

LATINOS: DISCRETE AND INSULAR NO MORE

Cristina M. Rodríguez*

Ordinarily, court cases that address the Latino experience in the United States are presented as addenda to larger narratives—as casebook squibs. *Hernandez v. Texas*,¹ which explores the status of Mexican Americans as a “protected class,” sits in the considerable shadow of *Brown v. Board of Education*,² decided two weeks later. Discrimination based on language is presented as a minor variation on the central question of race in American constitutional law.³ The 1975 extension of the Voting Rights Act to cover jurisdictions in which Latinos were denied access to the vote is a historical second thought.⁴ Courts and lawmakers have assessed Latinos’ claims for recognition using, for the most part, the tools designed for the African American struggle for equality, which has often been tantamount to forcing square pegs into round holes.⁵

The publication of *Latinos and the Law*,⁶ however, takes the legal controversies that have helped define the Latino position in the American polity from the squibs and makes them the focal point of inquiry. Like the growth of Latino Studies programs in arts and science departments across the country, the publication of a casebook devoted to Latinos and the law signifies a kind of arrival. The existence of the book underscores that Latinos represent a socially salient group—one that simultaneously shapes the general aesthetic, legal, and political cultures and is constructed and regulated by those same cultures, in ways significant enough to merit study.⁷

* Professor of Law, NYU School of Law. Thank you to Gabriel Díaz for excellent research assistance and to Sam Issacharoff for helpful conversations.

¹ 347 U.S. 475 (1954) (rejecting the argument that there are only two classes under the Fourteenth Amendment—“white and Negro”—and overturning a conviction, after noting a history of discrimination against persons of Mexican descent, on the ground that Mexicans had been excluded from the pool of jurors).

² 347 U.S. 483 (1954).

³ See, e.g., PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 1019 (Aspen Publishers, 5th ed. 2006).

⁴ See Cristina M. Rodríguez, *From Litigation, Legislation: A Review of Brian Landsberg’s Free at Last To Vote: The Alabama Origins of the 1965 Voting Rights Act*, 117 YALE L.J. 1132, 1150-63 (2008) (discussing how the 1975 amendments and the addition of the bilingual ballot requirement reflected incomplete and sometimes awkward adaptations of the mechanisms employed in the original Voting Rights Act of 1965 to combat the disenfranchisement of African Americans in the South).

⁵ See Cristina M. Rodríguez, *Language Diversity in the Workplace*, 100 NW. U. L. REV. 1689, 1738-50 (2006) (critiquing reliance on Title VII to police imposition of English-only rules in the workplace).

⁶ See RICHARD DELGADO, JUAN F. PEREA & JEAN STEFANCIC, *LATINOS AND THE LAW: CASES AND MATERIALS* (2008).

⁷ See ARLENE DÁVILA, *LATINO SPIN: PUBLIC IMAGE AND THE WHITEWASHING OF RACE* (2008) (discussing the market-driven construction of Latinos as upwardly mobile members of

As this symposium recognizes and celebrates the achievements of Richard Delgado, Juan Perea, and Jean Stefancic in bringing Latinos into the casebook canon, I would like to raise a simple question. What explains the emergence of a Latinos and the law casebook at this point in time? We are past the heyday of the ethnic and critical studies movements, and at the dawn of the Obama administration, the post-ethnic⁸ or post-racial orientation is receiving substantial reinforcement, at least as a rhetorical device, if not in reality. Why, then, is the time nonetheless ripe for a Latinos and the law casebook?

There are many conceivable answers to this question. The mere existence of the rich primary materials with which the authors of this book construct the simultaneously broad and deep narrative of Latinos in the United States provides the easiest answer. Of course, but for the scholarly initiative of the authors and a critical mass of Latino law professors whose work has brought to light the contents of the book, a treatise on Latinos and the law would not have come into being. And it is precisely the concept of a critical mass that makes the publication of *Latinos and the Law* seem like a natural event. The size of the Latino population, even within the legal academy, has become too big to ignore, and the legal and cultural controversies that surround the Latino presence in the United States have become too significant to treat as examples of other themes.

A 2008 study by the Pew Hispanic Center revealed that Latinos make up just over fifteen percent of the U.S. population and that the Latino population has grown by twenty-nine percent in this decade (as compared to four percent for the non-Latino population).⁹ Notably, this growth has been more the result of natural increases inside the United States than immigration,¹⁰ and if current trends continue, Latinos will comprise twenty-nine percent of the population by 2050.¹¹ Of course, even the most robust of demographic projections do not predict that Latinos will form an outright majority in the United States as a whole. But the important point is that the “white” majority is ceasing to be a *dominant* majority, and by 2050, whites may become a forty-seven percent minority of the population.¹² It is becoming increasingly inappropriate to frame social and political relations in the United States in terms of a majority-minority dynamic.

In other words, the answer to the question of why study Latinos and the law is: numbers. The question then becomes, what is the significance of

the middle class and the attendant obscuring of the continued economic disadvantage and social dislocation of Latino populations).

⁸ See, e.g., DAVID A. HOLLINGER, *POSTETHNIC AMERICA: BEYOND MULTICULTURALISM* (10th anniversary ed. 2005).

⁹ See RICHARD FRY, PEW HISPANIC CTR., *LATINO SETTLEMENT IN THE NEW CENTURY*, at i (2008), <http://www.pewhispanic.org/files/reports/96.pdf>.

¹⁰ *Id.*

¹¹ JEFFREY S. PASSEL & D'VERA COHN, PEW RESEARCH CTR., *U.S. POPULATION PROJECTIONS: 2005-2050*, at i (2008), <http://www.pewhispanic.org/files/reports/85.pdf>.

¹² See *id.* (noting that if current trends continue, non-Hispanic whites will be a minority by 2050).

these numbers? How should they change the way we understand the rights and responsibilities of Latinos qua Latinos? Put more generally, what happens to our conceptions of rights and responsibilities when a minority starts to take on the characteristics of a majority, or when a dominant or true majority ceases to exist?

In this Essay, I begin to venture some answers to these questions. I argue that there are three different and not necessarily consistent ways in which our understanding of the category Latino might change as the population grows in size and importance. First, "Latino" is increasingly losing its coherence as a category, making it impossible to describe Latinos as the proverbial discrete and insular minority. The twentieth century constructs we still use to characterize the interests of racial and ethnic minorities are losing their descriptive validity and utility and must be adapted.¹³ Second, even if the Latino population retains its coherence as its internal diversity grows, the group's size increasingly will demand that it protect its interests through the political process, rather than through the courts and other forms of special solicitude. And third, as Latinos come into their electoral own, they should accrue some of the cultural benefits and burdens of being in the demographic majority.

Before exploring these conclusions, I should emphasize that the absence of substantial Latino population growth would not undermine the case for *Latinos and the Law*. As I have observed in other work, Latinos have been a part of the American fabric for centuries.¹⁴ And yet, Latinos are minor characters in American history. In my field of constitutional law, for example, race drives the conversation, but it is the African American experience and black-white relations that set the frame. It is the original sin of slavery, the crucible of the Civil War and Reconstruction, the imposition and overthrow of Jim Crow, and the relationship of each of these events to the structure of our institutions, our conceptions of state action, and our discourses of rights and citizenship that define the contours of what it means to be American. Latinos, like the Chinese and other Asian populations, have participated in the formation of the modern United States, and they have been exploited as laborers and confined as citizens within the parameters set by Jim Crow and its after-effects. But they have been cast as supporting players in the central dramas, treated as always somewhat foreign, to boot.¹⁵

¹³ This claim could be made generally and for the African American population. Cf. Richard H. Pildes, *The Decline of Legally Mandated Minority Representation*, 68 OHIO ST. L.J. 1139, 1140, 1145 (2007) (arguing that the anti-essentialist language used by the Court in its recent decision under Section 2 of the Voting Rights Act, *LULAC v. Perry*, 548 U.S. 399 (2006), "reveals a Court increasingly troubled by . . . the very concept of minority vote dilution and the accompanying legal requirement of 'safe minority districting'").

¹⁴ See Cristina M. Rodríguez, *Latinos and Immigrants*, 11 HARV. LATINO L. REV. 247, 251-52 (2008).

¹⁵ See Neil Gotanda, "Other Non-Whites" in *American Legal History: A Review of Justice at War*, 85 COLUM. L. REV. 1186, 1188 (1985) (book review) (noting that "[o]ne of the critical features of legal treatment of Other non-Whites has been the inclusion of a notion of 'foreignness' in considering their racial identity and legal status" and even native-born Latinos,

This conceptual and historical marginalization should be addressed regardless of the size of the Latino population. But the footnoting of Latino history becomes even less tenable as the size of the Latino population grows. The Latino-ization of the American demography means that we must come to terms with Latino populations' histories, with what the term Latino means, and with how Latinos have helped shape our social and political institutions. *Latinos and the Law* represents a major contribution to this agenda. In this Essay, I outline some of the questions the casebook's publication should be prompting us to address.

THE DECLINE OF INSULARITY

If it were ever possible to characterize Latinos as an *insular* minority, that time may have passed. It is hardly novel to note that the category "Latino" consists of people of varied national origins, races, citizenship statuses, histories within and relationships to the United States, language abilities, and socioeconomic classes. Indeed, the same diversity is also characteristic, to different degrees, of the other major race-and-ethnicity-based groupings we use to slice up our population.¹⁶ As the Latino population grows, however, it will become less and less coherent to describe it as a singular group. The population's interests and identities will continue to multiply. The immigration-inspired explosion inside the United States of a Latino culture tied

Asians, and Arab Americans have been stigmatized as foreign, with sometimes disastrous consequences).

¹⁶ See, e.g., PEW RESEARCH CTR., OPTIMISM ABOUT BLACK PROGRESS DECLINES: BLACKS SEE GROWING VALUES GAP BETWEEN POOR AND MIDDLE CLASS 1 (2007), <http://pewsocial.trends.org/assets/pdf/Race.pdf> ("African Americans see a widening gulf between the values of middle class and poor blacks, and nearly four-in-ten say that because of the diversity within their community, blacks can no longer be thought of as a single race . . ."). In his opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), Justice Powell emphasized that the "white" majority population is itself an enormously diverse population with historical experiences of discrimination. He wrote:

[T]he difficulties entailed in varying the level of judicial review according to a perceived "preferred" status of a particular racial or ethnic minority are intractable [because t]he concepts of "majority" and "minority" necessarily reflect temporary arrangements and political judgments. . . . [T]he white "majority" itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. Not all of these groups can receive preferential treatment and corresponding judicial tolerance of distinctions drawn in terms of race and nationality, for then the only "majority" left would be a new minority of white Anglo-Saxon Protestants. There is no principled basis for deciding which groups would merit "heightened judicial solicitude" and which would not.

Id. at 295-96. This sentiment helps explain the Court's move toward a strict anti-classification view, according to which any race-based classifications are subject to strict scrutiny, regardless of whether the racial group being burdened is a discrete and insular minority or a member of a majority group. Indeed, at least in the context of evaluating race-dependent decisions, if not in the consideration of which other sorts of groups are entitled to heightened scrutiny, the discrete and insular formulation has been supplanted by the presumption that all racial classifications are invalid.

closely to Latin American cultures, coupled with the inevitable linguistic and cultural assimilation of the second and third generations, will produce an increasingly differentiated Latino population.¹⁷ What is more, some demographers predict that because of the rate of Latino and non-Latino intermarriage, many “Latinos” of the future will not actually identify as Latino,¹⁸ which may mean that many members of the category will be “Latino” in last name and distant family tree only.

This loss of insularity and commonality will have political implications. In the short-term, the loss may make the group-based political mobilization of the Latino community more difficult; a larger population necessarily will be defined by a greater diversity of interests and associations. In the long-term, this fracturing may lead to the dissolution of the category altogether.

As a result of such changes, it will become increasingly difficult to justify treating Latinos as a racial group for the purposes of the Voting Rights Act, for example, as Latinos may cease to be the sort of easily identifiable political block that can be described as having its own particular “candidate of choice.” A similar point could be made about the inclusion of Latinos in affirmative action programs. If affirmative action is justified as a necessary means of remedying past discrimination, then a program that treats all Latinos as interchangeable will only become harder to defend than it already is.¹⁹ And where the justification for affirmative action includes diversity, justifying the giving of a preference to Latinos and not to other groups in society will become more difficult as the Latino population ceases to be a coherent group.²⁰

To be sure, a community can maintain its coherence in the face of internal diversity. The points of difference within the Latino population can be and historically have been overcome by a set of common experiences within the United States. Part of the process of assimilation for new immigrants from Latin America arguably includes becoming “Latino,” or transcending

¹⁷ See, e.g., N.C. Aizenman, *U.S. Latino Population Projected to Soar; Forecast Predicts Tripling by 2050*, WASH. POST, Feb. 12, 2008, at A3, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/02/11/AR2008021101294.html> (citing demographers Jeffrey Passel and D’Vera Cohn making this claim regarding intermarriage).

¹⁸ *Id.*

¹⁹ The fact that it can be difficult to ensure that the beneficiaries of affirmative action are related to or are themselves direct victims of past discrimination bedevils affirmative action debates concerning blacks, too. As commentators have noted, the children of recent African and Caribbean immigrants appear to benefit more from affirmative action than the descendants of black slaves or victims of Jim Crow. Cf. Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 155 & n.166 (2003).

²⁰ The affirmative action policy adopted by the University of Michigan Law School and upheld by the Supreme Court in *Grutter v. Bollinger*, 539 U.S. 306 (2003), did, of course, purport to value diversity of all kinds. The policy aspired to “achieve that diversity which has the potential to enrich everyone’s education and thus make a law school class stronger than the sum of its parts,” see *id.* at 315, recognizing “many possible bases for diversity admissions,” see *id.* at 316. The special attention or preference given to African Americans, Native Americans, and Latinos became necessary only because a substantial number of students from those groups would not be enrolled in the Law School without it. *Id.*

identification with their country of origin to begin to identify with other immigrants from and descendants of the Spanish-speaking Americas. In addition, in contrast to the other major demographic category constituted heavily by recent immigration—the “Asian” designation—the Latino category is remarkably homogeneous, given the linguistic commonality and similar histories of colonization and independence of the countries of Latin America.²¹ Add to these factors the fact that many Latinos are racially distinct from the white majority²² and that the Mexican component of the Latino population overwhelms all others numerically,²³ and for the foreseeable future “Latino” will remain a socially salient, identifiable category, even as its internal complexity grows. Even cross-generational assimilation may not extinguish the group’s coherence, given that an individual’s association with a Latino community can persist even as he or she develops an otherwise plural identity whose dimensions vary in importance depending on context.²⁴

Under these circumstances, the failure of Latinos to reach positions of power, as well as poor economic and educational performance by Latinos as a group relative to other major social groups, will continue to present a problem for our purportedly democratic, egalitarian society. Such disparities will indicate that an important and identifiable sector of society is not doing as well as other similarly situated groups. Addressing Latino underrepresentation will continue to be necessary, even as the means of doing so will need to be better targeted at the segments of the population most in need.

THE REALIZATION OF POLITICAL POWER

So let’s assume that even as the Latino population grows relative to other demographic groups, due to immigration and higher levels of Latino

²¹ This point is a *relative* one and is not intended to suggest that meaningful differences do not exist among Latin American cultures and societies.

²² Ian Haney López has argued that Latinos should be regarded as a race. He conceives of race as socially and historically constructed and defines it as “a vast group of people loosely bound together by historically contingent, socially significant elements of their morphology and/or ancestry[,] . . . a *sui generis* social phenomenon in which contested systems of meaning serve as the connections between physical features, races, and personal characteristics.” Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 7 (1994); see also Ian F. Haney López, *Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 85 CAL. L. REV. 1143, 1164 (1997) (noting that the Supreme Court has effectively acknowledged that race is a product of “community attitudes,” underscoring that the phenomenon is not biological but social, even as “divergent and conflicting conceptions of racial identity exist within and among communities”).

²³ There are approximately 30 million Mexicans and Mexican Americans in the United States. See PEW HISPANIC CTR., STATISTICAL PORTRAIT OF HISPANICS IN THE UNITED STATES, 2006, at 6 tbl.6 (2008), <http://pewhispanic.org/files/factsheets/hispanics2006/hispanics.pdf>. The next largest Latino group is those of Puerto Rican origin, at approximately 4 million. See *id.*

²⁴ For a discussion of the possibility of maintaining a “fluid civic identity,” see Cristina M. Rodríguez, *Accommodating Linguistic Difference: Toward a Comprehensive Theory of Language Rights in the United States*, 36 HARV. C.R.-C.L. L. REV. 133, 145-160 (2001).

reproduction inside the United States,²⁵ Latinos of all stripes will continue to consider themselves a community. What happens when Latinos evolve from being easily dismissed minorities to electorally powerful pluralities or even majorities in many states and localities? For decades, the Latino vote has been touted as an invaluable prize; this evolution, in fact, has been underway for quite some time and has almost certainly transformed state and local politics in select regions of the United States. But it may well be that the 2008 election cycle will come to be seen as the moment when the Latino vote fulfilled its “promise” by actually making a difference in electoral outcomes in races for national office.²⁶

Almost by definition, the ability to shape electoral outcomes signifies that Latinos no longer qualify as the sort of discrete and insular minority envisioned by Justice Stone in the famous footnote four of *United States v. Carolene Products Co.*,²⁷ or by John Hart Ely as part of his theory of judicial review, according to which courts are justified in intervening to protect groups unable to advance their own interests, even in a fully functioning and open political process, because of their minority status.²⁸ Again, the point is not that Latinos will ever form an outright majority in the United States as a whole. Instead, as the “white” majority ceases to be the dominant majority, it will be increasingly difficult to distinguish between Latinos and the “white” population in terms of their positions of power within the body politic, particularly if we take to heart the fact that this country’s “white” population is hardly a monolithic voting block whose power should be seen as the power of a majority.²⁹ More to the point, Latinos increasingly form local majorities and may soon approach statewide majorities or pluralities in

²⁵ See FRY, *supra* note 9.

²⁶ See generally MARK HUGO LOPEZ, PEW HISPANIC CTR., THE HISPANIC VOTE IN THE 2008 ELECTION (2008), <http://pewhispanic.org/files/reports/98.pdf> (taking a first cut at the influence of the Latino vote in the 2008 election); PEW HISPANIC CTR., LATINOS AND THE 2006 MID-TERM ELECTION (2006), <http://pewhispanic.org/files/factsheets/26.pdf> (discussing the impact of the Latino vote in the 2006 mid-term elections).

²⁷ 304 U.S. 144, 152 n.4 (1938). In *Carolene Products*, the Supreme Court upheld a federal statute that prohibited the shipment in interstate commerce of “filled” milk, applying a highly deferential standard of reasonableness in assessing the constitutionality of the statute. The Court, however, included a footnote that offered guidelines for continued judicial review of legislative action, despite the post-New Deal presumption that socio-economic legislation that discriminated against particular groups, such as the margarine industry, was valid. In footnote four, the Court emphasized that it might, among other things, more closely monitor laws that discriminated against “discrete and insular minorities.” *Id.* at 153 n.4.

²⁸ See JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); cf. Samuel Issacharoff, *Groups and the Right to Vote*, 44 EMORY L.J. 869, 872 (1995) (“[T]he current proliferation of group claims in the voting rights arena stems from a profound disorientation from the crucial factors that justify . . . the ‘affirmative’ reliance on racial or ethnic classifications. The rationale of *Carolene Products* . . . suggests that a claim for judicial reform of the political process requires a showing both of group disadvantage and of the group’s historic inability to redress that disadvantage . . .”).

²⁹ The notion that there is such a thing as the “white” vote, or that it conveys meaningful information to say that a certain percentage of the country’s white population voted for a candidate or an issue, seems extraordinarily reductive.

a variety of states, including the large and powerful Texas and California.³⁰ Particularly in a federal system like our own, this demographic fact translates into substantial voting and bargaining power, and it is on such power, rather than protection by the courts, that such groups should be expected to rely upon to advance their interests.³¹

The notion that Latinos now or will soon have sufficient power to protect their interests through the political process rather than through civil rights enforcement or judicial intervention is far from an open and shut case. Most important, many Latinos are not citizens and cannot vote.³² Not only does the Latino population not have the strength of its numbers at the ballot box, but politicians and lawmakers also are less likely to take non-citizen Latinos' interests as seriously as those of citizen Latinos.³³ In addition, structural inequities and disproportionate economic disadvantage may still persist, even in the face of complete Latino enfranchisement. Latinos may be disproportionately poorer, with less of the cultural capital necessary to succeed in American society than other groups.

If Latinos are still less likely to rise to positions of power through existing institutional structures such as bureaucracies or political parties, either because of past exclusion or relative minority status, then we should hardly be sanguine that a large Latino electorate will be capable on its own of securing equal status for the Latino population. What is more, status as a majority is hardly a guarantee of equality. Even after women gained the right to vote, for example, the advancement of gender equality required a combination of political mobilization and extra vigilance by courts and other legal

³⁰ Despite its increased dispersion across the country, the Latino vote remains fairly concentrated: growth in only 178 counties accounts for seventy-nine percent of the entire increase in the Latino population in the new century. See FRY, *supra* note 9, at iv.

³¹ This idea is clearly present in the way the Supreme Court has refined its interpretation of the Fourteenth Amendment, namely in the context of affirmative action. In *City of Richmond v. J.A. Croson Co.*, Justice O'Connor held that the city of Richmond's set-asides for minority contractors violated the Equal Protection Clause because, among other reasons, the City Council of Richmond and the city itself were majority black. See 488 U.S. 469, 495-96 (1989) (citing John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 739 n.58 (1974) ("Of course it works both ways: a law that favors Blacks over Whites would be suspect if it were enacted by a predominantly Black legislature.")). In other words, the set-asides looked like racial spoils, rather than attempts to assist a demographic and potentially excluded minority—an instance of a white majority imposing a burden on itself to advance the interests of a minority. An implication of this aspect of the Court's holding is that, where a population forms a majority, it must compete in an open marketplace rather than rely on the sort of preferential treatment deserved only by those who might be disadvantaged in open competition because of their size.

³² In 2006, for example, only thirty-nine percent of the Latino population was eligible to vote, as compared to seventy-six percent of the white population and sixty-five percent of the black population. PEW HISPANIC CTR., THE LATINO ELECTORATE: AN ANALYSIS OF THE 2006 ELECTION 4-5 & tbl.3 (2007), <http://www.pewhispanic.org/files/factsheets/34.pdf>. Some of this gap is attributable to the greater number of non-citizens in the Latino population, and some of it is attributable to the fact that the Latino population is disproportionately under the age of eighteen. See *id.*

³³ That said, the fact that these interests are intertwined and that many non-citizen Latinos eventually will become citizens provides politicians with some incentive to take account of non-citizen interests.

institutions to ensure that women's interests were not obscured by the perpetuation of stereotypes or existing institutional arrangements that embodied long-standing gender inequities.³⁴

For all of these reasons, I do not mean to declare the end of the civil rights paradigm. Instead, I simply suggest that, to the extent Latinos remain dissatisfied with the community's status in the corridors of power, or with the economic and educational achievement of the community as a whole, the remedy increasingly lies in Latinos' ability to mobilize the political will of their own numbers and to persuade the general electorate and officials in power of the importance of addressing concerns particular to the Latino community. Among the advantages of becoming a demographically formidable group is that whatever dysfunctions or inequalities define the Latino condition, addressing those problems becomes not just a matter of concern for the Latino community, but for society as a whole, because the large size of the population means its problems will affect others. But Latinos must take responsibility for setting and executing this political agenda.

THE MEANING OF CULTURAL POWER

In other work, I have discussed the importance of "normalizing" Latino culture.³⁵ By normalization I mean gaining recognition (in the popular imagination and in the national identity narratives Americans tell) of Latino culture as American culture, or as part of the traditions and customs of the United States, rather than as the product of incomplete immigrant assimilation and the presence of foreigners. The advantage of approaching near-majority status is that such normalization becomes more likely to occur simply as a matter of course, with institutions such as the media and the market playing the lead role in the gradual re-conceptualization of Latino culture as part of a necessarily hybrid dominant culture.³⁶ In addition, strength in numbers makes the demand, expectation, or hope that American society adapt to the Latino presence more democratically legitimate. By functionally becoming the mainstream, Latino culture acquires status as mainstream culture, further eroding the group's status as a minority and placing it at the core of American life. This newfound centrality, in turn, may translate into greater

³⁴ Other scholars have argued that the minority model is inaccurate as applied to African Americans because, in many parts of the South, African Americans historically have formed the majority of the population and yet, through violence, fraud, and other tactics, have been disenfranchised by a white minority, depriving blacks of their entitlement to "reshape the states to suit their views of the public good." Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. C.R.-C.L. L. REV. 65, 66-67 (2008). The consequence of this mistaken minority model has been the treatment of cases such as *Plessy v. Ferguson*, 163 U.S. 537 (1896), as "good-faith if wrongheaded efforts to balance majority rule and minority rights," when instead they should be seen in light of the deprivation of African Americans of their rights as a majority. Chin & Wagner, *supra*, at 67.

³⁵ See Rodríguez, *supra* note 14, at 257.

³⁶ Cf. ARLENE DÁVILA, *LATINOS, INC.: THE MARKETING AND MAKING OF A PEOPLE* (2001) (assessing the construction of Latino identity by the Spanish-language media).

appreciation of Latino customs and characteristics as woven into the social fabric of the United States.

This sort of cultural power entails both benefits and burdens, however. To see the two sides of what it means to be a cultural majority, consider how we understand the status of the Spanish language in our public sphere. English-only rules of the sort that arise in linguistically diverse workplaces or as official language laws at the state and local levels represent efforts to recapture a literally more coherent social environment.³⁷ Compelling reasons are given for such rules—primarily the preservation of the linguistic unity of the United States. But English-only rules also reflect the refusal to accept a changing public sphere or to acknowledge the linguistic diversity that has become a feature of our social life, as it is now constituted.³⁸ English-only rules are last-gasp efforts to preserve the privilege of the once dominant monolingual and largely white majority—the privilege of having a public sphere that mirrors one’s own manner of being—that becomes harder to justify in light of the demographic reconstitution of many communities across the country.

As the Latino population grows in size, therefore, the prevalence of the Spanish language in the public sphere arguably becomes a condition of life in the United States to which other social groups must learn to adapt, rather than an aberration that can be ignored or even suppressed through English-only requirements. Latinos, particularly those who are bilingual, are thus in positions of economic and cultural power because they understand and can navigate a cultural environment that has become bewildering to many non-Latinos. This ability to assert a kind of cultural power available only to Latinos, in turn, ought to be seen as coming with certain responsibilities. Latinos’ ability to assert cultural dominance ought to be accompanied by restraint and sensitivity to the interests of minorities in their midst, including white minorities, or even white majorities, who are experiencing dislocation as the result of cultural shifts occurring in American society.

In the context of linguistically diverse workplaces, this restraint would include the use of self-help by bilinguals who are uniquely capable of bridging linguistic gaps among workers, as well as a commitment by Latinos to not use the Spanish language to create new cultural in-groups, even where Latinos are only in de facto control of the workplace, not in de jure control as management. More generally, even if it remains possible for Latinos to live complete lives within their own communities—if the costs of not assimilating decline by virtue of the growth of the Latino population—citizenship requires that Latinos engage the larger world by honing the linguistic and cultural skills necessary to relate to all segments of the American population. Finally, because bilingualism is a source of political, cultural, and economic power, especially in an integrated hemisphere, it may well persist among non-immigrant Latinos. Latinos thus will have natural endowments that will

³⁷ See, e.g., Rodríguez, *supra* note 5, at 1696-1711 (discussing the phenomenon in detail).

³⁸ See generally *id.*

advantage them relative to their English-only peers—a reason to remain mindful of the disadvantages others bear in the competition for jobs and status.

In truth, this English-only example is not the best illustration of the point I am trying to make because it presents benefits and burdens that are limited in time. Considerable social science evidence suggests that Latinos are becoming English-language speakers as quickly or more quickly than previous immigrant groups, and few third-generation Latinos maintain any facility in Spanish.³⁹ The explosion of the Spanish-language marketplace is likely attributable largely to high levels of immigration. Second- and third-generation Latinos consume all or most of their news and culture in the English-language world.⁴⁰ In general, the inevitable assimilation of Latinos across generations makes it difficult to define Latino culture for present purposes and even more difficult to predict what Latino culture will become,⁴¹ particularly given the intermarriage rates discussed above.⁴²

Each of these points ultimately underscores and is reinforced by my initial claim regarding the decline in Latino insularity, which makes the cultural power (as well as the political power) of Latinos thin rather than thick. But even though we cannot fully or accurately describe the shape Latino culture in the United States will take as these demographic developments unfold, it seems likely that American culture itself will be changed by the higher growth of the Latino population relative to other groups. Latinos will gradually occupy a position closer to the center of American culture than historically has been the case—a status that ought to come with the responsibility to respect minority interests and to build cross-ethnic political and social coalitions.

CONCLUSION

As Latinos come to represent a larger and larger share of the American population, scholars and lawmakers must simultaneously interrogate the meaning of the word Latino and attempt to understand the status of the Latino population within the American polity. It is becoming increasingly awk-

³⁹ See, e.g., Rubén Rumbaut, Douglas S. Massey & Frank D. Bean, *Linguistic Life Expectancies: Immigrant Language Retention in Southern California*, 32 *POPULATION & DEV. REV.* 447, 454-55 (2006) (describing the United States as a “graveyard for languages”).

⁴⁰ See ROBERTO SURO, PEW HISPANIC CTR., *CHANGING CHANNELS AND CRISSCROSSING CULTURES: A SURVEY OF LATINOS ON THE NEWS MEDIA 2* (2004), <http://pewhispanic.org/files/reports/27.pdf> (revealing that nearly two-thirds of adult Latinos in the United States consume at least some news from the Spanish-language media but noting that the future of the industry depends on part on the future of immigration).

⁴¹ See generally Cristina M. Rodríguez, *Guest Workers and Integration: Toward a Theory of What Immigrants and Americans Owe One Another*, 2007 *U. CHI. LEGAL F.* 219, 228-47 (discussing the fact that it can be difficult and may be pointless to identify an end-state of assimilation, since the process of immigrant assimilation entails changes to the dominant culture).

⁴² See *supra* notes 17-18 and accompanying text.

ward to describe Latinos as a discrete and insular minority—a concept whose time may have passed altogether in any case. The questions I have raised in this Essay are designed to begin an inquiry into what it means for a group to lose its minority status. This inquiry should, in turn, force a broader reckoning with the majority-minority paradigm of race relations that has dominated American legal discourse to date. Demographic power comes with political power, and with political power comes responsibilities—to turn to the pluralist contest to advance one's interests while remaining mindful of the interests of others present in the polity.