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# Of Boroughs, Boundaries and Bullwinkles: The Limitations of Single-Member Districts In A Multiracial Context

## **Cover Page Footnote**

I am grateful to Lani Guinier for the considerable time she spent discussing issues and commenting on drafts. I also thank Joseph Diaz for his editorial and research assistance.

# OF BOROUGH, BOUNDARIES AND BULLWINKLES\*: THE LIMITATIONS OF SINGLE-MEMBER DISTRICTS IN A MULTIRACIAL CONTEXT

Judith Reed \*\*

## I. Introduction

At least once every decade, Congress, and state and local governments, go through a ritual known as redistricting. So it was with the New York City Council in 1991. Ostensibly, this districting was different from other council districtings, because of a substantial increase in the size of the council and the possibility of diminished incumbent influence on the appointed commission directing the process. Moreover, the commission received its mandate from a reform oriented Charter Revision Commission, which had been appointed in response to federal court litigation with broad authority to restructure city government consistent with the Constitution and the provisions of the Voting Rights Act. There was much that was different, but there was much, perhaps too much, that was the same.

This essay examines the 1991 city council districting, with particular focus on the problems inherent in districting a multiracial city and the limitations of single member districts as a method of minority empowerment. This essay is based on the experience of the writer as general counsel to the 1990 New York City Districting Commission and the ideas articulated by Professor Lani Guinier, of the University of Pennsylvania law school, in a recently published article.<sup>1</sup>

A central tenet of that article is that "a new conceptual approach is necessary to structure majoritarian collective decision-making bodies to ensure meaningful minority interest representation and participation at both the electoral and legislative stages of the political pro-

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\* The press so dubbed a proposed Bronx district after the cartoon character Bullwinkle the moose, because the shape of the district resembled a pair of antlers. See Frank Lombardi, *Dist. 17 Plan Hit*, N.Y. DAILY NEWS, May 18, 1991, at 5.

\*\* Associate Counsel, NAACP Legal Defense and Educational Fund Inc.; General Counsel to the New York City Districting Commission, Sept. 1990 to Sept. 1991. I am grateful to Lani Guinier for the considerable time she spent discussing issues and commenting on drafts. I also thank Joseph Diaz for his editorial and research assistance.

1. Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413 (1991) [hereinafter Guinier, *No Two Seats*]. While I cite extensively to this excellent and thought-provoking article, I strongly urge readers to take the time to read it thoroughly.

cess."<sup>2</sup> One such approach, which would shift the question from whether racial and ethnic minority groups per se are represented to whether the interests of those groups are represented, is Professor Guinier's proposal that in some circumstances single-member districts should be replaced by at-large election districts whose dilutive effects<sup>3</sup> would be mitigated by the use of cumulative or limited voting.<sup>4</sup> The use of single-member districts, Professor Guinier argues, may result in minority electoral success, but not minority power.<sup>5</sup>

Presumably, minority empowerment was a fundamental goal of the Charter Revision Commission. The Districting Commission was to accomplish this goal by drawing districts that increased minority representation on the enlarged council. Other objectives included: (1) increasing political participation by the use of smaller geographic districts to enhance representational effectiveness, premised on the idea that small districts mobilize voter participation; (2) increasing identification of the voter with the elected representative; and (3) better defining neighborhood boundaries and thus improving representation of communities of interest.<sup>6</sup>

Part II of this essay provides background on the council districting process and discusses the New York City Council's 1991 redistricting plan. Part III examines specific council districts that demonstrate the drawbacks in using a single-member scheme in districts that contain more than one minority group. The essay concludes that electing council members from at-large, borough-wide districts by cumulative voting is a more effective districting strategy.

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2. Guinier, *No Two Seats*, *supra* note 1, at 1416.

3. Vote dilution occurs when "election laws or practices . . . combine with systematic bloc voting among an identifiable group to diminish the voting strength of at least one other group." Chandler Davidson, *Minority Vote Dilution: An Overview*, in *MINORITY VOTE DILUTION 4* (Chandler Davidson, Joint Center for Political Studies, eds., 1984).

4. Guinier, *No Two Seats*, *supra* note 1, at 1427 n.49.

5. Guinier distinguishes between the right to cast an equally weighted vote, *see* *Reynolds v. Sims*, 377 U.S. 531, 579 (1964), and the right to cast an equally powerful vote, which conveys an equal opportunity to influence the political process at all levels. Guinier, *No Two Seats*, *supra* note 1, at 1422-24, 1441 n.105. While the former leads to the election of black officials, it is the latter that holds the potential for full participation of the electorate. Black electoral success without more may leave in place an "integrated legislature in which white majority rule in its self-interest is legitimate so long as some black representatives are there when the majority acts." *Id.* at 1415.

6. *See* Douglas Muzzio & Tim Thompkins, *On the Size of the City Council: Finding the Mean*, in *RESTRUCTURING THE NEW YORK CITY GOVERNMENT: THE REEMERGENCE OF MUNICIPAL REFORM 90-93* (Frank J. Mauro & Gerald Benjamin, Academy of Political Science eds., 1989) (discussing the eight core values identified by the Charter Revision Commission).

## II. The Districting Process

### A. The City Council and Districting Commission

The city council is the legislative body for the five counties, or boroughs, of New York City. Its members are elected from single-member districts to serve four-year terms, with elections being held in odd-numbered years to coincide with mayoral elections.<sup>7</sup> Up until 1989, the council was considered generally an ineffective branch of the New York City local government. That picture is expected to change in light of the expanded size and greater authority of the council that resulted from a major revision to the New York City Charter. Thus, the first districting of this newly empowered council — expanded in size from thirty-five to fifty-one members — was bound to assume an importance surpassing prior redistrictings.

In response to *Board of Estimate v. Morris*,<sup>8</sup> the revision to the city charter included a provision to abolish the board of estimate and transfer its functions to other governmental institutions.<sup>9</sup> The Charter Revision Commission (“Schwarz Commission”)<sup>10</sup> chaired by Frederick A.O. Schwarz, a former corporation counsel to the city, decided that most of the board’s powers should be transferred to the fifty-one seat city council, as a democratically elected body with greater potential for reflecting a racially diverse population. The increase in the number of districts from thirty-five to fifty-one meant a reduction in district size from an average of 212,000 to an average of 143,579. Not only was the city council itself changed in size and scope, but the independent commission charged with council districting was increased in size from nine persons to fifteen. To ensure a minority presence on the districting commission, the charter required that its membership reflect the racial and ethnic composition of the

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7. CHARTER OF THE CITY OF NEW YORK, Ch. 2, §§ 4, 25 (as amended Dec. 31, 1989) [hereinafter CHARTER].

8. 489 U.S. 688 (1989). The Supreme Court held that the voting structure of the board of estimate violated the constitutional principle of one person, one vote. The board of estimate, whose members were the mayor, city council president, comptroller and the five borough presidents, shared legislative power with the council in the budget process and had certain land use and franchise authority. 489 U.S. at 694 n.4. The three city-wide elected officials had two votes each and each borough president had one vote. Thus the least populous and the most populous borough had one vote.

9. SUBMISSION UNDER SECTION 5 OF THE VOTING RIGHTS ACT FOR PRECLEARANCE OF PROPOSED AMENDMENTS TO THE NEW YORK CITY CHARTER 16 (Aug. 11, 1989) [hereinafter CHARTER SUBMISSION] (on file at the New York Municipal Library, 55 Chambers St., New York, NY, 10007)

10. The Schwarz Commission assumed the work of an earlier Charter Revision Commission, the Ravitch Commission, named for its chair Richard Ravitch, the former head of the New York City Transit Authority.

city.<sup>11</sup> As a result of this provision eight of the commissioners were members of racial and language minorities: four African-Americans, three Latinos and one Asian-American. Finally, the new charter made specific reference to the Voting Rights Act in listing criteria for the line drawing,<sup>12</sup> and it provided for a special city council election to be held in 1991.

### B. Drawing the District Lines

With these guidelines in hand, the commission began its work in the spring of 1990. A driving force for the commission's work was compliance with the Voting Rights Act of 1965, as amended.<sup>13</sup> Section 2 of this Act forbids the use of voting practices or procedures that result in discrimination on the basis of race or language minority status. A governmental entity may be in violation of this section where aggrieved parties can show "that the political processes . . . are not equally open to participation by members of [racial and language minority groups] 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."<sup>14</sup>

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11. Section 50(b)(1) of the charter required that the commission be composed of "members of the racial and language minority groups of New York City which are protected by the [Voting Rights Act of 1965], in proportion, as close as practicable, to their population in the city." The Justice Department, while noting that the provision might be "vulnerable to constitutional challenge," precleared it, concluding that "the flexible goal as adopted serves a legitimate remedial purpose . . . in recognition of the need to insure that a broad cross-section of the electorate will participate in . . . [the] council districting." Letter from James P. Turner, Acting Asst. Att'y Gen., Civil Rights Div., to Frederick A.O. Schwarz, Jr., Chairman, New York City Charter Revision Commission 4 (Dec. 13, 1989). This requirement drew a lawsuit which is still pending, challenging the provision as unconstitutional. See *Ravitch v. City of New York*, No. 90 Civ. 5752 (MJL).

12. Reference to the Voting Rights Act appeared in the charter for the first time and was accorded greater weight than all other factors except for the requirement of one person, one vote. Other criteria (for example, community and neighborhood integrity, compactness and borough integrity) were given less weight than fair and effective representation of minorities. CHARTER, *supra* note 7, § 52.

13. 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1988).

14. 42 U.S.C. § 1973(b). In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Court set forth the elements of proving a violation under § 2 in the context of a challenge to multi-member districts. The Court held that plaintiffs must show the existence of three preconditions. First, plaintiffs must show that a minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district." Second, there must be a showing that the minority group is politically cohesive. Third, there must be a showing that the "white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." 478 U.S. at 50-51. A district court considering such a claim is to make a searching practical evaluation of the past and present reality to determine whether the political processes are equally open to minority groups. *Id.* at 45. The outcome depends on "the totality of the circumstances." 42 U.S.C. § 1973.

In light of New York City's history of discrimination in voting rights, the commission staff operated under the premise that where a minority district<sup>15</sup> could be created it *must* be created. This assumption derived from at least two sources: (1) the commission's interpretation of both the Voting Rights Act<sup>16</sup> and the Justice Department's position that districting plans "fairly reflect minority voting strength;"<sup>17</sup> and (2) the charter's requirement that districts be drawn in a manner that provides "fair and effective representation to groups protected by the Voting Rights Act,"<sup>18</sup> premised on the Charter Revision Commission's stated goal that representation of minority groups be maximized.<sup>19</sup>

To determine where such minority districts could be drawn, the commission's technical staff performed a detailed analysis of census data to identify geographical clusters of the various minority populations. Depending on the proximity of minority residents, lines could be drawn to "capture" a sufficient proportion of minority residents.<sup>20</sup>

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15. See *infra* notes 56-59 and accompanying text for a discussion of how the commission defined a "minority district."

16. The Court in *Gingles* declined to state whether the standards applicable to a challenge to a multimember system would be relevant to a challenge to a single-member system. 478 U.S. at 46 n.12. At least one court has suggested that *Gingles* could be adapted to the single-member district context, by requiring plaintiffs to show that additional single-member districts could have been drawn. *Jeffers v. Clinton*, 730 F. Supp. 196, 205 (E.D. Ark. 1989). However, the *Jeffers* court's determination that existence of the *Gingles* factors alone is not sufficient to make out a violation, *Id.* at 209, led it to find no § 2 violation in one of the challenged counties, based on the district court's assessment that other factors justified the failure to draw additional minority district. *Id.* at 215-17.

17. The Supreme Court has held that the sufficiency of representation may turn on whether a districting system "fairly reflects the strength of the [protected group] as it exists" and whether a "fairly designed" plan affords "representation reasonably equivalent to [the minority group's] political strength in the . . . community." *City of Richmond v. United States*, 422 U.S. 358, 370-71 (1975). This standard is echoed in the letter objecting to the 1981 New York council redistricting, where the Justice Department noted that the "[w]hile the city is *under no obligation to maximize* minority voting strength, [it is required to] demonstrate that the plan 'fairly reflects the strength of the [minority] voting power as it exists.'" Objection letter from U.S. Justice Dep't, at 2 (Oct. 27, 1981) (emphasis added) (citations omitted).

18. CHARTER, *supra* note 7, § 52.1.b.

19. CHARTER SUBMISSION, *supra* note 9, at 22.

20. Reference to "the sixty-five percent rule" is often seen in voting rights literature. See, e.g., Kimball Brace et al., *Minority Voting Equality: The 65 Percent Rule in Theory and Practice*, 10 LAW & POLICY 43 (1988). This is a reference to the presumed need for a minority district to contain 65% majority, in order to be able to elect a candidate of the minority community's choice. See *Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985). This figure is arrived at by adding 15% to a 50% plus one majority, to take into account the relative youth of the minority population (5%), as well as its lower registration rate (5%) and attendance at the polls, or turnout rate (5%). 740 F.2d at 1415-16.

The commission also received input from groups that were monitoring the process, such as NAACP Legal Defense and Educational Fund, Inc., Puerto Rican Legal Defense and Education Fund (PRLDEF), Asian-American Legal Defense and Education Fund (AALDEF), the Community Service Society and the Latino Districting Committee.

In June 1991, the commission submitted its districting plan to the Justice Department for review.<sup>21</sup> While the plan met the section five retrogression standard,<sup>22</sup> the Department nonetheless rejected the plan, based on its view that Latino interests had not been fairly represented.<sup>23</sup> On July 26, 1991, a plan slightly revised to accommodate the Justice Department's concerns was precleared.

### C. Charter Revision: The Road Not Taken

As stated above, the Schwarz Commission abolished the board of estimate and transferred its powers to the city council. During the commission's deliberations, an alternative to abolition considered was the creation of a bicameral legislative body consisting of an expanded city council and a body comprised of borough presidents and others selected on the basis of borough population. The commission also examined the use of cumulative or limited voting systems to elect the additional members.

In a cumulative voting system, a voter has as many votes as there are seats and may cast those votes as the voter wishes: the voter may either split her votes, allocating one or fewer votes for each candidate, or "cumulate" all her votes for a single candidate, a tactic referred to

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21. SUBMISSION UNDER SECTION 5 OF THE VOTING RIGHTS ACT FOR PRECLEARANCE OF 1991 REDISTRICTING PLAN FOR NEW YORK CITY COUNCIL (June 17, 1991) [hereinafter REDISTRICTING SUBMISSION] (on file at the New York Municipal Library, 55 Chambers St., New York, NY, 10007).

Three counties in New York, Kings (Brooklyn), New York (Manhattan) and the Bronx are "covered" under § 5 of the Voting Rights Act, because of the past use of literacy tests and because voter turnout in the 1968 presidential election was less than 50%, the statute's "triggering formula" for coverage. *See United Jewish Orgs. of Williamsburgh v. Carey*, 430 U.S. 144, 148-49 (1977) (setting forth New York City's failed attempt to be exempted from coverage); *New York v. United States*, 429 U.S. 888 (1974) (affirming district court order directing compliance with § 5 of the Act). Such jurisdictions must obtain prior approval ("preclearance") from the Justice Department before use of an electoral practice not in effect at the time the jurisdiction became covered. 42 U.S.C. § 1973c (1990).

22. 28 C.F.R. § 51.54(a). Under this standard, the party seeking preclearance must show that any electoral change, such as a redistricting, does not make minorities worse off than they were before the change, i.e., a prior districting plan.

23. *See* Letter from John Dunne, Asst. Att'y Gen., Civil Rights Div., to Judith Reed, General Counsel, New York City Districting Commission, at 2-3 (July 19, 1991).



as "plumping."<sup>24</sup> In a limited vote system the voter has fewer votes than the number of seats.<sup>25</sup> A principal advantage of these alternative systems is that they "eliminate the winner-take-all feature of at-large elections in order to empower politically cohesive minority voters."<sup>26</sup> Neither system guarantees that the majority will not be able to consistently out-vote a numerical minority, but the goal is to make it possible for the latter to cast meaningful votes, provided the parties and the voters engage in some strategic planning.<sup>27</sup> Moreover, voters get to express the intensity of their preferences as well as their political cohesion.<sup>28</sup>

While consideration was given to these alternative methods for electing the proposed bicameral legislature, apparently little or no attention was given to changing council districts from single-member to some form of at-large districts with cumulative or limited voting.<sup>29</sup> Although there is no record of any discussion of this alternative, it is likely that had the Schwarz Commission contemplated this scenario, it would have rejected it for the reasons given by the Schwarz Commission for rejecting the use of these alternatives for a modified board of estimate. "Major impediments . . . were seen [to be] the overwhelming size of the electoral districts involved, ranging from 1.2 to 2.2 million people, the cost of running for office in such large districts, the different nature of political communication and voter coordination in such large, impersonal districts, and the complexity of New York State's election laws and practices."<sup>30</sup>

This skepticism ignores the historical fact that city council members in the past have been elected in a variety of ways, including the use of some at-large districts and proportional representation to ensure representation of third party groups. Between 1937 and 1945, council members were selected not from individual districts, but

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24. See Edward Still, *Alternatives to Single Member Districts*, in MINORITY VOTE DILUTION 249 (Chandler Davidson, Joint Center for Political Studies ed., 1984); Guinier, *No Two Seats*, *supra* note 1, at 1427 n.48.

25. See Still, *supra* note 24, at 253.

26. Guinier, *No Two Seats*, *supra* note 1, at 1427.

27. Still, *supra* note 24, at 253-58.

28. Guinier, *No Two Seats*, *supra* note 1, at 1427 n.48.

29. Cf. Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 178 (1989) (noting that the "innate appeal of the geographic approach lies in large part in its familiarity").

30. Frank J. Mauro, *Voting Rights and the Board of Estimate: The Emergence of an Issue*, in RESTRUCTURING THE NEW YORK CITY GOVERNMENT: THE REEMERGENCE OF MUNICIPAL REFORM 66-67 (Frank J. Mauro & Gerald Benjamin, Academy of Political Science eds., 1989).

based on the proportion of total boroughwide votes<sup>31</sup> won by candidates and parties. Notwithstanding that history, the chair, Frederick A. O. Schwarz, has stated that "a proportional representation system produce[s] a good debating society [but not] a good legislature, [which] requires coherence."<sup>32</sup> Others point out that the former proportional representation system achieved not only geographic balance but also the ethnic diversity encouraged by the Voting Rights Act.<sup>33</sup>

The Schwarz Commission's revisions meant continued use of "geography as a proxy" for various interest groups.<sup>34</sup> The problem with such an approach is that while it takes advantage of racial segregation to create some minority-controlled districts, it places roadblocks in the way of minority empowerment. Guinier argues that the single-member districting strategy depresses minority political organization and participation and fails to promote the interests of voters. A geography-based districting scheme, Guinier further argues, favors incumbents who distort the districting process by seeking packed districts and who are then free to pursue their own agenda.<sup>35</sup> This strategy has

31. Marvin Gottlieb, *The 'Golden Age' of the City Council*, N.Y. TIMES, Aug. 11, 1991, § 4, at 6. One form of alternative voting, the "single-transferrable vote," is still in use in New York City school board elections. *Id.* Under this method the voter ranks candidates in order of preference, and candidates are then eliminated on successive ballot counts, by the "transfer" of votes from the losing candidates. Still, *supra* note 24, at 258-63.

32. Gottlieb, *supra* note 31, at 6.

33. Henry Stern, *Numbers vs. Neighborhoods*, N.Y. NEWSDAY, June 3, 1991, at 42 (New York Forum) (noting that historically the offices of mayor, comptroller and council president have been divided among Jews, Italians and Irish).

34. "[G]eography can serve as a proxy for a bundle of distinct political interests," since the residential segregation of ethnic minority groups "is often a product of racial discrimination in both the private and public housing markets. . . . [and] residence often reflects socioeconomic status and interests." Karlan, *supra* note 29, at 177.

35. Guinier, *No Two Seats*, *supra* note 1, at 1449, 1451, 1454-55. Since the 1982 redistricting, only one council incumbent has lost an election. Such perpetuation not only discourages participation of voters (which in turn assists the incumbent who is benefited by low turnout) and challengers who see a campaign effort as futile, but also limits accountability. *Id.* at 1455-56, 1465.

Incumbents expended considerable energy in trying to influence the commission. The clearest example of incumbent protection occurred in Brooklyn and, although the incumbent being protected was Latino, this appropriately drew an objection from the Justice Department. The Justice Department found that the plan resulted in overconcentration of Brooklyn's Hispanic voters in the 34th council district at the expense of Hispanic voters in the neighboring district, number 37. Letter from John Dunne, *supra* note 23, at 2-3. In another area of the city, supporters of African-American incumbent council member C. Virginia Fields protested that the district did not contain a sufficient percentage of African-Americans. Finally, the line-drawing in district 45 resulted in a lawsuit from the white incumbent who sought to be placed in that district, which contained portions of her former district. Other districts demonstrated visually the influence of incumbents or other politicians. See Jerry Gray, *Creating New City Council Districts: Minority*

two other drawbacks of particular relevance here. First, minority groups who may be politically cohesive but residentially dispersed<sup>36</sup> are apt to remain unrepresented.<sup>37</sup> Second, reliance on geography also may exacerbate conflict among minority groups, setting up what may be called a "political land grab."<sup>38</sup> These last two flaws were perfectly exemplified in the 1991 council districting.

#### D. The November 1991 Election Results

The Schwarz Commission predicted that the fifty-one member city council taking office in 1991 would boast at least eighteen minority members, representing a twofold increase from the nine who sat on the thirty-five member council. As it turned out, the number of minorities actually elected exceeded this estimate, and of the twenty-one minority members, the number of African-Americans on the council doubled and the number of Latino members tripled.<sup>39</sup> Not only is the council more ethnically diverse, but there are five Republican members up from one, and two openly gay members. One of the commission's vice-chairs, while noting that she was not "happy with everything [in the plan or] . . . with some of the things that happened . . . , [viewed] this plan [as] the best plan that has ever come out of a Districting Commission."<sup>40</sup>

From the Schwarz Commission's perspective, the districting commission's plan effectuated at least the first two of the stated goals, which were the following:

- (1) to enhance opportunities for minority voters to elect candidates of their choice, (2) to increase the number of minority council

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*Concerns vs. Incumbency*, N.Y. TIMES, July 23, 1991, at B3 (describing the "Miller finger", a reference to alteration of Brooklyn district 44, to include the residence of Assembly speaker Mel Miller.) Staten Island district 49 showed a distinct outcropping to include the incumbent's residence, and lines in Manhattan districts 4 and 5 on the Upper East Side excluded the residences of two previous challengers to a Vallone supporter and incumbent, Robert Dryfoos. *Id.*

36. Where this is true, "districting does not create a close fit between interests and residence." Guinier, *No Two Seats*, *supra* note 1, at 1452.

37. A dispersed minority group is simply unable to *elect* a candidate of its choice, absent the ability to form coalitions with other residents of the district.

38. Guinier, *No Two Seats*, *supra* note 1, at 1453.

39. The 12 black members represents an increase from six, while the nine Latinos represents an increase from three. Alternative counts are 13 black and eight Latino representatives, with the discrepancy attributable to how one "counts" new council member, Adam Clayton Powell IV, whose father, the well-known late Congressman, was black and whose mother is Puerto Rican. Powell was elected from a predominantly Latino district.

40. Comments of Esmeralda Simmons, Vice-Chair, New York City Districting Commission (June 3, 1991).

members, (3) to maintain a council of manageable size in which all members can meaningfully participate and (4) to increase council members' responsiveness by making their constituencies smaller, without making those constituencies so small as to foster parochialism.<sup>41</sup>

From the perspective of this writer, only the second goal was fully realized, while the first and most important goal was only partially realized. Whether the remaining two goals will be achieved remains to be seen.<sup>42</sup>

While the plan was a facial success,<sup>43</sup> neither this diversity, once thought likely to lead to a more independent body, nor the greatly enhanced power of the council, viewed as likely to attract more qualified members, has had the anticipated results. Also open to question is whether the formation of minority coalitions to formulate and work toward implementing a collective agenda of minority concerns will occur.<sup>44</sup> The new council sworn in on January 8, 1992, is still considered to consist of middle-of-the-road Democrats who are loyal to the entrenched Speaker, Peter Vallone, and his allies.<sup>45</sup> It is possible that

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41. CHARTER SUBMISSION, *supra* note 9, at 18.

42. Sam Roberts, *New York's City Council Field: Fresh Faces, Traditional Mold*, N.Y. TIMES, Aug. 12, 1991, at A1 (quoting a council political consultant as predicting that a "major transformation . . . in terms of experience or point of view or the kinds of interests represented" was unlikely). Roberts notes that eight of 32 former council members were running unopposed and that the process has "inspired . . . relatively few political neophytes." Another newspaper story described the results in pessimistic but accurate terms:

It is one thing . . . to see that the complexion of the Council changes . . . it is quite another to ensure that those changes will give voice to the voiceless. . . . A more diverse council may ease white liberal guilt, but it is hardly a guarantee of better representation for the city's poor and disenfranchised.

Terry Golway, *Bespoke Redistricting*, N.Y. OBSERVER, June 17, 1991, at 5.

43. This is not to denigrate the value of a racially diverse legislative body. See Karlan, *supra* note 29, at 213-19; Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and The Theory of Black Electoral Success*, 89 MICH. L. REV. 1077 (1991) [hereinafter Guinier, *The Triumph of Tokenism*]. Both authors discuss the symbolic and actual value of representatives who have shared the experience of minority groups, who are particularly sensitive to the views of that community, and whose presence both provides a sense of legitimacy, which may encourage minority participation, and puts these representatives in a position to take action on behalf of the communities they represent.

44. Una Clarke, the council's first Caribbean woman member, argues that "[w]ith twenty-one of us in the Black and Latino Caucus, we're forty percent of the council and should be able to come up with a common agenda." *Can She Fight The Power?*, VILLAGE VOICE, Feb. 4, 1992, at 13.

45. See James C. McKinley, Jr., *Vallone Seeks Broader Role on Schools*, N.Y. TIMES, Jan. 8, 1992, at B1. Reelected council speaker Peter Vallone, who has represented a Queens council district for many years and has served as speaker since 1986, has been described by the *New York Times* as "an old-school democrat [who] still runs a one man show that allows for little dissent or creativity, . . . reward[ing] loyalty with committee

these problems, and the districting difficulties discussed in the next section, are attributable, at least in part, to the Charter Revision Commission's failure to seriously consider alternatives such as cumulative voting for the election of the council, perhaps because its goals, while laudable, did not include that of minority *interest* representation. Nor did that commission focus on whether minority districts actually empower minority voters, as opposed to minority candidates. Achieving minority empowerment would require providing a vehicle for voters with common interests to express their preferences and elect representatives of their choice, regardless of where they lived.<sup>46</sup>

### III. Inter-Minority Conflict

Unlike previous redistrictings, where plan drafters were accused of fragmenting minority populations to favor white interests,<sup>47</sup> the most challenging issue faced by this commission was to resolve competing claims of three significant minority groups: African-Americans, Latinos and Asian-Americans. Where populations of different minority groups were highly commingled, very hard choices had to be made. This conflict was inevitable in light of the dispersal of the Latino and Asian populations and the limitation of the single-member district strategy.

#### A. The Numbers

New York City of 1990 had changed dramatically from the city of 1980. The intervening decade had seen an influx of African-American, Latino and Asian populations. According to the 1990 census

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chairmanships and other perquisites, punish[ing] dissent and dodg[ing] reform." *Welcome, Democracy*, N.Y. TIMES, Jan. 5, 1992, at A22.

46. Some hearing testimony suggested that interest politics or "borough nationalism" might transcend racial concerns, even in the current racially charged environment and in a city where ethnic politics has long held sway. In the Bronx, for example, residents of Co-op City, a multi-building, racially integrated, housing complex, testified that they wanted to be wholly contained in one district and expressly stated that they were unconcerned as to whether that single district was a minority or non-minority district. With regard to a proposed link of Latino communities in Brooklyn and Queens, both Latino and non-Latino witnesses from Queens (which would have been the smallest part of the bi-borough district) testified that they preferred to remain part of a Queens district. However, contrary testimony regarding a proposed combined Staten Island-Coney Island district that would have linked African-Americans living on the North Shore of Staten Island with those living in a section of Coney Island in Brooklyn split squarely along racial lines. Felicia R. Lee, *On S.I., Whites Like Plan A, but Blacks Like B*, N.Y. TIMES, May 3, 1991, at B3.

47. See, e.g., *The Shape of New York's Shame*, N.Y. TIMES, Oct. 29, 1991, at 26 (citing as one example of intentional discrimination the drawing of a district to remove enough minority voters to permit white voters to control a neighboring district).

data, African-Americans make up twenty-five percent of New Yorkers, while twenty-four percent are Latinos and seven percent are Asian.<sup>48</sup> Together, these three minority groups make up a majority of both the city's total population (fifty-six percent) and the voting age citizen population (fifty-two percent: twenty-three percent African-Americans, twenty-two percent Latino and seven percent Asian-Americans).<sup>49</sup>

One thing that had not changed however, was that residential patterns remained segregated, albeit at differing degrees for each of the three major minority groups.<sup>50</sup> A geographically based districting approach takes advantage of such residential segregation,<sup>51</sup> although not without cost. As a result of differing population dispersal rates, while the city's Latino and African-American populations are roughly equal (1.7 million and 1.8 million, respectively), it was much more difficult to draw districts in which Latinos predominate. The contrast between this difficulty and the relative ease with which the commission could draw African-American districts led to accusations that African-American and white commissioners "conspired" to favor African-Americans at the expense of the Latino population.<sup>52</sup> The necessary focus on race and capturing minority populations in general led to cries of racial polarization and balkanization.<sup>53</sup>

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48. See CHARTER SUBMISSION, *supra* note 9, at Appendix I (Report of 1990 Census Population Distributions and Densities).

49. *Id.*

50. African-Americans and whites are significantly more segregated than Asian-Americans and Latinos. In general, African-Americans and whites tend to live the farthest apart with Latinos tending to live immediately adjacent to African-Americans, and Asian-Americans tending to live adjacent to Latinos on one side and whites on the other. The commission found, for example, that while 69% of the city's African-Americans live in voter tabulation districts (the smallest geographical unit representing whole census blocks and tracts, as well as whole election districts, or precincts) in which they comprise at least 50% of the total VTD (voter tabulation district) population, only 48% of the city's Latinos reside in such VTDs.

51. As one commentator has noted, "[g]iven residential segregation and a significant minority-group population, a geographically based districting scheme is likely to produce some districts in which the electorate is composed primarily of minority-group members. In those predominantly minority districts, minority-group votes can elect candidates responsive to their needs. Karlan, *supra* note 29, at 177.

52. See Wayne Barrett, *Mapmaker, Mapmaker, Make Me a Map: How the Beastly Politics of Redistricting Pits Minorities Against One Another*, VILLAGE VOICE, Aug. 6, 1991, at 11, 12 (criticizing claim as a "conspiracy without a purpose" and noting that in some districts it appeared that Latino groups "prefer losing a seat to a white than to a black").

53. Guinier, *No Two Seats*, *supra* note 1, at 1453; Karlan, *supra* note 29, at 236 (noting that redistricting in single-member district context may exacerbate focus on racial politics); Martin Gottlieb, *New York's Democratic Experiment*, N.Y. TIMES, Sept. 15, 1991, at 18 (discussing the issue as one of "balkanization" or "healthy sharing of

The question of where one could draw minority districts dissolved naturally into a sub-issue of how much greater than a simple majority in a district was needed in order to achieve effective minority voting equality with whites.<sup>54</sup> The commission did not operate pursuant to a specific rule of thumb. However, it was aware that historically only those districts with eighty percent combined minority population (and where there was at least sixty percent of a single minority) elected minority council members. Where minority population concentrations permitted, the commission sought districts with a clear numerical preponderance of one or another of the protected groups.

In the first elections held under the 1982 redistricting, members of minority groups were elected to the council only from each of the nine districts with minority populations of eighty percent or more.<sup>55</sup> These districts also shared two other characteristics. First, they contained a clear preponderance of a given minority group; second, the white population was under twenty percent. The 1982 results showed that when minority groups were competitive and there was more than one minority candidate, each minority group tended to cancel the voting effectiveness of the other.<sup>56</sup> Moreover, when white voting strength approaches thirty percent, as it did for those three districts which, in 1982, had combined minority populations of between sixty-nine and seventy-two percent, lower rates of registration and turnout for racial and language minority groups mean that the white population controls the outcome of the election. These factors led the commission to try to lower white population and to increase minority percentages in the minority districts.

In order to further maximize minority electoral opportunities, the commission examined voting age population and registration rates by race in addition to total population data.<sup>57</sup> The estimated voter regis-

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power"); Sam Roberts, *Redistributing Oddities Reflect Racial and Ethnic Politics*, N.Y. TIMES, May 7, 1991, at B1. "Racial and ethnic politics is a New York tradition, but the latest redistricting appears to codify it as never before and to redefine community." *Id.*

54. See *supra* note 20 and accompanying text. Achieving effective voting equality means looking beyond total population to determine what level of minority group is needed in light of history, voting patterns and registration rates.

55. See REDISTRICTING SUBMISSION, *supra* note 21, at Exhibit 10.

56. Former districts 6, 8 and 25 each elected non-minority council members. Each of these districts had white populations ranging from 25 to 27%. REDISTRICTING SUBMISSION, *supra* note 21, at Exhibit 10. One of these districts, 8, had no minority group as a majority (the African-American and Hispanic percentages were 31% and 42%, respectively), while the other two districts, numbers 6 and 25, are believed to have high rates of noncitizens. Thus, in 1982, in an East Harlem-South Bronx district, a white candidate prevailed in a three-way contest involving two other Latino candidates.

57. Since the board of elections does not maintain a listing of voters by race, the commission used a surname analysis to estimate numbers of Latino and Asian-American

tration data was a critical component of the creation of districts in geographical areas where no single minority group was dominant. Such areas came to be known within the commission as "hot spots;" indeed, the struggle between minority groups, long denied significant influence in the governance of the city, was one of the distinguishing features of the 1991 districting. This inter-ethnic conflict surfaced most prominently in three areas of the city: the Lower East Side of Manhattan, District 8 in East Harlem and District 21 in Queens.

## B. The Lower East Side of Manhattan

### 1. *The Districting Conflict*

The districting of the Lower East Side of Manhattan is the most interesting and instructive. The Lower East Side is a neighborhood whose boundaries are well-defined and whose community has traditionally consisted of different racial and ethnic immigrant groups. Demographic analysis showed that the city's Latino population was more dispersed than the African-American population, and that the Asian-American population was the most dispersed of the three groups.<sup>58</sup> The problem with the creation of a minority district on the Lower East Side was essentially one of population: no matter how the commission drew a district, neither an Asian majority nor a Latino majority district could be created. Hence two alternatives emerged. First, the commission could draw two separate districts, one in which Latinos would be a plurality, and one in which Asians would have an "influence."<sup>59</sup> This involved placing the Asian-American population

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voters, and from those results to arrive at estimates of white and black voters, by election district. Subgroups within the major racial/ethnic groups in New York City tend to have differing rates of citizenship. Thus, while Puerto Ricans are citizens, other Latino subgroups such as Dominican, Honduran, Costa Rican, Colombian, Salvadoran, etc., are likely to have a large number of non-citizens. In addition, the number of persons under 18 years of age varies significantly among some subgroups in the same racial/ethnic category. These factors made clear that for some minority groups it would be necessary that such a group be much more than 65% of the population of a district, *supra* note 20, in order for such a group to have an opportunity to elect a candidate of its choice. *See, e.g.,* Latino Political Action Comm. v. City of Boston, 784 F.2d 409 (1st Cir. 1986) (noting that more than one minority group and insufficient cohesion may necessitate a higher percentage).

58. *See* REDISTRICTING SUBMISSION, *supra* note 21, at Appendix I (Report of 1990 Census Population Distributions and Densities).

59. An influence district is one containing "a significant minority population but not enough to exert electoral control." Guinier, *No Two Seats*, *supra* note 1, at 1452 n.146. In such a district the presumption is that a minority group will exercise influence by becoming a "swing vote" that a candidate must woo. *Id.* at 1468 n.199. The concept may be an illusory one wherein racially polarized voting exists, *supra* note 14, and inter-racial coalitions are absent or not reciprocal. *Id.*



concentration in the Chinatown areas with whites rather than with Latinos. Such a district would have had thirty-three percent Asian, and fourteen percent Latino voting age populations.<sup>60</sup> Second, the commission could draw one "multi-ethnic" district,<sup>61</sup> in which Latino and Asian-American populations would be combined. This issue was the subject of considerable testimony and disagreement, as both the Asian and Latino communities sought different solutions.

A majority of the Latino community, as well as both PRLDEF and AALDEF, favored the multi-ethnic alternative.<sup>62</sup> This might have resulted in a district with thirty-eight percent Asian, thirty-two percent Hispanic, thirteen and one-half percent African-American and sixteen percent non-minority total population, for a combined minority total of eighty-three and one-half percent.<sup>63</sup> In examining this alternative, the commission tried to ascertain whether there was political cohesion<sup>64</sup> among these groups. There was some evidence of cohesion and successful coalition-building around interests, and some indication that Latino voters were willing to support Asian-American candidates, although little indication that the converse was true.<sup>65</sup>

The Asian groups were divided. Some argued that it would be unfair to make them compete with the Latino electorate to elect a candidate of choice. These groups also argued that a separate district offered a better chance to elect an Asian candidate. On the other hand, PRLDEF, AALDEF and other individuals countered that: (1)

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60. See REDISTRICTING SUBMISSION, *supra* note 21, at Exhibit 17. (Redistricting Commission's Initial Plan).

61. The considered options were a district connecting the community of Chinatown with either the Hispanic sections of the Lower East Side to its North ("multi-ethnic") or with the essentially non-minority area to its west (the Financial District and Battery Park City), parts of "Little Italy" and some of the "Soho" area (an East to West district). Although the commission discussed the first option, it never released publicly a map that showed a combined district, except for pre-census receipt drafts, known as "scenarios."

62. The Community Service Society (CSS), an advocate primarily for the African-American community, also supported a combined district.

63. Data provided to Redistricting Commission by Lower East Siders for a Multi-Racial District, at 10.

64. Political cohesion may be shown where minority groups vote together or work together on issues. Compare *Campos v. City of Baytown*, 840 F.2d 1240 (5th Cir. 1988), *cert. denied*, 109 S. Ct. 3213 (1989) (finding cohesion between African-Americans and Latinos where they voted together for minority candidate), with *Romero v. City of Pomona*, 883 F.2d 1418 (9th Cir. 1989) (failing to find cohesion where majority of blacks supported white opponents of Latino candidates, and majority of Latinos supported white opponents of black candidates).

65. Ideally, one would examine contests involving white and minority candidates to see whether the two minority groups coalesced behind a single candidate. *Campos*, 840 F.2d at 1245. Of course, there were few elections, primarily low-salience judicial and school board elections where turnout was low, where Asian and Latino candidates ran and such an analysis could be performed.

a multiethnic district would better serve minority interests, since it would be more likely to produce a minority council member, or at least a member who would be sensitive to the needs of the community; (2) the Asian population was growing North, not West; and (3) the Lower East Side population was socioeconomically different from that of Battery Park, with common interests such as real estate development, of considerable importance in an era of gentrification and lack of affordable housing. The opposing factions were intensely divided, accusing each other of presenting plans that were candidate driven.

Certain members of the commission apparently were persuaded by the "separate-but-equal" geographical approach. Moreover, the commission concluded that, because of the low registration rates of both Latinos and Asian-Americans, in the absence of convincing evidence of significant cohesion between the two groups, non-Latino white voters in a multi-ethnic district could control the outcome of an election. In addition, there was some concern that the Latino community would predominate over the Asian-American community, because the registration rates for Asian-Americans are even lower than those of Latinos due to citizenship, recency of immigration and other barriers.<sup>66</sup>

The commission finally decided to pursue a course that would best further Asian empowerment in the city, so it decided to create two separate "minority districts." It considered various political realities, including the fact that Hispanic voters could consistently outvote an Asian preferred candidate if the two communities were pitted against each other, and the fact that Asians, with at least seven percent of the city's population, could be left with little political representation. The commission — although not in unanimity — resolved that the best method to proceed by would be to "cordon off" the Hispanic and the Asian communities and to create an Asian "influence" district, in which whites, rather than Latinos, would retain electoral control based on registration rates.<sup>67</sup>

The decision to create two "minority districts" had several negative consequences: (1) it "wasted" votes of the Latino community; (2) it

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66. See generally S. Sun Bai, *Affirmative Pursuit of Political Equality for Asian Pacific Americans: Reclaiming the Voting Rights Act*, 139 U. PA. L. REV. 731 (1991).

67. Of the total population in this district, 37% is non-minority, 6% is African-American, 17% is Latino and 39% is Asian-American. However, at the estimated registration level Asian-Americans are only 14% of the district while whites are 61.5%. Ironically, there was a greater percentage of Latino registered voters (15.5%) than Asian-American (14%) in this so-called Asian district. See REDISTRICTING SUBMISSION, *supra* note 21, at Exhibit 15.

was criticized by Latino groups and some Asian groups; (3) it fractured communities of interest and in so doing prevented the opportunity for coalition-building;<sup>68</sup> (4) it put pressure on the size of other Manhattan districts, because to concentrate Asian voters, the district was set at the smallest allowable size;<sup>69</sup> and (5) it was unrealistic in an expectation that an Asian candidate might be elected.

The second alternative, a multi-ethnic district, would have reflected the traditional multi-ethnic composition of a distinct neighborhood, keeping a socioeconomically similar community intact. The election results belie the notion that the commission had created a district where Asian-Americans could elect a candidate of their choice: no Asian candidate was elected, despite the fact that two Asian-American candidates ran, one of whom, Margaret Chin, outspent her opponents by a considerable margin.<sup>70</sup> Instead, not surprisingly, a white candidate was elected by non-Asian voters.<sup>71</sup> The neighboring district

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68. Asians and Latinos have worked on issues important to both groups, such as affordable housing, health care, immigration services and bilingual education. Margaret Fung, *A District Like A Mosaic*, N.Y. NEWSDAY, Apr. 12, 1991, at 68. See also *Will They Draw a Credible Map?*, N.Y. NEWSDAY, May 31, 1991, at 52 (criticizing the joining of "a mostly Chinese portion of the Lower East Side to a mostly white, yuppie district to the south and west" preventing the creation of a "district that could elect a minority council member to address its shared socioeconomic concerns"). The commission's choice also meant that neighboring district 2 Latinos were linked to affluent Grammercy Park residents to the North.

69. An application of the one person, one vote rule, with a permissible 10% deviation from the average population, meant that districts could range in size from 137,930 to 151,938. CHARTER, *supra* note 7, § 52a.1. Once the decision was made to create a lower Manhattan district of 137,930 persons, most of the remaining Manhattan districts were over 151,000. The large size of those districts meant that Manhattan had "fewer representatives per capita than any other borough." Bob Fitch, *Mauling the Mosaic: Redistricting Was Meant to Boost Minorities. It Ended up Preserving White Power*, VILLAGE VOICE, June 18, 1991, at 12. More importantly this result deprived other minority groups in Manhattan of the benefit of small districts, and deprived the commission of flexibility that would have been useful when, because of a Justice Department objection, the commission had to redraw district 8 in El Barrio. In attempting to avoid a "ripple effect" that might have delayed the election, the commission was severely constricted in the changes that could be made to this district.

70. According to statements filed by all candidates who received public financing, Chin spent a total of \$196,565, while Fred Teng and Kathryn Freed, the other two candidates, each spent \$113,708 and \$147,554, respectively. PUBLIC DISCLOSURE REPORTS 3: EXPENDITURES (on file with the New York City Campaign Finance Board, 40 Rector Street, New York, NY, 10006).

71. Kathryn Freed, the white Democratic candidate received 5,717 votes, while Margaret Chin, on the Liberal line, won 2,853 votes, and Republican Asian-American candidate Fred Teng received 2,630 votes. 1991 NEW YORK CITY BOARD OF ELECTIONS ANNUAL REPORT. An Asian-American candidate who was victorious in a district controlled by affluent white voters might well have fallen victim to conflicting loyalties. Cf. Guinier, *The Triumph of Tokenism*, *supra* note 43, at nn. 155, 157, 196 and accompanying text (where blacks are elected by white voters they may experience tactical campaign

produced a Latino council member who was elected with considerable white support.

Given the negative consequences of the commission's decision and the extensive testimony in favor of a multi-ethnic district, it is fair to ask on what basis a majority of the commission made its decision.<sup>72</sup> The option chosen was the preference of the one Asian-American commissioner and one of the Latino commissioners, while African-American commissioners were prepared to support either option. The multi-ethnic alternative was preferred by two of the three Latino commissioners.<sup>73</sup> The majority of the commissioners were persuaded, ultimately, by the strongly expressed views of its sole Asian-American member and by the fact that in a geographically based districting scheme there was no area other than lower Manhattan where Asian-Americans might exercise any influence,<sup>74</sup> while there were other opportunities to create districts where Latinos could elect candidates of choice or exercise influence.

## 2. *Borough-Wide Districts and the Cumulative Voting Option*

Let us now examine what could have resulted had the commission not been restrained by the single-member districting strategy. Under an alternative system, with a council consisting of fifty-one seats, the members would be elected not from single-member districts, but, as Professor Guinier postulates, from at-large borough-wide districts whose voters would vote cumulatively. The population of Manhattan meant that it was entitled to ten districts. Under an at-large plan not bound by geography,<sup>75</sup> in which cumulative voting was used, each voter residing anywhere in Manhattan would have ten votes which

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difficulties, lose their ability to advocate for the minority community, and there is a danger that triumph loses some of its community value).

72. Although these commissioners "descriptively represented their respective minority groups, as appointed rather than elected representatives, their status as 'authentic' community-based representatives was not established." See Guinier, *The Triumph of Tokenism*, *supra* note 43, at 1102-09 (defining authentic representation based on importance of community connections and electoral ratification). Descriptive representation is representation by culturally and physically similar persons. *Id.* at 1102 n.114.

73. Commissioner Chin evidently disdained the notion that common interests should play a role in districting decisions, stating to a reporter that the commission was not "empowered to carry on the class struggle." See Fitch, *supra* note 69. One commissioner privately expressed a disinclination to "ghettoize poor people."

74. It was clear that although there are about a half of a million Asian-Americans in the city, or seven percent of the total population, their distribution was such that there would likely not be a single district in which Asian-American voters could exercise a strong influence in determining which candidate should serve in the council.

75. Moreover, "[i]f geography fails to define completely the minority group interests, it also pigeonholes whites as well." Guinier, *No Two Seats*, *supra* note 1, at 1475.

could be cast as he or she wished. Regardless of whether one Asian out of ten Manhattan council members was elected, the votes of the Asian-American community would have counted as much as the votes of any other community.

The results would have depended less on individual commissioners, whose advocacy seems to have been a greater determinant than the voice of the public, and more on views of the public affected.<sup>76</sup> There is no evidence that an individual commissioner, appointed by the mayor, is a more authentic representative of the Asian-American community than others.<sup>77</sup> Although the revised charter listed several criteria,<sup>78</sup> neither it nor any other source provides standards for resolving conflicts between minority groups.<sup>79</sup>

These conflicts would be considerably lessened under cumulative voting, which "fosters minority representation without directly "singling out" some minority groups.<sup>80</sup> Cumulative voting allows voters to form coalitions<sup>81</sup> with other residents of a given borough to, in effect, create their own districts:

This electoral ability is totally independent of the geographic compactness of the group; even if its members are randomly scattered throughout the jurisdiction, they will be able to join together at election time. In essence, then, this [alternative voting scheme] allows the creation of "voluntary," nongeographic single-member districts within the jurisdiction.<sup>82</sup>

Given the dispersal of the fastest growing ethnic group in the country,

76. Indeed, the commission's deputy counsel, Joseph Diaz, was so convinced that the public had indicated a preference for a lower Manhattan district that combined Latinos of the lower east side and Asians of Chinatown, that after one public hearing dedicated primarily to district 1, he mused: "Well, we know what the public wants, I wonder how the commissioners will respond?"

77. The "authentic" minority leader may be thought of as one who is actually elected by the minority community and not one who is handpicked by the "establishment." Guinier, *The Triumph of Tokenism*, *supra* note 43, at 1103.

78. *See supra* note 12.

79. Guinier, *No Two Seats*, *supra* note 1, at 1453. *See also* Jerry Gray, *New Prize in Districting Tug-of-War*, N.Y. TIMES, Aug. 5, 1991, at B3 (quoting Esmerelda Simmons, Vice-Chair, Districting Commission, who commented that division of power is not easy "particularly when people are losing power and others are gaining power and the question is who gets what when). *See also* Jack Newfield, *Hidden Agendas Ruled, Council Gerrymandered*, N.Y. OBSERVER, June 24, 1991, at 10 (accusing commission of a "double standard" for being willing to "bend and stretch lines to create potentially gay and Asian districts" but refusing to do the same for Latinos).

80. Note, *Alternative Voting Systems as Remedies for At-Large Systems*, 92 YALE L.J. 144, 155 (1982).

81. One reason for this may be that cumulative voting "rewards cooperative, rather than competitive, behavior." Guinier, *No Two Seats*, *supra* note 1, at 1464.

82. Karlan, *supra* note 29, at 226.

Latinos, and the hoped-for demise of residential segregation, voters should be "allowed to support candidates of their choice without worrying which side of a line they were living on."<sup>83</sup> The commission would have been spared months of debate in a futile attempt to determine whether the Asian community was "better off" with whites in Battery Park or Latinos on the Lower East Side.<sup>84</sup> Instead, the voters would have answered that question themselves.<sup>85</sup>

### C. "El Barrio" and Queens

In East Harlem ("El Barrio") and in District 21 in Queens, the commission had to decide how to accommodate Latino and African-American interests. The census indicated that the traditional Latino area of "El Barrio" (District 8) had by 1990 become nearly fifty percent African-American, and that Latinos had become more dispersed. The commission, deciding that the predominant population of this district should be Latino rather than either African-American or white, chose to draw a district that enhanced the electoral opportunities for the Latino population.<sup>86</sup> To increase Latino potential, however, the commission had to remove areas that were overwhelmingly nonminority and had to unite areas of the South Bronx and Manhattan Valley.

In Queens, the question for the commission was whether to draw District 21 with a majority Latino population but with African-Americans as the largest registered group, or to draw a "nominally" Latino district that would really be dominated by whites because of low Latino registration rates. The commission chose the former alternative.

In both District 8 and District 21, some Latino groups argued for inclusion in a majority white district as a "swing vote," rather than in

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83. Gottlieb, *supra* note 31 (quoting Henry Stern).

84. Karlan notes that "[o]ne of the central debates in voting rights law has been, at least ostensibly, over the means of assuring black civic inclusion: are blacks better off controlling completely the electoral fortunes of a few representatives or are they better off influencing the electoral prospects of a larger number of candidates?" Karlan, *supra* note 29, at 213; See Guinier, *No Two Seats*, *supra* note 1, at 1458 (arguing that such a dichotomy is a false one, since "[t]he single-member district model . . . presupposes an unresponsive decision-making body and then builds in appropriately limited alternatives, without ever defining what 'better off' means").

85. See Guinier, *No Two Seats*, *supra* note 1, at 1461-63 (emphasis added) (describing advantage of election method that recognizes voluntary interest constituency in which voters "identify themselves with each other based on their own evaluation of their interest").

86. This district, with 22% African-Americans, 51% Latinos and 13% Asian-Americans, has a combined total minority population of 76%. African-Americans and Latinos were a majority of the registered voters, at 44% and 22%, respectively. REDISTRICTING SUBMISSION, *supra* note 21, at Exhibit 15.

a "minority district," where Latinos and African-Americans would have to compete. Under the single-member district strategy, the commission chose to create "minority districts," which it felt would maximize the likelihood that minority voters would be able to choose a candidate of their choice.<sup>87</sup>

The dispersal of identifiable population groups should not be viewed as a detriment, but as an asset, as an indication that our society is moving beyond rigid residential segregation. And yet in Districts 8 and 21, the dispersal of the Latino population raised the decibel level of interminority dispute. The single-member district strategy forced the commission to ask a very unappealing question: is a geographically-dispersed minority "better off" with white voters, who may or may not have any sympathy for Latino interests, or with other minority groups, with whom there is the presumption of destructive competition?

The use of a cumulative voting strategy would have provided a way for dispersed Latino communities to make common cause with any sympathetic group found in the particular borough. However, in 1991, instead of the districting process being used to heal rifts, it served to widen them in these areas.

#### IV. Conclusion

This essay has explored the issue of whether it is possible to construct districts under a single-member district system in a manner that actually empowers minority communities *and their interests* — as opposed to simply electing more minorities — where those minority communities are either highly commingled or too dispersed to form a majority in a district. Using the recent New York City Council districting as an example, I have attempted a practical application of Professor Guinier's theories concerning the use of cumulative or limited voting. Admittedly, I have not considered the viability of such theories as they apply to local governance in a setting such as New York City. Arguments both for and against the use of these alternative schemes should also be addressed in this regard, but I leave that for another time.

Ultimately, the focus needs to be on fundamental values and the

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87. Instead, the Justice Department viewed the commission's choice in District 21 as evidence of intentional discrimination against Latino voters. Objection Letter from John Dunne, *supra* note 23, at 3. In response to this criticism, the commission removed the black population from the district, raising the Latino population to 55.2%. Letter from Victor A. Kovner, Corporation Counsel, to Richard Jerome, Esq., U.S. Dep't of Justice, at 7 (July 25, 1991).

empowerment of voters. This aim involves more than simply sprinkling a greater minority presence on the city council, although such presence has some value. Unless a particular community's needs are assessed and addressed, however, only limited change in the quality of representation and in the amount of voter participation will occur.

Methods of empowerment and society's views of electoral opportunity should not be tied to once-appropriate systems of remedying discrimination that now limit the advancement of minority empowerment and governmental accountability. Rather than looking back, we need to look forward by exploring new ideas and concepts of fairness and real representation. Now that the right to cast an equally weighted vote has been secured, we need to ensure that the right to vote be extended into the right to have one's vote yield as much influence as another's. Future charter revision commissions must expand their conceptions about the range of possibilities that can result in true empowerment.