

# ENFRANCHISING LANGUAGE MINORITY CITIZENS: THE BILINGUAL ELECTION PROVISIONS OF THE VOTING RIGHTS ACT

*James Thomas Tucker*\*‡

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\* S.J.D. and L.L.M., University of Pennsylvania; J.D., University of Florida; M.P.A., University of Oklahoma; B.A., Arizona State University Barrett Honors College. The author is Policy Counsel for the ACLU’s Washington Legislative Office. The author is a former Senior Trial Attorney with the United States Department of Justice and Voting Rights Consultant for the National Association of Latino Elected and Appointed Officials (NALEO). During the recent Voting Rights Act (VRA) reauthorization hearings, he testified before Congress three times on the language assistance and federal observer provisions. The views expressed herein do not necessarily reflect those of the ACLU.

‡ Dedicated with all my love to my wife Sue, who endured three years of working weekends and late nights and six months apart during the successful fight to renew and restore the expiring provisions of the Voting Rights Act.

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*The right to vote is one of the most fundamental of human rights. Unless government assures access to the ballot box, citizenship is just an empty promise. Section 203 of the Voting Rights Act, containing bilingual election requirements, is an integral part of our government’s assurance that Americans do have such access.*

Senator Orrin Hatch (R-Utah)<sup>1</sup>

## I.

### INTRODUCTION

Imagine that you are a registered voter and want to exercise your fundamental right to participate in the political process. You have trouble locating your designated polling site because you cannot read either the written instructions that accompanied your voter registration card or the posted signs directing you to the site. If you are fortunate enough to arrive at the correct destination, you encounter poll workers who are speaking incomprehensible words<sup>2</sup> and are visibly irritated

1. *Voting Rights Act Language Assistance Amendments of 1992: Hearings on S. 2236 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 102d Cong. 134 (1992) [hereinafter *S. 2236 Hearings*] (statement of Sen. Orrin Hatch, Member, S. Comm. on the Judiciary).

2. See generally *infra* notes 319–25 and accompanying text (observing that a higher level of English vocabulary is required to vote effectively than that possessed by many language minority voters).

when you do not know how to respond to them. When you give them your name, the poll workers cannot find it in their registration books.<sup>3</sup> Even if they find your name and give you a ballot, you do not know what to do with it. A look of embarrassment spreads across your face. You have not voted before. You cannot grasp any of the instructions the poll workers try to give to you, if they bother to make the effort. You walk into the voting booth but do not even know how to close the curtain. No one is allowed to accompany you inside the voting booth to help you.<sup>4</sup> You cannot read the ballot that is given to you. Alone and without any guidance, you attempt to cast a meaningful ballot.

You would not be alone in your plight. According to the 2000 Census, forty-seven million Americans, or 18% of the total population of the United States aged five and over, speak a language other than English at home.<sup>5</sup> Of this number, approximately 21.3 million people spoke English “less than very well,”<sup>6</sup> and 11.9 million people in 4.4 million households were “linguistically isolated” from the rest of the population.<sup>7</sup> In 2000, Asian Americans numbered 11.9 million persons,<sup>8</sup> of whom 39.5% were not proficient in English.<sup>9</sup> Spanish-

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3. Often, poll workers are not given training about language assistance, including the need to ask persons of certain ethnicities if they are registered under another name. *See generally infra* notes 305–08 and accompanying text (describing inadequate language assistance training for election officials). For example, Latinos commonly use more than one last name, including their mother’s maiden name. *See United States v. Berks County*, 250 F. Supp. 2d 525, 529 (E.D. Pa. 2003) (describing hostile statements by poll workers regarding Hispanic last names).

4. *See generally* DR. JAMES THOMAS TUCKER & DR. RODOLFO ESPINO, MINORITY LANGUAGE ASSISTANCE PRACTICES IN PUBLIC ELECTIONS 80–82 (2006) [hereinafter LANGUAGE ASSISTANCE PRACTICES], reprinted in *Voting Rights Act: Evidence of Continued Need, Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 2124, 2214–16 (2006) [hereinafter *Evidence of Continued Need Hearing*] (finding that 89.7% of responding jurisdictions reported voter assistance practices that violated section 208 of the VRA, which protects the right to receive voter assistance); *see also infra* notes 143–49 and accompanying text (describing the VRA’s voter assistance requirements).

5. BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, LANGUAGE USE AND ENGLISH-SPEAKING ABILITY: 2000 1 (2003) [hereinafter LANGUAGE ABILITY]. This data includes non-citizens and minors who are not eligible to vote.

6. *See id.* at 4 tbl.1. Persons who speak English “less than very well” are not sufficiently proficient in the English language to be able to cast a meaningful ballot without receiving assistance. *See infra* note 156 and accompanying text (defining the meaning of “limited-English proficient” included in section 203 of the VRA and explaining how English language proficiency is determined under the Act).

7. LANGUAGE ABILITY, *supra* note 5, at 10. A “linguistically isolated household” refers to “one in which no person age 14 or over speaks English at least ‘Very well.’ That is, no person aged 14 or over speaks only English at home, or speaks another language at home and speaks English ‘Very well.’” *Id.*

8. BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, WE THE PEOPLE: ASIANS IN THE UNITED STATES 1 (2004). According to the 2000 Census, 69.9% of all Asian

speaking persons comprise the largest segment of the non-English speaking voting population.<sup>10</sup> Many citizens with limited-English language skills are American citizens by birth, including Puerto Ricans;<sup>11</sup> Hawaiians, persons born in America Samoa, and inhabitants of Guam;<sup>12</sup> and of course the “first Americans,” including American Indians and Alaska Natives.<sup>13</sup>

The minority language assistance provisions of the Voting Rights Act (VRA),<sup>14</sup> originally enacted in 1975,<sup>15</sup> were designed to remove

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Americans were foreign-born, approximately half of whom were naturalized citizens. *See id.* at 9 fig.6. Approximately two-thirds of all Asian Americans were citizens. *See id.*

9. *See id.* at 11 fig.8. According to the 2000 Census, the following numbers of Asian-American persons age five years and older speak the identified languages at home: over two million speak Chinese; over 1.2 million speak Tagalog (Filipino); over one million speak Vietnamese; nearly 900,000 speak Korean; and nearly half a million speak Japanese. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CENSUS 2000 SUMMARY FILE 3, at tbl.PCT10 [hereinafter SUMMARY FILE 3].

10. *See* LANGUAGE ABILITY, *supra* note 5, at 4 tbl.1, 7 tbl.3. Persons who speak Spanish comprise nearly two-thirds of all Americans who speak English “less than very well,” totaling approximately 13.8 million of the 21.3 million limited-English proficient Americans. *See id.* at 4 tbl.1. According to the 2000 Census, approximately 80% of all Hispanic persons aged five and older spoke Spanish at home, including approximately 90% of all Central American, Dominican, and South American Hispanics. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, WE THE PEOPLE: HISPANICS IN THE UNITED STATES 10 fig.8 (2004) [hereinafter HISPANICS IN THE UNITED STATES]. Over 70% of all Hispanic persons in the United States are either native-born or naturalized citizens. *See id.* at 8 fig.6.

11. *See id.* at 10 fig.8 (noting that 26.7% of all Puerto Ricans speak English less than “very well”). According to the 2000 Census, there are over 3.4 million Puerto Ricans in the United States, making them the second largest group of Hispanic Americans behind only Mexican Americans, who include over 20.9 million persons. *See id.* at 1 tbl.1.

12. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, WE THE PEOPLE: PACIFIC ISLANDERS IN THE UNITED STATES 11 fig.8 (2005). According to the 2000 Census, there are approximately 400,000 Native Hawaiian citizens, 128,000 Samoan citizens, and 91,000 Guamanian or Chamorro citizens. *See id.* at 1 tbl.1. Approximately 44% of all Pacific Islander persons spoke a language other than English at home. *Id.* at 11 fig.8. Approximately one-third of these persons did not speak English “very well.” *See id.*

13. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, WE THE FIRST AMERICANS 2 fig.1, 13 fig.23 (1993). According to the 2000 Census, there were over 4.1 million American Indians and Alaska Natives living in the United States. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2000 at 1, 3 tbl.1 (2002) [hereinafter NATIVE AMERICANS]. Historically, Navajos have comprised the largest number of Native Americans with limited English skills. According to the 2000 Census, Navajo-speaking persons comprise nearly half of the roughly 380,000 persons who speak a Native American language. *See* SUMMARY FILE 3, *supra* note 9, at tbl.PCT10.

14. *See* 42 U.S.C. §§ 1973 to 1973bb-1 (2000).

15. *See* Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400 (1975) (codified as amended in scattered sections from 42 U.S.C. §§ 1973 to 1973bb-

language barriers to voting and to provide limited-English speaking American citizens with a full and meaningful opportunity to cast ballots. The basic mandate, contained in sections 4(f)(4) and 203 of the Act, prohibits jurisdictions with prescribed levels of limited-English proficient (LEP) citizens of voting age from conducting English-only elections.<sup>16</sup> Other sections of the VRA help secure equal access to elections for language minorities by prohibiting voting discrimination<sup>17</sup> and use of certain tests or devices,<sup>18</sup> authorizing the appointment of federal examiners and observers,<sup>19</sup> requiring certain designated jurisdictions to comply with the special preclearance requirements of section 5 of the Act,<sup>20</sup> and making voting assistance available to those who need it.<sup>21</sup> The federal minority language assistance provisions, which have proven effective when applied properly, currently apply to five states in their entirety and portions of twenty-six additional states.<sup>22</sup>

Despite the increasing importance of minority language assistance throughout the United States, the federal bilingual election requirements are probably the least known and most widely misunderstood provisions of the VRA. This Article strives to dispel misinterpretations of this important law by describing the powerful impact these provisions have had in helping to enfranchise millions of language minority citizens. Part II outlines the legislative history and

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1). The bilingual election provisions originally were to be in effect for ten years, until August 6, 1985. *See id.* § 301, 89 Stat. at 402–03. The bilingual requirements under the Act were modified and extended in 1982, 1992, and 2006. *See* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 4, 96 Stat. 131, 134 (1982) (extending until 1992); Voting Rights Language Assistance Act of 1992, Pub. L. No. 102-344, § 2, 106 Stat. 921 (1992) (extending until 2007); Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. 109-246, 120 Stat. 577 (2006) [hereinafter VRARA] (extending until 2032). The bilingual election provisions described in sections 4(f)(4) and 203(c) were scheduled to expire on August 6, 2007. *See* 42 U.S.C. § 1973b(a)(8); 42 U.S.C. § 1973aa-1a(b)(1). The new 2032 expiration date extends the provisions an additional twenty-five years.

16. *See* 42 U.S.C. §§ 1973b(f)(4), 1973aa-1a.

17. *See* 42 U.S.C. § 1973. Section 2 of the VRA is the general non-discrimination provision of the Act, is permanent, and applies nationwide. For a more detailed discussion of section 2, *see generally* James Thomas Tucker, *Tyranny of the Judiciary: Judicial Dilution of Consent Under Section 2 of the Voting Rights Act*, 7 WM. & MARY BILL RTS. J. 443, 546–61 (1999).

18. *See* 42 U.S.C. § 1973aa.

19. *See* 42 U.S.C. §§ 1973a, 1973d to 1973g. Sections 1973d, 1973e, and 1973g were repealed by the VRARA. *See* VRARA, *supra* note 15, § 3(c) (repealing sections 6, 7, and 9 of the VRA; *see also infra* note 92).

20. *See* 42 U.S.C. § 1973c.

21. *See* 42 U.S.C. § 1973aa-6.

22. *See infra* notes 181–91 and accompanying text.

substance of the VRA's bilingual requirements and explains the continued evolution of these provisions to improve the access of limited-English proficient voters to the political process. Part III addresses criticism of the provisions by assessing the demand for and costs of providing bilingual language assistance and materials to remove barriers to language minority voters.

The bilingual election provisions of the VRA do not divide American citizens along ethnic lines. Instead, the provisions remove barriers posed by English-only elections to ensure that, in Senator Hatch's words, citizenship is not "just an empty promise" for language minority citizens who want to be integrated into American society and the democratic process.<sup>23</sup>

## II.

### THE BILINGUAL ELECTION PROVISIONS OF THE VOTING RIGHTS ACT

*The protection of the Constitution extends to all, to those who speak other languages as well as those born with English on the tongue.*

Meyer v. Nebraska<sup>24</sup>

The bilingual election provisions of the Voting Rights Act were adopted to eliminate language barriers to non-English speaking citizens and to remove the present effects of past discrimination against language minorities.<sup>25</sup> Congress originally targeted these provisions to protect Spanish-language minorities in Texas, whose experience

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23. See *supra* note 1 and accompanying text.

24. 262 U.S. 390, 401–03 (1923) (invalidating a state law that prohibited public and private grammar schools from teaching any language other than English).

25. See generally section 4(f) of the VRA, wherein Congress stated its legislative intent for expanding the Act to encompass discrimination against language minority groups:

The Congress finds that voting discrimination against citizens of language minorities is pervasive and national in scope. Such minority citizens are from environments in which the dominant language is other than English. In addition they have been denied equal educational opportunities by State and local governments, resulting in severe disabilities and continuing illiteracy in the English language. The Congress further finds that, where State and local officials conduct elections only in English, language minority citizens are excluded from participating in the electoral process. In many areas of the country, this exclusion is aggravated by acts of physical, economic, and political intimidation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting English-only elections, and by prescribing other remedial devices.

with discrimination in voting and education was well-documented.<sup>26</sup> Congress also considered evidence of widespread discrimination against other language minority groups,<sup>27</sup> however, and enacted the minority language assistance provisions to secure equal access to the political process for speakers of several different language groups.

This Part discusses the specific requirements and legislative history of the three bilingual election provisions of the VRA—the ban on English literacy tests, the special provisions of the VRA, and the bilingual election provisions of the VRA—and how they have changed to respond to evidence of continued voting discrimination against language minority groups.

### A. *Ban on English Literacy Tests*

As originally enacted in 1965, the VRA did little to improve the plight of language minorities excluded from the political process. One notable protection, however, was section 4(e),<sup>28</sup> which was enacted to enfranchise much of the Puerto Rican population in New York that was barred from voting by the state's English literacy requirement.<sup>29</sup> Under section 4(e), no person who demonstrates he has successfully completed a sixth grade education in a school in the United States “in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election

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42 U.S.C. § 1973b(f)(1); *see also* 42 U.S.C. § 1973aa-1a(a) (stating a similar basis for section 203 of the VRA).

26. *See* David H. Hunter, *The 1975 Voting Rights Act and Language Minorities*, 25 CATH. U. L. REV. 250, 254–57 (1976).

27. *See* S. REP. NO. 94-295, at 24–31, 37–39 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 790–97, 804–06; 121 CONG. REC. H4711–13, H4716–20 (daily ed. June 2, 1975) (statement of Rep. Edwards). A more detailed discussion of the evidence of voting discrimination against language minorities considered by Congress in passing the bilingual election provisions is beyond the scope of this Article. I am editing a separate book on the subject that is forthcoming. For further discussion, *see generally* U.S. COMM'N ON CIVIL RTS., THE VOTING RIGHTS ACT: TEN YEARS AFTER 22–25, 57–59, 85–87, 97–99, 103–04, 108–11, 114–21, 123, 144, 160, 166, 220–30, 242–48, 251–54, 331–32 (1975) [hereinafter TEN YEARS AFTER].

28. 42 U.S.C. § 1973b(e) (2000). For a more detailed discussion of the legislative history of section 4(e), *see generally* Juan Cartagena, *Latinos and Section 5 of the Voting Rights Act: Beyond Black and White*, 18 NAT'L BLACK L.J. 201 (2005).

29. *Katzenbach v. Morgan*, 384 U.S. 641, 645 n.3 (1966) (collecting citations); *see also* REPORT OF THE U.S. COMM'N ON CIVIL RIGHTS 68 (1959) (observing “that Puerto Rican American citizens are being denied the right to vote, and that these denials exist in substantial numbers in the State of New York”). Although section 4(e) applied to students educated in languages other than English anywhere in the United States, its practical effect was “limited to enfranchising those educated in Puerto Rican schools.” *Morgan*, 384 U.S. at 645 n.3.

because of his inability to read, write, understand, or interpret any matter in the English language.”<sup>30</sup>

In *Katzenbach v. Morgan*, the Supreme Court rejected a constitutional challenge to section 4(e) from New York City voters, who argued that the statute violated the Fifth Amendment because it only prohibited the use of literacy tests for persons educated in American schools in which the language of instruction was not English.<sup>31</sup> The Court disagreed, reasoning that Congress had made valid legislative choices to limit the scope of the provision to Puerto Ricans.<sup>32</sup> The Court found that section 4(e) was a valid exercise of congressional powers under the Enforcement Clause of the Fourteenth Amendment<sup>33</sup> and distinguished its earlier ruling in *Lassiter v. Northampton County Board of Elections*, which upheld a state literacy test.<sup>34</sup> The Court also rejected New York’s assertion that its English language requirement was created to give language minorities an incentive to learn English.<sup>35</sup> Instead, the *Morgan* Court opined that Congress may have “questioned whether denial of a right deemed so precious and fundamental in our society was a necessary or appropriate means of encour-

30. 42 U.S.C. § 1973b(e)(2).

31. *Morgan*, 384 U.S. at 654, 656–57.

32. The *Morgan* Court observed:

In the context of the case before us, the congressional choice to limit the relief effected in § 4(e) may, for example, reflect . . . a recognition of the unique historic relationship between the Congress and the Commonwealth of Puerto Rico, an awareness of the Federal Government’s acceptance of the desirability of the use of Spanish as the language of instruction in Commonwealth schools, and the fact that Congress has fostered policies encouraging migration from the Commonwealth to the States.

*Id.* at 657–58 (footnotes omitted).

33. *Id.* at 648–58. The *Morgan* Court held that section 5 of the Fourteenth Amendment was intended to give Congress “the same broad powers expressed in the Necessary and Proper Clause.” *Id.* at 650 (citing U.S. CONST. art. I, § 8, cl. 18). For an additional discussion of Congress’ enforcement powers under section 5 of the Fourteenth Amendment and section 2 of the Fifteenth Amendment, see generally Archibald Cox, *The Supreme Court 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966).

34. 360 U.S. 45 (1959). In *Lassiter*, the Court found the literacy test constitutional under the Equal Protection Clause because “[t]he ability to read and write . . . has some relation to standards designed to promote intelligent use of the ballot.” *Id.* at 51. According to the *Morgan* Court, *Lassiter* was “inapposite” because no showing of an Equal Protection violation was necessary to sustain section 4(e), which was enacted to enforce the Equal Protection Clause pursuant to congressional enforcement powers under section 5 of the Fourteenth Amendment. See 360 U.S. at 648–50.

35. *Id.* at 654. See also *infra* notes 310–16 and accompanying text.

aging persons to learn English, or of furthering the goal of an intelligent exercise of the franchise.”<sup>36</sup>

Eliminating English literacy requirements did not, however, secure the right to vote for Puerto Ricans with limited English skills. According to one court examining claims brought by Puerto Rican voters under section 4(e) of the Act, “[i]t is simply fundamental that voting instructions and ballots, in addition to any other material which forms part of the official communication to registered voters prior to an election, must be in Spanish as well as English, if the vote of Spanish-speaking citizens is not to be seriously impaired.”<sup>37</sup> Courts likewise interpreted section 4(e) to require oral language assistance for illiterate Spanish-speaking voters,<sup>38</sup> following the reasoning applied in the South to provide redress for illiterate voters under the VRA<sup>39</sup> and the Equal Protection Clause.<sup>40</sup> Additionally, some courts ordered that bilingual materials and assistance be provided to Spanish-speaking voters.<sup>41</sup> A handful of state legislatures voluntarily adopted bilingual

36. *Morgan*, 384 U.S. at 654. In *Cardona v. Power*, 384 U.S. 672 (1966), decided the same day as *Morgan*, the Supreme Court suggested that other applications of New York’s English literacy statute might be invalid under section 4(e) of the VRA, even if those applications were not expressly prohibited by section 4(e). *Id.* at 674.

37. *Torres v. Sachs*, 381 F. Supp. 309, 312 (S.D.N.Y. 1974).

38. *See, e.g., id.* (invalidating city election procedures for failing to provide language assistance to Spanish-speaking voters); *Coal. for Educ. in Sch. Dist. One v. New York City Bd. of Elections*, 370 F. Supp. 42, 58 (S.D.N.Y. 1974) (invalidating school board elections for inadequate language assistance for Hispanic voters), *aff’d*, 495 F.2d 1090 (2d Cir. 1974).

39. *See generally* *United States v. Louisiana*, 265 F. Supp. 703, 708 (E.D. La. 1966) (three-judge court) (“As Louisiana recognized for 150 years, if an illiterate is entitled to vote, he is entitled to assistance at the polls that will make his vote meaningful. We cannot impute to Congress the self-defeating notion that an illiterate has the right [to] pull the lever of a voting machine, but not the right to know for whom he pulls the lever.”), *aff’d*, 386 U.S. 270 (1967).

40. *See generally* *Garza v. Smith*, 320 F. Supp. 131, 136 (W.D. Tex. 1970) (three-judge court) (“If the ‘right to vote’ consists only of the right to enter the voting booth without hindrance or discrimination, perform the physical act of voting, and have the vote so recorded counted in the total of like votes cast, we cannot say that the challenged provisions have an impact on the illiterate voter’s ability to exercise the right. Except for physically disabled or blind illiterates, as to whom the issue is moot, an illiterate voter is capable of performing each element of the ‘right to vote,’ as defined above . . . . We decide, however, that the ‘right to vote’ additionally includes the right to be informed as to which mark on the ballot, or lever on the voting machine, will effectuate the voter’s political choice.”), *vacated and remanded for appeal to 5th Circuit*, 401 U.S. 1006 (1971), *appeal dismissed for lack of jurisdiction*, 450 F.2d 790 (5th Cir. 1971).

41. *See, e.g.,* *Puerto Rican Org. for Political Action v. Kasper*, 490 F.2d 575, 580 (7th Cir. 1973) (Chicago); *Arroyo v. Tucker*, 372 F. Supp. 764, 767–68 (E.D. Pa. 1974) (Philadelphia).

assistance requirements similar to those ordered by courts under section 4(e) of the VRA.<sup>42</sup>

Unfortunately, section 4(e) proved to be too narrow: it did nothing to secure the right to vote for other language minority groups and Spanish-speaking persons who were not Puerto Rican. Moreover, the temporary suspension of all literacy tests or other similar “tests or devices” under sections 4(a) and 4(b) of the 1965 Act<sup>43</sup> applied to only those jurisdictions meeting the triggering formula. As a result, few jurisdictions with language minorities were covered in 1965, notwithstanding congressional findings that literacy tests were subject to abuse in their administration and had a discriminatory impact on minority groups who had suffered from disparate educational opportunities.<sup>44</sup>

In 1970, Congress remedied some of the limitations of section 4(e) by adopting section 201 of the VRA, which extended the suspension of literacy tests or other similar “tests or devices”<sup>45</sup> nationwide for five years.<sup>46</sup> This change temporarily superseded section 4(e) of the Act, allowing all otherwise qualified language minorities to register and vote regardless of their literacy in English or their native language.<sup>47</sup> According to Congress, the nationwide ban was justified because “there is insufficient relationship between literacy and responsible interested voting to justify such a broad restriction of the franchise.”<sup>48</sup> In *Oregon v. Mitchell*, which upheld section 201, Justice Douglas explained that this reasoning was well founded, because “most States do not have literacy tests; . . . the tests have been used at times as a discriminatory weapon against some minorities, . . . [and]

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42. See S. REP. NO. 94-295, at 33 & n.35 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 799–800 & n.35 (New Jersey; Dade County, Florida; Massachusetts; Pennsylvania; and Connecticut). After the California Supreme Court struck down an English literacy requirement under the Equal Protection Clause of the Fourteenth Amendment, *see* *Castro v. State*, 466 P.2d 244, 244–45 (Cal. 1970), the state legislature enacted legislation requiring recruitment of bilingual deputy registrars and poll workers in precincts with at least a 3% non-English speaking voting age population, and making a Spanish-language sample ballot available to voters upon request. See S. REP. NO. 94-295 at 33, *reprinted in* 1975 U.S.C.C.A.N. at 799.

43. See Pub. L. No. 89-110, § 4(a)–(b), 79 Stat. 437, 438 (1965).

44. See H.R. REP. NO. 89-439 (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2444–47.

45. Section 201 of the Act adopts the same definition of “test or device” as the one used in section 4(c) of the Act. Compare Pub. L. No. 91-285, § 6, 84 Stat. 314, 315, with Pub. L. No. 89-110, § 4(c), 79 Stat. 437, 438–39.

46. See Pub. L. No. 91-285, § 6, 84 Stat. 314, 315.

47. TEN YEARS AFTER, *supra* note 27, at 22.

48. See S. REP. NO. 94-295, at 23 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 789 (citing 116 CONG. REC. 5221 (1970)).

radio and television have made it possible for a person to be well informed even though he may not be able to read and write.”<sup>49</sup>

In 1975, Congress relied on the evidence cited by Justice Douglas to sustain a permanent nationwide ban on literacy tests.<sup>50</sup> The majority of states already had abolished literacy tests,<sup>51</sup> and none of the witnesses who testified during the Senate hearings opposed extending section 201.<sup>52</sup> In addition, there was substantial evidence that literacy tests were subject to discriminatory uses against minority groups.<sup>53</sup> In a similar vein, Congress deemed it “patently unfair” for states to require a certain level of literacy of the same minority citizens to whom the states had denied educational opportunities.<sup>54</sup> Finally, Congress concluded that “[i]t is difficult to see why citizens who cannot read or write should be prevented from participating in decisions that directly affect their environment, particularly in an era when radio and television are primary sources of information.”<sup>55</sup>

Although the ban on literacy tests under section 201 of the VRA provided some salutary effect for language minorities, it was designed specifically to address “[t]he problems of English-speaking illiterates—those citizens who can speak but can neither read nor write English.”<sup>56</sup> Congress opted to address problems for language minorities without proficiency in spoken or written English through sections 4(f)(4) and 203(c) of the 1975 amendments to the VRA, which will be addressed in the remainder of this Part.

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49. 400 U.S. 112, 147 (1970).

50. See 121 CONG. REC. H4716 (daily ed. June 2, 1975) (statement of Rep. Edwards) (quoting Justice Douglas); Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, § 102, 89 Stat. 400, 400 (codified as amended at 42 U.S.C. § 1973aa (2000)).

51. Only fourteen states still used some form of literacy tests by 1975. See *Extension of the Voting Rights Act of 1965: Hearings on S. 407, S. 903, S. 1297, S. 1409, and S. 1443 Before the Subcomm. on Constitutional Rts. of the S. Comm. on the Judiciary*, 94th Cong. 666 (1975) (Ex. 24 to statement of J. Stanley Pottinger, Assistant Attorney General).

52. S. REP. NO. 94-295 at 23, reprinted in 1975 U.S.C.C.A.N. at 789.

53. *Id.*

54. *Id.* at 23, reprinted in 1975 U.S.C.C.A.N. at 790.

55. *Id.* at 24, reprinted in 1975 U.S.C.C.A.N. at 790.

56. *Id.* at 23, reprinted in 1975 U.S.C.C.A.N. at 789.

*B. Coverage Under Section 4(f)(4) and the Special Provisions of the Voting Rights Act*

*1. Evolution of the Preclearance Trigger Mechanism of Section 4 to Include Language Minorities*

The 1965 Act focused primarily on remedying voting discrimination against African Americans in the South.<sup>57</sup> The “heart of the Voting Rights Act,”<sup>58</sup> sections 4 through 9, were special temporary measures that only applied to states or political subdivisions that had used a literacy test or similar “tests or devices”<sup>59</sup> in a manner that had resulted in low registration or voting rates. Application of the triggering formula was thus restricted primarily to seven southern states.<sup>60</sup> Consequently, the temporary suspension of literacy tests or devices under section 4,<sup>61</sup> the administrative preclearance provisions contained in section 5,<sup>62</sup> the use of federal examiners to enroll and list

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57. See *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966) (observing that the Voting Rights Act was enacted “to banish the blight of racial discrimination in voting” against African Americans in the South). The Act was designed to cure deficiencies of earlier civil rights legislation passed in 1957, 1960, and 1964 that had proven inadequate to prevent the discriminatory use of barriers to political participation by southern blacks, including poll taxes, voter registration procedures, and literacy tests. See H.R. REP. NO. 89-439 (1965), reprinted in 1965 U.S.C.C.A.N. 2437; S. REP. NO. 89-162 (1965), reprinted in 1965 U.S.C.C.A.N. 2508. For a summary of the social, economic, and physical pressures directed at suppressing the black vote in the South, see James Thomas Tucker, *Affirmative Action and [Mis]representation: Part I—Reclaiming the Civil Rights Vision of the Right to Vote*, 43 *How. L.J.* 343, 343–48 (2000).

58. TEN YEARS AFTER, *supra* note 27, at 5.

59. Section 4(c) of the Act defines “test or device” as:

any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

42 U.S.C. § 1973b(c) (2000).

60. Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, and Virginia were covered in their entirety, in addition to forty counties in North Carolina, four counties in Arizona, and one county each in Hawaii and Idaho that met the triggering formula provided in the 1965 Act. See TEN YEARS AFTER, *supra* note 27, at 13. Between 1965 and 1970, Alaska, three counties in Arizona, one county in North Carolina, and the one Idaho county were exempted from coverage after successful lawsuits under the bailout provisions of section 4(a) of the VRA. See *id.* at 14.

61. See Pub. L. No. 89-110, § 4, 79 Stat. 437, 438–39 (1965).

62. See *id.* at § 5, 79 Stat. at 439. For an additional discussion of section 5 and enforcement efforts by the Department of Justice under that section, see, e.g., U.S. COMM’N ON CIVIL RTS., A CITIZEN’S GUIDE TO UNDERSTANDING THE VOTING RIGHTS ACT 7–10 (1984) [hereinafter CITIZEN’S GUIDE]; U.S. COMM’N ON CIVIL RTS., THE VOTING RIGHTS ACT: UNFULFILLED GOALS 64–75, 83–84 (1981) [hereinafter UN-

eligible voters under section 6,<sup>63</sup> and election coverage by federal observers under section 8 of the 1965 Act<sup>64</sup> initially had little impact on language minorities.

The 1970 amendments to the VRA, however, provided some relief to language minorities.<sup>65</sup> Congress expanded the triggering formula under section 4 to also include voter turnout in the 1968 Presidential election,<sup>66</sup> requiring many jurisdictions with large numbers of language minorities to comply with the Act's special coverage provisions.<sup>67</sup> Furthermore, section 4(a) was amended to provide that covered jurisdictions had to be free from discriminatory tests or devices for at least ten years before being eligible for exemption from coverage.<sup>68</sup>

Despite the 1970 amendments, when the temporary provisions of the VRA again came up for renewal in 1975, there was overwhelming evidence of "a systematic pattern of voting discrimination and exclusion against minority group citizens who are from environments in which the dominant language is other than English."<sup>69</sup> Congress responded by modifying the VRA "to broaden its special coverage to new geographic areas in order to ensure the protection of the voting rights of 'language minority citizens.'"<sup>70</sup> Title II of the 1975 amendments expanded the triggering formula under section 4 of the Act<sup>71</sup> to apply to "those jurisdictions with the more serious problems" of vot-

FULFILLED GOALS]; TEN YEARS AFTER, *supra* note 27, at 25–31, 402–09; Drew S. Days, *Section 5 and the Role of the Justice Department*, in *CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE* 52–65 (Grofman & Davidson eds. 1992). See generally Mark A. Posner, *Time Is Still On Its Side: Why Congressional Reauthorization Of Section 5 Of The Voting Rights Act Represents A Congruent And Proportional Response To Our Nation's History Of Discrimination In Voting*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 51 (2007).

63. See Pub. L. No. 89-110, § 6, 79 Stat. 437, 439–40 (1965).

64. See *id.* at § 8, 79 Stat. 440–41.

65. See Pub. L. No. 91-285, 84 Stat. 314 (1970).

66. See *id.* at § 4, 84 Stat. at 315.

67. Three counties in New York City, five counties in Arizona, two counties in California, one county in Wyoming, and several towns in New England were covered under the new triggering formula. See TEN YEARS AFTER, *supra* note 27, at 14–15. In addition, some jurisdictions that had successfully sought exemption from the special provisions after initially being covered under the 1965 Act were covered again under the 1970 amendments, including four election districts in Alaska, three counties in Arizona, and the one county in Idaho. *Id.* at 14.

68. See Pub. L. No. 91-285, § 3, 84 Stat. 314, 315 (1970).

69. S. REP. NO. 94-295, at 24 (1975), reprinted in 1975 U.S.C.C.A.N. 774, 790.

70. *Id.*

71. The section 4(f)(4) trigger is "virtually identical" to the trigger under section 4(b) of the 1965 Act, except that it expanded the term "test or device" to "also mean the use of English-only election materials in jurisdictions where more than 5 percent of the voting age citizen population is comprised of members of any single language

ing discrimination against language minorities.<sup>72</sup> Under section 4(f)(4), a State or “political subdivision”<sup>73</sup> is covered if it meets three criteria: (1) more than 5% of the voting-age citizens on November 1, 1972, were members of a single language minority group;<sup>74</sup> (2) the Attorney General finds that “registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots” were provided only in English on November 1, 1972;<sup>75</sup> and (3) the Director of the Census determines that fewer than 50% of voting-age citizens were registered to vote on November 1, 1972, or that fewer than 50% voted in the November 1972 Presidential election.<sup>76</sup> A covered state or political subdivision

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minority group.” 121 CONG. REC. H4716 (daily ed. June 2, 1975) (statement of Rep. Edwards).

72. S. REP. NO. 94-295 at 31, *reprinted in* 1975 U.S.C.C.A.N. at 798; *see also id.* at 9, *reprinted in* 1975 U.S.C.C.A.N. at 775 (stating that section 4(f)(4) applies to areas “where severe voting discrimination was documented” against language minorities). Specifically, “the more severe remedies of title II are premised not only on educational disparities,” like the less stringent provisions under title III of the 1975 amendments, “but also on evidence that language minorities have been subjected to ‘physical, economic, and political intimidation’ when they seek to participate in the political process.” 121 CONG. REC. H4718 (daily ed. June 2, 1975) (statement of Rep. Edwards).

73. *See* 42 U.S.C. § 1973l(c)(2) (2000) (defining “political subdivision” as “any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting”). When a political subdivision such as a county or parish is covered under either section 4(f)(4) or 203 of the VRA, “all political units that hold elections within that political subdivision (e.g., cities, school districts) are subject to the same requirements” under the Act as the political subdivision. 28 C.F.R. § 55.9 (2006).

74. *See* 42 U.S.C. § 1973b(f)(3) (2000). Some members of Congress advocated for a less inclusive 10% trigger, *see* 121 CONG. REC. S13,645–52 (daily ed. July 24, 1975) (statement of Sen. Chiles), but Congress ultimately adopted the 5% figure because it had been established as a “relevant cut-off” in court decisions and state laws mandating bilingual election materials in areas with a sufficient number of language minorities. S. REP. NO. 94-295 at 32 n.31, *reprinted in* 1975 U.S.C.C.A.N. at 799 n.31. Specifically, the 5% trigger had been ordered by courts to determine coverage for providing bilingual election materials in New York, *see* *Torres v. Sachs*, 381 F. Supp. 309, 313 (S.D.N.Y. 1974), and Philadelphia, *see* *Arroyo v. Tucker*, 372 F. Supp. 764, 768 (E.D. Pa. 1974). In addition, state legislatures in California and Connecticut used a trigger of 5% or less. 121 CONG. REC. S13,647 (daily ed. July 24, 1975) (statement of Sen. Bayh); *id.* at S13,650 (statement of Sen. Tunney); S. REP. NO. 94-295 at 33 n.35, *reprinted in* 1975 U.S.C.C.A.N. at 800 n.35.

75. *See* 42 U.S.C. §§ 1973b(b), 1973b(f)(3) (2000); *see also* 42 U.S.C. § 1973b(b) (providing that coverage under the special provisions of the VRA requires a determination by the Attorney General that a State or political subdivision maintained on Nov. 1, 1972, any “test or device”).

76. *See* 42 U.S.C. § 1973b(b). Determinations by the Attorney General and Director of the Census under section 4(f)(4) are not reviewable in any court and are effective upon publication in the Federal Register. *Id.*

is subject to all of the special provisions of the VRA<sup>77</sup> and must provide all election materials, including assistance and ballots, in the language of the applicable language minority group.<sup>78</sup> Currently, section 4(f)(4) covers three states in their entirety and parts of six other states.<sup>79</sup>

Congress adopted the triggering formula in section 4(f)(4) to insure that the VRA's special temporary provisions only would apply to states and political subdivisions where "significant concentrations of

77. See 121 CONG. REC. H4716 (daily ed. June 2, 1975) (statement of Rep. Edwards) (describing the effects of the bill he sponsored on the VRA).

78. See 42 U.S.C. § 1973b(f)(4). As noted in 28 C.F.R. § 55.8(a) (2006), this requirement is "essentially identical" to section 203(c). The bilingual election requirements are discussed *infra* notes 103–54 and accompanying text. The term "language minorities" is defined in the Act as "persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage," 42 U.S.C. § 1973l(c)(3), as defined by the census definitions for each of these language minority groups. See 121 CONG. REC. H4716 (daily ed. June 2, 1975) (statement of Rep. Edwards). When the 1975 amendments were enacted, the Bureau of the Census defined the language minority groups in the following manner:

[T]he category of Asian American includes persons who indicated their race as Japanese, Chinese, Filipino, or Korean. The category of American Indian includes persons who indicated their race as Indian (American) or who did not indicate a specific race category but reported the name of an Indian tribe. The population designated as Alaskan Native includes persons residing in Alaska who identified themselves as Aleut, Eskimo or American Indian. Persons of Spanish heritage are identified as (a) "persons of Spanish language" in 42 States and the District of Columbia; (b) "persons of Spanish language" as well as "persons of Spanish surname" in Arizona, California, Colorado, New Mexico and Texas; and (c) "persons of Puerto Rican birth or parentage in New Jersey, New York, and Pennsylvania."

S. REP. NO. 94-295 at 24 n.14, *reprinted in* 1975 U.S.C.C.A.N. at 790–91 n.14 (quoting Letter from Meyer Zitter, Chief, Population Div., Bureau of the Census, to House Judiciary Comm. (Apr. 29, 1975)).

Congress selected these language minority groups because of substantial evidence that many of these groups suffered from voting discrimination or other forms of discrimination that limited their ability to participate in the political process, suffered from severe language barriers, and had depressed voter registration and turnout. See S. REP. NO. 94-295 at 30–31, *reprinted in* 1975 U.S.C.C.A.N. at 797. Other language groups were not included because there was no evidence that they experienced similar difficulties in voting. See *id.* at 31, *reprinted in* 1975 U.S.C.C.A.N. at 797.

79. See 28 C.F.R. pt. 55, app. (2006). States covered under section 4(f)(4) statewide include Alaska (Alaska Natives), Arizona (Spanish heritage), and Texas (Spanish heritage). *Id.* In addition, Arizona has four counties covered under section 4(f)(4) under a different minority language than the one that triggered statewide coverage (American Indian). See *id.* States partially covered under section 4(f)(4) include three counties in California (Spanish heritage), five counties in Florida (Spanish heritage), two townships in Michigan (Spanish heritage), two counties in New York (Spanish heritage), Jackson County in North Carolina (American Indian), and two counties in South Dakota (American Indian). See *id.*

minorities with native languages other than English reside.”<sup>80</sup> But during congressional debates on the 1975 amendments, several members of Congress had argued in favor of nationwide coverage rather than use the triggering formula, which they viewed as arbitrary and resulted in covering jurisdictions with no history of discrimination against language minorities. Congress ultimately rejected nationwide coverage for several reasons. As an initial matter, section 2 and certain other provisions of the VRA already applied nationwide. Furthermore, the formula for section 4(f)(4) coverage used a trigger “essentially identical to the traditional trigger” found in section 4(b),<sup>81</sup> which already had proven effective in covering jurisdictions with a history of discriminating against African Americans. Limited resources also would have made it difficult for the Attorney General to administer and enforce the Act effectively nationwide. Finally, nationwide coverage created the risk that the section 4(f)(4) trigger would be unconstitutional because it would be broader than necessary to remedy discrimination against language minorities.<sup>82</sup>

Some members of Congress expressed concerns that the Act’s special provisions would be applied in jurisdictions covered by the automatic trigger in section 4(f)(4) that did not have a history of voting discrimination against language minorities. Congress responded to these concerns in several ways. Under section 4(d), a jurisdiction can be removed from section 4(f)(4) coverage if it shows that the uses of discriminatory “tests or devices” were few in number and were corrected promptly and effectively, the effects of such uses have been eliminated, and there is no reasonable probability of their recurrence.<sup>83</sup> The “bailout” provision in section 4(a) likewise allows a state or political subdivision to be removed from coverage under section 4(f)(4) if it obtains a declaratory judgment in the District Court of the District of Columbia that it has not used English-only elections or any other “test or device” in a discriminatory manner against language minorities and other racial or ethnic groups for the preceding ten years.<sup>84</sup> Moreover,

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80. See S. REP. NO. 94-295 at 9, *reprinted in* 1975 U.S.C.C.A.N. at 775.

81. *Id.* at 32, *reprinted in* 1975 U.S.C.C.A.N. at 798.

82. See generally 121 CONG. REC. H4894–95 (daily ed. June 4, 1975) (statement of Rep. Edwards) (criticizing an amendment that would include all persons “whose principal spoken language is other than English” as “suffer[ing] from such a degree of overbreadth that it would destroy the bill” because it “would result in a coverage of over 40 States and 1,200 counties where there is no record of discrimination whatsoever”).

83. See 42 U.S.C. § 1973b(d) (2000).

84. See 42 U.S.C. § 1973b(a); see also S. REP. NO. 94-295 at 35, *reprinted in* 1975 U.S.C.C.A.N. at 801–02 (describing “bailout” for areas covered by section 4(f)(4) “where there has been no voting discrimination”). Representative Edwards described

a covered jurisdiction may partially bail out of the special provisions where the jurisdiction can show that it has “not discriminated against one or more of the pertinent subgroups.”<sup>85</sup>

## 2. *Special Provisions to Facilitate Compliance with the Bilingual Election Requirements*

The special provisions of the VRA play a crucial role in protecting language minorities’ right to vote. Under section 5 of the Act, jurisdictions covered under section 4(f)(4) must demonstrate that a change affecting voting “does not have the purpose and will not have the effect” of denying or abridging the rights of language minorities to vote.<sup>86</sup> The Supreme Court generally has construed section 5 liberally<sup>87</sup>; as a result, a covered jurisdiction cannot implement any changes in voting laws, practices, and procedures, including changes

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how he anticipated the bailout provision would work for a jurisdiction covered by section 4(f)(4):

[I]t is expected that a successful bailout could typically be achieved if the jurisdiction can demonstrate factors such as high turnout and participation by its language minority population; . . . and literacy in the English language among that group. It is clear that if factors such as these could be demonstrated, for the 10 years preceding the filing of the bailout action, then the jurisdiction’s past use of English-only election procedures did not have a discriminatory effect.

121 CONG. REC. H4718 (daily ed. June 2, 1975) (statement of Rep. Edwards). Where a jurisdiction is covered by both section 4(f)(4) and section 203, termination of coverage under one of these sections does not have the effect of terminating coverage under the other section. *See* S. REP. NO. 94-295 at 46, *reprinted in* 1975 U.S.C.C.A.N. at 813. Certain covered counties in Colorado, New Mexico, and Oklahoma have bailed out of section 4(f)(4) coverage pursuant to section 4(a). For further discussion of the “bailout” provisions, *see, e.g.*, Hunter, *supra* note 26, at 259–60; CITIZEN’S GUIDE, *supra* note 62, at 13–14; Paul F. Hancock & Lora L. Tredway, *The Bailout Standard of the Voting Rights Act: An Incentive to End Discrimination*, 17 URB. LAW. 379 (1985).

85. 121 CONG. REC. H4718 (daily ed. June 2, 1975) (statement of Rep. Edwards). For example, a jurisdiction that is covered for Asian-American language minorities may be able to bail out of coverage for bilingual election materials for Japanese, Chinese, Filipino, or Korean, if it can prove that it has not discriminated against one of those “subgroups” of Asian-American languages. *See id.*; *see also id.* at H4886–87 (daily ed. June 4, 1975) (statement of Rep. Edwards) (describing bailout on a subgroup-by-subgroup basis).

86. 42 U.S.C. § 1973c (2000).

87. *See generally* Allen v. State Bd. of Elections, 393 U.S. 544 (1969) (holding that changes from single-member districts to at-large elections, from elected to appointed offices, methods of placing independent candidates on ballots, and procedures for casting write-in ballots were all covered changes subject to the preclearance requirement under section 5 of the VRA); Presley v. Etowah County Comm’n, 502 U.S. 491, 502–03 (1992) (changes involving the manner of voting, such as the location of polling places, are voting changes covered by section 5).

made to comply with section 4(f)(4) of the Act,<sup>88</sup> without first obtaining “preclearance” from the Attorney General or a declaratory judgment from the United States District Court for the District of Columbia.<sup>89</sup> This administrative process allows the federal government to determine in advance whether covered changes “evade the remedies for voting discrimination contained in the Act itself.”<sup>90</sup> Section 5 thus helps ensure that the progress made because of the availability of language assistance “shall not be destroyed through new procedures and techniques” that discriminate against language minorities.<sup>91</sup>

Section 8 of the Act has also provided an important means to evaluate a jurisdiction’s language assistance practices through the use of federal election observers,<sup>92</sup> who are non-lawyer employees of the United States Office of Personnel Management (OPM).<sup>93</sup> They are appointed to observe in jurisdictions that have been certified by the Attorney General pursuant to section 8 of the Act,<sup>94</sup> or by a federal

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88. See S. REP. NO. 94-295 at 47, *reprinted in* 1975 U.S.C.C.A.N. at 814; 28 C.F.R. § 55.22 (2006).

89. See 42 U.S.C. § 1973c.

90. *South Carolina v. Katzenbach*, 383 U.S. 301, 335 (1966).

91. S. REP. NO. 94-295 at 19, *reprinted in* 1975 U.S.C.C.A.N. at 785.

92. See 42 U.S.C. § 1973f (2000). The federal observer provisions were substantially modified in 2006 to update them to contemporary usage. Previously, a jurisdiction had to be certified for federal examiners under section 6 of the Act before federal observers could be deployed. See Pub. L. No. 89-110, § 6, 79 Stat. 437, 439–40 (1965) (codified as amended at 42 U.S.C. § 1973d (2000) (repealed 2006)). Federal examiners were authorized to examine voter registration applicants concerning their qualifications for voting, to create lists of eligible voters to forward to the local registrar, and to issue voter registration certificates to eligible voters. See Pub. L. No. 89-110, § 7, 79 Stat. 437, 440–41 (1965) (codified as amended at 42 U.S.C. § 1973e (2000) (repealed 2006)). Although federal examiners initially accounted for a large percentage of black voters registered in the South after passage of the VRA in 1965, they “have been used sparingly in recent years.” S. REP. NO. 94-295 at 20, *reprinted in* 1975 U.S.C.C.A.N. at 786. As of December 31, 2005, there were only 112,078 federally-registered voters remaining in five southern states: Alabama (50,566), Georgia (2253), Louisiana (12,289), Mississippi (42,388), and South Carolina (4582). CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, FEDERAL EXAMINERS AND FEDERAL OBSERVERS, [http://www.usdoj.gov/crt/voting/examine/activ\\_exam.htm](http://www.usdoj.gov/crt/voting/examine/activ_exam.htm) (last visited Feb. 28, 2006). Since no new voters had been registered since 1983, see *The Federal Examiner and Observer Program: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 10 (2005) (statement of Nancy Randa, Deputy Associate Director for Human Resources Products and Services, U.S. Office of Personnel Management), the federal examiner provisions were eliminated as part of the 2006 reauthorization. VRARA, *supra* note 15, § 3(c) (repealing sections 6, 7, and 9 of the VRA). For a more detailed discussion of these changes, see generally James Thomas Tucker, *The Politics of Persuasion: Passage of the Voting Rights Act Reauthorization Act of 2006*, 33 J. LEGIS. (forthcoming 2007).

93. See 42 U.S.C. § 1973f.

94. See 42 U.S.C. § 1973d. The Attorney General may certify a jurisdiction covered under section 4(f)(4) of the Act for federal observers if he or she either has

court pursuant to section 3(a).<sup>95</sup> Observers are not sent to every certified jurisdiction for every election. Instead, they typically only are dispatched to jurisdictions with “a substantial prospect of election day problems.”<sup>96</sup> According to the Senate Report on the 1975 amendments to the VRA, “the role of Federal observers can be critical in that they provide a calming and objective presence which can serve to deter any abuse which might occur. Federal observers can also still serve to prevent or diminish the intimidation frequently experienced by minority voters at the polls.”<sup>97</sup>

Federal observers are authorized to observe the casting and tabulating of ballots.<sup>98</sup> They are “trained by OPM and by the Justice Department to watch, listen, and take careful notes of everything that happens inside the polling place during an election, and are also trained not to interfere with the election in any way.”<sup>99</sup> Bilingual observers are considered preferable, because they are able to observe the manner in which language minority voters are treated as well as assess the quality of any written language materials and oral assistance offered to voters in their native language.<sup>100</sup> When a voter requires assistance to cast a ballot, the observer can accompany that voter behind the curtain of the voting booth if the observer first obtained the voter’s

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received written meritorious complaints from residents, elected officials, or civic participation organizations, or if he or she believes their appointment is necessary to enforce voting rights protected under the Fourteenth and Fifteenth Amendments to the United States Constitution. *Id.*

95. See 42 U.S.C. § 1973b(a) (2000). Private parties, as well as the Attorney General, can request certification of a jurisdiction pursuant to section 3(a).

96. CITIZEN’S GUIDE, *supra* note 62, at 12. The Department of Justice has not issued regulations governing how certified jurisdictions are selected for coverage by federal observers. *Id.* However, the Department has informally stated that the following procedure typically is used: Department employees initially conduct telephone surveys of covered jurisdictions with significant minority populations to determine whether any minority candidates are running; a second telephone survey then is conducted of minority contacts in jurisdictions in which there are minority candidates or where there is information suggesting there may be election day problems; if there is sufficient evidence of potential problems, a Department attorney is dispatched to the jurisdiction to conduct an investigation and recommends whether observers should be dispatched; and the decision then is made whether to send observers. *Id.*; COMPTROLLER GENERAL OF THE UNITED STATES, VOTING RIGHTS ACT: ENFORCEMENT NEEDS STRENGTHENING 22–23 (1978) [hereinafter COMPTROLLER REPORT].

97. S. REP. NO. 94-295 at 21, *reprinted in* 1975 U.S.C.C.A.N. at 787.

98. 42 U.S.C. § 1973f (2000).

99. CIVIL RIGHTS DIV., U.S. DEP’T OF JUSTICE, THE RIGHT TO VOTE: HOW FEDERAL LAW PROTECTS YOU, <http://www.usdoj.gov/crt/voting/misc/voterev.htm> (last visited Nov. 30, 2006).

100. See generally COMPTROLLER REPORT, *supra* note 96, at 24–25 (summarizing complaints received from minority contacts about the absence of minorities serving as federal observers).

permission.<sup>101</sup> Federal observers have also been a key component of efforts to ensure compliance with the Act because they prepare reports that can be used in subsequent litigation and because the observers themselves can testify as witnesses.<sup>102</sup>

### *C. Coverage Under Section 203 and the Bilingual Election Requirements*

Title III of the 1975 amendments, codified in section 203 of the VRA, is “specifically directed to the problems of ‘language minority groups.’”<sup>103</sup> Congress found that these problems, including high illiteracy rates, resulted from “the failure of state and local officials to afford equal educational opportunities”<sup>104</sup> and from the lack of adequate bilingual assistance at the polls.<sup>105</sup> Section 203 adopts a practical approach to the illiteracy problem: rather than attempting to

101. *See* *United States v. Louisiana*, 265 F. Supp. 703, 715 (E.D. La. 1966) (three-judge court).

102. *See generally* 42 U.S.C. § 1973f (providing that persons assigned as observers “shall report to . . . the Attorney General, and if the appointment of observers has been authorized pursuant to [section 3(a)], to the court”); *see also* S. REP. NO. 94-295 at 21, *reprinted in* 1975 U.S.C.C.A.N. at 787 (noting that “observer reports have served as important records relating to the conduct of particular elections in subsequent voting rights litigation”); *accord* THE RIGHT TO VOTE: HOW FEDERAL LAW PROTECTS YOU, *supra* note 99 (stating that observers “prepare reports that may be filed in court, and they can serve as witnesses in court if the need arises”).

103. S. REP. NO. 94-295 at 37–38, *reprinted in* 1975 U.S.C.C.A.N. at 804. Section 203 uses the same definition of “language minorities” as section 4(f)(4) of the Act. *Compare* 42 U.S.C. § 1973aa-1a(e) (2000) *with* 42 U.S.C. § 1973l(c)(3) (2000).

104. S. REP. NO. 94-295 at 28, *reprinted in* 1975 U.S.C.C.A.N. at 794; *see also* 42 U.S.C. § 1973aa-1a(a) (“The Congress finds that, through the use of various practices and procedures, citizens of language minorities have been effectively excluded from participation in the electoral process. Among other factors, the denial of the right to vote of such minority citizens is ordinarily directly related to the unequal educational opportunities afforded them, resulting in high illiteracy and low voting participation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting these practices, and by prescribing other remedial devices.”).

105. Congress found that state and local jurisdictions had been “disturbingly unresponsive” to illiteracy among language minorities:

Some . . . do provide bilingual officials or materials in areas with 5 percent or more Spanish-speaking citizens; others . . . provide no assistance whatsoever. Seventeen states do allow for the possibility of bilingual assistance “through the aid of a judge or friend,” but . . . this assistance is often inadequate. Another seventeen states lack any provision for voter assistance whatsoever to language minorities, and of these seventeen, eleven come under Title III, which is based on a concentration of 5 percent or more of language minority citizens.

S. REP. NO. 94-295 at 39, *reprinted in* 1975 U.S.C.C.A.N. at 805–06.

“correct the deficiencies of prior educational inequality,” it is intended “to permit persons disabled by such disparities to vote now.”<sup>106</sup>

## 1. Requirements for Covered Jurisdictions Under Section 203

### a. Bilingual Voting Materials

Jurisdictions covered by section 203(c) are prohibited from providing English-only “voting materials”<sup>107</sup> in any election.<sup>108</sup> All “voting materials”—defined as “registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots”<sup>109</sup>—provided in English generally must also be provided in the language of all applicable minority groups or sub-groups that triggered coverage.<sup>110</sup> The Department of Justice has indicated that this definition “should be broadly construed to apply to all stages of the electoral process,”<sup>111</sup> and many courts

106. *Id.* at 34, reprinted in 1975 U.S.C.C.A.N. at 800; see also *id.*, reprinted in 1975 U.S.C.C.A.N. at 801 (observing that Title II of the 1975 amendments “is a temporary measure to allow such citizens to register and vote immediately; it does not require language minorities to abide some unknown, distant time when local education agencies may have provided sufficient instruction to enable them to participate meaningfully in an English-only election”); accord 121 CONG. REC. H4734 (daily ed. June 2, 1975) (statement of Rep. Drinan); *id.* at H4739 (daily ed. June 2, 1975) (statement of Rep. Badillo).

107. 42 U.S.C. § 1973aa-1a(b)(3)(A) (defining “voting materials”).

108. See 42 U.S.C. § 1973aa-1a(b)(1); see also 42 U.S.C. § 1973l(c)(1) (describing types of elections covered by section 203); 28 C.F.R. § 55.10 (2006) (same).

109. 42 U.S.C. § 1973aa-1a(b)(3)(A). Failure to provide language minority citizens with equal access to the ballot also violates section 2 of the VRA. See generally *Brown v. Post*, 279 F. Supp. 60, 63–64 (W.D. La. 1968) (concluding that failure to provide black citizens with the same access to absentee ballots as white citizens violated section 2).

110. 42 U.S.C. § 1973aa-1a(c). The requirement for written voting materials in the language of each subgroup typically applies only to Asian Americans because Spanish primarily is a single language and “[m]ost of the Alaskan Native and American Indian languages have no written form.” 121 CONG. REC. H4886 (daily ed. June 4, 1975) (statement of Rep. Edwards). For languages having more than one dialect, such as Chinese, the written voting materials may be provided in “the one that is generally used.” *Id.* at H4890 (daily ed. June 4, 1975) (statement of Rep. Edwards).

111. 28 C.F.R. § 55.15 (2006). The regulation further provides that section 203(c) encompasses:

voter registration through activities related to conducting elections, including, for example the issuance, at any time during the year, of notifications, announcements, or other informational materials concerning the opportunity to register, the deadline for voter registration, the time, places and subject matters of elections, and the absentee voting process.

*Id.*; see also 28 C.F.R. § 55.18 (2006) (“voting materials” includes materials provided by mail, public notices, registration materials, polling place activities and materials, and publicity concerning the availability of minority language materials).

have agreed.<sup>112</sup> Conversely, some courts have excluded such actions as publication of an English-only notice to seek a recall<sup>113</sup> or circulation of an English-only initiative petition if neither the State nor the political subdivision created the materials.<sup>114</sup> Although some language in the legislative history of section 203(c) supports a narrower construction of “voting materials,”<sup>115</sup> such an approach is inconsistent with the expansive definition of “voting” adopted by Congress elsewhere in the Act.<sup>116</sup>

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112. *See generally* United States v. Metropolitan Dade County, 815 F. Supp. 1475 (S.D. Fla. 1993) (holding that section 203(c) applied to a voter information pamphlet that explained changes in election format, registration, and voting times and voting places, and that publication of the same information in two Spanish language newspapers was insufficient); *see also* Zaldivar v. City of Los Angeles, 780 F.2d 823, 833 n.11 (9th Cir. 1986) (observing in dictum that the “argument that a recall notice is only a preliminary step to voting and therefore is unaffected by the bilingual provisions of the Act” was “without merit” because section 203(c) “does not exempt information or material, compelled by statute, which is preliminary to voting, but essential if an election is to occur”), *abrogated on other grounds*, Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990); Montero v. Meyer, 696 F. Supp. 540, 546–47 (D. Colo. 1988) (agreeing with the *Zaldivar* dictum that petitions circulated for purposes of placing a constitutional initiative on the ballot are covered “voting materials,” particularly because of the role that Colorado state government played in the initiative process and the petitions’ inclusion of information essential to effective participation in the electoral process), *rev’d*, 861 F.2d 603 (10th Cir. 1988).

113. *See* Padilla v. Lever, 463 F.3d 1046 (9th Cir. 2006) (en banc); Zaldivar v. City of Los Angeles, 590 F. Supp. 852, 854–55 (C.D. Cal. 1984) (finding that recall proponents did not violate section 203(c) by publishing English-only notice of intention to recall city councilman because neither state nor political subdivision was involved in printing the notice and the recall petition was not part of the “electoral process”), *rev’d in part on other grounds*, 780 F.2d 823, 833 n.11 (9th Cir. 1986) (in dictum, disagreeing with district court’s conclusion); Gerena-Valentin v. Koch, 523 F. Supp. 176 (S.D.N.Y. 1981).

114. *See* Delgado v. Smith, 861 F.2d 1489, 1490–91 (11th Cir. 1988) (holding that English-only initiative petition did not constitute “voting materials” because involvement by state officials in the initiative process did not constitute sufficient state action to trigger section 203); Montero v. Meyer, 861 F.2d 603, 607 (10th Cir. 1988) (concluding that “electoral process” under section 203(c) did not commence under state law until a measure was certified as qualified for placement on ballot, and signing of initiative petitions was not “voting” that would trigger coverage for bilingual election materials).

115. *See generally* S. REP. NO. 94-295, at 49 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 815 (“Whenever any *jurisdiction* covered under this title provides *official* registration or election materials, those materials must be provided in the language of the applicable language minority group as well as in English.”) (emphases added); *see also* H.R. REP. NO. 109-478, at 59 (2006) (“However, language assistance that facilitates equal participation in the voting process so language minority citizens are able to cast effective ballots does not require private citizens to make privately prepared and distributed materials available in the covered languages.”).

116. *See generally* 42 U.S.C. § 1973l(c)(1) (2000) (defining the terms “vote” or “voting” as including “all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant

Section 203 does not necessarily require voting materials to be provided in the written language of all the language minorities and sub-groups that triggered coverage. During the debates on the 1975 amendments, some members of Congress argued that including Alaska Natives and American Indians placed an “impossible burden”<sup>117</sup> on covered jurisdictions because the languages of these two language groups are in multiple dialects, and few are in written form.<sup>118</sup> The House of Representatives, rather than striking the coverage formula contained in Title II<sup>119</sup> or excluding “Alaskan Natives” from the definition of “language minority group,”<sup>120</sup> amended section 203(c) to include the following proviso proposed by Senator Stevens of Alaska:

[W]here the language of the applicable minority group is oral or unwritten or in the case of Alaskan Natives and American Indians, if the predominant language is historically unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.<sup>121</sup>

In addition, “if an American Indian language is historic in nature and is not used by the population of the relevant tribes, then . . . not even oral assistance in such nonspoken language cases will be required.”<sup>122</sup> In short, section 203 merely mandates that a covered juris-

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to this Act, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election”) (emphasis added).

117. 121 CONG. REC. H4806 (daily ed. June 3, 1975) (statement of Rep. Young).

118. *See, e.g., id.; id.* at H4738 (daily ed. June 2, 1975) (statement of Rep. Badillo); *id.* at H4747 (daily ed. June 2, 1975) (statement of Rep. McClory); *id.* at H4807, H4825 (daily ed. June 3, 1975) (statement of Rep. McClory); *see also id.* at H4827 (daily ed. June 3, 1975) (statement of Rep. Edwards) (“There is no way to have a written bilingual ballot for a language that is oral.”). Even to the extent that some Alaska Native and American Indian languages are reduced to written form, frequently those written languages only are used by university professors and a small number of natives, but are not generally used within the covered language minority groups or sub-groups. *See id.* (statement of Rep. McClory); *id.* (statement of Rep. Young).

119. *See* 121 CONG. REC. H4825–26 (daily ed. June 3, 1975) (rejecting the amendment by a vote of 104 in favor, 305 opposed).

120. *See* 121 CONG. REC. H4827–29 (daily ed. June 3, 1975) (rejecting the amendment by a vote of 145 in favor, 264 opposed).

121. 42 U.S.C. § 1973aa-1a(c) (2000); *see also* 121 CONG. REC. H4893 (daily ed. June 4, 1975) (adopting the proviso without objection); *infra* note 122 (referring to this proviso as the Stevens amendment). The same proviso is contained in section 4(f)(4) of the Act. *See* 42 U.S.C. § 1973b(f)(4) (2000).

122. 121 CONG. REC. H4908 (daily ed. June 4, 1975) (statement of Rep. Edwards); *see also* S. REP. NO. 94-295, at 39 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 806 (“a jurisdiction is not required to provide oral materials or assistance in an extinct

diction provide written language materials or oral assistance based upon the actual needs of the applicable language minority groups or sub-groups.<sup>123</sup>

The responsibility for determining what materials must be provided in a minority language ultimately rests with the jurisdiction conducting the election.<sup>124</sup> Even good faith efforts by a jurisdiction to comply with section 203 are actionable if they ultimately are ineffective.<sup>125</sup> Covered jurisdictions must provide the same materials used for the general electorate in the language of the covered language minority groups.<sup>126</sup> In addition, all materials provided in minority languages must be “clear, complete and accurate.”<sup>127</sup> If the covered minority language group uses more than one language, dialect, or written form, voting materials and assistance should be in the form most commonly used among the voting-age citizens in that group.<sup>128</sup> Also, jurisdictions must publicize the availability of minority language materials and assistance through methods most likely to reach lan-

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language”). Representative Edwards explained the effect of the proviso on bilingual election procedures under sections 4(f)(4) and 203(c) of the Act:

Languages recently developed by anthropologists, which are obviously not used or widely used by citizens of voting age within the language group, have always been, for our purposes, “oral” or “unwritten” languages. Therefore, the mandate imposed under such circumstances was not one for printed bilingual election materials but rather one for bilingual oral assistance in registration and voting. . . . [A]lthough the language of the Stevens amendment has been placed only in [section 203], . . . this is in no way to imply that a contrary interpretation is to be given to the bilingual elections mandate as it appears in [section 4(f)(4)].

121 CONG. REC. H7631 (daily ed. July 28, 1975) (statement of Rep. Edwards). Assistant Attorney General J. Stanley Pottinger concurred in Representative Edwards’s construction of the proviso. *See id.* at H7632 (daily ed. July 28, 1975) (quoting Letter from J. Stanley Pottinger, Assistant Attorney General, to Rep. Edwards, (July 28, 1975)).

123. *See* 121 CONG. REC. H4718 (daily ed. June 2, 1975) (statement of Rep. Edwards); *id.* at H4900 (daily ed. June 4, 1975) (statement of Rep. Badillo); *see also id.* at H4827 (daily ed. June 3, 1975) (statement of Rep. Edwards) (observing that in the case of Alaska Natives, compliance with section 203(c) “would be a relatively simple process because the languages of Alaska are similar and they require only one interpreter”).

124. *See* 28 C.F.R. § 55.19(a) (2006).

125. *See* *Chinese for Affirmative Action v. Leguennec*, 580 F.2d 1006, 1008–09 (9th Cir. 1978) (reaching this conclusion even though the covered city only had a few days in which to make contracts and modify its election procedures to get into compliance with section 203).

126. 42 U.S.C. § 1973aa-1a(c); *see also* *Chinese for Affirmative Action*, 580 F.2d at 1008–09.

127. *See* 28 C.F.R. § 55.19(b).

128. *See* 28 C.F.R. §§ 55.12–.13 (2006).

guage minority citizens, including outreach with language minority organizations and citizens.<sup>129</sup>

*b. Oral Language Assistance at Voter Registration Sites and Polling Places*

Covered jurisdictions also must ensure that they have effective bilingual voter registration programs.<sup>130</sup> One method of accomplishing this objective is to provide bilingual registration materials to all prospective registrants and to have only bilingual persons working as registrars.<sup>131</sup> Alternatively, it may be sufficient to use some bilingual registrars who are members of the covered language group, establish registration sites in areas heavily populated by language minorities, and have bilingual registration materials available at those sites.<sup>132</sup> Regardless of which method is used, registration sites should be kept open at times convenient for language minorities to register, bilingual registrars need to be readily accessible to persons making telephone inquiries, and signs should be displayed in the covered languages at the central registration office and at sites in language minority communities “advertising the availability of bilingual assistance.”<sup>133</sup> Failure to provide language minority citizens with equal access to registration opportunities not only violates section 203 in covered jurisdictions<sup>134</sup> but also violates the general nondiscrimination requirements of section 2 of the VRA even in non-covered jurisdictions.<sup>135</sup>

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129. See 28 C.F.R. § 55.18(e) (2006) (describing steps that “may include the display of appropriate notices, in the minority language, at voter registration offices, polling places, etc., the making of announcements over minority language radio or television stations, the publication of notices in minority language newspapers, and direct contact with language minority group organizations”); UNFULFILLED GOALS, *supra* note 62, at 80–81.

130. See 42 U.S.C. § 1973aa-1a(c); 28 C.F.R. § 55.18(c).

131. See *id.*

132. See *id.*

133. CITIZEN’S GUIDE, *supra* note 62, at 16.

134. See generally Ass’n of Cmty. Orgs. for Reform Now v. Edgar, 1995 WL 532120, at \*3 (N.D. Ill. Sept. 7, 1995) (concluding that Cook County defendants were required to provide not only written voter registration materials for Hispanics, but also oral language assistance for voter registration including “public service announcements in the Spanish language . . . providing assistance in Spanish under the fail safe provisions of the Act, as well as providing oral and written assistance at all registration sites”).

135. See generally Hernandez v. Woodard, 714 F. Supp. 963, 967–69 (N.D. Ill. 1989) (deciding that plaintiffs bringing challenge on behalf of Hispanic voting-age citizens to clerk’s standard practice of appointing only two deputy election registrars from any civic organization could state equal access claims under sections 2 and 203 of the VRA, even though Hispanics comprised less than 5% of eligible voters in the county); Windy Boy v. County of Big Horn, 647 F. Supp. 1002, 1007–08 (D. Mont.

Similarly, language assistance must be available at polling places on election day.<sup>136</sup> In most cases, all written materials at the polls need to be in the language of each covered minority language group<sup>137</sup> and be “readily accessible and in a conspicuous place,” along with signs advertising the availability of bilingual assistance.<sup>138</sup> Oral language assistance also must be provided to the extent necessary to allow language minority citizens to participate effectively.<sup>139</sup> The Department of Justice Guidelines require covered jurisdictions to determine the number of “helpers” necessary to provide oral assistance in the minority language.<sup>140</sup> Jurisdictions should be proactive in recruiting bilingual poll workers who are members of the covered language minority group to ensure that oral language assistance is available.<sup>141</sup> If they fail to do so, they also may run afoul of section 2, which prohibits discriminatory poll official appointment policies or practices.<sup>142</sup>

Congress added section 208 of the VRA in 1982,<sup>143</sup> after determining that existing law, including section 201’s permanent ban on literacy tests, did not adequately protect several groups of voters, including LEP language minority citizens, who needed assistance at the

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1986) (finding a vote dilution claim under section 2 was supported by “irregularities in distribution of registration cards” to Native American voting-age citizens); *United States v. Post*, 297 F. Supp. 46, 50–51 (W.D. La. 1969) (concluding that administration of voter registration that does not provide information in an effective manner was unlawful discrimination). Section 2 prohibits equal access violations that are sustained or occur as an “episodic” violation in a single election. S. REP. NO. 97-417, at 30 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 207; *see also* NAACP v. Hampton County Election Comm’n, 470 U.S. 166, 178 (1985) (holding section 5 also reaches changes that affect only a single election). Equal access violations do not require proof of factors considered in vote dilution actions brought under section 2. *See Welch v. McKenzie*, 765 F.2d 1311, 1315–17 (5th Cir. 1985); *see also* Tucker, *supra* note 17, at 547–61 (discussing vote dilution claims).

136. *See* 42 U.S.C. § 1973aa-1a(c) (2000); 28 C.F.R. § 55.20 (2006).

137. *See* 42 U.S.C. § 1973aa-1a(c).

138. CITIZEN’S GUIDE, *supra* note 62, at 16.

139. 28 C.F.R. § 55.20; *see also* 42 U.S.C. § 1973aa-1a(c).

140. 28 C.F.R. § 55.20(c).

141. *See* CITIZEN’S GUIDE, *supra* note 62, at 16.

142. *See Harris v. Graddick*, 593 F. Supp. 128, 132–33 (M.D. Ala. 1984) (finding, in a case involving the lack of minority poll workers, that section 2 covers any practice that prevents minority voters from participating “on the same terms and to the same extent as non-minority voters”). The absence of minority language poll officials may discourage language minority citizens from voting because they do not feel welcome at polling places, particularly if they have been mistreated at the polls in the past or no language assistance is available for them in the present. *See id.* at 131–32; UNFULFILLED GOALS, *supra* note 62, at 79–80.

143. *See* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 5, 96 Stat. 131, 134–35 (codified at 42 U.S.C. § 1973aa-6).

polls.<sup>144</sup> Congress concluded that the only way to make such votes meaningful “is to permit them to bring into the voting booth a person whom the voter trusts and who cannot intimidate him.”<sup>145</sup> Accordingly, section 208 provides that “[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter’s choice, other than the voter’s employer or agent of that employer or officer or agent of the voter’s union.”<sup>146</sup> Like the mandate for minority language assistance contained in section 203, voter assistance under section 208 must be provided at every stage of the voting process, from registration through actually casting a ballot.<sup>147</sup> Unlike section 203, section 208 applies nationwide, and requires even those jurisdictions not covered under section 203 to allow LEP language minority citizens, and other protected voters, to receive assistance from the person of their choice.<sup>148</sup> State laws are preempted to the extent that they place limitations on voter assistance inconsistent with section 208.<sup>149</sup>

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144. Specifically, Congress made the following findings in enacting section 208:

Certain discrete groups of citizens are unable to exercise their rights to vote without obtaining assistance in voting including aid within the voting booth. These groups include the blind, the disabled, and those who either do not have a written language or who are unable to read or write sufficiently well to understand the election material and the ballot. Because of their need for assistance, members of these groups are more susceptible than the ordinary voter to having their vote unduly influenced or manipulated. As a result, members of such groups run the risk that they will be discriminated against at the polls and that their right to vote in state and federal elections will not be protected.

S. REP. NO. 97-417, at 62 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 240; *see also id.* at 63–64, *reprinted in* 1982 U.S.C.C.A.N. at 242 (noting that the amendment “does not create a new right . . . to receive assistance; rather it implements an existing right by prescribing minimal requirements as to the manner in which voters may choose to receive assistance”).

145. *Id.* at 62, *reprinted in* 1982 U.S.C.C.A.N. at 241.

146. 42 U.S.C. § 1973aa-6 (2000). The employer limitation “does not apply to cases of voters who must select assistance in a small community composed largely of language minorities whose language is primarily unwritten or oral, such as those residing in an Alaskan native village [or] a New Mexican pueblo or reservation.” S. REP. NO. 97-417 at 64, *reprinted in* 1982 U.S.C.C.A.N. at 242. The ban on assistance by an agent “does not extend to assistance by a voter’s co-worker, or fellow union-member.” *Id.*

147. *See* S. REP. NO. 97-417 at 63, *reprinted in* 1982 U.S.C.C.A.N. at 241 (providing that under section 208 “a procedure could not deny . . . assistance at some stages of the voting process during which assistance was needed”).

148. *See* 42 U.S.C. § 1973aa-6; CITIZEN’S GUIDE, *supra* note 62, at 5–6.

149. *See* S. REP. NO. 97-417 at 63, *reprinted in* 1982 U.S.C.C.A.N. at 241. For example, many state laws only permitted voting assistance given by poll officials or relatives. CITIZEN’S GUIDE, *supra* note 62, at 6.

Ultimately, minority language assistance is not possible without the cooperation of local election officials.<sup>150</sup> It is not sufficient for a covered jurisdiction to merely translate election materials and hire bilingual election officials and poll workers. Problems frequently arise where election officials violate the federal bilingual election provisions because they do not understand them, are following inconsistent state law, or simply refuse to comply. Therefore, all election officials should be provided with effective training on these requirements and be informed of the consequences if they do not comply.<sup>151</sup> Furthermore, election officials must work closely with members of the language minority community to determine the most effective way to implement their bilingual election program.<sup>152</sup> Jurisdictions also must be prepared for contingencies, such as poll workers failing to appear, problems with distribution of language materials, and minority language voters showing up at unexpected polling sites.<sup>153</sup> Finally, effective bilingual election programs cannot be static, but instead must evolve with the changing realities of the local language minority communities.<sup>154</sup>

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150. See UNFULFILLED GOALS, *supra* note 62, at 82–83.

151. See CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, MINORITY LANGUAGE CITIZENS: SECTION 203 OF THE VOTING RIGHTS ACT, [http://www.usdoj.gov/crt/voting/sec\\_203/203\\_brochure.htm](http://www.usdoj.gov/crt/voting/sec_203/203_brochure.htm) (last visited Nov. 30, 2006) [hereinafter MINORITY LANGUAGE CITIZENS] (noting that new poll workers and “many veteran poll officials” need effective training on minority language assistance requirements). Failure of election officials to comply with provisions of the VRA might not only lead to their dismissal, but also may lead to criminal liability under section 205 of the Act. See 42 U.S.C. § 1973aa-3 (2000) (providing that violations of sections 201, 202, or 203 of the Act are punishable by a fine of up to \$5,000 and up to five years imprisonment).

152. See 28 C.F.R. § 55.16 (2006) (observing that a “jurisdiction is more likely to achieve compliance . . . if it has worked with the cooperation of and to the satisfaction of organizations representing members of the applicable language minority group”). Outreach should not be limited to minority leaders. “By talking to a broad range of people in the minority community—educators, business groups, labor groups, [English as a Second Language] programs, parent-teacher organizations, senior citizen groups, church groups, social and fraternal organizations, veterans groups, and the like—election officials will be able to identify the most effective and most efficient program possible.” MINORITY LANGUAGE CITIZENS, *supra* note 151. Local members of minority language groups likewise are a good source for bilingual election officials and can confirm the accuracy of translations. See *id.*

153. See *id.* Some ways to address these problems include proper training, back-up communication, and extra language materials and bilingual poll workers to be dispatched immediately when necessary. See *id.*

154. See *id.*

## 2. Determining Coverage Under Section 203

Coverage under section 203 applies to jurisdictions “with less severe voting difficulties” than those covered by section 4(f)(4).<sup>155</sup> Under section 203(c), a State or political subdivision is covered if it has a sufficient number of “limited-English proficient”<sup>156</sup> single-language minority citizens who experience a higher illiteracy rate than the national average.<sup>157</sup> Today, the requisite number of language minority citizens reside in a state or political subdivision if the Director of the Census determines any one of the following:<sup>158</sup> more than 5% of the voting-age citizens are members of a single language minority and are limited-English proficient;<sup>159</sup> more than ten thousand voting-age citizens are members of a single language minority and are lim-

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155. S. REP. NO. 94-295, at 31 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 798.

156. *See generally* 42 U.S.C. § 1973aa-1a(b)(3)(B) (2000) (defining “limited-English proficient” as being “unable to speak or understand English adequately enough to participate in the electoral process”). The 1992 House Report explains the manner in which the Director of Census determines the number of limited-English proficient persons:

The Director of the Census determines limited English proficiency based upon information included on the long form of the decennial census. The long form, however, is only received by approximately 17 percent of the total population. Those few that do receive the long form and speak a language other than English at home are asked to evaluate their own English proficiency. The form requests that they respond to a question inquiring how well they speak English by checking one of the four answers provided—“very well,” “well,” “not well,” or “not at all.” The Census Bureau has determined that most respondents over-estimate their English proficiency and therefore, those who answer other than “very well” are deemed LEP.

H.R. REP. NO. 102-655, at 8 (1992), *reprinted in* 1992 U.S.C.C.A.N. 766, 772.

157. *See* 42 U.S.C. § 1973aa-1a(b)(2). “Illiteracy” means “the failure to complete the 5th primary grade,” 42 U.S.C. § 1973aa-1a(b)(3)(E), and was adopted to conform to the Census definition of that term. *See* 121 CONG. REC. H4719 (daily ed. June 2, 1975) (statement of Rep. Edwards). Illiteracy determinations are to be made “on a subgroup-by-subgroup basis rather than aggregate one illiteracy figure for the overall language minority group.” *Id.*

158. Like section 4(f)(4), determinations by the Attorney General and Director of the Census under section 203(c) are not reviewable in any court and are effective upon publication in the Federal Register. 42 U.S.C. § 1973aa-1a(b)(4); *see also* 42 U.S.C. § 1973b(b) (2006) (providing the same rule for section 4(f)(4) coverage determinations). The Director of the Census may update census data and publish section 203(c) coverage determinations more frequently than decennially, as new data becomes available. *See* *Doi v. Bell*, 449 F. Supp. 267, 272 (D. Haw. 1978).

159. 42 U.S.C. § 1973aa-1a(b)(2)(A)(i)(I). Section 203 further provides that in a State meeting this requirement, a political subdivision within that State cannot independently be covered under the coverage formula if it “has less than 5 percent voting age limited-English proficient citizens of each language minority which comprises over 5 percent of the statewide limited-English proficient population of voting age citizens.” 42 U.S.C. § 1973aa-1a(b)(2)(B).

ited-English proficient;<sup>160</sup> or, in a political subdivision containing any part of an Indian reservation,<sup>161</sup> more than 5% of the American Indian or Alaska Native voting-age citizens are members of a single language minority and are limited-English proficient.<sup>162</sup> Thus, coverage under section 203(c) is both “broader and narrower” than under section 4(f)(4), because it “covers more areas but imposes less stringent remedies.”<sup>163</sup>

Since 1975, Congress has amended the section 203 trigger in three important ways. In 1982, Congress added the “limited-English proficient” requirement<sup>164</sup> to ensure that the Director of the Census only counts those persons who are unable to understand English sufficiently to participate in the electoral process.<sup>165</sup> The 1975 amendments originally provided that the Director of the Census would count all persons in designated groups when determining whether 5% of the voting-age citizens of a State or political subdivision were members of a language minority group.<sup>166</sup> However, in 1982, Senator Don Nickles of Oklahoma succeeded in adding the limited-English proficiency requirement so that section 203 covered only those jurisdictions where more than 5% of voting-age citizens in a single language group speak English less than “very well” and needed assistance.<sup>167</sup> The Nickles Amendment reduced the number of covered counties from over 300 prior to 1984 to 197 by 1992.<sup>168</sup>

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160. 42 U.S.C. § 1973aa-1a(b)(2)(A)(i)(II).

161. An “Indian reservation” is “any area that is an American Indian or Alaska Native area, as defined by the Census Bureau.” 42 U.S.C. § 1973aa-1a(b)(3)(C); *see also* H.R. REP. NO. 102-655 at 10, *reprinted in* 1992 U.S.C.C.A.N. at 774 (describing the definition of American Indian and Alaska Native areas used by the Census Bureau in the 1990 decennial census).

162. 42 U.S.C. § 1973aa-1a(b)(2)(A)(i)(III).

163. 121 CONG. REC. H4719 (daily ed. June 2, 1975) (statement of Rep. Edwards).

164. *See* 42 U.S.C. § 1973aa-1a(b)(2).

165. *See* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 4, 96 Stat. 131, 134 (1982).

166. *See* Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, § 203(b), 89 Stat. 400, 403 (1975). Despite concerns that this definition would mandate unnecessary bilingual election materials and assistance, Congress rejected efforts to restrict coverage to persons for whom English was not their “dominant language.” *See* 121 CONG. REC. H4882-84 (daily ed. June 4, 1975) (rejecting by a vote of 122 in favor and 292 against an amendment that would have excluded from the definition of “language minority group” those persons whose dominant language is English).

167. *See generally* 128 CONG. REC. S14,301 (daily ed. June 18, 1982) (statement of Sen. Nickles) (stating that “the amendment I offer would more accurately target bilingual assistance to those who are truly in need of such assistance”). The amendment was proposed on the floor of the Senate and accepted without debate. *Id.*

168. *See* S. REP. NO. 102-315, at 10 (1992).

Congress further modified the bilingual election trigger in 1992 in two ways to cure “flaws” created by the “limited-English proficient” requirement, which excluded large numbers of language minorities who comprised less than 5% of the voting-age citizen population.<sup>169</sup> First, it added the ten thousand voting-age citizen benchmark<sup>170</sup> to cover “highly populated metropolitan areas” where “many language minority citizens in need of assistance are not covered because they do not make up a large enough percentage of the local population to trigger coverage.”<sup>171</sup> Second, it created an alternative coverage formula for Native American language minority voters living on reservations,<sup>172</sup> because the county-specific requirement included in the 1975 amendments ignored “the historical fact that reservation boundaries predate and therefore often do not correspond to State or county lines.”<sup>173</sup> Though the 1992 amendments maintained

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169. H.R. REP. NO. 102-655, at 8 (1992), *reprinted in* 1992 U.S.C.C.A.N. 766, 772; 138 CONG. REC. H6609 (daily ed. July 24, 1992) (statement of Rep. Torres); H.R. REP. NO. 102-655 at 7, *reprinted in* 1992 U.S.C.C.A.N. at 771 (“The combination of both the 5 percent trigger and the limited English proficiency requirement . . . caused the number of covered jurisdictions to drop from 369 counties prior to 1982 to 197 counties.”).

170. *See* Voting Rights Language Assistance Act of 1992, Pub. L. No. 102-344, § 2, 106 Stat. 921, 921–22 (codified at 42 U.S.C. § 1973aa-1a(b)(2)(A)(i)(II)).

171. S. REP. NO. 102-315 at 16. According to 1990 Census data, the following numbers of language minority citizens with limited-English proficiency lived in large metropolitan areas not covered under the trigger implemented in the 1975 Act and the 1982 amendments: over 87,000 Hispanics in Cook County (Chicago), Illinois, where they accounted for 2.5% of the voting-age citizen population; 39,000 Chinese Americans in Los Angeles County, California; and 37,000 Asian Americans in Honolulu County, Hawaii. *Id.* In addition, thousands of limited-English proficient Asian-American citizens living in San Francisco County, California, and Queens County, Kings County, and New York County in New York also were not covered under the original trigger, although San Francisco County would have met the 5% trigger under the 1990 Census. *See id.* at 17; H.R. REP. NO. 102-655 at 8, *reprinted in* 1992 U.S.C.C.A.N. at 772. According to 1990 census data, the 10,000 voting-age citizen benchmark extended section 203 coverage to 860,000 limited-English proficient language minorities living in at least thirty-four counties throughout the United States. S. REP. NO. 102-315 at 17 (estimating thirty-four counties); H.R. REP. NO. 102-655 at 4, *reprinted in* 1992 U.S.C.C.A.N. at 768 (estimating thirty-eight counties); *see also* Voting Rights Act Amendments of 1992, Determinations Under Section 203, 57 Fed. Reg. 43,213 (Sept. 18, 1992).

172. *See* Voting Rights Language Assistance Act of 1992, Pub. L. No. 102-344, § 2, 106 Stat. 921, 921–22 (codified at 42 U.S.C. § 1973aa-1a(b)(2)(A)(i)(III)). The 1992 Senate Report indicates that this alternative standard “is intended to supplement, not supplant, the coverage triggers under current law” and therefore a “county may be covered for Native Americans under any of [the] three coverage formulas.” S. REP. NO. 102-315 at 18.

173. S. REP. NO. 102-315 at 18. For example, LEP Native American citizens living on the Tohono O’odham Reservation in Arizona, which is the fifth largest reservation in the nation and spans three counties, were not covered under the 1975 amendments.

the “limited-English proficient” requirement,<sup>174</sup> the amendments improved the section 203 trigger by giving “a voice to those citizens who [had] been left out” under the existing coverage formula.<sup>175</sup>

The 2006 amendments provided a straight reauthorization of the coverage formula under section 203, but also updated the language ability data used for coverage determinations to reflect changes in how the Census Bureau collects that data. In future censuses, the existing method of collection, decennial long-form data, will be replaced by the American Community Survey, which will “provide long-form-type information every year instead of once in ten years.”<sup>176</sup> Coverage determinations under section 203(b) will be made using “the 2010 American Community Survey census data and subsequent American Community Survey data in five-year increments, or comparable census data.”<sup>177</sup>

Section 203(d) of the Act provides that a covered jurisdiction may bail out from coverage under the bilingual election provisions if it can demonstrate “that the illiteracy rate of the applicable language minority group” that triggered coverage “is equal to or less than the national illiteracy rate.”<sup>178</sup> “Having found that the voting barriers experienced by these citizens is in large part due to disparate and inadequate educational opportunities,” this bailout procedure rewards jurisdictions that are able to remove these barriers.<sup>179</sup> Also, like the section 4(f)(4) bailout procedure, it helps ensure that application of section 203(c) is limited to those jurisdictions where it is actually needed.<sup>180</sup>

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Although there were 4,500 voting-age citizens living on that reservation in Pima County, they were not covered under section 203(c) because they comprised fewer than 5% of the half-million voting-age citizens in Pima County. See H.R. REP. NO. 102-655 at 9, *reprinted in* 1992 U.S.C.C.A.N. at 773. In addition, the 1975 Act’s trigger created the inconsistent result that some Native Americans living on a reservation in one county could receive bilingual assistance, whereas others living on the same reservation but in a different county could not. See *id.* at 9–10, *reprinted in* 1992 U.S.C.C.A.N. at 773–74; S. REP. NO. 102-315 at 18.

174. The 1992 amendments maintained the limited-English proficient requirement to ensure that section 203 “is well-targeted” to calculate “coverage by counting only those citizens who do not speak English well enough to make an informed vote.” 138 CONG. REC. H6595 (daily ed. July 24, 1992) (statement of Rep. Pelosi).

175. *Id.* (statement of Rep. Kennelly).

176. U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY: A HANDBOOK FOR STATE AND LOCAL OFFICIALS 1 (2004). Because the American Community Survey is part of the census, responding to it is required by law. *Id.* at 2.

177. VRARA, *supra* note 15, § 8.

178. 42 U.S.C. § 1973aa-1a(d) (2000).

179. 121 CONG. REC. H4719 (daily ed. June 2, 1975) (statement of Rep. Edwards).

180. For a discussion of the continuing need for section 203 coverage because of educational discrimination, see *infra* notes 219–78 and accompanying text.

As a result of new determinations made by the Director of the United States Bureau of the Census in July 2002, the minority language assistance provisions now cover thirty-one states in whole or in part.<sup>181</sup> Five states are covered in their entirety: Texas, under both section 4(f)(4) and section 203; Alaska and Arizona under section 4(f)(4); and California and New Mexico under section 203.<sup>182</sup> A total of 505 political subdivisions nationwide now are covered under either section 4(f)(4) or section 203. Forty-eight of these political subdivisions must provide language assistance in more than one minority language: thirty-one in two languages; fourteen in three languages; two in four languages; and one, Los Angeles County, California, in six languages (Spanish, Chinese, Tagalog, Japanese, Korean, and Vietnamese).<sup>183</sup> Spanish language assistance is the most common among the covered jurisdictions, including statewide coverage in Arizona, California, New Mexico, and Texas and 224 political subdivisions in twenty states, for a total of 425 counties and townships.<sup>184</sup> Assistance in American Indian languages is the next most common, covering eighty-one political subdivisions in eighteen states.<sup>185</sup> Lan-

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181. See Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 48,871 (July 26, 2002) [hereinafter 2002 Determinations] (to be codified at 28 C.F.R. pt. 55). Two states that previously were covered in part by section 203, Iowa and Wisconsin, no longer are covered. See *id.*; 28 C.F.R. pt. 55, app. (2006). Section 203 coverage has been extended to political subdivisions of five states not covered previously: Kansas, Maryland, Montana, Nebraska, and Washington. See 2002 Determinations, *supra*; 28 C.F.R. pt. 55, app. For a detailed discussion of the 2002 determinations, see generally LANGUAGE ASSISTANCE PRACTICES, *supra* note 4, at 5–13, reprinted in *Evidence of Continued Need Hearing*, *supra* note 4, at 2139–47.

182. See LANGUAGE ASSISTANCE PRACTICES, *supra* note 4, at 6, reprinted in *Evidence of Continued Need Hearing*, *supra* note 4, at 2140. The three states covered in their entirety under section 4(f)(4) of the Act, Alaska (Alaska Natives), Arizona (Spanish heritage), and Texas (Spanish heritage), *id.*, are required to comply with the requirements of section 203. See 42 U.S.C. § 1973b(f)(4) (2000); see also 42 U.S.C. § 1973aa-1a(c) (providing the same bilingual election requirements under section 203 of the Act). In addition, these three states also include several political subdivisions covered under section 203(c) for American Indian language minorities not otherwise covered under section 4(f)(4). See 28 C.F.R. pt. 55, app. The section 4(f)(4) determinations are unaffected by the new section 203 determinations and remain in effect. See 2002 Determinations, *supra* note 181, at 48,872.

183. See LANGUAGE ASSISTANCE PRACTICES, *supra* note 4, at 7, reprinted in *Evidence of Continued Need Hearing*, *supra* note 4, at 2141.

184. See *id.* at 8–9, reprinted in *Evidence of Continued Need Hearing*, *supra* note 4, at 2142–43.

185. See *id.* at 8, 11, reprinted in *Evidence of Continued Need Hearing*, *supra* note 4, at 2142, 2145. As a result of the new Census determinations, assistance is required in more than eighteen different American Indian language groups identified by the Census Bureau. See *id.* at 11, reprinted in *Evidence of Continued Need Hearing*, *supra* note 4, at 2145 (summarizing the jurisdictions required to provide language

guage assistance in Alaska Native languages is required statewide in Alaska and in at least thirteen political subdivisions of Alaska.<sup>186</sup> A growing number of jurisdictions also have to provide language assistance in Asian languages, including Chinese,<sup>187</sup> Filipino,<sup>188</sup> Vietnamese,<sup>189</sup> Korean,<sup>190</sup> and Japanese.<sup>191</sup>

### 3. *Enforcement by the Attorney General and Private Parties*

The 1975 amendments to the VRA included two important provisions that enhance compliance with the bilingual election requirements by recognizing the important role of private parties who can “assist the process of enforcing voting rights” of language minorities.<sup>192</sup> First, Congress modified section 3(a) to allow “any aggrieved

assistance for American Indians). Language assistance actually has to be provided in substantially more than these eighteen American Indian languages because many of the language groups include several different languages or dialects. For example, the Pueblo American Indian group includes the Havasupai, Hopi, Keres, Tiwa, and Tiowa Indian languages. See 28 C.F.R. pt. 55, app. (listing these languages separately under the previous determinations). In addition, the Sioux American Indian group includes the Dakota, Lakota, and Nakota languages. See S.D.C.L. § 12-3-10. Many of the descriptions for Native American language minority groups changed as a result of new Census Bureau definitions. See LANGUAGE ASSISTANCE PRACTICES, *supra* note 4, at 12, *reprinted in Evidence of Continued Need Hearing*, *supra* note 4, at 2146.

186. See *id.* at 10, *reprinted in Evidence of Continued Need Hearing*, *supra* note 4, at 2144; 28 C.F.R. pt. 55, app. (listing sixteen covered jurisdictions in Alaska).

187. Chinese language assistance must be provided in a total of six counties in California; Honolulu County, Hawaii; Cook County, Illinois; three counties in New York; and King County, Washington. See LANGUAGE ASSISTANCE PRACTICES, *supra* note 4, at 12, *reprinted in Evidence of Continued Need Hearing*, *supra* note 4, at 2146.

188. Filipino language assistance must be provided in the Kodiak Island Borough of Alaska, three counties in California, and in two counties in Hawaii. See *id.* at 12, *reprinted in Evidence of Continued Need Hearing*, *supra* note 4, at 2146.

189. Vietnamese language assistance must be provided in three counties in California and in Harris County, Texas. See *id.* at 12–13, *reprinted in Evidence of Continued Need Hearing*, *supra* note 4, at 2146–47.

190. Korean language assistance must be provided in two counties in California and in Queens County in New York. See *Voting Rights Act: Section 203—Bilingual Election Requirements (Part I): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 17 (2005) (statement of Margaret Fung, Executive Director, Asian American Legal Defense and Education Fund).

191. Japanese language assistance must be provided in Los Angeles County, California, and in Honolulu County, Hawaii. See LANGUAGE ASSISTANCE PRACTICES, *supra* note 4, at 13, *reprinted in Evidence of Continued Need Hearing*, *supra* note 4, at 2147.

192. S. REP. NO. 94-295, at 40 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 807; 121 CONG. REC. S13,374 (daily ed. July 23, 1975) (statement of Sen. Tunney). The Senate Committee specifically noted that it was “aware of the significant numbers of suits brought under the 14th amendment to enforce the voting rights of Spanish-speaking citizens.” S. REP. NO. 94-295 at 40 n.40, *reprinted in* 1975 U.S.C.C.A.N. at 807 n.40.

person” to obtain federal court authorization for examiners and observers in “a proceeding under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision.”<sup>193</sup> As a result, both the Attorney General and private parties may secure application of some of the special provisions of the Act to a jurisdiction, even if that jurisdiction is not otherwise subject to those provisions under section 4(f)(4).<sup>194</sup> Second, Congress amended section 14 to create an incentive for private parties to bring these actions by awarding reasonable attorneys’ fees to prevailing plaintiffs.<sup>195</sup>

In 2006, enforcement of the bilingual election requirements was strengthened by an amendment to the VRA authorizing recovery of expert witness fees. In 1991, the Supreme Court had held that absent such express authority under federal civil rights laws, plaintiffs could not recover expert fees as part of reasonable attorneys’ fees.<sup>196</sup> Although Congress immediately responded by amending the Civil Rights Act of 1964 to provide for recovery of expert witness fees,<sup>197</sup> it did not apply this change to the VRA. The 2006 amendments addressed this deficiency by amending section 14 to provide for recovery of “reasonable expert fees, and other reasonable litigation expenses” in addition to reasonable attorneys’ fees.<sup>198</sup>

### III.

#### THE UTILITY AND COSTS OF THE FEDERAL BILINGUAL ELECTIONS MANDATE

*[T]here is a continuing need for bilingual elections . . . [that] can be implemented efficiently and cost-effectively . . . . Even if the costs of bilingual elections were higher, when viewed in proper*

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193. See Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, § 401, 89 Stat. 400, 404 (adding the words “or an aggrieved person”) (codified as amended at 42 U.S.C. § 1973a(a) (2000)).

194. See S. REP. NO. 94-295 at 40, *reprinted in* 1975 U.S.C.C.A.N. at 806 (“The amendment proposed by S. 1279 would authorize courts to grant similar relief to private parties in suits brought to protect voting rights in covered and noncovered jurisdictions.”).

195. 42 U.S.C. § 1973l(e) (2000). For an additional discussion of this provision, see generally Martha S. Davis, *Attorney Fee Awards in Voting Rights Litigation*, 34 S.D. L. REV. 303 (1989).

196. See *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83 (1991).

197. H.R. REP. NO. 102-40(I), at 77–78 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 615–16.

198. VRARA, *supra* note 15, § 6.

*perspective, . . . certain costs should be willingly incurred to make our most fundamental political rights a reality for all Americans.*

Senate Judiciary Committee, 1982<sup>199</sup>

### A. *The English-Only Movement and Hostility to the Bilingual Election Requirements*

Since 1981, legislators have introduced numerous bills in Congress that would repeal federal requirements for bilingual materials or assistance in several areas, including voting.<sup>200</sup> The most significant challenge came in 1996, when the House of Representatives adopted the Bill Emerson English Language Empowerment Act of 1996, which would have repealed the VRA's language assistance requirements, including sections 4(f)(4) and 203.<sup>201</sup> The proposal died in a Senate committee.<sup>202</sup>

In 2006, English-only advocates tried and failed to repeal or limit the language assistance provisions on no less than three separate occa-

199. S. REP. NO. 97-417, at 64–65 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 243–44.

200. *See, e.g.*, National Language Act of 1999, H.R. 1005, 106th Cong. (1999); Declaration of Official Language Act of 1999, H.R. 50, 106th Cong. (1999); National Language Act of 1997, H.R. 1005, 105th Cong. (1997); Declaration of Official Language Act of 1997, H.R. 622, 105th Cong. (1997); English Language Empowerment Act of 1996, H.R. 3898, 104th Cong. (1996); Bilingual Voting Requirements Repeal Act of 1995, H.R. 351, 104th Cong. (1995); Declaration of Official Language Act of 1995, H.R. 739, 104th Cong. (1995); National Language Act of 1995, H.R. 1005, 104th Cong. (1995); *see also* MEXICAN AM. LEGAL DEF. & EDUC. FUND, REDRESSING IMPEDIMENTS TO VOTING LANGUAGE MINORITIES: THE NEED TO REAUTHORIZE AND EXPAND SECTION 203 OF THE VOTING RIGHTS ACT 46–71, *reprinted in* S. 2236 *Hearings, supra* note 1, at 406, 454–71 (summarizing efforts by the English-only movement to repeal bilingual requirements between 1981 and 1992). Other federal laws mandating bilingual materials or assistance also have been threatened by proposed legislation, such as the Bilingual Education Act, 20 U.S.C. §§ 7401–7491 (2000); provisions for language assistance at migrant health care centers, *see* 42 U.S.C. §§ 254b(b)(1)(A)(iv), 254b(k)(3)(K) (2000); and for persons receiving treatment in alcohol rehabilitation programs, *see* 42 U.S.C. § 4577(b) (2000). *See, e.g.*, National Language Act of 1995, H.R. 1005, 104th Cong. § 3 (1995) (seeking to repeal the Bilingual Education Act); English Language Empowerment Act of 1996, H.R. 3898, 104th Cong. § 166 (1996) (superseding any federal law contrary to its provisions).

201. *See* Bill Emerson English Language Empowerment Act of 1996, H.R. 123, 104th Cong. (1996). The bill would have repealed the language assistance requirements of the VRA, including sections 4(f)(4) and 203. *See id.* The bill was adopted by a vote of 259 to 169. *See* 142 CONG. REC. H9769–72 (daily ed. Aug. 1, 1996). An identical bill was introduced in 1997, except that it would not have repealed the VRA's language assistance requirements. *See* Bill Emerson English Language Empowerment Act of 1997, H.R. 123, 105th Cong. (1997). For an extended discussion of these bills, *see generally* Lucy Chiu, Note, *The Emerson English Language Empowerment Act: The House's "Straw Man" Bill*, 23 J. LEGIS. 231 (1997).

202. *See* Language of Government Act of 1995, S. 356, 104th Cong. (1995); S. 175, 104th Cong. (1995).

sions during debate on the Voting Rights Act Reauthorization Act (VRARA).<sup>203</sup> One effort in the House, an amendment to strike section 203 from the bill entirely, was rejected in both the House Judiciary Committee markup of the bill<sup>204</sup> and in a full House vote.<sup>205</sup> Additionally, during the Senate Judiciary Committee markup of the VRARA (S. 2703), Senator Tom Coburn of Oklahoma offered an amendment to change the definition of “limited-English proficient” to only include persons who speak English “not well” or “not at all.” The amendment failed.<sup>206</sup> It would have reduced section 203 coverage by more than two-thirds and would have eliminated statewide coverage for Spanish in two states, reducing the number of covered counties from fifty-eight to ten in California and thirty-three to one in New Mexico.<sup>207</sup> The Senate Judiciary Committee rejected the Coburn Amendment because it was based upon the false premise that persons who speak English “well” do not need language assistance. As one witness testified, “[w]hile they may speak conversational English well, these U.S. citizens may not be fully proficient because they were intentionally denied the academic instruction necessary to vote effectively in English-only elections that employ complicated language and terminology.”<sup>208</sup>

English-only advocates also tried and failed to undermine the language assistance provisions through other legislation. Senator James Inhofe of Oklahoma offered an amendment to the Comprehensive Immigration Reform Act that would have made English the national language.<sup>209</sup> Although the Senate passed the Inhofe Amendment, it was a symbolic vote that did not impact section 203.<sup>210</sup> Moreover, the

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203. For further discussion of the motives behind these amendments and the politics of the reauthorization debate, see generally Tucker, *supra* note 92.

204. See H.R. REP. NO. 109-478, at 85-86 (2006) (reporting the vote on Rep. King’s amendment to allow the language assistance provisions to sunset in 2007 failed 26 to 9, and the vote on Rep. King’s amendment to reauthorize the provisions for six years instead of twenty-five years failed 24 to 10).

205. See 152 CONG. REC. H5205-06 (daily ed. July 13, 2006) (reporting the vote on Amendment No. 3 offered by Rep. King, which failed 238 to 185).

206. See S. REP. NO. 109-295, at 4 (2006).

207. The impact of the Coburn Amendment was determined by using sampled data from the 2000 Census.

208. *Continuing Need for Section 203’s Provisions for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 347 (2006) (statement of John Trasviña, Interim President and General Counsel, Mexican American Legal Defense and Education Fund).

209. See 152 CONG. REC. S4723-24 (daily ed. May 17, 2006) (reporting S. Amdt. 4064 to Comprehensive Immigration Reform Act, S. 2611, 109th Cong. (2006)).

210. See *id.* at S4769-70 (daily ed. May 18, 2006) (reporting adoption of the amendment 63 to 34 with Sen. Landrieu voting in favor); *id.* at S4759 (daily ed. May 18, 2006) (statement of Sen. Alexander).

Inhofe Amendment was substantially diluted after the passage of another amendment, offered by Senator Ken Salazar of Colorado. The Salazar Amendment would declare that “English is the common and unifying language of the United States” without making English the national language.<sup>211</sup> In the end, both the Inhofe and Salazar Amendments are dead letters. The Comprehensive Immigration Reform Act continues to languish in Congress, with little prospect that the amended legislation will ever be enacted after the Democrats recaptured both houses of Congress.<sup>212</sup>

Opponents of language assistance in the House saw the Inhofe Amendment as supporting their efforts to eliminate section 203<sup>213</sup> and joined with Southern opponents of section 5 to delay the House floor vote in the VRARA.<sup>214</sup> Their efforts to hijack the bill were short-lived, however; a proposal by Representative Cliff Stearns of Florida to cut off funding for Justice Department enforcement of the language assistance provisions failed in a full House vote, which appeared to repudiate the English-only position.<sup>215</sup> Less than three weeks later, the VRARA passed the House by a vote of 390 to 33<sup>216</sup> and one week later in the Senate by a vote of 98 to 0.<sup>217</sup> Nevertheless, opponents of the minority language provisions of the VRA continue to insist that bilingual ballots and assistance are unnecessary and actually harmful to American society for a number of reasons, including the perceived absence of voting discrimination against language minorities, lack of demand, ineffectiveness, cost, and a belief that the provisions are divisive and create a disincentive to learn English.<sup>218</sup> This Part responds to these criticisms by demonstrating the continuing need for the bilingual election requirements, actual use of language assistance, and the minimal costs required to make the right to vote a reality for millions of language minority citizens.

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211. See 152 CONG. REC. S4757 (daily ed. May 18, 2006) (reporting S. Amdt. 4073 to Comprehensive Immigration Reform Act, S. 2611, 109th Cong. (2006)).

212. Comprehensive Immigration Reform Act of 2006, Bill Summary & Status Info (2006), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SN02611>: (last visited Jan. 16, 2007).

213. See Press Release, Rep. Steven King, King Comments on English as the Official Language: Amendment Passes in Senate (May 18, 2006), available at [http://www.house.gov/list/press/ia05\\_king/PREnglishPassesSenate051806.html](http://www.house.gov/list/press/ia05_king/PREnglishPassesSenate051806.html).

214. See Tucker, *supra* note 92.

215. See H. AMDT. 1145 to Science, State, Justice, Commerce, and Related Agencies Appropriations Act for FY 2007, H.R. 5672, 109th Cong. (2006); 152 CONG. REC. H4743–44 (daily ed. June 28, 2006). See also *id.* at H4774–75 (daily ed. June 28, 2006) (reporting the vote on the Stearns Amendment).

216. See 152 CONG. REC. H5207 (daily ed. July 13, 2006).

217. See *id.* at S8012 (daily ed. July 20, 2006).

218. See *infra* notes 310–16 and accompanying text.

*B. The Continuing Need for the Language Assistance Provisions: Education Discrimination and Ongoing Barriers to Voting*

*Congress found that there is a positive correlation between the bilingual assistance provisions and increased voter registration levels in jurisdictions fully complying with section 203. At the same time, a significant number of jurisdictions have yet to fully comply with section 203's obligations, which has had the effect of keeping citizens from experiencing full participation in the electoral process.*

House Judiciary Committee, May 2006<sup>219</sup>

Just over thirty years after sections 4(f)(4) and 203 were enacted, those provisions have had a tremendous impact on voting participation by language minority voters. Among American Indians, registration and turnout have increased between 50% and 150% in many places as a direct result of language assistance.<sup>220</sup> Although Hispanic registration still lags far behind non-Hispanic registration, increased enforcement of section 203 partially contributed to the increase of registered Hispanic voters from 7.6 million to 9.3 million between 2000 and 2004.<sup>221</sup> The Hispanic voter registration rate, which was 34.9% in 1974, has nearly doubled since sections 4(f)(4) and 203 have been in

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219. H.R. REP. NO. 109-478, at 58–59 (2006).

220. FIRST AM. EDUC. PROJECT, NATIVE VOTE 2004, at 7 (2005), reprinted in *Voting Rights Act: Section 203—Bilingual Election Requirements (Part II): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 11, 17 (2005). For example, in Apache County, Arizona, the Justice Department's section 203 enforcement litigation in *United States v. Arizona* and the resulting consent decree caused turnout among Navajo voters to increase by 26% between 2000 and 2004, from 14,277 to 17,955. *Voting Rights Act: Sections 6 and 8—The Federal Examiner and Observer Program: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 12–14 (2005) (statement of Penny Pew, Elections Director, Apache County, Arizona).

221. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, SERIES P20-542, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2000, tbl.4a, available at <http://www.census.gov/population/socdemo/voting/p20-542/tab04a.pdf> [hereinafter NOVEMBER 2000 VOTING AND REGISTRATION NUMBERS]; BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, SERIES P20-556, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2004, tbl.4a, available at <http://www.census.gov/population/socdemo/voting/cps2004/tab04a.xls>. For a listing of cases showing increased enforcement of the language assistance provisions during this period, see generally DR. JAMES THOMAS TUCKER, VOTING RIGHTS CONSULTANT TO THE NALEO EDUCATIONAL FUND, THE CONTINUING NEED FOR AND CONSTITUTIONALITY OF SECTION 203 OF THE VOTING RIGHTS ACT (June 30, 2006) [hereinafter CONTINUING NEED] (scheduled to be reprinted in the official congressional record).

effect.<sup>222</sup> Increased voter registration and turnout have also greatly increased Hispanic representation at all levels of the government. Between 1973 and 2006, the number of Hispanic elected officials in six covered states (Arizona, California, Florida, New Mexico, New York, and Texas) increased more than 347%, from 1,280 to 4,532.<sup>223</sup> As of January 2006, there were more than 5,100 Hispanic elected officials in the United States.<sup>224</sup> Following the November 2006 election, Hispanic elected officials nationwide included three U.S. Senators, twenty-three U.S. Representatives, five statewide officials (including three from New Mexico alone), approximately sixty state senators, and 180 state representatives.<sup>225</sup> Similarly, between 1996 and 2004, Asian-American voter registration and turnout increased 58% and 71%, respectively, as a direct result of increased coverage that followed the 1992 amendments to section 203.<sup>226</sup> As of the end of 2005, at least 346 Asian Americans have been elected to office, including six to federal offices, an increase from 120 elected officials in 1978.<sup>227</sup>

Nevertheless, critics of the minority language assistance requirements maintain that there is insufficient evidence that the bilingual election mandate is necessary, especially compared to the record in 1975 when Congress was considering reauthorizing the VRA's non-language provisions.<sup>228</sup> This argument, first raised in 1992,<sup>229</sup> was raised again in 1996, when Congress considered repealing section

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222. See *Continuing Need for Section 203's Provisions for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 347 (2006) (statement of John Trasviña, Interim President and General Counsel, Mexican American Legal Defense and Education Fund) (indicating 1974 registration rates); NOVEMBER 2000 VOTING AND REGISTRATION NUMBERS, *supra* note 221 (reporting 34.9% overall registration rate with a 60.9% citizenship rate).

223. NAT'L ASS'N OF LATINO ELECTED & APPOINTED OFFICIALS (NALEO) EDUC. FUND, 1985 NATIONAL ROSTER OF HISPANIC ELECTED OFFICIALS xiii (1985); NALEO EDUC. FUND, 2006 LATINO ELECTION HANDBOOK 11, 15, 25, 37, 41, 45 (2006).

224. NALEO EDUC. FUND, 2006 LATINO ELECTION HANDBOOK 7 (2006).

225. See Press Release, NALEO, Latinos Achieve New Political Milestones in Congress and State Houses (Nov. 11, 2006), available at <http://www.naleo.org/pr110906.html>.

226. See *Continuing Need for Section 203's Provisions for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 230–31 (2006) (statement of Margaret Fung, Executive Director, Asian American Legal Defense and Education Fund); *supra* notes 169–71 and accompanying text.

227. See *Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (Part II): Hearing on H.R. 9 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 43 (2006) (statement of Karen K. Narasaki, President and Executive Director, Asian American Justice Center).

228. See Hunter, *supra* note 26, at 253–57 (summarizing evidence of racial discrimination that existed at the time of the 1975 amendments).

203,<sup>230</sup> and in 2006, when it renewed the provisions for twenty-five years.<sup>231</sup> The contention ignores the compelling factual data presented to Congress demonstrating educational discrimination against language minority citizens.<sup>232</sup> Indeed, there is substantial evidence that over a quarter of a century after the federal bilingual election provisions were adopted, they continue to be necessary “to bar discrimination against Spanish-speaking Americans, American Indians, Alaskan [N]atives, and Asian Americans.”<sup>233</sup>

Congress found that unequal educational opportunities still result “in high illiteracy and low voting participation” among language minority voters.<sup>234</sup> Among the 403 language groups for which Census data is available in the 367 covered political subdivisions, an average of 13.1% of voting age citizens are LEP in the languages triggering coverage.<sup>235</sup> In jurisdictions covered for Alaska Native languages, an average of 22.6% of all voting age citizens are Alaska Native LEP citizens; 40% of covered Alaska Native reservations have LEP rates greater than 50%.<sup>236</sup> In jurisdictions covered for American Indian languages, an average of 16.3% of all voting age citizens are American Indian LEP citizens; over one-quarter of covered American Indian reservations have LEP rates greater than 50%.<sup>237</sup> In jurisdictions covered for Spanish, an average of 10.4% of all voting age citizens are Spanish-speaking LEP citizens.<sup>238</sup> Twenty-five of the twenty-seven juris-

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229. H.R. REP. NO. 102-655, at 16 (1992), *reprinted in* 1992 U.S.C.C.A.N. 766, 778 (dissenting views of Reps. Hyde, Sensenbrenner, McCollum, Coble, James, Ramstad, and Allen).

230. *See, e.g.*, 142 CONG. REC. H9739, H9758 (daily ed. Aug. 1, 1996) (statement of Rep. Canady).

231. *See Continuing Need for Section 203's Provisions for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 11–12 (2006) (statement of Peter N. Kirsanow, Commissioner, Commission on Civil Rights); *id.* at 15–16, 20–21, 164–66 (statement of Linda Chavez, Chairman, Center for Equal Opportunity); *id.* at 331–32 (statement of Chris Norby, Supervisor, Fourth District, Orange County Board of Supervisors, Santa Ana, California).

232. *See* S. REP. NO. 102-315, at 4–10 (1992); UNFULFILLED GOALS, *supra* note 62, at 78–88. For a summary of the evidence of discrimination against language minorities between 1982 and 2006, *see generally* CONTINUING NEED, *supra* note 221.

233. President Gerald R. Ford, Remarks upon Signing H.R. 6219 into Law, 11 WEEKLY COMP. PRES. DOC. 837 (Aug. 11, 1975).

234. 42 U.S.C. § 1973aa-1a(a) (2000).

235. *See* LANGUAGE ASSISTANCE PRACTICES, *supra* note 4, at 24, *reprinted in Evidence of Continued Need Hearing*, *supra* note 4, at 2158.

236. *See id.* at 35, *reprinted in Evidence of Continued Need Hearing*, *supra* note 4, at 2169.

237. *See id.* at 38, *reprinted in Evidence of Continued Need Hearing*, *supra* note 4, at 2172.

238. *See id.* at 32, *reprinted in Evidence of Continued Need Hearing*, *supra* note 4, at 2166.

dictions covered for Asian languages have more than ten thousand Asian-American LEP citizens.<sup>239</sup>

Despite substantial progress, educational barriers still impede equal political participation for LEP voters.<sup>240</sup> The victims of educational discrimination who provided the original basis for enacting the language assistance provisions continue to suffer from the effects of that discrimination.<sup>241</sup> The problem is exacerbated by widespread discrimination and underfunding of English language programs in schools in jurisdictions covered by section 203.<sup>242</sup> Unfortunately, millions of English Language Learner (ELL) students have become the unwilling beneficiaries of language assistance in elections because of this discrimination.<sup>243</sup>

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239. See *id.* at 41, reprinted in *Evidence of Continued Need Hearing*, *supra* note 4, at 2175. More than a third of the Asian-American population overall, nearly four million people, is considered LEP. A majority of six Asian-American groups are LEP: Vietnamese, Hmong, Cambodian, Laotian, Bangladeshi, and Taiwanese. More than one out of three Koreans, Chinese, Thai, Indonesians, and Malaysians, and more than a fifth of Filipinos, Japanese, Asian Indians, and Pakistanis are LEP, or not fluent in English. *Continuing Need for Section 203's Provisions for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 118–19 (2006) (statement of Karen K. Narasaki, President and Executive Director, Asian American Justice Center).

240. Congress also considered substantial evidence of voting discrimination against language minorities. A discussion of the evidence is beyond the scope of this article but will be included in a forthcoming book I am editing on the language assistance provisions.

241. As Chairman Sensenbrenner observed,

Now I think that probably the need for continuation of bilingual ballots is perhaps an indictment as to the lack of effectiveness of bilingual education. . . . Should we close the door to understanding a ballot because of a failure of our educational system or because of the fact that people have moved to a place where English is commonly used in the United States from a place in the United States where English is not commonly used? I would answer that question no . . . .

H.R. REP. NO. 109-478, at 135 (2006) (statement of Rep. Sensenbrenner); see also Hunter, *supra* note 26, at 254–58 (describing evidence of discrimination underlying the 1975 enactment of the language assistance provisions).

242. CONTINUING NEED, *supra* note 221, at 15. The top six states with LEP students are California with 1,511,646, Texas with 570,022, Florida with 254,517, New York with 239,097, Illinois with 140,528, and Arizona with 135,248. *Id.* Twenty-seven of the twenty-eight school districts that had 10,000 or more LEP students in 2004–2005 are in section 203 covered jurisdictions, including all of the top twenty-five. *Id.* School districts with more than 50,000 ELL students include: Los Angeles with 328,684; New York with 122,840; Chicago with 82,540; Miami-Dade with 62,767; Houston with 61,319; Clark County (Las Vegas), Nevada, with 53,517; and Dallas with 51,328. *Id.*

243. ANNEKA L. KINDLER, U.S. DEP'T OF EDUC., SURVEY OF THE STATES' LIMITED ENGLISH PROFICIENT STUDENTS AND AVAILABLE EDUCATIONAL PROGRAMS AND SERVICES 2000–2001 SUMMARY REPORT 3, 10, 13 (2002), available at <http://www.nclae.gwu.edu/policy/states/reports/seareports/0001/sea0001.pdf>.

Numerous state and local jurisdictions have been found liable for denying equal educational opportunities to ELL students in public schools.<sup>244</sup> In the landmark case of *Lau v. Nichols*, the United States Supreme Court held that an English-only curriculum violated Title VI of the Civil Rights Act of 1964 where it deprived Chinese-speaking students in San Francisco of equal educational opportunities.<sup>245</sup> The unequal educational opportunities identified in *Lau* and its progeny<sup>246</sup> remain problematic; since 1975, at least twenty-four successful educational discrimination cases have been brought on behalf of ELL students in fifteen states, fourteen of which are presently covered in whole or in part by the language assistance provisions.<sup>247</sup>

Educational disparities persist for minority language groups across America. In Alaska, which has the single largest indigenous population in the United States, 75% of all Alaska Natives complete

244. CONTINUING NEED, *supra* note 221, at 14.

245. 414 U.S. 563, 566 (1974). Title VI of the Civil Rights Act of 1964 provides that "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (2000).

246. See *Castañeda v. Pickard*, 648 F.2d 989 (5th Cir. 1981); *Serna v. Portales Mun. Schs.*, 499 F.2d 1147 (10th Cir. 1974). Other statutory bases for these cases have included section 1703(f) of the Equal Educational Opportunity Act (EEOA) and its implementing regulations, the Education for All Handicapped Children Act of 1975, the Bilingual Education Act and Title VII of the Elementary and Secondary Education Act of 1968, section 504 of the Vocational Rehabilitation Act of 1973, numerous sections of the Individuals with Disabilities Education Act (IDEA), and Title III of the No Child Left Behind Act of 2002 (NCLB). See, e.g., *Castañeda*, 648 F.2d at 999 (basing claim on the EEOA); *Serna*, 499 F.2d at 1149; *Kielbus ex rel. Kielbus v. New York City Bd. of Educ.*, 140 F. Supp. 2d 284, 287 (E.D.N.Y. 2001) (basing claim on the Rehabilitation Act and the IDEA); *Flores v. Arizona*, 405 F. Supp. 2d 1112, 1118 (D. Ariz. 2005) (basing claim on the NCLB).

247. DR. JAMES THOMAS TUCKER, VOTING RIGHTS CONSULTANT TO THE NALEO EDUCATIONAL FUND, UNEQUAL EDUCATIONAL OPPORTUNITIES FOR ENGLISH LANGUAGE LEARNER STUDENTS IN SECTION 203 COVERED JURISDICTIONS 11 (2006) [hereinafter UNEQUAL OPPORTUNITIES], reprinted in *Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (Part II): Hearing on H.R. 9 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 59, 69 (2006). These cases likely represent only a small number of the successful education cases brought because so many of the decisions are unpublished. Nevertheless, the cases provided a compelling basis for concluding that present educational discrimination and the effects of past educational discrimination required renewal of the language assistance provisions. *Id.* at 20, reprinted in *Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (Part II): Hearing on H.R. 9 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. at 69.

high school, compared to 90% of non-Natives.<sup>248</sup> Over 80% of Alaska Native graduating seniors are not proficient in reading comprehension and have failure rates on standardized tests more than 20% higher than non-Native students.<sup>249</sup> In a 1999 decision, an Alaska Superior Court concluded that Alaska has a dual, arbitrary, unconstitutional, and racially discriminatory system for funding school facilities.<sup>250</sup> Perhaps because of a combination of these unequal educational opportunities and lack of language assistance, Alaska Natives' voter turnout lags behind the statewide rate by approximately 17 percentage points.<sup>251</sup>

American Indians have not fared any better. Montana's educational disparities are illustrative of those present in other states with large Native American populations.<sup>252</sup> American Indian pupils in Montana's public schools trail non-Indian students in every category of educational attainment as a direct result of educational discrimination.<sup>253</sup> Although American Indians comprised only 11.4% of Montana's public school K–12 students in 2005, they constituted 72% of the total junior high dropout rate and 24% of high school dropouts.<sup>254</sup> On average, only 39% of American Indian students in grades 4, 8, and 11 scored proficient or advanced in Reading, compared to 79% for

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248. *Modern Enforcement of the Voting Rights Act: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 125 (2006) (statement of Natalie Landreth, Staff Attorney, Native American Rights Fund).

249. NATALIE LANDRETH & MOIRA SMITH, *RENEWTHEVRA.ORG, VOTING RIGHTS IN ALASKA 1982–2006*, at 27 (2006), *reprinted in Evidence of Continued Need Hearing*, *supra* note 4, at 1308, 1335.

250. *Kasayulie v. State*, No. 3AN-97-3782 CIV (Alaska Super. Ct. Sept. 1, 1999).

251. LANDRETH & SMITH, *supra* note 249, at 24–25, *reprinted in Evidence of Continued Need Hearing*, *supra* note 4, at 1308, 1332–33 (discussing the difficulty of accurately determining Alaska Native turnout).

252. Montana, Arizona, and Alaska are the only states tracking this data, and all three showed substantial educational disparities between American Indians and non-Hispanic whites. *See also id.* at 5, *reprinted in Evidence of Continued Need Hearing*, *supra* note 4, at 1313; CONTINUING NEED, *supra* note 221.

253. In *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684, 690 (Mont. 1989), the Supreme Court of Montana held that the state's education finance system was unconstitutional. In 2004, a state court held that Montana's public schools remained underfunded and the State had shown "no commitment in its educational goals to the preservation of [American Indian] cultural identity." *Columbia Falls Elementary Sch. Dist. No. 6 v. State*, No. BDV-2002-528, 2004 WL 844055, at \*31 (Mont. Dist. Ct. Apr. 15, 2004), *aff'd*, 2005 MT 69, 109 P.3d 257 (Mont. 2005). *See also Heavy Runner v. Bremner*, 522 F. Supp. 162 (D. Mont. 1981) (charging the state school districts with failure to provide its Blackfeet Indian students an equal education).

254. *See* MONT. OFFICE OF PUB. INSTRUCTION, *AMERICAN INDIAN EDUCATION DATA FACT SHEET* (2007), *available at* <http://www.opi.mt.gov/pdf/indianed/IEFADDataFactSheet.pdf>.

non-Indians.<sup>255</sup> Overall, twenty-nine out of sixty-nine school districts in Montana that failed to make Adequate Yearly Progress (the State's measure for school performance) in 2005 have 50 to 100% American Indian student populations.<sup>256</sup>

According to the 2000 Census, Hispanic-American educational attainment is equally lacking. Only 52.4% of all Hispanic Americans have a high school education or more, compared to 80.4% for all persons in the United States.<sup>257</sup> In 2005, a federal court cited Arizona for contempt for failing over the course of the preceding thirteen years to provide opportunities for Spanish-language students to learn English in the public schools.<sup>258</sup> In February 2006, the court began fining Arizona at least \$500,000 a day until the problem is corrected and equal opportunities are provided to the 175,000 ELL students estimated to be in Arizona's schools.<sup>259</sup> The damage has already been done, however: Arizona's American Indian and Hispanic ELL students lag in every significant educational category.<sup>260</sup>

Asian-American students also continue to be subjected to educational discrimination. For example, in *Y.S. v. School District of Philadelphia*,<sup>261</sup> a successful class action brought on behalf of 6,800 Asian ELL students, one of three named plaintiffs was a Cambodian refugee enrolled in English-only English as a Second Language (ESL) courses who was placed in a class for mentally handicapped students after failing to make progress for three years. As a result, the court entered

255. *See id.*

256. *See id.*

257. *See* HISPANICS IN THE UNITED STATES, *supra* note 10, at 11 fig.9.

258. *Flores v. Arizona*, 405 F. Supp. 2d 1112, 1113, 1120 (D. Ariz. 2005).

259. *Id.* at 1120–21.

260. *See* UNEQUAL OPPORTUNITIES, *supra* note 247, at 15–16, reprinted in *Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (Part II): Hearing on H.R. 9 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 59, 73–74 (2006). (“Eighty-three percent of juniors and sophomores who qualify as English learners failed key portions of the [state graduation] test such as reading and writing. While about half of non-Hispanic whites have passed all of the [test] sections, more than three-quarters of Latinos, African-Americans, and American Indians have not. Sixty-five percent of non-Hispanic whites passed the math section, twice the percentage of African-American and Hispanic students. Only about 25 percent of American Indian students have passed the math section. Of the 13,279 students who continue to score in the lowest of four possible categories, 70 percent of those students were minorities.”).

261. No. 85-6924 (E.D. Pa. May 4, 1988) (consent decree continued by stipulation in 2001), cited in UNEQUAL OPPORTUNITIES, *supra* note 247, at 12–13, reprinted in *Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (Part II): Hearing on H.R. 9 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. at 70–71.

a consent decree requiring judicial oversight of the treatment of Asian language students, which was extended by stipulation in 2001.<sup>262</sup>

The problem of educational discrimination and under-funding in public schools<sup>263</sup> is further aggravated by insufficient adult ESL programs in most of the covered jurisdictions.<sup>264</sup> A majority of surveyed ESL providers in sixteen states covered by section 203 reported that they have lengthy waiting lists.<sup>265</sup> For example, in Phoenix, the state's largest ESL provider has a waiting list of over one thousand people, who wait for up to eighteen months for the highest-demand evening classes.<sup>266</sup> In Albuquerque, the largest provider reported waiting times of twelve to fourteen months.<sup>267</sup> In Boston, where Massachusetts has mandated class sizes of no more than twenty students, there are at least 16,725 adults on ESL waiting lists, with waiting times as long as three years.<sup>268</sup> In New York City, where an estimated one million adults need ESL, only 41,347 adults were able to enroll in 2005 because of limited availability; most adult ESL programs no longer keep waiting lists because of the extreme demand, but use lotteries in which at least three out of four applicants are turned away and the waiting time can be several years.<sup>269</sup> ESL providers that do not have waiting lists often have overcrowded classrooms, insufficiently trained instructors, place ESL students in the wrong level of English class, and even turn adults away because of insufficient resources.<sup>270</sup>

Among LEP voting age citizens, the average illiteracy rate is nearly fourteen times the national illiteracy rate of 1.35%.<sup>271</sup> An aver-

262. *Id.*

263. Successful school funding cases have been brought in at least fifteen of the thirty-one states covered in whole or in part by section 203: Alaska, Arizona, California, Connecticut, Idaho, Kansas, Maryland, Massachusetts, Montana, New Jersey, New Mexico, New York, North Dakota, Texas, and Washington. Additional school funding cases are pending in four states that are partially covered by section 203: Colorado, Nebraska, Oklahoma, and Oregon. *Id.* at 11–12, apps. A-1 to A-5, reprinted in *Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (Part II): Hearing on H.R. 9 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 59, 69–70, 85–89 (2006).

264. See DR. JAMES THOMAS TUCKER, NALEO EDUC. FUND, WAITING TIMES FOR ADULT ESL CLASSES AND THE IMPACT ON ENGLISH LEARNERS 18–41 (2006).

265. See *id.* at 3, 19–20.

266. *Id.* at 4, 20.

267. *Id.* at 4, 33.

268. *Id.* at 4, 31.

269. *Id.* at 4, 33–34.

270. *Id.* at 5, 20.

271. See LANGUAGE ASSISTANCE PRACTICES, *supra* note 4, at 24, 29–30, app. C, reprinted in *Evidence of Continued Need Hearing*, *supra* note 4, at 2158, 2163–64, 2272–95.

age of 28.3% of Alaska Native LEP voting age citizens are illiterate, nearly 21 times the national rate; 40% of covered Alaska Native reservations have illiteracy rates greater than 50%.<sup>272</sup> An average of 11.7% of all LEP American Indian voting age citizens are illiterate, nearly nine times the national rate; over one-quarter of covered American Indian reservations have illiteracy rates greater than 50%.<sup>273</sup> An average of 20.8% of all LEP Spanish-speaking voting age citizens are illiterate, over fifteen times the national rate.<sup>274</sup> An average of 8.5% of all LEP Asian-American voting age citizens are illiterate, more than six times the national rate.<sup>275</sup>

As Congress recognized in its findings supporting the language assistance provisions,<sup>276</sup> the barriers posed by educational discrimination, the absence of sufficient ESL classes, and high illiteracy result in extremely depressed voter participation. According to the Census Bureau, in the November 2004 Presidential Election, Hispanic voting-age U.S. citizens had a registration rate of 57.9% and Asian voting-age U.S. citizens had a registration rate of only 52.5%, compared to 75.1% of all non-Hispanic white voting-age U.S. citizens.<sup>277</sup> In Arizona, American Indian turnout remains low, comprising just over 54% of all registered American Indian voters in the 2004 presidential election, compared to the statewide turnout of 76%.<sup>278</sup> Despite the progress that has been made as a result of the language assistance provisions, this data shows that there is still a long way to go. This evidence provided Congress a compelling basis for extending the language assistance provisions for an additional twenty-five years.

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272. *See id.* at 35–36, reprinted in *Evidence of Continued Need Hearing*, *supra* note 4, at 2169–70.

273. *See id.* at 39, reprinted in *Evidence of Continued Need Hearing*, *supra* note 4, at 2173.

274. *See id.* at 33, reprinted in *Evidence of Continued Need Hearing*, *supra* note 4, at 2167.

275. *See id.* at 42, reprinted in *Evidence of Continued Need Hearing*, *supra* note 4, at 2176.

276. *See supra* notes 25, 104 and accompanying text.

277. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, SERIES P20-556, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2004, tbl.4a, available at <http://www.census.gov/population/socdemo/voting/cps2004/tab04a.xls>. The Census data did not track registration and turnout for Alaska Natives and American Indians. *See id.*

278. DR. JAMES THOMAS TUCKER & DR. RODOLFO ESPINO, VOTING RIGHTS IN ARIZONA 1982–2006, at 19 (2006), reprinted in *Evidence of Continued Need Hearing*, *supra* note 4, at 1363, 1381.

C. *Widespread Use of the Language Assistance Provisions*

*It is well documented that language assistance is needed and used by voters.*

Representative Joe Baca (D-California)<sup>279</sup>

Critics of the minority language assistance requirements also maintain that bilingual voting materials and assistance are not used by LEP voting age citizens.<sup>280</sup> To the contrary, bilingual materials and assistance are in demand wherever they are offered. A 1984 General Accounting Office (GAO) study found that out of 275,000 Hispanic voters in 1,102 Texas precincts, 69,000 used bilingual voting materials and 85,000 used some form of oral assistance.<sup>281</sup> Use of bilingual election materials and assistance was limited overwhelmingly to those Hispanic voters with limited English skills, with few of these voters considering themselves to be English readers or speakers.<sup>282</sup> Seventy-seven percent of Hispanic voters who used a bilingual ballot were born in the United States.<sup>283</sup> Hispanics who were elderly or who had less than a high school education were the most likely voters to use bilingual election materials and assistance.<sup>284</sup> The same patterns were present in other states, with approximately one-fifth of all Spanish-speaking voters nationwide requiring Spanish language materials and assistance to be able to cast their ballot effectively.<sup>285</sup>

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279. 152 CONG. REC. H5143 (daily ed. July 13, 2006) (statement of Rep. Baca).

280. *See supra* notes 230–31 and accompanying text.

281. U.S. GEN. ACCOUNTING OFFICE, BILINGUAL VOTING ASSISTANCE: COSTS OF AND USE DURING THE NOVEMBER 1984 GENERAL ELECTION 27–33 (1986) [hereinafter 1984 GAO REPORT].

282. *Id.* at 28–29.

283. *Id.* at 61.

284. *Id.* at 62 (observing that 73% of voters who used a Spanish language ballot had less than a high school education). *See also* NAT'L COUNCIL OF LA RAZA, STATE OF HISPANIC AMERICA 1991: AN OVERVIEW (1992) [hereinafter STATE OF HISPANIC AMERICA], reprinted in S. 2236 Hearings, *supra* note 1, at 88, 88–132 (describing the socio-economic barriers limiting the ability of Hispanic voters to participate effectively in the political process).

285. *See generally* S. REP. NO. 102-315 (1992), wherein the Senate Judiciary Committee made the following observation:

In the 1988 general election, 20 percent of Hispanic voters in the State of New Mexico, 19 percent of Hispanic voters in the State of Texas, and 10 percent of Hispanic voters in the State of California reported using bilingual voting assistance. In the 1990 general election, 25 percent of Hispanic voters in Texas and 18 percent of Hispanic voters in California used bilingual election services.

*Id.* at 11. Many of the Hispanic voters using bilingual election assistance in other states were elderly, uneducated, or poor. *See* MEXICAN AM. LEGAL DEF. & EDUC. FUND, BILINGUAL ELECTIONS: LATINOS, LANGUAGE AND VOTING RIGHTS 26–28 (1992), reprinted in S. 2236 Hearings, *supra* note 1, at 32, 60–62.

Similarly, Native Americans often have to rely upon oral language assistance to be able to participate in elections, as “many Native Americans—particularly older individuals—continue to speak their traditional languages and live in isolation from English-speaking society.”<sup>286</sup> Surveys of tribes nationwide confirmed that language differences continue to depress Native American political participation. Thirty-seven percent of 319 responding tribal leaders identified “language differences” and 25% identified “English language ballots” as significant barriers.<sup>287</sup> A separate survey of Navajo and Pueblo Indians in northwestern New Mexico found that 48% were “more comfortable” speaking their own language than English.<sup>288</sup> The need for oral language assistance for Native American voters is particularly acute for ballot questions. Federal observers found that during the 1988 and 1990 elections in the Southwestern United States, American Indians often had no access to translations, and “even when translators were available, the message conveyed to minority language voters often did not resemble the issue on the ballot and it was impossible for a minority-language individual to cast an informed vote.”<sup>289</sup> The absence of oral language assistance and information in their own language is devastating to Native American political participation.<sup>290</sup>

There is likewise a widespread demand for bilingual election materials among Asian-American voters. In New York, 80% of Chinese-American voters in Chinatown and Queens County stated that they would vote more often if bilingual assistance was provided.<sup>291</sup> Similarly, a 1991 survey of non-English speaking Chinese voters in San Francisco found that nearly 90% believed that the availability of bilingual materials was important for them to participate in elections, and one-third actually requested bilingual assistance on election day.<sup>292</sup> A separate survey conducted among Asian-American voters in

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286. *S. 2236 Hearings*, *supra* note 1, at 159 (statement of John Dunne, Assistant Attorney General). According to Dunne, his point was illustrated by 1980 Census data demonstrating that more than one-half of Navajo voters in Apache and Navajo Counties, Arizona were limited-English proficient. *Id.*

287. *See S. 2236 Hearings*, *supra* note 1, at 328 (joint testimony of Native American Rights Fund and National Congress of American Indians).

288. *Id.* (observing that the majority of the respondents were registered voters).

289. *S. 2236 Hearings*, *supra* note 1, at 156–57 (statement of John Dunne, Assistant Attorney General).

290. For example, in the 1988 general election in Sandoval County, New Mexico, although 62.7% of all ballots included votes on referendum issues, only 7.4% of Native American ballots included votes for those issues. S. REP. NO. 102-315, at 9 (1992). Similarly, in the County’s 1984 election, only 4% of eligible Native American voters cast absentee ballots, compared to 26% of eligible white voters. *Id.*

291. *Id.* at 12.

292. *Id.*

Los Angeles County found that 84% of the respondents indicated bilingual ballots would be helpful, with 56% of all registered voters stating that they would be more likely to vote if bilingual assistance was available.<sup>293</sup>

More recent data introduced during the 2006 VRA reauthorization indicates a growing demand for language materials and assistance. According to a November 2000 exit survey of language minority voters in Los Angeles and Orange Counties in California, 54% of Asian and Pacific Islander voters and 46% of Hispanic voters reported that they would be more likely to vote if they received language assistance. These numbers are consistent with other exit surveys done in the same counties in March 2000 and November 1998.<sup>294</sup> The exit surveys are also consistent with the experience of election officials. In 2006, Deborah Wright, Acting Assistant Registrar-Recorder and County Clerk for Los Angeles County, testified:

Language minority citizens in Los Angeles County have consistently demonstrated use of translated materials. Evidence of use includes continuous requests via voter registration forms for materials in languages other than English, tally cards prepared by poll workers on election day enumerating the number of voters who requested multilingual materials, and feedback from community-based organizations.<sup>295</sup>

According to Los Angeles County data, bilingual material requests had increased from 6,227 in 1993 to 137,091 by April 2006.<sup>296</sup>

When bilingual election materials and assistance are available, voter registration and turnout among language minority voters skyrocket. Between 1980 and 1990, Hispanic voter participation increased at five times the rate of the rest of the nation, and approximately 500,000 newly-registered Hispanic voters were added between 1990 and 1992.<sup>297</sup> Furthermore, voter turnout in precincts on

293. *Id.*

294. *Statement of Eugene Lee, Staff Attorney, Voting Rights Project, Asian Pacific American Legal Center, Before the National Commission on the Voting Rights Act, Western Regional Hearing at 4* (Sept. 27, 2005), available at [http://www.votingrightsact.org/hearings/pdfs/eugene\\_lee.pdf](http://www.votingrightsact.org/hearings/pdfs/eugene_lee.pdf).

295. *Continuing Need for Section 203's Provisions for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 95* (response of Deborah Wright, Acting Assistant Registrar-Recorder, Department of Registrar-Recorder, Los Angeles, California, to written questions).

296. *Id.* at 96.

297. H.R. REP. NO. 102-655, at 6 (1992), reprinted in 1992 U.S.C.C.A.N. 766, 770. The link between the language assistance provisions and Latino participation is evident because the increase in registration and turnout far outpaced the increase in the number of Latinos who had become naturalized citizens. For a discussion establishing the causal link between language assistance and Latino voter participation, see

seven Arizona Indian reservations rose from 11,789 in 1972 to 15,982 in 1980, with voter registration increasing by 87% in Navajo County, Arizona, and 165% in Coconino County, Arizona.<sup>298</sup> Turnout among American Indians in Navajo County increased by 120% between 1972 and 1990, while Apache County, Arizona, experienced an 88% increase during the same period.<sup>299</sup> American Indians in New Mexico and Utah experienced similar increases in voter registration and turnout.<sup>300</sup> Additionally, greater participation of language minority voters has translated into increased electoral success at the polls for language minority candidates.<sup>301</sup>

Even if there appears to be “low use” of bilingual election materials, the materials may still be needed. “Low use” could also suggest that a jurisdiction is not conducting sufficient outreach to the communities that would most benefit. In a 2005 survey of 810 section 203 covered jurisdictions, nearly two-thirds of election officials admitted they do not engage in any community outreach to covered language groups.<sup>302</sup>

The power of community outreach is perhaps best evidenced by the experience of Chinese-American voters in King County, Washington, which includes the city of Seattle. One witness who urged an opt-out provision for low use cited King County’s experience in 2000, when it became a covered jurisdiction for voters who speak Chinese but only twenty-four Chinese ballots were used.<sup>303</sup> Noting such low usage, officials in King County worked with Chinese-American community organizations and increased publicity about bilingual election materials. In 2005, the number of requested Chinese ballots increased by more than 5,800%.<sup>304</sup>

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generally Michael Jones-Correa, *Language Provisions Under the Voting Rights Act: How Effective Are They?*, 86 SOC. SCI. Q. 549 (2005).

298. H.R. REP. NO. 102-655 at 6–7, *reprinted in* 1992 U.S.C.C.A.N. at 770–71.

299. S. REP. NO. 102-315, at 12 (1992).

300. *See S. 2236 Hearings*, *supra* note 1, at 186–87 (statement of Marshall Plummer, Navajo Nation Vice-President).

301. *See supra* notes 220–27 and accompanying text.

302. LANGUAGE ASSISTANCE PRACTICES, *supra* note 4, at 69, 85–86, *reprinted in Evidence of Continued Need Hearing*, *supra* note 4, at 2203, 2219–20. Fifty-two percent of election officials responded to the survey.

303. *Continuing Need for Section 203’s Provisions for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 304–05 (statement of Mauro E. Mujica, Chairman of the Board, U.S. English, Inc.).

304. *Continuing Need for Section 203’s Provisions for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 65 (response of John Trasviña, Interim President and General Counsel, Mexican American Legal Defense and Education Fund, to written questions).

The lack of outreach is often compounded by the failure of covered jurisdictions to provide language materials and assistance. Of the surveyed jurisdictions, 19.4% provided no language assistance and 14% provided only bilingual written materials.<sup>305</sup> Sixty-one percent failed to provide language assistance to voters making telephonic inquiries.<sup>306</sup> Over half (57.1%) did not have at least one full-time worker in the covered languages, and 67.1% failed to provide oral language assistance for more than half of all common election activities.<sup>307</sup> Additionally, over two-thirds of surveyed jurisdictions did not confirm the language abilities of poll workers who claimed to be bilingual, and nearly two-thirds did not provide any training on compliance with section 203.<sup>308</sup>

*D. The Bilingual Election Requirements: Political Inclusion, Not “Balkanization”*

*The Judiciary Committee’s records show[ ] that adults who want to learn English experience long wait times to enroll in English as a second language literacy centers. And, once enrolled, learning English takes adult citizens several years to even obtain a fundamental understanding of the English language. Even after completing literacy classes, it is often not enough to understand complex ballots.*

Representative James Sensenbrenner (R-Wisconsin)<sup>309</sup>

Much of the opposition to the bilingual election requirements has concerned the disincentive the provisions purportedly create for language minorities to learn English.<sup>310</sup> Critics also argue that the language assistance provisions drive a wedge into American society by

305. LANGUAGE ASSISTANCE PRACTICES, *supra* note 4, at 47–48, *reprinted in Evidence of Continued Need Hearing*, *supra* note 4, at 2181–82. These jurisdictions generally have high percentages of LEP voters in one or more of the covered languages. *See id.*

306. *Id.* at 47, 65, *reprinted in Evidence of Continued Need Hearing*, *supra* note 4, at 2181, 2199.

307. *Id.* at 47, 55–56, 61, *reprinted in Evidence of Continued Need Hearing*, *supra* note 4, at 2181, 2189–90, 2195.

308. *Id.* at 69, 77–79, *reprinted in Evidence of Continued Need Hearing*, *supra* note 4, at 2203, 2211–13.

309. 152 CONG. REC. H5191–92 (daily ed. July 13, 2006) (statement of Rep. Sensenbrenner).

310. *See* 142 CONG. REC. H9739 (daily ed. Aug. 1, 1996) (statement of Rep. Roukema) (deriding the provisions as “a great threat to our national unity” by dividing the country “into many ethnic enclaves”).

creating “cultural enclaves” of non-English speaking communities.<sup>311</sup> This charge of “balkanization,” however, is unsupported.<sup>312</sup> Today’s immigrants lose their native language by the second or third generation, and most are speaking English on a daily basis within ten years of their arrival.<sup>313</sup>

Furthermore, bilingual election materials lead to greater integration by enhancing the opportunities for language minorities to participate in the political process. Congress has long rejected the notion that voting rights should be denied as “a necessary or appropriate means of encouraging persons to learn English,”<sup>314</sup> instead opting to help citizens and first time voters gain familiarity with the American voting process, including registration, referenda, and voting machines.<sup>315</sup> As one sponsor of the 1992 Amendments testified, “[f]ar from threatening the primacy of English in America, it is precisely tools such as section 203 which facilitate the integration of immigrants into the diverse culture of this nation. Bilingual elections do not promote cultural separatism, but instead help to integrate non-English speaking citizens into our system of democracy.”<sup>316</sup>

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311. Brian DeBose, *Lawmakers Push Official English*, WASH. TIMES, Apr. 3, 2006, at A6. Rep. King explained the meaning of “balkanization” in a February 2006 letter to Chairman Sensenbrenner stating his opposition to the language assistance provisions: “Multilingual ballots divide our country, increase the risk of voter error and fraud, and burden local taxpayers. The multilingual ballot mandate encourages the linguistic division of our nation and contradicts the ‘Melting Pot’ ideal that has made us the most successful multi-ethnic nation on earth.” *Rep. King Applauds Decision to Give Americans Another Chance to End Bilingual Voting*, U.S. FED. NEWS, June 21, 2006, available at 2006 WLNR 10888239.

312. See *Continuing Need for Section 203’s Provisions for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 66 (response of John Trasviña, Interim President and General Counsel, Mexican American Legal Defense and Education Fund, to written questions) (describing balkanization as “a loaded term of mythical proportions that has absolutely no basis in fact, and is used as a divisive measure”).

313. See *S. 2236 Hearings*, *supra* note 1, at 25 (testimony of Rep. Jose Serrano); STATE OF HISPANIC AMERICA, *supra* note 284, at 3–4, reprinted in *S. 2236 Hearings*, *supra* note 1, at 99–100. One significant barrier to the ability of immigrants to learn the English language sooner is the lack of resources allocated to English as a Second Language (ESL) courses. See 138 CONG. REC. S11,743–45 (daily ed. Aug. 6, 1992) (statement of Sen. Simon) (quoting Louis Freeberg, *Thousands Shut Out of English Classes in California Schools*, S.F. CHRON., Nov. 5, 1991, at A13).

314. S. REP. NO. 94-295, at 34 (1975), reprinted in 1975 U.S.C.C.A.N. 774, 800–01 (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 655 (1966)).

315. See ASIAN AM. LEGAL DEF. & EDUC. FUND, ASIAN AMERICANS AND THE VOTING RIGHTS ACT: THE CASE FOR REAUTHORIZATION 7 (2006) available at <http://www.aaldef.org/docs/AALDEF-VRAREauthorization-2006.pdf> [hereinafter AALDEF] (describing the cultural barriers faced by immigrant voters not covered by section 203).

316. *S. 2236 Hearings*, *supra* note 1, at 25 (statement of Rep. Serrano).

The experience of Asian Americans demonstrates the impact of the bilingual election requirements on language minorities' participation in the political process. According to a report by the Asian American Legal Defense and Education Fund, after section 203 coverage was expanded in 1992, the number of Asian Americans registered to vote increased dramatically. Between 1996 and 2004, Asian Americans had the highest increase of new voter registration (58.7%).<sup>317</sup> Moreover, in covered areas where the Department of Justice brought section 203 enforcement actions, participation not only in voting but in running for political office has increased dramatically. For example, after the Department obtained a Memorandum of Agreement in Harris County, Texas, Vietnamese-American voter turnout doubled and the first Vietnamese-American candidate in history, Hubert Vo, was elected to the Texas legislature—defeating the incumbent chair of the Appropriations Committee by sixteen votes out of more than 40,000 cast.<sup>318</sup>

Bilingual election materials and voter assistance are also necessary because the level of English proficiency required to pass a citizenship test does not approach the level of proficiency required to register to vote or to understand ballot measures. Certain older applicants, who make up a significant number of all naturalized citizens,<sup>319</sup> do not have to satisfy any form of language proficiency to become citizens.<sup>320</sup> For those who do, applicants generally must demonstrate that they “can read or write simple words and phrases” and that they have a third or fourth grade knowledge of English.<sup>321</sup> Voting, however, requires a much higher level of English proficiency;<sup>322</sup> a survey of voter registration materials found that their language level was much higher than third or fourth grade.<sup>323</sup> Complex ballot initiatives and lengthy directions to operate voting machines often require a high

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317. AALDEF, *supra* note 315, at vi.

318. *Voting Rights Act: Section 203—Bilingual Election Requirements (Part I): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 12 (2005) (statement of Bradley J. Schlozman, Acting Assistant Attorney General, Civil Rights Division, Department of Justice).

319. ANA HENDERSON, CHIEF JUSTICE EARL WARREN INSTITUTE ON RACE, ETHNICITY, AND DIVERSITY, ENGLISH LANGUAGE NATURALIZATION REQUIREMENTS AND THE BILINGUAL ASSISTANCE PROVISIONS OF THE VOTING RIGHTS ACT 6 (2006) (on file with *NYU Journal of Legislation and Public Policy*).

320. See 8 U.S.C. § 1423(b)(2) (2000).

321. See 8 U.S.C. § 1423(a)(1); *Continuing Need for Section 203's Provisions for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 84 (response of John Trasviña, Interim President and General Counsel, Mexican American Legal Defense and Education Fund, to written questions).

322. See *id.*

323. HENDERSON, *supra* note 319, at 5.

school level education or higher. According to one California election official, “complicated ballots challenge all voters to be prepared and to have the information they need prior to casting their ballots. Often a high level of English proficiency is needed even by native speakers of English to understand these ballot initiatives and to cast an informed ballot.”<sup>324</sup> Complex ballots have become such a widespread problem that many states are considering legislation to simplify ballot language.<sup>325</sup>

Language barriers in voting are not limited to naturalized citizens. Many native-born voting age citizens are LEP because of unequal educational opportunities.<sup>326</sup> Certain groups of native-born citizens are singled out for protection by other federal acts. The Native American Languages Act of 1990<sup>327</sup> recognizes the special status of Native Americans, Native Hawaiians, and Native American Pacific Islanders<sup>328</sup> and declares the official policy of the United States to “preserve, protect, and promote” the use of their native languages.<sup>329</sup> Federal law likewise acknowledges the unique position of Puerto Rican persons, who are American citizens from birth.<sup>330</sup> Contrary to what many English-only advocates argue, language assistance cannot

324. *Continuing Need for Section’s 203 Provisions for Limited English Proficient Voters: Hearing Before S. Comm. on the Judiciary*, 109th Cong. 385 (2006) (statement of Deborah Wright, Acting Assistant Registrar-Recorder, Department of Registrar-Recorder, Los Angeles, California).

325. See MINNESOTA HOUSE OF REPRESENTATIVES, SESSION WEEKLY, Mar. 5, 2004, at 7–8 available at <http://www.house.leg.state.mn.us/hinfo/swkly/2003-04/sw504.pdf> (discussing a bill to simplify mandatory language for certain ballot measures); *Continuing Need for Section 203’s Provisions for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 62 (response of John Trasviña, Interim President and General Counsel, Mexican American Legal Defense and Education Fund, to written questions) (describing the difficulty many native born citizens have with complex ballot language).

326. See *supra* notes 248–56 and accompanying text.

327. Pub. L. No. 101-477, 104 Stat. 1153 (codified as amended at 25 U.S.C. §§ 2901–2906 (2000)).

328. See *id.* §§ 102–103 (codified as amended at 25 U.S.C. §§ 2901–2902). See also *id.* § 103 (codified as amended at 25 U.S.C. § 2902) (defining “Native American language” as “the historical, traditional languages” spoken by Indians, Native Hawaiians, or Native American Pacific Islanders).

329. *Id.* § 104 (codified at 25 U.S.C. § 2903). Although there are no published court decisions discussing the Native American Languages Act as a source for mandating language assistance for American Indian and Alaska Native voters, such a construction is consistent with the plain language of the Act. See generally *id.* § 105 (codified at 25 U.S.C. § 2904) (“The right of Native Americans to express themselves through the use of Native American languages shall not be restricted in any public proceeding, including publicly supported education programs.”).

330. See 8 U.S.C. § 1402 (2000) (“All persons born in Puerto Rico on or after April 11, 1899, and prior to January 13, 1941 . . . are declared to be citizens of the United States as of January 13, 1941. All persons born in Puerto Rico on or after January 13,

be limited to native-born voting age citizens.<sup>331</sup> The Supreme Court has flatly rejected the argument that “[c]itizenship obtained through naturalization is . . . a second-class citizenship.”<sup>332</sup> Instead, the Court has found that “it is plain that citizenship obtained through naturalization carries with it the privilege of full participation in the affairs of our society.”<sup>333</sup>

*E. The Low Cost of Compliance with the  
Bilingual Election Mandate*

*[A]lthough there are costs associated with implementing the minority language assistance provisions, they are reasonable . . . Ensuring full access to American[s'] right to vote certainly is worth this reasonable cost.*

Senator Patrick Leahy (D-Vermont)<sup>334</sup>

In 1975, several members of Congress opposed adoption of the bilingual election provisions because of the high cost they believed the provisions would impose on federal, state, and local governments.<sup>335</sup> Their fears have not materialized. The bilingual election requirements

1941, and subject to the jurisdiction of the United States, are citizens of the United States at birth.”).

331. *See, e.g.*, 152 CONG. REC. H5166 (daily ed. July 13, 2006) (statement of Rep. Cubin) (arguing against bilingual ballot provisions for immigrants); *id.* at H5195–96 (daily ed. July 13, 2006) (statement of Rep. Stearns) (same); *see also id.* at H5173 (daily ed. July 13, 2006) (statement of Rep. Serrano) (refuting the argument that naturalized citizens should not be covered by section 203); *id.* at H5198 (daily ed. July 13, 2006) (statement of Rep. Meek) (same).

332. *Knauer v. United States*, 328 U.S. 654, 658 (1946).

333. *Id.* The Court repeatedly has reaffirmed the basic principle that there is no distinction between native born and naturalized citizens, with the exception that naturalized citizens are ineligible to serve as President or Vice President. *See, e.g., id.*; *Schneider v. Rusk*, 377 U.S. 163, 165 (1964) (“[T]he rights of citizenship of the native born and of the naturalized person are of the same dignity and are coextensive. The only difference drawn by the Constitution is that only the ‘natural born’ citizen is eligible to be President.”); *Luria v. United States*, 231 U.S. 9, 22 (1913) (“Under our Constitution, a naturalized citizen stands on an equal footing with the native citizen in all respects, save that of eligibility to the Presidency.”); *Osborn v. Bank of the United States*, 22 U.S. 738, 827–28 (1824) (“A naturalized citizen is . . . a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native.”).

334. 152 CONG. REC. S7904 (daily ed. July 19, 2006) (statement of Sen. Leahy).

335. *See, e.g.*, 121 CONG. REC. H4740 (daily ed. June 2, 1975) (statement of Rep. Wiggins); *id.* at H4828 (daily ed. June 3, 1975) (statement of Rep. Young); *id.* at H4890–91 (daily ed. June 4, 1975) (statement of Rep. Talcott); *id.* at H4901 (daily ed. June 4, 1975) (statement of Rep. Ashbrook); *id.* at H4912 (daily ed. June 4, 1975) (statement of Rep. Lagomarsino); *id.* at E3011–12 (daily ed. June 10, 1975) (statement of Rep. Kindness); *id.* at S13,367 (daily ed. July 23, 1975) (statement of Sen. Stevens); *id.* at S13,405 (daily ed. July 23, 1975) (statement of Sen. Bellmon); *id.* at

have imposed only minimal costs on the federal government for administration and enforcement expenses.<sup>336</sup> In addition, many covered jurisdictions already have to comply with similar bilingual election procedures under their state laws, at “relatively little cost,”<sup>337</sup> and thus do not require additional funds to implement section 203.<sup>338</sup> To the extent that some minority languages are unwritten, the cost for complying with bilingual election requirements is decreased even further.<sup>339</sup>

### 1. *Use of Targeting to Direct Bilingual Materials and Assistance to Those Who Need It*

The costs of compliance are greatly minimized in most covered jurisdictions by the selective use of “targeting.” Targeting allows a covered jurisdiction to comply with the bilingual election require-

\$13,590 (daily ed. July 24, 1975) (statement of Sen. Domenici) (quoting Letter from Ernest D. Evans, Secretary of State, New Mexico, to Sen. Tunney (June 5, 1975)).

336. Most of the expenditures borne by the federal government resulted from the “modest” \$45 to \$55 million costs for the surveys that Congress mandated the Director of the Census to conduct under section 207 of the Voting Rights Act, 42 U.S.C. § 1973aa-5 (2000). See S. REP. NO. 94-295, at 64 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 818. Because the various definitions contained in the minority language provisions of the Act track existing census definitions, these expenses will not recur absent congressional direction to the Census Bureau to conduct additional surveys. See *supra* notes 78 and 157 and accompanying text. The remaining federal expenditures have been for enforcement costs under the Act. See S. REP. NO. 94-295 at 64, *reprinted in* 1975 U.S.C.C.A.N. at 818 (estimating \$200,000 to \$300,000 in incremental outlays over ten years for implementing the 1975 amendments); H.R. REP. NO. 102-655, at 12 (1992), *reprinted in* 1992 U.S.C.C.A.N. 766, 776, and S. REP. NO. 102-315, at 20–21 (1992) (estimating costs of about one million dollars over the 1993–1997 period “mostly for Department of Justice lawsuits and monitoring activities”).

337. For example, for several years New York City had been holding elections in a manner Congress found complied with section 203, at an additional cost of approximately \$100,000 per year for 345,800 Spanish-speaking citizens. S. REP. NO. 94-295 at 39, *reprinted in* 1975 U.S.C.C.A.N. at 806.

338. See *supra* note 42; H.R. REP. NO. 102-655 at 12, *reprinted in* 1992 U.S.C.C.A.N. at 776; S. REP. NO. 102-315 at 20–21; *Continuing Need for Section 203’s Provisions for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 59–60 (2006) (response of John Trasviña, Interim President and General Counsel, Mexican American Legal Defense and Education Fund, to written questions).

339. See *supra* notes 117–21 and accompanying text (noting that in such circumstances, language materials and assistance do not have to be provided); see also U.S. GEN. ACCOUNTING OFFICE, BILINGUAL VOTING ASSISTANCE: ASSISTANCE PROVIDED AND COSTS 8–9 (1997) [hereinafter 1997 GAO REPORT] (reporting that Gila, Arizona provided written and oral assistance to Hispanic voters, but only oral assistance to Apache Indians because their language is unwritten); *id.* at 13 (reporting that only four out of thirty-four responding jurisdictions provided bilingual written materials to Native American voters).

ments by providing bilingual materials and assistance “only to the language minority citizens and not to every voter in the jurisdiction.”<sup>340</sup> Although the VRA does not expressly provide for targeting, the legislative history of the Act demonstrates that Congress intended to allow covered jurisdictions flexibility in devising appropriate methods to provide bilingual language assistance.<sup>341</sup> Targeting is permissible as long as it ensures that language minority voters have equal access to bilingual materials.<sup>342</sup> Even some of those who oppose bilingual election requirements support targeting as a cost-effective approach to providing minority language voter assistance.<sup>343</sup>

The first step in targeting is to identify the location and number of voters and citizens not yet registered to vote who need voting materials and assistance in their native language. There are several ways to do this. For example, new voters can be asked their language preference when they register, and existing voters can be sent a postcard in the covered language asking them to identify their preferred language, to ensure that written materials and oral assistance are available where necessary.<sup>344</sup> Alternatively, the jurisdiction can rely upon existing data sources. Census information is one obvious method, but its utility often is limited.<sup>345</sup> Voter registration lists also can be used, particularly where data on the race or ethnicity of registered voters is

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340. S. REP. NO. 94-295 at 39, *reprinted in* 1975 U.S.C.C.A.N. 806.

341. *See* 121 CONG. REC. S13,650 (daily ed. July 24, 1975) (statement of Sen. Tunney).

342. S. REP. NO. 94-295 at 69, *reprinted in* 1975 U.S.C.C.A.N. at 820. *See also* 28 C.F.R. § 55.17 (2006) (stating the Attorney General’s view “that a targeting system will normally fulfill the Act’s minority language requirements if it is designed and implemented in such a way that language minority group members who need minority language materials and assistance receive them”).

343. *See S. 2236 Hearings, supra* note 1, at 300 (statement of Stanley Diamond, Chairman of U.S. English) (describing targeting as the “least objectionable alternative” where it is limited to voter assistance and does not include “printing all materials in languages other than English”).

344. S. REP. NO. 94-295 at 68, *reprinted in* 1975 U.S.C.C.A.N. at 819; *see also* 28 C.F.R. § 55.18(a) (2006) (describing a similar method for targeting the provision of voting materials by mail).

345. *See* COMPTROLLER REPORT, *supra* note 96, at 39–40. Accurate census data often is unavailable, for some of the following reasons: census blocks may be split between two or more election precincts; the data may be stale, particularly for language minority residents who have arrived in a jurisdiction since the last census; language minorities are undercounted; sparsely populated census blocks may preclude accurate sampled data from being available; and census data may be suppressed for less populated jurisdictions where the disclosure of that data likely would reveal the sources of information and thereby violate respondents’ rights to confidentiality. The passage of the VRARA will cure some of the staleness problems through use of more frequently updated ACS data. *See supra* notes 176–77 and accompanying text.

available or surname analysis is possible,<sup>346</sup> although registration data will not necessarily identify precincts where large numbers of unregistered language minority citizens reside.<sup>347</sup> In addition, jurisdictions may be able to rely upon assessment by precinct officials, with the understanding that those officials may downplay the need for language materials and assistance<sup>348</sup> or base their decisions on intuition and their own knowledge about community demographics.<sup>349</sup> In the end, the most effective way to target is to use some combination of these methods, along with input from the affected language minority community.<sup>350</sup> Covered jurisdictions must be prepared to update this information regularly, particularly if the demographics of the communities are changing.

After determining where bilingual materials and assistance should be targeted, a covered jurisdiction can reduce its costs by focusing its efforts on those areas. Mailings of written materials in the covered language can be directed to only those “persons who are likely to need them or to residents of neighborhoods in which such a need is likely to exist, supplemented by a notice of the availability of minority language materials in the general mailing (in English and in the applicable minority language),” along with separate publicity regarding those materials.<sup>351</sup> Minority language materials do not need to be provided at polling sites with a small number of language minority registered voters if the jurisdiction has targeted assistance through “an alternative system enabling those few to cast effective ballots.”<sup>352</sup>

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346. Under surname analysis, the number of registered voters from certain language minority groups may be determined by examining the surname of registered voters. Surname analysis is an accepted methodology for determining an accurate estimate of persons of Spanish or Filipino heritage. See S. REP. NO. 94-295 at 24 n.14, *reprinted in* 1975 U.S.C.C.A.N. at 790–91 n.14; *Hernandez v. Texas*, 347 U.S. 475, 480 n.12 (1954); *Ely v. Klahr*, 403 U.S. 108, 118 (1971) (Douglas, J., concurring); *Aranda v. Van Sickle*, 600 F.2d 1267, 1269 (9th Cir. 1979); *Perez v. Pasadena Indep. Sch. Dist.*, 958 F. Supp. 1196, 1212 n.21 (S.D. Tex. 1997); *Terrazas v. Slagle*, 789 F. Supp. 828, 836 (W.D. Tex. 1992); *Garza v. County of Los Angeles*, 756 F. Supp. 1298, 1325–28 (C.D. Cal. 1990), *aff’d*, 918 F.2d 763 (9th Cir. 1990). For a description of the steps in performing Spanish-surname analysis, see *Garza*, 756 F. Supp. at 1325–26.

347. See COMPTROLLER REPORT, *supra* note 96, at 40.

348. See *id.* at 39–40.

349. *Id.*

350. See *id.*; *supra* note 152 and accompanying text.

351. 28 C.F.R. § 55.18(a) (2006). See also 138 CONG. REC. H6605 (daily ed. July 24, 1992) (statement of Rep. Brooks) (noting that “English language mailings sent to registered voters will obviously not assist language minority voters unless, at a minimum, the mail includes information in that minority language regarding how to request help”).

352. 28 C.F.R. § 55.18(d). See also 138 CONG. REC. H6604 (daily ed. July 24, 1992) (statement of Rep. Edwards) (observing that section 203 does “not demand the

Similarly, it may not be necessary to have bilingual election officials at polling places where limited-English proficient voters receive assistance from a person of their choice.<sup>353</sup> The availability of language assistance must comply with an “effectiveness” standard, in which the extent of assistance available is tailored to ensure that language minority voters can participate effectively in the election process.<sup>354</sup>

Another form of targeting is hiring and training bilingual language minority voters to serve as election officials in jurisdictions where they are needed. Such hiring is an often overlooked and underutilized way to lower costs.<sup>355</sup> Unless otherwise required by state law or court order,<sup>356</sup> covered jurisdictions generally are not required to hire additional poll workers if they retain poll workers who are able to communicate effectively in the applicable minority languages.<sup>357</sup> In most cases, bilingual poll workers are paid the same as other poll workers.<sup>358</sup> Moreover, rather than hiring bilingual poll workers for every polling place, some jurisdictions instead use standby poll workers who are “available to come to the polling place, if called, to provide assistance.”<sup>359</sup> The use of volunteers also may be acceptable if minority language voters have the same opportunities as other voters

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unreasonable from jurisdictions” and therefore “jurisdictions with small language minority communities may not need to implement language assistance measures identical to those provided in larger jurisdictions”).

353. See 28 C.F.R. § 55.20(c) (2006). Frequently, however, language minority voters are accompanied to the polls by assisters of their choice because no language materials or assistance is available for them at the polls. See *Continuing Need for Section 203’s Provisions for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 74–76 (2006) (response of John Trasviña, Interim President and General Counsel, Mexican American Legal Defense and Education Fund, to written questions). Therefore, covered jurisdictions cannot necessarily rely upon voters’ use of outside assisters as demonstrating there is no need for bilingual election materials or officials.

354. 28 C.F.R. § 55.20(c).

355. See *S. 2236 Hearings*, *supra* note 1, at 197–98 (statement of Larry Echohawk, Attorney General, Idaho) (describing how efforts by the Shoshone-Bannock Tribes to provide language assistance for elderly Native American voters by hiring bilingual Native American poll workers initially were rebuffed by local election officials).

356. See, e.g., N.J. STAT. ANN. § 19:6-1 (1999). Under New Jersey law, the county elections board must ensure that at least two bilingual board workers (or poll workers) of Hispanic origin fluent in Spanish are present in each designated Spanish Election District, which are those voting precincts “in which the primary language of 10% or more of the registered voters is Spanish.” *Id.*

357. See 1984 GAO REPORT, *supra* note 281, at 20; 138 CONG. REC. H6606 (daily ed. July 24, 1992) (statement of Rep. Pelosi).

358. 1984 GAO REPORT, *supra* note 281, at 20.

359. *Id.*

to serve as paid election officials.<sup>360</sup> Also, if a language recording provides oral instructions and assistance effectively to voters who need it, bilingual poll workers may not be necessary at all.<sup>361</sup>

Furthermore, targeting can be a cost-effective way to resolve problems associated with voting machines that “cannot mechanically accommodate a ballot in English and in the applicable minority language.”<sup>362</sup> For example, in 1992, Los Angeles County was required to provide election materials in six languages and was expected to have the greatest costs of any jurisdiction covered by section 203.<sup>363</sup> Faced with more languages than its voting machines could handle, Los Angeles County was forced to implement alternative voting methods that would allow it to provide language assistance without relying on a bilingual ballot in a voting machine.<sup>364</sup> Congress recognized that under such circumstances, jurisdictions may use sample ballots in polling booths to minimize expenses.<sup>365</sup> As long as sample ballots and voting machine instructions in the covered minority languages are distributed effectively and language minority voters are permitted to bring the sample ballots with them into the voting booth, it may not be necessary for all voting machines to have ballots printed in each of the covered languages.<sup>366</sup> The particular methods of targeting may vary, depending upon the specific needs of the covered language minority group and the jurisdiction’s resources. Ultimately, the touchstone for an alternative targeting method is whether “it is designed and imple-

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360. *See id.* Failure to provide minority language voters with equal poll worker opportunities violates section 2 in addition to section 203. *See supra* notes 141–42 and accompanying text. If their exclusion is intentional, the jurisdiction also may be held liable under the Fourteenth and Fifteenth Amendments.

361. *See* Christina Leonard, *Translator Finds Words for Pima-Speaking Voters*, ARIZ. REPUBLIC, Aug. 13, 2002, at 7B (describing use of recorded instructions by Maricopa County, Arizona, to provide oral language assistance to limited-English proficient voters from the Pima Indian community); *infra* note 381.

362. 28 C.F.R. § 55.19(d) (2006).

363. H.R. REP. NO. 102-655, at 12 (1992), *reprinted in* 1992 U.S.C.C.A.N. 766, 776; S. REP. NO. 102-315, at 20–21 (1992). As a result of the 2002 determinations, Los Angeles County now has to provide voting information in seven languages, including English. *See supra* note 183 and accompanying text.

364. H.R. REP. NO. 102-655 at 12, *reprinted in* 1992 U.S.C.C.A.N. at 776; S. REP. NO. 102-315 at 20–21.

365. H.R. REP. NO. 102-655 at 9, *reprinted in* 1992 U.S.C.C.A.N. at 773. Sample ballots are replicas of the official ballots that are provided in advance by election officials to allow voters to become familiar with the candidates and issues before election day.

366. *See* 28 C.F.R. § 55.19(d). Increasingly, new voting machine technology is facilitating the availability of oral and written assistance in multiple languages. *See* Michael Amedeo, *Getting Voting Machines to Speak Navajo Can Be Tricky*, ALBUQUERQUE JOURNAL, Oct. 19, 2006, at A.1.

mented in a manner that ensures that all members of the language minority who need assistance, receive assistance.”<sup>367</sup>

## 2. *Cost Savings From Targeting*

The experience of covered jurisdictions demonstrates that the successful use of targeting significantly reduces the costs of compliance with the bilingual election requirements. The GAO conducted studies in 1984 and 1997 to determine the costs associated with providing minority language assistance under section 203. While most of the responding jurisdictions failed to track the costs of providing bilingual voting assistance, the data suggest that those costs are minimal.<sup>368</sup> Overall, the costs of compliance generally comprised only a small portion of total election expenses. It appears some of the lower costs were attributable to effective targeting programs.<sup>369</sup>

According to the GAO’s 1984 study, an estimated eighteen states incurred no additional costs as a result of the bilingual election provisions of the VRA.<sup>370</sup> Of the 295 responding jurisdictions, the average cost of providing written bilingual language materials or assistance was 7.6% of the total election expenditures.<sup>371</sup> By comparison, of the 259 jurisdictions providing oral language assistance, 205 reported no cost at all, and thirty-nine reported a total cost of only \$30,000, about 2.9% of election expenditures.<sup>372</sup> The GAO concluded that the low costs for oral language assistance could be attributed to targeting only those areas where such assistance actually was needed and using bilingual poll workers who could perform all of the duties of regular poll workers in addition to providing oral assistance.<sup>373</sup> The GAO further determined that the cost of bilingual materials and assistance likely would decrease over time, because bilingual election materials could be reused and election officials would become more familiar with how to comply with the bilingual elections mandate.<sup>374</sup> The Congressional Budget Office relied upon the GAO’s 1984 findings in estimating that the total costs incurred by the 140 jurisdictions affected by the trigger-

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367. H.R. REP. NO. 102-655 at 9, *reprinted in* 1992 U.S.C.C.A.N. at 773.

368. *See* 1997 GAO REPORT, *supra* note 339, at 16; 1984 GAO REPORT, *supra* note 281, at 17.

369. *Id.* at 18.

370. *See* 1984 GAO REPORT, *supra* note 281, at 16.

371. *Id.* at 16.

372. *Id.* at 20.

373. *Id.*

374. *Id.* at 18.

ing formula included in the 1992 amendments were “likely to be less than \$5 million a year.”<sup>375</sup>

The GAO’s 1997 study, reporting data from twenty-six states and 292 covered jurisdictions, further demonstrates that compliance with the federal bilingual provisions can be cost-effective.<sup>376</sup> Most jurisdictions reported providing written and oral assistance.<sup>377</sup> Of the twenty-eight jurisdictions reporting complete data for 1996, bilingual costs averaged 4.9% of the total election costs.<sup>378</sup> Bilingual written materials comprised the largest percentage of bilingual costs,<sup>379</sup> but still comprised only a fraction of total election expenses.<sup>380</sup> Nearly all of the responding jurisdictions incurred little or no additional costs for providing oral assistance.<sup>381</sup> For example, Los Angeles County, which provided language materials and assistance to six different language groups, including English, in 5,632 polling places, reported bilingual costs of only 3.6% of its total election budget.<sup>382</sup> Similarly, Hawaii and Florida reported total bilingual costs of only \$23,328 and \$7,900, respectively.<sup>383</sup> Bilingual election expenses varied greatly from jurisdiction to jurisdiction, depending upon the number of covered languages, the number of polling sites, the type of covered language minority groups, and the ability of the jurisdiction to use targeting to reduce its costs.<sup>384</sup>

A private 2005 study reported low costs for language assistance consistent with those in the two GAO reports.<sup>385</sup> Where implemented properly, language assistance accounts for only a small fraction of to-

375. H.R. REP. NO. 102-655, at 12 (1992), *reprinted in* 1992 U.S.C.C.A.N. 766, 776; S. REP. NO. 102-315, at 20–21 (1992).

376. 1997 GAO REPORT, *supra* note 339, at 1.

377. *See id.* at 2–3.

378. *See id.* at 20–22 tbl.2.

379. *See id.* (reporting that bilingual written materials comprised about 3.8% of total election costs). Of the 258 jurisdictions reporting that they provided written assistance, 94% provided bilingual or separate translated ballots, 87% provided bilingual or translated voting instructions, 71% provided bilingual or translated signs at polling places, and 70% placed bilingual notices in newspapers. *Id.* at 3.

380. *See id.* at 20–22 tbl.2.

381. *See id.* at 11–12, 20–22 tbl.2, 24–26 tbl.3, 27 tbl.4. Of the 227 jurisdictions reporting the availability of minority language oral assistance, 187 hired bilingual poll workers or office workers, 35 used volunteers, 30 hired interpreters, and 13 used language recordings. *Id.* at 12. Thirty-four jurisdictions reported other types of oral assistance, including radio announcements, a telephone hotline, and the use of bilingual officials in other offices to provide assistance. *Id.*

382. *See id.* at 20–22 tbl.2.

383. *See id.* at 3–4.

384. *See id.* at 3–4, 8–9, 20–22 tbl.2, 24–26 tbl.3, 27 tbl.4, 28 tbl.5, 29 tbl.6.

385. *See* LANGUAGE ASSISTANCE PRACTICES, *supra* note 4, at 90–106, *reprinted in Evidence of Continued Need Hearing*, *supra* note 4, at 2224–40.

tal elections costs, if any at all. Among the 411 responding jurisdictions in the thirty-one states covered by section 203, a majority of jurisdictions reported incurring no additional costs for either oral or written language assistance, with most of the remaining jurisdictions incurring additional expenses of less than 1.5% for oral language assistance and less than 3% for written language assistance.<sup>386</sup> The lack of additional costs is the result of several factors. Many jurisdictions reported hiring bilingual poll workers who are paid the same wages as other poll workers.<sup>387</sup> Jurisdictions with Alaska Native and American Indian voters report that bilingual materials are not required because the covered languages are unwritten.<sup>388</sup> Several jurisdictions providing bilingual written materials use election officials or community volunteers to translate materials, resulting in no additional costs.<sup>389</sup> In many cases, printing costs do not increase as a result of having bilingual written materials.<sup>390</sup>

Election officials presented evidence during the 2006 reauthorization that corroborates the low costs associated with providing language assistance. One witness testified that even in a jurisdiction such as Los Angeles County, which has the highest number of language minority voters in the greatest number of languages, the costs are “reasonable” and “comparable to the percentage of limited-English proficient residents.”<sup>391</sup> Similarly, the Secretary of State of New Mexico testified that the costs of complying with section 203 “are really minimal. The printing of ballots, the hiring of translators to translate the issues—the bond issues, the constitutional amendment issues, the various offices that people are running for—in Spanish, for example—it’s a minimal cost to the State of New Mexico.”<sup>392</sup>

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386. See *id.* at 17, 90, 95–96, 98–100, reprinted in *Evidence of Continued Need Hearing*, *supra* note 4, at 2151, 2224, 2229–30, 2232–34.

387. See *id.* at 95, reprinted in *Evidence of Continued Need Hearing*, *supra* note 4, at 2229.

388. See *id.* at 98, reprinted in *Evidence of Continued Need Hearing*, *supra* note 4, at 2232.

389. See *UNEQUAL OPPORTUNITIES*, *supra* note 247, at 21, reprinted in *Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (Part II): Hearing on H.R. 9 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 59, 79 (2006).

390. See *LANGUAGE ASSISTANCE PRACTICES*, *supra* note 4, at 98–99, reprinted in *Evidence of Continued Need Hearing*, *supra* note 4, at 2232–33.

391. *Continuing Need for Section 203’s Provisions for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 97 (response of Deborah Wright, Acting Assistant Registrar-Recorder, Department of Registrar-Recorder, Los Angeles, California, to written questions).

392. *Voting Rights Act: Section 203—Bilingual Election Requirements (Part I): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*,

Despite the modest expenses associated with the bilingual election provisions, some members of Congress have decried the imposition of the provisions as yet another unfunded federal mandate.<sup>393</sup> In 1975, Congress considered and rejected an amendment that would have required the federal government to pay for all the costs of the bilingual elections mandate, thus alleviating the burden on state and local governments.<sup>394</sup> A similar amendment was narrowly rejected when the bilingual election provisions were extended in 1992.<sup>395</sup> Although the VRA does not fund the bilingual election requirements, the Help America Vote Act of 2002 made substantial federal funding available for jurisdictions providing minority language assistance and addressing other voter accessibility issues.<sup>396</sup> As a result, jurisdictions had the opportunity to recover at least some of the modest costs associated with complying with the federal bilingual election requirements. Even if federal funds were unavailable, however, it would not be unreasonable to expect covered jurisdictions to absorb the minimal expenses required to make the fundamental right to vote fully accessible to language minorities. The benefits of such expenses greatly outweigh the costs.

#### IV.

#### CONCLUSION

The history of our Republic has been long dominated by an ongoing struggle to achieve political equality for all American citizens. Far

109th Cong. 37 (2005) (statement of Rebecca Vigil-Giron, Secretary of State, New Mexico).

393. *See, e.g.*, 152 CONG. REC. H5165 (daily ed. July 13, 2006) (statement of Rep. Paul); *id.* at H5192 (daily ed. July 13, 2006) (statement of Rep. Gingrey); *id.* at H5193 (daily ed. July 13, 2006) (statement of Rep. Campbell); *id.* (daily ed. July 13, 2006) (statement of Rep. Hayworth); *id.* at H5194 (daily ed. July 13, 2006) (statement of Rep. Brown-Waite).

394. *See* 121 CONG. REC. H4901 (daily ed. June 4, 1975) (statement of Rep. Krebs); *see also id.* at H4902 (daily ed. June 4, 1975) (rejecting the amendment).

395. *See* 138 CONG. REC. H6600-04 (daily ed. July 24, 1992) (rejecting the amendment offered by Rep. Condit 186 to 184).

396. *See* Pub. L. No. 107-252, 116 Stat. 1666 (codified at 42 U.S.C.A. §§ 15301-15545). Section 101 of the Help America Vote Act allocates funding for states "providing assistance to Native Americans, Alaska Native citizens, and to individuals with limited proficiency in the English language." 42 U.S.C. § 15301(b)(1)(G) (2000). The Act does not limit payments to jurisdictions covered under section 4(f)(4) or section 203 of the VRA, providing a financial incentive to non-covered jurisdictions to take appropriate steps to make voting more accessible to minority language citizens. *See id.* Total funding for programs directly assisting voters, including accessibility for minority language and disabled voters, amounted to \$3.75 billion from Fiscal Years 2003 to 2005. *See* 42 U.S.C. §§ 15304, 15407, 15424 (2000).

too often, even after the removal of formal barriers to participation, such as the outright disenfranchisement of African Americans, Native Americans, Asian Americans, and women,<sup>397</sup> informal obstacles with an equally deleterious impact on voting replace them. For language minority citizens who have suffered from educational discrimination, English-only elections are insurmountable barriers that victimize them a second time. While many aspire to have “our citizens with limited English skills speak and understand English proficiently,”<sup>398</sup> limited-English proficient citizens must be allowed to participate until the shackles of the crippling legacy of educational discrimination are removed. The language assistance provisions have enfranchised millions of language minority citizens by allowing them to have meaningful participation in public elections. As a result of their participation, the halls of our democracy have been enriched by their voices and our laws have greater legitimacy.

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397. *See generally* ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* (2000).

398. H.R. REP. NO. 109-478, at 59 (2006).