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## The Perennial Eclipse: Race, Immigration, and How Latinx Count in American Politics

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# ARTICLE

## THE PERENNIAL ECLIPSE: RACE, IMMIGRATION, AND HOW LATINX COUNT IN AMERICAN POLITICS

*Rachel F. Moran\**

### ABSTRACT

In 2016, the U.S. Supreme Court decided *Evenwel v. Abbott*, a case challenging the use of total population in state legislative apportionment as a violation of the Equal Protection Clause. The plaintiffs sued Texas, alleging that the State impermissibly diluted their voting power because they lived in areas with a high proportion of voting-age citizens. When total population was used to draw district lines, the plaintiffs had to compete with more voters to get their desired electoral outcomes than was true for voters in districts with low proportions of voting-age citizens. The Court rejected the argument, finding that states enjoy the discretion to choose among different population bases, including total population.

Since the *Evenwel* decision, there has been ongoing interest at both the federal and state levels in using alternatives such as citizen voting-age population (CVAP) to apportion representation.

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So far, the lack of accurate data on citizenship status has stymied these efforts. Even so, the issues in *Evenwel* deserve more attention than they have received. The choice about how to count when redistricting can have significant ramifications for both partisan power and minority voices. The litigation reveals the ways in which demographic change, especially the rise of immigrant populations, has tested the efficacy of a voting rights jurisprudence that largely focuses on citizens.

After describing the lawsuit and its aftermath, this Article turns to CVAP's potential impact on political representation. The discussion first draws on the work of law professors Joseph Fishkin and Ilya Somin, both of whom conclude that alternative forms of representation significantly mitigate the shortcomings of the formal electoral process. Professor Fishkin focuses on virtual representation of those unable to vote, while Professor Somin emphasizes foot voting to express individual preferences. This Article suggests the limits of these strategies, especially for the undocumented, and then examines the issues from the perspective of immigrant integration. While most immigrants who are legally present in the United States eventually will be eligible to cast a ballot, those without legal status remain disenfranchised no matter how long they reside in and contribute to their communities.

For that reason, it is important to address how a switch to CVAP will affect the political representation of minority communities with substantial numbers of immigrants. This Article's concluding section shows how this change might violate Section 2 of the Voting Rights Act if adopted in Texas. Redrawn maps could result in voter denial if large districts in areas with high proportions of noncitizens depress minority turnout. Under a totality of the circumstances test, altered district lines would be particularly vulnerable because of Texas's history of electoral discrimination, ongoing racial and ethnic disparities, and continuing polarization. The shift could also lead to impermissible voter dilution. Empirical data reveals that Texans remain deeply divided along both partisan and racial lines. Using CVAP instead of total population would strengthen non-Hispanic white and Republican representation while weakening Latinx and Democratic representation. Those effects would be pronounced and, therefore, should be subject to the most exacting judicial scrutiny. Otherwise, a purportedly race-neutral choice about population count could be manipulated to suppress minority

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voters' influence. By considering how the exclusion of those ineligible to vote will harm the minority electorate, courts can retool and revitalize Section 2 jurisprudence to meet the challenges of a changing demography.

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## I. INTRODUCTION

On the eve of a momentous presidential election, it seems fitting to speak about politics in a state as influential to our national debates as Texas. The Lone Star State's significance has been recognized for years. Most notably, Republican strategists have worried about how to preserve their party's dominance despite growing diversity in the population, especially the rising number of Latinx residents. As Mick Mulvaney noted in 2015:

There are three million Hispanic people in Texas who will be able to register to vote before the next election, 2016, three million new Hispanic voters who are not eligible to vote in 2012 but will be eligible to vote in 2016. If the next Republican candidate for President gets the same percentage of the Hispanic vote that Mitt Romney got, we will lose Texas. Not in 2024, not in 2020, but in 2016. And if we lose

Texas folks, I've got news for you, we're never gonna elect a Republican president again.<sup>1</sup>

Around the same time that Mulvaney was lamenting the future of the Republican Party in Texas, the U.S. Supreme Court was deciding *Evenwel v. Abbott*, a lawsuit challenging the state's reliance on total population rather than citizen voting-age population (CVAP) when apportioning legislative districts.<sup>2</sup> The proposed shift to CVAP would have excluded young people and immigrants, significantly reducing Latinx and Democratic representation while bolstering non-Hispanic white and Republican influence.<sup>3</sup> The Court ultimately held that Texas was not required to use CVAP but left open whether it could choose this method or other alternatives to total population count.<sup>4</sup>

Because the Court declined to impose clear constraints on official discretion, there has been relatively little commentary on *Evenwel's* implications. That is a mistake, and I feel fortunate to have the remarkable platform of the Frankel Lecture to call attention to the importance of who counts in apportionment decisions. There will certainly be more battles regarding these issues. In fact, both federal and state officials have expressed an interest in switching from total population to CVAP.<sup>5</sup> So, it behooves us to develop a deeper understanding of the case's implications now. After reviewing the dispute in *Evenwel*, this Article will address some valuable commentary on methods of representation, focusing on the work of Professor Fishkin and Professor Somin. Each offers a cogent assessment of features of the electoral system that transcend an individual's formal right to

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1. Joshua S. Sellers, *Election Law and White Identity Politics*, 87 FORDHAM L. REV. 1515, 1530 & n.73 (2019) (citing Frontline PBS, *Rep. Mick Mulvaney Chastises Fellow Republicans on Immigration*, YOUTUBE, at 02:17 (Oct. 26, 2015), <https://www.youtube.com/watch?v=6T5lMHNcPUI> [<https://perma.cc/JGY8-JS3K>]).

2. *Evenwel v. Abbott*, 578 U.S. 54, 57 (2016).

3. Richard L. Hasen, *New Memo Reveals the Census Question Was Added to Boost White Voting Power*, SLATE (May 30, 2019, 11:59 AM), <https://slate.com/news-and-politics/2019/05/census-memo-supreme-court-conservatives-white-voters-alito.html> [<https://perma.cc/c2PH-ETWW>].

4. *Evenwel*, 578 U.S. at 74–75.

5. Travis Crum, *Deregulated Redistricting*, 107 CORNELL L. REV. 359, 379–80 (2022); Alexa Ura, *Trump Pushes to Exclude Undocumented Immigrants When Congressional Seats Are Divvied Up Next Year*, TEX. TRIB. (July 21, 2020, 1:00 PM), <https://www.texastribune.org/2020/07/21/trump-undocumented-immigrants-census-redistricting/> [<https://perma.cc/PX85-32AF>].

vote.<sup>6</sup> After evaluating their arguments, this Article will explore why their approaches do not fully address the perils posed by *Evenwel*'s proposed shift to CVAP. Because that shift would exclude noncitizens from the population count, I next turn to concerns about the potential impact on immigrant integration. At present, long-term undocumented residents without a pathway to citizenship are permanently disenfranchised in federal, state, and most local elections, while permanent residents typically cannot vote until they apply for and receive citizenship.<sup>7</sup> Immigrant-focused measures, such as a path to citizenship for some undocumented residents or voting rights for permanent residents in municipal elections, could be effective ways to include the foreign-born in the political process. However, these reforms are unlikely to be widely adopted anytime soon. For that reason, reliance on total population rather than CVAP will remain an important way to protect immigrants' concerns by ensuring that they count in the districts where they live. I close by considering whether adoption of a CVAP formula might, under circumstances like those in Texas, violate Section 2 of the Voting Rights Act by impermissibly diminishing the influence of minority-group voters, particularly Latinx.

## II. *EVENWEL V. ABBOTT*: TESTING THE BOUNDARIES OF WHO COUNTS

In 2016, the U.S. Supreme Court decided *Evenwel v. Abbott*.<sup>8</sup> The plaintiffs, led by Sue Evenwel, sued Governor Greg Abbott because Texas used total population when drawing the boundaries of state legislative districts.<sup>9</sup> Evenwel argued that this approach violated the Equal Protection Clause because it impermissibly diluted her vote.<sup>10</sup> To make her voter equality claim, Evenwel showed that she lived in an area with a high proportion of eligible voting-age citizens, while other Texans resided in districts with

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6. Joseph Fishkin, *Taking Virtual Representation Seriously*, 59 WM. & MARY L. REV. 1681, 1727 (2018); ILYA SOMIN, *FREE TO MOVE: FOOT VOTING, MIGRATION, AND POLITICAL FREEDOM* 16–19 (rev. ed. 2020).

7. *Who Can and Cannot Vote*, USAGOV, <https://www.usa.gov/who-can-vote> [<https://perma.cc/D4Z8-479N>] (last updated Feb. 20, 2024).

8. *Evenwel*, 578 U.S. at 54.

9. *Id.* at 57, 62.

10. *Id.* at 62.

much lower percentages of eligible citizens.<sup>11</sup> She demonstrated that in her legislative district, there were 557,525 eligible voting-age citizens in 2005–2009 compared to just 506,235 in another district.<sup>12</sup> That meant that Evenwel had to compete with proportionately more voters for her voice to be heard.<sup>13</sup>

The Court made short work of the case, unanimously rejecting Evenwel’s challenge.<sup>14</sup> In an opinion by Justice Ruth Bader Ginsburg, the Court concluded that Texas could rely on total population when apportioning representation in the state legislature but declined to resolve whether officials might use CVAP, the registered voter population, or some combination of metrics like those.<sup>15</sup> The Court did not adopt any particular theory of political representation,<sup>16</sup> although some Latinx legislators in Texas argued that the shift to CVAP would leave historically underrepresented groups with less access to elected officials. Emphasizing the harms to representational equality, these legislators demonstrated that Latinx would find themselves in larger districts with fewer minority representatives under plaintiffs’ proposed maps.<sup>17</sup>

The *Evenwel* decision left unanswered whether Texas and other jurisdictions could rely on CVAP rather than total population. Subsequent developments at both the national and state level indicate ongoing interest in implementing the new metric. The Trump administration unsuccessfully tried to add a

11. Brief for Appellants at 10, *Evenwel*, 578 U.S. 54 (No. 14-940). This argument for voter equality focuses on inequities in the strength of votes that are cast. Steven J. Mulroy, *Coloring Outside the Lines: Erasing “One-Person, One-Vote” & Voting Rights Act Line-Drawing Dilemmas by Erasing District Lines*, 85 MISS. L.J. 1271, 1280–81, 1289–90 (2017); see J. Colin Bradley, *The Continued Relevance of the Equal Access Theory of Apportionment*, 96 N.Y.U. L. REV. ONLINE 1, 12–13 (2021).

12. Brief for Appellants, *supra* note 11, at 10–12.

13. *Id.* at 10, 18.

14. *Evenwel*, 578 U.S. at 74–75.

15. *Id.*

16. See *id.* at 63–64, 71–73. The State of Alabama sought to revisit these issues in a lawsuit alleging that the use of total population count in apportioning congressional seats and electoral votes violated the federal government’s duty to conduct an “actual Enumeration” of the population. The claim was dismissed with prejudice in 2021. *Alabama v. U.S. Dep’t of Com.*, 546 F. Supp. 3d 1057, 1063–69 (M.D. Ala. 2021).

17. Brief for *Amici Curiae* Texas Senators in Support of the Appellees at 16–19, *Evenwel*, 578 U.S. 54 (No. 14-940); Brief of the Texas Senate Hispanic Caucus and the Texas House of Representatives Mexican American Legislative Caucus as *Amici Curiae* in Support of Appellees at 17–19, *Evenwel*, 578 U.S. 54 (No. 14-940). Representation equality stresses the importance of serving a similar number of constituents regardless of their voting status. Bradley, *supra* note 11, at 7. For an account of how competing theories of political representation affect immigrants, see Ming H. Chen & Hunter Knapp, *The Political (Mis)Representation of Immigrants in Voting*, 92 U. COLO. L. REV. 715, 722–23 (2021).

citizenship question to the 2020 census to generate information that would make a CVAP count administrable.<sup>18</sup> The Supreme Court ultimately rebuffed the effort based on procedural irregularities that revealed Secretary of Commerce Wilbur Ross's reliance on pretextual reasons for including the question.<sup>19</sup> After that setback, Secretary Ross issued a memorandum ordering the exclusion of undocumented immigrants from the count when apportioning seats in the U.S. House of Representatives.<sup>20</sup> Several district courts enjoined enforcement of Ross's mandate before the Supreme Court vacated the decisions in December 2020 on standing grounds.<sup>21</sup> Shortly after taking office, President Joseph Biden rescinded the Ross memorandum, requiring total population to be used.<sup>22</sup> At the state level, Missouri passed a constitutional amendment in November 2020 that authorizes a CVAP count in apportioning legislative seats.<sup>23</sup> Nebraska also proposed legislation in 2018 that would prohibit its political subdivisions from counting noncitizens when apportioning districts.<sup>24</sup> Maine's state constitution excludes "foreigners not naturalized" from the population base used to apportion representation on county commissions.<sup>25</sup> Finally, Arizona and Texas have expressed an interest in using CVAP in redistricting should the necessary data become available.<sup>26</sup>

18. Crum, *supra* note 5, at 400; Justin Levitt, *Citizenship and the Census*, 119 COLUM. L. REV. 1355, 1374–77 (2019); Ming Hsu Chen, *The Political (Mis)Representation of Immigrants in the Census*, 96 N.Y.U. L. REV. 901, 918, 920–21 (2021).

19. *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2562, 2575–76 (2019).

20. *See* *Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census*, 85 Fed. Reg. 44679, 44679–80 (July 23, 2020).

21. *New York v. Trump*, 485 F. Supp. 3d 422, 476–78, 481–82 (S.D.N.Y. 2020), *vacated and remanded*, 141 S. Ct. 530 (2020); *City of San Jose v. Trump*, 497 F. Supp. 3d 680, 686, 743–44 (N.D. Cal. 2020), *vacated and remanded*, 141 S. Ct. 1231 (2020); *Useche v. Trump*, No. 8:20-cv-02225-PX-PAH-ELH, 2020 WL 6545886, at \*1 (D. Md. Nov. 6, 2020), *vacated and remanded*, 141 S. Ct. 1231 (2020).

22. Exec. Order No. 13986, *Ensuring a Lawful and Accurate Enumeration and Apportionment Pursuant to the Decennial Census*, 86 Fed. Reg. 7015, 7015–17 (Jan. 20, 2021).

23. Chen, *supra* note 18, at 927; Crum, *supra* note 5; YURIJ RUDENSKY ET AL., *REPRESENTATION FOR SOME: THE DISCRIMINATORY NATURE OF LIMITING REPRESENTATION TO ADULT CITIZENS 4* (Brennan Ctr. for Just. 2021).

24. Leg. 1115, 105th Leg., 2d Sess. § 1 (Neb. 2018). There would have been difficulties in implementing the bill because of a lack of data on citizenship status. Joshua S. Sellers & Erin A. Scharff, *Preempting Politics: State Power and Local Democracy*, 72 STAN. L. REV. 1361, 1387 n.150 (2020).

25. ME. CONST. art. IX, § 25(1)(A).

26. TYE RUSH ET AL., *WHITEWASHING REPRESENTATION: HOW USING CITIZENSHIP DATA TO GERRYMANDER WILL UNDERMINE OUR DEMOCRACY* 17 (Com. Cause 2019), [https://www.commoncause.org/wp-content/uploads/2019/10/WhitewashingRepresentation\\_WEBFINAL.pdf](https://www.commoncause.org/wp-content/uploads/2019/10/WhitewashingRepresentation_WEBFINAL.pdf) [<https://perma.cc/EYP7-BYUR>].



Perhaps because the Court left the permissibility of switching to CVAP unresolved, *Evenwel* has not attracted a great deal of media or scholarly attention. When the case was filed, some news stories depicted the litigation as a battle over rural and urban representation. In doing so, reporters largely downplayed the partisan implications of *Evenwel*'s approach and the impact on Latinx.<sup>27</sup> Later, the lawsuit received renewed attention when civil rights organizations sued to enjoin the Department of Commerce from adding a citizenship question to the 2020 U.S. Census.<sup>28</sup> During discovery, a memorandum prepared by Thomas Hofeller, known as the Republican Michelangelo of gerrymandering, came to light.<sup>29</sup> The memorandum summarized research he had done to determine whether a case like *Evenwel*'s should be filed. His findings made clear that a shift from total population to CVAP in Texas would help Republicans and non-Hispanic whites while it hurt Democrats and Latinx.<sup>30</sup> Despite the incontrovertible evidence that race and partisanship played a role in the push to mandate CVAP, much of the popular press coverage focused on Ross and his improper behavior in pressing for a citizenship question.<sup>31</sup> Meanwhile, law review articles mainly emphasized the administrability of a formula based on CVAP, given the lack of

27. See, e.g., Adam Liptak, *Supreme Court Agrees to Settle Meaning of 'One Person One Vote'*, N.Y. TIMES (May 26, 2015), <https://www.nytimes.com/2015/05/27/us/supreme-court-to-weigh-meaning-of-one-person-one-vote.html> [<https://perma.cc/R2GV-JJPR>]; Warren Richey, *Supreme Court to Examine if Texas Districts Violate One Person, One Vote*, CHRISTIAN SCI. MONITOR (May 26, 2015), <https://www.csmonitor.com/USA/Justice/2015/0526/Supreme-Court-to-examine-if-Texas-districts-violate-one-person-one-vote> [<https://perma.cc/6X9M-BCKY>]; Richard Wolf, *Supreme Court to Consider Redefining 'One-Person, One-Vote'*, DES MOINES REG. (May 27, 2015), <https://www.newspapers.com/newspage/108127198> [<https://perma.cc/VF7P-4RE7>]; David G. Savage & David Lauter, *'1 Person, 1 Vote' Rule to Be Weighed by 9 Justices*, S. FLA. SUN SENTINEL (May 27, 2015), <https://sun-sentinel.newspapers.com/image/265663811> [<https://perma.cc/7MMX-YM43>].

28. *New York to Lead States in Suing over Citizenship Question on Census*, GUARDIAN (Mar. 27, 2018, 4:15 PM), <https://www.theguardian.com/us-news/2018/mar/27/us-census-citizenship-question-2020> [<https://perma.cc/2HAT-FTME>].

29. Michael Wines, *Deceased G.O.P. Strategist's Hard Drives Reveal New Details on the Census Citizenship Question*, N.Y. TIMES (May 30, 2019), <https://www.nytimes.com/2019/05/30/us/census-citizenship-question-hofeller.html> [<https://perma.cc/RRV6-YWTZ>].

30. *Id.*

31. See, e.g., Michael Wines, *Inside the Trump Administration's Fight to Add a Citizenship Question to the Census*, N.Y. TIMES (Nov. 4, 2018), <https://www.nytimes.com/2018/11/04/us/wilbur-ross-commerce-secretary.html> [<https://perma.cc/U5KP-K6A6>]; Mike Schneider, *Watchdog: Wilbur Ross Mised on Reason for 2020 Census Citizenship Question*, USA TODAY, <https://www.usatoday.com/story/news/politics/2021/07/19/wilbur-ross-mised-congress-census-citizenship-question-watchdog/8017463002/> [<https://perma.cc/UF2-37BQ>] (July 21, 2021, 9:36 AM); Salvador Rizzo, *Wilbur Ross's False Claim to Congress that the Census Citizenship Question Was DOJ's Idea*, WASH. POST (July 30, 2018, 3:00 AM), <https://www.washingtonpost.com/news/fact-checker/wp/2018/07/30/wilbur-rosss-false-claim-to-congress-that-the-census-citizenship-question-was-doj-idea/> [<https://perma.cc/X8DA-G9E7>].

reliable data on citizenship.<sup>32</sup> Some scholars did reflect on theories of democratic representation that figured in the *Evenwel* litigation. For instance, Professor Joseph Fishkin explored the concept of virtual representation, questioning whether those eligible to vote are reliable representatives of the disenfranchised.<sup>33</sup> He concluded that, to the extent that communities of interest are segregated, geography becomes a surprisingly effective way of preserving high-quality virtual representation.<sup>34</sup>

The *Evenwel* case deserves more attention than it has received. The lawsuit reveals how misplaced assumptions about race and citizenship could hamper the nation's ability to achieve democratic equality. The Court's decision is largely agnostic about the significance of substantial disparities in voter eligibility based on race or ethnicity. By suggesting that a formula based on either total population or CVAP might be permissible, the Court fails to acknowledge how recent decades of immigration complicate a paradigm of voter equality based on race. These difficulties go beyond the Justices' interpretation of the Equal Protection Clause and ultimately implicate protections under the Voting Rights Act. When the Act was first passed in 1965, Asian Americans and Latinx accounted for less than 5% of the U.S. population.<sup>35</sup> Consequently, Congress looked primarily to Blacks and non-Hispanic whites in framing protections. Neither group included large numbers of immigrants, so legislators likely presumed that there were no substantial differences in eligibility to vote based on race.<sup>36</sup> Ten years later, Congress explicitly acknowledged the

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32. See, e.g., Nathaniel Persily, *Who Counts for One Person, One Vote?*, 50 U.C. DAVIS L. REV. 1395, 1403–15 (2017); Nathaniel Persily, *The Law of the Census: How to Count, What to Count, Whom to Count, and Where to Count Them*, 32 CARDOZO L. REV. 755, 774–76 (2011). Professor Persily also filed an amicus brief in the *Evenwel* case that addressed these issues. Brief of Nathaniel Persily, Bernard Grofman, Stephen Ansolabehere, Charles Stewart III, and Bruce E. Cain as *Amicus Curiae* in Support of Appellees at 6–10, *Evenwel v. Abbott*, 578 U.S. 24 (2015) (No. 14-940).

33. See generally Fishkin, *supra* note 6.

34. *Id.* at 1711.

35. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (Aug. 6, 1965) (codified at 52 U.S.C. §§ 10101, 10301–14, 10501–08, 10701–02); Muzaffar Chishti et al., *Fifty Years On, the 1965 Immigration and Nationality Act Continues to Reshape the United States*, MIGRATION POLY INST. (Oct. 15, 2015), <https://www.migrationpolicy.org/article/fifty-years-1965-immigration-and-nationality-act-continues-reshape-united-states> [<https://perma.cc/Z9T2-U73D>] (reporting that non-Hispanic whites accounted for 84% of the U.S. population while Latinos accounted for 4% and Asian Americans for less than 1%).

36. The foreign-born represented 5% of the total population in 1965, and 80% were white. Just 1% of the foreign-born were Black, while 14% were Latino and 5% were Asian.

nation's growing diversity by including protections for linguistic minority voters.<sup>37</sup> However, the 1975 legislation did not revisit the distribution of eligibility for citizenship across racial and ethnic groups. Instead, the law remained focused on eligible voters and the need to empower them to exercise the franchise.<sup>38</sup>

*Evenwel* drew attention to substantial gaps in eligibility to vote, as an amicus brief filed by the Leadership Conference on Civil and Human Rights and other public interest organizations demonstrates.<sup>39</sup> Based on 2013 data, 79.1% of non-Hispanic whites were eligible to vote as were 70.2% of Blacks.<sup>40</sup> This was a meaningful difference, but the biggest gaps emerged for Latinx and Asian American voters. Just 45.2% of Latinx and 54.5% of Asian Americans were eligible voters.<sup>41</sup> For Latinx, both youth and immigration status resulted in low levels of eligibility, while for Asian Americans, immigration status was the primary driver.<sup>42</sup> The failure to recognize these systematic differences has contributed to a narrative attributing low rates of political mobilization among Latinx to lack of interest or motivation. Latinx have repeatedly been described as the sleeping giant of American politics, a constituency that could exercise real power if only it could rouse itself and get to the polls.<sup>43</sup> In fact, the giant has found

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PEW RSCH. CTR., MODERN IMMIGRATION WAVE BRINGS 59 MILLION TO U.S., DRIVING POPULATION GROWTH AND CHANGE THROUGH 2065: VIEWS OF IMMIGRATION'S IMPACT ON U.S. SOCIETY MIXED (Sept. 28, 2015). Given that non-Hispanic whites made up 84% of the population, this meant that less than 5% were immigrants. By contrast, both Latinos and Asians made up a significantly higher share of the foreign-born population than the total population. See Chishti et al., *supra* note 35.

37. An Act of August 6, 1975, Pub. L. No. 94-73, 1975 U.S.C.C.A.N. (89 Stat.) 400, 402–03 (codified at 52 U.S.C. § 10503). During passage of the original act, Congress had recognized language issues that affected Puerto Ricans, but the language protections were limited to “persons educated in American-flag schools in which the predominant classroom language was other than English.” 52 U.S.C. § 10303(e)(1). The U.S. Supreme Court upheld the constitutionality of the measure in *Katzenbach v. Morgan*, 384 U.S. 641, 646–47 (1966). For a useful history of language rights under the Voting Rights Act, see Angelo N. Ancheta, *Language Accommodation and the Voting Rights Act*, in VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER 293, 295–300 (Ana Henderson ed., 2007).

38. Terry M. Ao, *When the Voting Rights Act Became Un-American: The Misguided Vilification of Section 203*, 58 ALA. L. REV. 377, 379–80 (2006).

39. Brief of the Leadership Conference on Civil and Human Rights et al. as *Amici Curiae* in Support of Appellees at 3, *Evenwel v. Abbott*, 578 U.S. 54 (2016) (No. 14-940).

40. *Id.* at 1c–2c, 4c.

41. *Id.* at 3c–4c.

42. *Id.* at 25–27, 3c–4c; see Chen, *supra* note 18, at 908, 912 (describing the growing divergence between total population and voting population in the United States since the 1960s).

43. MICHAEL RODRÍGUEZ-MUÑIZ, FIGURES OF THE FUTURE: LATINO CIVIL RIGHTS AND THE POLITICS OF DEMOGRAPHIC CHANGE 114, 126–27, 163–64 (2021).

itself in a Procrustean political bed with its legs cut off by low levels of eligibility for the franchise.<sup>44</sup> The persistent neglect of structural barriers to participation has affected the public perception of Latinx as an electoral bloc: slow, lumbering, and difficult to awaken.

### III. THE IMPACT OF THE DISENFRANCHISED ON POLITICAL REPRESENTATION

A fundamental question, one not addressed by the Court, is whether this persistent neglect of disparities in voter eligibility undermines the legitimacy and representativeness of the democratic process. Both Professor Fishkin and Professor Somin offer valuable accounts of how shortcomings in the formal electoral process can be mitigated by dynamics that go largely unacknowledged by courts, policymakers, and scholars. Professor Fishkin argues that even when individuals are disenfranchised, voters' virtual representation can confer meaningful benefits. In his view, *Evenwel* was an occasion to take "aim[] at the soft underbelly of our present system: its extensive yet undertheorized reliance on virtual representation."<sup>45</sup> Fishkin admits that "[n]obody likes virtual representation," but nonetheless, it is an inevitable feature of our democratic history and process.<sup>46</sup> Early in life, children are too immature to make an informed decision, and immediately upon arrival, immigrants are typically not eligible to cast a ballot.<sup>47</sup> Because it is not possible to enfranchise all nonvoters, Fishkin focuses on the quality of virtual representation.<sup>48</sup> As he explains, the American political system has relied on geography to allocate representation.<sup>49</sup> Because segregation has created communities of shared identity and interest, "the dead-simple geographic pin-drop approach tends to be fairly effective at clumping nonvoters with voters who are 'inseparably connected in their interests' along lines of geography,

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44. Luis Noe-Bustamante et al., *Where Latinos Have the Most Eligible Voters in the 2020 Election*, PEW RSCH. CTR. (Jan. 31, 2020), <https://www.pewresearch.org/short-reads/2020/01/31/where-latinos-have-the-most-eligible-voters-in-the-2020-election/> [<https://perma.cc/3RZH-GDX5>] (finding that Latinos have the smallest share of eligible voters of any racial or ethnic group).

45. Fishkin, *supra* note 6, at 1685–86.

46. *Id.* at 1682, 1686–89.

47. *Id.* at 1686.

48. *Id.* at 1689.

49. *Id.* at 1710–11.

partisanship, race, and some other axes besides.”<sup>50</sup> This system works so well that “for all its flaws, [it] amounts to an unintentionally elegant solution to the problem of how to achieve tolerably good virtual representation.”<sup>51</sup>

Meanwhile, Professor Somin contends that access to the formal electoral process is less important than the ability to vote with one’s feet. He believes that Americans rationally conclude that investing time and energy in casting a ballot is not worth the effort because any given individual’s vote has a negligible influence on the outcome.<sup>52</sup> For that reason, Somin questions whether political representation through the formal electoral process offers a truly robust and reliable expression of an individual’s preferences.<sup>53</sup> He concludes that the weaknesses of ballot-box voting can be overcome by “foot voting,” that is, decisions to migrate from one jurisdiction to another.<sup>54</sup> Voting with one’s feet reflects preferences based on governance practices, tangible resources, and other comparative advantages.<sup>55</sup> For Somin, foot voting involves high-stakes decisions that prompt people to carefully investigate the pros and cons of uprooting themselves.<sup>56</sup>

Even disenfranchised immigrants can vote with their feet, Somin says, and this “is often a life-altering experience that massively improves their situation for the better.”<sup>57</sup> Foot voting does not do away with virtual representation, of course. Minor children, for instance, are not free to move as they wish from one place to another; they must depend on their parents to make that choice for them. But Somin likely hopes that because foot voting is based on substantial information and careful deliberation, the quality of virtual representation will be better than that achieved

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50. *Id.* at 1711.

51. *Id.* at 1718.

52. SOMIN, *supra* note 6, at 16–19; Ilya Somin, *Foot Voting, Political Ignorance, and Constitutional Design*, 28 SOC. PHIL. & POL’Y, Winter 2011, at 202, 204–06.

53. Ilya Somin, *Why Political Ignorance Undermines the Wisdom of the Many*, 26 CRITICAL REV. 151, 156–58 (2014).

54. The most common form of foot voting involves moving from one jurisdiction to another in a federal system, though Professor Somin also recognizes foot voting through international migration and foot voting in the private sector. SOMIN, *supra* note 6, at 2, 7–8.

55. Somin, *supra* note 52, at 210–11.

56. SOMIN, *supra* note 6, at 19; Somin, *supra* note 53, at 165–66.

57. SOMIN, *supra* note 6, at 2, 68–70.

through the formal electoral process.<sup>58</sup> Interestingly, like Fishkin, Somin prefers compact geographical jurisdictions, but his reasons are different. Fishkin believes that these districts coincide with more cohesive communities of interest, while Somin finds that smaller units of government make moving easier and offer more choices to the foot voter.<sup>59</sup>

Both Fishkin's and Somin's analyses suggest that significant disparities in eligibility to vote among racial and ethnic groups are not cause for serious concern because the disenfranchised will enjoy the benefits of virtual representation or foot voting. Yet there are limits to these assertions. Virtual representation depends on geographically proximate voters sharing the same political preferences as the disenfranchised. Some ethnographic research casts doubt on this assumption, especially for the undocumented. Sociologist Abigail Leslie Andrews describes unauthorized immigrants' experiences in two communities in southern California.<sup>60</sup> In both locations, migrants arrived from the Mexican state of Oaxaca. Those from the village of Partida settled in Los Angeles, while those from Retorno lived in a county north of San Diego.<sup>61</sup> These two destinations adopted widely divergent approaches to undocumented immigrants. Los Angeles officials refrained from harsh enforcement, while San Diego authorities targeted immigrants and turned the undocumented over to immigration officers for deportation.<sup>62</sup> Though the two areas were near one another, the politics were vastly different, probably due to mobilization by labor unions and pro-immigrant social movements in Los Angeles.<sup>63</sup> In turn, differences in the treatment of undocumented immigrants led to distinct feelings of belonging. Those in Los Angeles believed that if they worked hard and obeyed the law, they would not be deported, while those in north San Diego County felt alienated, powerless, and afraid due to arbitrary

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58. Somin alludes to this when he says that “[f]oot voting need not always be completely individualistic. Families and businesses, for example, make foot-voting decisions that require the assent of more than one person. But in most such cases, there are individuals who can either make the choice all on their own or at least exercise a high degree of influence.” *See id.* at 8, 19.

59. Fishkin, *supra* note 6, at 1718, 1720 (noting the need for single-member geographic districts that align with communities in which people live or have lived); Somin, *supra* note 52, at 224–26 (describing the importance of decentralized government to allow individuals to vote with their feet).

60. ABIGAIL LESLIE ANDREWS, UNDOCUMENTED POLITICS: PLACE, GENDER, AND THE PATHWAYS OF MEXICAN MIGRANTS 6 (2018).

61. *Id.* at 13–14.

62. *Id.* at 60–64, 77–78.

63. *Id.* at 15–16, 63–65.

and aggressive enforcement practices.<sup>64</sup> If geographic proximity alone reliably operates as a significant guarantor of high-quality virtual representation, it is hard to explain the stark contrasts in local representation that Andrews observed.

Even when virtual representation does occur, as it seemed to in Los Angeles, there can be costs for those who cast ballots. Some Latinx have reported that they feel obligated to vote and to consider the needs of disenfranchised undocumented immigrants.<sup>65</sup> Similarly, Puerto Ricans on the mainland at times have said that they must represent compatriots who remain on the island and have no way to vote in national elections that affect conditions there.<sup>66</sup> These accounts suggest that virtual representation can impose unique burdens on voters who weigh the preferences of the disenfranchised. There may be only so many goods and services for which a voting bloc can bargain. In New York, for instance, trade-offs had to be made between pushing for benefits for Puerto Ricans in the city and those who remained on the island.<sup>67</sup> Other voters, less burdened by an obligation of virtual representation, can simply push for their desired gains.

Fishkin's account presumes that residential segregation will do the work of making geography an elegant solution to the problem of high-quality virtual representation.<sup>68</sup> That assumption creates problematic dynamics for the goal of racial integration. The temptation to segregate to achieve greater political voice is real. Consider, for instance, New York Times columnist Charles Blow's proposal that Blacks migrate to the South to enhance their

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64. *Id.* at 60–63.

65. *See, e.g.*, Angela Gutierrez et al., *Somos Más: How Racial Threat and Anger Mobilized Latino Voters in the Trump Era*, 72 POL. RSCH. Q. 960, 971, 973 (2019) (reporting that a sense of immigrant-linked fate prompted Latinos to engage in political activities); Eva Frishberg et al., *Designing for Meaning: Using Behavioral Science to Mobilize the Latino Vote*, IDEAS42, at 5 (Oct. 2020), <https://www.ideas42.org/wp-content/uploads/2020/10/Using-Behavioral-Science-to-Mobilize-the-Latino-Vote.pdf> [<https://perma.cc/3RZH-GDX5>] (concluding that “[v]oters who come from mixed status households” of legally present citizens or permanent residents and undocumented immigrants felt “a responsibility to vote on behalf of family members who could not use their voice”); *see also* Ariel White, *When Threat Mobilizes: Immigration Enforcement and Latino Voter Turnout*, 38 POL. BEHAV. 355, 369, 372 (2016) (discussing how harsh treatment of undocumented immigrants helped to mobilize Latino voters even if they were not subject to the policies). *But see* Marcel Roman et al., *How Social Ties with Undocumented Immigrants Motivate Latinx Political Participation*, 75 POL. RSCH. Q. 661, 667 (2022) (finding that Latinx with social ties to undocumented immigrants were more likely to protest but not more likely to vote).

66. *See* Frishberg et al., *supra* note 65, at 7; BENJAMIN FRANCIS-FALLON, *THE RISE OF THE LATINO VOTE: A HISTORY* 37 (2019).

67. FRANCIS-FALLON, *supra* note 66, at 35–39, 41–44.

68. Fishkin, *supra* note 6, at 1711.

influence over electoral politics.<sup>69</sup> For minority groups with substantial numbers of disenfranchised individuals, the pressures to preserve cohesive communities are probably even greater. Patterns of mobility that reduce racial or ethnic concentration in immigrant enclaves threaten to leave the disenfranchised with compromised virtual representation.<sup>70</sup>

As for foot voting, Somin acknowledges concerns that not all individuals are similarly able to uproot themselves, but he nonetheless finds evidence that a high percentage of low-income people in the United States have moved. As a result, he concludes that foot voting is within the reach of the less advantaged.<sup>71</sup> Somin takes a similar position when it comes to immigrants. He argues that immigration across national boundaries can be transformative not only for individuals but for national economies. He suggests that the world's gross national product could double if there was free mobility across borders.<sup>72</sup> Harsh immigration enforcement policies pose impediments to foot voting, and these practices “undermine the freedom of native-born Americans as well as immigrants” when “millions of native-born Americans cannot hire the workers they want, associate with the businesses that they choose, nor benefit from the entrepreneurship of immigrants . . . .”<sup>73</sup>

These are only some of the spillover effects of border enforcement that can affect citizens. In twelve Latinx-majority counties in south Texas, residents were subjected to dramatically higher rates of traffic citations between 2019–2020 and 2021–2022 because of Operation Lone Star—Governor Abbott's initiative to crack down on illegal immigration.<sup>74</sup> The persistent disruption of everyday activities prompted second thoughts about the

69. CHARLES M. BLOW, *THE DEVIL YOU KNOW: A BLACK POWER MANIFESTO* 31–33, 58–59 (2021).

70. This is true even if upwardly mobile Latinos who move to the suburbs feel a sense of obligation to less privileged family members who remain in low-income, segregated communities. JODY AGIUS VALLEJO, *BARRIOS TO BURBS: THE MAKING OF THE MEXICAN AMERICAN MIDDLE CLASS* 74–84 (2012) (describing ongoing social ties, financial support, and sense of obligation among Latinos who grew up in low-income, immigrant neighborhoods and migrated to predominantly non-Hispanic white suburbs).

71. Somin, *supra* note 52, at 214–15.

72. Ilya Somin, *Immigration, Freedom, and the Constitution*, 40 *HARV. J.L. & PUB. POL'Y* 1, 1 (2017).

73. *Id.* at 2.

74. Suzanne Gamboa & Joe Murphy, *In Texas, Resentment Builds as Border Crackdown Ensnarers Local Drivers*, *NBC NEWS* (Aug. 21, 2022, 4:00 AM), <https://www.nbcnews.com/news/latino/Texas-lone-star-latinos-citations-border-abbotttrcna42022> [<https://perma.cc/YSD6-4UKY>].



enforcement efforts. In the border community of Eagle Pass, Texas, some landowners and city officials who initially agreed to cooperate became increasingly disillusioned with the initiative.<sup>75</sup> After all, aggressive traffic stops interfered with the mobility of all Latinx residents, not just undocumented immigrants.<sup>76</sup> Civil liberties groups ultimately demanded a federal investigation to determine whether Texas's Department of Public Safety had engaged in illegal racial profiling.<sup>77</sup>

As Somin suggests, harsh enforcement policies make it especially difficult for undocumented immigrants to vote with their feet. Yet foot voting by vulnerable residents may be impeded by other factors as well. For many of the undocumented, choices about where to live are not entirely individualistic. As Andrews explains in her study of Oaxacan migrants in southern California, newcomers depended on networks formed with others from their home villages. These networks provided job referrals, help in finding goods and services, and much-needed friendship and support.<sup>78</sup> With limited English proficiency, modest skills, and a fear of deportation, the undocumented found it difficult to leave a community with harsh enforcement policies because fellow migrants—even if similarly lacking in political voice—provided a social safety net.<sup>79</sup> As a result, when newcomers faced a hostile environment in north San Diego County, they did not move to a more hospitable location in nearby Los Angeles. Indeed, foot voting was limited to returning to their home country if conditions in the United States became unbearable.<sup>80</sup>

#### IV. IMMIGRANT INTEGRATION AND POLITICAL VOICE

Discussions of formal political representation largely ignore disparities in access to citizenship, and hence voting rights, but these issues are front and center in efforts to understand how immigrants integrate into American life. Immigrant integration focuses heavily on ensuring a path to full participation, of which

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75. Edgar Sandoval, *At Texas Border, Some Support for Abbott's Crackdown Is Waning*, N.Y. TIMES (Aug. 22, 2023), <https://www.nytimes.com/2023/08/22/us/texas-border-abbott-lone-star.html> [<https://perma.cc/L6WU-SZYF>].

76. Gamboa & Murphy, *supra* note 74.

77. *Id.*

78. ANDREWS, *supra* note 60, at 40–41, 47–49 (describing how patterns of circular migration limited mobility outside of social networks).

79. *Id.* at 117–19.

80. *Id.* at 119, 121–23.

voting is just one part.<sup>81</sup> Permanent residents in the United States have a legal route to citizenship, so immigration advocates concern themselves with whether newcomers feel welcomed, how their reception affects the motivation to become citizens, and how easily immigrants can naturalize once they choose to do so.<sup>82</sup> Settlement programs enable immigrants to familiarize themselves with their community, build a network of friends and acquaintances, and obtain jobs. This integration in turn facilitates an interest in naturalization.<sup>83</sup> By contrast, harsh immigration enforcement can sow fears that discourage efforts to naturalize.<sup>84</sup>

According to immigrant integrationists, full participation is critical not only for immigrants themselves but for democratic integrity. As political scientist Irene Bloemraad observes, “[i]f a sizeable proportion of a country’s population remains outside the political system—as when immigrants fail to naturalize or participate—the moral and political legitimacy of the nation-state is challenged.”<sup>85</sup> Rates of naturalization among the foreign-born population are therefore an important barometer of immigrant integration. In 2018, about one in seven U.S. residents, or 13.7%, were foreign-born.<sup>86</sup> The overall rate of naturalization for permanent residents was 67% in 2015,<sup>87</sup> but rates varied widely depending on national origin. Immigrants from Asia had relatively high levels of naturalization, ranging from 76% for China to 86% for Vietnam.<sup>88</sup> By contrast, rates for immigrants from Latin America were substantially lower, ranging from 42% for Mexico to 74% for Colombia.<sup>89</sup> The disparities suggest that the disenfranchisement of many legally present Latinx immigrants

81. IRENE BLOEMRAAD, BECOMING A CITIZEN: INCORPORATING IMMIGRANTS AND REFUGEES IN THE UNITED STATES AND CANADA 65–66 (2006); *see also* Chen, *supra* note 18, at 936 (arguing that overlooking naturalized immigrants’ “claims to representation undermines democratic legitimacy and disrespects the associative obligations of Americans to noncitizens”).

82. *See* BLOEMRAAD, *supra* note 81, at 79–81.

83. *Id.* at 112–14.

84. *Id.* at 110.

85. *Id.* at 11.

86. Abby Budiman, *Key Findings About U.S. Immigrants*, PEW RSCH. CTR. (Aug. 20, 2020), <https://www.pewresearch.org/short-reads/2020/08/20/key-findings-about-u-s-immigrants/> [https://perma.cc/M8X7-X85G].

87. Ana Gonzalez-Barrera & Jens Manuel Krogstad, *Naturalization Rate Among U.S. Immigrants Up Since 2005, with India Among the Biggest Gainers*, PEW RSCH. CTR. (Jan. 18, 2018), [https://www.pewresearch.org/short-reads/2018/01/18/naturalization-rate-among-u-s-immigrants-up-since-2005-with-india-among-the-biggest-gainers/ft\\_18-01-17\\_naturalizations\\_all/](https://www.pewresearch.org/short-reads/2018/01/18/naturalization-rate-among-u-s-immigrants-up-since-2005-with-india-among-the-biggest-gainers/ft_18-01-17_naturalizations_all/) [https://perma.cc/ESC5-XMP9].

88. *Id.*

89. *Id.*

will persist, while most Asian immigrants will eventually acquire the right to vote.

If a permanent resident pursues naturalization, the odds of obtaining citizenship are overwhelmingly high. However, there are differences in success based on race and ethnicity. For example, 94.15% of non-Hispanic white females complete the naturalization process compared to 92.70% of Asian women, 91.61% of Latinas, and 90.98% of Black females.<sup>90</sup> For non-Hispanic white males, the rate of success is 92.86% compared to 92.25% for Asian men, 89.98% for Latinos, and 89.27% for Black males.<sup>91</sup> Proponents of immigrant integration worry that barriers to naturalization will impede a sense of belonging. For instance, there are concerns that high naturalization fees discourage some immigrants from applying for citizenship.<sup>92</sup> In addition, the process has become more onerous as the length of time to naturalize has grown significantly.<sup>93</sup> The delay can make “it more difficult for immigrants to become civically engaged and to solidify ties to their adopted country . . . .”<sup>94</sup> Finally, some immigrant advocates predict that changes to tests of English-language fluency and civics proficiency will hurt future prospects for becoming a citizen.<sup>95</sup>

To address the problem of long-term disenfranchisement of a substantial number of residents, some municipalities have passed laws permitting permanent residents to vote in elections in which they have a direct stake.<sup>96</sup> School board elections are one example,

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90. Emily Ryo & Reed Humphrey, *The Importance of Race, Gender, and Religion in Naturalization Adjudication in the United States*, PROC. NAT'L ACAD. SCI. U.S., Mar. 1, 2022, at 5 (2022), <https://www.pnas.org/doi/epdf/10.1073/pnas.2114430119> [<https://perma.cc/AXB4-QUDW>].

91. *Id.*

92. *Id.* at 2.

93. Chen & Knapp, *supra* note 17, at 738–39; *see also* Miriam Jordan, *Wait Times for Citizenship Have Doubled in the Last Two Years*, N.Y. TIMES (Feb. 21, 2019), <https://www.nytimes.com/2019/02/21/us/immigrant-citizenship-naturalization.html> [<https://perma.cc/T6JY-L9JH>] (stating how wait times doubled to an average of ten months from 2017 to 2019 with waits as long as 31 months in heavily impacted areas like Las Vegas).

94. Jordan, *supra* note 93.

95. Trisha Ahmed, *U.S. Citizenship Test Changes Are Coming, Raising Concerns for Those with Low English Skills*, ABC NEWS (July 5, 2023, 1:03 AM), <https://abc17news.com/news/2023/07/05/us-citizenship-test-changes-are-coming-raising-concerns-for-those-with-low-english-skills/> [<https://perma.cc/A44U-2QZN>].

96. Joshua A. Douglas, *The Right to Vote Under Local Law*, 85 GEO. WASH. L. REV. 1039, 1063–65 (2017); Virginia Harper-Ho, *Noncitizen Voting Rights: The History, the Law, and Current Prospects for Change*, 18 LAW & INEQ. 271, 311–14 (2000); *see also* Fatoumata Waggeh, *Extending the Franchise for “Americans in Waiting”: Municipal Voting Rights for*

given that immigrant children regularly attend local public schools.<sup>97</sup> The opportunity to vote can send a message that immigrants are important constituents in the school district, and the process of voting can integrate them into civic life as they inform themselves about school policy.<sup>98</sup> Apropos of Professor Fishkin's discussion of virtual representation, these provisions also permit immigrant parents to serve as proxies for the interests of their disenfranchised children, some of whom are citizens.<sup>99</sup>

The undocumented population presents special difficulties for immigrant integration because these individuals lack a clear path to becoming permanent residents or citizens. A substantial portion of the immigrant population, almost 25% in 2017, is unauthorized and ineligible to naturalize.<sup>100</sup> Issues of disenfranchisement are especially vexing in areas with concentrated populations of undocumented immigrants. Parts of south Texas provide an instructive example. Hidalgo County is home to nearly 900,000 residents of whom 100,000 (or slightly over 11%) are undocumented.<sup>101</sup> Of these unauthorized immigrants, 85% have resided in the United States for over five years, and nearly 70%

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*Noncitizens*, HARV. C.R.-C.L. L. REV.: AMICUS (Jan. 5, 2022), <https://journals.law.harvard.edu/crcl/extending-the-franchise-for-americans-in-waiting-municipal-voting-rights-for-noncitizens/> [<https://perma.cc/6XLG-4VT7>]; Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1442–45 (1993). A federal district court in Washington, D.C. recently upheld a District of Columbia law that allows noncitizen residents to vote in municipal elections and run for local office. Seven plaintiffs have challenged the provision as an impermissible dilution to their voting rights as citizens. *Hall v. D.C. Bd. of Elections*, No. 23–1261, 2024 U.S. Dist. LEXIS 48966 (D.D.C. Mar. 20, 2024).

97. Douglas, *supra* note 96, at 1063–64; Harper-Ho, *supra* note 96, at 283; Raskin, *supra* note 96, at 1460–62; *see also* Waggeh, *supra* note 96.

98. Waggeh, *supra* note 96; Douglas, *supra* note 96, at 1062–64; Harper-Ho, *supra* note 96, at 297–98; *see also* Raskin, *supra* note 96, at 1464–67.

99. According to a 2023 report, “[a]pproximately 18 million U.S. children under age 18 lived with at least one immigrant parent in 2021. They accounted for 26 percent of the 69.7 million children under age 18 in the United States.” Nicole Ward & Jeanne Batalova, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POL’Y INST. 13 (Mar. 14, 2023), <https://www.migrationpolicy.org/sites/default/files/publications/frs-print-2023.pdf> [<https://perma.cc/9ASF-HK34>]. Most of the children were birthright citizens. *Id.*

100. Jeffrey S. Passel & D’Vera Cohn, *Mexicans Decline to Less than Half the U.S. Unauthorized Immigrant Population for the First Time*, PEW RSCH. CTR. (June 12, 2019), <https://www.pewresearch.org/short-reads/2019/06/12/us-unauthorized-immigrant-population-2017/> [<https://perma.cc/ZZ76-LPGP>].

101. *Quick Facts: Hidalgo County, Texas*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/hidalgocountytexas/PST045222> [<https://perma.cc/SKT2-VSTL>] (last visited Jan. 7, 2024); *Profile of the Unauthorized Population: Hidalgo County, TX*, MIGRATION POL’Y INST., <https://www.migrationpolicy.org/data/unauthorized-immigrant-population/county/48215> [<https://perma.cc/XWB3-86LC>] (last visited Jan. 7, 2024).

have resided in the United States for ten years or more.<sup>102</sup> Only 7% are under the age of sixteen, suggesting that if there were a path to legalization, many could become voters.<sup>103</sup>

Addressing integration of the undocumented is important because enforcement efforts can undermine a sense of belonging not only for the unauthorized but also for permanent residents and citizens. Some Latinx millennials report that they have felt excluded by presumptions about their immigration status and language proficiency as well as by epithets, such as “wetback,” that treat them like illegal entrants into the United States.<sup>104</sup> These experiences can alienate youth in ways that hamper their political participation and damage the nation’s democratic integrity. That said, some Latinx millennials have developed counternarratives to reclaim their place as true Americans. Some double down on “their birthright citizenship as incontrovertible proof of their Americanness.”<sup>105</sup> Others embrace their multicultural backgrounds as a more genuine expression of American identity than the traditional white Anglo-Saxon Protestant ideal, given the increasing diversity of the country’s population.<sup>106</sup>

Because Congress has shown little appetite for immigration reform and many undocumented people are long-term residents, large numbers of disenfranchised adults will remain a pervasive presence in places like south Texas. A critical question, then, is whether the undocumented are likely to be civically engaged despite their unauthorized status. According to anthropologist Susan Bibler Coutin, the odds are low because the undocumented occupy a “space of nonexistence.”<sup>107</sup> That is, they “are denied legal rights, social services, and full personhood, and can be detained and deported if apprehended by immigration authorities.”<sup>108</sup> As a consequence, these immigrants feel that they must live clandestinely. They do not integrate into their communities, instead staying home as much as possible to avoid the risk of

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102. *Profile of the Unauthorized Population: Hidalgo County, TX*, *supra* note 101.

103. *Id.*; *Who Can and Cannot Vote*, *supra* note 7.

104. NILDA FLORES-GONZÁLEZ, CITIZENS BUT NOT AMERICANS: RACE AND BELONGING AMONG LATINO MILLENNIALS 39–43 (Pierrette Hondagneu-Sotelo & Victor M. Rios eds., 2017).

105. *Id.* at 125–26.

106. *Id.* at 135–38.

107. Susan Bibler Coutin, *Illegality, Borderlands, and the Space of Nonexistence*, in *GLOBALIZATION UNDER CONSTRUCTION: GOVERNMENTALITY, LAW, AND IDENTITY* 171, 172–73, 193–94 (Richard Warren Perry & Bill Maurer eds., 2003).

108. *Id.* at 173.

detection and deportation.<sup>109</sup> The growth in the undocumented population, including long-term residents, therefore poses significant challenges if these individuals are excluded from meaningful participation despite a significant stake in the outcome of the political process.<sup>110</sup>

To mitigate the threat to democratic integrity, government officials and community organizations can provide other opportunities for immigrants, whether legally present or unauthorized, to become civically engaged. Public meetings open to all residents, committee service that does not turn on citizenship status, and open petitions and protests allow immigrants to develop political voice even if they are unable to vote.<sup>111</sup> Despite Coutin's grim prognosis of nonexistence, community organizations can offer important support for representation and voice, even for the undocumented. For instance, a Catholic parish in Los Angeles took steps to provide social services to unauthorized immigrants while encouraging them to participate in civic activities and discuss current affairs.<sup>112</sup>

Levels of engagement among undocumented youth are especially high. According to a national survey of undocumented millennials in late 2013 and early 2014, 66% of respondents had participated in "online activism" by signing a petition, and 59.9% had posted about social or political issues on social media. As for "offline activism," 40.7% were involved in a political rally or demonstration, and 9.5% had committed an act of civil disobedience.<sup>113</sup> These levels of participation far outstripped those of the youthful population as a whole.<sup>114</sup> Organizational membership was once again proven to be an important factor in creating a sense of efficacy that led to political participation.<sup>115</sup>

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109. *Id.* at 178.

110. At times, longstanding residency has become the predicate for legalization, reflecting this very tension between democratic legitimacy and a large population of permanently disenfranchised individuals. *Id.* at 187–88.

111. THE NAT'L ACADS. OF SCIS., ENG'G, & MED., *THE INTEGRATION OF IMMIGRANTS INTO AMERICAN SOCIETY* 184–85, (Mary C. Waters & Marisa Gerstein Pineau eds., 2015). In 2019, California enacted legislation that authorizes state residents, regardless of immigration status, to serve on government boards and commissions. S.B. 225, 2019 (Ca. 2019) (codified at Cal. Gov. Code §§ 241, 1020).

112. Emily J. Erickson, *Citizens of Heaven: Political Participation of Undocumented Americans*, 9 *EJOURNAL PUB. AFFS.*, Sept. 2020, at 38, 45–46.

113. Tom K. Wong et al., *The Political Incorporation of Undocumented Youth*, 66 *SOC. PROBS.* 356, 360–61 (2019).

114. *Id.* at 361.

115. *Id.* at 366.

Importantly, the conditions for undocumented youth's high levels of civic engagement were secured by the U.S. Supreme Court's 1982 decision in *Plyler v. Doe*.<sup>116</sup> In *Plyler*, the state of Texas had adopted legislation authorizing public schools to bar undocumented children or charge them tuition to attend.<sup>117</sup> When some school districts chose to exclude these students, the Court made clear that there was an equal protection violation not simply because of the harm to the children but also because of the injury to democratic integrity.<sup>118</sup> To create a shadow class of illiterates in the nation's midst was to betray a commitment to preparing every child for the obligations of work and civic life.<sup>119</sup> As Justice William Brennan noted, many of these children would remain as long-term residents of the United States, becoming a permanent underclass unable to exercise even the most basic rights of expression.<sup>120</sup>

The Court's decision made clear that the capacity for voice, regardless of immigration status, is one hallmark of a healthy democracy. In fact, public schools have played an important role in inculcating a sense of belonging among undocumented youth. For these students, "reciting the Pledge of Allegiance and singing patriotic songs planted early seeds of a 'sense of we-ness.'"<sup>121</sup> Reflecting on experiences in school, Lilia recalled that:

They say go back to your country, but I don't even know the Mexican national anthem. It's kind of embarrassing around my cousins from Mexico, but I didn't grow up there. I sure do know all of our national songs, 'My Country 'Tis of Thee,' 'America the Beautiful.' We learned them in school. . . . I think that means something. It says something about me, where I'm from. It connects us.<sup>122</sup>

High school graduation often came as a rude awakening when undocumented students learned of their profound marginalization and bleak prospects for full participation.<sup>123</sup> Many college-goers saw advocacy as a means to "stake claim to a political world long

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116. See *Plyler v. Doe*, 457 U.S. 202, 221–22 (1982). For a thorough discussion of the circumstances leading up to the case, the complicated strands of the decision itself, and the contemporary implications of the opinion, see Rachel F. Moran, *Personhood, Property, and Public Education: The Case of Plyler v. Doe*, 123 COLUM. L. REV. 1271, 1287–1324 (2023).

117. *Plyer*, 457 U.S. at 205, 206 n.2.

118. *Id.* at 218–19, 221, 223–24.

119. *Id.* at 218–19, 221–22.

120. *Id.* at 222 n.20, 226.

121. ROBERTO G. GONZALES, LIVES IN LIMBO: UNDOCUMENTED AND COMING OF AGE IN AMERICA 76 (2016).

122. *Id.*

123. *Id.* at 171–73.

the exclusive domain of citizens.”<sup>124</sup> Even if undocumented youth could not engage in the formal electoral process, they believed that they could challenge public policy and make a meaningful difference.<sup>125</sup>

Alternative forms of civic participation are important because research on immigrant integration casts growing doubt on how well virtual representation or foot voting can serve the undocumented population in border communities like those in south Texas. Anxious about the strain that undocumented immigration has placed on local resources, some Latinx voters have turned to the Republican Party because it represents law and order.<sup>126</sup> Historically, the Rio Grande Valley has been “a Democratic stronghold where Hispanics make up more than 90 percent of the population.”<sup>127</sup> Republicans are still a minority in the Valley, but President Donald Trump made surprising in-roads into the Latinx vote there.<sup>128</sup> In addition, Mayra Flores, a Mexican-born woman who grew up in the Rio Grande Valley, flouted the conventional wisdom by successfully running for Congress with calls for a border wall and ramped-up immigration enforcement.<sup>129</sup> Much as in north San Diego County, these political sentiments have made it unlikely that local officials will provide a greater civic voice for undocumented immigrants despite their large share of the local population. That leaves the prospects of municipal voting rights for immigrants, even in school board elections, dim.<sup>130</sup> Moreover, should any local official pursue such

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124. *Id.* at 169.

125. *Id.* at 170.

126. Jennifer Medina, *How Immigration Politics Drives Some Hispanic Voters to the G.O.P. in Texas*, N.Y. TIMES, <https://www.nytimes.com/2022/02/28/us/politics/border-grievance-politics.html> [<https://perma.cc/Z8F8-2R8X>] (last updated Mar. 1, 2022).

127. *Id.*

128. *Id.*

129. Jennifer Medina, *The Rise of the Far-Right Latina*, N.Y. TIMES (July 6, 2022), <https://www.nytimes.com/2022/07/06/us/politics/mayra-flores-latina-republicans.html> [<https://perma.cc/KJ2H-UGQ8>]. She subsequently lost her seat as a result of redistricting but plans to run again. Patrick Svitek, *National GOP Recruiting Mayra Flores, Ousted from Her South Texas Seat, to Run Again for Congress*, TEX. PUB. RADIO (July 6, 2023, 8:32 AM), <https://www.tpr.org/government-politics/2023-07-06/national-gop-recruiting-mayra-flores-ousted-from-her-south-texas-seat-to-run-again-for-congress> [<https://perma.cc/V7Z6-DC73>]; Sean Saldana, *Can Mayra Flores Win Back the Congressional Seat She Lost in November?*, TEX. STANDARD (July 12, 2023, 3:36 PM), <https://www.texasstandard.org/stories/mayra-flores-running-congress-texas-vicente-gonzalez/> [<https://perma.cc/E8LL-RFW9>].

130. Harper-Ho, *supra* note 96, at 299–301 (describing fears that immigrants are disloyal and therefore should not be permitted to vote); Raskin, *supra* note 96, at 1445–46 (summarizing arguments that noncitizens are insufficiently integrated to be part of a common political community).



an effort, the Texas Constitution appears to bar noncitizen voting and would have to be amended.<sup>131</sup> That statewide requirement impedes immigrant integration and hampers local innovation that could stimulate foot voting.

#### V. CHANGING THE COUNT AND THE IMPLICATIONS FOR THE VOTING RIGHTS ACT

Immigrant integration efforts are unlikely to solve the problem of disenfranchisement anytime soon. Naturalization is becoming somewhat more difficult for permanent residents, and there is still no clear path to legalization for the undocumented, even those who are long-term residents of their communities. Municipal voting rights reach only permanent residents, and these initiatives are likely politically infeasible in all but the most progressive jurisdictions. Given these ongoing limitations, voting rights scholars need to attend more closely to the impact of differential rates of citizenship across racial and ethnic groups. Unfortunately, there is no clear guidance on how best to do that. Section 2 of the Voting Rights Act has traditionally concerned itself with protecting eligible minority voters from denial or dilution of the franchise.<sup>132</sup> As a result, the shift to CVAP from total population must somehow affect the rights of these voters to qualify as a cognizable injury. Here, this Article will explore whether a switch to CVAP can violate Section 2 under the unique conditions that pertain in Texas.<sup>133</sup>

##### A. *Can a Switch to CVAP Constitute a Denial of the Franchise?*

Protection against denial of the franchise is a well-established feature of voting rights jurisprudence. Denial happens when

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131. TEX. CONST. art. VI, § 2(a); Harper-Ho, *supra* note 96, at 320–21.

132. Sellers, *supra* note 1, at 1549–50; Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 COLUM. L. REV. 2143, 2148–49 (2015).

133. Recently, a federal court of appeals held that there is no private right of action under Section 2 of the Voting Rights Act. *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 86 F.4th 1204, 1207 (8th Cir. 2023). As the dissent noted, the holding flies in the face of decades of decisions recognizing such actions. *Id.* at 1219 (Smith, C.J., dissenting). Even if such a right were rejected, the Department of Justice could still use the analysis set forth here. *Id.* at 1207–08 (majority opinion) (concluding that the Attorney General of the United States has sole authority to enforce Section 2). The appellate court's unprecedented denial of a private right of action has roots in a 2021 U.S. Supreme Court decision in which Justice Neil Gorsuch, joined by Justice Clarence Thomas, raised this question in a brief concurring opinion. *See Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2350 (2021) (Gorsuch, J., concurring).

officials deploy racially discriminatory practices to prevent minorities from casting ballots. These can include use of literacy tests, failure to provide English-language assistance, imposition of poll taxes, purging of voter rolls, removal of voting booths, and implementation of stringent voter identification requirements.<sup>134</sup> In evaluating voter denial claims, federal courts consider whether an election practice “imposes a discriminatory burden on members of a protected class” because they “have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”<sup>135</sup> If so, the courts will examine whether the practice is, at least in part, “caused by or linked to ‘social and historical conditions’ that have or currently produce discrimination against members of the protected class.”<sup>136</sup> The courts use a totality of the circumstances test, which considers the following factors: historical discrimination in the electoral process; racial polarization of the electorate; the use of unusually large electoral districts; other evidence of discrimination (for instance, in education) that hinders a protected group from participating in the political process; a lack of elected minority officials; the use of racialized appeals in political campaigns; a lack of responsiveness to a minority’s policy concerns; and a tenuous reason for adopting the election practice.<sup>137</sup>

Because denial of the franchise emphasizes individual access to the ballot box, it might not seem like a promising avenue to challenge a proposed shift in the count from total population to CVAP. However, there are some good arguments that the change would negatively affect minority voters’ ability to participate in the political process and elect candidates of their choice. Returning to the factors under a totality of the circumstances test, reliance on CVAP would lead to unusually large districts that disproportionately burden Latinx voters in a state like Texas.<sup>138</sup> Those oversized districts could diminish Latinx’ ability to

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134. Sellers, *supra* note 1, at 1533–34, 1546–47; Ancheta, *supra* note 37, at 301.

135. See, e.g., *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 245 (4th Cir. 2014) (quoting 52 U.S.C. § 10301).

136. *Id.* at 240 (citing *Ohio State Conf. of the NAACP v. Husted*, 768 F.3d 524, 554 (6th Cir. 2014)).

137. Sellers, *supra* note 1, at 1549 & n.208.

138. See *supra* note 17 and accompanying text.

influence outcomes and might even depress their turnout rates.<sup>139</sup> Because the use of CVAP is a novel method, there might not be direct empirical evidence of a disparate impact on minority voters. However, insofar as the switch leads to much larger districts in predominantly Latinx communities, data that demonstrates the effect of district size on voter participation could provide necessary proof of an adverse effect on the minority electorate. These studies should examine both geographic size and population density in determining whether a switch to CVAP would impede Latinx voter access. Moreover, Texas has a history of racial polarization in voting, evidenced, in part, by the existence of the Hofeller memorandum.<sup>140</sup> That polarization has affected both Blacks and Latinx, and they have sometimes formed coalitions essential to give a candidate a winning margin in Texas.<sup>141</sup> As a result, impeding Latinx political participation could harm the prospects for Blacks and Latinx to elect candidates of their choice.

In addition, the burden on electoral access created by using CVAP can be linked to historical discrimination in the electoral process. Before the U.S. Supreme Court struck down the Section 4(b) formula for determining which jurisdictions were subject to preclearance in *Shelby County v. Holder*,<sup>142</sup> Texas was covered in its entirety because of a history of discrimination against minority voters.<sup>143</sup> The state is also home to the largest number of counties covered by provisions that safeguard access for linguistic minority voters.<sup>144</sup> Moreover, Texas has been sued for its voter identification laws.<sup>145</sup> Finally, Texas reports one of the lowest rates of voter

139. See Elmendorf & Spencer, *supra* note 132, at 2184 (“Any voting requirement that has the demonstrable effect (compared to some feasible regulatory alternative) of skewing the racial/ethnic makeup of the population of actual voters, relative to the population of voting-eligible citizens, should be presumptively regarded as materially burdensome.”).

140. See *supra* notes 29–30 and accompanying text; *infra* note 203.

141. See Shiro Kuriwaki et al., *The Geography of Racially Polarized Voting: Calibrating Surveys at the District Level*, AM. POL. SCI. REV. 1, 14–15, 15 fig. 6 (June 2023), <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/6BEF8C3000B763699C27A4F9E8590516/S0003055423000436a.pdf/the-geography-of-racially-polarized-voting-calibrating-surveys-at-the-district-level.pdf> [https://perma.cc/MFC2-7MHQ].

142. *Shelby County v. Holder*, 570 U.S. 529, 557 (2013).

143. *Jurisdictions Previously Covered by Section 5*, C.R. DIV., U.S. DOJ, <https://www.justice.gov/crt/jurisdictions-previously-covered-section-5> [https://perma.cc/9BZ2-WCMV] (last updated May 17, 2023).

144. TEXAS ADVISORY COMMITTEE TO THE U.S. COMMISSION ON CIVIL RIGHTS, VOTING RIGHTS IN TEXAS 2 (2018) [hereinafter VOTING RIGHTS IN TEXAS], <https://www.usccr.gov/files/pubs/2018/07-23-TX-Voting-Rights.pdf> [https://perma.cc/HGD6-JAME].

145. See, e.g., *Veasey v. Abbott*, 830 F.3d 216, 227 (5th Cir. 2016), *cert. denied*, 580 U.S. 1104 (2017).

registration, and the rates for Latinx voters are significantly lower than for non-Hispanic whites.<sup>146</sup>

In addition, there is evidence of other forms of racial discrimination that impede access to the ballot box.<sup>147</sup> Significant racial disparities persist in Texas concerning key indicators of well-being, such as education and socioeconomic status. According to a 2019 study by the Southern Education Foundation, Latinx households' median income in the state was \$52,010 compared to \$78,905 for non-Hispanic whites.<sup>148</sup> While 19% of Latinx children lived in poverty, just 8% of non-Hispanic white children did.<sup>149</sup> Levels of proficiency in reading and math were also substantially lower for Latinx students than for non-Hispanic whites.<sup>150</sup> The coronavirus pandemic likely exacerbated these gaps. For example, the Texas Education Agency found that disruptions related to COVID-19 had especially harmful effects on socioeconomically disadvantaged students and English language learners.<sup>151</sup>

In a voter denial claim, then, there is evidence that shifting from total population to CVAP in Texas would produce unusually large districts, which in turn could diminish minority access to the polls. Moreover, that change would come against a backdrop of historical discrimination in the electoral process, ongoing allegations of efforts to suppress minority participation, and persistent racial disparities in key measures of individual well-being. Taken together, these factors suggest that shifting to CVAP in Texas could violate Section 2 of the Voting Rights Act under the totality of the circumstances test. State officials would have to offer convincing evidence that shifting from total population to CVAP was necessary to advance valid policy objectives. In *Evenwel* itself, the focus was on ensuring equal voice for voters in districts with a high percentage of CVAP. Presumably, the state would have to show how these

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146. See VOTING RIGHTS IN TEXAS, *supra* note 144, at 5–6.

147. See Michael Barber & John B. Holbein, *400 Million Voting Records Show Profound Racial and Geographic Disparities in Voter Turnout in the United States*, 17 PLOS ONE, no. 6, at 1, 5–8 (2022) (describing turnout deserts with depressed voting rates for Blacks and Latinx in Texas and throughout the United States).

148. *Economic Vitality and Education in the South (EVES): The South's Pre-Pandemic Position: Texas, 2019*, S. EDUC. FOUND. (2022), <https://southerneducation.org/wp-content/uploads/publications/texas-eves-infographic.pdf> [<https://perma.cc/Y2TJ-QT4Y>].

149. *Id.*

150. *Id.*

151. *Impacts of COVID-19 and Accountability Updates for 2022 and Beyond*, TEX. EDUC. AGENCY (2021), <https://tea.texas.gov/texas-schools/accountability/academic-accountability/performance-reporting/2021-tac-accountability-presentation-final.pdf> [<https://perma.cc/8VLR-7CK2>].

predominantly non-Hispanic white voters are unfairly disadvantaged by using total population, given the CVAP count's adverse impact on minority constituencies.

*B. Can a Switch to CVAP Constitute Dilution of the Franchise?*

A shift to CVAP from total population in Texas also implicates concerns about voter dilution. Dilution occurs when individual members of minority groups cast ballots, but structural features of the electoral process minimize their impact.<sup>152</sup> For instance, plaintiffs have successfully challenged the use of at-large elections rather than single-member districts. At-large elections make it impossible for minority voters to elect a candidate of their choice because they are always outvoted by the majority in large geographic jurisdictions.<sup>153</sup> In addition, plaintiffs have contested racial gerrymandering that packs minority voters into majority-minority districts or cracks (that is, disperses) them throughout multiple districts.<sup>154</sup> Packing means that minorities elect fewer representatives than they otherwise might, while cracking means that minorities are consistently outvoted and exert minimal influence in the electoral process. These strategies correlate not only with racial disadvantage but also partisan advantage. Republicans have discovered that creating majority-minority districts allows them to consolidate their influence elsewhere and achieve party gains.<sup>155</sup> So far, the Court has not been willing to combat the use of racial gerrymandering by requiring proportional representation of minorities, but it does consider this as a factor under the totality of the circumstances test.<sup>156</sup>

Voting rights jurisprudence has been in flux in recent years. Indeed, scholars have worried that racial gerrymandering cases under Section 2 could become a thing of the past as the Court increasingly embraces a colorblind approach to redistricting.<sup>157</sup> For that reason, it is important to look at how the Justices reaffirmed their commitment to enforcing Section 2 in the 2023

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152. Elmendorf & Spencer, *supra* note 132, at 2175 n.148.

153. Mulroy, *supra* note 11, 1281–82.

154. Crum, *supra* note 5, at 380, 402 n.291.

155. Sellers, *supra* note 1, at 1539.

156. League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 409, 436 (2006).

157. Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Race and Representation Revisited: The New Racial Gerrymandering Cases and Section 2 of the VRA*, 59 WM. & MARY L. REV. 1559, 1593–95 (2018).

decision *Allen v. Milligan*.<sup>158</sup> There, the plaintiffs challenged Alabama's proposed redistricting as a dilution of the Black vote because it packed African Americans into a single district, which in turn deprived them of the opportunity to elect representatives in two majority-minority districts.<sup>159</sup> The Court upheld the challenge, using a three-part test first set forth in *Thornburg v. Gingles*,<sup>160</sup> which asks whether a minority group is large and geographically compact enough to make up a majority in a reasonably configured district; whether the minority group is politically cohesive; and whether the white majority votes as a bloc to defeat the minority group's preferred candidates.<sup>161</sup> In *Milligan*, the majority found that there were enough Black voters in Alabama to constitute a majority in a second district, that Blacks and non-Hispanic whites voted as blocs, and that non-Hispanic white voters would systematically defeat Blacks' preferred candidates.<sup>162</sup>

Significantly, the Court rejected Alabama's proposed colorblind approach to redistricting.<sup>163</sup> Novel technologies now allow states to use an algorithm to generate multiple redistricting maps based solely on factors like compactness, contiguity, and population equality, which are characterized as race-neutral.<sup>164</sup> One of Alabama's experts testified that when colorblind criteria were used to create two million districting plans, "none contained two majority-black districts while many plans did not contain

158. *Allen v. Milligan*, 143 S. Ct. 1487, 1498 (2023).

159. *Id.* at 1501–02, 1504.

160. *Id.* at 1502–04 (citing *Thornburg v. Gingles*, 478 U.S. 30, 48–51 (1986)).

161. *Thornburg*, 478 U.S. at 48–51.

162. *Allen*, 143 S. Ct. at 1504–06. On remand, the Alabama Legislature resisted the Court's mandate to create a second majority-minority district. Kim Chandler, *Alabama Lawmakers Refuse to Create a Second Majority-Black Congressional District*, PBS NEWSHOUR (July 21, 2023, 5:58 PM), <https://www.pbs.org/newshour/politics/alabama-lawmakers-refuse-to-create-a-2nd-majority-black-congressional-district> [https://perma.cc/ZX8E-RJUJ]. The lower federal court once again found a map with just one majority-minority district impermissible and ordered a special master to draw one with two such districts. Alabama has appealed the decision. Emily Cochrane, *Federal Court Again Strikes Down Alabama's Congressional Map*, N.Y. TIMES, <https://www.nytimes.com/2023/09/05/us/politics/alabama-congressional-map.html> [https://perma.cc/F9KT-EQ6R] (last updated Sept. 6, 2023); Amy Howe, *Alabama Returns to the Supreme Court over Allegedly Discriminatory Voting Map*, SCOTUSBLOG (Sept. 11, 2023, 10:48 PM), <https://www.scotusblog.com/2023/09/alabama-returns-to-the-supreme-court-over-allegedly-discriminatory-voting-map/> [https://perma.cc/G4D7-SDE5].

163. *Allen*, 143 S. Ct. at 1512 (“The contention that mapmakers must be entirely ‘blind’ to race has no footing in our § 2 case law.”).

164. *Id.* See Jowei Chen & Nicholas O. Stephanopoulos, *The Race-Blind Future of Voting Rights*, 130 YALE L.J. 862, 882–88 (2021) (describing the interest in and development of algorithms to generate randomized redistricting maps).

any.”<sup>165</sup> A second expert testified that of 30,000 maps generated through this process, none contained two majority-black districts.<sup>166</sup> Based on this evidence, Alabama officials contended that their race-blind benchmark for redistricting did not violate Section 2 of the Voting Rights Act.<sup>167</sup>

The Court dispensed with this argument decisively, noting that “[t]he test is flawed in its fundamentals.”<sup>168</sup> The Court observed that metrics for the underlying race-neutral criteria were themselves highly contestable.<sup>169</sup> Moreover, these advanced computing techniques did not exist at the time that Congress adopted Section 2 of the Voting Rights Act, and nothing suggested that equal access to the voting process should depend on “computer simulations that are technically complicated, expensive to produce, and available to ‘only a small cadre of university researchers [who] have the resources and expertise to run’ them.”<sup>170</sup> Finally, the Court alluded to the imponderable nature of the randomized maps. According to computational experts, algorithms could generate a “trillion trillions” worth of redistricting maps.<sup>171</sup> It was impossible to tell what additional maps would show, and “Section 2 cannot require courts to judge a contest of computers when there is no reliable way to determine who wins, or even where the finish line is.”<sup>172</sup>

What the Court did not say is that purportedly race-neutral criteria can have racial implications.<sup>173</sup> As *Evenwel* shows, the choice of how to count the population can affect racial and ethnic groups when there are substantial disparities in the eligibility to vote.<sup>174</sup> Moreover, Fishkin’s work on virtual representation reveals that geographically compact districts can be racially segregated.<sup>175</sup>

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165. *Allen*, 143 S. Ct. at 1512.

166. *Id.*

167. *Id.*

168. *Id.* at 1513.

169. *Id.*

170. *Id.* (citing Brief of Computational Redistricting Experts as *Amici Curiae* in Support of Appellees and Respondents at 28, *Allen v. Milligan*, 143 S. Ct. 1487 (2023) (Nos. 21-1086, 21-1087) (citing Chen & Stephanopoulos, *supra* note 164, at 882–84)).

171. *Id.* at 1514.

172. *Id.*

173. The closest the Court came to acknowledging the manipulability of purportedly race-neutral criteria was a statement that “‘quantifying, measuring, prioritizing, and reconciling these criteria’ requires map drawers to ‘make difficult, contestable choices.’” *Id.* at 1513. See also Brief of Computational Redistricting Experts, *supra* note 170, at 10.

174. See *Evenwel v. Abbott*, 578 U.S. 54, 62, 73 (2016); Brief of the Leadership Conference on Civil and Human Rights, *supra* note 39, at 25–27.

175. Fishkin, *supra* note 6, at 1714–15.

By ignoring the racial consequences of purportedly race-neutral criteria, algorithmically generated maps can undermine racial representation.<sup>176</sup> As professors Jowei Chen and Nicholas Stephanopoulos observe, “in most states, enacted state-house plans have more opportunity districts than would typically arise if the lines were drawn on nonracial grounds.”<sup>177</sup> These differences affect both Black and Latinx voters.<sup>178</sup> The disparities are especially great in states like Alabama and Texas that were previously subject to preclearance requirements based on a history of discrimination in the electoral process.<sup>179</sup> In addition, although Chen and Stephanopoulos found that the partisan impact of algorithmic maps is generally trivial, in southern states like Alabama, Georgia, Louisiana, and Texas, these maps plainly confer a significant Republican advantage.<sup>180</sup> That advantage, in turn, correlates with high levels of racially polarized voting in each state.<sup>181</sup>

The Court’s rebuff of Alabama’s colorblind approach is a powerful affirmation of Section 2’s ongoing significance in promoting fair racial representation. According to Chen and Stephanopoulos, if race-neutral, algorithmic mapmaking was accepted, most Section 2 lawsuits to create new minority opportunity districts would fail, states might dismantle existing opportunity districts with impunity, and plaintiffs could attack some opportunity districts as impermissible racial gerrymanders.<sup>182</sup> *Milligan* has immediate implications for ongoing redistricting litigation in Texas. In *LULAC v. Abbott*, the plaintiffs have alleged that newly drawn legislative districts pack Latinx to dilute their influence and to enhance that of non-Hispanic whites.<sup>183</sup> In addition, the complaint charges that Latinx voters in rural areas are cracked by dispersing them among predominantly

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176. Brief of Computational Redistricting Experts, *supra* note 170, at 10; Kayla Swan, “Race-Blind” Redistricting Algorithms, 73 DUKE L.J. 1141, 1162–69 (2024).

177. Chen & Stephanopoulos, *supra* note 164, at 914.

178. *Id.*

179. *Id.* at 903 & n.181, 917; see also Kareem Crayton, *The Voting Rights Act Explained*, BRENNAN CTR. FOR JUST. (July 17, 2023), [https://www.brennancenter.org/our-work/research-reports/voting-rights-act-explained?utm\\_medium=PANTHEON\\_STRIPPE&utm\\_source=PANTHEON\\_STRIPPE](https://www.brennancenter.org/our-work/research-reports/voting-rights-act-explained?utm_medium=PANTHEON_STRIPPE&utm_source=PANTHEON_STRIPPE) [https://perma.cc/H9GN-254E].

180. Chen & Stephanopoulos, *supra* note 164, at 937.

181. *Id.* at 939.

182. *Id.* at 922–23.

183. *League of United Latin Am. Citizens v. Abbott*, No. 3:21–CV–259–DCG–JES–JVB, 2023 WL 4055392, at \*7 (W.D. Tex. June 16, 2023).



non-Hispanic white districts.<sup>184</sup> In response, Texas officials have argued that Section 2 does not apply to redistricting plans and that, in any event, the map-making process was race-neutral.<sup>185</sup> After *Milligan*, the state's leaders must clearly explain how legislators failed to produce additional minority opportunity districts despite significant growth in the minority population, especially among Latinx.<sup>186</sup>

That said, *Milligan* leaves some important questions unanswered—ones that affect the prospects of claiming that a switch to CVAP constitutes voter dilution. The Texas redistricting litigation reveals strong connections between race and partisanship in the map-making process. According to e-mail exchanges produced during discovery, state legislators deliberately considered how “to make districts appear as if they had large Hispanic populations while still leaning Republican.”<sup>187</sup> This correlation between race and partisan affiliation presents an important complication for voter dilution cases under Section 2 of the Voting Rights Act. Non-white groups, especially Blacks, are more likely to identify as Democrats and to vote for Democratic presidential candidates than non-Hispanic whites are.<sup>188</sup> The U.S. Supreme Court has said that it can intervene to address racial but not partisan gerrymandering.<sup>189</sup> Yet, as Professor Janai Nelson notes, it can be difficult to tell whether district lines have been drawn based on race or partisanship, given the close connection

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184. *Id.* at 2023 WL 4055392, at \*7; see also Alexa Ura, *Where Texas Redistricting Lawsuits Stand After U.S. Supreme Court Ruling in Alabama Case*, TEX. TRIB. (June 13, 2023, 5:00 AM) [hereinafter *Where Texas Redistricting Lawsuits Stand*], <https://www.texastribune.org/2023/06/13/texas-redistricting-lawsuits/> [https://perma.cc/7YTS-UTG9]; Alexa Ura, *Republicans Say Texas' New Political Maps Are "Race Blind." To Some Voters of Color, That Translates as Political Invisibility*, TEX. TRIB. (Oct. 20, 2021, 5:00 AM) [hereinafter *Republicans Say Texas' New Political Maps Are "Race Blind"*], <https://www.texastribune.org/2021/10/20/texas-redistricting-race-discrimination/> [https://perma.cc/M4PR-4XP8].

185. *Where Texas Redistricting Lawsuits Stand*, *supra* note 184.

186. *Republicans Say Texas' New Political Maps Are "Race Blind," supra* note 184; *Where Texas Redistricting Lawsuits Stand*, *supra* note 184.

187. *Where Texas Redistricting Lawsuits Stand*, *supra* note 184.

188. Richard L. Hasen, *Race or Party, Race as Party, or Party All the Time: Three Uneasy Approaches to Conjoined Polarization in Redistricting and Voting Cases*, 59 WM. & MARY L. REV. 1837, 1852–53, 1858–59 (2018); Bruce E. Cain & Emily R. Zhang, *Blurred Lines: Conjoined Polarization and Voting Rights*, 77 OHIO ST. L.J. 867, 873–74, 873 n.25 (2016).

189. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019); see also *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999) (“[A] jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact.”).

between the two.<sup>190</sup> Nelson argues that the Court should recognize a claim for hybrid racial and partisan gerrymandering.<sup>191</sup> Under this approach, the Court would apply strict scrutiny when partisan impact is high and when racial and partisan polarization are intense because these are situations in which “race and party choice are linked so closely and consistently that punishing one is tantamount to punishing the other.”<sup>192</sup> Using this framework, Nelson would subject Texas’s latest proposed redistricting plan to the highest level of review because it has major consequences for partisan advantage and the electorate is highly polarized based on both race and party affiliation.<sup>193</sup> On October 11, 2023, the Court heard oral argument on these difficult questions in *Alexander v. South Carolina State Conference of the NAACP*.<sup>194</sup> There, the plaintiff asserted that South Carolina legislators engaged in racial gerrymandering while claiming to be motivated by partisan considerations.<sup>195</sup>

Professor Nelson’s proposal offers a useful framework when thinking about how to best account for racial disparities in CVAP rates. Her hybrid approach shows how race can correlate with a trait, partisan affiliation, that the Court has not traditionally accorded judicial protection.<sup>196</sup> Similarly, changes in methods of counting the relevant population involve characteristics, such as youth and immigration status, that historically have not been an object of concern under the Voting Rights Act.<sup>197</sup> However, these traits correlate with race in ways that can undermine minority group influence at the polls.<sup>198</sup> Indeed, Hofeller’s memorandum makes plain that proposals to use CVAP can manipulate predictable racial and ethnic differences in eligibility to vote to

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190. Janai Nelson, *Parsing Partisanship and Punishment: An Approach to Partisan Gerrymandering and Race*, 96 N.Y.U. L. REV. 1088, 1092–95 (2021).

191. *Id.* at 1111–12.

192. *Id.* at 1116.

193. *See supra* notes 179–81 and accompanying text.

194. *Alexander v. S.C. State Conf. of the NAACP*, 143 S. Ct. 2456 (2023); *Docket No. 22-807*, SUP. CT. U.S., <https://www.supremecourt.gov/docket/docketfiles/html/public/22-807.html> [<https://perma.cc/7UMR-JPFW>] (last visited Dec. 12, 2023).

195. Keecee DeVenny, *How South Carolina Attempted to “Bleach” Charleston and the Attorneys Fighting to Stop It—All the Way to the Supreme Court*, LEGAL DEF. FUND (Oct. 18, 2023), <https://www.naacpldf.org/alexander-v-sc-naacp-supreme-court-gerrymandering/> [<https://perma.cc/2J3V-TSY9>].

196. Nelson, *supra* note 190, at 1092–94, 1096 & n.41.

197. *See* Valencia Richardson, *Leveraging Civil Rights Statutes to Empower the Youth Vote*, 74 RUTGERS U. L. REV. 1839, 1841–42 (2022); *see also* Chen, *supra* note 18, at 923.

198. *See supra* notes 17, 40–42 and accompanying text.

diminish the minority electorate's access to representation.<sup>199</sup> The same is true of proposals to base the count on the number of registered voters, given racial disparities in rates of registration.<sup>200</sup>

Although states enjoy discretion to select among counting methods, that discretion cannot be boundless.<sup>201</sup> There should be special concern about proposed changes when a state like Texas has a history of using other methods to suppress minority voting.<sup>202</sup> A switch in the formula for counting the population should be subject to the same elevated scrutiny as other forms of racial gerrymandering. As the Hofeller memorandum made clear, the shift to CVAP was designed to redraw district lines in a way that would significantly reduce the political power of not only Democrats but also Latinx in Texas.<sup>203</sup> Even if the Court does not intervene to address partisan gerrymandering, it must protect against racial gerrymandering. Here, the effects on historically underrepresented minority groups are clear. Had *Evenwel* succeeded, every one of the ten most underpopulated districts under the new map would have been majority-minority, mostly in large urban areas like El Paso, Dallas, and Houston.<sup>204</sup> In addition, eight of ten members of the Latino caucus would have found their districts underpopulated.<sup>205</sup>

As these facts demonstrate, the change proposed in *Evenwel* undoubtedly would have produced significant losses for Democrats even as it undermined Latinx access to representation. These conclusions are further reinforced by Chen and Stephanopoulos' empirical study of the effects of switching from total population to CVAP in several states, including Texas. The simulations show that in the Lone Star State, redistricting with CVAP would lead to a sizable drop in the number of districts in which minority voters

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199. See *supra* note 29–30 and accompanying text.

200. See Rodrigo Dominguez-Villegas & Michael Rios, *From Eligibility to the Ballot Box: Examining the Racial and Ethnic Voter Turnout Gaps in the U.S. and California*, UCLA LATINO POL'Y & POL. INST. (Sept. 27, 2022), <https://latino.ucla.edu/research/voter-turnout-gaps-2020/> [<https://perma.cc/TCA5-MMBB>] (Latinos had the lowest registration rates at 61.1%, over 10% lower than the overall rate of 72.7%).

201. *Evenwel v. Abbott*, 578 U.S. 54, 59–60 (2016).

202. See *supra* note 146 and accompanying text.

203. Jowei Chen & Nicholas O. Stephanopoulos, *Democracy's Denominator*, 109 CALIF. L. REV. 1019, 1023, 1025–26 (2021). Other studies replicated Hofeller's conclusions about the impact of shifting from CVAP to total population. *Id.*

204. Rudensky et al., *supra* note 23, at 12; see also *supra* notes 35–41 and accompanying text.

205. Rudensky et al., *supra* note 23, at 12.

could elect candidates of their choice.<sup>206</sup> Under an analysis in which the mapmaker was “party-blind,” minority opportunity districts would fall from sixty-five to fifty-four.<sup>207</sup> The partisan impact would also be notable with the median number of Republican districts rising from eighty to eighty-nine.<sup>208</sup> Chen and Stephanopoulos describe the results in Texas as “exceptional” in their magnitude when compared to other states.<sup>209</sup> Those results largely persist under the more realistic condition of partisan, rather than party-blind, gerrymandering.<sup>210</sup>

Given the substantial impact on both partisan and racial influence in Texas, strict scrutiny should apply so that mapmakers cannot camouflage harms to minority influence.<sup>211</sup> The use of CVAP not only renders some disenfranchised residents invisible but also undercuts opportunities for eligible minority voters to elect representatives of their choice.<sup>212</sup> With the change from total population to CVAP, smaller districts are consolidated into larger ones likely dominated by non-Hispanic white voters.<sup>213</sup> Indeed, by eliminating broad segments of the Latinx population from the count, the use of CVAP mimics the consequences that occur with a shift from single-member to at-large elections, as minority voters are systematically outvoted in bigger geographic districts.<sup>214</sup> Given the adverse consequences for minority representation, Texas must continue to rely on total population, not CVAP, under Section 2 of the Voting Rights Act because of the state’s significant history of past discrimination in the electoral process, because the electorate is polarized by partisanship and race, and because CVAP, like partisan affiliation, can be used as a proxy to inflict racial disadvantage.<sup>215</sup>

In sum, there is good reason to believe that a change to CVAP would violate Section 2 of the Voting Rights Act in Texas. Preserving the use of total population in apportionment protects minority voters from both denial and dilution of the franchise. Although voting rights law does not explicitly protect the legally

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206. Chen & Stephanopoulos, *supra* note 203, at 1042.

207. *Id.*

208. *Id.* at 1043.

209. *Id.* at 1045.

210. *Id.* at 1059–60.

211. *See supra* note 192 and accompanying text.

212. *See supra* notes 203–07 and accompanying text.

213. *See supra* notes 17, 138–39 and accompanying text.

214. *See supra* note 153 and accompanying text.

215. *See supra* notes 30, 140, 142–46.

disenfranchised, it is worth noting that the traditional population count has incidental benefits for virtual representation and foot voting.<sup>216</sup> Because districts remain geographically smaller, they are more likely to reflect cohesive communities of interest. A formula based on CVAP disperses representation more broadly, likely diluting virtual representation as immigrant enclaves are folded into larger districts. Those districts are apt to include substantial numbers of individuals who have little knowledge of or affinity for the experience of the foreign-born. Similarly, insofar as counting the total population maximizes the number of districts, it facilitates foot voting because dissenters, whether eligible voters or not, can more readily relocate to a jurisdiction with appealing political representation. By contrast, the CVAP method leads to larger districts, all of which may be less responsive to the concerns of those ineligible to vote.

## VI. CONCLUSION

In this Article, I have argued that changing demography, especially the increasing significance of the immigrant population, requires a more robust response to the *Evenwel* decision than seen so far. Immigration has led to substantial disparities in the proportion of eligible voting-age citizens among Latinx and Asian Americans as compared to other racial and ethnic groups. Large numbers of disenfranchised persons already weaken the political clout that these constituencies wield. At the same time, the disparities leave minority groups vulnerable to proposals, like the one in *Evenwel*, that use these differences to further diminish depressed levels of electoral influence. Voting rights jurisprudence has focused on eligible voters and largely ignored those who are ineligible to cast a ballot, but this approach seriously endangers the political voice of Latinx and Asian American communities. In fact, if the Court ignores the racial and ethnic implications of methodological choices like these, it will countenance diminished representation for citizens and immigrants alike.

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216. For example, in determining whether minority voters can elect the representative of their choice, courts can opt to look at only eligible voters, ignoring those who are legally unable to vote. *See, e.g.*, *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 436, 438–39 (2006). *See* Mulroy, *supra* note 11, at 1286–88.