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# From Litigation, Legislation: A Review of Brian Landsberg's Free at Last to Vote: The Alabama Origins of the 1965 Voting Rights Act

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THE YALE LAW JOURNAL

CRISTINA M. RODRÍGUEZ

# From Litigation, Legislation: A Review of Brian Landsberg's *Free at Last To Vote: The Alabama Origins of the 1965 Voting Rights Act*

*Free at Last To Vote:*
*The Alabama Origins of the 1965 Voting Rights Act*
BY BRIAN LANDSBERG
LAWRENCE: UNIVERSITY PRESS OF KANSAS, 2007. PP. 264. $34.95

**AUTHOR.** Associate Professor of Law, NYU School of Law. Thank you to Sam Issacharoff, Patrick Garlinger, and Ellen Van Scoyoc for their insights.

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## INTRODUCTION

Brian Landsberg puts lawyers at the center of history. In *Free at Last To Vote: The Alabama Origins of the 1965 Voting Rights Act*,[1] Landsberg tells the story of the Department of Justice (DOJ) attorneys who spent the early 1960s bringing case after case against recalcitrant local officials in Alabama to enforce the voting rights provisions of the civil rights statutes that preceded the landmark Voting Rights Act of 1965 (VRA).[2] In the popular imagination and in broadly framed historical accounts, the VRA represents the culmination of grassroots civil rights struggle and hardball national politics.[3] But Landsberg reminds us that a group of dedicated litigators not only helped set the stage for the passage of what scholars call the most successful civil rights law of all time,[4] but also played a critical role in shaping the content of that statute.[5]

Landsberg, then fresh out of law school, was among this initial cadre of lawyers. His carefully researched account of the cases they brought in three Alabama counties is nicely inflected by personal recollections of the dramatis personae, as well as a sense of relief that his fact-gathering labors ultimately contributed to a revolutionary social achievement—a reminder to all frustrated by the minutiae of the practice of law that meticulous attention to detail is essential to the vindication of lofty principles. In this history cum memoir, Landsberg does not set out to revise, so much as expand, existing accounts of events leading up to the VRA, and he succeeds in deepening the institutional picture of the origins of the statute.

Through the witness testimony they collected to support their cases, Landsberg and his colleagues constructed elaborate records that exposed how local registrars applied neutral requirements in disparate ways to keep otherwise qualified black residents from joining the voting rolls. By

1. BRIAN K. LANDSBERG, FREE AT LAST TO VOTE: THE ALABAMA ORIGINS OF THE 1965 VOTING RIGHTS ACT (2007).

2. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1973-1973bb (2000)).

3. *See, e.g.*, ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 264-65 (2000) (noting that resistance to racial equality that "was finally overcome in the 1960s was a result of the convergence of a wide array of social and political forces," such as migration of blacks to the cities, growing political power of blacks in the North, the civil rights movement itself, and a commitment to democracy in the face of fascism and communism in Europe).

4. *See, e.g.*, Richard H. Pildes, *Introduction* to THE FUTURE OF THE VOTING RIGHTS ACT, at xi (David L. Epstein et al. eds., 2006) ("The Voting Rights Act . . . is a sacred symbol of American democracy . . . [and] was the last significant stage in the nearly universal formal inclusion of all adult citizens in American democracy.").

5. *See* LANDSBERG, *supra* note 1, at 148-89.

manipulating legally approved devices designed to assess potential voters' qualifications, such as literacy tests and registration questionnaires, the local officials in charge of Alabama's voting machinery effectively maneuvered around the voting rights laws then in place. The DOJ litigation—both the practices it revealed and the responses it elicited from southern judges—made it plain that additional action by Congress would be required to bring an end to the exclusion of blacks from democracy in the South. In addition, the DOJ litigation highlighted that any new voting legislation would have to be based on a paradigm shift—from an emphasis on registering all qualified voters, defined in a facially neutral way, to an emphasis on access, plain and simple, regardless of qualifications. This shift was ultimately reflected in Congress's temporary suspension in the VRA of literacy tests, which the Supreme Court had previously declared constitutional,[6] as well as in the administrative apparatus created under section 5 of the Act, pursuant to which covered jurisdictions were required to seek preclearance from the DOJ before changing any aspect of their voting systems—a requirement that remains in place today.[7]

In simply telling his story, Landsberg makes an important contribution to the historiography of voting rights in the United States. But his account also presents an opportunity for reflection on how the remedies designed to address the particular circumstances he explores evolved to address later voting rights concerns. The paradigm shift from qualifications to access established a new conceptual framework that made possible later voting rights innovations designed to secure access for all voters, regardless of qualifications. Perhaps the most important (and controversial) of these innovations was the bilingual ballot, a 1975 addition to the statute.[8] Though it is a long way from black/white

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6. *See* Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959). In *Oregon v. Mitchell*, 400 U.S. 112 (1970), the Court held that Congress's decision to make the literacy test ban permanent in 1970 "was supported by substantial evidence . . . that a nationwide ban . . . was appropriate to enforce the Civil War amendments." *Id.* at 133.

7. 42 U.S.C. §§ 1973b-1973c (2000).

8. This emphasis on access is similarly evident in present-day struggles over voter registration initiatives, such as the Clinton-era Motor Voter effort, pursuant to which citizens can register to vote when applying for a driver's license. *See* National Voter Registration Act of 1993, 42 U.S.C. §§ 1973gg to 1973gg-10 (2000). Efforts to ensure universal registration are increasingly met with the argument that registration procedures must protect against voter fraud—a concern that fueled opposition to the Motor Voter Act and supports state laws that require proof of identity to register or vote. But local officials who use administrative mechanisms to limit voter registration, such as Ohio Secretary of State Kenneth Blackwell, who in 2004 rejected voter registration applications that did not use adequate cardstock, find themselves facing public criticism animated by the "access to the vote" paradigm. *See* Editorial, *The Poll Tax, Updated*, N.Y. TIMES, Oct. 7, 2004, at A34 (citing Blackwell's

relations in Sumter County, Alabama, in 1963 to Mexican American/Anglo-American relations in Texas in the 1970s—the time and place that gave rise to the bilingual ballot requirements[9]—the principles that connect those times and places are of great significance to contemporary conceptions of democracy.

Landsberg certainly does not set about trying to trace any such continuities, and one of the limitations of his account is that it is not well-situated in broader historical or theoretical frames. His declared ambition is simply to give the DOJ lawyers their due. In so doing, he helpfully reminds us of the key roles lawyers have played in important social transformations. But placing his story in a broader historical context yields important insights about how the struggles of one group of American citizens—namely blacks—to become full members of the polity have been translated to support the interests of others—namely Latinos. This translation has expanded our understanding of who constitutes a socially salient minority group and what constitutes discrimination against that group. Landsberg's account helps us to see that once remedies migrate from litigation to legislation, they establish a framework that subsequent reformers can use to address problems not contemplated by the original remedies.

In addition to helping us identify these continuities, Landsberg's work also gives us an opportunity to reflect on the continued relevance of the VRA's original remedies to the current state of affairs in the electoral arena. The migration of remedies from litigation to legislation certainly has been empowering, but it also has been limiting. Though it has made some sense for Congress to adapt the original framework of the VRA to address apparent new threats to the right to vote, it remains important to recognize when those frameworks are no longer sufficient or necessary to ensure equal participation.[10] While pointing to the law's continuities, then, Landsberg's

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insistence that voter registration be printed on eighty-pound card stock as an instance of local officials' efforts to disenfranchise minority voters).

9. For a discussion of these developments, see *infra* Section II.A.

10. *Compare* Georgia v. Ashcroft, 539 U.S. 461, 484 (2003) (redefining the retrogression inquiry to be based on a totality of circumstances test, rather than rigid adherence to prior electoral practice as a benchmark on the theory that minority voters may prefer to have fewer but more powerful representatives), *with* Beer v. United States, 425 U.S. 130, 141 (1976) (defining the preclearance inquiry as an inquiry into whether a state's proposed alteration of its voting rules would produce "retrogression," or backsliding in the ability of voters to vote and elect the candidate of their choice). *Georgia v. Ashcroft* demonstrates how far we have come from 1963 Alabama: it was brought by a coalition of black and white Democrats who believed the traditional retrogression standard was preventing blacks from electing their candidate of choice, who was not black, but a Democrat. Some scholars also have questioned whether section 5 itself has outlived its usefulness. *See, e.g.*, Samuel Issacharoff, *Does Section 5 of the Voting Rights Act Still Work?*, *in* THE FUTURE OF THE VOTING RIGHTS ACT, *supra* note

work set in context also reminds us of the need to continually ask whether altogether new strategies are required to keep democracy vital—an insight of particular relevance to the rights and interests of Latinos today.

This Review first explores how Landsberg's story reveals the dynamics just described—the transformation from a system focused on voters' qualifications to an overriding concern for universal access, as well as the simultaneously path-dependent and evolutionary nature of the federal voting rights provisions and their enforcement. Part II then considers how these dynamics evolved in another context along a similar trajectory, through efforts in 1975 to extend the protections of the VRA to include Latinos and other so-called language minorities. In these extensions, the influence of Landsberg's DOJ lawyers is clear. Not only would the administrative remedy that emerged from their work be extended to protect Mexican Americans in Texas, but the idea of access as opposed to qualifications also would help give rise to the bilingual ballot. Much as the abolition of the literacy test a decade earlier was seen as a mechanism for ensuring access for southern blacks, the bilingual ballot came to be regarded as crucial to securing access for Mexican Americans and other language minorities.

Despite these significant achievements of the 1970s, however, it has become apparent that neither the bilingual ballot, nor the inclusion of Latinos generally as a subject of the VRA, has been the key to securing robust political participation by Latinos. One of the lessons that emerges from tracing the continuities between Landsberg's story and the 1975 VRA Amendments is thus that the efficacy of frameworks designed to address the particular problems of one group can be lost in translation to the context of another group. Part III of this Review argues that Latino underrepresentation in the "pull, haul, and trade"[11] of politics ultimately cannot be remedied by the VRA. Part of the Act's limitation in serving these ends stems from the unstable nature of "Latino" as a political category. The larger issue, however, is that the Latino population in the United States consists of sizable numbers of noncitizens who lack access to the franchise—a condition the VRA simply cannot remedy.

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4, at 107, 108 (exploring whether the "evolution of politics since the last extension of section 5 in 1982 has altered the conditions for its continued utility as a first-order mechanism to oversee minority participation in the political process"); *see also* Heather K. Gerken, *A Third Way: Section 5 and the Opt-In Approach*, *in* THE FUTURE OF THE VOTING RIGHTS ACT, *supra* note 4, at 277, 277 ("[T]he academics who study [section 5 and the VRA] and the lawyers who enforce it are at an impasse. . . . What divides them is a single question: do racial and ethnic minorities finally wield enough power in the political process to protect themselves?").

11. Johnson v. De Grandy, 512 U.S. 997, 1020 (1994).

At first glance, this condition may not seem to require a remedy. But Latino noncitizens' lack of access to the vote resonates on some level with the story Landsberg tells. To be sure, unlike blacks in the Jim Crow South, noncitizens have not been determined by anyone to be eligible voters, and the access concerns of the latter therefore do not have the same moral significance as those of the former. But the citizenship gap compromises robust electoral democracy nonetheless, particularly as such democracy has come to be understood since Landsberg's time. The focus of the VRA quickly shifted from concern for the individualized right to vote to group-oriented representational concerns, or whether certain groups in the political process have the capacity to elect candidates of their choice. This shift from first-order access concerns to second-order representation concerns has highlighted the importance of group power to electoral democracy.

Understood in light of this development, the Latino citizenship gap presents a genuine dilemma. Latino citizens and noncitizens share interests and together form a coherent group, but they are deprived by the citizenship gap of the power to associate formally to defend those interests in the political process. As I will elaborate, the answer to this limitation on the Latino capacity to associate is certainly not the instant transformation of all Latino noncitizens into citizens. But more targeted ways of addressing this conundrum exist. Devising even limited strategies to address the gap would help balance the democracy interest of Latinos with the inevitable reality that all groups whose numbers are fed by immigration must face some disconnect between their numbers as a group and their ability to participate in the political process.

## I. LITERACY TESTS AND ACCESS TO THE VOTE IN 1960S ALABAMA

Landsberg's story is striking because the litigation in which he participated bears little resemblance to the redistricting battles that bedevil voting rights litigation today. The stories of white registrars preventing black citizens from being counted among voters read as if from a different world. Landsberg's is a first-order story about access to the political process, or the individual right to vote. His history ends before the modern preoccupation with second-order concerns, such as vote dilution and the ability of minority groups qua groups to elect candidates of their choice, begins. Among the contributions Landsberg makes is thus to remind us of how successful the VRA has been in eradicating the blatantly exclusionary and racially discriminatory practices it was designed

to combat.[12] Though first-order barriers to access still exist and impede individuals from voting,[13] such concerns are no longer symptomatic of structural, Jim Crow-like subordination or exclusion.

### *A. Fighting for the Right To Vote in Alabama*

The storytelling heart and unique contribution of *Free at Last To Vote* rests primarily in the three chapters through which Landsberg recounts the cases the DOJ brought in the early 1960s in Sumter, Elmore, and Perry counties. In each county, local registrars behaved similarly. Local white registrars consistently applied exacting review to the registration applications of all black citizens and rejected many of them for "technical" errors that bore no relationship to black applicants' qualifications.[14] At the same time, registrars affirmatively assisted illiterate white voters in filling out and filing their applications[15] and helped white registrants but not black registrants in finding the required supporting witness.[16]

To be sure, the extent of the discrimination against black voters depended on the particular personalities of the white registrars and the composition of the community in each county. In Sumter County, for example, registrar Ruby Pickens Tartt, who had been on the county board of registrars since 1952 and was in her eighties by 1963, cut an ambiguous figure. Miss Ruby was known for attending black churches, visiting black homes, and even lobbying local officials to increase the number of fire hydrants and benches in the black part of town,[17] but she also exuded the paternalism characteristic of many white "patrons" of black interests, believing that "most Negroes should not vote because they [would] be misled by unscrupulous whites."[18] Across the board, however, racially motivated disparate treatment led to the dramatic under-registration of black voters. In Sumter County, between 1954 and approximately 1962, local registrars rejected the applications of 47% of blacks,

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12. *See, e.g.*, KEYSSAR, *supra* note 3, at 264 ("In Mississippi, black registration went from less than 10 percent in 1964 to almost 60 percent in 1968; in Alabama, the figure rose from 24 percent to 57 percent. In the region as a whole, roughly a million new voters were registered within a few years after the bill became law . . . .").

13. For discussion of these barriers, see *supra* note 8 and accompanying text.

14. *See* LANDSBERG, *supra* note 1, at 81-82.

15. *Id.* at 43, 81.

16. *Id.* at 66.

17. *Id.* at 45.

18. *Id.* at 47.

but only 1.7% of whites.[19] And in Elmore County, between 1959 and 1964, local registrars accepted 95% of white applicants' registration forms, but rejected 93% of black applicants' forms.[20]

Among the more intriguing dynamics Landsberg brings to light in detailing how DOJ lawyers devised a strategy to address these disparities is the relationship between the voting rights litigation and the processes of school desegregation launched nearly a decade earlier by the Supreme Court's decision in *Brown v. Board of Education*.[21] On the one hand, the DOJ lawyers sought to use *Brown* to their advantage, challenging the validity of literacy tests on the grounds that segregated schools had resulted in the undereducation of blacks, which in turn meant that literacy tests were parasitic on the consequences of unlawful segregation and therefore unlawful themselves.[22] On the other hand, however, the resentment that *Brown* engendered toward federal oversight of race relations in the South, coupled with the extraordinary pressure local federal judges felt as a result of their Supreme Court-imposed role in the desegregation of the schools, made those same judges substantially less receptive to the entreaties of the DOJ lawyers.

Much in the same way that *Brown* simultaneously empowered and hamstrung the DOJ litigation, the statutory frameworks the lawyers had to work with at the time were helpful but limited. The litigation was conducted under the auspices of the 1957, 1960, and 1964 Civil Rights Acts. The 1957 statute, in addition to creating the Civil Rights Division within the DOJ, authorized the Attorney General to seek injunctions against voting officials and to file civil suits in defense of voting rights—authorization Landsberg describes as "very mild"[23] and other scholars have termed "modest."[24] After the Civil Rights Commission observed that the 1957 Act had not stopped racial discrimination in voter registration, Congress responded with the 1960 Civil Rights Act. The statute authorized district courts to appoint and oversee referees, who would be qualified voters from the local jurisdiction and would collect evidence and report findings to the court to help the judge identify victims of discrimination. The landmark Civil Rights Act of 1964 added several more protections, including a provision that authorized the federal government to seek review of a case by three district court judges—a reform that reflected

19. *Id.* at 38.

20. *Id.* at 103.

21. 347 U.S. 483 (1954).

22. LANDSBERG, *supra* note 1, at 61.

23. *Id.* at 149.

24. KEYSSAR, *supra* note 3, at 260.

growing frustration with the sometimes obstructionist action of the southern district court judges acting alone.[25]

But as Landsberg makes clear, none of these enactments eliminated the poll tax or the literacy test. They each required litigation, which would necessarily proceed on a case-by-case, county-by-county basis,[26] the limits of which were obvious. Not only was litigation painstaking, but its success also depended on the receptiveness of southern federal district court judges.[27] The DOJ's victories, not surprisingly, were limited. In Sumter County, for example, DOJ lawyers found themselves in the courtroom of the judge who had declared the application of the Civil Rights Act of 1964 to the now-infamous Ollie's Barbecue restaurant unconstitutional.[28] Judge Harlan Hobart Grooms ultimately enjoined local registrars in Sumter County from discriminating on the basis of race and imposing a supporting white witness requirement on black applicants. He stopped short, however, of ordering local officials to register those who had been discriminated against, demanding only that officials notify failed applicants that they were permitted to reapply. This approach, Landsberg suggests, gave local registrars the chance simply to change their tactics rather than mend their ways.[29] By the time Landsberg and his colleagues arrived in Judge Daniel H. Thomas's courtroom in Perry County, the judge had acquired a reputation for delay and had even told an interviewer that in desegregation cases, he "follow[ed] the minimum of what

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**25.** LANDSBERG, *supra* note 1, at 149.

**26.** *Id.*

**27.** *See id.* Congress noted the ineffectiveness of case-by-case litigation in the legislative history of the 1975 extension of the VRA, as well as in the history of the original Act.

> The case-by-case litigation approach of the 1957, 1960, and 1964 voting legislation had proven to be totally ineffectual. In describing the expeirences [sic] under earlier voting rights legislation, this Committee's report on the 1965 Act noted the following: "Progress has been painfully slow, in part because of the intransigence of state and local officials and repeated delays in the judicial process."

H.R. REP. NO. 94-196, at 4 (1975) (quoting H.R. REP. NO. 89-439, at 9-10 (1965)).

**28.** LANDSBERG, *supra* note 1, at 70. In *Katzenbach v. McClung*, 379 U.S. 294 (1964), the Supreme Court upheld the constitutionality of the Civil Rights Act of 1964 as applied to entities such as Ollie's, which served no out-of-state customers, on the grounds that Ollie's bought some of its meat from an in-state supplier who had bought some of his goods out of state. The Court thus affirmed the applicability of the Act to virtually all commercial transactions and public accommodations, regardless of the extent of their connection to interstate commerce.

**29.** *See* LANDSBERG, *supra* note 1, at 71. The DOJ ultimately did not appeal this decision, and Landsberg speculates that the government may have believed that black voters would reapply and be registered under the revised standards articulated by the court.

the law required."[30] Like Judge Grooms, Judge Thomas found violations of the civil rights statutes, but did not order registrars to register qualified applicants, giving registrars a second chance to restructure their method of disenfranchisement.[31]

The notable exception to this foot dragging was Judge Frank Johnson, who in the early 1960s was already shaping what would become his reputation as a true civil rights hero.[32] Assistant Attorney General John Doar, in fact, designed the Elmore County case specifically to get into Judge Johnson's courtroom. In contrast to Judge Thomas's opinion, Judge Johnson laid out a detailed factual account of the white registrars' misdeeds, noting no fewer than six forms of discrimination in their actions.[33] He also ordered local registrars to register the 102 black applicants the court had found to be qualified within fifteen days, and then ordered the DOJ to assist in the enforcement of the court's decree.[34]

But Judge Johnson ultimately kept the easy-to-manipulate literacy test device in place, and his actions essentially amounted to the exception that proved the need for new rules.[35] In the end, each slap on the wrist meted out to local registrars by the district courts had only a limited effect on their future behavior. And, by virtue of the case-by-case nature of the DOJ's efforts, the victories they were able to secure were geographically circumscribed.

### *B. Alabama in Context*

Some of the voting rules highlighted by Landsberg's story were hardly unique to Alabama. Literacy tests had been in existence in various parts of the

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30. *Id.* at 119.

31. *Id.* at 121.

32. In the Macon County registration case, Judge Johnson wrote one of the first opinions to apply the 1957 and 1960 laws, finding that the local registrars had "invariably made certain that the first applicants to take the time-consuming qualification tests were white applicants," that highly educated blacks were being rejected even as white applicants who had failed to complete elementary school were registered, and that blacks' applications "were rejected for minor inconsequential errors," whereas whites' were not. *Id.* at 87-88.

33. *Id.* at 103 (listing as violations "[u]sing the application form as a strict examination for Negro but not white applicants . . . ; [r]ejecting blacks for errors or omissions on their application forms even though the form as a whole showed they met the qualifications required of whites; [and] [f]ailing to give blacks the type of assistance the registrars gave whites to fill out their forms").

34. *Id.* at 108.

35. Landsberg suggests that had other judges in the South enforced existing statutes with the same rigor as Judge Johnson, Congress might never have passed the preclearance requirement, leaving enforcement instead to local judges. *Id.*

United States for over a century before the civil rights movement. Both Massachusetts and Connecticut, for example, adopted literacy tests in the 1850s.[36] In New York, between 1923 and 1929, 15% of the 472,000 people who took the required tests failed.[37] In his comprehensive study of the right to vote in American history, Alexander Keyssar traces the proliferation of state-enacted voter qualification and registration to the period between the Civil War and World War I, with support for them becoming widespread in the 1870s.[38]

States' adoption of literacy tests was justified as a measure to "produce a more competent electorate"[39] by effectively "weed[ing] out sizable numbers of poor immigrant voters."[40] As a "qualification," the literacy test was defended on the grounds that voters who could not read "labor[ed] . . . under mental incapacity."[41] The literacy test was thought, as well, to help ensure that the foreign-born became sufficiently acculturated before voting and to create incentives for immigrants to assimilate.

Despite these patterns elsewhere in the country, however, nowhere was the literacy test used more vigorously to exclude segments of the population from voting than in the South. By the 1950s, seven southern states had literacy tests on the books. As in Alabama, registrars across the South enforced them strictly against black registrants, failing black applicants for misspellings and the like.[42] Until the voting rights battles of the 1960s, the Supreme Court tinkered with this literacy machinery in an effort to police its discriminatory implementation.

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**36.** *See* KEYSSAR, *supra* note 3, at 144-45. In Connecticut, for example, voters approved an amendment in 1895, by a ten-to-one majority, establishing that voter literacy had to be in English. *Id.* at 145. Democrats in New York, allied with Irish, Italian, and Jewish communities, were able to resist imposition of a literacy test until 1921, when the state passed a constitutional amendment requiring prospective voters either to pass a difficult English test or to prove that they had an eighth grade education. *Id.*

**37.** *Id.* at 146.

**38.** *Id.* at 142.

**39.** *Id.* at 128. Keyssar does, of course, note exceptions to these trends, emphasizing that the "partisan line-up" behind these restrictions was never consistent and that the views of the "middle and upper classes were never homogeneous." *Id.* at 129.

**40.** *Id.* at 142.

**41.** *Id.* at 143 (quoting Edward L. Godkin, *The Democratic View of Democracy*, 101 N. AM. REV. 103, 119 (1865)). The fact that northern Democrats depended on the votes of the urban poor meant that they strenuously opposed registration requirements in some states. The combination of Democratic opposition and the political mobilization of ethnic groups, particularly Germans and Scandinavians in the Midwest, prevented literacy requirements from being imposed in many states; that said, thirteen northern and western states had literacy requirements by the mid-1920s. *Id.* at 144-45.

**42.** *See id.* at 258.

The Court struck down the so-called grandfather clauses that states passed to exempt illiterate white voters who had been voting prior to the institution of a literacy test from having to meet the requirement.[43] In 1959, though the Supreme Court held North Carolina's literacy test to be neutral on its face, the Court nonetheless suggested that states must also apply literacy tests without regard for race, color, and sex.[44]

The shift away from these fairness-based limitations on literacy rules toward an outright ban did not take off until the advent of the VRA, and Landsberg documents the mobilizations that eventually led to the national demise of the literacy test. With the VRA, Congress initially suspended literacy tests in the South for ten years. In 1969, the Court held that literacy tests were unconstitutional in districts that had run segregated schools.[45] In 1970, Congress extended the suspension of literacy tests to all states for five years, an action the Supreme Court upheld[46] on the grounds that minorities had received an inferior education across the country, not just in the South[47]—a move of a piece with the Court's expansion of its school desegregation decisions to encompass the North and the West around the same time.[48] In testimony during the 1970 VRA debates, Attorney General John Mitchell characterized the literacy test as a "psychological obstruction" that would suppress the minority vote because of the test's historical connection to the poll tax and the discriminatory practices of local southern officials.[49]

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43. *See, e.g.*, Lane v. Wilson, 307 U.S. 268 (1939); Myers v. Anderson, 238 U.S. 368 (1915); Guinn v. United States, 238 U.S. 347 (1915).

44. Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 51-54 (1959).

45. Gaston County v. United States, 395 U.S. 285 (1969) (upholding the district court's finding that segregated schools produced inequality in education and thus ensured that literacy tests had a discriminatory effect on black voters).

46. *See* Oregon v. Mitchell, 400 U.S. 112 (1970) (upholding the constitutionality of a nationwide literacy test ban on Fourteenth and Fifteenth Amendment grounds). In recognizing Congress's authority to ban literacy tests, the Court did not determine that the tests were per se unconstitutional.

47. *Cf. infra* notes 83-84 and accompanying text.

48. *See, e.g.*, Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 218-19 (1973) (Powell, J., concurring) ("The focus of the school desegregation problem has now shifted from the South to the country as a whole. . . . But if our national concern is for those who attend such schools . . . we must recognize that the evil of operating separate schools is no less in Denver than in Atlanta."). As Keyssar points out in his discussion of the 1970 amendments, extending the suspension of literacy tests to the North was "a means of placating southern opinion" by removing "the stigma from the legislation." KEYSSAR, *supra* note 3, at 274.

49. *Voting Rights Act Extension: Hearings on H.R. 4249, H.R. 5538, and Similar Proposals To Extend the Voting Rights Act of 1965 with Respect to the Discriminatory Use of Tests and Devices, Before Subcomm. No. 5 of the H. Comm. on the Judiciary*, 91st Cong. 278 (1969) (statement of

Though the suspension of literacy tests in the 1965 Act was intended to be temporary and responsive to the discriminatory implementation throughout the South, the literacy test as a device thus came to be understood as a structural impediment to the individual's ability to exercise the right to vote, in no small measure due to the evidence accumulated by the DOJ lawyers. Their work helped precipitate the shift from a qualifications paradigm policed for fairness to an access paradigm according to which securing the right to vote was understood as more important than securing a qualified electorate—a shift whose consequences I trace below. In 1975, Congress finally made the ban on literacy tests permanent, at the same time that it adopted the bilingual ballots provision of section 203,[50] thus entrenching the access paradigm.

### *C. A New Framework*

From the Alabama history he recounts, Landsberg ultimately pulls two key lessons about the relationship between litigation and social change. First, the DOJ litigation highlighted the inadequacies of existing frameworks for protecting the right to vote. These limitations stemmed in large measure from existing law's inability to prevent local registrars from adapting their tactics even after they were enjoined from discriminating when processing registration applications. As Landsberg notes, "[t]he record of well meaning [people] like Ruby Tartt . . . and Judge Grooms" showed that "too many local officials and federal judges had proven unwilling or unable to provide neutrality" in the administration of the literacy test and supporting witness requirements.[51] The litigation in which Landsberg participated thus highlighted the need for congressional action[52] and federal supervision.[53]

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John Mitchell, Att'y Gen.) ("I believe the literacy test is an unreasonable physical obstruction to voting even if it is administered in an evenhanded manner. . . . It unfairly denies the franchise to those who have been denied an equal educational opportunity because of inferior schooling in the North and South. . . . I suggest to this committee that it is the psychological barrier of the literacy test . . . that may be responsible for much of the low Negro voter registration in some of our major cities.").

**50.** This permanent ban was never challenged in court, and by 1975 states had begun adopting provisions allowing assistance to illiterate voters. *See* KEYSSAR, *supra* note 3, at 275.

**51.** *See* LANDSBERG, *supra* note 1, at 169.

**52.** *See id.* at 172; *cf.* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 441-42 (2004) (arguing that the southern resistance prompted by *Brown* helped crystallize for the North the need to take decisive national action to advance civil rights). This progression of events bears an interesting resemblance to events after the Civil War. After the abolition of slavery, Congress passed civil rights legislation intended to protect the rights of the newly freed slaves to enter into contracts, among other things. But the combination of concerns over the statute's

Second, the lessons learned from litigation shaped the remedies crafted to respond to the specific violations uncovered. Most importantly, the stories black residents of Sumter, Elmore, and Perry counties told through their lawyers made clear that access to the franchise could not be secured unless the value of access was prioritized above other objectives, such as ensuring the intelligent exercise of the franchise.[54] It also became clear that protecting the rights of black voters required a regulatory apparatus that bound all jurisdictions with broad-based access requirements, as opposed to case-by-case litigation. The DOJ's litigation thus pushed Congress to write this shift toward the access paradigm not only into law, but into a new federal regulatory apparatus to police what litigation could not.[55] This administrative regime put a quick end to the blatantly discriminatory manipulation of voting qualifications.[56]

As Part II explains, this prioritization of access helped lay the groundwork for the extension of the VRA to protect minority groups other than southern blacks. The conceptual shifts that Landsberg documents thus helped secure the revolutionary character of the VRA. But that extension also depended on a second conceptual shift, which simultaneously occurred outside of Landsberg's frame of reference and addressed the electoral interests of the voters for whom

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constitutionality and the persistence of the Black Codes in the southern states pushed Congress toward a much stronger statement—the Fourteenth Amendment. *See* PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 301-09 (4th ed. 2006).

53. Landsberg notes that "the problem was no longer only the existence of race discrimination, but of blatant disregard of federal laws and court orders." LANDSBERG, *supra* note 1, at 175.

54. Opponents of the original VRA recognized its potential. Senator Sam Ervin of North Carolina observed that the bill would "allow the registration of individuals who are not qualified to vote under any objective standard, regardless of race or color, in the guise of preventing discrimination solely because of race or color." *See* Rodolfo O. de la Garza & Louis DeSipio, *Reshaping the Tub: The Limits of the VRA for Latino Electoral Politics*, *in* THE FUTURE OF THE VOTING RIGHTS ACT, *supra* note 4, 139, 142 (quoting the legislative history of the 1965 VRA).

55. *See* Gerken, *supra* note 10, at 278 ("This preclearance requirement . . . solved the central problem in voting rights enforcement during the civil rights era: keeping up with the increasingly creative strategies recalcitrant state and local governments used to disenfranchise black voters.").

56. The power of state and local officials to limit access to the vote through administrative action certainly has not disappeared. *See, e.g.*, de la Garza & DeSipio, *supra* note 54, at 143-44 (noting that Latino office holding has grown slowly because "local jurisdictions and non-Hispanic political elites have continued to find ways to mute Latino voices" through tactics that include the "constant cleansing of voter registration rolls" as the result of "an annual English-language census mailed without translation").

the DOJ litigation was originally brought: a shift from the focus on individual access to the polls to group power.

The effective eradication of the local registrars' practices in the South did not mean that black voting rights had been secured. Rather, while outright exclusion of black voters became extremely difficult after the VRA, more subtle and perhaps even unintended forms of discrimination arose in its wake—a development Landsberg and his colleagues could probably have predicted. The Supreme Court, as a result, quickly recognized that the right to vote involved not simply access to the polls for individual voters, but also the right to an effective vote more generally.[57] In other words, it became clear that securing the individual right to vote would have little meaning if it was not accompanied by the power to elect candidates of one's choice. This realization, in turn, meant ensuring that blacks had the capacity to aggregate their individual interests into voting blocs; access to power depended on the ability to function as a group.[58]

Thus, even the access-over-qualifications shift engendered by the DOJ litigation of the 1960s was not sufficient to secure for minorities the ability to participate in the "pull, haul, and trade"[59] of normal pluralist politics. Unlike their statutory predecessors, the VRA's tools were sufficiently malleable to provide some assistance in addressing the new concern for vote dilution.[60] But the subsequent shift in emphasis toward group power still required more innovation. The growing second-order representational concerns were reflected in the Supreme Court's expansion of the scope of section 5[61] and its elaboration of standards to implement section 2, which Congress amended in

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**57.** *E.g.*, Williams v. Rhodes, 393 U.S. 23, 30 (1968) ("[T]he right of qualified voters, regardless of their political persuasion, to cast their votes effectively . . . rank[s] among our most precious freedoms.").

**58.** *See* Samuel Issacharoff, *Groups and the Right To Vote*, 44 EMORY L.J. 869, 883 (1995) ("To be effective, a voter's ballot must stand a meaningful chance of effective aggregation with those of like-minded voters to claim a just share of electoral results.").

**59.** Johnson v. De Grandy, 512 U.S. 997, 1020 (1994).

**60.** After the Supreme Court's holding in *Allen v. State Board of Elections*, 393 U.S. 544 (1969), it was clear that the section 5 preclearance process could be used to police whether covered jurisdictions were making adjustments to the election procedures that diminished the power of black votes. *See, e.g.*, Issacharoff, *supra* note 10, at 107-08 ("[S]ection 5 provided oversight not only on the processes of registering and casting a ballot, but on issues such as annexations and the use of at-large election districts. . . . In extending the reach of section 5 to include the electoral prospects of minority-preferred candidates, the Court gave invaluable protection to fledgling minority political successes.").

**61.** *See* Issacharoff, *supra* note 4, at 107-08.

1982 to guarantee minority voters in all jurisdictions the right to "elect representatives of their choice."[62]

Much has been written about whether this group-based focus and the race-conscious decision making that has resulted from it are at odds with our otherwise highly individualized conception of constitutional rights.[63] But for the purposes of the remainder of this piece, the significance of this shift from the individual to the group is that it helped facilitate the extension of the Act's protections to other minority groups in American society. If voting rights were to be understood broadly to include the right to elect candidates of one's choice, then other underrepresented minority groups arguably merited protection, particularly to the extent that members of these groups suffered forms of exclusion similar to what blacks experienced in the 1960s South.[64] The emergent group-based framework, coupled with concern for the continuing exclusion of minorities from voting in uncovered jurisdictions, pushed Congress toward its later VRA amendments. The Parts that follow focus on the interplay between access and effectiveness in Congress's efforts after 1965 to extend the VRA to protect the interests of new minority groups, namely language minorities and Latinos.

## II. BILINGUAL BALLOTS AND ACCESS FOR LANGUAGE MINORITIES

During the 2006 debate over whether to reauthorize the Voting Rights Act, the media and witnesses before Congress paid considerable attention to section 203—the bilingual ballots provision originally added to the Act in 1975.

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62. 42 U.S.C. § 1973 (2000); *see also* Pildes, *supra* note 4, at xiii ("[S]ection 2 consists of a permanent, nationwide ban on voting practices that deny or abridge minority voting rights. . . . Since [Congress strengthened section 2 in 1982, it] has been a major vehicle for attacking . . . redistrictings that dilute minority voting power, voting fees that operate much like poll taxes, and many other practices."). Though section 2 is enforced through case-by-case adjudication, its nationwide reach eventually ensured that the basic right to join with others to elect a candidate of the group's choice became a right available to all minority groups.

63. For an explanation of this divergence based, in part, on the grounds that in the "context of reapportionments . . . race operates as a shorthand description of a bloc whose self-defined political interests set it apart from the majority," see Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CAL. L. REV. 1201, 1203 (1996).

64. As discussed in Section II.A, many of the same practices that prevented individual blacks from registering to vote were also used by local registrars in states with high Latino populations, particularly Texas. The 1975 extensions of the VRA were thus intended to address basic access issues. But the group-based conception that evolved in the years after the initial Act's passage was also, arguably, instrumental in justifying the provision of bilingual ballots to language minorities in general.

Editorialists such as George Will declared bilingual ballots to be an impediment to assimilation and an affront to the mutual discourse and linguistically generated common values necessary for a functional political community.[65] Republican Representative Steve King of Iowa introduced an amendment to repeal section 203, an effort that was eventually defeated by a vote of 185-238 in the Republican-controlled House of Representatives.[66] On the Senate side, Senator Tom Coburn of Oklahoma introduced an amendment in the Judiciary Committee, where it eventually failed by voice vote, intended to reduce the number of jurisdictions covered by section 203.[67] In defense of section 203, advocates for various ethnic groups lined up to testify before Congress to proclaim that bilingual ballots were crucial to protecting the right to an effective vote for linguistic minorities.[68]

Whatever the merits of these positions, both sides of this debate are ultimately marginal to the question of Latino political participation.[69] There is no evidence that bilingual ballots have stalled the process of Latinos' assimilation. But bilingual ballots also have not been the key to robust Latino participation in the electoral process.[70] Nonetheless, as I argue below, the inclusion of the bilingual ballot provision in the VRA was significant. Like the literacy test suspension, the bilingual ballot may not have been sufficient to secure robust participation, but it arguably was necessary. In addition, the

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**65.** *See* George F. Will, Op-Ed., *A Vote for English*, WASH. POST, May 25, 2006, at A29.

**66.** *See* 152 CONG. REC. H5205-06 (daily ed. July 13, 2006).

**67.** *See* S. REP. NO. 109-295, at 4 (2006) (defining "limited English proficient" to exclude anyone who claimed to speak English "well" in response to Census Bureau inquiries). One commentator has estimated that this amendment would have reduced the number of jurisdictions covered by section 203 by two-thirds. *See* James Thomas Tucker, *The Politics of Persuasion: Passage of the Voting Rights Act Reauthorization Act of 2006*, 33 J. LEGIS. 205, 259 (2007).

**68.** *See, e.g.*, *Voting Rights Act: Section 203—Bilingual Election Requirements* (pt. 1)*: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 15-21 (2005) (statement of Margaret Fung, Executive Director, Asian American Legal Defense and Education Fund); *To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 21 (2005) (statement of Ann Marie Tallman, President and General Counsel, Mexican American Legal Defense and Education Fund) ("If Congress does not reauthorize the language minority provisions of the VRA, [millions of] Latino citizens will be unable to effectively exercise the franchise.").

**69.** For simplicity's sake, I focus primarily on the electoral interests of Latinos. Many of my observations will apply to other groups, but because it is not possible to generalize about "language minorities," I concentrate on the largest of those minorities.

**70.** For a more detailed discussion of these observations, see *infra* notes 108-112 and accompanying text.

bilingual ballot's importance transcends the immediate benefits it may or may not have for language minority voters, because its inclusion in the VRA reflects the entrenchment of the access-over-qualifications paradigm that Landsberg brings to light. Challenges to the bilingual ballot provision threaten the consensus that universal access to the franchise overrides all other qualification-related concerns, because the challenges depend on rhetoric claiming that those who are unable to read English cannot be informed voters. In other words, efforts to undo the bilingual ballot provision target important conceptual underpinnings of the VRA.

### *A. Bilingual Ballots and the Access Paradigm*

Section 203 of the VRA, which requires states or political subdivisions, under certain circumstances, to provide bilingual ballots and oral voting assistance,[71] became a part of the VRA in 1975, in large part as a function of legislators' efforts to bring the state of Texas under the section 5 umbrella. Texas is singled out repeatedly in the legislative history of the 1975 amendments for its extensive and statewide suppression of the black and Mexican American vote,[72] as well as for its history of invidious discrimination

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**71.** The requirements of section 203 are triggered when the illiteracy rate of citizens in a language minority group is higher than the national illiteracy rate, 42 U.S.C. § 1973aa-1a(b)(2)(A)(ii) (2000), and when one of three conditions exists: 1) more than 5% of citizens of voting age within a jurisdiction are members of a single-language minority group and are limited English proficient, *id.* § 1973aa-1a(b)(2)(A)(i)(I); 2) where a language minority population consists of more than ten thousand citizens of voting age who are limited English proficient, *id.* § 1973aa-1a(b)(2)(A)(i)(II), a trigger added to the statute in 1992; or 3) where more than 5% of Native Americans in a jurisdiction containing an Indian reservation are members of a single language group and are limited English proficient, *id.* § 1973aa-1a(b)(2)(A)(i)(III). The VRA defines language minorities to include individuals who are "American Indian, Asian American, Alaskan natives, or of Spanish heritage." *Id.* § 1973aa-1a(e).

**72.** The House report accompanying the 1975 amendments made clear:

> The State of Texas, for example, has a substantial minority population, comprised primarily of Mexican-Americans and blacks. Evidence before the Subcommittee documented that Texas also has a long history of discriminating against members of both minority groups in ways similar to the myriad forms of discrimination practiced against blacks in the South.

H.R. REP. NO. 94-196, at 17 (1975); *id.* (noting low voter turnout in Texas between 1960 and 1972 and observing that the only reason Texas was not covered by the VRA of 1965 was that it applied restrictive devices other than a formal literacy test); *id.* at 18 ("Witnesses testified that local law enforcement officials in areas of Texas patrol only Mexican-American voting precincts, and harass and intimidate Mexican-American voters."); *id.* ("Fear of job loss is a major deterrent to the political participation of language minorities. A witness from

against Mexican Americans in "'education, employment, economics, health, [and] politics.'"[73] Yet, though Congress's primary goal was to end the harassment and intimidation of minority voters in Texas, an additional factor became central to its efforts to police the exclusion of minorities: the effects of English-only elections.

Many lawmakers believed that the absence of language assistance, in addition to other forms of voter suppression, resulted in the exclusion of language minorities from the political process. In their estimation, English-only elections exacerbated the subordinating effects of the "systematic failure of the educational process, which . . . ignores the educational needs of Chicano students."[74] Reflecting this multifaceted conception of discrimination, Congress in the 1975 debates identified a spectrum of discrimination in voting, dividing its intended reforms into two parts. In jurisdictions where evidence of educational disparities existed and was accompanied by evidence that "language minorities have been subjected to physical, economic, and political intimidation" similar to the extensive evidence adduced in Texas, Title II would apply, thus extending section 5 along with the bilingual ballots provisions to the identified jurisdictions.[75] In addition to reaching Texas, this combination of factors resulted in the extension of section 5 to the state of Alaska, as well as to select counties in other states where language minorities had been excluded routinely from the polls.[76]

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Texas indicated that an Anglo candidate who was a loan officer at the bank went to each Mexican American who had loans with the bank and told them he expected their votes. The Subcommittee record is replete with overt economic intimidation designed to interfere with and abridge the rights of Mexican American voters." (citation omitted)); *id.* ("In Texas, although Mexican-Americans comprise 16.4 percent of the population, they hold only 2.5 percent of the elective positions."); *id.* at 19 ("Election law changes which dilute minority political power in Texas are widespread in the wake of recent emergence of minority attempts to exercise the right to vote."); *see also* de la Garza & DeSipio, *supra* note 54, at 140 ("Testimony in support of extending coverage to Latinos came primarily from Latino leaders .... Their testimony focused on similarities between the black and Latino experiences with exclusion and intimidation.").

**73.** *See* H.R. REP. NO. 94-196, at 22 (1975) (quoting Graves v. Barnes, 343 F. Supp. 704, 728 (W.D. Tex. 1972), *aff'd in relevant part sub nom.* White v. Regester, 412 U.S. 755 (1973)).

**74.** *Id.* at 20 (quoting U.S. COMM'N ON CIVIL RIGHTS, THE EXCLUDED STUDENT 23 (1972)).

**75.** *See id.* at 30 (internal quotation marks omitted).

**76.** Coverage would be triggered where the "device" of English-only election materials was used, and also where voter registration or turnout was lower than 50% in the 1972 election. *Id.* at 23-24 (noting that data indicated that coverage would extend to certain counties in California, Arizona, Florida, Colorado, New Mexico, Oklahoma, New York, North Carolina, South Dakota, Utah, Virginia, and Hawaii, as well as the entire states of Alaska and Texas).

But Congress also recognized that the absence of outright intimidation did not mean that discrimination had not occurred. With Title III, Congress extended the bilingual ballots provision nationwide, without the added burden of section 5, to address "milder" forms of exclusion from the political process. Title III covered those language minority groups for whom some evidence of discrimination had been introduced into the record,[77] namely "citizens of Spanish heritage, Asian Americans, American Indians, and Alaskan Natives."[78] By drawing a connection between political exclusion and educational disadvantage[79] in particular, Congress transformed amendments precipitated by rampant discrimination in Texas to justify remedies for less overt forms of discrimination experienced by minorities generally. Congress thus sought to address what it perceived to be a range of discriminatory practices that kept language minorities from exercising their right to vote, not simply the sorts of barriers that resembled the transgressions of the Jim Crow South.[80]

Congress thus reaffirmed the principle that access to the polls trumped the states' interest in ensuring the intelligent exercise of the franchise. Indeed, in the same legislative session, Congress made the literacy test ban permanent. This triumph of the access paradigm, combined with the then-developing attention to the interests of groups in the electoral process, must have underscored the logic of extending the bilingual ballots provision to groups other than the original sources of concern. With the focus of voting legislation now on a broader concern for group qua group power, it was likely difficult for legislators to see the justification for limiting the expansion of the access principle to the discrete group of Mexican Americans in Texas. The structural impediments Congress perceived as present in English-only elections existed whether local officials engaged in outright discrimination, or the less overt and perhaps more benign perpetuation of structural forms of discrimination, such as educational disadvantage.[81]

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**77.** Title III is essentially the bilingual ballots provision still in effect today. *See id*. at 30-32.

**78.** *Id.* at 30. Congress considered and rejected a proposal to extend the language assistance provision to all groups. *See* de la Garza & DeSipio, *supra* note 54, at 140.

**79.** Congress, for example, cited the then-recently decided case *Lau v. Nichols*, 414 U.S. 563 (1974), in which the Supreme Court held that the failure of the San Francisco Board of Education to provide language instruction to Chinese students who did not speak English denied them a fruitful opportunity to participate in the public school program. *Id*.

**80.** *See, e.g.*, H.R. REP. NO. 94-196, at 20 ("[T]he language disabilities of Asian Americans are particularly egregious and deter their participation in the electoral process.").

**81.** The legislative history of the 1975 amendments makes very clear that the bilingual assistance provisions were targeted specifically and only at groups that were subject to discrimination of some kind. *See, e.g.*, *id.* at 28 (noting that the groups that the Act intends to enfranchise are "groups which, the evidence shows, have been subjected to voting discrimination").

The connection between language access and the right to vote was not a novel one for Congress to draw; it was, in fact, present in the original VRA. Though the statute focused primarily on disabilities imposed on black voters in the South, section 4(e) addressed the interests of the hundreds of thousands of citizens from Puerto Rico living in New York in the 1960s. The statute prohibited the use of English-language literacy tests to prevent those who had been educated in Spanish-speaking American schools in Puerto Rico from registering to vote.[82] The Supreme Court upheld this provision, rejecting the state's claim that section 4(e) could not be deemed "appropriate legislation" under Section 5 of the Fourteenth Amendment unless the Court outlawed literacy tests altogether.[83] In response to the state's claim that it sought to provide non-English speakers an incentive to learn the English language, the Court sounded the access-over-qualifications theme, emphasizing that "Congress might have . . . questioned whether denial of a right deemed so precious and fundamental in our society was a necessary or appropriate means of encouraging persons to learn English, or of furthering the goal of an intelligent exercise of the franchise."[84]

As with the other original remedies of the VRA, litigation proved central to the extension of the language access concept present in 4(e) to minority groups other than Puerto Ricans. The need for bilingual assistance in voting as a means of broadening access to the franchise, like the need to suspend literacy tests, gradually became apparent to Congress through a series of important cases litigated in jurisdictions with high concentrations of Hispanic voters. Through these cases, lawyers and courts elaborated the normative justification for bilingual ballots, essentially highlighting the need to expand the protections of 4(e) beyond the specific population directly addressed by the statute.

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**82.** *See* KEYSSAR, *supra* note 3, at 267. The section reads, in part:

> Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.

42 U.S.C. § 1973b(e)(1) (2000).

**83.** U.S. CONST. amend. XIV, § 5.

**84.** Katzenbach v. Morgan, 384 U.S. 641, 654 (1966). The Court also noted, however, that literacy in Spanish was sufficient to ensure the intelligent exercise of the franchise, noting that "an ability to read or understand Spanish is as effective as ability to read English for those to whom Spanish-language newspapers and Spanish-language radio and television programs are available to inform them of election issues and governmental affairs." *Id.* at 655.

In *Puerto Rican Organization for Political Action v. Kusper*, for example, the district court ordered a local elections board in Illinois to provide a range of Spanish-language materials in precincts where evidence suggested that voters required it.[85] The court concluded that "[t]he right to vote means the right to effectively register the voter's political choice, not merely the right to move levers on a voting machine or to mark a ballot."[86] In upholding the district court's order, the Seventh Circuit likened the application of an English-only system to Puerto Rican citizens who had been educated in Spanish-language schools to the literacy tests applied to blacks who were educated in segregated schools,[87] and drew an analogy to the decisions of other courts to strike down state laws that denied assistance to illiterate voters.[88]

Efforts to protect the interests of language minorities other than Puerto Ricans also occurred through litigation in state courts. In *Castro v. State*,[89] for example, the California Supreme Court heard a challenge to the state's literacy criteria. These requirements initially appeared at the turn of the twentieth century and were introduced by a state assemblyman well known for his "anti-Chinese agitation" in the late nineteenth century.[90] Though members of both political parties opposed the requirements, which scholars have described

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**85.** 350 F. Supp. 606, 611 (N.D. Ill. 1972).

**86.** *Id.* at 610; *see also id.* at 611-12 (ordering the implementation of "'Directions For Voting on Voting Machines' to be affixed to Specimen General Elections Ballots, posters advising who is entitled to assistance, and instruction cards to be affixed to the model voting machines . . . [and] appoint[ment], as judges of election . . . qualified applicants who are bilingual in Spanish and English").

**87.** Puerto Rican Org. for Political Action v. Kusper, 490 F.2d 575, 579 (7th Cir. 1973).

**88.** *Id.* at 579-80 (citing United States v. Louisiana, 265 F. Supp. 703 (E.D. La. 1996), *aff'd*, 386 U.S. 270 (1967) (mem.)). For a similar decision, see *Torres v. Sachs*, 381 F. Supp. 309 (S.D.N.Y. 1974), which held that New York City's provision of bilingual ballots and assistance at those districts with at least 5% Spanish-speaking voters were insufficient and that voting instructions and ballots, as well as any other "official communication," had to be in Spanish and English, on the grounds that "[i]t is simply fundamental that voting instructions and ballots . . . must be in Spanish as well as English, if the vote of Spanish-speaking citizens is not to be seriously impaired." *Id.* at 312. As the legislative history of the 1975 VRA amendments makes clear, the *Torres* case led the DOJ to "move to recover the New York counties which formerly bailed out from under the Act's special provisions," arguing that "monolingual elections constituted discriminatory 'tests or devices.'" H.R. REP. NO. 94-196, at 25 n.37 (1975); *see also* Arroyo v. Tucker, 372 F. Supp. 764, 767 (E.D. Pa. 1974) (holding that failure to provide bilingual materials and assistance to Spanish speakers of Puerto Rican descent in Philadelphia violates the VRA and noting that the right to vote must be understood broadly as "the right to an effective vote" (internal quotation marks omitted)).

**89.** 466 P.2d 244 (Cal. 1970).

**90.** KEYSSAR, *supra* note 3, at 145.

variously as aimed at Chinese immigrants, Mexican Americans, and European immigrants,[91] they eventually became law through a referendum with the support of nearly 80% of voters.[92]

The challenge to the amendment was brought by Spanish-literate voters who claimed not only that the English-language literacy test unconstitutionally deprived them of their right to vote, but also that the state was required to implement a bilingual voting system.[93] In *Castro*, though the court did not outlaw literacy tests altogether, it did strike a blow in favor of access over qualification by finding the California literacy test unconstitutional as applied to those who were literate in Spanish.[94] The court declined to implement a bilingual system due to cost, finding that all that mattered was that those literate in Spanish be able to vote, an act they did not view as hampered by voting materials printed exclusively in English.[95] Barriers to understanding, the court emphasized, could be addressed by advance study by voters, as well as through reliance on informal assistance, such as bilingual friends and commentary in Spanish-language media.[96]

In enacting the bilingual ballot provisions, Congress was clearly aware of this litigation, highlighting in the legislative history of the Act the various conclusions of the courts in *Kusper* and *Castro*, among other cases.[97] Congress also made note of developments in other states that had taken affirmative steps, without the threat of litigation, to provide election materials in Spanish,[98] while acknowledging evidence of the inadequacies of other states'

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**91.** *See, e.g.*, *id.*; Roger Daniels & Eric F. Petersen, *California's Grandfather Clause: The "Literacy in English" Amendment of 1894*, 50 SO. CAL. Q. 51, 52-54 (1968). The literacy requirement was first introduced by a California assemblyman who appealed to the xenophobic declarations found in a political party platform of the era. *See Castro*, 466 P.2d at 248-49 ("We look with alarm upon the increased immigration of the illiterate and unassimilated elements of Europe. If we do not take some steps to prevent the ignorant classes . . . from exercising the right of suffrage until they have acquired a knowledge of our Constitution, our system of government, and our laws, it will soon come to pass that this element will direct our politics and our institutions will be overthrown.").

**92.** KEYSSAR, *supra* note 3, at 145.

**93.** *See Castro*, 466 P.2d at 246.

**94.** *Id.* at 258.

**95.** *Id.*

**96.** *Id.*

**97.** *See* H.R. REP. NO. 94-196, at 24-25 (1975).

**98.** *Id.* at 25 n.39 (noting that New Jersey had adopted a statute requiring bilingual sample ballots and registration forms in election districts with 10% or more registered Spanish-speaking voters; that Dade County, Florida had provided all registration and election materials in English and Spanish for two years; and that Massachusetts, Pennsylvania, and

efforts to ensure access for language minorities.[99] Congress, like the courts and states that had grappled with the question of language minority access, eventually came to regard the bilingual ballot as the logical extension of the ban on literacy tests. The *Castro* court's analysis notwithstanding, the legislative history of the VRA reflects Congress's apparent belief that the English-only ballot served as a functional equivalent of a literacy test: a seemingly neutral means of judging qualifications that through its disparate effect excluded otherwise qualified voters from the franchise.

To be sure, the environment in which Congress adopted the bilingual ballot in 1975 presents a sharp contrast to the context that gave rise to the literacy test ban, as brought into view by Landsberg. Literacy tests in the South were deliberately manipulated to exclude black voters, whereas the impediment from the English-only ballot came from the ballot itself. And whereas Landsberg's is a story of local officials resistant even to the mandates of federal civil rights law, by 1975, state courts and legislators had taken the lead in devising ways to enfranchise language minorities, particularly Mexican Americans, with some apparent success—a lead Congress followed with a measure it did not consider "a radical step."[100]

But the remedial innovations developed during the 1975 debate nonetheless depended on the presence of certain continuities with the events that precipitated the original VRA. Congress arguably could not have taken even these steps had evidence of local recalcitrance echoing the tactics of registrars in the South not also been in the record. In its survey of the state of affairs in Texas, Congress made note of the obstacles erected by local officials to "discourage, frustrate, or otherwise inhibit" language minority access.[101]

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Connecticut also provided language assistance in areas with a concentration of Spanish speakers).

**99.** *See, e.g.*, Letter from U.S. Comm'n on Civil Rights to the President of the Senate and the Speaker of the House 103, 114 (Jan. 1975) (on file with the Yale Law Journal) (noting, among other things, that poll workers in California who speak only English have difficulty finding names of registered voters with Spanish surnames and the failure of California and New York to carry out state requirements that bilingual workers be recruited).

**100.** *See* H.R. REP. NO. 94-196, at 24.

**101.** *Id.* at 17. The legislative history emphasizes that the only reason Texas had not been covered by the original VRA was because it employed test devices other than a literacy requirement, namely a poll tax. Commentators have noted that Congress likely did not use the poll tax as a triggering device in 1965 for two reasons. First, there was disagreement at the time over whether Congress could ban the poll tax by statute, as the Twenty-Fourth Amendment banned poll taxes in presidential and congressional elections. Second, President Johnson, himself a Texan, may well have sought to avoid angering the powerful Texas and Arkansas delegations to Congress. *See* SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 470 (2007).

Congress concluded that it was the conjunction of the "cultural and language impediment" with "the poll tax and the most restrictive voter registration procedures in the nation" that had effectively denied Mexican American voters access to the political process—an exclusion that had lasted longer than blacks' exclusion by the state's white primary before it was invalidated.[102] Though Congress may have characterized these reforms as modest at the time, in enacting them, Congress expanded the definition of discrimination in potentially radical ways to include structurally created impediments, as opposed to simply flagrant and affirmative forms of exclusion.

### *B. Access and Effectiveness*

Congress clearly intended bilingual ballots to be temporary remedies, or "to fill that hiatus until genuinely equal educational opportunities are afforded language minorities."[103] But thirty years later, the prohibition on English-only elections remains firmly entrenched in law. And yet voter intimidation of the sort recorded in the 1975 legislative history is largely a thing of the past, and substantial progress has been made in remedying the educational disadvantages of language minorities.[104] What is more, some evidence suggests that language minorities' use of bilingual ballots is limited, and that the gap between Latino and white participation still has not been closed, despite the

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**102.** *See* H.R. REP. NO. 94-196, at 17.

**103.** *Id.* at 26.

**104.** *See, e.g.*, Equal Educational Opportunity Act, 20 U.S.C. §§ 1701-1720, 1793(f) (2000) (providing that "no state shall deny equal educational opportunity to an individual . . . by . . . the failure . . . to take appropriate action to overcome language barriers"); *cf.* Cristina M. Rodríguez, *Language and Participation*, 94 CAL. L. REV. 687, 758-65 (2006) (discussing debates over bilingual education and evidencing considerable attention paid by social scientists and lawmakers to education of language minorities).

When the bilingual ballots provision was added to the VRA, the Bilingual Education Act of 1974 (BEA), Pub. L. No. 93-380, 88 Stat. 503 (codified as amended at 20 U.S.C. §§ 7401-7601 (2000)), already committed the government to addressing this disadvantage. Congress noted in the legislative history of the 1975 amendments, though, that

> [h]owever beneficial those laws may be, they have not yet been in operation long enough to reduce the illiteracy rate of certain language minorities below the national average . . . . Consequently, the prohibition of English-only elections in certain areas is necessary to fill that hiatus until genuinely equal educational opportunities are afforded language minorities.

H.R. REP. No. 94-196, at 26. Of course, this point elides the fact that many of the voters that the bilingual ballots provision was meant to protect would not benefit from the BEA, either because they were educated in Puerto Rico in Spanish-language schools, or because they arrived in the United States as adults.

bilingual ballot requirement.[105] What justification remains, then, for the bilingual ballot?

As a conceptual matter, bilingual ballots remain justified on a pure access theory. Just as Congress made the nationwide ban on literacy tests permanent in 1975, moving beyond the original purpose and scope of the ban, the continued prohibition on English-only elections reflects the triumph of the access paradigm. As applied to the bilingual ballots issue, a pure access theory, separated from evidence of overt discrimination, affirms the idea that it is more important for people to be able to participate in the electoral process than for them to meet certain neutral criteria we might value in an ideal voter. Even if the inability to read or understand English limits a voter's opportunity to engage his fellow citizens and therefore leaves him with an imperfect or incomplete understanding of the issues relevant to an election, the access paradigm that supports a concept of universal suffrage demands that such voters have access to the political process. What is more, as I have argued at length elsewhere,[106] the claim that inability to understand English at the level required by the electoral system undermines the cohesion necessary for a political community to survive is deeply flawed. It posits a single, national conversation where none exists, particularly in a decentralized and fractured media environment. The claim also ignores the simple and basic insight that the education necessary to participate in an election can be acquired through domestic media conducted in languages other than English—an insight more true today than when the Supreme Court recognized its validity in *Katzenbach v. Morgan*.[107]

Of course, even though bilingual ballots can be defended on pure access grounds, the empirical evidence as to whether they help achieve the goals of the VRA is mixed, suggesting perhaps that they may no longer be warranted. Some evidence suggests that bilingual ballots promote voter turnout among Latinos. In testimony before the House Committee on the Judiciary, the Acting Assistant Attorney General of the Civil Rights Division emphasized that the Bush Administration's unprecedented enforcement activity under section 203 has "significantly narrowed gaps in electoral participation."[108] In the legislative

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**105.** For discussion of this evidence, see *infra* notes 108-116 and accompanying text.

**106.** *See* Rodríguez, *supra* note 104.

**107.** *See* Katzenbach v. Morgan, 384 U.S. 641, 655 & n.16 (1966) (noting, in the process of upholding section 4(e) as a valid exercise of Congress's power to enforce the Fifteenth Amendment, that the proliferation of Spanish-language media underscored that Spanish speakers had available to them the sources necessary to access the political debate).

**108.** *The Voting Rights Act: Provisions on Language Minorities: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 3 (2005) (statement of Bradley J.

history supporting the 2006 reauthorization of section 203, the House found "a positive correlation between the bilingual assistance provisions and increased voter registration levels in jurisdictions *fully complying with Section 203*," as well as evidence that a "significant number of jurisdictions have yet to fully comply."[109] These findings, combined with continuing educational disparities that fall disproportionately on language minority citizens and the dearth of English-language literacy centers for adult language learners, solidified congressional support for continued authorization.[110]

But it is still not apparent that those linguistic minorities who already vote rely heavily as a group on bilingual assistance. One study conducted just after the 2000 elections found that living in a jurisdiction where Spanish-language ballots are provided does not increase the likelihood that first generation Latinos will vote.[111] An older study based on data gathered after the 1988 elections found that very few Latinos used Spanish-language ballots; that Cubans, whose interests were not taken into account during the 1975 amendments, were more likely to have access to bilingual assistance than Puerto Ricans and Mexican Americans; and that Puerto Ricans were the most likely to use the ballots when available.[112] Ironically, then, it may be that the

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Schlozman, Acting Assistant Att'y Gen.) ("In Yakima County, Washington, for example, Hispanic voter registration is up over 24% since the Division's Section 203 lawsuit. In San Diego County, California, Spanish and Filipino registration are up over 21%, and Vietnamese registration is up over 37% since the Division's enforcement action.").

**109.** H.R. REP. NO. 109-478, at 58 (2006) (emphasis added); *see also* CAROLINE FREDRICKSON & DEBORAH J. VAGINS, AM. CIVIL LIBERTIES UNION, PROMISES TO KEEP: THE IMPACT OF THE VOTING RIGHTS ACT IN 2006, at 26 (2006) (noting the DOJ suit against Passaic County, New Jersey in the late 1990s, which resulted in a consent decree that required election officials to recruit bilingual election workers, publish notices in Spanish, and provide Spanish-language assistance at the polls).

**110.** *See* H.R. REP. NO. 109-478, at 59 (2006), *reprinted in* 2006 U.S.C.C.A.N. 659-60.

**111.** *See* S. Karthick Ramakrishnan & Thomas J. Espenshade, *Immigrant Incorporation and Political Participation in the United States*, 35 INT'L MIGRATION REV. 870, 891 (2001) ("Our analysis reveals that the presence of Spanish ballots is not sufficient to ensure higher voting among first generation Latinos.").

**112.** *See* Rodolfo O. de la Garza & Louis DeSipio, *Save the Baby, Change the Bathwater, and Scrub the Tub: Latino Electoral Participation After Seventeen Years of Voting Rights Act Coverage*, 71 TEX. L. REV. 1479, 1506 (1993). According to testimony before the House Judiciary Committee in 2006, a 1986 General Accounting Office (GAO) study documented that almost half of the jurisdictions that provided estimates to the GAO reported that no one used oral language assistance, and more than half of the jurisdictions reported that no one used the written voter assistance. *See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006* (pt. 1)*: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 34 (2006) (statement of Roger Clegg, President and General Counsel, Center for Equal Opportunity)

foremost reason bilingual ballots do not present threats to assimilation and communication among voters is that they are not widely used by the populations they are intended to serve.

Despite this mixed evidence, one thing is clear: regardless of the bilingual ballot's efficacy, Latinos register and vote at a much lower rate than whites and blacks. Even as the VRA has succeeded in largely closing the gap between black and white voting patterns, Latino registration and participation lag behind[113]—a gap that exists whether the rate of Latino participation is measured with reference to the population of eligible Latino voters or the population of Latinos generally. As the Pew Hispanic Center reported recently, 54% of eligible Latino voters registered in 2006, compared to 61% of eligible black voters and 71% of eligible white voters.[114] The Center also has reported that only 18% of Latinos voted in the 2004 elections, compared to 51% of non-Hispanic whites and 39% of blacks.[115] In addition, Latino office holding, though it has increased significantly since 1984 (the first year a national account was taken), has not kept pace with the growth in the Latino population in the period during which Latino groups have been covered by the VRA.[116]

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(citing U.S. GEN. ACCOUNTING OFFICE, BILINGUAL VOTING ASSISTANCE: COSTS OF AND USE DURING THE NOVEMBER 1984 GENERAL ELECTION 25, 32, 39 (1986)).

**113.** *See* Ramakrishnan & Espenshade, *supra* note 111, at 873 (citing various studies documenting racial gaps in voting among different groups); *see also* de la Garza & DeSipio, *supra* note 54, at 146 (noting that though the raw numbers of Latinos going to the polls has increased since 1975, the percentage of Latino adults voting has dropped, and that in 1976, 31.8% of Latino adults voted, whereas in 2004, only 28% of Latino adults voted).

**114.** *See* PEW HISPANIC CTR., THE LATINO ELECTORATE: AN ANALYSIS OF THE 2006 ELECTION 2 (2007), *available at* http://www.pewhispanic.org/files/factsheets/34.pdf.

**115.** *See* ROBERTO SURO & GABRIEL ESCOBAR, PEW HISPANIC CTR., 2006 NATIONAL SURVEY OF LATINOS: THE IMMIGRATION DEBATE 6 (2006), *available at* http://www.pewhispanic.org/files/reports/68.pdf. The Pew Hispanic Center has reported similar discrepancies for the 2006 elections, in which 13% of the Latino population voted, as compared to 39% of whites and 27% of blacks. *See* PEW HISPANIC CTR., *supra* note 114, at 2. The report also notes that though Latinos accounted for almost half of U.S. population growth between 2002 and 2006, they represent only 20% of new voters. *See id.* Among Latinos who are U.S. citizens, the number of voters has increased more than the number of nonvoters, but nonvoting citizens still outnumber voting citizens. *See* de la Garza & DeSipio, *supra* note 54, at 146 ("[W]hile the number of Latinos going to the polls has increased dramatically, the number of Latino adults not going to the polls have [sic] increased even more rapidly.").

**116.** Between 1984 and 2004, the Latino population increased by 150%, but the number of Latinos in office increased only by 55.1%. *See* de la Garza & DeSipio, *supra* note 54, at 142 (citing U.S. Census Bureau figures). De la Garza and DeSipio attribute this disparity to the fact that "local jurisdictions and non-Hispanic political elites have continued to find ways to mute Latino voices." *Id.* at 143-45.

But to expect bilingual ballots to have solved the Latino turnout problem is ultimately asking far too much of section 203. Latino citizens clearly register and participate at lower rates than white and black citizens, but it is far from apparent that inability to read English-language ballots explains this discrepancy such that we should expect bilingual ballots to have solved the problem on their own. Even more to the point, a sizable number of Latinos counted in census figures are noncitizens, which helps explain why Latino participation rates relative to the total population size are particularly low. Bilingual ballots cannot possibly address this dimension of the participation gap. The persistence of low Latino participation, then, is hardly an argument for repealing the bilingual ballots requirement.

Section 203 instead serves a limited but still important purpose. Even if bilingual ballots slow the process of English-language acquisition—an empirically unproven conclusion in any case[117]—they give citizens in the transition toward learning English equal access to the rights and benefits of citizenship. As government officials and advocates alike emphasized during the reauthorization debate, section 203 meets a persistent need held by many minority voters[118]: Puerto Ricans educated on the island, the remaining native-born Mexican Americans who were denied an English-language education in the early 1970s, and first-generation immigrants[119] who have naturalized but have had difficulty learning English, sometimes because of age. Indeed, the fact that the language requirements for naturalization demand a third-grade level of English proficiency, while deciphering ballots and voting instructions often requires a high school or college level of English language literacy, should be enough to end the debate.[120] In a recent survey conducted by the National

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**117.** I am aware of no empirical evidence demonstrating that bilingual ballots slow English-language acquisition, and given how infrequently Americans vote, it seems a dubious proposition. Some evidence suggests that there is no support for the assumption that immigrants lack incentives to learn English in a world with bilingual ballots. *See* Chalsa M. Loo, *The 'Biliterate' Ballot Controversy: Language Acquisition and Cultural Shift Among Immigrants*, 19 INT'L. MIGRATION REV. 493 (1985).

**118.** *See, e.g.*, *Voting Rights Act: Section 203—Bilingual Election Requirements* (pt. 1)*: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, *supra* note 68, at 17 (statement of Margaret Fung, Executive Director, Asian American Legal Defense and Education Fund) (noting that according to her organization's exit polls of eleven thousand Asian American voters in 2004, almost one-third needed some form of language assistance and over 51% received their news from Asian-language media).

**119.** *See* de la Garza & DeSipio, *supra* note 112, at 1518.

**120.** *See* John Trasviña, *Bilingual Ballots: Their History and a Look Forward*, *in* LANGUAGE LOYALTIES: A SOURCE BOOK ON THE OFFICIAL ENGLISH CONTROVERSY 258, 263 (James Crawford ed., 1992).

Association of Latino Elected and Appointed Officials, 86.2% of respondents felt that Spanish-language assistance was needed in their jurisdictions,[121] but that much of the need remains unmet.[122]

This evidence of need, coupled with the evidence that bilingual ballots are somewhat effective at improving turnout, suggests that Congress was correct to retain section 203. The fact that the DOJ only recently has focused vigorously on enforcing section 203 further justifies the provision's continued inclusion in the VRA and may mean that its full potential has yet to be realized.[123] Even those scholars who document the limits of the bilingual ballot emphasize the ballot's symbolism.[124] Bilingual ballots announce the access principle to the electorate and encourage affiliation with the body politic, because they represent the openness of the polity to groups of all types, whether the group conforms to conceptions of the ideal American or not.[125]

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121. *See* JAMES THOMAS TUCKER, NAT'L ASS'N OF LATINO ELECTED & APPOINTED OFFICIALS, "I WAS ASKED IF I WAS A CITIZEN": LATINO ELECTED OFFICIALS SPEAK OUT ON THE VOTING RIGHTS ACT 11 (2006), *available at* http://www.naleo.org/downloads/NALEO_VRA_Report.pdf.

122. *Id.* at 11-12 (noting that one in five officials reported that their jurisdictions do not make all public election-related materials available in Spanish, Spanish-language materials are poorly written and confusing, and lack of oral language assistance poses a substantial obstacle to Spanish-language voters).

123. *See The Voting Rights Act: Provisions on Language Minorities: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, *supra* note 108, at 3 (statement of Bradley J. Schlozman, Acting Assistant Att'y Gen.) (noting that, since 2001, the Civil Rights Division has filed more minority language cases under sections 4 and 203 than in the entire previous twenty-six years in which these provisions have existed, in states such as Florida, California, Massachusetts, New York, Pennsylvania, Texas, and Washington, including the first suits ever filed to protect Filipino and Vietnamese voters).

124. *See* de la Garza & DeSipio, *supra* note 112, at 1518 ("[A]t a symbolic level, the bilingual provisions still serve as a signal that Latinos are welcome in the American political system. Few may use the bilingual ballots, but their presence reminds voters that Spanish speakers are a part of the nation.").

125. If bilingual ballots have only a marginal impact on voter participation, their opponents' claim that the money spent on ballots would be better spent on updating voting equipment, or other measures, gains salience. *See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006* (pt. 1)*: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, *supra* note 112 (statement of Roger Clegg, President and General Counsel, Center for Equal Opportunity) (claiming that bilingual ballots have only a marginal impact). The few studies that have examined the cost question have been hampered by the inability of responding jurisdictions to specify the costs of bilingual assistance. *See id.* pt. 2, at 4 (statement of James Thomas Tucker, Voting Rights Consultant, NALEO Educ. Fund). Advocates for minority voting rights emphasize that the fear of high costs has not materialized, in part because jurisdictions can hire bilingual poll workers at the same rate as nonbilingual workers, and the costs of printing materials do not

Whatever its effectiveness, section 203 survived the 2006 reauthorization process, and so it remains part of the VRA. But its reauthorization clearly cannot end the debate about Latino participation, given the discrepancies in the participation rates of Latinos, blacks, and whites cited above. At least to the extent that we remain committed to enhancing the power of minority groups as groups—a question largely bracketed in this Review—there remains a clear need for new strategies above and beyond the bilingual ballot to enhance Latinos' participation in the electoral process. Advocates and the government alike must work to identify the impediments to participation that the VRA and its implementation have not addressed, or cannot address, both with respect to Latino citizens and the Latino population as a whole. It is to this need that I turn in the final Part of this Review.

## III. EXPANDING THE FRANCHISE AND THE PROBLEMATICS OF LATINO GROUP IDENTITY

One of the lessons of Landsberg's account, when put in broader historical perspective, is that we conceptualize how to extend the benefits of the civil rights laws in new directions using the frameworks created to deal with particular historical circumstances. We remain invested in those frameworks, even when they may not contribute directly to solving current problems. As the history of the 1975 VRA Amendments makes clear, to address Latino participation, Congress adopted the mechanisms designed to address the particular concerns of black voters in the South; the bilingual ballot, in particular, may have seemed tailor-made for language minorities, but it really represented a variation on the literacy test ban. In updating the access principle to apply to Latinos, Congress exhibited its path dependency, approaching the problem of Latino turnout only obliquely.[126]

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necessarily rise when the language requirements are met. *Id.* at 5-7 (noting that of the 154 jurisdictions reporting oral language assistance, 59.1% incur no additional cost, and of the 144 jurisdictions reporting written language assistance, 54.2% incur no additional cost); *see also id.* at 6-7 (noting that the costs estimates are skewed by the top 10% of respondents reporting very high costs due to their small district size). The DOJ, as part of its section 203 enforcement efforts, has been steering local jurisdictions toward more cost-effective means of implementing their obligations. *See The Voting Rights Act: Provisions on Language Minorities: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, *supra* note 108, at 3 (statement of Bradley J. Schlozman, Acting Assistant Att'y Gen.) (noting that the DOJ encourages avoidance of unnecessary expenditures, such as publishing Spanish language notices in English language newspapers, and reliance on no-cost fax and e-mail trees to disseminate bilingual election notices).

**126.** *See* de la Garza & DeSipio, *supra* note 112, at 1517.

To make this observation is not to say that both the first- and second-order tools of the VRA have been irrelevant to advancing the cause of Latino participation. The benefit of the VRA's first-order mechanisms is discussed above, and in two recent, high-profile section 2 cases, courts struck down electoral districts because of their failure to channel the Latino vote properly.[127] These decisions, along with the reauthorization of section 203, should be marked as victories for the promotion of Latino political participation.[128] But despite Latinos' ability to use the VRA to advance their interests, the participation gap persists. As Rodolfo de la Garza and Louis DeSipio, political scientists who study the Latino vote, ultimately conclude, the extension of the VRA to Latinos, along with the protections of section 203, "have not overcome the historical legacy of underrepresentation in Latino communities."[129]

Latino underparticipation occurs on two levels. First, Latino citizens clearly participate at rates lower than white and black citizens. The traditional explanations for this gap offered by political scientists emphasize that the eligible Latino population contains a higher number of the types of individuals least likely to participate in the political process: new voters and voters with low levels of education and income.[130] Newer voters, for example, are less likely to be socialized into the political system and therefore more likely to be habitual nonvoters. The Latino population, a generally younger population, consists of more new eighteen-year-old voters, many of whose parents are not themselves voters, as well as more recently naturalized voters than other groups.[131] Given that existing tools to boost participation have not adequately addressed these and other causes of the participation gap between Latino and

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**127.** *See* League of United Latin Am. Citizens v. Perry, 126 S. Ct. 2594 (2006) (striking down a portion of a redistricting plan in Texas on the ground that it violated section 2, because the district lines were drawn to protect the Republican incumbent from growing opposition from the Latino population); United States v. Port Chester, No. 06 Civ. 15173, 2008 WL 190502 (S.D.N.Y. Jan. 17, 2008) (finding a section 2 violation in an at-large electoral system in Port Chester, New York, on the grounds that it produced a dramatic underrepresentation of Latinos on the Village's Board of Trustees (no Latino candidate has ever been elected Mayor or Trustee) in a community with a substantial Latino population).

**128.** *But see* Richard H. Pildes, *The Decline of Legally Mandated Minority Representation*, 68 OHIO ST. L.J. 1139, 1140, 1145 (arguing that the Court's anti-essentialist language in *LULAC v. Perry* destabilizes the conventional view of the VRA and "reveals a Court increasingly troubled by . . . the very concept of minority vote dilution and the accompanying legal requirement of 'safe minority districting'").

**129.** *See* de la Garza & DeSipio, *supra* note 54, at 145. They note, instead, that "underrepresentation has increased since the 1970s." *Id.*

**130.** *See* de la Garza & DeSipio, *supra* note 112, at 1510.

**131.** *Id.* at 1510-11.

non-Latino eligible voters, diagnoses and treatments of the gap should continue to be developed.[132]

But the second aspect of the Latino participation problem—that millions of Latinos are not eligible voters, making noncitizenship "[t]he most significant explanation for nonvoting among Latino adults"[133]—is arguably the more serious cause for concern and therefore the focus of the balance of this Review. As far as Latino *group* power is concerned, the basic problem remains one of access;[134] in today's political world, first-order access and second-order group representation concerns remain alive, and, in the case of Latinos, intertwined.[135]

Existing law has an easy and constitutionally grounded answer to this citizenship gap: naturalization. The fact that naturalization is available to lawful permanent residents and is not particularly onerous, requiring only five years of continuous residence in the United States,[136] suggests that the citizenship gap is not a civil rights problem and that assessing Latino participation by looking at aggregate population statistics is obfuscating. Instead, to the extent that we think Latinos in the United States should have the political strength of their numbers, the obvious solution to the access problem is to promote naturalization and consider whether bottlenecks exist in the naturalization process.

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**132.** De la Garza and DeSipio propose various strategies for reducing barriers to Latino registration, including same-day registration. *See* de la Garza & DeSipio, *supra* note 54, at 152-54.

**133.** De la Garza & DeSipio, *supra* note 54, at 148 ("In the 1990s, approximately 40 percent of Latino adults were not U.S. citizens . . . ."); *see also id.* at 146-47 ( "[N]on-U.S. citizen Latino adults have been the most-rapidly growing share of the Latino nonvote. The number of Latino adult non-U.S. citizens increased from 2.6 million in 1976 to 11.0 million in 2004, an increase of nearly 489 percent.").

**134.** In November 2006, for example, 39% of the Hispanic population was eligible to vote, compared to 76% of whites and 65% of blacks. *See* PEW HISPANIC CTR., *supra* note 114, at 4. Given record rates of immigration, this gap is likely to widen, particularly if Congress in the next few sessions opts to legalize the undocumented population, over 70% of which is Latin American in origin. For a discussion of the literature documenting these trends, see Rodríguez, *supra* note 106, at 719-22. For a discussion of the demographics of the undocumented population, see JEFFREY S. PASSEL, PEW HISPANIC CTR., ESTIMATES OF THE SIZE AND CHARACTERISTICS OF THE UNDOCUMENTED POPULATION (2005), *available at* http://www.pewhispanic.org/files/reports/44.pdf.

**135.** While this concern is not irrelevant to other language minority groups, it is of particular concern to Latinos, because of the high rate of immigration from Latin America and the notable growth of the Latino population, which some studies have estimated will constitute "29% of the U.S. population by 2050." *See* JEFFREY S. PASSEL & D'VERA COHN, U.S. POPULATION PROJECTIONS: 2005-2050, at 1 (2008), *available at* http://pewhispanic.org/files/reports/85.pdf.

**136.** *See* 8 U.S.C. § 1427(a) (2000).

Even the possibility of naturalization, however, does not address what at any given time can still be characterized as a democracy problem—that Latinos as a group do not have the power of their numbers. Latinos, citizen and noncitizen, form a community, but they do not have the power to associate formally as a community. A more meaningful response to the citizenship gap, then, could be to provide means for formal inclusion of noncitizens who are permanently resettled in the United States, that is, to recognize noncitizen voting rights.

The following Sections consider naturalization and noncitizen voting, neither of which is likely to involve VRA litigation, as solutions to the Latino participation gap. In this sense, existing law has been outstripped by events on the ground, and addressing today's civil rights concerns requires more than innovating on the previous generation's advancements, as Congress did in 1975 when it extended section 5 and adopted the bilingual ballot. But the citizenship gap still implicates concerns at the heart of the VRA and therefore merits consideration as part of an exploration of how best to achieve its participatory goals. Before exploring naturalization and noncitizen voting as political programs, then, I consider why the current citizenship gap sits on a historical continuum with the history that Landsberg recounts.

### *A. The Citizenship Gap*

The obvious rejoinder to the claim that the citizenship gap presents a democracy problem is that we need not be concerned with the inability of noncitizens to vote. They are, after all, noncitizens.[137] Latinos, along with other groups whose numbers are fed by large-scale immigration, will always face this gap. It is a gap inherent in the nature of an immigrant society, inherent in the existence of a nation state, and it certainly is not a cause of concern for the Voting Rights Act. The Latino access problem arguably bears no resemblance to the access problems faced by the people of Landsberg's history. Not only did the latter face rank race-based discrimination, violence, and intimidation, but also their exclusion was perpetrated despite the presence of a historically rooted national consensus, embodied in the Reconstruction Amendments, that they were members of the political community. If Landsberg's story begins at Time One, then noncitizens are still at Time Zero.[138]

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**137.** As the Supreme Court has explained, "The exclusion of aliens from basic governmental processes is not a deficiency in the democratic system but a necessary consequence of the community's process of self-definition." Cabell v. Chavez-Salido, 454 U.S. 432, 439 (1982).

**138.** In referring to noncitizens, I primarily mean to invoke lawful permanent residents, not tourists or students. Undocumented immigration raises an additional complication. Many

Nonetheless, this citizenship gap has civil rights implications, for two reasons. In the wake of today's heated immigration debate, murmurings that we are at the front edge of a new civil rights movement have emerged.[139] In a recent survey conducted for the Pew Hispanic Center, for example, 62% of native-born and 64% of foreign-born Latinos said they believed the 2006 immigrants' rights marches could have been the start of a new civil rights movement.[140] Concern for economic exploitation of immigrants and growing nativism and racism are features of the immigration debate, and the civil rights movement provides us with our vocabulary for approaching these sorts of social dysfunctions. Indeed, some of the immigration-related measures adopted by state and local governments in recent years resemble the poor laws of the nineteenth century[141] and the segregationist impulse of the twentieth, focused as they are on closing communities off to certain immigrants by denying them very basic needs, such as housing,[142] and generally available municipal services, such as local swimming pools and libraries. Calls for a new civil rights movement have emphasized the moral illegitimacy of using immigrant labor and bringing the full force of the state to bear on immigrants' vested interests through the power to deport, without giving immigrants voice of any kind. Under this formulation, noncitizens, both legal and illegal, are like the personae of Landsberg's story.

What has not yet been articulated clearly, and what ties the first-order access concerns of noncitizens to the second-order political participation

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of these individuals essentially have resettled in the United States. Though I would not suggest that those who are here illegally should be incorporated formally into the political process, the fact that so many are here illegally is related to the restraints on Latino participation generally. It may be that Latino citizens and permanent residents would vote to keep this illegal population out, but their interconnection with the undocumented population, which is necessarily stronger than the connection of the non-Latino population, gives them a special interest in the status of the undocumented.

**139.** *See, e.g.*, Kevin R. Johnson & Bill Ong Hing, *The Immigrant Rights Marches of 2006 and the Prospects for a New Civil Rights Movement*, 42 HARV. C.R.-C.L. L. REV. 99 (2007) (discussing the possibilities of a multiracial civil rights movement centered around immigrant concerns but with broader appeal); David Bacon, *Time for a More Radical Immigrant-Rights Movement*, AM. PROSPECT, July 24, 2007, http://www.prospect.org/cs/articles?article=time_for_a_more_radical_immigrantrights_movement.

**140.** SURO & ESCOBAR, *supra* note 115, at 4-9, 16-17.

**141.** *See* Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 640 (2008).

**142.** *See, e.g.*, Hazleton, Pa., Ordinance 2006-18, § 5 (Sept. 12, 2006) (prohibiting landlords from harboring unlawful immigrants); Hazleton, Pa., Ordinance 2006-13, § 7b (Aug. 15, 2006) (requiring landlords to check potential tenants' occupancy permits issued by city indicating citizenship or lawful status).

concerns of citizens is the fact that these noncitizens are members of the community of Latinos in the United States. Instead of concerning ourselves primarily with the individuals who are situated today as southern blacks were in 1963—a historical analogy that many will find inaccurate, if not specious—we should be concerned with the inability of groups protected by the civil rights laws to progress along the trajectory that grew out of the original VRA. The citizenship gap is not just an issue of immigrants' rights; it is also directly linked to the ability of Latinos qua Latinos to participate in the political process.

In the world of voting rights litigation where group power matters, the fact that a group made up of people with shared interests does not have power commensurate with its numbers should be a cause for concern; the interests of the members of the group may not be overlapping, but they are intertwined. Indeed, the hallmark of the group-based view is not that all members of that group think alike or are fungible, but that certain commonalities will produce shared interests in the outcome of the political process. When the measure of a group, particularly one to whom the VRA is directly addressed, is not fully taken, the pluralist contest suffers, because it becomes less representative and less fair.

This claim, of course, depends on the assumption that Latino citizens and noncitizens form a coherent group. "Latino" is something of a manufactured category, made up of people diverse in national origin, linguistic affiliation, race, class, legal status, and historical attachment to the United States.[143] The Republican party of George W. Bush and Karl Rove has staked its future on the observation that Latino voting behavior is much less homogeneous than African American patterns, which trend decisively Democratic. Downsides to conflating the interests of Latino citizens and immigrants from Latin America certainly exist; as I have written elsewhere, long-entrenched Latino populations exhibit mixed feelings regarding new immigrants and have a strong interest in not being perpetually lumped with newcomers, particularly those who have broken the law to enter or remain in the United States.[144]

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143. *Cf.* Issacharoff, *supra* note 58, at 872 ("[T]he current proliferation of group claims in the voting rights arena stems from a profound disorientation from the crucial factors that justify . . . the 'affirmative' reliance on racial or ethnic classifications. The rationale of *Carolene Products* . . . suggests that a claim for judicial reform of the political process requires a showing both of group disadvantage and of the group's historic inability to redress that disadvantage . . . . Whatever the merits of the 'rainbow coalition' as a matter of political program, not all members of the coalition share these features; not all are entitled to the special solicitude for which they clamor.").

144. *See* Cristina M. Rodríguez, *Latinos and Immigrants*, 11 HARV. LATINO L. REV. (forthcoming 2008).

Latinos have had different experiences with respect to discrimination and exclusion, with Cubans and South Americans having suffered fewer of the traditional difficulties of a minority against whom the majority bears animus than Mexican Americans and Puerto Ricans.

It is indisputable, however, that the interests of foreign- and native-born Latinos overlap and that the mainstream voting population conflates the two groups.[145] Take, for example, the immigration issue. Latino citizens today are more likely than any other group, other than Asian Americans, to be connected to noncitizens. The regulation of noncitizens, including through the effectuation of removal and the denial of public benefits to certain noncitizens, affects the earning potential and familial integrity of citizens. A police department's decision to cooperate with federal authorities in the enforcement of immigration law may be directed at unlawful migrants, but it substantially increases the risk of racial profiling of Latinos, as well as mistaken identity debacles, such as the erroneous arrest of Latino citizens for removal orders outstanding against individuals with similar names.[146] A city's decision to prohibit landlords from renting to unauthorized aliens ostensibly addresses unlawful noncitizens only, but the burden it places on landlords makes them more likely to resist renting to Latinos altogether. These measures as a whole create a climate of hostility toward Latinos that citizen Latinos acutely perceive.[147] This problem is particularly pointed when the relationship is between a U.S. citizen child, who has no voting power, and a noncitizen parent.

Solidarity between Latino citizens and immigrants is thus not chimerical, just complicated. A recent Pew Hispanic Center survey documented that a majority of Latinos, regardless of country of origin, believe that the immigration debate will drive more Hispanics to vote, suggesting that the issue is of particular salience to the group as a whole. Latino citizens may have complex views when it comes to the subject of noncitizens,[148] but they also

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**145.** For an example of this conflation in historical context, see Mae Ngai's discussion of the ways in which Anglos in Texas during the Bracero era conflated illegal immigrants with legal immigrants and Hispanic citizens, and the complex positions on immigration within the Hispanic community that were engendered as a result. *See* MAE M. NGAI, IMPOSSIBLE SUBJECTS (2004).

**146.** *See, e.g.*, Editorial, *Not a Minor Offense: Profiling Is No Way To Find Illegal Immigrants*, DALLAS MORNING NEWS, Sept. 25, 2007, at 10A (noting an incident in which a Hispanic Texas native was nearly deported as the result of mistaken identification).

**147.** *See, e.g.*, SURO & ESCOBAR, *supra* note 115, at 4-9.

**148.** *See id.* (noting also that Puerto Ricans and Cubans are more likely to have restrictive views of immigration, and that foreign-born Latinos are more likely than native-born Latinos to

perceive anti-Latino sentiment in current and vehement opposition to immigration reform and in the ways in which the American media and non-Latino voters characterize the current immigration mess.[149]

In short, the body politic does not always distinguish between citizens and noncitizens when it makes decisions about English-only measures, language education policies, or immigration policies. As a result, Latinos are unable to defend their interests fully as a group, or to the same extent as would be possible were the entire group enfranchised. In fact, it may well be that non-Latino voters take the overall size of the Latino population into account when they consider certain policies; one explanation for English-only, antibilingual education and immigration crackdown measures is voters' perception that the size of the Latino population is threatening cultural cohesion, or the interests of the English-speaking majority. But because Latinos lack the voting power of their numbers, the political deck is stacked against them. For Latinos as a group to have an impact on the political process that reflects and responds to the full significance of these sorts of measures for the Latino community, the group must have the strength of its numbers, and the citizenship gap must be addressed. It is not enough for Latino citizens to act as proxies for Latino noncitizens if the voice citizens possess is not commensurate with the full scope of the issue as it affects the group.

There are at least two complications to this story. First, it is by no means clear that enfranchising Latino noncitizens would cure the turnout problem, or that Latino noncitizens' votes would advance the interests in all cases of Latino citizens. But we would never expect the interests of all the members of a group to align perfectly, and it is probably safe to presume that members' interests are more likely to be advanced if all members of the group can participate in decision making. The more intractable issue is the problem of illegal immigration. The step between acknowledging the interconnection of lawful noncitizen Latinos and citizen Latinos and giving the former formal rights for the benefit of the latter makes sense because the former are already recognized as members and potential future citizens by the law. But the formal incorporation of undocumented noncitizen Latinos, while morally defensible in some contexts, can hardly be translated into a legitimate expectation of the state. No state can be expected to permit those who have violated formal

have concluded that the 2006 immigrants' rights marches had a positive effect on the image of illegal immigrants).

149. *See, e.g.*, *id.* (finding that 82% of Latinos think that discrimination is a problem that prevents Latinos from succeeding in the United States and that more than half of native-born and foreign-born Latinos believe the immigration policy debate has made discrimination against Latinos more of a problem).

membership criteria to have a formal voice. As a result, Latinos today simply cannot have the strength of their numbers.

This problem is not insoluble, however, as strong justification exists for regularizing the status of the unlawful and putting them on the path to formal incorporation.[150] Perhaps incorporating lawful noncitizen Latinos into decision-making processes would hasten this reform and help stem laws targeted at undocumented immigrants. Latinos acting alone cannot make this regularization happen; they must form coalitions—a requirement from which other minority groups are hardly immune. The point of arguing that Latinos should have the strength of their numbers is not to circumvent this basic requirement of politics. It is only to highlight a disparity worth addressing and to suggest that the gap be closed to the extent possible.

### *B. Making Citizens*

The desire among immigrants to naturalize is strong and growing. Recent research by the Pew Hispanic Center indicates that the population of naturalized citizens has reached a historic high of 12.8 million. By 2005, naturalized citizens made up more than half of legal foreign-born residents—the highest rate of naturalization in twenty-five years.[151] Among the explanations for the surge in naturalization applications are imminent naturalization fee increases, the very real prospect that the language and civics requirements will be made more rigorous, and the fact that lawful permanent

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**150.** *See, e.g.*, SEYLA BENHABIB, THE RIGHTS OF OTHERS 214-15, 219-20 (2004) (arguing that a "democratic adjustment of the practices of legal incorporation is needed so as to normalize undocumented immigrants"). I have treated this question elsewhere. *See* Cristina Rodríguez, *Immigration Reform I: Looking Back*, Balkinization, June 27, 2007, http://balkin.blogspot.com/2007/06/immigration-reform-i-looking-back.html.

**151.** *See* JEFFREY S. PASSEL, PEW HISPANIC CTR., GROWING SHARE OF IMMIGRANTS CHOOSING NATURALIZATION, at i (2007), *available at* http://pewhispanic.org/reports/report.php?ReportID=74. Passel notes that "the tendency to naturalize has increased significantly between 1995 and 2005, regardless of an immigrant's individual characteristics," and that the onset of this increased tendency is different from group to group, with the acceleration for long-term immigrants beginning in 1998, for shorter term residents in 2000, for Mexican and Caribbean immigrants in 1998, for immigrants from the Middle East in 2002, and for immigrants from Africa, Europe, and Canada in 2004 or 2005. *See id.* at 17. Even though the naturalization rate for Mexicans has increased more than for any other group, they remain less likely to naturalize than immigrants from other parts of the world, due largely to their comparatively lower levels of education and higher levels of poverty. *See id.* at 17-18. These lower rates may also be explained by the proximity of Mexico to the United States and the correspondingly greater likelihood that Mexicans plan to return to their country of origin, unlike other similarly poor and undereducated immigrants, such as the Vietnamese.

resident status has become increasingly insecure due to the expansion of removal grounds.[152]

To be sure, the efforts to make naturalization more difficult can be defended, particularly to the extent that their aims are to identify lawful permanent residents who place a high value on citizenship and ensure a level of loyalty and acculturation among those who naturalize. The five years of continual residence currently required by law may not be a sufficient proxy for determining qualifications for citizenship. That said, it is precisely in this context that we would be wise to remember the access principle elaborated in Parts I and II—that it is better for those who have permanent residence, or who are permanent members of our community, to be able to participate than it is to turn those individuals into the perfect voters before allowing them to participate.

In the same vein, de la Garza and DeSipio emphasize the importance of streamlining and facilitating naturalization to addressing the root causes of Latino underparticipation. They have proposed that the federal government actively promote naturalization and give grants to community organizations and local governments to encourage naturalization and help immigrants navigate a bureaucratic maze that has only become more complicated in recent years.[153] As I have observed in other work, some states have themselves become active in promoting naturalization, and the possibility for federal-state partnerships in this area has great potential not only to provide stability in immigrant communities, but also to incorporate a growing and increasingly important population into the formal democratic fold.[154] De la Garza and DeSipio suggest that sections 2 and 5 of the VRA could be used to address bottlenecks in the naturalization process; to the extent that states engage in "antinaturalization practices" or impose structures that impede the naturalization process, they arguably are engaging in "initiatives that limit

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**152.** The *New York Times* recently reported that "[t]he number of legal immigrants seeking to become United States citizens is surging . . . prompted by imminent increases in fees to process naturalization applications, citizenship drives across the country and new feelings of insecurity among immigrants." Julia Preston, *Sharp Rise Seen in Applications for Citizenship*, N.Y. TIMES, July 5, 2007, at A1. The Pew Hispanic Center emphasizes more "positive" motivations, including the increasing availability of dual citizenship and the fact that a good economy and a welcoming immigrant community make immigrants feel more secure in the United States, as factors that may play a role. *See* PASSEL, *supra* note 151, at 22; *see also* Nicole Gaouette, *New Citizenship Test Is Unveiled*, L.A. TIMES, Sept. 28, 2007, at A20; *cf.* Press Release, U.S. Citizenship & Immigration Servs., Fact Sheet: USCIS Naturalization Test Redesign (Jan. 22, 2007), *available* at http://www.uscis.gov/files/pressrelease/natztestfs.pdf.

**153.** *See* de la Garza & DeSipio, *supra* note 112, at 1522.

**154.** *See* Rodríguez, *supra* note 141.

Latino voting" and that are, as a result, "retrogressive."[155] Whether states are, in fact, erecting obstacles to naturalization, de la Garza and DeSipio's core insight—that Latinos as a group would benefit from the creation of incentives for immigrants to naturalize—resonates with the democracy-promoting goals of the VRA.

### *C. Incorporating Noncitizens*

As Gerald Rosberg points out in his comprehensive defense of modern noncitizen voting, U.S. historical experience belies the claim that "citizen" and "voter" are synonymous.[156] Though noncitizen voting is a part of the American political heritage, it has largely disappeared from the modern scene.[157] Efforts to put it back on the table have been marginal to the broader democracy agenda and have focused primarily on the local level.

But because of the burgeoning size of the Latino population, a number of scholars from diverse fields have begun advocating noncitizen voting of various sorts in recent years. With the specific interest of closing the citizenship gap for Latinos, de la Garza and DeSipio have proposed permitting lawful permanent residents to vote during the five-year period leading up to their naturalization eligibility. After these five years, they would lose the right to vote if they remain noncitizens, thus creating an incentive for them to naturalize.[158] In his

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**155.** *See* de la Garza & DeSipio, *supra* note 54, at 147-48; *see also id.* at 150 (noting that administrative barriers to naturalization have increased over time). The problem, of course, is not exclusively or even primarily with state governments. The federal citizenship bureaucracy has received much attention of late for its apparent inability to manage record numbers of naturalization applications, leading some commentators to suggest that the maintenance of an "underperforming bureaucracy" reflects hostility toward the naturalization process itself. *Citizenship Blues*, N.Y. TIMES, Feb. 17, 2008, Week in Review, at 11.

**156.** *See* Gerald M. Rosberg, *Aliens and the Right To Vote*, 75 MICH. L. REV. 1092, 1093-1100 (1977) (detailing the history of alien suffrage in the United States).

**157.** For a discussion of the "rise and fall of immigrant voting in U.S. history," see RON HAYDUK, DEMOCRACY FOR ALL: RESTORING IMMIGRANT VOTING RIGHTS IN THE UNITED STATES 15, 15-40 (2006).

**158.** *See* de la Garza & DeSipio, *supra* note 112, at 1522. Note that de la Garza would limit noncitizen voting to local elections, whereas DeSipio would permit voting at the state and federal level as well. *Id.* Advocates have begun to secure the right to vote for noncitizens in school board and other municipal elections in places such as San Francisco, Washington, D.C., and Takoma Park, Maryland. *See* HAYDUK, *supra* note 157, at 111-34, 138-73. A coalition of advocates in New York City repeatedly has introduced legislation in the City Council that would permit noncitizens to vote in various local elections. The city of Cambridge, Massachusetts, regularly files home-rule petitions with the state seeking authorization to

recent work animated by the desire to provide immigrants with a more secure membership status, Hiroshi Motomura advocates similar treatment of lawful permanent residents. He calls for the United States to revive an early twentieth century practice whereby immigrants could file papers declaring themselves intending citizens. Declaration of intent would entitle them to most of the rights of citizenship, including the right to vote, which they would retain only if they naturalized when eligible.[159]

Arguments made for noncitizen voting over the past few decades have coalesced around two basic claims, both of which are worth reinforcing to underscore the legitimacy of noncitizen voting in and of itself. First, the "no taxation without representation" conception of fairness militates in favor of permitting direct noncitizen participation in politics. On the theory that those who are bound by the laws of a society must have the opportunity to influence the making of those laws, permitting at least permanently resettled immigrants to vote seems justified.[160] Indeed, this principle undergirds a growing movement in favor of a human right to political participation that transcends borders.[161]

This sort of participation claim could never be universalized; we would want participants to have something of a broad time horizon vis-à-vis their presence in the United States, and excluding tourists and other temporary sojourners from elections seems required on democratic legitimacy grounds.[162] But the need to exclude marginal players does not refute the claim that settled migrants should be empowered to defend their interests. Indeed, related to the principle-based argument from democracy is the more consequentialist claim that democracy suffers a crisis of legitimacy when hierarchies exist within it, or when large numbers of society's members remain excluded from the ultimate

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extend voting rights to noncitizens in local elections. *See* MICHAEL CASTAGNA ET AL., SECURING NON-CITIZEN VOTING RIGHTS: DETERMINING THE FEASIBILITY OF ENABLING LEGISLATION IN MASSACHUSETTS 1-2 (2005), *available at* http://ase.tufts.edu/uep/Degrees/field_project_reports/2005/4-securing_noncitizen_voting_rights.pdf. For a comprehensive survey of noncitizen voting initiatives today, see HAYDUK, *supra* note 157.

**159.** *See* HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 189-94 (2006).

**160.** For a discussion of these sorts of social contract arguments, see HAYDUK, *supra* note 157, at 59-65. For a discussion of this principle generally, see BENHABIB, *supra* note 150, at 218-21.

**161.** *See* Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1394, 1457 (1993).

**162.** *Cf.* BENHABIB, *supra* note 150, at 219-20 ("[T]he democratic *demos* can reconstitute itself by enfranchising groups without voice. . . . But . . . it is inconceivable that democratic legitimacy can be sustained without some clear demarcation of those in the name of whom the laws have been enacted from those upon whom the laws are not binding.").

forms of decision making. Though some exclusion from democratic politics is always necessary and can be tolerated in a world where international travel is inevitable and desirable, the demographic shift represented by the citizenship gap discussed above makes the concern for legitimacy urgent.[163]

Second, scholars have emphasized the role that voting and participating in pluralist politics can play in securing the assimilation of immigrants.[164] This argument is premised on the assumption that the noncitizens who would vote are in the United States to stay. That assumption, in turn, requires that the state actively promote the incorporation of those inevitable long-term members. Unlike participation in social organizations, voting connects the individual to the entire body politic. He may vote his own interests, but voting more than any other activity binds the individual to his fellow citizens. By giving the noncitizen the opportunity to relate to the polity in this way, voting provides a unique form of access that ultimately promotes continued investment in a community outside of one's own immediate interests. This assimilation claim is somewhat in tension with the idea that noncitizen voters will stand in for the interests of those who remain excluded because it touts voting as a means of drawing immigrants away from their particular interest groups. But, of course, these questions are all ones of degree.

A final claim that has not yet been articulated clearly in the literature on noncitizen voting relates directly to the group-based interests of Latinos and straddles the moral imperative for incorporating noncitizens and the second-order pluralist concerns that also should be part of the discussion of this issue. Specifically, there would be practical, problem-solving benefits to permitting noncitizen suffrage, or to expanding the Latino cohort with the power to weigh in on issues of special interest to Latinos. This formulation relates to the concern that those who are excluded from the political process are likely to be subjected to animus—a rationale that supports the Supreme Court's treatment of alienage as a suspect class.[165] But it adds an important dimension to the argument by emphasizing not that noncitizen participation will permit aliens who are bound by the law to obtain outcomes that are better for them according to the standard interest group story, but that such participation will

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**163.** *See, e.g.*, Marta Tienda, *Demography and the Social Contract*, 39 DEMOGRAPHY 587, 588 (2002). *See generally* LINDA BOSNIAK, THE CITIZEN AND THE ALIEN (2006) (exploring the implications for liberal and democratic theory of the extension of the border into the United States in the form of distinctions between citizens and noncitizens).

**164.** *See, e.g.*, MOTOMURA, *supra* note 159, at 95, 173, 193-94.

**165.** *See* Graham v. Richardson, 403 U.S. 365 (1971) (striking down an Arizona law providing that noncitizens were eligible for welfare only if they had lived in the United States for fifteen years, on the grounds that the law violated equal protection).

produce outcomes that are simply better, because they incorporate more of the interests affected by the law.[166] The point is not that having more inputs would yield policies that reflect a difficult-to-define public good, but that increasing the number of inputs into the electoral process would produce outcomes that more accurately reflect the range of popular expertise needed to resolve the issue.[167]

Even if these normative claims carry the day, questions of political feasibility and implementation remain. On the subject of feasibility, the idea of noncitizen voting remains marginal in both academic and popular discussion. While our constitutional law, as well as public attitudes generally, accept the application of other important democratic values to noncitizens—the rights to free speech,[168] to equal protection of the laws[169] (vis-à-vis states, at least), and to due process of law[170]—voting and office holding, as the quintessential political rights, remain off limits. Restricting the right to vote represents the last and most fundamental control citizens have over noncitizens—the mechanism to ensure that noncitizens cannot transform themselves into citizens on terms to which citizens might object. The limitation on noncitizen voting is also a way of keeping a mystical conception of citizenship alive—that it belongs only to the truest of the true. To give citizenship meaning, it must be exclusive in some way. Because we now think of voting as the quintessential

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**166.** Take, for example, the debate over comprehensive immigration reform. American voters as a whole favor proposals that would regularize the current undocumented population. *See* Tamar Jacoby, *Immigration's Future*, WASH. POST, May 23, 2007, at A21 (noting that "60 to 85 percent of voters" favor legalization). Immigration restrictionists, however, speak in a loud voice and have powerful representatives supporting them because this issue is much more salient to them than to the general public. Those whose level of interest might offset this "squeaky wheel," or those who are most directly affected by matters of immigration policy, are hamstrung in their ability to respond, not because they lack speech rights, but because their speech is of limited interest to lawmakers whose primary concern is pleasing constituents.

**167.** This claim is different from the pure group power argument defended in Section III.A, as its focus is more on the expertise brought in by including noncitizens than the community of interest among citizen and noncitizen Latinos.

**168.** *See* Bridges v. Wixon, 326 U.S. 135, 161-62 (1945) (Murphy, J., concurring) (noting that the amendments of the Bill of Rights, including the First and Fifth Amendments, "extend their inalienable privileges to all 'persons' and guard against any encroachment on those rights by federal or state authority").

**169.** *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886) (establishing that the Equal Protection Clause applies to persons and not only to citizens).

**170.** *See, e.g.*, Zadvydas v. Davis, 533 U.S. 678 (2001) (noting that due process protections apply to noncitizens and interpreting immigration statute to avoid constitutional problem posed by indefinite detention).

expression of political community—a conception advanced in no small measure by the VRA—we use voting to establish the hard outer limits on citizenship.

The claim that citizenship must maintain a political purity of some sort in order to retain value has an intuitive appeal. But this claim is in some tension with the access principle and the notion that universalization of the franchise to the members of a political community is more important than ensuring that all participants are reasonably qualified.[171] Rejecting the devaluation argument need not mean rejecting all membership criteria whatsoever. A showing of commitment to the polity—the willingness to make a pledge of loyalty and a demonstration of minimal capacity to participate in the institution—can be required. Citizenship may be a proxy for that pledge, but as advocates of noncitizen voting have emphasized, better and fairer proxies exist. On the subject of implementation, the key question is what sort of voting rights should be pursued. I have emphasized in other work that the Time Zero reckoning necessary for the formal incorporation of noncitizens is much more likely to occur on a piecemeal basis at the local level than at the national level, simply because Americans' views on this subject are wildly divergent.[172] It helps that, as a conceptual matter, it is easier to defend noncitizen participation in local affairs, which traffic in the quotidian, and thus in the day-to-day matters that affect noncitizens' lives, rather than the larger questions of national belonging. What is more, local voting can be framed as a training ground for citizenship—a means of inculcating participatory norms as preparation for entrance into the larger national political community.

A locally based approach would, of course, deflate the claim that noncitizen voting will help amplify Latino group power, because it would leave the gap in place where it arguably has the greatest impact—at the level of government where major policy, particularly immigration policy, is set. But local noncitizen voting does represent a channel of formal inclusion, which turns noncitizens into constituents whose interests become relevant to localities, which in turn changes the dynamics of how those localities relate to their states and the national government. To the extent that the robustness of the democracy

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**171.** The claim resembles the argument that permitting gay marriage devalues the institution of marriage. Making an institution more plural may diminish its value, and exclusivity is clearly integral to maintaining private clubs and elite institutions. But the idea that for something to have value, others must be excluded from it, is incompatible with institutions such as the polity or marriage, both of which are already plural, widespread, and largely indifferent to merit.

**172.** *See* Rodríguez, *supra* note 141. Local noncitizen voting will, in many cases, require actions by states. In Massachusetts, for example, Cambridge and Amherst have authorized noncitizen voting, but the state of Massachusetts has rejected these cities' home rule petitions. *See* CASTAGNA ET AL., *supra* note 158.

policed by the VRA depends on complete participation by society's salient groups traditionally excluded from the political process, the single biggest access obstacle to achieving that objective cannot be ignored.

Whether it would be better to focus on immigrants qua Latinos or immigrants qua immigrants when addressing these concerns, the noncitizen voting platform depends on disassociating the concept of citizen from the concept of voter. A Time Zero movement designed to make the case for formal noncitizen participation must justify itself on its own terms. But it also should emphasize the ways in which such incorporation would enhance the capacity of Latinos as a group, and hence the pluralist dynamic.

## CONCLUSION

The distance between the voting rights struggles of the people who animate Landsberg's story and the interests of contemporary Latino immigrants is considerable. They have in common, however, a core value that emerges from the story Landsberg tells—the value of access. The Voting Rights Act was designed initially to secure that access for blacks in the South who had been treated as less than citizens for decades as the result of Jim Crow segregation. But the migration of that access principle from the particular case into a landmark piece of social engineering, coupled with the ascendant appreciation of the value of group membership in pluralist politics, ensured that the access principle embodied in the VRA would evolve to reach beyond its original purposes. That evolution has been both innovative and path dependent, as reflected in the heavy emphasis lawmakers still place on the bilingual ballot—a variation on the literacy test ban—as the means of securing access for groups analogous to southern blacks. But in the face of this path dependency, it is crucial for lawmakers and advocates to remain attentive to the limitations of old models, even in their updated forms. Sometimes, as in the case of Latinos in the United States today, to address impediments to participation we must be willing to look outside of the framework of the VRA, with which the idea of democracy has become so bound, to secure both the inclusiveness and robustness of the pluralist dynamic that the VRA was designed to protect.