

¡SU VOTO ES SU VOZ! INCORPORATING VOTERS OF LIMITED ENGLISH PROFICIENCY INTO AMERICAN DEMOCRACY

JOCELYN FRIEDRICH BENSON*

Abstract: As the diversity of the United States' voting population has increased, many have debated how American political and legal structures can best incorporate citizens with limited English proficiency ("LEP") into the electoral system. Some argue that government-provided language accommodations are necessary to ensure that all citizens can exercise their right to vote. Others expect that all citizens should be sufficiently proficient in English if they choose to vote, or should rely on their families, linguistic communities, or political campaigns for assistance. This Article argues for the necessity of accommodations that reach all LEP voters and incorporate them into the electoral system. It offers a detailed critique of current federal and state accommodationist policies and proposes a flexible legal infrastructure to address existing inadequacies in government protections. The proposed model—assistance by federally certified translators, increased involvement of LEP community groups and organizations in determining the extent of coverage under federal law, and improved enforcement of court orders by federal courts—is an attempt to seek accommodations that are tailored to serve all voters who require language assistance in order to act as equal participants in our American democracy.

INTRODUCTION

When she was four years old, Betty Goldman immigrated to the United States with her family, fleeing the Russian Revolution to settle in

* Assistant Professor of Law, Wayne State University Law School. J.D., Harvard Law School; M.Phil., Oxford University; B.A., Wellesley College. I am tremendously grateful to Terrence Griffin and Manuela Policicchio for their thorough and invaluable research and to the editors of the *Boston College Law Review* for their scrupulous editing. I am also indebted to the advice, support, inspiration, and guidance I have received in various forms from Angelo Ancheta, Derek Bambauer, Alvaro Bedoya, Robert Chang, Christopher Edley, Jr., Zanita Fenton, Heather Gerken, Michael Kang, Ellen Katz, Glenn Magpantay, Spencer Overton, Michael Pitts, Dana Roach, and Martha Watanabe in the development of this piece. All errors and omissions are my own.

California.¹ Despite having only a primary school education, Betty eventually was able to speak and write English well enough to become a naturalized U.S. citizen.² Even so, according to her daughter, U.S. Senator Dianne Feinstein, Betty still needed assistance in her native language to help her fulfill her role as an active and engaged voting citizen on election day.³ Because English was her second language, Betty "could never really fully understand the [ballot initiatives]," Feinstein recalled.⁴ "I don't know what she would have done if she didn't have us to read [the ballot] and discuss it with her."⁵

Betty Goldman's story illustrates the barriers that millions of citizens with limited English proficiency face in exercising their right to vote. According to the U.S. Census, in 2000 there were approximately eight million citizens in the United States over the age of eighteen who spoke a language other than English at home and claimed to speak English less than "very well."⁶ The Census Bureau deems such citizens to be "Limited English Proficient," or "LEP."⁷ As this significant sector of our electorate grows,⁸ our democracy is faced with the question of

¹ Lisa Friedman, *Bilingual Ballot Fate Debated*, DAILY NEWS (L.A.), June 14, 2006, at N4.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ U.S. CENSUS BUREAU, LANGUAGE SPOKEN AT HOME FOR THE CITIZEN POPULATION 18 YEARS AND OVER WHO SPEAK ENGLISH LESS THAN "VERY WELL," FOR THE UNITED STATES, STATES, AND COUNTIES: 2000 (2000), <http://www.census.gov/mp/www/spectab/language/spokenSTP194.xls>; HYON B. SHIN & ROSALIND BRUNO, U.S. CENSUS BUREAU, LANGUAGE USE AND ENGLISH-SPEAKING ABILITY: 2000, at 2 (2003), <http://www.census.gov/prod/2003pubs/c2kbr-29.pdf> (noting that "[t]he number and percentage of people in the United States who spoke a language other than English at home increased between 1990 and 2000"). The Shin and Bruno report also revealed that the ten languages most frequently spoken at home other than English and Spanish were Chinese, French, German, Tagalog, Vietnamese, Italian, Korean, Russian, Polish, and Arabic. SHIN & BRUNO, *supra*, at 2 fig.3.

⁷ H.R. REP. NO. 102-655, at 8 (1992), as reprinted in 1992 U.S.C.C.A.N. 766, 772. According to the 1992 House Report on the Voting Rights Act:

The Director of the Census determines limited English proficiency based upon information included on the long form of the decennial census. . . . 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 overestimate their English proficiency and therefore, those who answer other than "very well" are deemed LEP.

Id.

⁸ See Associated Press, *Report: Minority Populations Growing in Almost Every State*, CHI. TRIB., Aug. 15, 2006, at 7. This trend has been ongoing for several decades. See Keith Aoki, *A Tale of Three Cities: Thoughts on Asian American Electoral and Political Power After 2000*, 8 ASIAN PAC. AM. L.J. 1, 24-25 (2002). Aoki states:

whether and how to ensure that these citizens have an equal opportunity to exercise their fundamental right to vote in the same way and with the same ease as any other voter.

The need to resolve this critical question relates to the preeminent role of voting rights in the American legal system and is underscored by the egalitarian reality that, under the principle of "one person, one vote,"⁹ to vote in the United States is to speak with the same power as any other.¹⁰ Thus, any limitation on any one person's right to vote inherently restricts the strength of his or her unique, valid, and independent voice. To be legitimate, our legal and political structures governed by the vote must actively concern themselves with promoting equal access to voting rights for citizens who encounter barriers to exercising that right. For LEP citizens, that barrier is a limited ability to speak, read, or fully understand the English language.

A multitude of scholars, advocates, and political leaders have debated how American political and legal structures can best promote equal access to the electoral system for LEP citizens.¹¹ Some argue that accommodations for LEP citizens are necessary to protect against ongoing discrimination in the electoral process, to address continuing inequalities in education that negatively affect non-English-speaking citizens, and to promote the full and equal participation of a growing sec-

The growth of New York City's Asian American population from 1980 to 1990 was second only to California's. While California experienced a 127 percent increase in its Asian American population, raising it to 10 percent by 1990, New York City's Asian American population increased from 3 percent in 1980 to almost 7 percent in 1990.

Id.

⁹ *Reynolds v. Sims*, 377 U.S. 533, 558 (1964).

¹⁰ See *id.* at 576; see also Adeno Addis, *Cultural Integrity and Political Unity: The Politics of Language in Multilingual States*, 33 ARIZ. ST. L.J. 719, 789 (2001) (noting that the "question of how to develop the capacity to live with difference, where difference is going to be the defining feature of almost all political communities, is the major question of the twenty-first century").

¹¹ See, e.g., Angelo Ancheta, *Language Accommodations and the Voting Rights Act*, in VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER (Ana Henderson ed., forthcoming 2007); Rodolfo O. de la Garza & Louis DeSipio, *Save the Baby, Change the Bathwater, and Scrub the Tub: Latino Electoral Participation After Seventeen Years of Voting Rights Act Coverage*, 71 TEX. L. REV. 1479, 1517-23 (1993); Glenn D. Magpantay, *Asian American Access to the Vote: The Language Assistance Provisions (Section 203) of the Voting Rights Act and Beyond*, 11 ASIAN L.J. 31, 48-56 (2004); Brenda Fathy Abdelall, Note, *Not Enough of a Minority? Arab Americans and the Language Assistance Provisions (Section 203) of the Voting Rights Act*, 38 U. MICH. J.L. REFORM 911, 932-38 (2005).

tor of the electorate.¹² To this end, many court orders and state and federal laws, such as section 203 of the Voting Rights Act,¹³ require election officials to accommodate some groups of LEP voters.¹⁴ The opposing side emphasizes that all citizens, native born or naturalized, should be sufficiently proficient in English prior to exercising their right to vote.¹⁵ If they are not, it is argued, they can rely on their respective families or linguistic communities for assistance with political engagement. Supporters of this viewpoint heavily criticize accommodations such as section 203 as "wasteful and expensive" and "mov[ing] the Nation toward 'Balkanization' into separate ethnic groups."¹⁶

These views are a discrete manifestation of a larger debate over the role of the English language in American life and democracy.¹⁷ The

¹² Friedman, *supra* note 1 (describing the president of the Mexican American Legal Defense and Education Fund, John Trasvina, as saying that section 203 "remains necessary to protect against discrimination in elections"); see also Juan F. Perea, *Buscando America: Why Integration and Equal Protection Fail to Protect Latinos*, 117 HARV. L. REV. 1420, 1465-68 (2004) (defending the incorporation of cultural particularity and openness to the value of minority cultures as an important aspect to democracy, noting that "[t]he recognition and protection of pluralism broadens our understanding of our own community" and that "[a]n accurate sense of the many different groups constituting our community seems fundamentally important for more accurate understandings of our history and of the requirements of justice").

¹³ Voting Rights Act § 203, 42 U.S.C.A. § 1973aa-1a (West 2001 & Supp. 2006).

¹⁴ Section 203 was added to the Voting Rights Act in 1975 and requires jurisdictions with large concentrations of language-minority citizens to provide election materials translated into voters' native languages. See *id.* Section 203 in particular is a federal requirement that localities and states with high concentrations of Latino, Asian American, Native American, or Alaska Native citizens provide election materials in the native languages of those citizens. *Id.*

¹⁵ Senators John Cornyn and Tom Coburn articulated this argument during a legislative debate over section 203 of the Voting Rights Act in April 2006. Friedman, *supra* note 1.

¹⁶ See *Voting Rights Act: Section 203—Bilingual Election Requirements (Part I): Oversight Hearing Before the Subcomm. on the Constitution of the H. Comm. of the Judiciary*, 109th Cong. 22 (2005) [hereinafter *Hearing*] (testimony of Linda Chavez, President, One Nation Indivisible), available at <http://judiciary.house.gov/media/pdfs/printers/109th/24503.pdf>.

¹⁷ See Cristina M. Rodriguez, *Accommodating Linguistic Difference: Toward a Comprehensive Theory of Language Rights in the United States*, 36 HARV. C.R.-C.L. L. REV. 133, 137 (2001) (noting that "the issues inevitably raised by [language accommodation] arguments are (1) whether American citizenship requires us to give up any of our affiliations; (2) to what extent we must be conscious of differences among citizens; and (3) whether the state should participate in the perpetuation of these differences"); see also Terrence Meyerhoff, *Multiculturalism and Language Rights in Canada: Problems and Prospects for Equality and Unity*, 9 AM. U. J. INT'L. L. & POL'Y 913, 922 (1994). Meyerhoff articulates the distinction between accommodationist policies, which promote cultural pluralism, and assimilationist government acts, writing:

Cultural pluralism envisages the harmonious coexistence of separate cultural groups. It assumes that cultural groups are equal and should be free to preserve their culture and language. By contrast, assimilation posits that minority ethnic groups will adopt gradually the majority language and culture, and

broader controversy asks whether it is the responsibility of government actors to support pluralism and preserve languages that are symbolic of a culture's history and identity,¹⁸ or whether those actors must instead promote the assimilation of these cultures into a unified "melting pot" by refusing to provide any "difference-promoting" accommodations.¹⁹ Do courts and legislative bodies have a responsibility²⁰ to accommodate non-English-speaking citizens?²¹ Or do such acts run contrary to the norms of American life and ideals,²² potentially breeding a "separatism"

concomitantly relinquish their own. Assimilation seeks to eliminate those linguistic and cultural distinctions that cultural pluralism or multiculturalism aspire to preserve.

Meyerhoff, *supra*, at 922.

¹⁸ See Perea, *supra* note 12, at 1425 ("Language is much more than just words. Language, properly understood within historical context, is a symbol of political struggle, status, and domination and subordination."); see also Allison M. Dussias, *Waging War with Words: Native Americans' Continuing Struggle Against the Suppression of Their Languages*, 60 OHIO ST. L.J. 901, 978 (1999) ("Language is more than a shared code of symbols for communication. People . . . fight and die [to preserve a language] . . . because they feel that their identity is at stake—that language preservation is a question of human rights, community status and nationhood." (quoting David Crystal, *Languages: When the Last Speakers Go, They Take with Them Their History and Culture*, CIVILIZATION, Feb.–Mar. 1997, at 44)). See generally Dussias, *supra* (emphasizing the importance of language to American Indians).

¹⁹ See Mark L. Adams, *Fear of Foreigners: Nativism and Workplace Language Restrictions*, 74 OR. L. REV. 849, 908 (1995) (describing a tension "between the melting pot metaphor, in which cultural traits and ethnic differences are eliminated through assimilation into a homogeneous American identity with predominately Anglo characteristics, and . . . cultural pluralism, in which cultural traits add to the richness of the American experience").

²⁰ Most experts, and the courts, have rejected the idea that the government is legally required, particularly under the Fourteenth or Fifteenth Amendments of the U.S. Constitution, to provide language accommodations for LEP citizens. See Posting of Dan Tokaji to Election Law Blog, <http://electionlawblog.org/archives/005671.html> (May 19, 2006, 14:24 EST). Sandra Guerra argues that there is a right to such accommodations for LEP voters. See Sandra Guerra, Note, *Voting Rights and the Constitution: The Disenfranchisement of Non-English Speaking Citizens*, 97 YALE L.J. 1419, 1420 (1988) (contending that because voting is a specially protected fundamental right, the Equal Protection Clause of the Fourteenth Amendment guarantees that, absent compelling justification, states may not provide voting assistance to English speakers without also providing equivalent assistance to non-English speakers). Louder are the voices who have argued that language minorities should receive protections as a suspect class under the Equal Protection Clause (although this is an interpretation the courts have failed to incorporate into their equal protection jurisprudence). See Note, "Official English": *Federal Limits on Efforts to Curtail Bilingual Services in the States*, 100 HARV. L. REV. 1345, 1347 (1987).

²¹ David Michael Miller, Note, *Assimilate Me. It's As Easy As (Getting Rid of) Uno, Dos, Tres*, 74 UMKC L. REV. 455, 456 (2005) ("Is it the United States government's responsibility to 'assimilate' these non-English-speaking citizens to the extent that everyone speaks the same tongue or should the United States celebrate its rich diversity and cultural differences?").

²² Michael W. Valente, Comment, *One Nation Divisible by Language: An Analysis of Official English Laws in the Wake of Yniguez v. Arizonans for Official English*, 8 SETON HALL CONST.

that will threaten "the political stability of the United States"?²³ Do accommodations harm LEP individuals by removing assimilation incentives²⁴ and fostering hostilities between such individuals and the English-speaking majority?²⁵ Or do such acts ensure that our institutions promote our American ideal of *E Pluribus Unum*, "Out of Many, One," reflecting the idea of many cultures uniting while retaining their individual qualities in the name of diversity?²⁶

Cristina Rodríguez, a leading scholar on issues of language rights, identifies accommodations as the only solution to enabling "multiple communities with vastly different . . . forms of ethnic identity to interact

L.J. 205, 207 (1997) ("The diverse cultures of the United States should be preserved, but not at the expense of accommodating several languages and creating an unworkable standard of bilingual signs, driver's licenses and government forms."); John J. Miller, *English Is Broken Here*, POL'Y REV., Sept.-Oct. 1996, at 54, 54 (stating that "bilingual ballots 'impose an unacceptable cost by degrading the very concept of the citizen'" (quoting then-Boston University President John Silber)).

²³ Valente, *supra* note 22, at 210; see also *Frontera v. Sindell*, 522 F.2d 1215, 1220 (6th Cir. 1975) (noting the national interest in preserving English as common language); Miller, *supra* note 22, at 55 (arguing that the number of voters using "some form of bilingual assistance . . . [is] devastating to democracy"). But see Yniguez v. Arizonans for Official English, 69 F.3d 920, 944-47 (9th Cir. 1995) (rejecting the argument that English-only laws promote significant state interests in protecting democracy by encouraging unity and political stability, encouraging a common language, and protecting public confidence).

²⁴ See, e.g., Addis, *supra* note 10, at 724 (noting that "the language of the majority [is] the language of the public institutions, occupying all public space, [and] not to be proficient in that language is to be marginalized in the economic, educational and political realms"); Perea, *supra* note 12, at 1467 ("As everyone recognizes, assimilation in the form of English-language acquisition is necessary and beneficial for effective participation in higher education and majority society generally."); Lawrence Grey, Editorial, *English-Only Law Helps Minorities*, COLUMBUS DISPATCH, Apr. 24, 1996, at 9A (arguing that inability to speak English hurts minorities).

²⁵ See William Booth, *A Plan to Write Off Bilingual Education; Californians to Vote on English-Immersion Proposal*, WASH. POST, Feb. 28, 1998, at A01; Carrie Budoff, *Dispute over Bilingual Ballot a Sign of Changes to Come, Experts Say*, PHILA. INQUIRER, May 20, 2003, at National Political News; Miguel Bustillo, *City Criticized for Printing Notices in Spanish Paper*, L.A. TIMES, Sept. 28, 1995, at B1 (describing citizen complaints that arose when municipality awarded contract to publish legal notices to low-bidding Spanish-language newspaper).

²⁶ Adams, *supra* note 19, at 871. Adams writes:

[T]he original design for a Great Seal celebrated this diversity by "propos[ing] that the seal should be engraved on the obverse with a shield divided into six quarterings, symbolizing the six major lands of origin of the American people—England, Scotland, Ireland, France, Germany, Holland. . . . The motto was to be: *E Pluribus Unum*."

Id. (quoting HORACE M. KALLEN, *CULTURAL PLURALISM AND THE AMERICAN IDEA* 69 (1956)); see also April Chung, Comment, *Noncitizen Voting Rights and Alternatives: A Path Toward Greater Asian Pacific American and Latino Political Participation*, 4 ASIAN PAC. AM. L.J. 163, 163 (1996) ("The American political community is firmly rooted in individual rights and common values, concepts that stabilize the effects of self-interested decisionmaking.").

with one another within a common community of principle without forcing individuals and groups to abandon the affiliations meaningful to them," while embracing multilingualism as a "public asset."²⁷ Samuel Huntington, on the other hand, argues that the nonassimilation (both linguistic and cultural) of the growing Latino population in the United States is partly to blame for the country's crisis of identity.²⁸ He states that "Mexican Americans will share in [the American dream] . . . only if they dream in English."²⁹

This broader controversy takes on even greater urgency in the context of examining access to the fundamental right to vote. The challenge is to develop a legal and political infrastructure within these larger competing perspectives. Such a system ideally would allow all citizens to play an equal part in one unified democratic system, with each vote meaning no more or less than any other.³⁰ At the same time, it must consider allowing limited but effective government accommodations to certain citizens when they are necessary to eliminate obstacles that the government and other institutional hierarchies have created or reinforced over time.³¹ If our American democracy is to be the participatory and representative model that its founding fathers hoped it would be,³²

²⁷ Rodríguez, *supra* note 17, at 136. Rodríguez writes that "[a]pplying a fluid conception of political community to the language debate does not demand that all linguistic minorities be transformed into monolingual English speakers but rather that linguistic difference be accommodated and multilingualism be embraced as a public asset." *Id.*; see also Cristina Rodríguez, *Language and Participation*, 94 CAL. L. REV. 687, 693 (2006) (arguing for the institutional incorporation of multilingualism into American society, suggesting that the United States's "legal and political framework for managing multilingualism should be built around the value of participation in public life").

²⁸ See SAMUEL P. HUNTINGTON, WHO ARE WE? THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY 18–19 (2004); Samuel P. Huntington, *The Hispanic Challenge*, FOREIGN POL'Y, Mar.–Apr. 2004, at 30, 45.

²⁹ Huntington, *supra* note 28, at 45.

³⁰ In the words of one of the philosophical fathers of participatory democracy, Jean Jacques Rousseau, "the participatory process ensures that although no man, or group, is master of another, all are equally dependent on each other and equally subject to the law." See CAROLE PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 27 (1970).

³¹ Addis, *supra* note 10, at 725–26 ("The choice, therefore, is not between national unity on the one hand and the acknowledgment and affirmation of linguistic differences on the other hand. Rather, the issue is what institutional structures would enable us to strengthen national unity while affirming and cultivating linguistic diversity.").

³² Chung, *supra* note 26, at 185. Chung writes:

A primary objective of the American democratic experiment is to create a political institution that encourages the active participation of its new members. We seek to include many voices in political discussion and to incorporate pluralistic concerns into the decision-making process. . . . [I]f we fail to adapt to evolving circumstances, we must accept a tragically limited vision of our rights.

it must include legal and political structures that embrace differences—linguistic or otherwise—while supporting a unified democratic process that enables the equal participation and representation of all citizens. To meet this latter end, any accommodations must be cost-efficient and minimally intrude on any existing avenues of participation available to other, non-LEP, voters.

This Article explores the role of government-provided language accommodations for voters who speak English less than "very well." It examines the placement of such accommodations in a paradigm that promotes the equal access of these communities within the existing democratic infrastructure.³³ It suggests that many of the existing accommodations are only partially successful in this regard, in part because the individuals who wield the power to construct and enforce these accommodations are often government officials who, themselves not being LEP citizens, may be unfamiliar with ways to incorporate LEP citizens into U.S. democratic processes effectively.³⁴ To this end, this Article concludes with proposals for amending current federal policies in order to reduce more effectively the barriers LEP citizens face in exercising their right to vote.³⁵ Specifically, it details three significant reforms that could vastly improve the effectiveness of language accommodations for LEP communities.³⁶ First, this Article suggests that Congress should empower a federal agency such as the U.S. Department of Justice or the Election Assistance Commission, with the input and expertise of relevant local constituency groups, to develop rules to increase the effectiveness of existing federal protections for LEP voters.³⁷ Second, Congress should create standards for certifying and perhaps fund bilingual or multilingual translators to assist LEP voters affirmatively at the ballot box.³⁸ Finally, federal courts should interpret existing language accommodation laws and constitutional protections to provide for stronger enforcement of court orders mandating accommodations for LEP communities.³⁹ Implementing changes such as these would ensure that federal protections effectively reach all LEP popula-

Id.

³³ See *infra* notes 104–402 and accompanying text.

³⁴ See *infra* notes 104–297 and accompanying text.

³⁵ See *infra* notes 299–407 and accompanying text.

³⁶ See *infra* notes 299–407 and accompanying text.

³⁷ See *infra* notes 318–369 and accompanying text.

³⁸ See *infra* notes 370–387 and accompanying text.

³⁹ See *infra* notes 388–407 and accompanying text.

tions in need and thus remove or lessen the effect of language barriers on LEP citizens' right to vote.

I. THE RELEVANCE OF LANGUAGE ACCOMMODATIONS IN THE ELECTORAL SYSTEM

A. *The Growing LEP Electorate*

It is easily and often forgotten that since the founding of the United States, American citizens have spoken numerous languages, representing various cultures and traditions,⁴⁰ from Native American, to German, Spanish, Russian, French, and Dutch.⁴¹ Most of these arose from the multitude of immigrant communities established in the eighteenth century, each of which conducted business and education in its native tongue.⁴² Perhaps because of this vast linguistic diversity and the founders' emphasis on individual liberty, the U.S. Constitution does not name English as an official language.⁴³ Rather, many early federal government documents, including the Articles of Confederation and other official papers of the Continental Congress, were published in French,

⁴⁰ Adams, *supra* note 19, at 854 ("Although English traditionally has been the de facto primary language in this nation, multiple languages and cultures have flourished in the United States since its initial population by Native-Americans, who spoke hundreds of different languages and developed varied cultures.").

⁴¹ *Id.* at 854-55 ("European colonists brought even more languages, with German, Spanish, French, Dutch, and Swedish all serving as official languages in different regions of the United States during the colonial era.").

⁴² NANCY F. CONKLIN & MARGARET A. LOURIE, A HOST OF TONGUES: LANGUAGE COMMUNITIES IN THE UNITED STATES 226 (1983) (observing that in its first hundred years, the United States was multilingual); Shirley B. Heath, *Why No Official Tongue?*, in LANGUAGE LOYALTIES: A SOURCE BOOK ON THE OFFICIAL ENGLISH CONTROVERSY 20, 21-22 (James Crawford ed., 1992) (noting that multiple languages played a wide variety of roles in America's early history); Donna F. Coltharp, Comment, *Speaking the Language of Exclusion: How Equal Protection and Fundamental Rights Analyses Permit Language Discrimination*, 28 ST. MARY'S L.J. 149, 158 (1996) (citing Shirley B. Heath, *English in Our Language Heritage*, in LANGUAGE IN THE USA 6, 7 (Charles A. Ferguson & Shirley B. Heath eds., 1981)).

⁴³ See Adams, *supra* note 19, at 855. Adams describes a debate between John Adams, who wanted to establish English as the national language, and other framers, including Thomas Jefferson, who believed that doing so would be a restriction on individual liberty:

[A] conflict existed between the Jeffersonian view of individual liberty and the movement towards assimilation and Americanization. Jefferson, who was fluent in French and studied the Anglo-Saxon language, viewed ability in several languages as necessary for politics and law. In contrast, John Adams proposed a national language academy designed to establish standards for the English language; however, his proposal was rejected because of the conflict between government regulation of language and freedom of speech.

German, and English.⁴⁴ Individual states and territories published their original laws in languages other than English,⁴⁵ funded French- or German-speaking schools,⁴⁶ and printed their constitutions in various languages.⁴⁷

It was not long, however, before English-speaking communities evolved to enjoy legal and cultural domination.⁴⁸ In addition to attempts to force the English language onto native populations,⁴⁹ there are records of English-speaking citizens holding non-English speakers with contempt or suspicion.⁵⁰ This backlash grew into official actions against non-English-speaking citizens in the late nineteenth and early twentieth centuries, as an influx of immigrants from Southern and Eastern Europe and the outbreak of World War I intensified latent xenophobia.⁵¹ In one instance, Iowa passed a law requiring the use of English in

⁴⁴ *Id.* at 855; see also Rodríguez, *supra* note 17, at 133 ("[T]he leaders of the Revolution issued key documents, including the Articles of Confederation, in German and French.").

⁴⁵ Adams, *supra* note 19, at 858 (noting that the Commonwealth of Pennsylvania published state laws in German, while California and New Mexico gave similar recognition to Spanish, and Louisiana recognized French); see also Rodríguez, *supra* note 17, at 134 ("Many of the states of the Southwest began as bilingual entities, conducting official business in English and Spanish. In New Mexico, territorial laws had to be translated from Spanish to English.").

⁴⁶ Adams, *supra* note 19, at 856 ("In Pennsylvania, 'German schools received public funding well into the nineteenth century.'" (quoting CONKLIN & LOURIE, *supra* note 42, at 65)); Rodríguez, *supra* note 17, at 134 ("Demands for bilingual education coincided with the nation's inception and the establishment of German and French language schools in Pennsylvania and Louisiana, respectively.").

⁴⁷ See Coltharp, *supra* note 42, at 160 n.32 (noting that while Louisiana's first constitution called for all laws and governmental proceedings to be conducted in English, the state soon moved to accommodate its French-speaking citizens by printing its constitution in French and English, and, in 1845, amending the constitution to require that laws be translated in both languages (citing Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 324 (1992))); see also Note, *supra* note 20, at 1348 (observing that the first California constitution was printed both in English and Spanish, and provided for all laws to be published in English and Spanish).

⁴⁸ See Coltharp, *supra* note 42, at 159 (cautioning that "language maintenance efforts often met with resistance from the English-speaking majority"); Note, *supra* note 20, at 1348 ("In the late eighteenth century, for example, fear of the German language's prominence in Pennsylvania led to vitriolic anti-German rhetoric.").

⁴⁹ See Coltharp, *supra* note 42, at 159 n.29 ("Language conversion was a chief goal among policy-makers dealing with Native Americans.").

⁵⁰ Most infamous among these is Benjamin Franklin, whose writings reveal a fierce opposition to the spread of the German language. Coltharp, *supra* note 42, at 159 (citing various reports detailing Benjamin Franklin's fear of the potential dominance of the German language in Pennsylvania).

⁵¹ For a description of the changes in language accommodations in the early twentieth century, see Coltharp, *supra* note 42, at 160-61 (noting that, among other things, "[i]n an attempt to eradicate German language from American conversation, American patriots

all telephone conversations, schools, and church services.⁵² In the 1920s, at the height of these efforts, the U.S. Supreme Court issued two decisions to quell the tide against non-English languages: *Meyer v. Nebraska*, striking down a Nebraska statute that required all schools to teach only in English as a violation of the Fourteenth Amendment of the U.S. Constitution,⁵³ and *Farrington v. Tokushige*, overturning a Hawaii state law that imposed stringent requirements on non-English language schools as a violation of the Fifth Amendment of the U.S. Constitution.⁵⁴

In the nearly one hundred years since these two decisions, the number of new non-English-speaking American citizens has increased significantly, due in large part to the growth of Latino and Asian populations.⁵⁵ In 1980, 23 million individuals in the United States, or 11% of the total population over the age of five, spoke a language other than English at home.⁵⁶ That number grew to nearly 32 million, or 14% of the total population over the age of five, in 1990 and skyrocketed to 47 million, or 18%, in 2000.⁵⁷ In particular, Latinos have grown from only 6% of the population in 1980 to 13.4% in 2000.⁵⁸ Individuals of Asian

replaced 'German fried potatoes' with 'American fries' and 'sauerkraut' with 'liberty cabbage'); Note, *supra* note 20, at 1349 ("During World War I, when suspicion of foreigners reached new heights, Americans turned against the use of any language other than English, and several states passed laws forbidding the use of other languages in schools.").

⁵² Adams, *supra* note 19, at 859–60. Adams writes:

By 1919, fifteen states had banned the teaching of foreign languages. . . . Because of these restrictions, the number of students studying German fell from approximately 324,000 in 1915 to [fewer] than 14,000 in 1922. . . . In the Southwest, "Mexican-American children were prohibited from speaking their native language anywhere on school grounds." . . . [N]ative French-speaking students were severely punished for speaking in French. Children of language minority groups were also segregated into separate and unequal schools.

Id. (footnotes omitted).

⁵³ *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923).

⁵⁴ *Farrington v. Tokushige*, 273 U.S. 284, 299 (1927).

⁵⁵ See SHIN & BRUNO, *supra* note 6, at 2.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Daniel J. Rearick, *Reaching Out to the Most Insular Minorities: A Proposal for Improving Latino Access to the American Legal System*, 39 HARV. C.R.-C.L. L. REV. 543, 545 (2004). Rearick notes:

While every state has some Hispanic population, the distribution varies widely. At one extreme, 42% of the population of New Mexico is Hispanic; in California and Arizona, Hispanics represent 32% of the total population. More than one-quarter of the populations of New Mexico, Texas, and California speak Spanish at home, and in seven other states, more than one person in ten primarily speaks Spanish.

Id. at 545–46 (footnotes omitted).

descent have increased as a proportion of the population as well, estimated in the 2000 Census to number almost 12 million,⁵⁹ up from 6.9 million in 1990.⁶⁰ The number of Vietnamese-speaking individuals doubled during this time period, growing from about 500,000 speakers to just over 1 million speakers.⁶¹ Census figures indicate that the Arab population increased 41% in the 1980s and 38% in the 1990s.⁶² The 2000 Census also estimated that just under 1.2 million U.S. citizens were of Arab descent,⁶³ with community groups estimating that the number is closer to 2.5 million.⁶⁴ In addition, of the twenty non-English languages most frequently spoken at home, the number of individuals speaking Russian tripled between 1990 and 2000, growing from 242,000 to over 700,000.⁶⁵ A growing number of households are linguistically isolated, where no one over the age of fourteen speaks English "very

⁵⁹ Glenn D. Magpantay & Nancy W. Yu, *Asian Americans and Reauthorization of the Voting Rights Act*, 19 NAT'L BLACK L.J. 1, 1 (2005). Three quarters of the Asian American population are concentrated in just ten states: California, New York, Illinois, Texas, New Jersey, Washington, Florida, Hawaii, Virginia, and Massachusetts. Glenn Magpantay, *Two Steps Forward, One Step Back, and a Side Step: Asian Americans and the Federal Help America Vote Act*, 10 ASIAN PAC. AM. L.J. 31, 34-35 (2005) (also noting that "[w]ithin these states, Asian Americans are typically concentrated in only a few cities," and that "[n]ationwide, New York City has the largest Asian American population, followed by Los Angeles").

⁶⁰ JESSICA S. BARNES & CLAUDETTE E. BENNETT, U.S. CENSUS BUREAU, *THE ASIAN POPULATION: 2000*, at 3 (2002), available at <http://www.census.gov/prod/2002pubs/c2kbr01-16.pdf>. Today, sixty-six percent of Asian Americans are U.S. citizens, with nearly half born on U.S. soil. Magpantay & Yu, *supra* note 59, at 2.

⁶¹ SHIN & BRUNO, *supra* note 6, at 3.

⁶² G. PATRICIA DE LA CRUZ & ANGELA BRITTINGHAM, U.S. CENSUS BUREAU, *THE ARAB POPULATION: 2000*, at 2 (2003), available at <http://www.census.gov/prod/2003pubs/c2kbr23.pdf>.

⁶³ *Id.* at 3 tbl.1. For a listing of all ancestries included under the "Arab American" heading by the U.S. Census Bureau, see *id.*; see also *id.* at 1 ("For the purposes of this report . . . a person is included in the Arab ancestry category if he or she reported being Arab, Egyptian, Iraqi, Jordanian, Lebanese, Middle Eastern, Moroccan, North African, Palestinian, Syrian, and so on.").

⁶⁴ See Arab Am. Inst., *Arab Americans: Demographics*, <http://www.aaiusa.org/arab-americans/22/demographics> (last visited Feb. 8, 2007). The website notes:

Limitations of the sampling methodology, combined with non-response by some, under-response . . . and reporting ancestry as race, result[] in relatively higher under reporting among Arab Americans. While the 2000 Census accounted for some 1.25 million persons who self-identify with an Arabic-speaking origin, our estimates . . . place the population at more than 3.5 million.

Id. For further discussion on how underreporting of the U.S. Census affects various minority groups, see Glenn D. Magpantay, *Asian American Voting Rights and Representation: A Perspective from the Northeast*, 28 FORDHAM URB. L.J. 739, 741-44 (2001).

⁶⁵ SHIN & BRUNO, *supra* note 6, at 3.

well.”⁶⁶ In 2000, 4.4 million households (encompassing 11.9 million individuals) were linguistically isolated, up from 2.9 million households (encompassing 7.7 million individuals) in 1990.⁶⁷

As for eligible voters, over half of the 8 million LEP citizens over the age of eighteen, 4.5 million, speak Spanish or Spanish Creole as their native language under the 2000 Census.⁶⁸ Over 1.5 million speak an Asian language,⁶⁹ and even more—1.7 million—speak an Indo-European language.⁷⁰ Census figures also estimate that nearly 35% of citizens of Arab descent speak English less than “very well,”⁷¹ while almost half (43%) of Asian Americans over the age of eighteen are classified as LEP.⁷²

In addition, many members of this significant population of LEP citizens in the United States have experienced continual discriminatory treatment from the English-speaking majority.⁷³ The “English Only” movement exemplifies this hostility,⁷⁴ but the ongoing inequalities of the U.S. public educational system represent its broadest and most pernicious manifestation. Historical segregation into separate and unequal schools⁷⁵ and modern controversies over bilingual education,

⁶⁶ See *id.* at 10.

⁶⁷ *Id.*

⁶⁸ U.S. CENSUS BUREAU, *supra* note 6.

⁶⁹ *Id.*; see also SHIN & BRUNO, *supra* note 6, at 3 (describing Asian languages as including Chinese, Korean, Japanese, Vietnamese, Hmong, Khmer, Lao, Thai, Tagalog, and Filipino).

⁷⁰ U.S. CENSUS BUREAU, *supra* note 6; see also SHIN & BRUNO, *supra* note 6, at 3 (describing Indo-European languages as including German, Yiddish, Dutch, Swedish, Norwegian, French, Italian, Portuguese, Russian, Polish, Serbo-Croatian, Hindi, Gujarathi, Punjabi, Urdu, Celtic languages, Greek, Baltic languages, and Iranian languages).

⁷¹ See SHIN & BRUNO, *supra* note 6, at 4 tbl.2. Census figures also show that Arabic is one of the ten languages most frequently spoken at home in the United States, other than English and Spanish. See *id.* at 2 fig.3.

⁷² Magpantay, *supra* note 59, at 36.

⁷³ See Su Sun Bai, Comment, *Affirmative Pursuit of Political Equity for Asian Pacific Americans: Reclaiming the Voting Rights Act*, 139 U. PA. L. REV. 731, 753 (1991) (“[T]hroughout American history, Asian Pacific Americans were systematically excluded from participating fully in society and were relegated to those roles for which they were allowed to enter the United States in the first place—that of providing cheap labor.”); see also S. REP. NO. 94-295, at 28 (1975), as reprinted in 1975 U.S.C.C.A.N. 774, 794 (finding that the high illiteracy rates experienced by language minorities were “not the result of choice or mere happenstance,” but instead resulted from “the failure of state and local officials to afford equal educational opportunities”).

⁷⁴ See Thomas Ricento, *Language Policy in the United States*, in LANGUAGE POLICIES IN ENGLISH-DOMINANT COUNTRIES 122, 150 (Michael Herriman & Barbara Burnaby eds., 1996).

⁷⁵ Perea, *supra* note 12, at 1425–26. Perea explains:

funding inequities, and standardized test scores⁷⁶ combine to dampen the ability of many LEP citizens to learn English at a level equal to their non-LEP peers. Research from two foremost scholars on Latino issues, Rodolfo de la Garza and Louis DeSipio, has documented this point.⁷⁷ De la Garza and DeSipio present evidence that many native-born U.S. citizens of Mexican or Puerto Rican descent are not functional in English due to discriminatory educational systems that denied them equal opportunities to learn English and function in an English-dominant society.⁷⁸ The U.S. Supreme Court has also recognized this view, famously striking down a California school district's lack of educational programs for LEP students as discrimination in violation of the Civil Rights Act of 1964.⁷⁹

[Historically, L]atino students were educated in segregated, unequal schools designed to teach them to accept an inferior status in American society. After *Brown*, Latino students were discriminated against in integrated schools. Both the assimilative demand that Latinos abandon Spanish and their cultural heritage and outright race discrimination against Latinos by teachers and school administrators have created past and present inequality.

Id.

⁷⁶ Gary Borden, *Creating an Underclass Through Benign Neglect: The Plight of Ethnic Minorities with Limited English Proficiency*, 8 GEO. J. ON POVERTY L. & POL'Y 395, 408 (2001) (describing how "LEP students receive lower overall grades and below average scores on standardized math and reading assessments from the very beginning of their education," and noting that "these figures demonstrate that although their English proficiency will likely improve during school, most LEP students will never reach the level of their [English-speaking] peers").

⁷⁷ See de la Garza & DeSipio, *supra* note 11, at 1518.

⁷⁸ *Id.* A 1986 report by the U.S. General Accounting Office found that seventy-three percent of voters who used only a Spanish version of the ballot lacked a high school education. U.S. GEN. ACCOUNTING OFFICE, BILINGUAL VOTING ASSISTANCE: COSTS OF AND USE DURING THE NOVEMBER 1984 GENERAL ELECTION 62 (1986) [hereinafter 1986 GAO REPORT], available at <http://archive.gao.gov/R0302/131209.pdf>. And seventy-seven percent of citizens who used only the Spanish ballot were born in the United States. *Id.* at 61; see also Chung, *supra* note 26, at 168. Chung writes:

A large proportion of voting age Latino citizens have low levels of formal education as compared to the general adult citizen population. Only 53.4% of voting age Latinos have completed four years of high school or more, compared to 81.7% of the general adult citizen population. For Latinos, low educational achievement correlates with low voter registration and low voting rates.

Chung, *supra* note 26, at 168 (footnotes omitted).

⁷⁹ *Lau v. Nichols*, 414 U.S. 563, 568 (1974) (holding that a California school district's failure to accommodate LEP students and provide programs designed to assist them in overcoming their language barriers was discrimination in violation of Title VI of the Civil Rights Act of 1964).

It should be no surprise, then, that LEP populations have experienced both blatant and subtle discrimination in the electoral context, leading to disenfranchisement in "many guises, ranging from their direct exclusion from membership in the polity and violent intimidation, to subtler but no less pernicious forms of exclusion, such as stringent state residency requirements . . . [and] literacy, character and understanding tests."⁸⁰ In November 2000, poll workers in Arizona and Texas challenged the citizenship of many Hispanic voters, requiring them to provide on-the-spot evidence of their citizenship before they were permitted to vote.⁸¹ During a city election in Hamtramck, Michigan in November 1999, poll workers challenged over forty voters with "dark skin and distinctly Arabic names, such as Mohamed, Ahmed, and Ali," claiming that they were not citizens.⁸² The challenged voters were re-

⁸⁰ Aoki, *supra* note 8, at 4-5 (also noting that "[f]rom the mid-1800s until 1965, discriminatory immigration and naturalization laws were the main obstacle barring Asian Americans from mainstream political participation").

⁸¹ Barry H. Weinberg & Lyn Utrecht, *Problems in America's Polling Places: How They Can Be Stopped*, 11 TEMP. POL. & CIV. RTS. L. REV. 401, 412 (2002); see also *id.* at 413 (recounting how, at a "Ukrainian school, challengers became very aggressive and were yelling at voters, stating that they did not live in the country and should not vote" (quoting *United States v. Passaic City*, No. 99-2544, Order Appointing an Independent Election Monitor in Passaic County (D.N.J. Sept. 6, 2000) (three-judge court))). The authors also recount a "disturbing incident" from a 2001 municipal primary election in Passaic, New Jersey:

Someone allegedly stole the flag from outside the polling place. The police were called. An officer responded and caught the purported perpetrator. The [o]fficer entered the polling place and . . . barked comments in substance to the poll workers as follows, "Can't you read? What country do you come from?" When a municipal worker of Indian origin came to see what the problem was, the officer then asked, "And what country do you come from?" When a Latino federal observer tried to explain the dictates of the consent decree, the officer asked for credentials. When the observer showed his credentials, the officer found them inadequate because they lacked a picture and detained the observer. . . . When a [s]ergeant from the Passaic Police [D]epartment responded at the scene and learned what had happened, he apologized to the federal observer and told him he thought some sensitivity training might be in order for the officer. Notably, this discriminatory behavior took place in a city where the Latino population is at 62 percent.

Id. at 413 (quoting *Passaic City*, No. 99-2544).

⁸² *Id.* at 410 (quoting *United States v. City of Hamtramck*, No. 00-73541 (E.D. Mich. Aug. 7, 2000)). Weinberg and Utrecht quote a portion of the Consent Order and Decree in *United States v. City of Hamtramck*:

The challengers did not appear to possess or consult any papers or lists to determine whom to challenge. . . . Once challenged, the city election inspectors required the challenged voters to swear that they were American citizens before permitting them to vote. Voters who were not challenged were not required to do so. The city election inspectors did not evaluate the propriety or

quired to take an oath of citizenship prior to being permitted to vote.⁸³ In New York City during the general election of 2000, local political party officials appointed English-speaking poll workers despite the fact that many of the new voters in certain areas were Puerto Rican and only spoke Spanish.⁸⁴ Voters of Chinese descent encountered similar disparities in New York and San Francisco.⁸⁵ In addition, reports by the Asian American Legal Defense and Education Fund ("AALDEF") indicate that many voters of Asian descent encountered "rude and hostile behavior" from poll workers across the country.⁸⁶

merit of the challenges. . . . No white voters were challenged for citizenship. No white voters were required to take a citizenship oath prior to voting.

Id. (quoting *Hamtramck*, No. 00-73541).

⁸³ *Id.* U.S. Justice Department lawyers brought a challenge under section 2 of the Voting Rights Act, which resulted in a court-issued consent decree that required, among other things, that the city provide Arabic translated ballots and bilingual poll workers at polling places during subsequent elections. *Hamtramck*, No. 00-73541.

⁸⁴ Weinberg & Utrecht, *supra* note 81, at 412.

⁸⁵ *Id.* at 413 ("The use of English rather than Chinese in polling places in Chinese neighborhoods of San Francisco and Oakland (Alameda County), California, and New York City left voters confused about procedures, and ignorant of ballot propositions and contested offices."). These problems are particularly dramatic when one considers the number of voters who are affected by such disparities. *See id.* at 414. Weinberg and Utrecht note:

The 1990 Census reports that 11,394 persons or 37.83 percent of the Chinese citizen voting age population in Alameda County, and 1.3 percent of the total citizen voting age population in Alameda County do not speak English well enough to participate effectively in English language elections. Thus, over 11,000 Chinese American citizens in Alameda County cannot function effectively in the electoral process except in the Chinese language.

Id. (quoting *United States v. Alameda County*, No. C95 1266 (N.D. Cal. Jan. 22, 1996)).

⁸⁶ Magpantay & Yu, *supra* note 59, at 3-4. Magpantay and Yu recount:

In one such instance, a poll site supervisor in Richmond Hill, Queens, NY said: "I'll talk to [Asian voters] the way they talk to me when I call to order Chinese food," which was then followed with random English phrases with a mock Chinese accent. Another site supervisor in Borough Park, Brooklyn, NY asked: "How does one tell the difference between Chinese and Japanese?" and brought her fingers to each side of her eyes and moved her skin up and down. A poll worker in Edison, NJ carried on stating: "If you're an American, you better lose the rest of the [Asian] crap." A poll worker in Falls Church, VA commented to other poll workers, after he offered candy to a Pakistani American voter who politely declined in observance of Ramadan: "If you think certain cultures are weird, you should read about [Muslims]. They're really weird."

Id. (citing ASIAN AM. LEGAL DEF. & EDUC. FUND, ASIAN AMERICAN ACCESS TO DEMOCRACY IN THE 2004 ELECTIONS: LOCAL COMPLIANCE WITH THE VOTING RIGHTS ACT AND HELP AMERICA VOTE ACT (HAVA) IN NY, NJ, MA, RI, MI, IL, PA, VA (2005), available at <http://>

Such discriminatory treatment and educational disparities,⁸⁷ along with corresponding cultural⁸⁸ and sociological⁸⁹ factors, have combined to contribute to dramatically low voter participation among LEP citizens.⁹⁰ In 1975, the House and Senate Judiciary Committee reports on the Voting Rights Act, which led to the creation of significant accommodations for some LEP voters, found that just 44.4% of Latino citizens were registered to vote in the 1972 general election, compared to 73.4% of non-LEP citizens.⁹¹ In 1974, only 34.9% of persons of Hispanic descent were registered to vote, as opposed to 63.5% of eligible non-LEP citizens.⁹² And in the 1974 national election, only 22.9% of eligible Latino citizens voted, which was "less than one-half the rate of participation" for white voters.⁹³

In 1984, an informal community survey revealed that only 25% of residents in New York City's Chinatown were registered to vote, com-

www.aaldef.org/articles/2005-08-18_189_AsianAmericanA.pdf; ASIAN AM. LEGAL DEF. & EDUC. FUND, ASIAN AMERICAN ACCESS TO DEMOCRACY IN THE 2003 ELECTIONS IN NYC: AN ASSESSMENT OF THE NEW YORK CITY BOARD OF ELECTIONS COMPLIANCE WITH THE LANGUAGE ASSISTANCE PROVISIONS OF THE VOTING RIGHTS ACT (2004), available at http://www.aaldef.org/docs/AALDEF203_Report2003Elections.pdf.

⁸⁷ The 1975 House and Senate Judiciary Reports on the Voting Rights Act emphasized this connection. See S. REP. NO. 94-295, at 28 (1975), as reprinted in 1975 U.S.C.C.A.N. 774, 794 (drawing a connection between educational barriers and low voter participation, citing the low educational attainment of Mexican Americans in Texas (according to the 1970 census, over thirty-three percent had not completed the fifth grade), and their correspondingly low electoral participation).

⁸⁸ See, e.g., Magpantay, *supra* note 59, at 36 ("Asian Americans are often 'unfamiliar with the American electoral process, having come from Asian countries with political systems very different from the United States and which may even lack a tradition of voting.'" (citation omitted)); Chung, *supra* note 26, at 171-73 (arguing that "[b]ecause of their former political traditions, it takes time for Latino and APA immigrants to learn the American political system and to become politically involved").

⁸⁹ Adams, *supra* note 19, at 861 (citing expert testimony in the case of *Serna v. Portales Municipal Schools*, 499 F.2d 1147, 1150 (10th Cir. 1974), which stated that where one "finds no evidence of his language and culture and ethnic group represented," one "becomes withdrawn and nonparticipating").

⁹⁰ See Bai, *supra* note 73, at 747 (describing a report on Asian Pacific American voting patterns in San Francisco, which revealed that although Japanese Americans generally have higher socioeconomic indices, the highest education levels, and the highest income of all Asian Pacific American subgroups, their voter registration rate is still no higher than that of Chinese Americans). The San Francisco study concluded that "the greater factor for the low political participation by Asian Pacific Americans stems from the impact of race, culture, and responses to discrimination [which] may be affecting both Chinese and Japanese Americans and discouraging them from registering [sic] to vote." See *id.* (internal quotations omitted).

⁹¹ S. REP. NO. 94-295, at 30, as reprinted in 1975 U.S.C.C.A.N. at 797.

⁹² *Id.*

⁹³ *Id.*

pared with 47% of all citizens living in Manhattan.⁹⁴ A 1989 study that attempted to account for citizenship found that out of the registered Asian American electorate, only 69% actually voted (compared with 80% of whites and 81% of African Americans).⁹⁵ In 1992, the Native American Rights Fund and the National Congress of American Indians submitted a report to the House and Senate Judiciary Committees that revealed that 37% of tribal leaders surveyed confirmed that language issues continued to serve as a significant barrier between American Indians and the voting booth.⁹⁶ Another report found that "[v]oter registration rates in the predominantly Native-American precincts have been less than half the rate in non-Native-American precincts, and Native-Americans are affected disproportionately by voter purge procedures."⁹⁷ Another analysis found that in the 1994 general election, 69% of white citizens were registered to vote and, of those registered, 73% voted.⁹⁸ Comparatively, only 53% of eligible Latino and Asian Americans registered to vote.⁹⁹ Of those registered, 62% of the Latinos voted, while 76% of the Asian American citizens cast a ballot.¹⁰⁰

A recent analysis of Arab American voting patterns reflects this trend.¹⁰¹ The study compared voter participation rates between white and Arab American citizens in the English-only elections held in Dearborn, Michigan, the location of the highest concentration of Arab Americans in the United States.¹⁰² Among other things, the study found that in the general election of 2004:

⁹⁴ Bai, *supra* note 73, at 738.

⁹⁵ Aoki, *supra* note 8, at 46.

⁹⁶ *Voting Rights Act Language Assistance Amendments of 1992: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 102d Cong. 328 (1992) [hereinafter *VRA Amendments Hearing*] (joint testimony of the Native American Rights Fund and the National Congress of American Indians).

⁹⁷ Weinberg & Utrecht, *supra* note 81, at 414-15 (quoting *United States v. Cibola County*, No. 93 1134 (D.N.M. Apr. 21, 1994)). The quoted report goes on to note:

There is a need for election information in the Navajo and Keresan languages, and a need for publicity concerning all phases of the election process for voters in Ramah, Acoma and Laguna. The rate of participation by Native-Americans on such issues is less than one third of the participation rate among non-Native-Americans. There is a need for polling places staffed with trained translators conveniently situated for the Native-American population.

Id. at 415.

⁹⁸ Aoki, *supra* note 8, at 46.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ See Jocelyn Benson, *Language Protections for All?*, in *VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER*, *supra* note 11.

¹⁰² *Id.*

the average turnout of registered voters in east Dearborn, the area with the highest concentration of Arab American voting age citizens, was 53.5%, while the average turnout of registered voters in precincts located in west Dearborn was ten percentage points higher: 63.2%. Similar 10-point gaps occurred in the 2004 Primary Election (17.4% to 26.6%) and the 2000 General Election (49.4% to 59.1%).¹⁰³

B. Language Accommodations and the LEP Electorate

The above examples of discrimination, turnout disparities, and the increasing size of the diverse LEP citizenry in the United States suggest that this portion of the electorate is growing while, at the same time, the barriers to the ballot facing non-English-speaking populations show little sign of decreasing. Yet, traditional democratic theory and the equality ideal behind the legal mandate of "one person, one vote" together reinforce the notion that the effective incorporation and involvement of all citizens on an equal basis are vital to maintaining the health of the American democracy.¹⁰⁴ The U.S. Supreme Court declared the right to an equal vote to be the "bedrock" of our political system less than fifty years ago.¹⁰⁵ But centuries earlier Jean-Jacques Rousseau, whose *Social*

¹⁰³ Benson, *supra* note 101. The percentages for the 2004 general election were drawn from City of Dearborn Unofficial Canvass of Voters, General Election November 2, 2004 (Nov. 3, 2004). In the primary election held on August 3, 2004, the average turnout of registered voters in east Dearborn was 17.37%, compared with 26.6% in west Dearborn. City of Dearborn Unofficial Canvass of Voters, Primary Election August 3, 2004 (Aug. 4, 2004). The study also found that:

[I]n Dearborn . . . the precinct with the highest turnout of registered voters in the 2004 General Election, 71.15%, was P31, located in west Dearborn, while the precinct with the lowest turnout, 37.6%, was P15, located in east Dearborn. Of the top twenty precincts with the lowest turnout in the same election, eighteen were in east Dearborn while all of the top twenty precincts with the highest turnout rates were in west Dearborn.

Benson, *supra* note 101.

¹⁰⁴ See Paul R. Abramson, *Participation, Political*, in 3 THE ENCYCLOPEDIA OF DEMOCRACY 913, 913 (Seymour Martin Lipset ed., 1995) ("Although popular participation does not by itself make a democracy, the opportunity for the average citizen to participate in the political process is essential for any democracy, and participation is often included in the definition of democracy.").

¹⁰⁵ See *Reynolds v. Sims*, 377 U.S. 533, 563 (1964). This is not to suggest that there is a constitutional right to translated election materials under *Reynolds's* fundamental right to vote analysis. For a review of the arguments surrounding the premise of a constitutional right to such interpretations, see Guerra, *supra* note 20, at 1424–36; *id.* at 1420 (arguing that "because voting is a specially protected fundamental right, the equal protection clause

Contract provides a foundation for Western democratic ideals, emphasized the importance of full and equal participation.¹⁰⁶ Rousseau argued that a robust democracy must ensure that no one individual or group is "master of another."¹⁰⁷ He wrote that a healthy democracy must enable members of an electorate to be free to represent and defend their interests,¹⁰⁸ while fostering "the feeling among individual citizens that they 'belong' in their community."¹⁰⁹ If the American political system is to adhere to these legal and theoretical ideals of equality, empowerment, and inclusion, it must actively address the ongoing discrimination and language barriers many members of the LEP community face at the ballot box in a meaningful and effective way.¹¹⁰

Existing government accommodations for LEP citizens have brought us closer to meeting all three of these democratic ideals. In terms of equal participation, in the twelve years following the 1975 passage of section 203 of the Voting Rights Act,¹¹¹ which requires counties and ju-

of the Fourteenth Amendment guarantees that absent compelling justification states may not provide voting assistance to English speakers without also providing equivalent assistance to non-English speakers").

¹⁰⁶ See PATEMAN, *supra* note 30, at 27. See generally JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (Maurice Cranston trans., 1968) (1762).

¹⁰⁷ See PATEMAN, *supra* note 30, at 27.

¹⁰⁸ See *id.* at 26.

¹⁰⁹ *Id.* at 27.

¹¹⁰ Rodríguez, *supra* note 17, at 196 (noting that accommodations for LEP citizens "emphasize[] the equality dimension of participation," while "creat[ing] a space for public expression of linguistic difference and incorporat[ing] linguistic minorities as linguistic minorities into public institutions, even going so far as to permit a relationship between the state and its citizens that does not depend on the capacity to understand English").

¹¹¹ Voting Rights Act § 203, 42 U.S.C.A. § 1973aa-1a (West 2001 & Supp. 2006). The text of section 203 reads in part:

A State or political subdivision is a covered State or political subdivision for the purposes of this subsection if the Director of the Census determines, based on the 2010 American Community Survey census data and subsequent American Community Survey data in 5-year increments, or comparable census data, that—

(i) (I) more than 5 percent of the citizens of voting age of such State or political subdivision are members of a single language minority and are limited-English proficient;

(II) more than 10,000 of the citizens of voting age of such political subdivision are members of a single language minority and are limited-English proficient; or

(III) in the case of a political subdivision that contains all or any part of an Indian reservation, more than 5 percent of the American Indian or Alaska Native citizens of voting age within the Indian reservation are members of a single language minority and are limited-English proficient; and

(ii) the illiteracy rate of the citizens in the language minority as a group is higher than the national illiteracy rate.

risdictions with certain numbers of Latino, Asian American, American Indian, or Native Alaskan citizens to provide translated election materials, Latino voters went from comprising just 2.4% of the national electorate to 3.6%—a nearly 50% increase.¹¹² After Congress extended section 203 to cover more Native American populations, turnout on Indian reservations covered by section 203 increased.¹¹³ In one county in Arizona, registration grew by 165% between 1972 and 1990.¹¹⁴ And in 1992, after the numerical triggers of section 203 were amended to apply to more predominantly Asian communities,¹¹⁵ 31% of Chinese American voters surveyed in New York City said they relied on translated election materials and ballots when voting in the 1994 general election.¹¹⁶ Census data from 1998 and 2004 showed a 61% increase in registration rates and a 98% increase in turnout rates among self-identifying Asian American citizens between November 1998 and November 2004.¹¹⁷

Id. § 1973aa-1a(b)(2)(A).

¹¹² de la Garza & DeSipio, *supra* note 11, at 1500. De la Garza and DeSipio are quick to emphasize, however, that the Latino adult population increased nearly 100% during the same twelve-year period. *Id.*

¹¹³ *VRA Amendments Hearing*, *supra* note 96, at 182 (statement of Marshall Plummer, Vice-President, Navajo Nation); H.R. REP. NO. 102-655, at 6–7 (1992), as reprinted in 1992 U.S.C.C.A.N. 766, 770–71.

¹¹⁴ See *VRA Amendments Hearing*, *supra* note 96, at 186. In addition, turnout among Native Americans in Coconino County increased by 120% between 1972 and 1990, while Apache County, Arizona experienced an 88% increase during the same period. See *id.*

¹¹⁵ See Voting Rights Language Assistance Act of 1992, Pub. L. No. 102-344, 106 Stat. 921 (codified as amended at 42 U.S.C.A. § 1973aa-1a(b) (West 2001 & Supp. 2006)).

¹¹⁶ Michael DiChiara, Note, *A Modern Day Myth: The Necessity of English as the Official Language*, 17 B.C. THIRD WORLD L.J. 101, 119 (1997) (concluding that “[t]hose significant percentages of the Chinese population might not have been able to participate if bilingual ballots had not been available”). In addition, fourteen percent of Chinese American voters in San Francisco relied upon translated ballots in the 1994 general election. *Id.*

¹¹⁷ See *Western Regional Hearing Before the Nat’l Comm’n on the Voting Rights Act* 3 (Sept. 27, 2005) [hereinafter *Western Regional Hearing*] (statement of Eugene Lee, Staff Attorney, Voting Rights Project, Asian Pacific American Legal Center), available at http://www.votingrightsact.org/hearings/pdfs/eugene_lee.pdf. Lee’s testimony also noted that the increases in voting and registration among Asian American citizens “have outpaced the increase in both the overall APIA voting age population and the overall APIA citizen voting age population.” *Id.*; see also *Hearing*, *supra* note 16, at 15 (statement of Margaret Fung, Executive Director, AALDEF). Fung stated:

Section 203 has also aided grass-roots efforts to increase voter registration among eligible Asian Americans. As compared to a decade ago, when only a small number of nonpartisan groups did voter registration, there are now scores of new Asian American groups and coalitions throughout the country doing voter education and registration in the Korean, Filipino, Asian Indian, Pakistani, Bangladeshi, Cambodian, Laotian, and Vietnamese communities.

Hearing, *supra* note 16, at 15 (statement of Margaret Fung, Executive Director, AALDEF).

On the flip side, studies illustrate that when accommodations (in the form of translated ballots and election materials) are *not* available to LEP voters, participation decreases¹¹⁸ and voter error increases.¹¹⁹ For instance, in 1982, the Chinatown Voter Education Alliance found that in New York City, 35.2% of Chinatown voters, as compared to 18.9% of voters outside of Chinatown, who went to the polls left without voting or lost their vote due to an error once they were in the voting booths.¹²⁰ A 2004 exit poll of 11,000 Asian American voters conducted by AALDEF found that 80% of Asian American citizens surveyed in Manhattan's Chinatown and Flushing, Queens did not speak or read English well, but would vote regularly if bilingual assistance were provided.¹²¹ A 1992 survey of Navajo and Pueblo Indians in northwestern New Mexico revealed that 48% of respondents indicated they were "more comfortable" speaking and voting in their own language than in English.¹²²

As participation among Asian American and Latino citizens (the two groups most actively targeted by existing language accommodations)¹²³ increases, the descriptive representation of both groups also tends to increase.¹²⁴ Between 1973 and 1991, Latino elected officials in

¹¹⁸ One empirical study conducted by the Mexican-American Legal Defense and Education Fund ("MALDEF") found that seventy percent of Spanish-speaking citizens surveyed reported that they would be less likely to register and less likely to vote if oral assistance in Spanish or bilingual ballots were discontinued. Guerra, *supra* note 20, at 1430-31.

¹¹⁹ See Bruce Feffer & Earle Tockman, *Asian-Americans Pin Hopes of Voting on Court and Congress*, N.Y. L.J., Jul. 30, 1992, at 2 (also noting that in the 1992 primary election, Chinatown voters "became intimidated by inspectors who hurried them out of the voting booth as they painstakingly struggled to read the ballot and instructions (which appeared only in English and Spanish)").

¹²⁰ Magpantay, *supra* note 59, at 37.

¹²¹ See *Hearing*, *supra* note 16, at 13 (testimony of Margaret Fung, Executive Director, AALDEF). Fung's testimony also noted that AALDEF's exit poll found "almost one-third of all respondents needed some form of language assistance in order to vote, and the greatest beneficiaries of language assistance (46%) were first-time voters. Of those polled, over 51% of Asian American voters got their news about politics and community issues from the Asian-language media." *Id.* at 17.

¹²² *VRA Amendments Hearing*, *supra* note 96, at 328 (joint testimony of the Native American Rights Fund and the National Congress of American Indians).

¹²³ See 42 U.S.C. § 1973b(f) (2000); 42 U.S.C.A. § 1973aa-1a (West 2001 & Supp. 2006).

¹²⁴ Such increased participation also enables minority racial and ethnic groups to better defend their legal and political rights when under attack from a majority bloc of voters. See Sylvia R. Lazos Vargas, *Judicial Review of Initiatives and Referendums in Which Majorities Vote on Minorities' Democratic Citizenship*, 60 OHIO ST. L.J. 399, 421-73 (1999) (examining ballot initiatives and referendums in which a majority group of voters is in a position to vote on the content of a minority's democratic civic standing, thus allowing a majority to curtail the rights of minority citizens); see also René Galindo & Jami Vigil, *Language Restrictionism Revisited: The Case Against Colorado's 2000 Anti-Bilingual Education Initiative*, 7 HARV. LATINO

Arizona, California, Florida, New Mexico, New York, and Texas nearly tripled in number from 1280 to 3677.¹²⁵ In 1995, over 1200 Asian Americans held either elected or major appointed federal offices, compared to just a few hundred in 1978.¹²⁶ This increase led Margaret Fung, Executive Director of AALDEF, to testify before the House Judiciary Constitution Subcommittee that language accommodations can be directly linked to an increase in the number of elected officials from the Asian American community.¹²⁷ While experts stress that both Latinos and Asian American citizens are still "grossly underrepresented in the political process,"¹²⁸ the increase in representation seen in the decades following the enactment of section 203 has led not only to more Asian

L. REV. 27, 47-60 (2004) (recounting unsuccessful attempts to place an anti-bilingual education initiative on a ballot in Colorado).

¹²⁵ de la Garza & DeSipio, *supra* note 11, at 1495.

¹²⁶ Chung, *supra* note 26, at 166 n.13.

¹²⁷ See *Hearing*, *supra* note 16, at 13 (testimony of Margaret Fung, Executive Director, AALDEF); see also *Western Regional Hearing*, *supra* note 117, at 2 (statement of Eugene Lee, Staff Attorney, Voting Rights Project, Asian Pacific American Legal Center). Lee stated:

With the recent election of Ted Lieu to the State Assembly, there are now nine APIA state legislators in California. This stands in marked contrast with 1990 when that number was zero. One factor in this electoral success has been Section 203 language assistance allowing limited English proficient voters (or voters who speak English less than very well) to fully exercise their right to vote. . . . [E]very county in California that is covered under Section 203 for an Asian language has at least one APIA legislator from a district in such county.

Western Regional Hearing, *supra* note 117, at 2 (statement of Eugene Lee, Staff Attorney, Voting Rights Project, Asian Pacific American Legal Center).

¹²⁸ See Bai, *supra* note 73, at 737 (quoting Grant Din, An Analysis of Asian/Pacific American Registration and Voting Pattern in San Francisco 86 (Nov. 29, 1984) (unpublished M.A. thesis, Claremont Graduate School) (on file with Honnold/Mudd Library, Claremont Graduate School)) (concluding that Asian Pacific Americans are "grossly underrepresented in terms of their voting power in relation to their numbers in the population," leading to "a lack of say in decisions that affect them the most, such as bilingual ballots, Chinatown development . . . and less of a likelihood to elect Asian/Pacific candidates than their numbers would indicate"); see also Rearick, *supra* note 58, at 550. Rearick notes:

[In 2003] the American population [was] . . . over 13% Hispanic, there [were] . . . no Hispanic senators, and Hispanics . . . constitute[d] only 5% of the House of Representatives. Although the number of Hispanic representatives . . . [stood] at a record twenty-two, up from nineteen after the 2000 election, the gains can be attributed almost entirely to redistricting rather than to an increase in voter participation or shifting voting patterns. . . . This under-representation makes it less likely that the issues of concern to many Hispanics, such as immigration, health care, education, and an increase in the minimum wage, will be addressed by Congress.

Rearick, *supra* note 58, at 550.

Americans and Latinos elected to office, but to a greater responsiveness of all elected officials towards those communities.¹²⁹

Finally, the mere presence of translated ballots and election materials in a voter's native language sends the message that LEP citizens "are a part of the nation," even though they "were consciously excluded from participation for almost 100 years."¹³⁰ De la Garza and DeSipio note that the language accommodations included in section 203 of the Voting Rights Act, though flawed,¹³¹ "serve as a signal that Latinos are welcome in the American political system."¹³² In 1990, the enactment of the Native American Languages Act ("NALA"), a broad statement of recognition of and support for the many languages spoken by American Indians and Native Alaskans,¹³³ sent a similar message of respect to the native community.¹³⁴ Ben Nighthorse Campbell, who was a member of the House of Representatives and the only Native American in Con-

¹²⁹ See de la Garza & DeSipio, *supra* note 11, at 1505. The authors note an overall increase in responsiveness from all elected officials towards the Latino community since the passage of section 203:

[Latino survey] respondents believe that they were treated fairly by the last public official with whom they interacted. Also . . . large majorities of those who did report interaction [with their elected representatives] find that both Latino and non-Latino public officials treat them fairly. Surprisingly, perceptions of governmental fairness are even stronger among Spanish speakers.

Id.

¹³⁰ *Id.* at 1518; see also Kathay Feng et al., *Voting Matters: APIAs, Latinas/os and Post-2000 Redistricting in California*, 81 OR. L. REV. 849, 855 (2002) (arguing that "meaningful political participation beginning (but not ending) with fair representation is an absolutely necessary and crucial precondition to achieving and implementing the substantive social justice" for Latinos and other language minority citizens).

¹³¹ For a discussion of the flaws of section 203, see *infra* notes 179–297 and accompanying text.

¹³² de la Garza & DeSipio, *supra* note 11, at 1518.

¹³³ Native American Languages Act of 1990, Pub. L. No. 101-477, tit. I, 104 Stat. 1152, 2253 (codified as amended at 25 U.S.C. §§ 2901–2906 (2000 & Supp. III 2003)).

¹³⁴ See Dussias, *supra* note 18, at 940 (noting that in passing NALA, Congress explicitly stated its intent "to act together with Native Americans to ensure the survival of these unique cultures and languages") (quoting 25 U.S.C. § 2901(1)). Dussias notes:

[The enactment of NALA] at last indicated some appreciation on the part of the federal government of the importance of Native American languages. . . . NALA appeared to represent a repudiation of past government policies aimed at suppressing and ultimately eradicating the traditional languages of the indigenous peoples of the United States and replacing them with English.

Id. at 939. The Senate report on NALA also acknowledged that "[l]anguage is the basis of culture. History, religion, values, feelings, ideas and the way of seeing and interpreting events are expressed and understood through language." *Id.* at 940.

gress at the time of NALA's passage,¹³⁵ spoke specifically in support of the legislation as an "important step in restoring the true identities of Native American individuals and communities."¹³⁶

Existing examples of accommodations for some LEP voters therefore suggest that such policies have led to the empowerment¹³⁷ and inclusion¹³⁸ of historically excluded citizen groups,¹³⁹ and an increase in their engagement in and integration with the overall American community.¹⁴⁰ This can subsequently lead to increased acceptance and tol-

¹³⁵ Ben Nighthorse Campbell was a member of the House of Representatives, representing Colorado, from 1987 to 1992. He served in the U.S. Senate, representing Colorado, from 1993 to 2004.

¹³⁶ Dussias, *supra* note 18, at 948.

¹³⁷ See Aoki, *supra* note 8, at 14–15 (recalling that "[e]arlier ethnic groups such as Italian, Irish, and Jewish immigrants managed to ascend the slippery ladder to political power in local and state government in the late nineteenth and early twentieth centuries via ethnic bloc voting and well-oiled political machines"); Mimi Ho, *Californians for Justice*, 27 N.Y.U. REV. L. & SOC. CHANGE 38, 41–42 (2001–02). Ho writes:

[E]lections are a tool. They can leverage other types of power. If an organization can show that it has the ability to mobilize voters, even if those voters only make up a few percentage points of the total vote, she can garner some attention. This attention then can translate to power in other arenas, perhaps in a legislative campaign or in a direct action accountability session with a key decision maker.

Ho, *supra*, at 41–42.

¹³⁸ Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 347 (1986) ("Voting is not just an expression of political preferences; it is an assertion of belonging to a political community."). The importance of participation in promoting a feeling of inclusion in the greater polity is also referred to in Aristotle's *Politics*. See Sanford Levinson, *Suffrage and Community: Who Should Vote?*, 41 FLA. L. REV. 545, 546 (1989).

¹³⁹ Feng et al., *supra* note 130, at 850–51 ("[Voting] matters more to members of ethnic and racial minority groups such as Asian Pacific Islander Americans (APIAs), Latina/os, and African Americans who have until recently been marginalized electorally and have often been the object of political animus and overt racial discrimination.").

¹⁴⁰ See, e.g., Karst, *supra* note 138, at 332 ("Political party activity makes [cultural minorities] feel like insiders. . . . Local ethnic power produces the belief that 'the system works for us,' further strengthening national allegiance."); Chung, *supra* note 26, at 172. Chung notes that lack of participation and representation breeds exclusion and disenfranchisement:

The neglect by political candidates and government officials exacerbates political ambivalence in the APA and Latino communities. . . . When these communities are neglected, eligible citizens in them have decreased incentive to vote. When these citizens do not vote, politicians perceive no need to address their concerns. This results in a vicious cycle of neglect and ambivalence that further discourages active APA and Latino voting.

Chung, *supra* note 26, at 172 (citation omitted).

erance of a language minority group by the dominant culture¹⁴¹ and the promotion of equal participation of all groups in the larger aspects of society.¹⁴²

C. Language Accommodations in Other Arenas

Although voting is a unique and fundamental right in our democracy, the relevance of government accommodations for LEP citizens is underscored by their presence in other areas of domestic and international law. Government-financed or court-mandated attempts to provide support for LEP citizens in these areas illustrate a loose consensus around a general accommodationist policy towards individuals who know some English, but are not sufficiently proficient to participate fully in employment, education, or the legal system itself.¹⁴³ This consensus is reflected in the decisions of public and private entities to provide translated materials for LEP individuals who, though able to speak English at a basic level, still have difficulty understanding complex manufacturing warnings¹⁴⁴ or medical information.¹⁴⁵ The U.S. De-

¹⁴¹ See Karst, *supra* note 138, at 335–36. Karst writes:

When the enforced separation of a cultural minority ends and its members come to participate in the activities and institutions of the wider society [such as voting], that participation itself promotes assimilation. At the same time, the need [for cultural minorities] to seek refuge in a 'defensive' cultural identity decreases. Correspondingly, as a cultural minority becomes more assimilated, its members find more tolerance among the majority for the cultural differences that may remain.

Id. During the 1992 debate over whether to reauthorize section 203, Congressman Jose Serrano, a Democrat from New York, emphasized the assimilation benefits of the provision, noting that it "facilitate[s] the integration of immigrants into the diverse culture of this nation." *VRA Amendments Hearing*, *supra* note 96, at 25 (testimony of Rep. Jose E. Serrano).

¹⁴² Julian S. Lim, Comment, *Tongue-Tied in the Market: The Relevance of Contract Law to Racial-Language Minorities*, 91 CAL. L. REV. 579, 598 (2003) (warning that "[e]ffectively relegating non-English speakers to second-class status, an English literacy requirement, even if unofficial, restricts a non-English speaker's ability to fully participate in the political and social processes of their communities").

¹⁴³ See, e.g., *Lau*, 414 U.S. at 568 (holding that a California school district's failure to accommodate LEP students and provide programs designed to assist them in overcoming their language barriers was discrimination in violation of Title VI of the Civil Rights Act of 1964); *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 944–47 (9th Cir. 1995) (rejecting the argument that English-only laws promote significant state interests in protecting democracy by encouraging unity and political stability, encouraging a common language, and protecting public confidence).

¹⁴⁴ See Thomas H. Lee, Note, *A Purposeful Approach to Products Liability Warnings and Non-English-Speaking Consumers*, 47 VAND. L. REV. 1107, 1121–22 (1994). Lee notes:

partment of Health and Human Services Policy Guidelines interpret Title VI of the Civil Rights Act of 1964¹⁴⁶ to require federally funded medical providers such as Medicaid and Medicare to provide translators for LEP patients.¹⁴⁷ The Guidelines state that meaningful access to health care for LEP individuals occurs only when such individuals are "given adequate information, able to understand the services and benefits available, and able to receive those for which he or she is eligible."¹⁴⁸ Various courts across the country have held companies liable

Arizona requires lenders to notify borrowers of their terms in Spanish, and requires process servers to provide notice of legal actions in Spanish. . . . New Jersey requires any retailer who regularly uses a language other than English in the ordinary course of business to provide a notice of consumer warranty rights in both English and the other language in its advertising.

Id. (footnotes omitted).

¹⁴⁵ *Id.* at 1122–23. Lee writes:

The Illinois legislature instructed state health clinics to provide women a pamphlet written in Spanish explaining obstetrical health issues. Pennsylvania's controversial abortion regulations require women seeking abortions to receive a notice of adoption possibilities printed in English, Spanish, and Vietnamese. . . . [W]hen individuals need to be notified of state or private actions implicating their legal rights and obligations or significantly affecting their health and welfare, the notice is ineffective if the receiver of that information cannot understand it.

Id. (footnotes omitted).

¹⁴⁶ 1964 Civil Rights Act tit. VI, 42 U.S.C. §§ 2000d to 2000d-7 (2000 & Supp. III 2003) (declaring it to be the policy of the United States that discrimination on the ground of race, color, or national origin shall not occur in connection with programs and activities receiving federal financial assistance and authorizing federal departments and agencies to take action to implement this policy).

¹⁴⁷ 1964 Civil Rights Act tit. VI; Policy Guidance on the Prohibition Against National Origin Discrimination as It Affects Persons with Limited English Proficiency, 65 Fed. Reg. 52,762, 52,765 (Aug. 30, 2002). While this translation requirement affects both small and large entities, the Department excuses recipients if it would be "unduly burdensome" to demand, for example, that the recipient translate material into all one hundred or more languages encountered. *Id.* at 52,768.

¹⁴⁸ Policy Guidance on the Prohibition Against National Origin Discrimination as It Affects Persons with Limited English Proficiency, 65 Fed. Reg. at 52,765. For more description and analysis of the Guidelines, see Mona T. Peterson, Note, *The Unauthorized Protection of Language Under Title VI*, 85 MINN. L. REV. 1437, 1441 (2001) (cautioning that "because the HHS Policy Guidance creates an increased potential for liability, providers may altogether cease to supply services to beneficiaries of government programs," and that "[i]f providers withdraw in this manner, the provision of health care services in rural and poverty-stricken urban areas will be further devastated"); Barbara Plantiko, Comment, *Not-So-Equal Protection: Securing Individuals of Limited English Proficiency with Meaningful Access to Medical Services*, 32 GOLDEN GATE U. L. REV. 239, 248–49 (2002). Plantiko notes:

HHS Guidance notes that the failure to provide language assistance for non-English speakers in the health and social service sector has the effect of denying

where they did not provide product or manufacturer's warnings in languages accessible to LEP citizens, where it was foreseeable that such populations would be using the product.¹⁴⁹

In the 1970s, federal jurisprudence and statutory protections in the area of education began focusing on accommodating LEP students in the classroom setting,¹⁵⁰ due in no small part to the U.S. Supreme Court's landmark 1974 decision in *Lau v. Nichols*.¹⁵¹ The Court in *Lau*, in reaction to blatant attempts to segregate LEP students in the California school system,¹⁵² held that a California school district's failure to accommodate LEP students and provide programs designed to assist them in overcoming their language barriers was discrimination in violation of Title VI of the Civil Rights Act of 1964.¹⁵³ The Court's strong statement in *Lau* led to the passage of the Equal Education Opportunities Act of 1974,¹⁵⁴ which sought to provide LEP stu-

and delaying essential services. It further recognizes that the consequences of denying access to such services are serious, at times life-threatening and generally constitute discrimination on the basis of national origin.

Plantiko, *supra*, at 248-49.

¹⁴⁹ See, e.g., *Hubbard-Hall Chem. Co. v. Silverman*, 340 F.2d 402, 405 (1st Cir. 1965) (holding that a company did not meet its duty to warn when it did not provide warnings for its product in Spanish or in symbols when it was foreseeable that the product would be used by farm laborers who were either illiterate or unable to speak English); *Stanley Indus. v. W.M. Barr & Co.*, 784 F. Supp. 1570, 1576 (S.D. Fla. 1992) (finding that when a product manufacturer uses non-English-language media to reach non-English-speaking consumers, the manufacturer cannot insist that product warnings in English only are sufficient); *Campos v. Firestone Tire & Rubber Co.*, 485 A.2d 305, 310 (N.J. 1984) (holding that a tire company had a duty to provide warnings in either symbols or languages other than English when it was foreseeable that its product would be used by a number of unskilled or semi-skilled workers, who often cannot read English).

¹⁵⁰ *Rodríguez*, *supra* note 17, at 209 ("In the educational sphere, courts generally have treated linguistic difference as a barrier to be overcome and have regarded the education of linguistic minorities as a straightforward antidiscrimination issue.").

¹⁵¹ 414 U.S. at 569.

¹⁵² See *Adams*, *supra* note 19, at 859-60 (noting that "[c]hildren of language minority groups were . . . segregated into separate and unequal schools" in the early twentieth century). The Court in *Lau* wrote that "[b]asic English skills are at the very core of what these public schools teach. Imposition of a requirement that, before a child can effectively participate in the educational program, he must already have acquired those basic skills is to make a mockery of public education." 414 U.S. at 566.

¹⁵³ See *Lau*, 414 U.S. at 568. It is important to emphasize that the Supreme Court in *Lau* only suggested, and did not mandate, that students be educated in their native language. See Note, *supra* note 20, at 1351-52 ("Although [the Court in *Lau*] remanded the case for determination of the particular form of assistance the school district was obliged to offer, the Court noted that special classes [t]eaching English . . . [are] one choice. Giving instruction . . . in Chinese is another." (internal quotations omitted)).

¹⁵⁴ Equal Opportunities Act, 20 U.S.C. § 1703(f) (2000) (requiring a school district to "take appropriate action to overcome language barriers that impede equal participation by

dents in secondary schools the opportunity to study in their native language, and the development of federal guidelines instituting bilingual education programs in public schools throughout the country.¹⁵⁵ Although bilingual education accommodations remain controversial,¹⁵⁶ with critics arguing that the programs inhibit the assimilation of the LEP student and promote disunity among the American citizenry,¹⁵⁷ bilingual education remains an accepted component of education policy, in part due to the strong statement in support of the policy by the U.S. Supreme Court.

In the workplace, Title VII of the Civil Rights Act of 1964¹⁵⁸ provides some opportunity for federal courts and the Equal Employment Opportunity Commission (the "EEOC") to step in when employers institute policies requiring employees to speak English while on the job.¹⁵⁹

its students in its instructional programs"). Section 1703(f) was preceded by the 1967 Bilingual Education Act, which offered financial assistance for local programs designed to assist children with limited English-speaking ability. Bilingual Education Act, Pub. L. No. 90-247 tit. VII, 81 Stat. 783, 816, *superseded by* No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified in scattered sections of 20 U.S.C.). The Bilingual Education Act expired in 2002 and was replaced by the No Child Left Behind Act of 2001, "which requires that funds be used only for the explicit acquisition of English." No Child Left Behind Act of 2001; Susan Katz & Herbert Kohl, *Banishing Bilingualism*, NATION, Dec. 9, 2002, at 6, 7.

¹⁵⁵ See Memorandum from J. Stanley Pottinger, Dir., Office of Civil Rights, Dep't of Health, Educ., and Welfare, to School Districts with More Than Five Percent National Origin-Minority Group Children (May 25, 1970), *available at* <http://www.ed.gov/about/offices/list/ocr/docs/lau1970.html> ("Where inability to speak and understand the English language excludes national origin-minority children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.").

¹⁵⁶ See 1998 Cal. Legis. Serv. Prop. 227 (West), § 1 (codified at CAL. EDUC. CODE § 300 (West 2002)); Frank del Olmo, *Commentary: Perspective on Proposition 227: A Thoughtful Measure, but Not the Right One; A Bill Vetted by Wilson Would Have Reformed Bilingual Education While Maintaining Local Control*, L.A. TIMES, May 24, 1998, at M5.

¹⁵⁷ See, e.g., Frank M. Lowrey, IV, Comment, *Through the Looking Glass: Linguistic Separatism and National Unity*, 41 EMORY L.J. 223, 279 (1992). Lowrey writes:

In the United States, political opposition to bilingual education has focused upon the idea that bilingual education fosters a permanent language minority with no incentive to learn English. . . . In particular, programs that provide for maintenance of minority language abilities could become increasingly vulnerable to public opposition grounded in fears of national disunity.

Id.

¹⁵⁸ Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin in federally assisted programs. 1964 Civil Rights Act tit. VI, § 601, 42 U.S.C. § 2000d (2000).

¹⁵⁹ Adams, *supra* note 19, at 849; Edward M. Chen, *Asian Law Journal Symposium on Labor and Immigration*, 6 ASIAN L.J. 223, 228-29 (1999). Adams notes:

There is, however, visible discord between the federal judiciary and the EEOC interpretation of Title VII's protections of LEP employees.¹⁶⁰ The EEOC guidelines promote accommodation in that they prohibit English-only requirements that are not a "business necessity,"¹⁶¹ whereas federal courts allow some private employers to institute assimilationist English-only requirements at their discretion.¹⁶²

The workplace has emerged as the primary battleground of the official English movement and the civil rights of language minorities. In recent years, the number of 'speak English only' rules in the workplace has sharply increased. As of June, 1994, the EEOC had approximately 120 active charges against 67 different employers who had imposed English-only rules.

Adams, *supra* note 19, at 849 (footnotes omitted). Similarly, Chen argues:

With respect to English fluency requirements, the appropriate analysis in most instances will be disparate impact theory under Title VII. Generally, it will not be difficult to demonstrate an English language requirement has a disproportionate adverse impact upon *e.g.* Latinos or Asian American workers. The key is the application of the business necessity test under which the employer is obliged to prove the requirement is demonstrably related to job performance. Here the law is not entirely settled as to the statistical methodologies that are acceptable and the degree of relationship to job performance that must be proven.

Chen, *supra*, at 228-29.

¹⁶⁰ See Lisa L. Behm, Comment, *Protecting Linguistic Minorities Under Title VII: The Need for Judicial Deference to the EEOC Guidelines on Discrimination Because of National Origin*, 81 MARQ. L. REV. 569, 589 (1998) ("A perusal of the case law reveals a substantial conflict in views between the separate branches of government and the judiciary—and even within the judiciary—regarding the general application of English-only rules [in the workplace]."). Compare *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973) (finding that the purpose of Title VII was to ensure "equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments"), with *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1488 (9th Cir. 1993) (finding that "Title VII is not meant to protect against [English-only] rules that merely inconvenience some employees [by prohibiting them from using the language with which they are most comfortable], even if the inconvenience falls regularly on a protected class").

¹⁶¹ See 29 C.F.R. § 1606.7 (2006); Adams, *supra* note 19, at 889. Adams notes:

The EEOC Guidelines create a presumption that rules requiring employees to speak English at all times in the workplace constitute national origin discrimination in violation of Title VII. However, the EEOC Guidelines do permit an employer to impose limited language restrictions if justified by a business necessity. If an employer institutes such a rule, the employer must notify the employees of the general circumstances when English is required and the consequences of violating the rule.

Adams, *supra* note 19, at 889 (footnotes omitted).

¹⁶² See *Garcia v. Gloor*, 618 F.2d 264, 268 (5th Cir. 1980) (determining that "neither [Title VII] nor common understanding equates national origin with the language that one chooses to speak" and denying plaintiff's claim for relief).

Judges and policymakers disagree over the question of how the judicial system can best accommodate LEP parties in litigation.¹⁶³ As in the field of education, statutory policy is predisposed toward accommodationist strategies, in the form of a diluted piece of federal legislation called the Court Interpreters Act,¹⁶⁴ which calls for government-provided translators for LEP parties at "critical phases" of litigation.¹⁶⁵ And although some federal courts have held that the Due Process Clause or Confrontation Clause of the U.S. Constitution requires language accommodation in some circumstances,¹⁶⁶ U.S. Supreme Court jurisprudence has generally limited the reach of judicially mandated language protections.¹⁶⁷

On the international level, democratic countries with linguistically diverse populations have employed language accommodation techniques in recent elections, indicating a loose awareness of the impor-

¹⁶³ For a description and critique of the accommodationist philosophy of the courts in dealing with LEP parties, see generally Rodríguez, *supra* note 17.

¹⁶⁴ Court Interpreters Act, 28 U.S.C. § 1827 (2000); see also FED. R. CRIM. P. 28 (authorizing courts to appoint interpreters of their own selection, either at state's or one or both parties' expense).

¹⁶⁵ Coltharp, *supra* note 42, at 185–86 (noting that the courts have limited the reach of the Interpreters Act, and stating that "[o]utside [the Act's] limited and somewhat unreliable provision for interpreters at 'critical phases' of court proceedings, language minority defendants are generally not entitled to interpreters").

¹⁶⁶ See *United States v. Martinez*, 616 F.2d 185, 188 (5th Cir. 1980) (acknowledging a due process interest in an interpreter); *United States v. Carrion*, 488 F.2d 12, 14 (1st Cir. 1973) (acknowledging a right to an interpreter under the Confrontation Clause when the defendant is indigent); *United States ex rel. Negron v. New York*, 434 F.2d 386, 389 (2d Cir. 1970) (holding defendant had a due process interest in an interpreter).

¹⁶⁷ See *Hernandez v. New York*, 500 U.S. 352, 370 (1991) (permitting prosecutors to strike potential jurors on the basis of their ability to speak a language other than English); *Perovich v. United States*, 205 U.S. 86, 91 (1907) (holding that the decision to provide interpreters is solely in the discretion of the trial court). State courts are not much different. See Rearick, *supra* note 58, at 556; see also *Jara v. Mun. Court*, 578 P.2d 94, 96–97 (Cal. 1978) (holding that California courts are not required under the federal constitution to appoint interpreters at public expense to assist indigent but represented litigants). As Daniel Rearick notes:

Few states have developed standardized interpreter certification programs like those found in federal courts; consequently, the quality of interpretation in state courts varies considerably. In North Carolina, for example, there are 175,000 Hispanics who do not speak proficient English, yet the state has no statutory, regulatory or constitutional entitlement to a foreign language interpreter. North Carolina is developing a state certification plan for interpreters in criminal, juvenile, and domestic abuse cases, but does not plan to use interpreters in general civil or administrative proceedings.

Rearick, *supra* note 58, at 556 (footnote omitted).

tance of such accommodations.¹⁶⁸ Countries with longstanding multilingual policies and citizenry, such as Finland¹⁶⁹ and Israel,¹⁷⁰ are required under law to provide all government materials, including election documents, in all recognized languages. In Israel, this requirement is poorly enforced.¹⁷¹ Canadian law, apart from producing all govern-

¹⁶⁸ While some "simply den[y] that there are linguistic minorities within a nation's borders," see Addis, *supra* note 10, at 729, 730-31 (noting France as an example of this denial), a handful of democracies have built accommodationist policies based on their obligations under the International Covenant on Civil and Political Rights (the "ICCPR"), a United Nations resolution that calls for the protection of the right of language minorities to "use their own language" in multi-ethnic nations, see International Convention on Civil and Political Rights art. 27, Dec. 19, 1966, 999 U.N.T.S. 171 ("In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."). Canada takes its obligations under the ICCPR very seriously, and its courts have found the provision to require bilingual education in Ontario. See Meyerhoff, *supra* note 17, at 952 (noting that the "Ontario Court of Appeal concluded that in light of section 27 [of the ICCPR] . . . the government [must] provide educational facilities tailored to linguistic minorities").

¹⁶⁹ See Anna Moyers, Note, *Linguistic Protection of the Indigenous Sami in Norway, Sweden, and Finland*, 15 TRANSNAT'L L. & CONTEMP. PROBS. 363, 378 (2005) (noting that "Finland's Constitution provides direct protection of the Sami language and those who speak it," and that "[w]hile admitting that Swedish and Finnish are the national languages of the country, this still provides a recognition of and respect for the Sami language"). Moyers describes Finland's extraordinary accommodations for its Sami population, even though the Swedish and Finnish languages are the official languages in the country, as based on the country's history of bilingualism:

With this history and system already in place, Finland has become accustomed to accommodating speakers of another language. The citizens are used to translations, to signs written in different languages, to neighbors with a distinct mother tongue, and to policies and representatives of the minority. This makes providing for and accommodating a third language seem much less of a concern and much less intrusive. In other words, if the Finns have already granted rights to one language minority, accommodating an additional minority language is not particularly burdensome.

Id. at 384.

¹⁷⁰ See Yuval Merin, *The Case Against Official Monolingualism: The Idiosyncrasies of Minority Language Rights in Israel and the United States*, 6 ILSA J. INT'L. & COMP. L. 1, 15-16 (1999-2000) (noting that under Article 82 of Israeli law, "a legal obligation exists to publish all official orders and forms of the government and all official announcements of the local authorities and municipalities in Arabic as well as in Hebrew," though compliance is rarely enforced).

¹⁷¹ See *id.* at 16. Merin writes:

Frequent violations . . . i.e., traffic signs, signs in public institutions, and street and road signs written in Hebrew and English but not in Arabic . . . exemplify the lack of implementation of Arabic as an official language. Even in areas populated by a majority of Arab citizens, most street and road signs are in Hebrew and English alone. Moreover, most government and public institutions use only Hebrew and English, ignoring the official status of Arabic.

ment documents in French and English,¹⁷² provides in the Canada Elections Act for elections officials to appoint a language interpreter "to assist the officer in communicating to an elector any information that is necessary to enable him or her to vote."¹⁷³ The United Kingdom's Electoral Commission goes further: the national government publishes all ballots and all election information for national issues in Welsh,¹⁷⁴ Bengali, Chinese, Urdu, Punjabi, and Gujarati.¹⁷⁵ And in Ireland (where immigrant citizens are a new and emerging demographic), although the government has not yet embraced an accommodationist approach for linguistic minority voters, political parties have recently provided translated election materials in a multitude of languages, ranging from Mandarin to Russian to Arabic, in order to boost support among immigrant populations for their causes.¹⁷⁶ This indicates that, in Ireland at least, the accommodationist approach is recognized as an important interest. One can predict that as immigrant citizens become a larger portion of the electorate, the Irish government will seek ways to accommodate officially those citizens in the election arena.

In each of the above arenas there is at least some consensus in support of the accommodation of LEP individuals.¹⁷⁷ But significantly, although equal access to areas such as education, employment, and health care is important, the Supreme Court has never held such access to be as fundamental as access to the ballot box. As much as the Court and Congress have deemed it important to provide access to accom-

Id. (footnotes omitted).

¹⁷² Official Languages Act, R.S.C., ch. 31 (1985). Under Canada's Official Languages Act, "French and English languages are the official languages of Canada," requiring all government documents to be translated into both languages. *Id.* pmbl.

¹⁷³ Canada Elections Act, 2000 S.C., ch. 9, § 156 (Can.) (stating that "a deputy returning officer may appoint and swear a language or sign language interpreter to assist the officer in communicating to an elector any information that is necessary to enable him or her to vote").

¹⁷⁴ THE ELECTORAL COMM'N, WELSH LANGUAGE SCHEME, http://www.electoralcommission.org.uk/files/dms/Englishversion_14390-10731_E_N_S_W_.pdf.

¹⁷⁵ See generally The Electoral Commission, <http://www.electoralcommission.org.uk> (last visited Feb. 13, 2007).

¹⁷⁶ See ABEL UGBA, EUROPEAN RESEARCH PROJECT POLITIS, ACTIVE CIVIC PARTICIPATION OF IMMIGRANTS IN IRELAND 27 (2005), available at <http://www.uni-oldenburg.de/politis-europe/download/Ireland.pdf>.

¹⁷⁷ See Bilingual Education Act, Pub. L. No. 90-247, tit. VII, 81 Stat. 783, 816, superseded by No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified in scattered sections of 20 U.S.C.); Court Interpreters Act, Pub. L. No. 95-539, 92 Stat. 2040 (codified as amended at 28 U.S.C. § 1827 (2000)); 1964 Civil Rights Act tit. VI, 42 U.S.C. §§ 2000d to 2000d-7 (2000 & Supp. III 2003) (education); 1964 Civil Rights Act tit. VII, 42 U.S.C. §§ 2000e to 2000e-17 (2000 & Supp. IV 2004) (employment).

modations to LEP citizens in the above arenas, there is an even greater need under our "one person, one vote" constitutional mandate to ensure equal access for this same group of citizens when casting their vote.

To the extent that there is disagreement over accommodationist policy in the United States in the above fields, it is most often over how far down the accommodation road, and in which direction, the government should travel.¹⁷⁸ The next Part details the extent to which the U.S. government and some state governments have provided election assistance for LEP citizens, and examines the effectiveness of the chosen approach.

II. THE SCOPE OF EXISTING LANGUAGE ACCOMMODATIONS IN THE ELECTORAL SYSTEM

The federal government's most significant attempt to date at protecting LEP voters is section 203 of the Voting Rights Act (the "Act").¹⁷⁹ Section 203 requires localities and states with high concentrations of Latino, Asian American, Native American, or Native Alaskan citizens to provide election materials in the native languages of those citi-

¹⁷⁸ For more discussion on how far down the road of accommodation the government should travel, see generally Rodríguez, *supra* note 17.

¹⁷⁹ Voting Rights Act § 203, 42 U.S.C.A. § 1973aa-1a (West 2001 & Supp. 2006). Section 203 as codified states in part:

(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. . . . 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.

(b) (1) Generally. Before August 6, 2032, no covered State or political subdivision shall provide voting materials only in the English language.

(2) (A) Generally. A State or political subdivision is . . . covered . . . based on . . . census data . . . that—(i) (I) more than 5 percent of the citizens of voting age of such State or political subdivision are members of a single language minority and are limited-English proficient; (II) more than 10,000 of the citizens of voting age of such political subdivision are members of a single language minority and are limited-English proficient; or (III) in the case of a political subdivision that contains all or any part of an Indian reservation, more than 5 percent of the American Indian or Alaska Native citizens of voting age within the Indian reservation are members of a single language minority and are limited-English proficient; and (ii) the illiteracy rate of the citizens in the language minority as a group is higher than the national illiteracy rate.

zens.¹⁸⁰ Congress added the provision to the Act after finding that LEP citizens belonging to these four groups were excluded from the electoral process due to a lack of educational opportunities.¹⁸¹ This lack of opportunity made it difficult for these LEP citizens to learn English and led to high illiteracy rates.¹⁸² The provision itself is temporary, intended to expire with the cessation of educational and other inequities facing Latino, Asian American, Native American, and Native Alaskan populations in the United States.¹⁸³ Congress most recently extended section 203 in July 2006 for twenty-five years, after making extensive findings indicating a continuing need for its protections.¹⁸⁴

Under section 203, any state or smaller political subdivision (such as a county or parish) must provide language assistance if over five percent *or* more than 10,000 of the voting age citizens in the jurisdiction are members of a single covered language minority group and collectively have an illiteracy rate higher than the national average.¹⁸⁵ The illiteracy rate is measured by the rate of the population over the age of

¹⁸⁰ *Id.* Currently, under section 203(e), the provision only applies to Latino, Asian American, Native Alaskan, and American Indian citizens. *Id.* § 1973aa-1a(e) ("For purposes of this section, the term 'language minorities' or 'language minority group' means persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage.").

¹⁸¹ *See id.* § 1973aa-1a.

¹⁸² *See id.*

¹⁸³ S. REP. NO. 94-295, at 34 (1975), as reprinted in 1975 U.S.C.A.N. 774, 800 (explaining that the language protections of section 203 would be temporary as they were "necessary to fill that hiatus until genuinely equal educational opportunities are afforded language minorities" through more permanent federal protections for bilingual education). Since its enactment, section 203 has been amended and reauthorized three times: for ten years in 1982 (Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified as amended at 42 U.S.C. § 1973 (2000))), for fifteen years in 1992 (Voting Rights Language Assistance Act of 1992, Pub. L. No. 102-344, 106 Stat. 921 (codified as amended at 42 U.S.C.A. § 1973aa-1a (West 2001 & Supp. 2006))), and most recently for twenty-five years in 2006 (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 (codified at U.S.C.A. §§ 1973a to 1973g, 1973j to 1973l, 1973aa-1a (West Supp. 2006))).

¹⁸⁴ *See* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006; *see also* *Hearing, supra* note 16, at 13-14 (testimony of Margaret Fung, Executive Director, AALDEF).

¹⁸⁵ *See* 42 U.S.C.A. § 1973aa-1a(b)(2)(A) (West 2001 & Supp. 2006); *see also* Bai, *supra* note 73, at 762 (noting that "[t]he threshold trigger figure for coverage was decided upon without an examination of the circumstances and the particular needs of Asian Pacific Americans" and that "the 5% trigger figure was lifted conveniently from lower court cases involving the disfranchisement of Spanish-speaking citizens by English-only elections").

twenty-five that has failed to complete the fifth grade.¹⁸⁶ As interpreted by the U.S. Census Bureau in 2000, section 203 accommodations currently extend to voters of the following descents: Hispanic, Chinese, Filipino, Japanese, Korean, Vietnamese, American Indian, and Native Alaskan.¹⁸⁷ The protections are not afforded to individuals of Haitian, Arab, or Russian descent, or any other non-English community outside of the aforementioned groups. Coverage is reexamined and altered every five years, under the direction of the U.S. Census Bureau.¹⁸⁸ If any covered state or political subdivision can show a federal district court that "the illiteracy rate of the applicable language minority group . . . is equal to or less than the national illiteracy rate," it can receive a declaratory judgment exempting it from coverage.¹⁸⁹

Section 203 was an expansion of another provision of the Voting Rights Act, section 4(e), which was enacted in 1965.¹⁹⁰ Section 4(e) prohibits discrimination against persons because of their "inability to read, write, understand, or interpret any matter in the English language," if they were educated through the sixth grade in an American school that delivered instruction in a language other than English.¹⁹¹

¹⁸⁶ 42 U.S.C.A. § 1973aa-1a(b)(3)(E) ("[T]he term 'illiteracy' means the failure to complete the 5th primary grade."); *see also* 28 C.F.R. § 55.6(b) (2006) ("[I]lliteracy means the failure to complete the fifth primary grade.").

¹⁸⁷ *See* 42 U.S.C.A. § 1973aa-1a. Two years after the completion of each decennial census, the Director of the Bureau of the Census publishes a revised list of areas covered under section 203. For the most recent list of covered areas, *see* Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 48871, 48871-77 (July 26, 2002).

¹⁸⁸ 42 U.S.C.A. § 1973aa-1a(b)(2)(A).

¹⁸⁹ *Id.* § 1973aa-1a(d).

¹⁹⁰ Voting Rights Act § 4(e), Pub. L. No. 89-110, 79 Stat. 437, 439 (codified as amended at 42 U.S.C. § 1973b(e) (2000)). In addition to section 203, section 4(f)4 provides permanent protections for certain language minorities. *See* Voting Rights Act § 4(f)(4), 42 U.S.C.A. § 1973b(f)(4) (West 2001 & Supp. 2006). The language minority requirements of section 4(f)(4) and section 203(c) are essentially identical; however, unlike section 4(f)(4), section 203(c) provides for a changing determination of coverage based on Census data, whereas protections provided by section 4(f)(4) are limited to language minorities present and recorded prior to the November 1, 1972 election. *See* 28 C.F.R. § 55.5 (discussing the coverage formula pursuant to section 4(f)(4)); *id.* § 55.8 (discussing the relationship between sections 4(f)(4) and 203(c)).

¹⁹¹ 42 U.S.C. § 1973b(e). Section 4(e) states:

1. Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.
2. No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any

Although the provision led the way for the passage of section 203 in 1975,¹⁹² it is generally interpreted to apply solely to citizens from Puerto Rico,¹⁹³ making section 203 the primary federal provision for requiring the availability of translated election materials to Latino, Asian American, Native American, and Native Alaskan citizens.¹⁹⁴

To be a covered jurisdiction under section 203 means generally that the state or, in most cases, the local county must fund and provide election materials and assistance in the language of the applicable minority group.¹⁹⁵ Beyond that, covered areas have a great deal of discretion as to how to comply with the provision.¹⁹⁶ Apart from a requirement to provide translated forms of any voting materials that the government entity provides in English,¹⁹⁷ jurisdictions are expected to

State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language

Id.

¹⁹² See Juan Cartagena, *Latinos and Section 5 of the Voting Rights Act: Beyond Black and White*, 18 NAT'L BLACK L.J. 201, 207, 209 (2004–05) (noting that in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the Court “unequivocally recognized the purpose of Section 4(e) as an exclusive protection for Puerto Rican voters,” but emphasizing that it paved the way for section 203 and “demonstrated the viability of creating comprehensive, bilingual alternatives to English-only electoral systems”).

¹⁹³ See *Katzenbach v. Morgan*, 384 U.S. 641, 652 (1966). The Supreme Court in *Morgan* noted:

4(e) may be viewed as a measure to secure for the Puerto Rican community residing in New York nondiscriminatory treatment by government—both in the imposition of voting qualifications and the provision or administration of governmental services, such as public schools, public housing and law enforcement. Section 4(e) may be readily seen as ‘plainly adapted’ to furthering these aims of the Equal Protection Clause. The practical effect of § 4(e) is to prohibit New York from denying the right to vote to large segments of its Puerto Rican community.

Id.

¹⁹⁴ As of July 22, 2002, over 335 jurisdictions were covered under section 203 based on Census figures from 2000: 220 jurisdictions were required to provide language assistance in Spanish and about 115 were required to provide assistance to Asian Americans, Alaskan Natives, or Native Americans. See Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. at 48,871–77.

¹⁹⁵ See 28 C.F.R. §§ 55.18–55.20 (2006).

¹⁹⁶ See *id.* §§ 55.11, 55.14(c) (discussing the discretion granted to jurisdictions covered under section 203).

¹⁹⁷ 42 U.S.C.A. § 1973aa-1a(c) (West 2001 & Supp. 2006). Congress defined voting materials as “registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots.” *Id.* § 1973aa-1a(b)(3)(A). Examples given in the federal regulations include machine ballots, sample ballots, affidavit

take reasonable steps to provide materials and assistance in a way that allows members of the applicable language group to be informed of and participate in election activities.¹⁹⁸ Jurisdictions may opt, though are not required, to use trained interpreters at poll sites¹⁹⁹ and to "target" their assistance to certain areas or precincts for coverage.²⁰⁰ Federal regulations encourage jurisdictions to take appropriate steps to publicize the availability of translated materials, including the display of notices in the minority language, announcements over minority language radio or television stations, publication of notices in minority language newspapers, and direct contact with language minority group organizations.²⁰¹

Due to the flexibility of these guidelines, methods and costs of compliance vary among jurisdictions.²⁰² The loose guidelines also lead

ballots, petitions, notifications, announcements, and other informational materials concerning the opportunity to register, the deadline for voter registration, upcoming elections, and absentee voting. 28 C.F.R. §§ 55.15, 55.19.

¹⁹⁸ 28 C.F.R. § 55.2(b)(1), (2). If the predominant language in the covered area is historically unwritten, as in the case of many Alaskan Native or American Indian tribal jurisdictions, the state or political subdivision only need furnish oral instructions, assistance, or other information relating to registration and voting. 42 U.S.C.A. § 1973aa-1a(c). The statute states:

[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.

Id.

¹⁹⁹ See 28 C.F.R. §§ 55.18(d), 55.20.

²⁰⁰ *Id.* § 55.17 ("[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.").

²⁰¹ *Id.* § 55.18(e).

²⁰² An evaluation of 292 of the 422 covered jurisdictions in the 1996 general election found that some areas provide only written materials, Alaska provides only oral assistance, and others provide both. See U.S. GEN. ACCOUNTING OFFICE, BILINGUAL VOTING ASSISTANCE: ASSISTANCE PROVIDED AND COSTS 8 fig.3 (1997), available at <http://www.gao.gov/archive/1997/gg97081.pdf>. In total, 258 jurisdictions that responded to the GAO survey reported providing written assistance, and 231 reported providing bilingual ballots. *Id.* at 9. Several counties reportedly incurred low costs through the use of bilingual volunteers, while Los Angeles County, California, claimed to provide written and oral bilingual assistance in Spanish, Chinese, Vietnamese, Japanese, and Tagalog at over 5600 polling places at costs exceeding \$1.1 million. *Id.* at 3. In New York City, Spanish and Chinese written and oral bilingual voting assistance was available at 788 of the 1280 polling places for a total cost of \$586,400—or approximately 4% of the city's entire election budget, while in Suffolk County, New York, Spanish written assistance totaled only \$1000, over 50% of the county's overall election costs. *Id.* at 20–21 tbl.2.

to poor compliance²⁰³ or even noncompliance in some areas.²⁰⁴ In addition to discrimination by poll workers,²⁰⁵ watchdog groups have occasionally found translated materials to be poorly or incorrectly translated,²⁰⁶ and oral language assistance to be unavailable or nonexistent.²⁰⁷ Where bilingual interpreters are provided, they are often poorly

²⁰³ Pei-te Lien, *The Participation of Asian Americans in U.S. Elections: Comparing Elite and Mass Patterns in Hawaii and Mainland States*, 8 ASIAN PAC. AM. L.J. 55, 90 (2002) (citing a report on the 1996 general elections that concluded "some jurisdictions [covered under section 203] were not in full compliance with the law," and that "[p]roblems existed in the recruiting, training, placement of election workers, and advertising the availability of language assistance").

²⁰⁴ See Magpantay, *supra* note 11, at 37–48 (providing a detailed description of the lack of compliance among covered jurisdictions); see also ASIAN AM. LEGAL DEF. & EDUC. FUND, ASIAN AMERICAN ACCESS TO DEMOCRACY IN THE 2003 ELECTIONS IN NYC: AN ASSESSMENT OF THE NEW YORK CITY BOARD OF ELECTIONS COMPLIANCE WITH THE LANGUAGE ASSISTANCE PROVISIONS OF THE VOTING RIGHTS ACT 10 (2004) (detailing the difficulty in obtaining sufficient numbers of competent interpreters on election day); ASIAN AM. LEGAL DEF. & EDUC. FUND, ASIAN AMERICAN ACCESS TO DEMOCRACY IN THE NYC 2001 ELECTIONS: AN ASSESSMENT OF THE NYC BOARD OF ELECTIONS COMPLIANCE WITH THE LANGUAGE ASSISTANCE PROVISIONS OF THE VOTING RIGHTS ACT 1 (2002) [hereinafter AALDEF 2001 ELECTIONS ASSESSMENT] (recounting numerous obstacles standing in the face of Asian American voters' ability to vote); NAT'L ASIAN PAC. AM. LEGAL CONSORTIUM, ACCESS TO DEMOCRACY: LANGUAGE ASSISTANCE AND SECTION 203 OF THE VOTING RIGHTS ACT 2 (2000) (describing how "full local compliance with Section 203 has not yet been achieved").

²⁰⁵ See *supra* notes 80–86 and accompanying text; see also Magpantay & Yu, *supra* note 59, at 5 (citing instances where "poll workers racially profiled Asian American voters and required them to prove their identities, verify their addresses, and sometimes even produce naturalization certificates"). Magpantay and Yu describe some specific instances of discrimination by poll workers:

AALDEF's poll monitoring efforts have also uncovered inappropriate or racially disparaging remarks made by elected officials and other voters. In one such instance, several white voters at a poll site in Jackson Heights, Queens, NY yelled at Asian Americans, saying: "You all are turning this country into a third-world waste dump!" A Democratic Party representative came to a poll site in Fort Lee, NJ and publicly claimed that there were no legitimate Korean American voters in the district and that the Korean American voters coming to vote were not "from here." In Edison, NJ, voters made a litany of racist comments about how Asian Americans were not, or should not be, American citizens.

Magpantay & Yu, *supra* note 59, at 4 (footnotes omitted).

²⁰⁶ See Magpantay, *supra* note 11, at 37.

²⁰⁷ See, e.g., Aoki, *supra* note 8, at 45; Feng et al., *supra* note 130, at 867 ("A recurrent problem has been English-speaking and reading ability and the availability of multilingual voting materials and multilingual pollworkers to answer questions."); Magpantay, *supra* note 59, at 38 n.63 (citing a letter written to the executive director of the New York City Board of Elections detailing missing materials during the 2001 city elections); *id.* at 38 n.64 ("During both [of] the 2000 NYC Primary Elections, twenty-nine Election Districts at sixteen sites were missing specific Chinese language materials, and in the General Elections, forty Election Districts at eighteen sites were missing specific Chinese language materi-

trained²⁰⁸ or speak the wrong language or dialect: Mandarin interpreters are offered where voters speak Cantonese,²⁰⁹ or Korean interpreters are provided where most voters are of Chinese descent.²¹⁰

One infamous incident of poor compliance with section 203 occurred in New York City during the general election of 2000.²¹¹ On election day in Queens, Chinese language ballots were translated incorrectly at six voting sites, so that Democratic candidates were labeled as Republican, and Republican candidates were labeled as Democrats.²¹² During that same election, officials in Chinatown in Lower Manhattan scrambled to replace translated ballots that asked the voter to select five candidates for state supreme court justices when they were only permitted to select three.²¹³

Reinforcing these problems is the fact that typically the Department of Justice has been slow to investigate issues of poor compliance or noncompliance.²¹⁴ In addition, private lawsuits brought to force covered jurisdictions into compliance require a great deal of detailed evidence of discrimination and participation barriers, and for that reason

als."). Aoki describes an incident where the AALDEF asked the New York City Board of Elections to provide ballots with the candidates' names translated into Chinese:

Election officials initially refused to supply the bilingual ballots, claiming there was not insufficient [sic] room for translations of the names. AALDEF obtained a U.S. Department of Justice ruling that such noncompliance was in violation of the Voting Rights Act because, "a candidate's name is one of the most important items of information sought by voters when casting a ballot."

Aoki, *supra* note 8, at 45.

²⁰⁸ Magpantay & Yu, *supra* note 59, at 6 (noting that in 2004, "[p]oorly trained and inefficient poll workers caused chaos in several poll sites"); Weinberg & Utrecht, *supra* note 81, at 422 ("Even after the Voting Rights Act was amended in 1975 to require that areas designated under a formula must provide information and ballots in languages other than English, inadequate training of polling place workers continued to disadvantage minority language voters.").

²⁰⁹ Magpantay, *supra* note 59, at 39 (citing AALDEF 2001 ELECTIONS ASSESSMENT, *supra* note 204, at 8-9).

²¹⁰ *Id.* ("In the 2004 elections, a Chinese American voter who asked for assistance was directed to a Korean interpreter.").

²¹¹ Editorial, *Bungled Ballots in Chinatown*, N.Y. TIMES, Jan. 1, 2001, at A1.

²¹² *Id.*

²¹³ *Id.* (noting that "[t]he mistakes were corrected, but not before uncorrected absentee ballots were sent out"). If any voter did select five candidates, their vote would be considered an "over vote" and would be discarded.

²¹⁴ See Magpantay, *supra* note 59, at 39 ("Section 203 is primarily enforced by the Department of Justice so voters are relegated to report violations solely to the Department. It is in the Department's discretion whether and how to act on these complaints.").

are often too expensive for private litigants or community groups to pursue.²¹⁵

Apart from poor compliance or noncompliance, other inadequacies of the language accommodation provided in section 203 surround its coverage formula—namely, which language groups get coverage, and how many Latino, Asian American, Native Alaskan, or American Indian citizens must be present in order to trigger coverage. Apart from the substantive language coverage, the fact that section 203 only applies to areas with a certain number of LEP citizens of a *single* language is a problem as well, particularly for Asian Americans.²¹⁶ Because citizens of Asian descent speak a variety of languages and dialects, collectively there may be over five percent or 10,000 voting age citizens of Asian descent in a particular jurisdiction, but section 203 coverage is only triggered when a single language group, such as citizens of Korean or Japanese descent, independently meets the numerical threshold.²¹⁷ As a result, following the 2000 census coverage determinations there were several localities with large Asian American populations that were not covered under section 203's "individual language" calculation.²¹⁸

²¹⁵ *Id.* ("The Voting Rights Act has its own private right of action, but litigating under the Act can sometimes be prohibitively expensive."); *id.* at 39 n.73 ("Lawsuits under the Voting Rights Act require detailed and widespread evidence of voting barriers. Such barriers must be reported by location (e.g., neighborhood, county), poll site and election.").

²¹⁶ See Bai, *supra* note 73, at 761 ("The coverage formula that triggers protection for members of a single language minority provides only minimal protection for non-English speaking Asian Pacific Americans.").

²¹⁷ *Id.*; Chung, *supra* note 26, at 170–71 ("APAs have had difficulty qualifying as language minorities under Section 203. Where APAs may comprise five percent of the voting age population, the composition of the APA community may include a number of language minorities, each falling short of the five percent threshold."). Bai writes:

[Section 203] inadequacies are exacerbated in the case of Asian Pacific Americans because of the diverse languages spoken by the 'generic' Asian Pacific American group. Thus, although Asian Pacific Americans as a group may form more than five percent of the voting age population in a jurisdiction, it is extremely difficult for one language minority (i.e., Chinese, Japanese, or Korean) to constitute five percent of the relevant population.

Bai, *supra* note 73, at 761.

²¹⁸ See Magpantay, *supra* note 11, at 53–54. After 2000, localities not covered under section 203 with large Asian American populations include Los Angeles (Khmer, Thai, Samoan); Honolulu (Korean); Hawai'i Island (Filipino); Bergen, New Jersey (Korean); Middlesex, New Jersey (Chinese); Boston (Chinese); Dorchester, Massachusetts (Vietnamese); Lowell, Massachusetts (Khmer); and Philadelphia (Chinese). In addition, although currently only nine languages of Asian descent are covered by section 203 (Japanese, Chinese, Korean, Vietnamese, Filipino, Asian Indian, Hawaiian, Samoan, and Guamanian), there are "at least seventeen Asian ethnic groups and eight Pacific Islander ethnic groups in the

Various community organizations, including the American Bar Association and the Asian American Legal Defense Fund, have issued proposals to address these specific concerns.²¹⁹ The suggestions range from Congress reducing the numerical cutoff for the coverage formula from 10,000 to anywhere between 7500²²⁰ and 1000,²²¹ studying the expansion of section 203 to include more language minority groups,²²² and doing away with the illiteracy component of the coverage formula.²²³ Constituency organizations formed to represent Asian American or Latino voters proposed these suggestions to Congress during the 2006 reauthorization of the Voting Rights Act.²²⁴ Unlike the amendments that these and other community groups and advocates proposed,²²⁵ the section 203 Congress voted to renew contained

United States." Chung, *supra* note 26, at 171 n.53; see also Magpantay, *supra* note 59, at 40. Magpantay writes:

Many states and localities have large and growing Asian American populations that are not covered under Section 203. For example, the Asian American population in New Jersey has doubled since 1990, numbering over half a million. But there is no Asian language covered under Section 203 in any county in New Jersey. As a result, many Asian Americans with limited-English proficiency in New Jersey have great difficulty participating in the political process.

Magpantay, *supra* note 59, at 40 (footnotes omitted).

²¹⁹ Magpantay, *supra* note 11, at 48 (arguing, first, that local jurisdictions must better comply with section 203 and correct deficiencies, second, that section 203 should be expanded to include more languages and more jurisdictions, and third, that Congress should strengthen section 203); see also AM. BAR ASS'N, REPORT FROM THE HOUSE OF DELEGATES, STANDING COMMITTEE ON ELECTION LAW SECTION OF STATE AND LOCAL GOVERNMENT LAW SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES GOVERNMENT AND PUBLIC SECTOR LAWYERS DIVISION 1-2 (2006) [hereinafter ABA REPORT] (declaring that the ABA urges Congress to lower the numerical trigger from 10,000 to 5000 and to require new coverage determination every five years, instead of every ten years).

²²⁰ Hearing, *supra* note 16, at 14 (testimony of Margaret Fung, Executive Director, AALDEF).

²²¹ Guerra, *supra* note 20, at 1436 (recommending that "instead of requiring multilingual elections in areas that meet the five percent requirement, the Act should be triggered in areas with . . . 1000 non-English speakers").

²²² Benson, *supra* note 101; see ABA REPORT, *supra* note 219, at 1-2.

²²³ Magpantay, *supra* note 11, at 55 (noting that because section 203 "does not require a local jurisdiction to provide language assistance unless the illiteracy rate of the relevant language minority community is less than that of the national average," many Asian American communities do not receive necessary bilingual assistance).

²²⁴ See Hearing, *supra* note 16, at 14 (testimony of Margaret Fung, Executive Director, AALDEF).

²²⁵ See, e.g., Jocelyn Benson, *Turning Lemons into Lemonade: Making Georgia v. Ashcroft the Mobile v. Bolden of 2007*, 39 HARV. C.R.-C.L. L. REV. 485, 508-10 (2004); American Civil Liberties Union, *Renewing and Restoring the '65 Act: Overview of Proposed Legislative Changes*, <http://www.votingrights.org/advocacy/?resourceID=4> (last visited Feb. 8, 2007) (calling on Congress to restore section 5 to "repair[] the damage done by two nar-

only one change: coverage determinations are now made every five years, based on the American Community Survey.²²⁶

These remaining issues—the lack of compliance, problems with how coverage is determined, and the many LEP citizens who fall through the gaps and fail to receive any accommodation—raise significant concerns about the efficacy of section 203 as the primary accommodation for LEP citizens in electoral politics. Indeed, while the presence of the provision sends the signal to some that the federal government is providing adequate accommodations and protections for LEP voters, simultaneously many of the voters who may need language accommodations are left out of coverage.²²⁷

A. Other Federal Protections: Section 208, the Help America Vote Act, and Court Orders

Apart from section 203, the Voting Rights Act provides an additional avenue for language accommodation via section 208.²²⁸ Section 208 applies nationwide and permits any voter in need of any type of aid or accommodation to be accompanied by another individual who is able to provide such assistance.²²⁹ The most frequent problem with

rowly decided U.S. Supreme Court decisions which fundamentally weaken the administration of Section 5: *Reno v. Bossier Parish Sch. Bd.* (2000) and *Georgia v. Ashcroft* (2003)"); cf. *Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006* § 2(b)(6), Pub. L. 109-246, 120 Stat. 577 (codified at 42 U.S.C.A. § 973 (West Supp. 2006)) ("The effectiveness of the Voting Rights Act of 1965 has been significantly weakened by the United States Supreme Court decisions in *Reno v. Bossier Parish II* and *Georgia v. Ashcroft*, which have misconstrued Congress' original intent in enacting the Voting Rights Act of 1965 and narrowed the protections afforded by section 5 of such Act.").

²²⁶ See *Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006* § 8 ("Section 203(b)(2)(A) of the Voting Rights Act of 1965 (42 U.S.C. [§] 1973aa-1a(b)(2)(A)) is amended by striking 'census data' and inserting 'the 2010 American Community Survey census data and subsequent American Community Survey data in 5-year increments, or comparable census data.'").

²²⁷ Guerra, *supra* note 20, at 1419 ("These multilingual election provisions of the Voting Rights Act, however, do not sufficiently guarantee non-English speaking citizens' right to vote. The language of the statute, as well as its implementation, have limited the reach of this federal statutory right."); *id.* at 1420 (referring to "the inadequacies of the Voting Rights Act as the sole guarantor of non-English speakers' right to vote").

²²⁸ 42 U.S.C. § 1973aa-6 (2000). The statute reads: "Any 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." *Id.*

²²⁹ *Id.*

this protection, however, is that it is frequently misapplied, ignored,²³⁰ or blatantly violated by local election officials.²³¹

These issues of misapplication, however, are easily remedied by efforts to ensure that local election officials are aware of the availability of protections under section 208. A greater concern is the burden that the provision itself places on the voter, who is required to access this "accommodation" by providing his or her own form of assistance.²³² The law thus assumes that the voter needing assistance has access to available family members or friends to assist in the voting process.²³³ The law further assumes that voters needing assistance are also comfortable with any extra attention they receive when they utilize or request extra assistance.²³⁴ If these assumptions are incorrect, the actual effect of the provision may be to produce a chilling effect on voters,

²³⁰ JAMES THOMAS TUCKER & RODOLFO ESPINO, MINORITY LANGUAGE ASSISTANCE PRACTICES IN PUBLIC ELECTIONS: EXECUTIVE SUMMARY 23 (2006), available at <http://renewthevra.civilrights.org/203execsum.pdf> (noting a finding of their study that approximately ninety percent of reporting jurisdictions reported using voter assistance practices that do not comply with section 208).

²³¹ See, e.g., *United States v. Berks County*, 277 F. Supp. 2d 570, 580 (E.D. Pa. 2003) (noting that election officials violated section 208 when they denied Spanish-speaking voters the statutory right to bring their assistant of choice into the voting booth); Michael Casey, *Were Interpreters Chased Out?*, RECORD (Bergen County, N.J.), Apr. 21, 2000, at L5 (reporting an incident where, in violation of section 208, white poll workers in Clifton, New Jersey yelled at two Spanish translators offering assistance to Latino voters and forced them to leave the polling site).

²³² See 42 U.S.C. § 1973aa-6.

²³³ For discussion of how the provision creates a similar burden for disabled voters, see Thomas H. Earle & Kristi M. Bushner, *Effective Participation or Exclusion: The Voting Rights of People with Disabilities*, 11 TEMP. POL. & CIV. RTS. L. REV. 327, 330 (2002). Earle and Bushner note:

Asking for assistance imposes a burden on the disabled voter to locate and verbalize the need for assistance and, depending on the jurisdiction, may require submission of a declaration describing and disclosing the nature of his or her disability. This can create an embarrassing or uncomfortable situation and can also leave the voter with uncertainty as to whether [his or her] ballot was cast correctly. Depending on the jurisdiction, this may also mean that the identities of disabled voters who vote with assistance and the person(s) assisting are kept on a separate list. All these considerations transform the simple and constitutionally guaranteed right to vote into an intrusive and burdensome task.

Id. (footnotes omitted).

²³⁴ *Id.* at 328 (noting that although "[e]lection officials, poll workers, relatives and friends are often present to help [disabled voters] cast their vote," nevertheless "[t]he bad news is that . . . there is a loss of anonymity, independence, [and] dignity," as well as "acute embarrassment associated with the extra attention assistance from others often brings").

who may find it easier to stay home than to exert the additional effort of finding someone to assist them in casting their ballot.²³⁵

The Help America Vote Act of 2002 ("HAVA") also provides support for language accommodations for all LEP voters.²³⁶ HAVA provides federal funds to assist states in improving their systems of election administration. It lists the provision of language assistance as one of a handful of changes the state can make with the federal funds.²³⁷ In addition to arguably mandating that any state receiving funds must also be in full compliance with section 203,²³⁸ HAVA created the Election Assistance Commission. The Election Assistance Commission is a quasi agency instructed primarily to study various issues relating to election reform, including improving "accessibility of voting, registration, polling places, and voting equipment to all voters, including . . . Native American or Alaska Native citizens, and voters with limited proficiency in the English language."²³⁹ Although many of those stud-

²³⁵ *Id.* Earle and Bushner write:

Asking for and receiving help is not often convenient and may mean that the disabled voter cannot vote quietly and discretely. All this often results in the choice by voters with disabilities to stay home and not vote . . . rather than surmount the many obstacles they face when attempting to vote at physically inaccessible polling places or when using inaccessible voting machines.

Id.

²³⁶ Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified at 42 U.S.C. §§ 15301 to 15545 (Supp. III 2003)). The Act states in part that states must use federal funding provided under HAVA to, among other things, "[improve] the accessibility and quantity of polling places, including providing . . . assistance to Native Americans, Alaska Native citizens, and to individuals with limited proficiency in the English language." *Id.* § 15301(b)(2)(G).

²³⁷ *Id.*; see also Magpanatay, *supra* note 11, at 52-53 ("Written translations can be prohibitively expensive. Due to these high costs, elections officials have been unwilling to provide the necessary discretionary money to provide written language assistance. In 2002, Congress enacted the Help American Vote Act (HAVA) which can help pay for these costs."). But see Magpanatay, *supra* note 59, at 40. Magpanatay cautions:

States have broad discretion to use the money for language assistance or to use these funds for other purposes, such as purchasing new voting machines or developing the statewide voter databases required under HAVA. Nevertheless, the federal government will pay for translated voting materials and interpreters at the polls, if states and localities seek funding for these purposes. Unfortunately, states are unlikely to do this on their own volition.

Magpanatay, *supra* note 59, at 40 (footnotes omitted).

²³⁸ 42 U.S.C. § 15481(a)(4); see also Magpanatay, *supra* note 59, at 37 ("One can argue that HAVA mandates language assistance through the incorporation of [section 203]. Subsequently, HAVA obligates assistance in languages and jurisdictions already covered under the Voting Rights Act.").

²³⁹ 42 U.S.C. § 15381(b)(5).

ies have yet to be performed,²⁴⁰ and although HAVA makes no specific improvements to sections 203 or 208,²⁴¹ it is significant that HAVA explicitly and repeatedly encourages states to provide and expand their language assistance provisions voluntarily.²⁴²

One final avenue of federal protections for LEP citizens comes from the courts in the form of sweeping consent decrees. Such decrees typically follow a particularly egregious violation of section 203 or incident of discrimination against LEP voters,²⁴³ and tend to mandate various forms of accommodation.²⁴⁴ Some are sought by private citizens,²⁴⁵ others by the Department of Justice.²⁴⁶ Some are sought to force section 203 jurisdictions into compliance,²⁴⁷ and others are sought in response to blatantly discriminatory acts aimed at LEP voters.²⁴⁸ The cases typically require a great deal of time, resources, and

²⁴⁰ A list of studies and publications on the Election Administration Commission web-site includes only two best practices reports and annual reports detailing the Commission's grant program. See Election Assistance Comm'n, EAC Publications, http://www.eac.gov/eac_pub.asp?format=none (last visited Feb. 8, 2007).

²⁴¹ Magpantay, *supra* note 59, at 39 ("Although HAVA does not add new counties or languages for required coverage, its implementation can address deficiencies at poll sites by underscoring the need for language assistance. . . . In conjunction with Section 203, HAVA can ensure the availability and posting of translated signs.").

²⁴² Magpantay, *supra* note 11, at 44 (noting that "[a]lthough HAVA itself does not expand language assistance already required under the Voting Rights Act, HAVA can be a tool for states to voluntarily provide or expand language assistance so many more Asian Americans can access the vote").

²⁴³ See Voting Rights Act § 2, 42 U.S.C.A. § 1973(a) (West 2001 & Supp. 2006).

²⁴⁴ See, e.g., Order at 1-2, *United States v. City of Boston*, No. 05-11598-WGY (D. Mass. Oct. 18, 2005); *Berks County*, 277 F. Supp. 2d at 583-85; Consent Order and Decree at 1-12, *United States v. City of Hamtramck*, No. 00-73541 (E.D. Mich. Aug. 7, 2000).

²⁴⁵ See, e.g., *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 360 & n.14 (S.D.N.Y. 2004) (describing plaintiffs as private citizens groups challenging New York's redistricting plan); *Coal. for Educ. in Dist. One v. Bd. of Elections*, 370 F. Supp. 42, 44 (S.D.N.Y. 1974) (describing plaintiffs as "predominantly black, Puerto Rican and Chinese residents of Community School District One in Manhattan . . . and the Coalition for Education in District One, an unincorporated association of parents, teachers and community residents").

²⁴⁶ See, e.g., *Berks County*, 277 F. Supp. 2d at 573 (noting that the complaint challenging the county's elections policies as discriminatory was filed by the United States); Complaint at 1, *United States v. Passaic City and Passaic County*, No. 99-2544 (D.N.J. June 4, 1999) ("The United States of America, plaintiff herein, alleges . . . [t]his is an action to protect the voting rights of Hispanic citizens, including those with limited-English proficiency.").

²⁴⁷ See Complaint at 4-5, *United States v. City of Springfield*, No. 06-301-23-MAP (D. Mass. Aug. 2, 2006) (alleging that the city failed to provide an adequate pool of bilingual workers to serve its Spanish-speaking voters, in violation of section 203, and that poll workers interfered with the ability of voters to receive assistance from persons of their choice, in violation of section 208).

²⁴⁸ See Consent Order and Decree at 1, *Hamtramck*, No. 00-73541; Complaint at 4-6, *City of Boston*, No. 05-11598-WGY; see also Magpantay, *supra* note 59, at 47 (emphasizing that although courts are an essential element in providing protections for LEP citizens, most

funds,²⁴⁹ which are in limited supply for many LEP citizens and communities.²⁵⁰ And significantly, because the filing of a lawsuit is inherently remedial, seeking protection in the courts is only available as a strategy once a wrong is committed and once an election is over.²⁵¹

The ultimate goal of seeking language protections via lawsuits in federal court is to obtain a court order or consent decree mandating some sort of language assistance or accommodation for the affected LEP community.²⁵² The consent decrees or court orders typically will mandate that the offending jurisdiction provide bilingual poll workers,²⁵³ translated election materials,²⁵⁴ or procedures for the education and registration of LEP voters.²⁵⁵ They can include details as minute as a listing of administrative personnel the jurisdiction must hire to perform a list of required duties.²⁵⁶ As detailed as they may be, however, and as much as they may involve jurisdiction leaders in constructing a

successful cases can only be brought in reaction to "severe, egregious, and widespread" instances of discrimination).

²⁴⁹ See Magpantay, *supra* note 59, at 39 (noting that "litigating under the [language provisions of the Voting Rights] Act can sometimes be prohibitively expensive" because the litigation requires detailed evidence of electoral barriers reported by location and election).

²⁵⁰ See *id.* at 47.

²⁵¹ *Id.* (noting that although courts "have historically played a critical role in guaranteeing the voting rights of racial and ethnic minorities," litigation seeking to assert rights "usually structures relief in terms of remedying past injustices").

²⁵² Weinberg & Utrecht, *supra* note 81, at 422 (describing how the Department of Justice employs reports from federal observers to "obtain consent decrees [from federal courts] that set out specific steps that the counties would take to effectively provide and translate election information").

²⁵³ See Consent Order and Decree at 9-10, *Hamtramck*, No. 00-73541.

²⁵⁴ See Memorandum of Agreement and Settlement at 3, *City of Boston*, No. 05-11598-WGY.

²⁵⁵ Weinberg & Utrecht, *supra* note 81, at 422.

²⁵⁶ *Id.* at 423. Weinberg and Utrecht describe the court order in *United States v. Cibola County*, No. 93-1134 (D.N.M. Apr. 21, 1994):

[It] is forty-four pages long, thirty-three pages of which is a Native-American Election Information Program [that requires the county to hire at least three coordinators to run the program]. . . . These coordinators have to be bilingual . . . they are to be hired only after the county consults with the tribes, they are to be trained in all aspects of the election process, they are to attend and make presentations at chapter and tribal council meetings, and perform numerous, specifically described functions that would provide election information to the Native-American citizens of Cibola County.

Weinberg & Utrecht, *supra* note 81, at 423.

remedy, court orders and consent decrees are by no means a panacea.²⁵⁷

A federal court order issued in 2000 mandating various protections for LEP citizens in Hamtramck, Michigan illustrates both the extent of the discrimination that LEP voters must endure before a case is brought and the difficulty in enforcing consent decrees once they are obtained.²⁵⁸ In 2000, the U.S. Department of Justice (the "DOJ") sued Hamtramck, Michigan, a historically Polish town near Detroit,²⁵⁹ after citizens complained to the DOJ about racially discriminatory treatment and interrogations directed toward voters of Arabic and Bangladeshi descent during a 1999 city election.²⁶⁰ At issue were the actions of members of the group named Citizens for a Better Hamtramck ("CCBH"), which had registered with the city clerk to provide challengers for the city elections in an effort to keep the election "pure."²⁶¹

During the 1999 city election, CCBH placed challengers in over half of Hamtramck's polling locations,²⁶² many of whom challenged the citizenship of over forty dark-skinned voters with Arabic-sounding surnames.²⁶³ CCBH members required each challenged voter to take

²⁵⁷ See Weinberg & Utrecht, *supra* note 81, at 423 ("It was and remains difficult . . . to compel obdurate county clerks and other county election administrators to perform the myriad election-connected functions in a way that meets the requirements of the court orders.").

²⁵⁸ Magpantay, *supra* note 59, at 48 ("Hamtramck is one of the only cases where Asian language voting notices had been mandated by a court. But to get to this remedy, the minority group had to endure exceptional indignities and disenfranchisement.").

²⁵⁹ *Id.* at 47.

²⁶⁰ See generally Complaint, *Hamtramck*, No. 00-73541. According to some accounts, Arab American voters faced intimidation at the polls in years prior to 1999 as well. See Joseph Hong, *Discrimination Allegations Bring Election Scrutiny*, ASIAN WEEK, Nov. 17, 2000, available at http://www.asianweek.com/2000_11_17/news2_votediscrim_michigan.html. Joseph Hong writes:

Some Hamtramck officials believe that racial tensions flared as early as 1997 when allegations were made that some members of the opposition party, who took on a mayoral challenger, threatened to intimidate Arab American[s] and South Asian[s] from voting. The contentious mayoral race between then-incumbent Robert Kozaren and Gary Zych had some poll workers challenging South Asian and Arab Americans, allegedly to deter them from supporting Zych at the polls.

Id.

²⁶¹ This stated "purity" goal was listed in the group's application to the local clerk. Consent Order and Decree at 3, *Hamtramck*, No. 00-73541.

²⁶² Hong, *supra* note 260 (noting that CCBH challengers were in nineteen of thirty-six polling locations throughout Hamtramck).

²⁶³ Complaint at 1, *Hamtramck*, No. 00-73541 ("This action arises out of the general election that took place in Hamtramck, Michigan, on November 2, 1999. In that election,

an oath of citizenship, in English, in order to vote,²⁶⁴ even if the challenged voter was able to produce an American passport.²⁶⁵ One voter of Yemeni descent, who was wearing a traditional Muslim headscarf, was asked to take an oath of citizenship despite the fact that she and her husband had lived in Hamtramck for fourteen years.²⁶⁶ As word of the discriminatory challenges spread throughout the Arab and Bangladeshi communities in Hamtramck, many more voters decided not to vote, expecting that they too would be "subjected to the embarrassment of being challenged as non-citizens."²⁶⁷

Because Hamtramck is not a covered jurisdiction under section 203,²⁶⁸ the DOJ responded to the incidents by filing a claim under section 2 of the Voting Rights Act²⁶⁹ and the Fourteenth and Fifteenth Amendments of the U.S. Constitution.²⁷⁰ The complaint alleged that

more than forty dark skinned or Arab American citizens were required to take an oath as a condition to voting, a requirement that was not imposed on white voters.".)

²⁶⁴ *Id.*

²⁶⁵ Consent Order and Decree at 4, *Hamtramck*, No. 00-73541. The Order and Decree stated:

Some voters were challenged before they signed their applications to vote. Other voters were challenged after they had signed their applications and their names had been announced. The challenged voters had dark skin and distinctly Arabic names, such as Mohamed, Ahmed, and Ali. The challengers did not appear to possess or consult any papers or lists to determine who to challenge.

Id.

²⁶⁶ Christopher M. Singer, *Activists Face Charges in Hamtramck Voter Intimidation Case*, DETROIT NEWS, Mar. 22, 2000, at 8S (noting also that one member of CCBH admitted during a Hamtramck City Council meeting that "she challenged a voter she knew personally and knew to be an American citizen"); see also *Voters Claim Harassment: Hamtramck Mayor's Opponents Question Muslims, They Say*, DETROIT NEWS, Nov. 3, 1999, at 1C (noting that one Bangladeshi American who had immigrated to the United States twenty-six years earlier and lived in Hamtramck for nearly a decade was stopped when he tried to vote in a polling site located in the city's heavily Arab southern region); Anne-Marie Cusac, *Counted Out*, ALTERNET.ORG, Sept. 20, 2004, <http://www.alternet.org/story/19917> (describing voters standing in line to vote being challenged by CCBH members and asked to "step aside and say an oath of citizenship, even if they were capable of producing a U.S. passport").

²⁶⁷ Complaint at 4, *Hamtramck*, No. 00-73541.

²⁶⁸ Arabic is not a covered language under section 203, see 42 U.S.C.A. § 1973aa-1a (West 2001 & Supp. 2006), and although Bengali is a covered language, the Bangladeshi community in Hamtramck, approximately 5000 citizens, failed to meet the numerical threshold for coverage set under the 2000 U.S. Census, see *Voters Claim Harassment*, *supra* note 266.

²⁶⁹ 42 U.S.C.A. § 1973(a) (applying prerequisites to voting in a manner that results in denial or abridgement of the right to vote on account of race or color).

²⁷⁰ Complaint at 5-6, *Hamtramck*, No. 00-73541.

although the State of Michigan and the Hamtramck city clerk's office were informed of the challengers' discriminatory actions "early on Election Day,"²⁷¹ government authorities failed to halt the practices or expel the challengers.²⁷² A federal district court agreed with the DOJ allegation, and in August 2000 issued a consent decree that ordered the city to establish a program to train election officials and private citizens regarding the proper grounds for election challenges.²⁷³ The order also required the placement of bilingual poll workers at every polling location in Hamtramck on election day²⁷⁴ and assigned federal observers to ensure the city's compliance with the order.²⁷⁵

Thus, from instances of discrimination came protection in the form of a court order requiring language accommodations for U.S. citizens of Arab and Bangladeshi descent. Yet, these accommodations fell short of removing the access barriers that these LEP Hamtramck voters faced in the 1999 election. Despite the continual presence of federal oversight during elections,²⁷⁶ local officials have only loosely

²⁷¹ *Id.* at 3; see also *id.* at 3-4 ("Members of the Zych Committee complained repeatedly to the City Clerk and the Deputy City Clerk that the CCBH challengers were targeting voters because of their skin color or because they were Arab, without any other reason to believe that the voters were not citizens.").

²⁷² *Id.* at 4. The complaint states:

Despite the complaints, the City gave no additional instructions to the election inspectors regarding evaluation of challenges; the City did not require challengers to set forth evidence of a reason to believe that voters were not qualified. . . . [T]he City did not prevent challenges of dark-skinned voters from continuing, and the election inspectors continued to require all voters who were challenged for 'citizenship' to take a citizenship oath as a prerequisite to voting.

Id. The complaint also notes that some representatives from a candidate's campaign were rebuffed after asking the City Clerk's office to expel the CCBH challengers for misconduct based on repeated discriminatory challenges. *Id.*

²⁷³ Consent Order and Decree at 6, *Hamtramck*, No. 00-73541 ("The City Clerk shall establish a training program for all election officials . . . at which the officials shall be trained in voting assistance procedures and voter challenge procedures."); *id.* at 7 ("The City Clerk . . . shall establish a training manual for all challengers and other persons permitted to be present in polling places on election day on behalf of citizens' associations or candidates.").

²⁷⁴ *Id.* at 10 ("Defendants shall appoint at least one bilingual Arab-American election inspector or one bilingual Bengali-American election inspector for each of the . . . polling places."); see also *id.* at 9 ("Defendants shall appoint at least two bilingual Arab-American election inspectors . . . for each of the polling places containing . . . precincts where challenges of dark-skinned voters occurred in the November 1999 election.").

²⁷⁵ *Id.* at 8.

²⁷⁶ Oralandar Brand-Williams, *Feds Monitor Hamtramck Polling Places; Justice Dept. Checks to Ensure Minorities Are Not Harassed*, DETROIT NEWS, Nov. 5, 2002, at 1C (reporting the continued presence of federal observers in Hamtramck, Michigan); see also Press Release, Dep't of Justice,

implemented the consent order in the years following the incidents leading to the litigation.²⁷⁷ In November 2000, for example, the city clerk failed to recruit sufficient numbers of Arabic-speaking poll workers, hiring only eight when fifty-five were required.²⁷⁸ Such lax compliance prompted the extension of the agreement in January 2004²⁷⁹ and an acknowledgement that there was "more to be done."²⁸⁰ The amended consent decree required the city to appoint at least two bilingual poll workers in every precinct "to provide assistance as needed . . . in demonstrating the use of voting equipment, and in handling voter challenges should an Arab American voter . . . need assistance or have his or her eligibility to vote challenged."²⁸¹ Despite these declarations, problems remain.²⁸² One volunteer who served as part of an "Election Protection" effort in the city in November 2004 bore witness to the ongoing confusion and harassment that voters of Bangladeshi and Arab descent experienced on election day, enduring angry threats from poll

Justice Department to Monitor Elections in States Across the Nation (Nov. 7, 2005), *available at* http://www.usdoj.gov/opa/pr/2005/November/05_crt_596.html (announcing that the Justice Department sent federal observers to Hamtramck, Michigan on election day 2005).

²⁷⁷ Christopher M. Singer, *Hamtramck Failed to Diversify Poll Force; Justice Dept. Gives City Until Tuesday to Hire Arabs, Asians*, DETROIT NEWS, Nov. 10, 2000, at 8A (noting that the City Clerk failed to hire sufficient numbers of Arabic-speaking poll workers in the first election following the consent order).

²⁷⁸ *Id.* In addition, Nancy Rue, a Justice Department attorney involved in the case, was reportedly "very concerned some Arab individuals showed up at the polls and walked out [on election day]. Some Arabs were subjected to rudeness when they, themselves, were very polite." *Id.*

²⁷⁹ Second Amended Consent Order and Decree at 2, *Hamtramck*, No. 00-73541. The Second Amended Consent Order and Decree stated:

Based on discussions of the effectiveness of the City's prior efforts to fulfill the terms of the consent decree . . . the parties have agreed to a limited extension of the terms pertaining to assignment of bilingual election inspectors and the authorization of federal observers to monitor compliance with these terms.

Id.

²⁸⁰ *Id.*

²⁸¹ *Id.* at 3.

²⁸² Some small gains have occurred in Hamtramck since the institution of the consent decree, most notably the election of the city's first Muslim American to the Hamtramck City Council in 2003. Cecil Angel, *Now They Call Him Councilman Ahmed; First Bangladeshi American Wins Hamtramck Office*, DETROIT FREE PRESS, Nov. 8, 2003, at 3A. Shahab Ahmed, a Bangladeshi American, was the first nonwhite person ever to be elected to the Hamtramck City Council. *Id.* He called his election a "victory for those who were stopped in 1999," referring to the actions of CCBH. *Id.*

workers after she attempted to assist two Arab American voters in translating the all-English ballot.²⁸³

The *Hamtramck* case illustrates the difficulties in attaining and relying on consent decrees and court orders to protect LEP voters seeking equal access to the ballot box. Not only must voters endure discriminatory treatment before a case can even be brought, but court orders are difficult to enforce and require a great deal of commitment and oversight from the federal government if they are going to result in change at the grassroots level.²⁸⁴ Ultimately, policy responses from the state government, via supporting legislation that codifies an order or otherwise responds to findings that emerge through litigation, are often necessary to ensure that a court order or consent decree is effective.²⁸⁵

B. *Protections and Accommodations at the State Level*

Though uncommon,²⁸⁶ some state and local governments have stepped in to fill the holes in the federal policies and infrastructure,²⁸⁷ with some success.

²⁸³ E-mail from Kenwah H. Dabaja, local political activist in Dearborn, Michigan, to author (Oct. 28, 2005, 12:51:35 EST) (on file with author). The volunteer recounts the events:

I had 2 Arab Americans ask me to translate something while in the voting area. I was not necessarily in the booth but the Challenger made a big fuss and started to urge the poll workers to do something. The poll workers did not know what to do. The challenger insisted that the ballots [were] now void. I resisted and stated the law. She countered saying that the ballots could not be entered. So I gave her the [alternative] of canceling the ballots and letting the voters revote. She again resisted and started yelling and threatening to . . . call the police. The argument was only finally resolved when a mutual friend in a high ranking city level told us to cool it before the cops came. They ended up voting but with limited assistance to avoid any more problems.

Id.

²⁸⁴ See Magpantay, *supra* note 59, at 47.

²⁸⁵ See *id.* ("Today . . . courts may be of little avail, thereby making legislation and policy advocacy the most effective ways to expand access to the vote."). For example, following the California Supreme Court's court order in *Castro v. State*, 466 P.2d 244, 258–59 (Cal. 1970), overturning a state literacy requirement, the California state legislature enacted a law mandating that counties provide translated election materials where three percent or more of the citizens in a county qualify as a language minority. The current version of the law can be found at CAL. ELEC. CODE § 14201 (West 2003).

²⁸⁶ See H.R. REP. NO. 102-655, at 3 (1992), as reprinted in 1992 U.S.C.C.A.N. 766, 767 (noting that "without a federal mandate, much needed bilingual assistance in the voting process, meant to ensure the guarantees of the Fourteenth and Fifteenth Amendments, may disappear"); S. REP. NO. 94-295, at 33 & n.35 (1975), as reprinted in 1975 U.S.C.C.A.N. 774, 797–98 (emphasizing that in 1975, prior to the enactment of section 203, only seven states required local jurisdictions to provide language assistance for LEP voters: California, Connecticut, Florida, Massachusetts, New Mexico, New Jersey, and Pennsylvania).

A 2004 American Civil Liberties Union study found that over thirty states have enacted some form of accommodation mechanism for LEP voters.²⁸⁸ Over half of these laws are mere replicas of section 208 of the Voting Rights Act,²⁸⁹ proactively permitting voters in need of assistance to bring someone with them to the polls as a translator.²⁹⁰ A handful of

²⁸⁷ See ME. REV. STAT. ANN. tit. 21A, § 603 (1993 & Supp. 2006) (requiring the Secretary of State to prepare ballot instructions in French and provide these instructions, where requested, to city and county clerks); MIAMI-DADE COUNTY, FLA., CODE § 12-16 (Supp. Ord. No. 99-160, 1999), available at <http://www.municode.com/resources/gateway.asp?pid=10620&sid=9> (mandating the availability of ballots translated into Creole in areas of Miami-Dade County where a significant portion of the electorate is Haitian American); see also Guerra, *supra* note 20, at 1423–24. Guerra states:

The inadequacy of the [Voting Rights Act] has led some jurisdictions with large concentrations of non-English speakers that fall outside federal statutory coverage . . . to provide multilingual ballots even though not required to do so under the Act. Additionally, some states have laws that supplement the requirements of the Voting Rights Act.

Guerra, *supra* note 20, at 1423–24.

²⁸⁸ See AM. CIVIL LIBERTIES UNION, WASH. LEGISLATIVE OFFICE, STATE LAWS PROVIDE AVENUE FOR LANGUAGE ASSISTANCE (2004), available at <http://www.votingrights.org/resources/?resourceID=18>. The following states have all enacted some sort of law aimed at providing accommodations for LEP voters: Alabama, Alaska, Arizona, Colorado, Connecticut, California, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Maryland, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Vermont, Wisconsin, and Wyoming. *Id.*

²⁸⁹ Voting Rights Act § 208, 42 U.S.C. § 1973aa-6 (2000).

²⁹⁰ See ALA. CODE § 17-4-250(h) (LexisNexis 2005) (permitting the Secretary of State to “prescribe forms in furtherance of state election laws deemed helpful to . . . voters speaking an alternative language to English who, according to the most recent decennial census, comprise more than five percent of the voting age population”); ALASKA STAT. § 15.15.240 (2006) (allowing a “qualified voter needing assistance” to receive it after the assisting person “state[s] upon oath . . . that they will not divulge the vote cast by the person assisted”); ARIZ. REV. STAT. ANN. § 16-580(G) (2006) (allowing assistants to accompany voters into the voting booths); COLO. REV. STAT. § 1-7-112(1)(a) (2006) (allowing non-English-speaking electors assistance from a bilingual election judge or any other person selected by the designated election official to provide assistance); CONN. GEN. STAT. ANN. § 9-236(b) (West Supp. 2006) (allowing every registered voter the right to ask for and receive assistance in voting); GA. CODE ANN. § 21-2-409(a) (Supp. 2006) (allowing assistance where the voter states under oath the reason why he or she requires assistance); HAW. REV. STAT. ANN. § 11-139 (LexisNexis 2006) (requiring voters who need language assistance to contact the chairperson or designated Voter Assistance Official assigned to their polling place); 10 ILL. COMP. STAT. ANN. 5/17-14 (West 2003 & Supp. 2006) (allowing any voter who declares upon oath that he or she cannot read, write, or speak the English language, upon request, to be assisted in the marking of his or her ballot); IND. CODE ANN. § 3-11-9-2 (LexisNexis 2002 & Supp. 2006) (allowing any voter who cannot write or read English the right to receive assistance to cast a vote in the election); IOWA CODE ANN. § 49.90 (West 1999) (allowing “[a]ny voter who may declare upon oath that the voter . . . cannot read the English language . . . [to], upon request, be assisted” in casting his or her vote by two precinct workers, one from each party, or by any other per-

states' laws, however, go beyond the protections in section 203 of the Voting Rights Act to accommodate LEP citizens seeking to participate in the political process.²⁹¹ In particular, state laws in California and

son the voter may select); *id.* § 49.91 (requiring that voters asking for help sign a form stating that they asked for help); MD. CODE ANN., ELEC. LAW § 10-310(c) (LexisNexis 2003 & Supp. 2006) (allowing voters who cannot read English to receive assistance in voting from two election judges or any other person except the voter's employer or union representative); MASS. GEN. LAWS ch. 54, § 79 (2004) (requiring a voter who cannot read in English to tell the presiding officer and then allowing him to designate any person to assist him); MINN. STAT. ANN. § 204C.15 (West 1992 & Supp. 2006) (allowing a voter who claims a need for assistance to obtain the aid of a person of her choosing); NEV. REV. STAT. ANN. § 293.296 (LexisNexis 2002) (allowing any registered voter by reason of inability to read or write the English language assistance, and stating that the election board may require a voter to sign a statement under penalty of perjury that he/she requires such assistance); TEX. ELEC. CODE ANN. §§ 64.031-.034 (Vernon 2003 & Supp. 2006) (allowing individuals who cannot read or write the language in which the ballots are written to receive assistance at the voting booth); UTAH CODE ANN. § 20A-3-108 (2003) (allowing a voter who is unable to read or write in English to obtain assistance from a person of the voter's choosing); VT. STAT. ANN. tit. 17, § 2569 (2002 & Supp. 2006) (allowing a person who needs help voting a person to assist him or her); WIS. STAT. ANN. § 6.82 (West 2004 & Supp. 2006) (allowing voters who cannot read or write to receive assistance from a person of their choosing); WYO. STAT. ANN. § 22-13-113(a) (2005) (allowing voters who cannot read or write to receive assistance from a person of their choosing).

²⁹¹ See, e.g., CAL. ELEC. CODE § 14201 (West 2003) (requiring minority language sample ballots posted in polling places where, under the assessment of the Secretary of State, three percent or more of the voting age citizens lack sufficient English skills to vote without assistance); COLO. REV. STAT. § 1-2-202(4) (2006) (requiring that county clerks, where a precinct is composed of three percent or more non-English-speaking eligible voters, recruit staff members who speak that language.); FLA. STAT. ANN. § 101.2515 (West 2002) (requiring the Department of State, upon the request of a supervisor of elections, to provide a written translation of a statewide ballot issue in the language of any language minority group specified in the provisions of section 203); LA. REV. STAT. ANN. § 18:106 (2004) (requiring that a registered voter who is a member of a language minority group, as determined under the federal Voting Rights Act, be provided by the registrar any information and assistance in conformity with the federal Voting Rights Act); ME. REV. STAT. ANN. tit. 21A, § 603 (requiring the Secretary of State to prepare ballot instructions in French, to be printed on a separate sheet of paper that may conveniently be attached to a sample ballot); MINN. STAT. ANN. § 204B.27(11) (West 1992 & Supp. 2006) (allowing the Secretary of State to develop voting instructions in languages other than English to be posted and made available in polling places during elections, based upon a determination from the state demographer); N.J. STAT. ANN. § 19:49-4 (West 1999) (requiring that at least two bilingual sample ballots be provided for covered election districts, bilingual sample ballots be sent out to voters, and two additional election district board members who are Hispanic in origin and fluent in Spanish be appointed in districts where Spanish is the primary language for ten percent or more of the registered voters in the election district); N.M. STAT. § 1-2-3(B) (2003) (requiring that "[a]ll registration or voting notices, forms, instructions, assistance, or other information relating to the election process . . . be printed in both English and Spanish"); *id.* § 1-10-10(A) (requiring that the county clerk print ballots in both English and Spanish in a quantity equal to ten percent of the number of voters in each precinct); N.C. GEN. STAT. § 163-165.5A (2005) (requiring that in every county or municipality where the Hispanic population exceeds six percent, in accordance with the most recent decennial federal census, all instructions to the voter be in both

Florida extend the coverage formula of section 203 to require additional local jurisdictions to provide translated election materials.²⁹²

Under California state law, for example, LEP voters who live in a county that is not covered under section 203 have the right to access a copy of the ballot, along with instructions translated into Spanish or another language, "if a significant and substantial need is found" by the local election official.²⁹³ California's laws also mandate that minority language sample ballots be provided and posted in polling areas where the Secretary of State determines that three percent or more of the voting age citizens are LEP, or when citizens or organizations provide information supporting a need for assistance.²⁹⁴ Local clerks in California are required to make reasonable efforts to recruit election officials who are fluent in Spanish and other languages,²⁹⁵ and the Secretary of State's office provides voter information in seven languages, including

English and Spanish, and that the state board of elections prepare a Spanish translation of ballot instructions for local boards of elections); OHIO REV. CODE ANN. § 3501.221 (West 1995) (allowing the county board of elections to appoint persons who are fluent in a non-English language to serve as interpreters to assist voters in certain election precincts); 25 PA. CONS. STAT. ANN. § 1327(a)(6) (West Supp. 2006) (requiring that, in jurisdictions where a single language minority exceeds five percent of the population, the secretary print a bilingual application and conduct a public educational program alerting both organizations and individuals of that group of the availability of bilingual applications); R.I. GEN. LAWS § 17-19-54 (2003) (requiring that a covered city or town "provide[] any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, . . . in the language of the applicable minority group as well as in the English language"); S.D. CODIFIED LAWS § 12-3-6 to 3-10 (2004) (requiring compliance with the Voting Rights Act by provision of election assistance to any Native American by providing a person proficient in the local Sioux dialect and the English language at all precincts of the county as required by the Act); TEX. ELEC. CODE ANN. §§ 272.001-.010 (Vernon 2003 & Supp. 2006) (requiring compliance with section 203 of the Voting Rights Act and that a judge presiding over an election in covered precincts make reasonable efforts to appoint election clerks who are fluent in both English and Spanish).

²⁹² See CAL. ELEC. CODE § 14201; FLA. STAT. ANN. § 101.2515. Although California and Florida have both adopted their own statewide language accommodations, it is also worth noting that the U.S. Department of Justice has sued counties in both states to seek compliance with section 203 of the Voting Rights Act. See, e.g., *United States v. City of Rosemead*, No. 05-5131 (C.D. Cal. Sept. 6, 2005); *United States v. City of Azusa*, No. 05-5147 (C.D. Cal. Aug. 22, 2005); *United States v. City of Paramount*, No. 05-05132 (C.D. Cal. Aug. 19, 2005); *United States v. Ventura County* (C.D. Cal. Sept. 2, 2004); *United States v. San Diego County*, No. 04-1273 (S.D. Cal. July 6, 2004); *United States v. Orange County*, No. 02-00737 (M.D. Fla. Oct. 9, 2002); *United States v. Alameda County*, No. 95-01266 (N.D. Cal. May 25, 1995); *United States v. Metro. Dade County*, No. 93-00485 (S.D. Fla. Apr. 8, 1993).

²⁹³ CAL. ELEC. CODE § 14201.

²⁹⁴ *Id.* Colorado is the only other state to rely on a three percent threshold for coverage, requiring that county clerks recruit full time staff members fluent in the relevant language where more than three percent of eligible voters are LEP. COLO. REV. STAT. § 1-2-202(4).

²⁹⁵ CAL. ELEC. CODE § 14201.

English, Chinese, Korean, Spanish, Japanese, Tagalog, and Vietnamese.²⁹⁶ Florida's election accommodations are not as extensive, but similarly go beyond federal requirements by requiring the Secretary of State, upon the timely request of a local election official, to provide a written translation of a statewide ballot issue in any of the languages included under section 203 of the Voting Rights Act.²⁹⁷

Both of these states' laws provide some guidance for improving the federal accommodation structure, but still fall short of the type of assistance that can be most effective for LEP voters. The discussion in Part III will now attempt to identify some potential solutions for these gaps in language accommodations for LEP citizens.²⁹⁸

III. TOWARDS A MORE EFFECTIVE LEGAL STRUCTURE FOR ACCOMMODATING LEP VOTERS

The foregoing analysis suggests that to adhere to dominant legal and theoretical democratic ideals, the U.S. government must affirmatively act to reduce the barriers facing many voters who speak English as a second language. To the extent that state and federal policies have attempted to address these issues, evidence suggests that more work needs to be done to reduce or eliminate language barriers to voting and the discriminatory acts that often stem from those barriers. Apart from general problems stemming from a lack of available funding,²⁹⁹ the gaps in the existing accommodation infrastructure involve incomplete coverage,³⁰⁰ poor

²⁹⁶ Cal. Sec'y of State, Elections & Voter Info., Multilingual Voter Services, http://www.ss.ca.gov/elections/elections_multi.htm (last visited Mar. 1, 2007).

²⁹⁷ FLA. STAT. ANN. § 101.2515 (West 2002). Requests must be filed within sixty days of the election. *Id.*

²⁹⁸ Determining the actual solutions once accommodation needs are identified is the central issue to many language protection analyses. See, e.g., Addis, *supra* note 10, at 723 ("[If the state must] support, materially and administratively, minority languages . . . then what are the appropriate institutional structures by which a multicultural state could simultaneously ensure the survival and flourishing of minority languages and the building of a national political community?").

²⁹⁹ See 1986 GAO REPORT, *supra* note 78, at 16–24 (articulating the costs involved in providing translated election materials and the difficulty local jurisdictions have in meeting those costs).

³⁰⁰ See *supra* notes 216–226 and accompanying text; see also Magpantay, *supra* note 59, at 42–43 (listing a number of LEP communities not covered under section 203 because they do not meet the language or numerical trigger requirements, including citizens of Korean descent in Cook County, Illinois and Bergen County, New Jersey; citizens of Chinese and Gujarati descent in Middlesex County, New Jersey; citizens of Bengali descent in Kings County and Queens County, New York; citizens of Chinese and Vietnamese descent in Boston, Massachusetts; citizens of Chinese, Vietnamese, and Khmer descent in Philadelphia, Pennsylvania; and citizens of Arab descent in Wayne County, Michigan).

compliance,³⁰¹ ineffective court orders,³⁰² and a lack of properly translated materials and prepared interpreters.³⁰³

Language rights advocates and election law experts have proffered several solutions for what Congress and state legislatures can do to fill some of these gaps if the federal and state governments remain committed to the accommodationist approach of including LEP voters in American democracy. Apart from reevaluating the coverage test for section 203,³⁰⁴ providing more funds to states and localities for translated materials,³⁰⁵ and incorporating new technologies that simplify translations,³⁰⁶ many suggested reforms focus on increasing the role that states play in providing accommodations.³⁰⁷ Indeed, state governments are likely more familiar with the nuances of their LEP citizenries than the federal government, and thus could be better suited to fund and allocate accommodations.³⁰⁸ States are also better situated to assist local jurisdictions in funding and in providing translated written election materials that are identical throughout the state, such as voter registration forms and information about candidates for statewide offices,³⁰⁹

³⁰¹ See *supra* notes 203–215 and accompanying text; see also Magpantay, *supra* note 11, at 48 (“Notwithstanding the progress in implementation [of section 203], local irregularities and inconsistencies abound, and some jurisdictions still resist fully complying with Section 203’s mandates.”).

³⁰² See *supra* notes 244–285 and accompanying text.

³⁰³ See *supra* notes 205–215 and accompanying text; see also Magpantay, *supra* note 11, at 48–49 (calling for elections officials in section 203 jurisdictions to “take more care in translating and typesetting ballots and transliterate all names of candidates,” to train local election day workers on the “proper use of bilingual materials and posting of bilingual signs,” and to ensure the availability of a “sufficient number of interpreters . . . on the day of the election”).

³⁰⁴ See, e.g., *Hearing*, *supra* note 16, at 14 (testimony of Margaret Fung, Executive Director, AALDEF) (asking Congress to consider lowering the numeric trigger for jurisdictions from 10,000 to 7500 voting age citizens); see also Magpantay, *supra* note 11, at 55 (calling on Congress to reevaluate the illiteracy test included in section 203 coverage, arguing that “the current measurement of illiteracy . . . has little to do with English proficiency”).

³⁰⁵ See Posting of Dan Tokaji, *supra* note 20 (noting that there is a “reasonable argument that the federal government should at least partly subsidize local jurisdictions’ costs”).

³⁰⁶ See Daniel P. Tokaji, *The Paperless Chase: Electronic Voting and Democratic Values*, 73 *FORDHAM L. REV.* 1711, 1748 (2005) (noting HAVA “clarifies Congress’s intent that [the] requirements [of section 203] apply to voting technology”).

³⁰⁷ See generally Magpantay, *supra* note 11.

³⁰⁸ *Id.* at 53 (noting the discretion that states have to decide how to provide and translate materials, recommending that states “develop a specific methodology to determine [in] which languages and locations to provide language assistance,” and noting that “[t]his could change periodically depending on the size and growth of the language minority group, rates of citizenship, and level of English proficiency”).

³⁰⁹ Magpantay, *supra* note 59, at 41–42 (“Voter registration forms, instructions on how to vote, nonpartisan election guides for statewide offices, and notices about voters’ rights

which are particularly helpful when LEP communities are dispersed throughout a state.³¹⁰ Though this latter top-down accommodation works specifically for the provision of translated written materials, it mirrors the manner in which the United Kingdom provides accommodations for LEP citizens in its smaller jurisdictions.³¹¹

But the need for states to play a role in accommodations does not mean the federal government can abdicate any responsibility in providing language protections.³¹² Both Congress and federal courts have legal authority and sufficient resources to play an even more significant role than they already do in protecting LEP voters. The following analysis details three suggested reforms for the two branches of the federal government to adopt in order to fill some of the gaps in current accommodations.³¹³ First, Congress should empower the Election Assistance Commission to provide avenues for affirmatively including all LEP communities in the development of rules to govern and enforce federal protections for LEP voters.³¹⁴ Second, Congress should create provisions for federally certified language translators to assist LEP voters on election day,³¹⁵ similar to the Voting Rights Act's provision for federal observers.³¹⁶ Finally, federal courts should actively interpret existing legislation and constitutional protections to provide better en-

are already uniform in many states due to HAVA. Costs would be minimized because these materials would only need to be translated once and used across the state."); *id.* at 43 (further explaining that "notices about voters' rights, in the forms of informational flyers or posters, are usually based on state laws that apply uniformly to citizens statewide," and that "[f]or counties or states that have one standard voting machine, translated instructions on how to vote are also all the same").

³¹⁰ This is true of many Asian American populations, which are often geographically dispersed throughout a state. Magpantay, *supra* note 11, at 54 (noting that states with significant, but dispersed, Asian American populations include Georgia, North Carolina, Maryland, Virginia, and Oregon).

³¹¹ See *supra* notes 174-175 and accompanying text.

³¹² See Weinberg & Utrecht, *supra* note 81, at 435-36. Weinberg and Utrecht note:

If the states do not assume the responsibility for conducting effective elections when the counties fail to do so, then the United States Congress should consider whether federal civil rights voting laws should be expanded to include the deprivations of voting rights at the polls because of administrative malfeasance, disregard of the rules, or a failure to apply rules equally to all voters and votes.

Id.

³¹³ See *infra* notes 318-407 and accompanying text.

³¹⁴ See *infra* notes 318-369 and accompanying text.

³¹⁵ See *infra* notes 370-387 and accompanying text.

³¹⁶ See 42 U.S.C.A. § 1973f (West 2001 & Supp. 2006) (authorizing the appointment of federal observers to investigate "meritorious complaints from residents, elected officials, or civic participation organizations that efforts to deny or abridge the right to vote under the color of law on account of race or color . . . are likely to occur").

forcement of court orders mandating accommodations for LEP communities, including the levying of financial sanctions against states and local jurisdictions that refuse to comply or poorly comply with existing federal accommodation requirements.³¹⁷ Each of these changes would bring the federal government significantly closer to achieving a legal structure that eliminates the language barriers facing LEP voters.

*A. A Structural Solution: The Inclusion of LEP Communities in
Determining the Extent of Federal Protections*

One of the most significant elements in the development of existing language accommodation policies has been the involvement of several LEP communities in requesting accommodations in the voting arena. When crafting and enacting the provision in 1975,³¹⁸ Congressional leaders responded to testimony³¹⁹ from well-organized, constituency-based nonprofit organizations (such as the Mexican American Legal Defense and Educational Fund ("MALDEF")) that presented Congress with overwhelming evidence of educational disparities, low turnout rates, and discriminatory barriers to voting.³²⁰ The evidence indicated that Latino, Asian American, and American Indian voters encountered discriminatory barriers to participation,³²¹ endured educational disparities correlating with high levels of illiteracy,³²² and experienced comparatively low turnout and registration

³¹⁷ See *infra* notes 388–407 and accompanying text.

³¹⁸ Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, § 203, 89 Stat. 400, 400–02 (codified as amended at 42 U.S.C.A. § 1973b (West Supp. 2006)).

³¹⁹ See, e.g., H.R. REP. NO. 94-196, at 16 (1975); S. REP. NO. 94-295, at 25–28 (1975), as reprinted in 1975 U.S.C.C.A.N. 774, 791–94; 121 CONG. REC. 13, 16246–47 (1975).

³²⁰ de la Garza & DeSipio, *supra* note 11, at 1482–84 (recounting testimony describing discriminatory experiences of LEP voters in the late 1960s and early 1970s); *id.* at 1492 ("In the testimony before Congress in both 1975 and 1982, Latino leaders offered many examples of the conscious exclusion of Mexican Americans from the vote. Techniques reminiscent of the pre-VRA South spiced the testimony.");

³²¹ H.R. REP. NO. 94-196, at 22–23 ("The definition of those groups included in language minorities was determined on the basis of the evidence of voting discrimination."); S. REP. NO. 94-295, at 25, as reprinted in 1975 U.S.C.C.A.N. at 791. The Senate Report states:

The extensive record . . . is filled with examples of the barriers to registration and voting that language minority citizens encounter in the electoral process. Testimony was received regarding inadequate numbers of minority registration personnel, uncooperative registrars, and the disproportionate effect of purging laws on non-English speaking citizens because of language barriers.

S. REP. NO. 94-295, at 25, as reprinted in 1975 U.S.C.C.A.N. at 791.

³²² H.R. REP. NO. 94-196, at 20 ("[O]ver 50 percent of all Mexican American children in Texas who enter the first grade never finish high school.").

rates.³²³ The result was the creation of a policy that provided protections for specific groups of LEP citizens, termed "language minorities," that only included groups—Latinos, Asian Americans, American Indians, and Native Alaskans³²⁴—whose representatives provided evidence to Congress of severe language barriers and other disparities that limited equal access to the political process.³²⁵

Both of the 1975 House and Senate Judiciary Committee reports acknowledge that other LEP ethnic groups—such as German or Polish citizens—could likely suffer from racial and ethnic discrimination.³²⁶ But neither committee received evidence that members of those groups experienced "voting difficulties" or low turnout and registration rates.³²⁷ And although in 1975, dissenting members of the House Judiciary Committee and then-Assistant Attorney General Stanley Pottinger

³²³ *Id.* at 22–24.

³²⁴ S. REP. NO. 94-295, at 24 n.14, as reprinted in 1975 U.S.C.C.A.N. at 790–91. The report provides a detailed explanation of the groups covered by the provision:

[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 of parentage in New Jersey, New York and Pennsylvania."

Id. (citation omitted).

³²⁵ See Adams, *supra* note 19, at 874 (explaining that the definition of language minority under section 203 was limited to citizens of American Indian, Asian American, Alaskan Native, or Spanish heritage because "Congress found that '[p]ersons of Spanish heritage [are] the group most severely affected by discriminatory practices, while the documentation [of discriminatory practices] concerning Asian Americans . . . [is] substantial'"); Guerra, *supra* note 20, at 1423 ("[Section 203] only protects certain racial and ethnic minorities. . . . Nonetheless, all non-English speakers, regardless of race or ethnicity, are effectively disenfranchised by elections held only in English."); see also Bai, *supra* note 73, at 761 ("The coverage formula that triggers protection for members of a single language minority provides only minimal protection for non-English speaking Asian Pacific Americans.").

³²⁶ S. REP. NO. 94-295, at 31 (1975), as reprinted in 1975 U.S.C.C.A.N. 774, 798 ("The Subcommittee [is] cognizant of the extent of voting discrimination against these [other] language minorities.").

³²⁷ *Id.* ("No evidence was received concerning the voting difficulties of other language groups. Indeed, the voter registration statistics for the 1972 Presidential election showed a high degree of participation by other language groups: German, 79 percent; Italian, 77.5 percent; French, 72.7 percent; Polish, 79.8 percent; and Russian, 85.7 percent.").

argued for the need to expand the definition to include other language minorities,³²⁸ attempts to broaden the definition of "language minority" to include all LEP citizens were rejected.³²⁹ In 1981, on the floor of the House of Representatives, Congressman Robert McClory complained that section 203 "is too sensitive to specific constituencies to the exclusion of others."³³⁰ McClory then proposed an amendment to repeal section 203 in its entirety, which failed on the floor of the House.³³¹

Recent evidence suggests that other LEP citizens continue to face language barriers and discrimination similar to existing language minorities, perhaps earning inclusion in section 203's definition of language minority citizens.³³² One study of the Arab citizen population in Michigan suggests that, although perhaps the extent of discrimination may differ from that experienced by Latinos and American Indians, Arab Americans have also suffered from educational inequities, low turnout and participation rates, and discrimination at polling locations.³³³ But during the 2006 reauthorization process for the provision, no representatives from noncovered LEP groups, such as Haitian or Arab Americans, testified before congressional leaders,³³⁴ and there was no documented official discussion or testimony that invited research into the expansion of section 203 to other LEP citizen groups.³³⁵

At times, Congress has been responsive to calls from community groups for a more effective section 203. For example, in 1992, Congress responded to criticisms of the numerical trigger formula from the

³²⁸ See H.R. REP. NO. 94-196, at 67, 89 (1975). Dissenting from the House Report, Representatives Henry Hyde, John Ashbrook, Carlos Morehead, Charles Wiggins, Edward Hutchinson, and Robert McClory reasoned that "[t]here is no reason to deny bilingual relief to other national origin groups if they are 'illiterate' within the terms of the statute," *id.* at 89, while in a separate dissent, Representative Jack Brooks cautioned that "the titles—being limited to American Indians, Asian Americans, Native Alaskans, and persons of Spanish heritage—do not provide similar protection to many minority language groups which also seem to deserve protection," *id.* at 67.

³²⁹ 121 CONG. REC. 13, 16,898 (1975) (recording the defeat of the Biaggi amendment); *id.* at 16,907 (recording the defeat of the Solarz amendment).

³³⁰ 127 CONG. REC. 17, 23,178 (1981).

³³¹ *Id.* at 23,177. Rep. McClory's amendment was defeated in a vote of 128–284. *Id.* at 23,190.

³³² See Abdelall, *supra* note 11, at 913 (arguing for the inclusion of Arab Americans in the definition of language minority in section 203).

³³³ Benson, *supra* note 101.

³³⁴ See generally S. REP. NO. 97-417 (1982), as reprinted in 1982 U.S.C.C.A.N. 177; H.R. REP. NO. 97-227 (1981); S. REP. NO. 94-295 (1975), as reprinted in 1975 U.S.C.C.A.N. 774; H.R. REP. NO. 94-196 (1975); H.R. REP. NO. 91-397 (1970).

³³⁵ See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (codified at U.S.C.A. §§ 1973a to 1973g, 1973j to 1973l, 1973aa-1a (West Supp. 2006)).

Asian American and American Indian communities by adding an additional trigger of 10,000 citizens to the five percent threshold.³³⁶ And in 2006, one of a handful of proposals from AALDEF³³⁷ made it into the final legislation: coverage calculations are now made every five years, as opposed to every ten years, and are based on data from the American Community Survey, as opposed to the Long Form provided by the decennial U.S. Census.³³⁸ However, despite AALDEF's testimony before the House and Senate Judiciary Committees calling for lowering the numerical trigger from 10,000 to 7500³³⁹ (so that section 203 coverage would reach many of the Asian ethnic groups that were not then covered by the provision), Congress did not even formally consider lowering the trigger.³⁴⁰ As a result, suggestions for improvement from some community groups went unanswered.³⁴¹

³³⁶ See, e.g., Danna R. Jackson, *Eighty Years of Indian Voting: A Call to Protect Indian Voting Rights*, 65 MONT. L. REV. 269, 278–80 (2004) (documenting how American Indian constituency groups worked in 1982 to present Congress with evidence that section 203's definition of a political subdivision as a county or parish left out many American Indian populations concentrated on reservations that often crossed county or even state boundaries, and noting that Congress responded by altering the triggering mechanism of the provision to include Indian reservations as a legitimate political subdivision); Magpantay & Yu, *supra* note 59, at 13 (describing the lobbying of the Asian American community for a new section 203 trigger of 10,000 language minority citizens).

³³⁷ Magpantay, *supra* note 11, at 56 (suggesting that a more frequently conducted census, such as the American Community Survey, can provide more timely and accurate information, noting that "Congress should authorize use of this census and allow Section 203 coverage to be determined each time the figures are released").

³³⁸ See Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 § 8 ("Section 203(b)(2)(A) of the Voting Rights Act of 1965 (42 U.S.C. [§] 1973aa-1a(b)(2)(A)) is amended by striking 'census data' and inserting 'the 2010 American Community Survey census data and subsequent American Community Survey data in 5-year increments, or comparable census data'").

³³⁹ *Hearing*, *supra* note 16, at 16 (prepared statement of Margaret Fung, Executive Director, AALDEF). AALDEF's Executive Director stated:

AALDEF supported the creation of the new, alternate numerical benchmark of 10,000 language minority citizens to trigger section 203 coverage, because large concentrations of Asian Americans in urban areas, such as New York City and Los Angeles, would not have been covered under the existing 5% threshold. At that time, no Asian American in New York had ever been elected to Congress, the New York State Legislature or the New York City Council. We found in our multilingual exit polls of Asian American voters in New York that 4 out of 5 voters in Manhattan's Chinatown and Flushing, Queens did not speak or read much English, and that they would vote more often if bilingual assistance were provided.

Id.

³⁴⁰ *Id.* A trigger of 7500 would expand coverage of section 203 to "Chinese coverage in Sacramento County, California; Cambodian in Los Angeles County; Korean in Cook County, Illinois; and Asian Indian in Queens County, New York," and lowering the trigger further to

Part of the hesitation for expanding section 203 came from a debate among academics and legal experts over the constitutional authority of Congress to renew section 203. Supreme Court opinions issued in the last two decades have questioned the limits of congressional power under the Equal Protection Clause.³⁴² Constitutional and federalism concerns have always lingered over the provision,³⁴³ but are even more relevant following the Supreme Court's 1997 decision in *City of Boerne v. Flores*³⁴⁴ and its progeny. Although Congress has clear authority to enforce the Fourteenth and Fifteenth Amendments of the U.S. Constitution,³⁴⁵ the Court's opinion in *Boerne* substantially altered the scope of congressional authority to enact legislation aimed at doing so.³⁴⁶ *Boerne* held that where Congress seeks to enforce the protections of the Fourteenth Amendment of the U.S. Constitution, its statutory protection must be "congruent and proportional" to the discrimination it seeks to remedy.³⁴⁷ This is particularly true when the legislation touches upon "legislative spheres of autonomy previously reserved to the States."³⁴⁸

5000 would "cover 8 Asian language groups (the same 5 languages under the current trigger [(Chinese, Korean, Filipino, Vietnamese, and Japanese)], plus Cambodian, Asian Indian, and Thai) in 21 jurisdictions." PHILLIP A. OLAYA ET AL., *ASIAN AM. LEGAL DEF. & EDUC. FUND, ASIAN AMERICANS AND THE VOTING RIGHTS ACT: THE CASE FOR REAUTHORIZATION* 35 (2006), available at <http://www.aaldef.org/docs/AALDEFVRARauthorization-2006.pdf>.

³⁴¹ The reasons for Congress amending section 5 but not altering section 203—despite calls for amendments to both from constituency groups—may have stemmed from the growing and apparent anti-immigrant sentiment in Congress. See Maria Elena Salinas, Opinion, *Voting Rights Survives Scare in the House*, *HERALD NEWS* (Passaic County, N.J.), Aug. 1, 2006, at B07.

³⁴² See *Nevada v. Hibbs*, 538 U.S. 721, 728 (2003); *City of Boerne v. Flores*, 521 U.S. 507, 529 (1997); Michael J. Pitts, *Section 5 of the Voting Rights Act: A Once and Future Remedy?*, 81 *DENV. U. L. REV.* 225, 238–49 (2003). See generally Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After Tennessee v. Lane*, 66 *OHIO ST. L.J.* 177 (2005).

³⁴³ See generally *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (rejecting a constitutional challenge to section 4(e) of the Voting Rights Act, and generally finding language assistance requirements to be a valid exercise of Congress's power to enforce the Fourteenth and Fifteenth Amendments).

³⁴⁴ *Boerne*, 521 U.S. at 520 (holding that any congressional enforcement effort under the Fourteenth Amendment must have a "congruence and proportionality" to the remedy it is seeking to address).

³⁴⁵ *Id.* at 518; see also *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980); *Washington v. Davis*, 426 U.S. 229, 246–47 (1976).

³⁴⁶ See *Boerne*, 521 U.S. at 535.

³⁴⁷ *Id.* at 520 ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."). For a more in-depth discussion about the constitutional conundrum in the post-*Boerne* world, see Pitts, *supra* note 342, at 238–49.

³⁴⁸ *Boerne*, 521 U.S. at 518 (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)).

Yet subsequent decisions³⁴⁹ and voting rights experts suggest that Congress has more authority when protecting fundamental rights such as voting.³⁵⁰ Additionally, the Supreme Court has explicitly upheld the authority of Congress to require language assistance to LEP voters under the Fourteenth and Fifteenth Amendments.³⁵¹ One piece of testimony before the House Judiciary Committee in 2006 attempted to argue that extending the language accommodations under section 203 could be unconstitutional under the *Boerne* precedent.³⁵² The irony of this weak argument, as the analysis in this Article suggests, is that section 203, in limiting coverage to only four language minority groups, is actually too narrowly tailored to address sufficiently the extensively documented language barriers in our electoral system.

One structural solution that could modify section 203 to ensure the coverage formula is as broad as evidence suggests it needs to be is to provide for a flexible avenue through which the federal government can continually work with community groups to build a coverage formula that incorporates the voices of all LEP constituencies enduring discrimination in the educational and democratic arenas. In particular, Congress could amend section 203 to grant rulemaking authority to

³⁴⁹ *Tennessee v. Lane*, 541 U.S. 509, 533–34 (2004); see *Hibbs*, 538 U.S. at 736.

³⁵⁰ See Posting of Dan Tokaji, *supra* note 20 (questioning whether it is “a congruent and proportional remedy to require all jurisdictions with substantial non-English proficient citizen populations and low literacy to provide affirmative language assistance” and suggesting that Congress may have more latitude to operate when enacting legislation aimed at promoting equality of participation, citing *Bush v. Gore*, 531 U.S. 98 (2000), “in which the Court found disparate standards for vote-counting unconstitutional, even without evidence of intentional discrimination (much less intentional race discrimination)”).

³⁵¹ *Morgan*, 384 U.S. at 658 (finding that Congress had the authority to enact section 4(e) of the Voting Rights Act, which provided for language assistance to Puerto Rican citizens); see also *Pitts*, *supra* note 342, at 238 (“In *South Carolina v. Katzenbach* and *City of Rome v. United States*, the Court ceded broad enforcement power to Congress and easily upheld the [Voting Rights Act’s] constitutionality.”). According to the Senate Report issued with the enactment of section 203 in 1975, Congress explicitly relied on the Court’s decision in *Morgan* when asserting its authority to pass the provision. See S. REP. NO. 94-295, at 34 (1975), as reprinted in 1975 U.S.C.C.A.N. 774, 800–01.

³⁵² *Hearing*, *supra* note 16, at 31 (prepared statement of Linda Chavez, President, One Nation Indivisible) (arguing that it is “very unlikely that the practice of printing ballots in English and not in foreign languages would be a violation of the Fourteenth or Fifteenth Amendments”). Chavez also submitted testimony that she believed there is “a lack of congruence and proportionality between the asserted discrimination in education and the bilingual ballot mandate in Section 203” because it is “much more likely that this lack of fluency” in English is rooted in reasons other than lack of equal educational opportunity, such as “recent immigration, most obviously, or growing up in an environment where English is not spoken enough.” *Id.* at 32. But see Posting of Dan Tokaji, *supra* note 20 (discussing various perspectives as to how the Court could interpret section 203 as a valid exercise of Congressional power under the Fourteenth and Fifteenth Amendments).

either the Justice Department or the Election Assistance Commission to frequently update the coverage formula based upon evidence that local LEP constituency groups present to the agency.³⁵³ Under this proposal, a group's application process for extended coverage or exceptions to coverage could be based on whether, among other things, the LEP groups can provide evidence pertaining to three phenomena that Congress originally found indicative of a need for coverage: barriers to participation in electoral politics,³⁵⁴ educational disparities correlating with high levels of illiteracy,³⁵⁵ and comparatively low turnout and registration rates.³⁵⁶ If the evidence indicated that these factors were present, the jurisdiction would be covered and the federal agency could work with the local LEP constituency to determine the most effective form of accommodations.

This proposal would also address a significant gap in section 203 protections—lack of coverage for groups that fall just below the numerical threshold.³⁵⁷ This includes locations where LEP voters collec-

³⁵³ There is already some movement in this direction from Congress—HAVA requires the Election Assistance Commission to study means of improving accommodations for LEP voters, and provides federal funds that may, at the state's discretion, supplement costs incurred in providing translated election materials. See 42 U.S.C. §§ 15301(b)(1)(G), 15322 (Supp. III 2003); Tokaji, *supra* note 306, at 1748. But see Magpanatay, *supra* note 11, at 53. Magpanatay cautions:

[HAVA's direction] is not a specific obligation and states have broad discretion in whether to use the money for language assistance or some other purpose altogether. Nevertheless, if states and localities seek this funding, the federal government will pay for translating voting materials and providing interpreters at the polls. Local advocacy from community groups is essential to ensuring that HAVA is used for these purposes.

Magpanatay, *supra* note 11, at 53.

³⁵⁴ See H.R. Rep. No. 94-196, at 22-23 (1975) ("The definition of those groups included in 'language minorities' was determined on the basis of the evidence of voting discrimination."); S. Rep. No. 94-295, at 25 (1975), as reprinted in 1975 U.S.C.C.A.N. 774, 791. The Senate Report states:

The extensive record . . . is filled with examples of the barriers to registration and voting that language minority citizens encounter in the electoral process. Testimony was received regarding inadequate numbers of minority registration personnel, uncooperative registrars, and the disproportionate effect of purging laws on non-English speaking citizens because of language barriers.

S. Rep. No. 94-295, at 25, as reprinted in 1975 U.S.C.C.A.N. at 791.

³⁵⁵ See H.R. Rep. No. 94-296, at 20 (1975) ("[O]ver fifty percent of all Mexican American children in Texas who enter the first grade never finish high school.").

³⁵⁶ See *id.* at 22-24.

³⁵⁷ See Magpanatay, *supra* note 11, at 49-52. Magpanatay states:

tively comprise a significant portion of the electorate, but the individual language group's population falls below the numerical cutoff.³⁵⁸ Through the proposed infrastructure, any LEP voters or local constituency groups currently excluded from section 203 could apply to the agency for coverage. Similarly, any group could also submit data showing that coverage is not needed, such as where, for example, states or local jurisdictions proactively have provided such accommodation.³⁵⁹

This solution recognizes the inherently local and complex nature of determining which LEP communities face language barriers. At the same time, it empowers community groups to gain protections if they prove via a formal judicial or agency proceeding that their members endure turnout disparities and language-based educational and electoral discrimination. Requiring the evidentiary proceeding before existing coverage is expanded may also address the *Boerne* concern of ensuring that any federal policies promulgated to enforce the Equal Protec-

One limitation of Section 203 is that it overlooks the needs of many Asian American voters in other parts of the country not covered by the select jurisdictions under the current numerical criteria. . . . According to the 1990 Census Report, Korean Americans in Queens, New York fell less than three-hundred persons short of meeting Section 203's numeric threshold of 10,000 voting-age citizens.

Id. In Los Angeles, "the Korean American community exceeded the numerical threshold requirement with 21,611 voting-age citizens of limited-English proficiency, but fell short of meeting the illiteracy test." *Id.* at 50.

³⁵⁸ See *id.* at 53-54. This phenomenon often occurs in Asian American communities, where there is a large collective population, but the individual groups—for instance, Chinese, Vietnamese, and Japanese—each fall under the numerical cutoff. See Bai, *supra* note 73, at 761. Bai states:

[B]ecause of the diverse languages spoken by the "generic" Asian Pacific American group, . . . although Asian Pacific Americans as a group may form more than five percent of the voting age population in a jurisdiction, it is extremely difficult for one language minority (i.e., Chinese, Japanese, or Korean) to constitute five percent of the relevant population.

Id.; see also *id.* at 762 (arguing that this phenomenon occurs because "[t]he threshold trigger figure for coverage was decided upon [by Congress] without an examination of the circumstances and the particular needs of Asian Pacific Americans").

³⁵⁹ This system would also preserve the ability of local and state governments to provide accommodations where not required under federal law. Voters who seek additional accommodations via the agency process will only have the incentive to do so where the local and state authorities have failed to act. For details on local and state governments that have voluntarily complied with requests for local LEP voters unprotected by section 203, see Magpantay, *supra* note 11, at 50-52 (detailing instances in which, after great prodding from advocacy groups, the state governments of Georgia, and election officials in New York City, Los Angeles, and San Jose, created accommodations for Asian communities that fell just under the numerical trigger for section 203 coverage).

tion Clause are congruent and proportional to the problems they seek to remedy.³⁶⁰ The agency could also have authority to adjudicate and address any allegations of inadequate compliance. This would include poor translations or other problems relating to language accommodations and would save community groups the expense and time of seeking remedies for such violations in federal courts.³⁶¹

Heather Gerken, a leading authority on election law, has suggested an analogous bottom-up approach that would actively involve grassroots constituency groups in the enforcement of section 5 of the Voting Rights Act.³⁶² Under such a regime, she notes, "local public interest and civil rights groups—not distant bureaucrats in Washington—would decide" which election law changes and procedures are worth investigating as a possible violation of section 5.³⁶³ The result? Constituency groups (who are arguably the most familiar with which election law changes are most likely to harm their respective communities) will strategically challenge only the changes that will be most problematic to their communities, allowing covered jurisdictions to move forward with innocuous changes while preserving a safety valve to protect against the enactment of harmful proposals.³⁶⁴ A bottom-up approach of this sort

³⁶⁰ See *Boerne*, 521 U.S. at 520.

³⁶¹ For discussion on the expense of enforcing section 203 coverage through federal courts, see *supra* notes 214–215, 244–285 and accompany text; see also Lim, *supra* note 142, at 602 (discussing the general hesitancy among non-English-speaking citizens to engage in litigation, noting that "[u]nfamiliar with the legal system and overwhelmed by the situation in which they find themselves because of their language barriers, many racial-language minorities may prefer privately absorbing the damages rather than losing more money on a legal action brought before an unsympathetic audience").

³⁶² See Heather Gerken, *Race (Optional)*, NEW REPUBLIC, Sept. 26, 2005, at 11, 12 (proposing a change to the preclearance structure of section 5 to allow civil rights groups to "have a chance to negotiate with local officials over any change they found objectionable" before a federal court or the Justice Department steps in to evaluate preclearance). Gerken notes that "[i]f the bargaining process was fair, a court or the Justice Department would let the decision stand. If negotiations broke down, however, the sword would fall: Civil rights groups would have the right to 'opt in' to VRA enforcement by filing a formal civil rights complaint" that would require the federal government to step in and evaluate the change. *Id.*

³⁶³ *Id.* Gerken further asserts that, with regard to evaluating whether proposed election changes violate section 5 of the Voting Rights Act, "[c]ivil rights groups are *already* doing this sort of legwork. The Department of Justice[']s . . . [preclearance investigation] usually involves a call by a Justice staffer to a civil rights group or an elected minority official to see if there is a problem." *Id.*

³⁶⁴ *Id.* at 12–14 ("Rather than challenging *every* change localities propose—thus needlessly reproducing the current system—civil rights groups will want to present Justice with needles, not haystacks. Flooding the system with weak claims would mean that a group's complaints are likely to be ignored in the future."). But see *id.* at 14 (cautioning that "[r]epresentatives of minority communities won't always be the best proxies for fairness,"

has also been suggested as an effective method of devising affirmative action programs that address existing and historical inequalities.³⁶⁵ In addition, several existing federal agencies, including the Environmental Protection Agency and the Federal Trade Commission, offer a similar infrastructure providing for bottom-up policy-making strategies.

This is not to minimize the existing efforts of community groups in lobbying Congress to structure the coverage formula and other requirements for section 203—indeed, it is because community groups have been historically active that the federal government provides the accommodations it does.³⁶⁶ The existing benefits of sections 203 and 208, and other language accommodations provided by the federal government, are a result of the effective advocacy of several national

because "[s]ome will negotiate from a position of weakness; others will be too self-interested to be trusted").

³⁶⁵ See Colleen Sheppard, *Equality Rights and Institutional Change: Insights from Canada and the United States*, 15 ARIZ. J. INT'L & COMP. L. 143, 163 (1998) (noting the relevance of the question of "who devises, structures and implements" programs to accommodate underrepresented communities). Sheppard writes:

To the extent that [affirmative action] initiatives tend to be top-down, and developed and implemented by human resources experts, they do not engage the institutional community in a process of grass-roots systemic change. The beneficiaries of the programs may not be consulted or actively involved in ensuring that their needs and interests are adequately reflected in the initiatives. While commitment from the top of an organization is essential to changing institutional culture, it does not always translate into the active initiatives throughout an organization that are needed to generate real change.

Id. (footnotes omitted).

³⁶⁶ See Cartagena, *supra* note 192, at 206 (describing the participation of Puerto Rican activists and community leaders who testified before Congress in 1965, leading to the passage of section 4(e) of the Voting Rights Act, noting that their testimony argued that "New York's English only literacy test requirement was discriminatory on its face and as applied to Puerto Ricans in the city" and effectively "sought to defuse the 'myth in our State of New York that a citizen can be an intelligent, well-informed voter only if he is literate in English'"); see also *id.* at 210 (documenting the testimony of the Mexican American Legal Defense and Education Fund before Congress in 1975, which led to the extension of section 5's coverage to "language minority citizens who faced electoral obstacles in English only systems"). In 1992, in response to the urging of advocacy groups like AALDEF, which provided congressional committees with evidence of the overwhelming support in the Asian American community for section 203, despite the lack of effective coverage, both houses of Congress amended the triggering mechanism of the provision to include jurisdictions with 10,000 or more LEP voting age citizens of a single language minority. See H.R. REP. NO. 102-655, at 4 (1992), *as reprinted* in 1992 U.S.C.C.A.N. 766, 768 (noting that "[w]ith a 10,000 person benchmark, 38 additional language minority communities will receive assistance").

constituency groups that presented Congress with overwhelming evidence of a need for such accommodations.³⁶⁷

What is evident from this history, however, is that the groups with the most resources and national influence received the most response from Congress,³⁶⁸ leading less-organized or smaller groups to have less influence.³⁶⁹ The creation of a regulatory process to address and adjust the accommodations will provide an ongoing avenue for any LEP voter or citizen group, regardless of resources and national status, to petition the federal government for language accommodations.

³⁶⁷ See de la Garza & DeSipio, *supra* note 11, at 1482–84 (recounting testimony describing methods employed to exclude minority language voters from the voting booth); *id.* at 1492 (“In the testimony before Congress in both 1975 and 1982, Latino leaders offered many examples of the conscious exclusion of Mexican Americans from the vote. Techniques reminiscent of the pre-VRA South spiced the testimony.”); Jackson, *supra* note 336, at 279. Jackson describes advocacy by American Indian activists:

[American] Indians and their advocates argued [in 1992] that a strengthened Section 203 ensured that no citizen would be denied the fundamental right to vote because of a lack of fluency in English. . . . After the Indian lobby proved the extended need for language assistance for selected minority populations and dispelled the myth that bilingual information was “too costly,” Congress passed the Voting Rights Language Assistance Act of 1992.

Jackson, *supra* note 336, at 279.

³⁶⁸ For instance, the coverage determinations for section 203 were originally calculated based on court findings of how best to measure the presence of Spanish-speaking citizens. Bai, *supra* note 73, at 762 n.144 (noting that “the 5% trigger figure was lifted conveniently from lower court cases involving the disfranchisement of Spanish-speaking citizens by English-only elections”). But see de la Garza & DeSipio, *supra* note 11, at 1480 (“[L]ittle debate went into the needs of Mexican Americans or other Latinos when Congress extended the provisions of the Act to them. Had Congress engaged in this debate, it might have developed voter empowerment strategies to meet the unique needs of this population.”).

³⁶⁹ For example, although a representative from the Arab-American Anti-Discrimination Committee testified before the Lawyers’ Committee’s National Commission on Voting Rights in 2005, a privately organized commission calling for greater inclusion of Arab Americans in the Voting Rights Act, there were no representatives from any Arab American community groups who testified to Congress during the reauthorization hearings. See *Hearing, supra* note 16, at III–IV; *Voting Rights Act: Section 203—Bilingual Election Requirements (Part II): Oversight Hearing Before the Subcomm. on the Constitution of the H. Comm. of the Judiciary*, 109th Cong., at III (2005), available at <http://judiciary.house.gov/media/pdfs/printers/109th/24505.pdf>; Ihsan Ali Alkhatib, Bd. President, Arab-American Anti-Discrimination Comm., Detroit Chapter, Statement Before the Lawyers’ Committee’s National Commission on the Voting Rights Act (July 22, 2005), available at http://www.votingrightsact.org/hearings/pdfs/alkhatib.Ihsan_testimony.pdf; see also Feng et al., *supra* note 130, at 879–82 (detailing efforts by two coalitions of Asian Pacific American community groups to push for fair redistricting efforts in California in the early 1990s, and arguing that because the coalitions “lacked a statewide organization with advocacy experience possessing the stature and history of organizations such as MALDEF and NAACP-LDF,” the coalitions’ success was “limited”).

B. A Substantive Solution: Federally Certified Translators

Another significant problem with existing language accommodations is that the translations themselves are often faulty. Ballots and other election materials risk being mistranslated,³⁷⁰ local election officials are often unable to recruit volunteers to provide oral translations,³⁷¹ and poll workers are not bilingual or multilingual, or are often unable or unwilling to offer assistance in a way that can immediately rectify any problems.³⁷² In a 2005 article, Glenn Magpantay and Nancy Yu describe numerous problems of this sort, including the revelation that during the 2004 general election, poll workers at one site in Boston required voters who appeared to be LEP to form a line separate from white voters, ostensibly in order to prevent LEP voters from slowing down the voting process for non-LEP voters.³⁷³ And although federal observers and volunteers from nonprofit groups such as AALDEF can be on hand to record problems that can form the basis for subsequent litigation,³⁷⁴ there is very little that these individuals are empowered to do while the election is taking place.³⁷⁵

Because some LEP citizens may be able to speak English at a conversational level, yet have difficulty deciphering complex referenda or ballot initiatives that can confuse even native English speakers,³⁷⁶ ac-

³⁷⁰ See Magpantay, *supra* note 11, at 38 (describing how, in 2000, ballots in "New York flipped the Chinese translations of the party headings so Democratic candidates were listed as Republicans and vice versa").

³⁷¹ See *id.* at 43 (describing how "[t]here have been many problems with the insufficient availability of interpreters").

³⁷² See Magpantay & Yu, *supra* note 59, at 4-5 (describing problems with poll workers being unwilling to address any problems on election day arising from LEP citizens having difficulty with the election process); *id.* at 6 (noting that "several poll workers and election officials were unhelpful or unknowledgeable about proper election procedures and election laws," and "[p]oorly trained and inefficient poll workers caused chaos in several poll sites").

³⁷³ *Id.* at 4; see also *id.* (noting that in Queens, New York a poll worker asked an AALDEF representative to tell Asian American voters to vote faster, and that in Brooklyn poll workers denied a request by an Asian American voter to vote by provisional ballot, even though he was legally entitled to do so).

³⁷⁴ See generally Complaint, *United States v. City of Boston*, No. 05-11598-WGY (D. Mass. July 29, 2005); Complaint, *United States v. City of Hamtramck*, No. 00-73541 (E.D. Mich. Aug. 7, 2000); Complaint, *United States v. Passaic City and Passaic County*, No. 99-2544 (D.N.J. June 4, 1999).

³⁷⁵ Weinberg & Utrecht, *supra* note 81, at 425 (noting that poll watchers are on hand during elections but do not typically have the power or authority to take immediate actions against local election officials or poll workers who are violating the law).

³⁷⁶ ANGELO N. ANCHETA, RACE, RIGHTS, AND THE ASIAN AMERICAN EXPERIENCE 114 (1998) (noting that "[e]ven those who possess sufficient English fluency to gain naturalization may still lack the higher level of English comprehension that is necessary to understand ballot language, particularly language explaining complex initiatives and referenda," and

curate translation is needed to ensure that LEP citizens are able to act as fully informed voters while they are in the process of becoming more proficient in the English language.³⁷⁷ But often translators or translated materials are neither available nor accurate.³⁷⁸ The most infamous example is discussed in Part II, where Chinese language ballots were mistranslated so that Democratic candidates were labeled as

that “[w]ithout bilingual ballots and other language assistance, these citizens might not be able to participate in the electoral process at all”); Editorial, *Yes on Bilingual Ballots: Encourage Non-English Speakers to Make Informed Choices*, WASH. POST, July 10, 2006, at A16. The Washington Post’s editorial states:

[T]he level of English proficiency required for citizenship isn’t the same as that which could be required to read a complicated ballot initiative—or even a form whose instructions aren’t completely clear. . . . And many native-born Americans whose English skills are limited—Native Americans, Alaskan Natives and Latinos—benefit from getting election information in their preferred languages. Puerto Rican citizens who move to the mainland ought to be able to read ballots in their native language.

Yes on Bilingual Ballots, supra.

³⁷⁷ A 2006 *Washington Post* editorial succinctly described the effect of government-provided translated election materials on Latino and Asian American voters:

When bilingual assistance is provided, voting participation increases and members of the affected groups have a better shot at winning elections. Hispanic voter registration in Yakima County, Wash., went up 24 percent after the Justice Department sued the county for failing to comply with the law. After Justice reached an agreement with Harris County, Texas, turnout of Vietnamese American voters doubled, and the first Vietnamese American was elected to the state legislature.

Yes on Bilingual Ballots, supra note 376.

³⁷⁸ See Magpantay, *supra* note 11, at 37. Poor translations and a lack of interpreters create problems in other fields, as well, particularly in courts and in the provision of medical services. See DiChiara, *supra* note 116, at 128 (describing the effects of mistranslations on LEP parties in court cases); Peterson, *supra* note 148, at 1438–39 (noting that “[a]dvocates for using bilingual interpreters assert that the provision of translators is the best solution to the language barrier because trained translators eliminate translation errors, provide confidentiality, and preserve family roles,” but cautioning that “unlike translators for hearing-impaired individuals, there are no national standards for medical translators, making it difficult to determine if an LEP translator is, in fact, qualified”); see also Rearick, *supra* note 58, at 578 (citing medical studies concluding that the use of an unqualified interpreter—typically a friend or family member—“has detrimental effects on the doctor-patient relationship” and noting that a solution is to “train doctors in the languages of their clients” or to offer “written information in the patients’ language or using bilingual assistants, nurses, or pharmacists”). One study conducted by the Virginia State Supreme Court concluded that improper translation often affects the outcome of a trial, leading to excessive sentences for LEP defendants. DiChiara, *supra* note 116, at 128. The study described one incident where court interpreters actually differed as to whether a statement by a defendant admitted or denied guilt. *Id.*

Republicans and Republican candidates were labeled as Democrats,³⁷⁹ creating obvious problems for Chinese Americans seeking to vote for candidates based on party alone. And in some jurisdictions with large tribal areas, Native American poll workers living on reservations had to drive several miles to attend poll worker trainings and then "were given little or no instruction about how to translate ballots and propositions, and many of their attempts to do so on election day resulted in the most rudimentary references."³⁸⁰

Some of these problems could be solved in the electoral arena if the federal government became more directly involved in the actual translation process, either through offering translated materials or broadcasts,³⁸¹ or, more realistically, by providing official and certified translators for use in localities with LEP voting populations.³⁸² These certified interpreters could serve at the polls on election day to ensure accurate language assistance is available. They could also provide accurate translations of ballots and other materials prior to the election itself.

There is an existing model for a national certified translation program: the courts. The Administrative Office of the United States Courts, through the National Center for State Courts (the "NCSC"), administers a Federal Court Interpreter Certification Examination that certifies court interpreters to serve in federal courts across the country.³⁸³ The NCSC administers written and oral English/Spanish certification examinations

³⁷⁹ See *supra* notes 211–213 and accompanying text; see also Magpantay, *supra* note 59, at 38.

³⁸⁰ Weinberg & Utrecht, *supra* note 81, at 415. As a result, the authors note:

Many times the Native-American poll workers found it so difficult to figure out how to explain items on the ballot they just instructed the voters to skip the offices or propositions. Moreover, Native-American voters who had been purged from the voter rolls because they failed to respond to written notices they either did not receive or did not understand, were turned away from the polls with no explanation of why they were not able to vote, and were given no opportunity to re-register there.

Id. (footnote omitted).

³⁸¹ See Rodríguez, *supra* note 17, at 222 (proposing that the Federal Communications Commission promulgate broadcasting regulations requiring certain amounts of airtime to be devoted to political advertisements in non-English in areas covered by section 203).

³⁸² The interpreters and translation services could first be available to areas covered by section 203, and secondly available to any areas where community groups or state or local election officials demonstrate a sufficient need for such assistance.

³⁸³ News Release, Nat'l Ctr. for State Courts, NCSC Receives Federal Contract for Court Interpreter Services (June 22, 2006), available at http://www.ncsconline.org/D_Comm/PressRelease/2006/Interpreter06.HTML.

to interested applicants, preparing them to serve as reliable court interpreters for Spanish heritage individuals involved in judicial actions.³⁸⁴ The NCSC also administers a Consortium for State Court Interpreter Certification that assists thirty member states in developing a standardized interpreter certification program.³⁸⁵ Several states—including Arkansas, California, Massachusetts, Minnesota, New Jersey, New Mexico, New York, Oregon, Utah, and Washington—work with the NCSC to provide a test and certification program to ensure that individuals who serve as interpreters in state courts are providing accurate translations for LEP individuals.³⁸⁶ This unified effort also ensures that states with small LEP populations are able to minimize administrative and overhead costs associated with court interpreter programs.³⁸⁷ Congress should act to establish and fund such a program, while delegating the administrative responsibilities to the Voting Rights Section in the Department of Justice or the Election Assistance Commission. In doing so, the federal government can bolster its existing accommodations by ensuring the translation methods employed by the states or local jurisdictions are accurate and helpful, while covering the most significant administrative costs entailed in providing accommodations for LEP voters.

C. A Solution for Courts: Possibilities for Better Enforcement of Court Orders

There is also an opportunity for federal courts to play a greater role in enforcing the accuracy and efficacy of language accommodations. As previously discussed, the outcome of much litigation brought seeking enforcement of language protections under sections 2, 203, or 208 of the Voting Rights Act³⁸⁸ is consent decrees or court orders man-

³⁸⁴ *Id.*; see also Alice J. Baker, *A Model Statute to Provide Foreign-Language Interpreters in the Ohio Courts*, 30 U. Tol. L. Rev. 593, 616–17 (1999) (arguing generally for the importance of state-sponsored interpreters in the court system).

³⁸⁵ See Nat'l Ctr. for State Courts, *supra* note 383.

³⁸⁶ Rearick, *supra* note 58, at 574. For a current and complete list of states involved in this effort, see Nat'l Ctr. for State Courts, Court Interpreting, Consortium Member States, http://www.ncsconline.org/D_Research/CourtInterp/Res_Cdnte_ConsortMemberStatesPubJune2006.pdf (last visited Mar. 1, 2007).

³⁸⁷ See Rearick, *supra* note 58, at 574.

³⁸⁸ The challenges in *United States v. Berks County* and *United States v. Hamtramck* were brought under section 2 of the Voting Rights Act. *United States v. Berks County*, 277 F. Supp. 2d 570, 573 (E.D. Pa. 2003); Complaint at 1, *Hamtramck*, No. 00-73541. Section 2 of the Voting Rights Act provides in part:

No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color

dating that the noncompliant jurisdiction provide some sort of written and oral accommodations for its LEP citizens.³⁸⁹ Although the mandates in these court orders often go unmet or unfulfilled,³⁹⁰ scholars have noted that where court orders offer more detailed requirements for compliance, they can be more successful.³⁹¹

Seeking financial sanctions against states and localities that do not provide language accommodations may be more effective both as a litigation strategy for the Justice Department and as an enforcement mechanism for the courts. In *United States v. Hamtramck*, for example, the Justice Department could have sought, or the federal district court could have granted, financial sanctions against the city when it did not fully comply with the court's mandates.³⁹² Such sanctions, or the threat of sanctions, may have compelled Hamtramck to comply more readily.

One problem with this strategy, however, is that financial sanctions may have little effect on encouraging compliance from a city like Hamtramck, Michigan, which was bankrupt and in receivership in the initial years the court order was in effect.³⁹³ Were a court to levy a fine against a city like Hamtramck for not complying with a court order, when the jurisdiction may not be able to afford to comply with the court order in the first place, it would only be making a dire situation even worse by adding to the debt of a city already sinking under a deficit. Nevertheless, many of the jurisdictions that have been the subject of lawsuits brought by the Justice Department³⁹⁴ are not facing financial distress as dire as that of Hamtramck, Michigan, and as such, financial sanctions—or the threat of sanctions—against many of these cities and counties may promote compliance where court orders otherwise would be ignored.

Voting Rights Act § 2, 42 U.S.C. § 1973 (2000).

³⁸⁹ See *supra* notes 244–285 and accompanying text.

³⁹⁰ See generally Second Amended Consent Order and Decree, *Hamtramck*, No. 00-73541; First Amended Consent Order and Decree, *Hamtramck*, No. 00-73541.

³⁹¹ See Weinberg & Utrecht, *supra* note 81, at 423 (describing an “alternative approach . . . taken in a consent decree between DOJ and Bernalillo County, New Mexico, where the court order was accompanied by, but did not incorporate, a manual containing procedures to be followed in order to comply” with the required language accommodations).

³⁹² See *supra* notes 276–283 and accompanying text.

³⁹³ See Christopher M. Singer, *Hamtramck's New Budget Is Balanced; Emergency Financial Manager Conforms City to State Guidelines*, DETROIT NEWS, June 26, 2001, at 9D (detailing Hamtramck's budget deficit in 2000 and 2001, the first two years of the consent decree).

³⁹⁴ For a list of recent challenges under sections 203 and 208 brought by the Justice Department, see U.S. Dep't of Justice, Voting Section Home Page, Litigation Brought by the Voting Section, <http://www.usdoj.gov/crt/voting/litigation/caselist.htm> (last visited Feb. 13, 2007).

An alternative solution is for federal courts to threaten a loss or reduction of the federal funding states receive under HAVA if a county does not comply with a court order or consent decree. States receiving federal funds through HAVA are required to use the funds towards various election activities,³⁹⁵ including "providing assistance to Native Americans, Alaska Native citizens, and to individuals with limited proficiency in the English language"³⁹⁶ and requiring that any "voting system used in an election for Federal office" must "provide alternative language accessibility pursuant to the requirements of Section 203 of the Voting Rights Act of 1965."³⁹⁷ Thus, in cases where the Justice Department or voters bring suit to force compliance with section 203, courts may add teeth to a court order or consent decree by taking away any federal funding received under HAVA until the election systems in the state or jurisdiction comply with the requirements of section 203.³⁹⁸

In addition, because many states are explicitly encouraged under HAVA to use the funding towards providing translated election materials, the Justice Department could also invoke Title VI of the Civil Rights Act of 1964,³⁹⁹ which prohibits federal funding recipients from discriminating against individuals on the basis of race, color, or national origin.⁴⁰⁰ President Clinton clarified this latter legal avenue in August 2000 when he issued an executive order that required federal agencies to address inadequacies in funding for programs that were geared toward LEP individuals.⁴⁰¹ In response, the Justice Department issued policy guidelines emphasizing compliance standards for recipients of federal funds and emphasizing that funded entities that do not take "reasonable steps to ensure 'meaningful' access to the information and services they provide" and actively promote the equal access and participation of LEP individuals in their programs may be dis-

³⁹⁵ 42 U.S.C. § 15301(b)(1) (Supp. III 2003).

³⁹⁶ *Id.* § 15301(b)(1)(G).

³⁹⁷ *Id.* § 15481(a)(4).

³⁹⁸ Where a jurisdiction is covered under section 203, but a state is not covered, and where the jurisdiction is the subject of the lawsuit, courts may still prohibit counties from benefiting from any federal funds received from a state until the county is in compliance with section 203.

³⁹⁹ 1964 Civil Rights Act tit. VI, 42 U.S.C. §§ 2000d to 2000d-7 (2000 & Supp. III 2003).

⁴⁰⁰ Under the U.S. Supreme Court's decision in *Alexander v. Sandoval*, private individuals may not bring a cause of action to enforce Title VI. 532 U.S. 275, 293 (2000). Thus, any remedial action brought under the provision must be initiated by a government entity, such as the U.S. Department of Justice. See *id.*

⁴⁰¹ Exec. Order No. 13,166, 65 Fed. Reg. 50,121, 50,121 (Aug. 16, 2000).

criminating in violation of Title VI.⁴⁰² Thus, where local jurisdictions receive federal funds under HAVA but do not provide translated materials to any LEP populations, the Justice Department can threaten to eliminate or reduce federal funding to force compliance with Title VI, section 203, and HAVA.

These above suggestions may help court orders become more effective by threatening the financial coffers of jurisdictions that violate a federal mandate to accommodate their LEP voters. There is also some debate over whether states and jurisdictions with LEP voters have an obligation under the Equal Protection Clause of the U.S. Constitution to provide language accommodations. Advocates of this viewpoint argue that a state or locality's decision not to accommodate LEP voters is a significant burden on the right to vote that must withstand strict scrutiny in order to be permissible under the Equal Protection Clause.⁴⁰³ Sandra Guerra argues specifically that courts should apply strict scrutiny to any elections held only in English in areas where there are LEP voters.⁴⁰⁴ Under this theory, courts could have additional authority to

⁴⁰² Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons with Limited English Proficiency; Policy Guidance, 65 Fed. Reg. 50,123, 50,124 (Aug. 16, 2000). The document states:

What constitutes reasonable steps to ensure meaningful access will be contingent on a number of factors. Among the factors to be considered are the number or proportion of LEP persons in the eligible service population, the frequency with which LEP individuals come in contact with the program, the importance of the service provided by the program, and the resources available to the recipient.

Id.

⁴⁰³ See *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964) (finding that the right to vote is a fundamental right and as such any state-imposed burdens on the vote are subject to strict scrutiny). While an argument can be made for treating language minorities as a suspect class under general Equal Protection Clause jurisprudence, federal courts have not yet declared it should be viewed as such. See, e.g., *Hernandez v. New York*, 500 U.S. 352, 371 (1991) (suggesting, but not affirming, that “for certain ethnic groups in some communities . . . proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis”); *Olague v. Russoniello*, 797 F.2d 1511, 1521 (9th Cir. 1986) (holding that a voter registration fraud investigation targeting Spanish- and Chinese-speaking individuals should be reviewed under strict scrutiny because it was directed toward foreign-born voters); *Soberal-Perez v. Heckler*, 717 F.2d 36, 44 (2d Cir. 1983) (rejecting plaintiff's challenge to English-only Social Security notices); *Guadalupe Org. v. Tempe Elementary Sch. Dist. No. 3*, 587 F.2d 1022, 1027 (9th Cir. 1978) (rejecting plaintiffs' claim to a constitutional and statutory right to bilingual education); see also Deborah A. Ramirez, *Excluded Voices: The Disenfranchisement of Ethnic Groups from Jury Service*, 1993 Wis. L. Rev. 761, 803 n.124 (asserting that the case law evaluating equal protection claims of language discrimination has resulted in inconsistent and inadequate results).

⁴⁰⁴ Guerra, *supra* note 20, at 1420. Guerra argues:

strike down any electoral regime that offers English-only elections where there is a notable LEP population.

Modern Supreme Court jurisprudence, however, typically does not interpret the Equal Protection Clause to require any nonremedial, affirmative action by the states to protect against all possible infringements or burdens on the right to vote. Lawrence Tribe has characterized this distinction as the difference between an "act" and an "omission."⁴⁰⁵ Although the Constitution prohibits active discrimination by state actors, the Supreme Court is unlikely to strike down a neutral electoral structure because it does not affirmatively ensure that individuals are able to cast ballots with equal ease. In most instances, states that do not provide translated election materials, whether due to a lack of a federal mandate or a will to do so, do not affirmatively burden LEP voters. However, if a state actor were to enact a policy banning the use of any accommodation materials for LEP citizens⁴⁰⁶ or were to provide language accommodations for some LEP groups, but not for other similarly sized and situated LEP groups, a constitutional violation may arise. In such instances, courts could find an equal protection violation

[B]ecause voting is a specially protected fundamental right, the equal protection clause of the Fourteenth Amendment guarantees that absent compelling justification states may not provide voting assistance to English speakers without also providing equivalent assistance to non-English speakers. Ensuring this right fully will require a judicial determination that the Constitution requires states to provide multilingual voting assistance for non-English speakers—a position that courts have yet to adopt fully.

Id.; see also Rearick, *supra* note 58, at 559 (suggesting that the fundamental right of access to courts under the Fourteenth Amendment is unfairly burdened for LEP parties to litigation where interpreters are not provided by the courts). Rearick goes on to state:

There is a strong equal protection argument for a constitutional right to an interpreter in many civil cases. Clearly, non-English speakers are not receiving "equal protection of the laws" when they cannot even understand court proceedings involving them; rather, they receive almost no protection under the law because they need to use the courts to enforce their legal rights.

Rearick, *supra* note 58, at 564 (footnote omitted).

⁴⁰⁵ See Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 331 (1985) (describing the state's failure to fund abortions for poor women as an "active" choice by government to discourage the exercise of an individual right).

⁴⁰⁶ See DiChiara, *supra* note 116, at 118 (arguing that a law requiring an election to be held entirely in English impinges upon the fundamental right to vote). *But see* Guerra, *supra* note 20, at 1427 ("While a state is not required to provide every service on an even-handed basis, the Fourteenth Amendment demands that opportunities to exercise fundamental rights be provided on an equal basis to all eligible citizens unless there is a reason that compels an unequal distribution of rights.").

unless the state's decision to limit its language accommodation is narrowly tailored to serve a compelling government interest.⁴⁰⁷

CONCLUSION

The increasing diversity of the U.S. electorate⁴⁰⁸ requires our legal system to provide cost-efficient and effective methods for enabling all eligible citizens to vote.⁴⁰⁹ This Article sets forth various arguments articulating the necessity for the federal and state governments to accommodate this nation's population of citizens who have limited-English proficiency. It is not meant to minimize in any way the importance of learning English to function in American society. Indeed, it is the responsibility of our educational system to fully prepare its students to participate as active citizens in the United States and English proficiency is crucial to functioning as such in our current economic and political structure.

The argument for language accommodations in voting stems from the need for the government to respect the fundamental importance of the right to vote in our democracy, coupled with the view that the government has a responsibility for ensuring that the right to vote is accessible to all, regardless of one's race or English-speaking ability.⁴¹⁰ Although many LEP voters may speak English, they may not be proficient enough to decipher complex ballot initiatives, or understand written directions explaining the ballot and how to vote; they thus require some sort of legal accommodation to cast a ballot based on their individual thorough and educated decision.⁴¹¹ Although the current poli-

⁴⁰⁷ See *Reynolds*, 377 U.S. at 561-62.

⁴⁰⁸ See Associated Press, *supra* note 8.

⁴⁰⁹ Eric Tang, *Communities Organizing Against Anti-Asian Violence*, 27 N.Y.U. REV. L. & SOC. CHANGE 31, 31 (2001-02) (arguing that "it is vital that we acknowledge the need for scholarship that elevates a discussion of race as a primary, if not *the* primary, terrain upon which power, politics, and culture are contested in U.S. society").

⁴¹⁰ See Magpantay, *supra* note 11, at 31 ("[T]he voting process ensures democracy only to the extent that all voters have access to and understand how to partake in the electoral franchise. Equal access and the opportunity to vote are only the first steps towards safeguarding this fundamental right.")

⁴¹¹ Rodríguez, *supra* note 17, at 220 (suggesting that "the world of politics is perhaps the most amenable to linguistic accommodation, as the need to appeal to the people who cast the votes provides the driving force behind representative democracy"); see also Lori A. McMullen & Charlene R. Lynde, Comment, *The "Official English" Movement and the Demise of Diversity: The Elimination of Federal Judicial and Statutory Minority Language Rights*, 32 LAND & WATER L. REV. 789 (1997) ("The best way to bring non-English speakers into the 'mainstream' is to involve them in the democratic process while they learn English, not shut them out of it until they are fluent.") (quoting Brief for U.S. Rep. Nydia M. Velázquez et al. as Amici Curiae Supporting Respondents at 19, *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997) (No. 95-974), 1996 WL 418711).

cies are incomplete, the jump in participation rates among Asian American and Latino voters after the passage of section 203 of the Voting Rights Act⁴¹² and subsequent enforcement litigation⁴¹³ underscore the benefits of language accommodations.

This Article proposes three reforms to improve the effectiveness of language accommodations geared toward LEP communities. First, Congress should empower the Election Assistance Commission to develop rules to govern and enforce federal protections for LEP voters. Second, Congress should provide certified language translators to assist LEP voters at the ballot box. Finally, federal courts should interpret the existing language accommodation laws, as well as the U.S. Constitution, to provide for stronger enforcement of court orders mandating accommodations for LEP communities. In implementing these changes, the federal government would remove many of the barriers standing in the way of LEP citizens' right to vote.

The right to vote is the right to assert one's individual power in an electoral system. The use of language itself is linked to the ability to assert power through the strength of one's voice. As such, it is imperative that the federal and state governments actively seek to promote and protect equal access to the democratic system for voters who have a limited ability to speak English. In doing so, they help to build a political infrastructure that ensures all American citizens are fully included in our diverse and robust democracy.

⁴¹² Section 203 requires covered states and political subdivisions to provide "registration or voting notices, forms, instructions, assistance, or other materials of information relating to the electoral process, including ballots, [and to] provide them in the language of the applicable minority group as well as in the English language." 42 U.S.C.A. § 1973aa-1a(c) (West 2001 & Supp. 2006).

⁴¹³ See *Hearing*, *supra* note 16, at 10 (testimony of Bradley J. Schlozman, Acting Assistant Attorney General, Civil Rights Division, U.S. Department of Justice) (noting that as a result of section 203 litigation brought by the Civil Rights Division of the Department of Justice, voter registration among Latinos is up over twenty-four percent in areas affected by the lawsuits). Schlozman testified that, for instance, "[i]n San Diego County, Spanish and Filipino registration rates are up over 21 percent, and Vietnamese registration is up over 37 percent since the division's enforcement action." *Id.*