

Are There “Sources of Resilience” When the Separation of Powers Breaks Down?

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I. Introduction: Challenges to the Separation of Powers

Jacob Levy describes three variants of the separation of powers in the 31st Annual McDonald Lecture in Constitutional Studies, only one of which is germane to this reflection. The first variant he describes is based solely on the independence of the judiciary from both the executive and legislative branches of governments; consequently, this variant encompasses both presidential and parliamentary systems under its conceptual ambit. Another variant, which Levy attributes to Montesquieu, envisages the separation of powers between executive, judicial, and legislative branches as a way of allowing for the “pooled”¹ rule of “the one” (i.e. monarch), “the few” (i.e. aristocrats), and “the many” (i.e. the people). Levy also describes a distinctly American variant of the separation of powers undergirded by a system of checks and balances. This variant was designed to ensure “mutual monitoring between executive and legislative”² and it vests the legislative branch with the power to impeach the executive in order to “maintain effective limits on the political power and the political ambition of the president.”³

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2 *Ibid* at 10.

3 *Ibid*.

In narrowing his focus to this distinctly American variant, Levy identifies political parties and partisanship as two main threats to the separation of powers and, by extension, to the survival of constitutional democracy. More specifically, he argues that: “[the] imagined rivalry between legislative and executive, simply as offices or institutions, gets replaced quite rapidly by the emergence of loyalty to a partisan side.”⁴ In a unified government — where the same political party controls both the executive branch as well as majority control of both upper and lower chambers of the legislature — partisan loyalty supplants loyalty to a particular branch of government, thus creating the conditions for “a relatively unconstrained executive, effectively not subject to the rule of law.”⁵ The executive is further constitutionally unfettered and “lawless”⁶ when, according to Levy, it exploits nationalism and populist ideology and presents itself as “the voice of the undifferentiated, unified, *true* people.”⁷ According to Levy, “unconstrained executives” can deploy the instruments of government both to persecute their opponents and to protect themselves from “any such indignity as being held to legal account for their action.”⁸ Levy nonetheless concludes his lecture on a mildly optimistic note. He acknowledges that, while the challenges to the separation of powers and constitutional democracy are real, “perhaps there are other sources of resilience in constitutional democratic systems I have not identified that will meet these challenges.”⁹

Are there “sources of resilience” when the separation of powers breaks down? The following reflection explores a puzzle in contemporary American politics and, in so doing, brings to light potential “sources of resilience” that may help address the four key challenges to constitutional democracy — political parties, partisan loyalty, unified governments, and “unconstrained executives” — that Levy identifies. To be clear: although Levy focuses mainly on the executive’s legal accountability, it is important to note that a unified government is also a “minimum winning coalition”¹⁰ that can bypass the institutional barriers in the lawmaking process that result from the separation of powers. A “minimum winning coalition” in a presidential democracy can act much like a majority government in a parliamentary democracy and pass laws along strictly partisan lines and without the consent of opposition parties. Therefore, when electoral outcomes lead to the formation of unified governments, partisan loyalty can both free executives from legal responsibility and, in essence, veto-proof the lawmaking process. The focus of this reflection is on identifying potential “sources of resilience” against the deployment of a deeply partisan policy agenda by a minimum winning coalition and an “unconstrained executive.”

The puzzle under examination in this reflection concerns the persistence of multilingual accommodation in the United States during the 115th Congress, which lasted from January 3, 2017 to January 3, 2019. For this period of time, the Republican Party held majority control of both chambers of the legislature, and when Donald Trump was inaugurated on January 20, 2017, the legislative and executive branches then formed a “unified” Republican government. As this reflection will show, these conditions were more than ideal for the deeply par-

4 *Ibid* at 12.

5 *Ibid*.

6 *Ibid* at 15.

7 *Ibid* [emphasis in original].

8 *Ibid* at 16.

9 *Ibid* at 17.

10 William H Riker, *The Theory of Political Coalitions* (New Haven, CT: Yale University Press, 1962).

tisan “Official English” movement to finally succeed in making English the official language of the United States and in putting an end to nearly six decades of language accommodation for American immigrants of limited English proficiency. Contrary to what one might have expected, this did not happen. Not only did Republican-sponsored “Official English” bills fail to pass out of a majority Republican Congress, but the only presidential candidate in the last three decades overtly sympathetic to the enshrinement of “Official English” chose not to rescind Executive Order 13166, a Clinton-era executive order mandating language accommodation by federal agencies and departments.

The “Official English” movement’s failure to entrench monolingualism at the federal level is directly attributable to the decisions of chairs of two congressional committees not to hold hearings on “Official English” bills and to President Trump’s decision not to rescind Executive Order 13166. There is further evidence that this failure was the result of internecine conflict within the Republican Party, the toxic and racist politics of the key congressional sponsor of “Official English” legislation, the size of the American “minority electorate,” and the absence of national level citizens’ initiative. Based on this evidence, this reflection concludes that there may be several “sources of resilience” even where the separation of powers seems to have failed.

II. The Puzzle: Persistence of Multilingual Accommodation in an Inhospitable Environment

Since the late 1960s, the United States federal government has developed and implemented three major language accommodation policies for immigrants with limited English proficiency. First, in 1968 the federal government incorporated the *Bilingual Education Act* of 1968 (*BEA 1968*) under Title VII of the *Elementary and Secondary Education Act* of 1965. The *BEA 1968* encouraged local educational agencies to develop bilingual education programs for children with limited English proficiency as well as “programs designed to impart to students a knowledge of the history and culture associated with their language.”¹¹ From 1968 to 1994, the federal government set aside hundreds of millions of dollars for the *BEA*’s implementation; following the adoption of the *No Child Left Behind Act* of 2002, minority language accommodation in education was reimagined as education in English language acquisition and the *BEA* was effectively replaced by the *English Language Acquisition, Language Enhancement, and Academic Achievement Act*. Second, in 1975 the federal government amended the *Voting Rights Act* of 1965 to include minority language assistance provisions in section 203, which outlines “minority language assistance provisions” that require *inter alia* that covered jurisdictions¹² provide registration and voting materials in languages other than English.¹³ Third, in the waning months

11 *Bilingual Education Act of 1968*, Pub L No 90-247, § 704(c)(2) at 817.

12 The United States Department of Justice defines a covered jurisdiction as follows: “A jurisdiction is covered under Section 203 where the number of United States citizens of voting age is a single language group within the jurisdiction: Is more than 10,000, or...Is more than five percent of all voting age citizens, or...On an Indian reservation, exceeds five percent of all reservation residents; and...The illiteracy rate of the group is higher than the national illiteracy rate.” “About Language Minority Voting Rights” (2020), online: *The United States Department of Justice* <www.justice.gov/crt/about-language-minority-voting-rights> [perma.cc/ESV5-D3SR].

13 Some scholars have questioned the effectiveness of minority language assistance provisions given that these provisions of the VRA “do not include an automatic trigger that necessitates local voting

of his second term in office, President Bill Clinton issued Executive Order 13166 which re-interpreted the anti-discrimination provisions of Title VI of the *Civil Rights Act* of 1964 to also include a duty “to improve access to federally conducted and federally assisted programs and activities for persons who, as a result of national origin, are limited in their English proficiency.”¹⁴ As a result of Executive Order 13166, each federal agency and department is required to design and to implement a Language Access Plan (LAP) detailing the steps they are taking to deliver their services in languages other than English.

By contrast to these policy developments, there is also a movement in the United States to make English the country’s official language and, in so doing, to assert English monolingualism in the American public sphere. This so-called “Official English” movement has been around for more than a century. Its two main representative organizations are: 1) US English, an organization founded by Senator S I Hayakawa in 1983 and whose current advisory board includes Arnold Schwarzenegger and Francis Fukuyama among others¹⁵ and 2) ProEnglish, an organization that was founded in 1994 by John Tanton — a progenitor of modern “white identity politics”¹⁶ — and that the Anti-Defamation League has identified as an “anti-immigration umbrella organization.”¹⁷ Both organizations advocate the enshrinement of “Official English” at the state and federal level, but they differ somewhat in their other objectives. US English’s main objective is to ensure that the business of government at the state and federal level is conducted solely in English, but the organization also advocates “common-sense exceptions permitting the use of languages other than English for such things as public health and safety services, judicial proceedings, foreign language instruction and the promotion of tourism.”¹⁸ By contrast, ProEnglish seeks not only to make English the official language of governments at both the state and federal levels, but also aims at putting an end to bilingual education and at “repealing federal mandates for the translation of government documents and voting ballots into languages other than English.”¹⁹ It should also be noted that understandings of the sources of popular support for “Official English” differ as well: for Raymond Tatalovich,²⁰

procedures and processes to be scrutinized by the federal government. Instead, the implementation of Sections 203 and 4(f)(4) depends on the cooperation of local election authorities.” Melissa J Marschall and Amanda Rutherford “Voting Rights for Whom? Examining the Effects of the Voting Rights Act on Latino Political Incorporation” (2016) *American Journal of Political Science* 60:3 at 590.

14 Exec. Order No. 13166, Fed. Reg. 65159 (Aug. 16, 2000), www.govinfo.gov/content/pkg/FR-2000-08-16/pdf/00-20938.pdf.

15 “U.S. English Advisory Board” (2020), online: *U.S. English* <www.usenglish.org/advisory-board/> [perma.cc/QNC5-8VB8].

16 Nicholas Kulish, “Dr. John Tanton, Quiet Catalyst in Anti-Immigration Drive, Dies at 85”, *The New York Times* (18 July 2019) online: <www.nytimes.com/2019/07/18/us/john-tanton-dead.html> [perma.cc/V3WQ-QF57].

17 “Anti-Immigrant Umbrella Group U.S., Inc.’s New Website Reveals Organization’s Influence” (21 February 2013), online (blog): *Anti-Defamation League* <www.adl.org/blog/anti-immigrant-umbrella-group-us-incs-new-website-reveals-organizations-influence> [perma.cc/4CWC-FSGG].

18 “Official English” (2020), online: *U.S. English* <www.usenglish.org/official-english/about-the-issue/> [perma.cc/J8FP-Q3KQ].

19 “Our Mission” (2021), online: *ProEnglish* <proenglish.org/our-mission/> [perma.cc/JQ6Q-ZJ5X].

20 See Raymond Tatalovich, *Nativism Reborn? The Official English Language Movement and the American States* (Lexington, KY: University Press of Kentucky, 1995).

“Official English” is evidence of “nativism reborn,” whereas Deborah J Schildkraut²¹ points to support for “Official English” from civic republicans, liberals, and soft-multiculturalists as well as from nativists and anti-immigrant xenophobes.

The “Official English” movement has had considerable success at the subnational level. Between 1919 and 1921, Nebraska state legislators passed the first three “Official English” laws in the United States. The laws targeted the state’s German-speaking minority; they enshrined the “American language” (i.e. English) as the state’s official language and they also made it illegal for public assemblies to be conducted in languages other than English.²² In 1923, Illinois became the second state to enshrine the “American language” as the state’s official language. As opposed to the Nebraska laws, the Illinois’ “Official English” law was articulated as a way of clearly differentiating the American republic from its British colonial roots.²³ While no other state passed an “Official English” law for nearly six decades thereafter, 30 states passed “Official English” laws between 1980 and 2016. In total, at the time of writing, 32 states have made English their official language.

The “Official English” movement has not fared nearly as well at the national level; members of Congress have thus far introduced 90 “Official English” bills to no avail. While “Official English” bills have as a primary objective the declaration of English as the United States’ official language, some bills have also aimed at repealing bilingual education policies and language assistance in voting and, in some cases, at having Executive Order 13166 declared unconstitutional. To this day, none of these bills has been signed into law and the United States still does not have an official national language. The closest the “Official English” movement came to succeeding was in 1996, when the *Bill Emerson English Language Empowerment Act* of 1996 passed out of the House of Representatives and was read twice in the Senate before being referred to the Senate Judiciary Committee for final consideration. The Senate Judiciary Committee did not hold hearings on the bill prior to the end of the 104th congressional session, effectively killing the *Bill Emerson English Language Empowerment Act*.

The conditions seemed most propitious for the “Official English” movement to finally succeed during the 115th Congress, which lasted from January 3, 2017 to January 3, 2019. During the 115th Congress, the Republican Party held majority control of both the upper and lower chambers of the legislative branch. This is significant because, as **Table 1** below shows, support for “Official English” is deeply partisan and comes overwhelmingly from the Republican Party. As one can see, Congressional sponsors and co-sponsors of the 39 “Official English” bills introduced in Congress between 2001 and 2021 were almost all Republicans. Consequently, there should have been little opposition to an “Official English” bill passing out of a Congress controlled by Republicans.

21 See Deborah J Schildkraut, *Press ‘One’ for English: Language Policy, Public Opinion, and American Identity* (Princeton, NJ: Princeton University Press, 2007).

22 Tatalovich, *supra* note 20 at 35.

23 Dennis Barron, “Federal English” in James Crawford, ed, *Language Loyalties: A Source Book on the Official English Controversy* (Chicago: The University of Chicago Press, 1992) at 39.

Table 1. Partisan Support for “Official English” Bills (2001-2021)

Number of Bills	Sponsors	Party Affiliation: Percentage Republican	Co-Sponsors	Party Affiliation: Percentage Republican
39	12*	100	348**	95.11***

* Six members of Congress sponsored multiple bills: Rep. Dan Burton x 2; Rep. John T Doolittle x 2; Rep. Peter T King x 7; Rep. Steve King x 11; Rep. Thomas G Tancredo x 2; Sen. James M Inhofe x 9. Each of these sponsors was only counted once in column 2.

** Members of Congress who co-sponsored multiple bills were only counted once.

*** The breakdown by party affiliation is: 331 Republicans, 16 Democrats, 1 Independent.

Furthermore, with Donald Trump’s inauguration on January 20, 2017, both the executive and legislative branches of government were under “unified” Republican control, meaning that legislation could pass out of Congress and be signed into law without the requirement of bipartisan support. To be clear, the 115th Congress was the most recent of three unified Republican governments since the first “Official English” bill was introduced in Congress in the early 1980s. However, this unified government differed from its two predecessors. While both legislative branches of government were also under “unified” Republican control during the 108th and 109th Congresses, then President George W Bush could hardly have been considered a committed advocate of “Official English.” Paradoxically, while he signed the *No Child Left Behind Act* into law, he was also the first President of the United States to deliver an official address in a language other than English²⁴ and he had previously opposed the enshrinement of English as the language of government when he was Governor of Texas.²⁵ Donald Trump, by contrast, was far more receptive to “Official English.” During a 2015 Republican presidential debate he stated that “we have a country where, to assimilate, you have to speak English ... we have to have assimilation ... this is a country where we speak English.”²⁶ Once he became the Republican nominee for President, Trump ran an “English-only” presidential campaign²⁷ and ProEnglish claims to have met with White House staff five times in 2018 to discuss the English Language Unity Act.²⁸ In addition, Vice President Mike Pence co-sponsored five “Official English” bills when he was a Senator, which suggests that the drive for monolingualism had another important ally in the White House.

24 Maria Elena Fernandez, “Bush Tries His Hand at Spanish in Radio Talk”, *Los Angeles Times* (6 May 2001) online: <www.latimes.com/archives/la-xpm-2001-may-06-mn-60019-story.html> [perma.cc/HRP9-UZH3].

25 James Thomas Tucker, “The Politics of Persuasion: Passage of the Voting Rights Act Reauthorization Act of 2006” (2006) 33:2 J Legis 205 at 210-211.

26 CNN, “Trump: We speak English here, not Spanish” (16 September 2015) at 00h:00m:17s, online (video): *YouTube* <www.youtube.com/watch?v=eNjcAgNuIAc> [perma.cc/HK6K-TRRG].

27 Shane Goldmacher, “Trump’s English-only campaign”, *Politico* (23 September 2016) online: <www.politico.com/story/2016/09/donald-trumps-english-only-campaign-228559> [perma.cc/4YHY-F8AY].

28 Stephen Guschov, “ProEnglish Launches Fall Campaign In Advance Of November Elections” (4 September 2018), online: <proenglish.org/2018/09/04/proenglish-launches-fall-campaign-in-advance-of-november-elections/> [perma.cc/64UW-4BCP].

Despite these propitious circumstances, the “Official English” movement failed again at the federal level. **Table 2**, below, shows that there were two attempts to pass “Official English” legislation during the 115th Congress, one in the House and one in the Senate. Both bills (i.e. bills H.R.997 and S.678) were given the same short title: the *English Language Unity Act* of 2017. Their nearly identical texts acknowledged that the United States’ “benefits from... diversity”²⁹ but also that “the common thread binding individuals of differing backgrounds has been the English language.”³⁰ The bills sought to amend Title IV of the US Code to include a declaration that “the official language of the United States is English”³¹ and to affirm that “[representatives] of the Federal Government shall have an affirmative obligation to preserve and enhance the role of English as the official language of the Federal Government.”³² The House bill was first referred to the Committee on Education and the Workforce and to the Committee on the Judiciary on February 9, 2017, before then being referred to the Subcommittee on Immigration and Border Security where it languished for close to two years until it was effectively killed when the 115th Congress ended. The Senate bill was read twice on March 21, 2017, before being referred to the Committee on Homeland Security and Governmental Affairs where it too was killed when the 115th Congress came to a close.

Table 2. “Official English” Bills introduced during the 115th Congress (2017-2019)

Bill	Introduced (Senate or House, Date)	Sponsor	Number of Co-sponsors	Final Action
<i>English Language Unity Act</i> of 2017 (H.R.997)	Introduced in House on 02/09/2017	Representative Steve King (Republican, Indiana)	72	Referred to the Subcommittee on Immigration and Border Security
<i>English Language Unity Act</i> of 2017 (S.678)	Introduced in Senate on 03/21/2017	Senator Jim Inhofe (Republican, Oklahoma)	6	Referred to the Committee on Homeland Security and Governmental Affairs

There was some scuttlebutt that the Trump administration might take matters into its own hands and make English the official language of government, but this too did not come to pass. On January 20, 2017, the day Donald Trump assumed office, the LA Times ran a story³³ drawing attention to White House’s official website — WhiteHouse.gov — which no longer included its Spanish translation function. The blogosphere picked up this story and very quickly began

29 US, Bill HR 997, *English Language Unity Act*, 115th Cong, 2017, § 2(1) [Bill 997]; US Bill S 678, *English Language Unity Act*, 115th Cong, 2017, § 2(1) [Bill 678].

30 Bill 997, *supra* note 29 at § 2(2); Bill 678, *supra* note 29 at § 2(2).

31 Bill 997, *supra* note 29 at § 161; Bill 678, *supra* note 29 at §161.

32 Bill 997, *supra* note 29 at § 162; Bill 678, *supra* note 29 at § 162.

33 Joshua Gillin, “Donald Trump did not make English the Official Language of the United States”, *Politifact* (9 February 2017) online: <www.politifact.com/factchecks/2017/feb/09/blog-posting/donald-trump-did-not-make-english-official-languag/> [perma.cc/f6Y3].

circulating a rumour that the Trump administration had made English the country's official language.³⁴ A few days later, a Trump aide dismissed the rumour and stated that the Spanish option would be quickly restored and that its removal had been an accident.³⁵ On March 12, 2019, Newsmax and ProEnglish.org published then Press Secretary Sarah Huckabee Sanders' statement that making English the official language of the United States is "the position of the White House."³⁶ Both Newsmax and ProEnglish.org also intimated that the Trump administration could make English the official language of government by rescinding Executive Order 13166 and issuing an "Official English" Executive Order.³⁷ Nevertheless, the Trump administration took no action against Executive Order 13166. In fact, during the Trump administration, federal agencies such as the Federal Election Commission, the Department of Education, the Public Benefit Guaranty Corporation, and the Environmental Protection Agency each issued updated Language Assistance Plans demonstrating their compliance with Executive Order 13166. In brief, the federal government continues to this day to conduct its business in English as well as in other languages.

III. Why Did the "Official English" Movement Fail at the Federal Level Despite Conditions That Should Have Facilitated its Success?

By not holding hearings on both versions of the *English Language Unity Act* of 2017 prior to the conclusion of the 115th Congress, two congressional committees — the Committee on Homeland Security and Governmental Affairs and the Subcommittee on Immigration and Border Security — played a pivotal role in stopping the legislative drive to make English the official language of the United States. More specifically, Senator Ron Johnson and Representative Jim Sensenbrenner, chairs of the Committee on Homeland Security and Governmental Affairs and the Subcommittee on Immigration and Border Security, respectively, were the key gatekeepers against "Official English." As committee chairs, it was up to them to decide whether or not to hold hearings to consider the "Official English" bills with which their committees were presented. Since neither chair opted to hold hearings, Senator Johnson and Representative Sensenbrenner effectively vetoed the bills.

Why weren't hearings held? **Table 3**, below, shows that only two of the eight Republicans sitting on the Committee on Homeland Security and Governmental Affairs during the 115th Congress had ever co-sponsored an "Official English" bill. Senator Rob Portman co-sponsored the *English Language Unity Act* of 2005 during the first session of the 109th Congress³⁸ while Senator Mike Enzi co-sponsored the *English Language Unity Act* of 2006 during the

34 *Ibid.*

35 Noah Bierman, "White House promises website will restore Spanish content: 'We're just building up'", *Los Angeles Times* (24 January 2017) online: <www.latimes.com/politics/washington/la-na-trailguide-updates-201701-htmlstory.html#white-house-promises-website-will-restore-spanish-content-were-just-building-up> [perma.cc/4TZ4-G7RF].

36 John Gizzi, "White House Backs English As Official US Language", *NewsMax* (12 March 2019) online: <www.newsmax.com/john-gizzi/white-house-donald-trump-english-us-language/2019/03/12/id/906613/>; Stephen Guschov, "White House Backs English As Official US Language", *ProEnglish* (12 March 2019) online: <proenglish.org/2019/03/12/white-house-backs-english-as-official-us-language/> [perma.cc/RUH5-CX3W].

37 *Ibid.*

38 When Portman was Representative of Ohio's 2nd district.

second session of the 109th Congress and the *S I Hayakawa Official English Language Act* of 2007 during the 110th Congress. In brief, most Republicans on the Committee on Homeland Security and Governmental Affairs, including the committee’s chair, had never sponsored or co-sponsored an “Official English” bill. Moreover, it had been a decade since Senators Portman and Enzi had themselves co-sponsored an “Official English” bill. Despite the deeply partisan nature of “Official English” initiatives, the Republicans sitting on the Committee on Homeland Security and Governmental Affairs during the 115th Congress were not, by all appearances, enthusiastic about making English the official language of the United States.

Table 3. Which Republican members of the Committee on Homeland Security and Governmental Affairs (115th Congress) previously sponsored/co-sponsored “Official English” bills

Members	“Official English”
Ron Johnson, chairman	No
John McCain	No
Rob Portman	Yes (x1)
Rand Paul	No
James Lankford	No
John Hoeven	No
Steve Daines	No
Mike Enzi	Yes (x2)

Table 4, below, shows that the same cannot be said about two of the Republicans sitting on the Subcommittee on Immigration and Border Security. Between 2007 and 2013, Representative Jim Jordan (Ohio) co-sponsored four “Official English” bills while Representative Steve King (Iowa) sponsored eleven “Official English” bills, including the *English Language Unity Act* of 2017, and co-sponsored six other “Official English” bills. Although Representative Jim Sensenbrenner — the chair of the Subcommittee on Immigration and Border Security — co-sponsored four “Official English” bills between 1980 and 2000, he has neither sponsored nor co-sponsored an “Official English” bill since then. In addition, Sensenbrenner was a key participant in the re-authorization of the *Voting Rights Act* in 2006, and with it the provisions for minority language assistance in voting. Sensenbrenner has since led the legislative charge to restore preclearance criteria in the application of the *Voting Rights Act* after they were rendered unenforceable following the Supreme Court’s ruling in *Shelby County v Holder*³⁹, on the application of the *Voting Rights Act*’s coverage formula. By contrast, Steve King is not only an outspoken critic of the minority language assistance provi-

39 133 S. Ct. 2612 (2013).

sions⁴⁰ in the *Voting Rights Act*, he also voted against the re-authorization of the *Voting Rights Act* in 2006.⁴¹ Furthermore, during the 115th Congress, Representative King was chair of the House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties and he chose not to hold hearings on the *Voting Rights Amendment Act* of 2017, a bill that Representative Sensenbrenner had sponsored. In other words, there is a distinct possibility that the House version of the *English Language Unity Act* of 2017 was killed in a tit-for-tat conflict between Republicans with fundamentally different perspectives on voting rights.

Table 4. Which Republican members of the Subcommittee on Immigration and Border Security (115th Congress) previously sponsored/co-sponsored “Official English” bills

Members	“Official English”
Jim Sensenbrenner, Chairman	No
Raul Labrador, Vice Chair	Yes (x1)
Lamar S. Smith	Yes (x1)
Steve King	Yes (x17)
Jim Jordan	Yes (x4)
Ken Buck	No
Mike Johnson	No
Andy Biggs	No

Although committee chairs have power to “enforce the status quo against the parent body’s wishes,”⁴² they are only partial veto players. A bill can be discharged from a committee and brought to the floor for consideration if an absolute majority in the House of Representatives signs a discharge petition. This means that the House version of the *English Language Unity Act* of 2017 could have been discharged from the Subcommittee on Immigration and Border Security with or without Representative Sensenbrenner’s consent. However, successful discharge petitions are a rarity: between 1931 and 2002, 563 discharge petitions were filed, yet only 47 obtained an absolute majority of signatories, and only 2 of the discharged bills became law.⁴³ Given that only 73 of 236 House Republicans had initially backed (as either sponsor or co-sponsor) the *English Language Unity Act* of 2017, it was improbable that the *English Lan-*

40 Dean Norland, “House Votes to Extend Voting Rights Act”, *ABC News* (13 July 2006) online: <abcnews.go.com/Politics/story?id=2190191&page=1> [perma.cc/W5UY-Y8SU].

41 Tom Curry, “Conservatives not keen on effort to revise key section of Voting Rights Act”, *NBC News* (18 July 2013) online: <www.nbcnews.com/politics/politics-news/conservatives-not-keen-effort-revise-key-section-voting-rights-act-flna6c10672368> [perma.cc/T6GM-NCC2].

42 David Epstein, “An informational rationale for committee gatekeeping power” (1997) 91:3/4 *Public Choice* 271 at 271.

43 Richard S Beth, “The Discharge Rule in the House: Recent Use in Historical Context” (17 April 2003), online (pdf): *Report for Congress* <www.everycrsreport.com/files/20030417_97-856GOV_3885a71978a83cada649980d602827d2c0d4a326.pdf> [perma.cc/Z9JV-3Y7A].

guage Unity Act of 2017 was going to secure enough signatures to discharge it had the bill's sponsors opted to file a petition. It is also likely that this option was avoided because of the bill's sponsor, Representative Steve King. Over the years, King has made a number of discriminatory and racist statements which include comparing undocumented migrants to livestock,⁴⁴ describing undocumented migrants as having “calves the size of cantaloupes,”⁴⁵ and claiming that “nonwhite groups” have contributed little to civilization.⁴⁶ King is also notorious for his friendly associations with the who's who of right-wing anti-immigrant populists such as Geert Wilders, Marine LePen, Frauke Petry, and Heinz-Christian Strache.⁴⁷ And, in January 2019, shortly after he asked, “White nationalist, white supremacist, Western civilization — how did that language become offensive?” in an interview with the *New York Times*,⁴⁸ he was stripped of his committee assignments and formally rebuked in the House of Representatives by a vote of 416-1.⁴⁹ In light of King's track record, it is unsurprising then that Republicans, particularly those trying to soft pedal nativist and anti-immigrant policies, would be unwilling to put their full weight behind a bill that he had sponsored.

To be sure, the legislative process of passing an “Official English” law could have been avoided altogether; President Trump could have simply followed ProEnglish's advice and signed an executive order both rescinding Executive Order 13166 and declaring English the official language of government. There are possible electoral and institutional explanations for why this did not happen. Koopmans et al's 2012 study⁵⁰ of liberal and restrictive citizenship rights (including minority language rights) for immigrants in Western Europe shows that a sizeable “minority electorate” disincentivizes political parties from restricting immigrant rights. Foreign-born naturalized American citizens account for 10% of the total national electorate⁵¹ which means that the American “minority electorate” is close to the size of the minority electorate in the UK,⁵² which has one of the most “inclusive” immigrant citizenship regimes in Western Europe. By contrast, Deborah J Schildkraut's explanation of the rapid spread of “Official English” laws at the subnational level points to the presence of institutions of direct democracy (i.e. citizens' initiatives) as a determining factor for whether or not a state is likely to make English its official language. She therefore concludes that the prospect of seeing a national level “Official English” law are limited not only due to the size of the foreign-born

44 Trip Gabriel “A Timeline of Steve King's Racist Remarks and Divisive Actions”, *New York Times* (15 January 2019), online: <www.nytimes.com/2019/01/15/us/politics/steve-king-offensive-quotes.html> [perma.cc/D8UC-PAX9].

45 *Ibid.*

46 *Ibid.*

47 *Ibid.*

48 *Ibid.*

49 Associated Press, “House votes 416-1 to rebuke Steve King's comments on white supremacy; Illinois' Bobby Rush lone no vote”, *Chicago Tribune* (15 January 2019) online: <www.chicagotribune.com/nation-world/ct-steve-king-white-nationalism-resolution-20190115-story.html> [perma.cc/4BNQ-NV86].

50 Ruud Koopmans, Ines Michalowski & Stine Waibel, “Citizenship Rights for Immigrants: National Political Processes and Cross-National Convergence in Western Europe, 1980-2008” (2012) 117:4 *American Journal of Sociology* 1202.

51 Abby Budiman, Luis Noe-Bustamante & Mark Hugo Lopez, “Naturalized Citizens Make Up Record One-in-Ten U.S. Eligible Voters in 2020,” online: *Pew Research Center* <www.pewresearch.org/hispanic/2020/02/26/naturalized-citizens-make-up-record-one-in-ten-u-s-eligible-voters-in-2020/> [perma.cc/2NTE-XNC5].

52 Koopmans, *supra* note 49 at 1225.

American electorate, but also due to the absence of a “national direct initiative ... [which] could mean that the chances of passage in any given year are near zero.”⁵³

IV. Conclusion: Sources of Resilience

The foregoing discussion suggests that there are several potential “sources of resilience” that could help address the challenges to the separation of powers that Jacob Levy identifies in the 31st Annual McDonald Lecture in Constitutional Studies. Overall, the failure of the “Official English” movement under conditions that should have facilitated its success brings to light the importance of formal institutional constraints even where the separation of powers seems to have failed.

More specifically, the evidence presented above shows that congressional committees represent critical veto-points in the lawmaking process and that veto players (i.e. committee chairs) can use their agenda-setting powers to act against partisan interests. Following from the previous point, Representative Sensenbrenner’s decision not to hold hearings on a Steve King-sponsored “Official English” bill also suggests that partisan loyalty in a unified government may sometimes be eclipsed by the personal politics and policy ambitions of individual lawmakers. Additionally, President Trump’s decision not to rescind Executive Order 13166 points to the possible importance of the size of the American minority electorate as key “source of resilience” against the implementation of a populist and nationalist policy agenda. However, it has also been argued that “Mr. Trump could have won in 2020 if only he had done as well among white voters as he did in 2016.”⁵⁴ If this assessment is accurate, then a majority electorate may be just as important a constraint on a populist minimum winning coalition as the “minority electorate.” Finally, a potential “source of resilience” is evidenced by the repudiation of Steve King’s racism and nativism, albeit 18 years after he first assumed office. It may be our changing societal norms that prove to be the most effective buttresses against both a unified government deploying a populist and nationalist agenda and a populist and nativist leader vindictively deploying executive power. For this possible source of resilience to be effective, our societies will have to put our full weight behind the ongoing movement for racial justice and equality and the deployment of a new politics of diversity.

53 Deborah J Schildkraut, “Official-English and the States: Influences on Declaring English the Official Language in the United States” (2001) 54:2 Political Research Quarterly 445 at 455.

54 Nate Cohn, “Why Rising Diversity Might Not Help Democrats as Much as They Hope; News Analysis”, *The New York Times* (4 May 2021), online <www.nytimes.com/2021/05/04/us/census-news-republicans-democrats.html?smtyp=cur&smid=fb-nytimes&fbclid=IwAR3dzTRUHX89lMQ9NBR1TuQYGIjAs_fuTRyCB4t2pmkMrXHUhace0WHiEc> [perma.cc/AUK8-AJXN].