may not pose a significant obstacle to groups with large and highly concentrated populations or for groups with similar citizenship profiles to non-Latino whites, in some areas and for some groups, the fifty percent CVAP requirements coupled with ACS data issues may affect access to VRA protection. Asian Americans may fall short of VRA protection thresholds not because their citizen voting age population numbers are too low, but because they are unable to prove they reach at least fifty percent of a potential district given current data availability. This is particularly true for APIs in many areas of the country because their populations are relatively small. A small underestimate could make the difference in a successful VRA claim or a line-drawing body drawing districts that allow API voters to elect a representative of their choice.

115. Citizen Voting Age Population (CVAP) Special Tabulation from the 2005–2009 5-Year American Community Survey, U.S. Census Bureau, [http://www.census.gov/rdo/data/voting\\_age\\_population\\_by\\_citizenship\\_and\\_race\\_cvap.html](http://www.census.gov/rdo/data/voting_age_population_by_citizenship_and_race_cvap.html) (last visited Dec. 31, 2013).

116. See, e.g., Nathaniel Persily, *The Law of the Census: How to Count, What to Count, Whom to Count and Where to Count Them*, 32 CARDOZO L. REV. 755, 765 (2011).

Existing case law contains examples where CVAP data made a difference in VRA protection. For example, in the Miami Beach litigation discussed above, Latino plaintiffs were able to draw three of seven districts over fifty percent Latino VAP, but applying citizenship data made it impossible to draw a district over fifty percent Latino.<sup>117</sup> Moreover, in a 2009 Texas lawsuit, the court rejected plaintiff's claim, even though plaintiff provided a potential districting plan that included a district that was seventy-eight percent Latino population and seventy-five percent Latino VAP, because it did not "prove" over fifty percent Latino CVAP.<sup>118</sup>

The fifty percent bright line rule and CVAP requirements can also effect redistricting decisions. When a jurisdiction believes that only districts over fifty percent minority CVAP are required by the Voting Rights Act, it may decide that districts with high, but not over fifty percent minority, CVAP should not be drawn. This could be because they choose to prioritize other redistricting criteria,<sup>119</sup> and do not feel bound to draw a less than fifty percent district; because they fear a plan will be invalidated as unconstitutional if they draw a high minority district that is not required;<sup>120</sup> or because it wants to draw as few minority districts as possible, so will only draw those that are blatantly required by the case law.

Regardless of the motive, the result is the same if line-drawing officials fail to draw a high minority district simply because it falls short of the fifty percent CVAP threshold. When CVAP data underestimate actual Asian American citizen voting age populations, the fifty percent bright line rule may have a disenfranchising effect. For example, in California's 2011 state redistricting, the Citizen's Redistricting Commission (CRC) drew a majority-API state assembly district. California's AD 49, in the San Gabriel Valley, has an Asian American CVAP of 50.09%.<sup>121</sup> To achieve this, the CRC divided a few cities between AD 49 and other adjacent districts.<sup>122</sup> The California Constitution advises against splitting cities if possible, but prioritizes VRA compliance over avoiding city splits. If it had not been possible to draw AD 49 with over fifty percent Asian CVAP, VRA coverage might not be triggered, leaving the CRC to weigh other redistricting

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117. *Negrón v. City of Miami Beach*, 113 F.3d 1563, 1567 (11th Cir. 1997).

118. *Reyes v. City of Farmers Branch*, 586 F.3d 1019, 1021–22 (5th Cir. 2009).

119. Other redistricting criteria may include incumbent protection, maintaining municipal or county boundaries, following natural landmarks, achieving compact districts, etc. *See, e.g.*, CAL. CONST. art. XXI, § 2(d) (2010) (setting forth the criteria to be used to draw state legislative and U.S. House of Representative districts in California).

120. The Supreme Court has prohibited the use of race as the sole or predominant factor in districting decisions. *See Shaw v. Reno*, 509 U.S. 630, 643 (1993).

121. *See CALIFORNIA CITIZENS REDISTRICTING COMM'N, FINAL REPORT ON 2011 REDISTRICTING* app.3, tbl.4 (2011) available at [http://wedrawthelines.ca.gov/downloads/meeting\\_handouts\\_082011/crc\\_20110815\\_5appendix\\_3.pdf](http://wedrawthelines.ca.gov/downloads/meeting_handouts_082011/crc_20110815_5appendix_3.pdf). Note that the Asian VAP in AD 49 is 55.04%. *See id.* tbl.3.

122. *See id.* app.4, available at [http://wedrawthelines.ca.gov/downloads/meeting\\_handouts\\_082011/crc\\_20110815\\_6appendix\\_4.pdf](http://wedrawthelines.ca.gov/downloads/meeting_handouts_082011/crc_20110815_6appendix_4.pdf).

criteria, such as avoiding city splits. An underestimate of just a small number of Asian American voting age citizens can make a real difference in this kind of situation.

#### CONCLUSION

Citizenship and voting have a special relationship in the United States. In recent years, efforts have accelerated to ensure that voting and electoral representation is indeed limited to citizens only. Citizenship verification laws and policies affect who can gain access to and remain on voter rolls, which in turn determines who may cast a ballot and have a voice in our democracy. Citizenship data requirements limit district drawing efforts as well as Voting Rights Act challenges to electoral schemes due to weaknesses in the data that Asian Americans are forced to use.

While on their face these measures make sense since voting is limited to citizens in nearly all U.S. jurisdictions, they have additional consequences that more harshly affect API citizens. Citizenship verification laws impose a new hurdle to voter registration, which disproportionately affect APIs, due to their lower voter registration rates, higher immigration rates (particularly among adults), and stereotype of perpetual foreignness. Citizenship data requirements make drawing districts that empower API communities as well as dismantling electoral systems that dilute API voting strength more difficult. Both citizenship verification and data requirements have the potential to impede API political participation and empowerment. This is particularly worrisome given APIs' already generally low levels of voter registration and participation.

Beyond the practical questions about potential effect on Asian American disenfranchisement, these measures pose larger questions about membership in U.S. society—who is a member and how can members be distinguished from non-members in contemporary settings? Both policy decisions seek to limit voting and representation to citizens by excluding non-citizens, raising larger questions about who is a citizen and therefore worthy of representational participation. In the process of defining who members are not, the U.S. polis defines itself. In a nation undergoing demographic shifts with cultural and racial/ethnic overtones but where racially discriminatory means of identification are no longer acceptable, defining who is a member becomes simultaneously more logistically difficult and important to majority members.

It remains to be seen whether the burgeoning preoccupation with citizenship in voting is a function of politics in a presidential election year or a more durable fixture of our political system in an era of demographic change. In the meantime, Asian American political empowerment may be hindered by citizenship preoccupations, adding novel challenges that must be overcome to achieve full political membership.