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One Person, One Vote: Protecting Access to the Franchise Through the Effective Administration of Election Procedures and Protections

Jocelyn Friedrichs Benson*

I. Introduction

WITH THE INCREASING LIKELIHOOD OF RECORD VOTER TURNOUT in the upcoming 2008 presidential election, it is critical that election administrators work to ensure that the voice of each eligible voter is heard and that each vote is counted accurately. Several governmental and nongovernmental entities are responsible for the administration of elections, and are essential players in ensuring that, for example, English-learning voters receive the proper linguistic assistance to afford them the ability to cast an educated and accurate vote. This article seeks to emphasize the important role that federal, state, and local governments, poll workers, political parties, and nonpartisan advocates play in ensuring fair and efficient elections, while also providing a case study of one particular area where these entities can work together to promote the participation of voters protected under the federally mandated language assistance provisions of the Voting Rights Act.

II. How the Government, Poll Workers, Political Parties and Nonpartisan Advocates Work Together to Ensure Smooth Election Administration

Across the United States on Election Day, multiple entities, from poll workers to candidates, voters to volunteers, election administrators to

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challengers, interact to shape the course of an election. Each has a specific role to play in ensuring that the day goes well, and each operates under the basic principle of working to ensure that the electoral outcome reflects the desires of a majority of voters. When these entities fail to perform or interact well, their failures can lead to eligible voters being wrongfully removed from registration lists or otherwise being turned away from the polls. They can also lead to votes being cast but, for a variety of reasons, being left uncounted. These failures are exacerbated when they lead to local administration disparities which often results in where a voter lives and seeks to cast their ballot directly affecting whether their vote is counted.¹

At the most basic level, a lack of uniformity in election administration threatens the ability of our electoral system to achieve the level of equality that is at the core of the fundamental principle of one person, one vote. Several empirical studies have also concluded that when difficulties and inequalities exist on Election Day—problems such as ballot spoilage, inaccurate voting lists, long lines, intimidation tactics, and the like—they often have a disparate impact on poor voters or voters of color. For example, in 2001, a study by the House Committee on Government Reform found that voters in low-income, high-minority congressional districts throughout the country were *three times* more likely to have their votes for president discarded than those in more affluent, low-minority districts.² Others note that precinct variations in spoiled ballot rates are strongly correlated with the percentage of black and Hispanic registered voters in a particular precinct, suggesting that the more minorities that resided in a precinct, the greater the percentage of uncounted ballots.³

1. See, e.g., *Stewart v. Blackwell*, 444 F.3d 843 (6th Cir. 2006) (determining that disparities in the accuracy of voting machines to be so great as to violate the Equal Protection Clause); CHRISTOPHER EDLEY, JR. ET AL., HARVARD CIVIL RIGHTS PROJECT, *DEMOCRACY SPOILED: NATIONAL, STATE, AND COUNTY DISPARITIES IN DISENFRANCHISEMENT THROUGH UNCOUNTED BALLOTS* 8 (2002) (finding significant disparities in ballot spoilage rates in the general election of November 2000).

2. SPECIAL INVESTIGATIONS DIV., COMM. ON GOV'T REFORM, INCOME AND RACIAL DISPARITIES IN THE UNDERCOUNT IN THE 2000 PRESIDENTIAL ELECTION U.S. H.R. (July 2001).

3. EDLEY, *supra* note 1; Bruce E. Hanson, A PRECINCT-LEVEL DEMOGRAPHIC ANALYSIS OF DOUBLE-PUNCHING IN THE PALM BEACH PRESIDENTIAL VOTE (Nov. 2000), available at <http://www.ssc.wisc.edu/bhansen/vote/vote.html>; see also MICHAEL C. HERRON & JASJEET S. SEKHON, *Overvoting and Representation: An Examination of Overvoted Presidential Ballots in Broward and Miami-Dade Counties*, 22 ELECTORAL STUDIES 21 (2001), available at http://www.vote.caltech.edu/media/documents/over_vote.pdf.

This Section of the article reviews the role of four particular entities in the election administration process: the government, the poll worker, political parties and candidates, and non-partisan voter advocacy groups and individuals. In addition to briefly discussing the general responsibilities of each entity before, during, and after Election Day, this article suggests several guidelines and standards which, if implemented together, could promote a baseline of uniformity to counteract some of the variations that challenge the reality of the one person, one vote principle on Election Day. At the center to the foregoing discussion is the presumption that the voter is sovereign on Election Day, and that every policy and practice implemented on that day must consider the voter and his or her experience as paramount.

A. The Role of the Government

Government actors are able to play perhaps the most powerful and influential role in ensuring that voters are protected on Election Day. In addition to the legal mandates and protections that bolster the federal government's oversight position, states are charged with the power to ensure that elections are properly administered, while local jurisdictions have the final responsibility in keeping the machine running smoothly. Elections work best when all three levels of government are working in sync to promote participation and integrity, and similarly elections are most likely to fail to go smoothly when these entities are unable to function together and in tandem with one another.

The primary role of the federal government lies in protecting the principles of equal access through the enforcement of statutes like the Voting Rights Act⁴ and providing funding to ensure that states are able to meet the principles established in laws such as the Help America Vote Act⁵ and the National Voter Registration Act.⁶ To that end, the main responsibility of the federal government on or prior to Election Day is to fully enforce all existing federal statutory protections and fully fund any existing statutory mandates. In addition, it is important to recognize the statutory and constitutional authority that the federal government has in this regard—including the power to send federal observers to localities to investigate and monitor election administration on the state and local level, and the resources to enable states with limited access

4. 42 U.S.C. § 1973 (2006).

5. Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (2002) (codified in tits. 2, 5, 10, 36, and 42 U.S.C.).

6. National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77 (codified at 42 U.S.C. §§ 1973gg-10 (2006)).

to financial capital to update and improve election machinery and other technology.

State governments are, in most jurisdictions, the crucial entity in election administration.⁷ Article I, Section 4 of the Constitution explicitly grants states the authority to regulate the “times, places and manner of holding elections” for federal officers.⁸ This authority has evolved to give states the role of first responder and primary agent for ensuring that elections run smoothly, voters are protected, votes are counted, and outcomes are accurate. To this end, the primary role of states lies in maintaining accurate voter registration lists, ensuring that voting is accessible, and counting all the votes that are cast.

This preeminent and generally unregulated role of the states in administering elections has led commentators to describe it as a “horrificing mishmash of self-serving behavior. . . .”⁹ Yet there are three specific areas where state oversight of election administration is particularly crucial in ensuring uniformity, accessibility, and accuracy on Election Day. One is the importance of each state developing uniform rules for casting and counting ballots, including provisional ballots. This requirement is particularly important in the post-*Bush v. Gore*¹⁰ era of election administration, where the Equal Protection Clause of the United States Constitution has been interpreted to require equal methods for counting ballots across a particular state.¹¹ Similarly, state governments should make certain that there is parity among localities receiving funding and technological support, and should be responsible for ensuring that all machines function properly throughout the state.¹²

7. Note, *Toward A Greater State Role In Election Administration*, 118 HARV. L. REV. 2314, 2323 (2005) (describing election administration as “almost entirely a state creature,” emphasizing that states “administer federal elections through widely varying systems, with minimal federal regulation and even less federal financial support.”) (hereinafter *Toward a Greater State Role*).

8. U.S. CONST. art. I § 4, cl. 2; see also *Storer v. Brown*, 415 U.S. 724, 730 (1974) (“States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways . . . the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates.”).

9. *Toward a Greater State Role*, *supra* note 7, at 2316; see also JEANNE RICHMAN & ROBERT R. OUTIS, STATE CONTROL OF ELECTION ADMINISTRATION, in ISSUES OF ELECTORAL REFORM 117, 118 (Richard J. Carlson ed., Lexington Books 1974) (“[E]very state exercises some responsibility for the conduct of elections, but the method and degree of control vary widely.”).

10. *Bush v. Gore*, 531 U.S. 98, 110 (2000).

11. *Id.* at 104. (finding that under the Equal Protection Clause, “the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter.”).

12. See generally, *Stewart v. Blackwell*, 444 F.3d 843 (6th Cir. 2006) (applying the Equal Protection analysis in *Bush v. Gore* to require parity among election machinery

Finally, state governments should actively assist localities in the recruitment and training of poll workers to ensure that throughout the state, polling sites are fully staffed and each poll worker has equal access to information and support.

Local governments also play a very important role in administering elections. The administration role may be vested in individual professionals, such as clerks, registrars, judges, and supervisors, or among several people in the form of election boards or commissions. Though they all function within the framework of state statutes and regulations, many localities have great responsibility over how elections are conducted, including the voting equipment to be used, ballot design and voter identification requirements at polling places.¹³

The most important role of a local government election authority is to conduct efficient and seamless elections. Jurisdictions can best achieve this through working with state governments and other localities to share resources and best practices, including the crucial task of recruiting and training poll workers. To the extent that they are able to, local governments should also ensure that voting equipment is adequately apportioned throughout the jurisdiction and should seek to effectively administer all of the state and federal mandates. Local governments must also ensure that any problems that do occur on Election Day are quickly resolved or adequately prevented in the future. This is simplified where localities are able to openly communicate with state and federal authorities regarding any problems during or after an election.

B. *The Role of the Poll Worker*

Poll workers serve in the front lines on Election Day. In addition to protecting the integrity of the ballots that are cast, their most significant role lies in providing an efficient and positive experience for citizens arriving to vote. To that end, there are three general and somewhat universal guidelines that poll workers should follow: they must ensure that the rights of all voters are protected and respected, they must be sensitive to any special needs of individual voters and they must be familiar

and technology within a state). *But see* Richard L. Hasen, *Bush v. Gore and the Future of Equal Protection Law in Elections*, 29 FLA. ST. U. L. REV. 377 (2001).

13. One of the most elaborate local government election offices is in Miami Dade County, Florida. The county's election department has over sixty-five employees responsible for everything from voter registration, election support, absentee ballots and voter fraud. *See* David Leahy, *Running an Election and the Work of the Elections Office*, in *COUNTING VOTES: LESSONS FROM THE 2000 PRESIDENTIAL ELECTION IN FLORIDA* 61, 61–62 (Robert P. Watson ed., University Press of Florida 2004).

with the technology of all voting machinery and prepared to address any potential breakdowns that may occur.

First and foremost, poll workers should be aware of and respectful of the rights of voters, as defined under state and federal law. Most of these rights are enumerated under state law, and generally include the right of voters to cast a ballot if they are in line at a polling place at the proper time, and the right to cast to a ballot in private and free from intimidation. There are also specific rights governing the casting of provisional ballots, which vary state to state, and it is incumbent upon every poll worker to be familiar with the proper procedure for when a voter who does not appear to be registered or otherwise entitled to vote has a right to cast a provisional ballot. In addition, as many states develop a number of new identification requirements for voters, it is crucial for poll workers to be intimately familiar with all forms of identification that are legally acceptable and the procedures to be followed when a voter does not have legal identification. For example, under Indiana law, voters who do not present proper identification on Election Day may vote using a provisional ballot, while in Michigan, voters without identification may still vote with a regular ballot provided they sign an affidavit attesting to their identity.¹⁴ In addition, in 2006 the Advancement Project published lists of "10 Things Every Poll Worker Should Know" for poll workers in Philadelphia, Baltimore, Detroit, Ohio and Florida.¹⁵ Such lists are helpful in ensuring that poll workers are sufficiently aware of the rights of voters in their state and are prepared to respect them.

Secondly, poll workers must be sensitive to the unique needs of all voters. As the country grows increasingly diverse, it is essential for poll workers to treat each voter with respect and ensure that individuals of all backgrounds enjoy equal access to the ballot box. Similarly, poll workers must be prepared to assist voters with disabilities in an open and non-pejorative manner. In July 2007, the United States Election Assistance Commission issued a report of "Successful Practices for Poll Worker Recruitment, Training, and Retention."¹⁶ The manual specifically recommended sensitivity training for poll workers, noting the importance of promoting accessibility for disabled voters and emphasizing that poll workers "respond well to sensitivity training, and

14. Compare IND. CODE § 3-5-2-40.5, with MICH. COMP. LAWS 168.523 (2007).

15. See <http://www.advancementproject.org/ourwork/power-and-democracy/voter-protection/tools-training-materials.php>.

16. U.S. ELECTION ASSISTANCE COMMISSION, SUCCESSFUL PRACTICES FOR POLL WORKER RECRUITMENT, TRAINING, AND RETENTION (2007), available at <http://www.eac.gov/files/BPPollWorker/General%20Pollworker.pdf>.

appreciate the tips offered to ensure that all voters have a positive voting experience.”¹⁷

To this end, several nonpartisan constituency organizations offer several recommendations to increase the sensitivity of poll workers to the special needs of individual voters. The National Federation of the Blind lists twelve “courtesy rules” for poll workers, including, “[y]ou don’t need to raise your voice or address me as if I were a child,” “[d]on’t ask my spouse questions about what I want or need, ask me directly,” and “I use a long white cane or guide dog for travel; please do not feel that it is necessary to move things out of my way.”¹⁸ The organization recommends that poll worker training include interaction with blind individuals that are able to demonstrate “the appropriate way to interact with the blind.”¹⁹ States have also adopted their own procedures for ensuring poll workers are culturally sensitive; for example, California trains its poll workers to respect differences and “wait—recognize—listen.”

- Wait—Slow down the instinctive reaction to launch into a quick response. Wait first to process the question, then formulate a reasoned, respectful response.
- Recognize—Poll workers must focus on how to recognize other people’s feelings, anticipate their needs, and be sensitive, accommodating and courteous in assisting them.
- Listen—Poll workers must listen before speaking in order to understand exactly what the voter is feeling, seeing, needing, and trying to say/communicate. It is most important [for the poll worker to refrain from making assumptions in order to avoid stereotyping] and to better enable the worker to hear and understand a voter’s responses.²⁰

A third general requirement is for poll workers to be adept at addressing any technological issues that may arise on Election Day, and be prepared to troubleshoot any potential problems related to voting machines and other possible breakdowns. Adequate and effective training to ensure that poll workers are technologically proficient becomes increasingly crucial as several states and jurisdictions transition to electronic

17. *Id.* at 127.

18. NATIONAL FEDERATION OF THE BLIND, TRAINING THE POLL WORKER: EMPOWERING THE BLIND VOTER, http://www.nfb.org/nfb/training_poll_workers.asp?SnID=2.

19. *Id.*

20. BRUCE MCPHERSON, CALIFORNIA DEPARTMENT OF STATE, POLL WORKER TRAINING GUIDELINES (2006), available at http://www.sos.ca.gov/elections/poll_worker_training_guidelines_final_draft1.pdf.

voting machines. It is also equally important for poll workers to be prepared to fix any minor problems with the machines, including machines designed particularly for voters with physical disabilities.

While this may appear to be a somewhat obvious recommendation, the importance of technological aptitude is often not emphasized to poll workers during training sessions. A recent report noted that in Philadelphia in 2006, training for poll workers lasted only 17 minutes, while only 7 minutes were spent on explaining the set up and operation of voting machines.²¹ In addition, as the Washington Post noted in 2006, “[many poll workers] are well into their retirement years, and the technology changes can be daunting for some of those who didn’t grow up using computers.”²² As such, some jurisdictions may find it reasonable to target recruitment efforts towards individuals who are accustomed to using computers. Whatever the method, it is crucial that poll workers arrive at their polling place on Election Day prepared to handle any technological crises that may arise.

C. *The Role of Political Parties and Candidates*

Since the election of 2000, both the Democratic and Republican parties have increased their efforts to place their own monitors at polling places on Election Day. And while all states and jurisdictions permit qualified political parties and candidates to designate poll watchers at each polling place and central counting station, there are three general guidelines that parties or campaigns should adhere to in sending representatives to the polls.

First, and most importantly, state law or regulations, or the parties themselves, should instruct party or campaign representatives at the polls to only interact with the voter inside the polling place as an advocate for voters or otherwise provide only innocuous assistance. They may not harass or otherwise intimidate any voter, or attempt to influence the content of an individual’s vote. Any indication that they are doing so must be addressed swiftly, the action ceased and the challenger removed from the polling place. Second, the numbers of poll watchers at each location should be limited to avoid undue crowding. Third, parties

21. PROJECT VOTE, PLIGHT OF THE POLL WORKER 4 (2006), available at http://projectvote.org/fileadmin/ProjectVote/Publications/Plight_of_the_Poll_Worker-Advance_ment_Project.pdf, at 4 (also noting that in Philadelphia, poll workers may elect, but are not required, to view a thirty-minute video on how to use the voting machines).

22. Christian Davenport, *More Poll Workers Recruited, But Training Proves Daunting*, WASH. POST, Nov. 2, 2006, at A10, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/01/AR2006110103212.html>.

or candidates designating poll watchers should be prohibited from targeting certain polling locations or voters based upon any pernicious affiliation of voters in the jurisdiction—particularly race, language status, or age.

The importance of the above three guidelines is illustrated in the 2004 case of *Spencer v. Pugh*,²³ in which the United States Supreme Court addressed the permissibility of an Ohio law that permitted political parties to place observers in polling sites on Election Day.²⁴ The case arose in part after the Hamilton County Republican Party filed a request for over 600 challengers to be “physically present in the polling places in order to challenge voters’ eligibility to vote” on Election Day 2004.²⁵ Two-thirds of these challengers were to be sent to predominantly African American precincts,²⁶ leading to claims that “African American voters will be intimidated; racial tension will rise, and African American voters will be blocked from exercising their right to vote” on Election Day.²⁷

On November 1, 2004, the District Court for the Southern District of Ohio granted a temporary restraining order and preliminary injunction against the placement of challengers in polling places as permitted under the state law.²⁸ Of primary concern to the district court was the poor training of potential challengers and their lack of experience, which, combined with the dearth of legal guidelines setting the parameters for their duties, created “an extraordinary and potentially disastrous risk of intimidation and delay.”²⁹ The Sixth Circuit rejected this analysis on appeal a few hours later.³⁰ The court acknowledged the lower court’s finding that allowing challengers in polling places without proper guidelines and parameters could lead to the “enormous

23. *Spencer v. Pugh*, 543 U.S. 1301 (2004).

24. *See* Summit County Democratic Ctr. v. Blackwell, 388 F.3d 547, 549 (6th Cir. 2004) (quoting Ohio Revised Code § 3505.20 which states “[a]ny person offering to vote may be challenged at the polling place by any challenger, any elector then lawfully in the polling place, or by any judge or clerk of elections.”); OHIO REV. CODE ANN. § 3505.21 (LexisNexis 2008) (“At any primary, special, or general election, any political party supporting candidates to be voted upon at such election and any group of five or more candidates may appoint [to any of the polling places] . . . one person, a qualified elector, who shall serve as observer for such party or such candidates during the casting of the ballots. . . .”).

25. *Spencer v. Blackwell*, 347 F. Supp. 2d 528, 530 (S.D. Ohio 2004).

26. *Id.* (noting also that “evidence presented at the hearing reflects that 14% of new voters in a majority white location will face a challenger . . . but 97% of new voters in a majority African-American voting location will see such a challenger”).

27. Summit County Democratic Ctr., 388 F.3d at 550 (citing amended complaint).

28. *Spencer v. Blackwell*, 347 F. Supp. 2d at 538.

29. *Id.* at 535.

30. *See* Summit County Democratic Ctr., 388 F.3d 547.

risk of chaos, delay, intimidation, and pandemonium.”³¹ But the Sixth Circuit weighed the “strong public interest in allowing every registered voter to vote freely,” against the “strong public interest in permitting legitimate statutory processes to operate to preclude voting by those who are not entitled to vote,” and concluded that the latter interest was most compelling.³² The United States Supreme Court agreed with the Sixth Circuit, noting a “faith” that voter deception and intimidation would not occur, and that “the elected officials and numerous election volunteers on the ground will carry out their responsibilities in a way that will enable qualified voters to cast their ballots.”³³

D. The Role of the Nonpartisan Voter Advocate

In addition to an increase in the number of partisan election observers or challengers in the polls since the Election of 2000, several nonpartisan groups have organized volunteers to serve as voter protectors or advocates in the polls on Election Day. Organizations vary in purpose. Some, such as a group founded by Harvard Law students called Just Democracy, focused on placing nonpartisan law students and attorneys in polling places to ensure that the rights of voters were protected. Others, including the NAACP, People for the American Way and the Advancement Project formed an Election Protection coalition to encourage early voting and the use of absentee ballots, coordinate comprehensive legal field programs, work with local election officials, develop legal responses to problems on and before Election Day, and to place volunteers to serve either as Election Day poll monitors in targeted precincts or to provide live voter assistance via a toll-free national hotline in 2004 and 2006 elections. In addition, groups like the Asian American Legal Defense and Education Fund (AALDEF) recruit several local polling place observers to conduct exit polls of voters of Asian descent and collect information on intimidating acts targeting voters.

The work of these organizations can serve as guidance for establishing standards to which nonpartisan voter advocates should adhere. For example, voter advocates should be permitted to observe all official acts and records used at the polling places, and should be instructed to present all objections and challenges directly to the Election Day officials. They should ensure that protections of the Voting Rights Act are met,

31. *Id.* at 550.

32. *Id.* at 551.

33. *Spencer v. Pugh*, 543 U.S. at 1303.

and be available to assist voters in asserting their rights throughout the voting process.

But perhaps the most unique and important role that these groups can play is to develop a record and report of any instances of irregularity at the polling location, including improper challenges to voters and any failures of the political process. Groups like AALDEF have, in recent years, illustrated the value of this role. Under the leadership of Margaret Fung and Glenn Magpantay, the group has placed advocates in polling locations during several recent federal elections, and has observed and recorded irregularities that inform subsequent successful legal actions and investigations by the United States Department of Justice. Through work such as this, nonpartisan voter advocates function almost entirely to serve the voter both on Election Day and in the future through the collection of information that can shine a light onto problems voters experience at the polls and help prevent the problems from reoccurring in the future. The above analysis offers a brief glimpse in to the roles that four major entities—the government, poll workers, political parties, and non partisan voter advocates—play on Election Day. Each are responsible for promoting and protecting the right to vote, and each are able to contribute in a unique way to ensuring the smooth administration of an election. If each is able to work together, but independently, towards this common goal, the voters and democracy reap the rewards.

While these entities are responsible for the overall administration of elections, they also play a role in administering or complying with the mandates of the Voting Rights Act, such as Section 203 of the Act. The following section of this article offers an in-depth description of the provisions of Section 203, as a case study that illustrates how the federal, state and local governments, and nonprofit entities can work together to ensure that the “one person, one vote” philosophy remains a priority in the American electoral process.

III. The Language Assistance Provisions of the Voting Rights Act and the 2006 Reauthorization

Sections 203 and 4(f)4 of the Voting Rights Act³⁴ are the federal government’s most significant attempt to date to ensure that certain citizens with limited English proficiency have some accommodations in casting their ballots. The provisions originated in 1975 amendments to the

34. 42 U.S.C. § 1971 (2006) (section 203 amended in 42 U.S.C. § 1973aa-1a and § 4(f)4 amended in 42 U.S.C. § 1973b(f)4).

Voting Rights Act after congressional hearings concluded that certain citizens with limited English proficiency were effectively excluded from participation in the electoral process as a result of poor educational opportunities, high illiteracy rates, and low voting participation.³⁵ To remedy this and promote the political participation of these historically underrepresented groups, Sections 203 and 4(f)4 required that jurisdictions provide translated election materials or bilingual poll workers if a significant number of Latino, Asian American, Native American, or Alaskan Native citizens living in those jurisdictions suffer from high rates of illiteracy.³⁶

When the provisions were added to the Voting Rights Act, congressional leaders held the optimistic hope that the sociological factors that created the need for language accommodations would eventually diminish.³⁷ As such, the most significant aspects of the provisions were intended to expire in 1982, after 7 years.³⁸ But in the face of consistent data indicating that language minority citizens covered by the provision continued to suffer from high rates of illiteracy and poor access

35. Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400 (1975); *see also* H.R. Rep. No. 94-196, at 17 (1975).

36. *Id.* Section 203 states, in part, that:

- (a) . . . The Congress finds that, through the use of various practices and procedures, citizens of language minorities have been effectively excluded from participation in the electoral process. Among other factors, the denial of the right to vote of such minority group citizens is ordinarily directly related to the unequal educational opportunities afforded them, resulting in high illiteracy and low voting participation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting these practices, and by prescribing other remedial devices.
- (b) (1) Generally. Before August 6, 2007, no covered State or political subdivision shall provide voting materials only in the English language.
(2) Covered States and political subdivisions. (A) Generally. 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 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.

37. S. REP. NO. 94-295, at 9 (1975).

38. Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400 (1975).

to both educational and electoral opportunities, Congress extended and renewed Section 203 for 10 years in 1982,³⁹ 15 years in 1992,⁴⁰ and most recently, in 2006, for 25 years.⁴¹

Today, under the coverage formula of Section 203, language accommodations are currently afforded to voters of the following descents: Hispanic, Chinese, Filipino, Japanese, Korean, Vietnamese, American Indian, and Native Alaskan.⁴² In addition, 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.⁴³ As of July 22, 2002, the most recent coverage calculation until 2010, over 335 jurisdictions were covered under Sections 203 or 4(f)4: 220 jurisdictions required to provide language assistance in Spanish and about 115 required to provide assistance to Asian Americans, Alaskan Natives, or Native Americans.⁴⁴ The United States Department of Justice monitors coverage compliance, and typically requires covered jurisdictions to include translated written materials, such as ballots, voter registration forms, and voting instructions,⁴⁵ oral assistance such as interpreters and bilingual poll workers,⁴⁶ and publicity regarding the elections and availability of bilingual assistance,⁴⁷ such as signs at polling sites and announcements in community media.⁴⁸ The Department of Justice also encourages covered jurisdictions to work

39. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 133 (1982).

40. Voting Rights Language Assistance Act of 1992, Pub. L. No. 102-344, 106 Stat. 921 (1992).

41. Fannie Lou Hamer Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 126 Stat. 577 (2006).

42. *Id.* 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).

43. 42 U.S.C. § 1973aa-1a(d) (2000).

44. Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 144, 48871-77 (July 26, 2002). The next coverage calculation will occur in 2010, and every 5 years after that.

45. 28 C.F.R. §§ 55.15, 55.19 (2008).

46. §§ 55.18, 55.20. Sometimes assistance must be provided in more than one dialect of the language. For instance, although there is one written form of Chinese, there are several spoken dialects, like Cantonese, Mandarin, Toisan, and others. *Id.*

47. § 55.20.

48. Of those polled, over 51% of Asian American voters got their news about politics and community issues from the ethnic press. NANCY W. YU, ASIAN AMERICAN DEFENSE AND LEGAL EDUCATION FUND (AALDEF), THE ASIAN AMERICAN VOTE: A REPORT ON THE MULTILINGUAL EXIT POLL IN THE 2004 PRESIDENTIAL ELECTION 2 (2004), available at http://www.aaldef.org/images/04-20-05_exit_poll_report.pdf.

with local community groups to ensure the accommodations are tailored to the needs of the community.⁴⁹

This analysis reviews the congressional decisions to extend and renew Section 203, including its most recent renewal in 2006. It also discusses its effectiveness and usefulness in American political law. In particular, it examines the events leading to the decision to Congress' most recent decision to extend the provision for an additional 25 years, and outlines the various arguments surrounding its controversial 2006 renewal. It concludes with a look to the future, and attempts to identify the ongoing relevance of the protections afforded by the federal law and the role states and localities must play to ensure its efficacy.

*A. The Development of Sections 203 and 4(f)4
of the Voting Rights Act*

Sections 203 and 4(f)4 were an expansion of another provision of the Voting Rights Act, Section 4(e), which was enacted in 1965.⁵⁰ Section 4(e) prohibits discrimination against persons who, due to poor educational opportunities, are not proficient in the English language,⁵¹ but is traditionally interpreted to apply solely to citizens from Puerto Rico.

In 1975,⁵² Congress engaged in an extensive debate over whether to broaden the scope of the Voting Rights Act to protect other language minorities.⁵³ A coalition of several civil rights constituency groups testified

49. 28 C.F.R. § 55.20.

50. In addition to Section 203, Section 4(f)4, codified as 42 U.S.C. § 1973b(f)(4) (2000), provides permanent protections for certain language minorities. 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 language minorities present and recorded prior to the November 1, 1972, election. See 28 C.F.R. § 55.8 (2006) (discussing the relationship between Sections 4(f)(4) and 203(c)); 28 C.F.R. § 55.5 (discussing the coverage formula pursuant to Section 4(f)(4)).

51. 42 U.S.C. § 1973b(e) (1982).

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 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. . . .

52. Voting Rights Act Amendments of 1975, §203, Pub. L. No. 94-73, 89 Stat. 400 (1975).

53. *Id.* § 207 (codified as amended at 1973aa-1a(e)).

before judiciary committees in both houses and presented overwhelming evidence of the educational disparities, low turnout rates, and discriminatory barriers to voting endured by Hispanics, Asian Americans, American Indians, and Alaska Natives.⁵⁴ After concluding that limited English proficiency was a serious barrier to political participation for these groups,⁵⁵ both houses voted to add Sections 203 and 4(f)4 to the Voting Rights Act.⁵⁶

The coverage formula for Section (4)(f)4 applied only to jurisdictions that, on November 1, 1972, failed to provide translated election materials to any language minority groups that comprised over five percent of the voting age citizen population on that date.⁵⁷ Section 203 was intended to provide similar protections but incorporated a flexible coverage formula, linked first to the census and now to the American Community Survey, and set to evolve with the size and literacy levels of language minority communities.⁵⁸

54. See Rodolfo de la Garza & Louis DeSipio, *Regulating the Electoral Process, 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, 1482–84 (1993) (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.”).

55. H.R. REP. NO. 94-296, at 22 (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) (“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.”).

56. See, e.g., H.R. REP. NO. 94-296, at 16–25 (1975); S. REP. NO. 295, at 24–28 (1975); 121 CONG. REC. 13, 16246–47 (1975).

57. 28 CFR § 55.5 (“Section 4(f)4 applies to any State or political subdivision in which (1) Over five percent of the voting age citizens were, on November 1, 1972, members of a single language minority group, (2) Registration and election materials were provided only in English on November 1, 1972, and (3) Fewer than [fifty] percent of the voting-age citizens were registered to vote or voted in the 1972 Presidential election.”) Jurisdictions covered under Section 4(f)4 are also required to submit any changes to their accommodations for language minorities to the Attorney General for preclearance. See 28 CFR § 55.2(d).

58. Specifically, a jurisdiction is covered under Section 203 if the Director of the Census determines that two criteria are met. First, the limited-English proficient citizens, or citizens who speak English “less than very well,” who are of voting age in a single language group must: (a) number more than 10,000; (b) comprise more than five percent of all citizens of voting age; or (c) comprise more than five percent of all American Indians of a single language group residing on an Indian reservation. Second, the illiteracy rate of the language minority citizens must exceed the national illiteracy rate.

At first, Section 203 mandated language assistance only to states and smaller jurisdictions where the voting age citizen population of a single language minority was greater than 5%, provided the illiteracy rate of the citizens in the jurisdiction was higher than the national illiteracy rate.⁵⁹ Though it was set to expire in 10 years, it was renewed in 1982 for an additional 10 years after testimony from a multitude of community groups⁶⁰ documenting the continued need for the provisions⁶¹ and noting the impact of the protections in increasing the electoral participation of the covered language minorities.⁶² In particular, the House and Senate reports cited surveys conducted in 1976 and 1980 that indicated a strong link between providing bilingual registration and voting materials and oral assistance at the polls and increased voter participation among members of the Latino community,⁶³ emphasizing the benefits of these materials for elderly voters who had lower levels of English proficiency.⁶⁴

Ten years later, the most significant expansion of Section 203 protections emerged after Congress reviewed evidence from various Asian American community groups. The evidence emphasized both the effectiveness of the provision in boosting the electoral engagement of Asian

59. 42 U.S.C. §1973 aa-1a(2)(A)(ii) (2000).

60. The Senate heard from groups such as the Mexican American Legal Defense and Educational Fund, the League of United Latin American Citizens, the Chinese for Affirmative Action, the National Congress of American Indians, and various state officials, who all spoke in favor of Section 203. S. REP. NO. 97-417, at 65-66 (1982). The House Judiciary Committee Report cited similar testimony from the Southwest Voter Registration Education Project, the Mexican American Equal Rights Project, the Texas Labor Council for Latin American Advancement, the National Congress of American Indians, Chinese for Affirmative Action, and the Mexican American Legal Defense Fund. H.R. REP. NO. 97-227, at 27 n.85 (1981).

61. Henry Der, Executive Director of Chinese for Affirmative Action, delivered particularly compelling testimony to the House Committee. According to the House Committee report, Der's testimony "pointed out that persons who oppose these provisions 'do not understand the discriminatory experiences that Chinese Americans have had to suffer and which have made it difficult for Chinese Americans, particularly the elderly, to learn English.'" *Id.* at 27 (citing Testimony of Henry Der, House Judiciary Committee Hearings, June 10, 1981).

62. *Id.* Testimony from David Dunbar, General Counsel for the National Congress of American Indians, for example, emphasized the positive effects of Section 203 in the American Indian community: "the provision of oral language assistance in the electoral process is of particular importance to American Indian communities." *Id.*

63. *Id.* at 27 n. 83. According to a survey conducted by the Mexican American Legal Defense Fund and the Southwest Voter Registration and Education Project, 23% of surveyed Latino voters received assistance from a bilingual poll worker and 32% said they would be less likely to vote if Spanish language assistance were not available. S. REP. NO. 97-417, at 66.

64. S. REP. NO. 97-417, at 66. ("Among those who participated in the survey [by MALDEF and SVREP] who are between 18 and 25, 6 out of 100 persons speak only Spanish. Among those over 65, 34 persons, or more than 33%, speak only Spanish.").

American citizens and the gaps in coverage that led to the exclusion of many Asian communities from protections in the provision.⁶⁵ In 1992, the only jurisdictions required under Section 203 to provide language assistance for Asian Americans were in Hawaii and San Francisco, California.⁶⁶ Excluded from coverage were several major cities, including Los Angeles and New York. In addition, data cited in congressional reports point to exit polls of Asian American voters in Los Angeles and New York expressing an overwhelming desire for translated materials. Approximately eighty percent of those surveyed in both cities agreed that bilingual ballots would provide significant help in the voting process, and stated that they would vote more often if bilingual assistance were provided.⁶⁷ To address these gaps in coverage, Congress voted to amend Section 203 to also cover jurisdictions with at least 10,000 voting age citizens of a single language minority already covered under the provision.⁶⁸ Immediately as a result of the amendment, ten counties in New York, California, and Hawaii were included and specifically required to provide ballots, voting materials, and language assistance in Asian languages.⁶⁹

65. *Id.* at 65–66.

66. H.R. REP. NO. 102-655, at 7 (1992); S. REP. NO. 102-315, at 17 (1992). (“After the 1982 reauthorization, no Asian American community outside of Hawaii qualified for assistance. Under the 1990 census, only Chinese Americans in San Francisco County would qualify on the mainland.”).

67. H.R. REP. NO. 102-655, at 7; *see also* S. REP. NO. 102-315, at 12 (“In New York City, for example, four out of five voters surveyed in that city’s Chinatown had language difficulties. These voters stated that they would vote more often if bilingual assistance were provided. In Queens County, NY, four out of every five limited English proficient Asian-American voters indicated they would vote more if bilingual assistance were provided.”).

68. H.R. REP. NO. 102-655, at 4 (“During the period from 1982 until the present, the need for a numerical benchmark became clear, so that jurisdictions with large language minority populations that do not meet the 5% trigger would be covered under S[ection] 203. With a 10,000 person benchmark, 38 additional language minority communities will receive assistance.”); S. REP. NO. 102-315, at 16–17 (“[A]n alternative, numerical trigger for section 203 coverage-jurisdictions with over 10,000 language minority citizens of voting age will be required to provide language assistance in the applicable minority language. According to 1990 census data, the addition of a 10,000 citizen benchmark coverage trigger will make the right to vote a reality for over 860,000 language minority citizens in the United States in 34 counties.”).

69. Implementation of the Provisions of the Voting Rights Act Regarding Language Minority Groups, 28 C.F.R. pt. 55, app. (2005). The counties and languages included Alameda County, CA (Chinese), Los Angeles County, CA (Chinese, Filipino, Japanese, Vietnamese), Orange County, CA (Vietnamese), San Francisco County, CA (Chinese); Honolulu County, HI (Filipino, Japanese), Kauai County, HI (Filipino), Maui County, HI (Filipino); Kings County, NY (Chinese), New York County, NY (Chinese), Queens County, NY (Chinese).

Congress renewed Section 203, as amended in 1992, in its 2006 passage of the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act,⁷⁰ after additional congressional hearings revealed an ongoing need for its protections.⁷¹ The sole amendment to the provision came from a suggestion from a coalition of civil rights community groups who requested that coverage calculations be based not on the decennial Census, but on data provided from the American Community Survey, collected every five years. The amendment ensures that the coverage formula for Section 203 is narrowly tailored to the language minority communities that Congress sought to protect.

B. *The 2006 Reauthorization of Section 203*

Since their enactment in 1975, the language protections of the Voting Rights Act have ensured that government has played a direct and pivotal role in promoting political participation and a responsive, inclusive government. Latino citizens living in areas covered by Section 203 were 4.4% more likely to vote in 1996 and 2000 than Latino citizens living in non-covered areas.⁷² In one Arizona county, the number of Native Americans registered to vote grew 165% between 1972 and 1980,⁷³ while turnout among Native Americans in Navajo County increased by 120% between 1972 and 1990, and in Apache County, Arizona by 88% during the same period.⁷⁴

As one would expect, this increased engagement has also led to an increase in the number of elected officials from the accommodated communities. The Executive Director of the Asian American Legal Defense and Education Fund (AALDEF) testified before Congress in 2005 that a recent increase in elected officials of Asian descent was directly

70. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246 (2006).

71. See, e.g., *Testimony of Margaret Fung, Executive Director of the Asian American Legal Defense Fund, Oversight Hearing on the Voting Rights Act: Section 203—Bilingual Election Requirements (Part I) Before the H. Comm. on the Judiciary, Subcomm. on the Constitution*, 109th Congress (November 8, 2005), available at <http://judiciary.house.gov/media/pdfs/fung110805.pdf> [hereinafter *Testimony of Margaret Fung*].

72. Michael Jones-Correa, *Language Provisions Under the Voting Rights Act: How Effective Are They?*, 86 SOC. SCI. Q. 549, 558 (2005).

73. H.R. REP. NO. 102-655 at 6–7, reprinted in 1992 U.S.C.C.A.N. 770–71; S. REP. NO. 102-315 at 12; S. 2236 *Hearings*, 102d Cong., 2d Sess., S. HRG. 102-1066, at 181–89 (1992) (statement of Navajo Nation Vice-President Marshall Plummer).

74. *Id.*

attributable to Section 203 requirements and accommodations⁷⁵—and better responsiveness from government entities.⁷⁶

These results have not come without controversy. Congress weighed several arguments extensively during its deliberations over whether to reauthorize Sections 4(f)4 and 203 in 2006, both in hearings and on the House and Senate floor.⁷⁷ Critics of the provisions cited concerns ranging from the practical, arguing that the measure is unnecessary and that the costs of compliance exceed what the government should be expected to provide to accommodate any voters, to the symbolic, suggesting that the provision “Balkanizes America,”⁷⁸ reduces incentives for citizens to learn English, and “degrades the idea of citizenship.”⁷⁹

75. *Testimony of Margaret Fung*, *supra* note 71 at 3 (“In New York City, the municipality with the nation’s largest Asian American population, the first Asian American, John Liu, was elected to the New York City Council in 2001. Jimmy Meng was elected the first Asian American member of the NY State Assembly in 2004. Both Liu and Meng were elected in Queens County, one of three counties in New York City covered by section 203. In California, the state with the largest Asian American population, there were no Asian Americans serving on the state legislature in 1990, and now, there are nine. In Houston, Texas, the first Vietnamese American, Hubert Vo, was elected to the state legislature in 2004, within years after Vietnamese language assistance was required in Harris County under Section 203.”); *see also Testimony of Eugene Lee, Staff Attorney for the Asian Pacific American Legal Center to the Western Regional Hearing Before the National Commission on the Voting Rights Act*, (Sept. 27, 2005), available at http://www.votingrightsact.org/hearings/pdfs/eugene_lee.pdf. (“One factor in [the recent electoral success of Asian Americans] 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.”).

76. *See de la Garza & DeSipio*, *supra* note 54, at 1505. (“[Section 203] has offered Latinos the option to elect co-ethnics to office. The [Latino National Political Survey (LNPS)] offers several measures of the degree to which Latinos feel government officials are responsive, how the presence of a co-ethnic on the ballot influences their decision about whether to vote and for whom to vote, and how useful bilingual election materials are to voters. Overwhelmingly, LNPS 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.”).

77. For a detailed and firsthand account of the reauthorization proceedings, see James Tucker, *The Politics of Persuasion: Passage of The Voting Rights Act Reauthorization Act of 2006*, 33 J. LEGIS. 205 (2007).

78. *Testimony of Linda Chavez, President of One Nation Indivisible, Oversight Hearing on the Voting Rights Act: Section 203—Bilingual Election Requirements (Part I) Before the H. Comm. on the Judiciary, Subcomm. on the Constitution*, 109th Congress at 1 (November 8, 2005), available at www.judiciary.house.gov/OversightTestimony.aspx?ID=510.

79. *See, e.g., John J. Miller, English is Broken Here*, POLICY REVIEW (Sept.–Oct. 1996), available at <http://www.hoover.org/publications/policyreview/3574512.html> (“Allowing voters to cast foreign-language ballots degrades the idea of citizenship.”).

Opponents offered testimony citing low dropout rates among Asian immigrant groups as evidence that the educational disparities that led to the need for the materials no longer exist.⁸⁰ Other testimony emphasized what they saw as a ratio of high costs of compliance with low usage of the materials, pointing to a 1997 report by the Federal General Accounting Office that Los Angeles County spent just over \$1 million to provide election materials during the 1996 election, while places like King County, Washington reported that after printing 3600 Chinese language ballots only 24 people requested them for a September 2002 primary election.⁸¹ And during the hearings, Congressman King circulated a letter signed by fifty-six congressional representatives that was reportedly drafted by ProEnglish, an advocacy organization that explicitly advocates for English-only laws, which included a handful of anecdotes from newspaper articles about the supposed high costs of compliance and the failure of targeted citizens to use the materials.⁸²

But the weight of statistics showed that translated materials and other accommodations were still needed and heavily utilized. A report by the Pew Hispanic Center cited in Congressional testimony revealed that despite gains since 1975, only 47% of eligible Hispanics participated in the November 2004 election, compared to 67% of Whites and 60% of African Americans.⁸³ Survey data from 2002 also showed that nearly a quarter (23%) of registered Latino voters identify Spanish as their primary language and indicate that they speak little or no English,⁸⁴ while a 2004 survey “found that 47% of Southeast Asian Americans said they were limited English proficient, and over one-third of all respondents needed some form of language assistance in order to vote.”⁸⁵ And “according to AALDEF’s 2004 exit poll of 11,000 Asian American voters, almost one-third of all respondents needed some form of language

80. *Statement of K.C. McAlpin, Executive Director of ProEnglish, Oversight Hearing on the Voting Rights Act: Section 203—Bilingual Election Requirements (Part II) Before the H. Comm. on the Judiciary, Subcomm. on the Constitution*, 109th Congress (May 10, 2006), available at <http://judiciary.house.gov/media/pdfs/mcalpin110905.pdf>.

81. *Id.*

82. Tucker, *supra* note 77, at 236.

83. *Testimony of Juan Cartagena, General Counsel to the Community Service Society in New York City, Oversight Hearing on the Voting Rights Act: Section 203—Bilingual Election Requirements (Part II) Before the H. Comm. on the Judiciary, Subcomm. on the Constitution*, 109th Congress at 1 (May 10, 2006), available at <http://judiciary.house.gov/media/pdfs/cartagena110905.pdf>.

84. *Id.* at 6.

85. *Testimony of Margaret Fung*, *supra* note 71, at 6.

assistance in order to vote, and the greatest beneficiaries of language assistance (46%) were first-time voters.”⁸⁶

The most extensive empirical data supplied to Congress revealed that, for many covered jurisdictions, costs of compliance were relatively minimal. Researchers James Tucker and Rodolfo Espino surveyed 361 of 800 jurisdictions covered under the language protections to, among other things, collect data on compliance costs.⁸⁷ Their research revealed not only that 71% of the responding jurisdictions believed that federal language assistance provisions should remain in effect for public elections, but that the price of compliance was modest. Specifically, their 2005 study of election officials in the 31 states covered by Section 203 revealed that a majority of covered jurisdictions incurred no additional costs for either oral or written language assistance, with most of the remaining jurisdictions incurring additional expenses of less than 1.5% for oral language assistance and less than 3% for written language assistance.⁸⁸

Symbolic arguments of either the immense importance or the disastrous effects of the language protections also abounded at the hearings. Linda Chavez, President of One Nation Indivisible, suggested in testimony to the House Judiciary Constitutional Subcommittee that Section 203 “Balkanizes” America, and stressed that America should be unified and “the government should be encouraging our citizens to be fluent in English.”⁸⁹ K.C. McAlpin, Executive Director of ProEnglish, also testified before the House Committee that bilingual ballots undermine our national unity.⁹⁰

Representative Jose Serrano rebuffed the argument, noting that he had “never met any immigrant, much less one who became a citizen, who did not want to learn English or understand that learning English is their key to the American dream.”⁹¹ Testimony from Rebecca Vigil-Giron,

86. *Id.* at 3.

87. See DR. JAMES THOMAS TUCKER & DR. RODOLFO ESPINO, MINORITY LANGUAGE ASSISTANCE PRACTICES IN PUBLIC ELECTIONS (2006), available at <http://www.votingrights.org/advocacy/downloads/Executive%20Summary.pdf>. Tucker and Espino contacted all 810 jurisdictions covered under Sections 4(f)4 and 203. *Id.* 361 responded fully to the survey and were included in the report. See *id.*

88. See *id.* at 23–24. The study also noted that many responding jurisdictions claimed they were “unable to identify the costs, if any, of their language assistance programs because they d[id] not track such costs in their budgets, or because the costs are included in expenses they would have to incur anyway.” *Id.* at 24.

89. Testimony of Linda Chavez, *supra* note 78, at 1.

90. Testimony of K.C. McAlpin, *supra* note 80, at 9.

91. Terry Ao, *When the Voting Rights Act Became Un-American: The Misguided Vilification of Section 203*, 58 ALA. L. REV. 377, 388 (2006) (citing 152 CONG. REC. H5173 (daily ed. July 13, 2006) (statement of Rep. Serrano)).

Secretary of State for New Mexico and past President of the National Association of Secretaries of State, similarly supported the language protections of the Voting Rights Act were the “legal foundation” of her administration’s ability to protect the voting rights of Americans with limited English proficiency and incorporate these citizens into American democracy.⁹² Margaret Fung of AALDEF also testified that “[a]t the most fundamental level, translated ballots . . . have enabled Asian American voters to exercise their right to vote independently and privately,”⁹³ while Juan Cartagena emphasized simply that the “rights we are advocating for today are the rights of citizens of this country to full and fair access to the franchise.”⁹⁴

*C. Amendments and Other Attempts to Weaken
Section 203 in 2006*

Despite the testimony documenting the continuing importance and relevance of the provisions, there were several attempts to repeal or limit the enforcement of Section 203 in particular throughout the reauthorization process.⁹⁵ In May 2006, during the House Judiciary Committee markup of the entire reauthorization bill, Representative King proposed two amendments—one to abolish the provision entirely, and another that would limit its renewal to six years, as opposed to the twenty five year renewal that all other expiring provisions received in the proposed legislation.⁹⁶ King argued that reauthorizing Section 203 would contradict “immigration law because English is a condition for naturalization.”⁹⁷ The chairman of the committee, Representative F. James Sensenbrenner, emphasized in response that it was the “failure” of the American public education system that was partially to blame for not preparing all citizens to speak English adequately.⁹⁸ The removal of Section 203, Sensenbrenner believed, would “close the door” to opportunities for these citizens to understand the ballot and participate in the

92. *Testimony of Rebecca Vigil-Giron, Secretary of State for New Mexico, Oversight Hearing on the Voting Rights Act: Section 203—Bilingual Election Requirements (Part II) Before the H. Comm. on the Judiciary, Subcomm. on the Constitution, 109th Congress at 1 (Nov. 8, 2005), available at <http://judiciary.house.gov/OversightTestimony.aspx?ID=511>.*

93. *Testimony of Margaret Fung, supra* note 71, at 3.

94. *Testimony of Juan Cartagena, supra* note 83, at 4.

95. For further discussion on the 2006 reauthorization efforts surrounding Section 203 of the Voting Rights Act, see generally Tucker, *supra* note 77, and Ao, *supra* note 91.

96. Ao, *supra* note 91, at 384 (citing H.R. REP. NO 109–478, at 85–87).

97. Tucker, *supra* note 77 at 238.

98. *See id.* at 238 n.334

electoral process.⁹⁹ Both King amendments failed committee votes and were not included in the markup legislation.¹⁰⁰ King also proposed an identical version of his amendment to strike Section 203 from the reauthorization altogether on the House floor in July 2006, which similarly failed in a full vote of 238–185.¹⁰¹

A backhanded attempt to do away with Section 203 occurred when Representative Clifford Stearns, a Republican from Florida, proposed an amendment to the Science, State, Justice, Commerce, and Related Agencies Appropriations Act of 2007, to eliminate funding for United States Justice Department to enforce the language accommodation provisions of the Voting Rights Act.¹⁰² Without appropriated enforcement funds, language assistance under the Voting Rights Act would be virtually nonexistent.¹⁰³ The Stearns amendment was ultimately defeated in a floor vote of 254–167.¹⁰⁴

D. *Other Attempts to Modify Section 203*

Congress also considered various proposals to modify Section 203 during the reauthorization process. Three specific changes were considered at the behest of a coalition of top civil rights organizations, academics, advocates, and litigators: (1) lowering the numerical trigger for coverage in jurisdictions from 10,000 to 7500, (2) changing the basis for Section 203 determinations from the decennial long-form survey under the United States Census to the American Community Survey (ACS) and (3) requiring Section 203 determinations to be made every 5 years, instead of every 10 years, beginning in 2010.¹⁰⁵

While the latter two changes were added to the reauthorized Section 203 without much fanfare, efforts to lower the numerical trigger

99. *See id.*

100. The vote on the first amendment to strike the reauthorization of Section 203 failed by a vote of 26 to 9. The second amendment, which would have seen Section 203 expire in six years, failed by a vote of 24 to 10. *Ao, supra* note 91 at 384 (citing H.R. REP. NO 109–478, at 85–87).

101. 152 CONG. REC. H5205–06 (daily ed. July 13, 2006) (Roll Call Vote No. 372).

102. The amendment provided that “[n]one of the funds made available in this Act may be used to carry out any provision of section 203 of the Voting Rights Act of 1965.” 152 CONG. REC. H4743 (daily ed. June 28, 2006).

103. *See Ao, supra* note 91 at 385 (“The measure was designed to kill language assistance even before the renewal vote.”); Tucker, *supra* note 77, at 248 (noting that “Representative King acknowledged [to the press] that the Amendment was a backdoor attempt to eliminate the language assistance provisions.”).

104. 152 CONG. REC. H4774–75 (daily ed. June 28, 2006) (Roll Call Vote No. 340).

105. *See generally* “Section 203 Modifications and Clarifications” (on file with author); *Testimony of Margaret Fung, supra* note 71; *Testimony of Juan Cartagena, supra* note 83.

for coverage faced stiff opposition. Congress had previously amended Section 203 to include jurisdictions where over 10,000 citizens were of limited English proficiency and members of a single language minority group, extending coverage to several Latino and Asian populations in dense urban environments. In 2006, civil rights advocates testified before House and Senate committees that lowering this numerical trigger to 7500 would extend coverage to at least 77,900 voters,¹⁰⁶ including many of Southeast Asian descent. In particular, Margaret Fung, Executive Director of the Asian American Legal Defense and Education Fund, offered specific testimony documenting the need for coverage to Southeast Asian communities,¹⁰⁷ and Juan Cartagena of the Community Service Society submitted similar testimony discussing the benefits that a lowered numerical threshold would provide for smaller Latino communities.¹⁰⁸ The issue failed to garner much support among congressional leaders and never moved beyond committee discussions.¹⁰⁹

Finally, there was some debate over whether citizen-created recall petitions and ballot initiatives were “election materials” requiring translation under Section 203. This controversy emerged from a decision by the United States Court of Appeals for the Ninth Circuit, sitting en banc, in *Padilla v. Lever*.¹¹⁰ The *Padilla* opinion held that Section 203 did not apply to citizen-initiated recall and initiative petitions because they were not election materials provided by the government.¹¹¹ Though there was no formal amendment to Section 203 addressing this issue, the House Committee report on the legislation included language explicitly noting that private citizens were not covered by the provision, reasoning that “[t]o impose Section 203’s requirements on private citizens whose actions are outside governmentally administered voting systems would have the effect of penalizing private citizens for injuries caused by States.”¹¹²

106. See *Testimony of Margaret Fung*, *supra* note 71, at 6.

107. See *id.* (“The current formula of section 203 still excludes a large sector of the Southeast Asian community, which includes Americans from Vietnam, Cambodia and Laos. Many came to the United States as refugees after the Vietnam War or are the children of refugees. They number over 1.8 million and have become United States citizens at rates higher than the national average. Southeast Asian American communities have high levels of limited English proficiency and low levels of educational attainment, which are the very characteristics of the citizens that Congress intended to protect under section 203.”).

108. *Testimony of Juan Cartagena*, *supra* note 83, at 28.

109. Tucker, *supra* note 77 at 238–39 (describing the failed efforts to lower the numerical trigger as a “casualty” of the reauthorization process).

110. 429 F.3d 910 (9th Cir. 2005), *withdrawn*, 446 F.3d 963 (9th Cir. 2006).

111. See *id.* at 922.

112. H.R. REP. NO. 109-478, at 59.

E. *Sections 203 and 4(f)4 in Action: Issues of Compliance and Efficacy*

As the United States citizenry becomes increasingly racially and culturally diverse, with Latino citizens and citizens of Asian descent among the country's fastest growing populations,¹¹³ the issue of federally mandated language accommodations in the electoral arena will continue to be a relevant ongoing discussion. And at the heart of this particular discussion will be the question of whether the existing assistance provisions in Sections 203 and 4(f)4 meet Congress's goals of reducing barriers to the electoral process for language minority citizens who have not had adequate access to educational opportunities that would enable them to learn English.

Coverage under Sections 203 and 4(f)4 typically means only that the state or local jurisdiction must fund and provide election materials and assistance in the language of the applicable minority group.¹¹⁴ Apart from that loose mandate, covered jurisdictions are given a great deal of discretion as to how to comply with the provision,¹¹⁵ but are expected to take reasonable steps to provide materials and assistance in a way that allows members of the covered language group to be informed of and participate in election activities.¹¹⁶ Jurisdictions may opt, though are not required, to use trained interpreters at poll sites¹¹⁷ and may "target" their assistance to certain areas or precincts for coverage.¹¹⁸

Noncompliance is an ongoing problem with covered jurisdictions, partially as a result of these flexible guidelines and inconsistent monitoring by the Department of Justice.¹¹⁹ Nearly 20% of the jurisdictions

113. *See generally*, ROBERTO R. RAMIREZ, U.S. CENSUS BUREAU, *WE THE PEOPLE: HISPANICS IN THE UNITED STATES* (2004); HYON B. SHIN & ROSALIND BRUNO, U.S. CENSUS BUREAU, *LANGUAGE USE AND ENGLISH-SPEAKING ABILITY: 2000*, Series C2KBR-29, at 2 (2003).

114. *See generally*, 28 C.F.R. §§ 55.18–55.20 (2006). Jurisdictions covered under Section 4(f)4 must also submit any changes to their election laws to the Justice Department for preclearance. *See* 28 C.F.R. § 55.8(b).

115. 28 C.F.R. § 55.14(c), § 55.11 (2006) (discussing the discretion granted to jurisdictions covered under Section 203); *see also* 28 C.F.R. § 55.14(c) ("It is the responsibility of the jurisdiction to determine what actions by it are required for compliance" with Section 203); 28 C.F.R. § 55.11 (2006) ("It is the responsibility of covered jurisdictions to determine what languages, forms of languages, or dialects will be effective.").

116. 28 C.F.R. § 55.2 (b)(1)(2) (2006).

117. 28 C.F.R. §§ 55.18, 55.20 (2006).

118. 28 C.F.R. § 55.17 (2006). ("[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.").

119. TUCKER AND ESPINO, *supra* note 87 at 22.

responding to the 2005 Tucker and Espino survey admitted that they did not provide any written or oral language materials, despite requirements under federal law. Just over 57% of the 336 respondent covered jurisdictions also did not have any full time workers who were fluent in the covered language. And although the Department of Justice regulations require that covered jurisdictions have direct contact with the language minority group organizations to ensure language assistance programs are effective, only 37.3% (120 jurisdictions) reported that they regularly consulted with community organizations or individuals from the covered language groups about providing election assistance in those languages.¹²⁰

Where there is compliance, several nonprofit monitoring groups have found written materials to be poorly or incorrectly translated,¹²¹ and oral language assistance to be unavailable or nonexistent.¹²² Where bilingual interpreters are provided, they are sometimes poorly trained¹²³

120. *Id.* Several other publications detail noncompliance with the language assistance provisions. See, e.g., 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 (May 2004) (providing a detailed description of the lack of compliance among covered jurisdictions); NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, ACCESS TO DEMOCRACY: LANGUAGE ASSISTANCE AND SECTION 203 OF THE VOTING RIGHTS ACT (2000); AALDEF, 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 (2002); AALDEF, 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).

121. 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, 38 (2005)

122. See, e.g., Kathay Feng, Keith Aoki & Bryan Ikegami, *Voting Matters: APIAs, Latinas/os and Post-2000 Redistricting in California*, 81 OR. L. REV. 849, 867 (2002) ("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 121, at 38. ("During both 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 materials."); Keith Aoki, *A Tale of Three Cities: Thoughts on Asian American Electoral Power*, 8 UCLA ASIAN PAC. AM. L.J. 1, 45 (2002) (describing an incident where the Asian American Legal Defense and Education Fund 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 room for translations of the names. AALDEF obtained a United States Department of Justice ruling that such non-compliance was in violation of the VRA because, 'a candidate's name is one of the most important items of information sought by voters when casting a ballot.'").

123. Barry H. Weinberg & Lyn Utrecht, *Symposium, Problems in America's Polling Places: How They Can be Stopped*, 11 TEMP. POL. & CIV. RTS. L. REV. 401, 422

or speak the wrong language or dialect: Mandarin interpreters are offered where voters speak Cantonese, or Korean interpreters are provided where most voters are of Chinese descent.¹²⁴ In Queens, New York during the general election of 2000, 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.¹²⁵

Discriminatory remarks made by poll workers in covered jurisdictions continue to be a problem. In 2004, election monitors from the Asian American Legal Defense and Education Fund observed “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!’”¹²⁶ A study of the 2006 elections revealed similar anecdotes.¹²⁷ Compounding these issues is the fact that until very recently, the Department of Justice has been slow to investigate issues of poor or noncompliance.¹²⁸ Further, the high evidentiary requirements of private causes of action under the Voting Rights Act often deter private litigants or community groups from pursuing litigation.¹²⁹

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 language minority citizens must be present in order to

(Spring 2002) (“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.”); Glenn D. Magpantay & Nancy W. Yu, *Asian Americans and Reauthorization of the Voting Rights Act*, 19 NAT’L BLACK L.J. 1, 6 (2005) (noting that in 2004, “[p]oorly trained and inefficient poll workers caused chaos in several poll sites.”).

124. Magpantay, *supra* note 121, at 39 (citing AALDEF, 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) (“In the 2004 elections, a Chinese American voter who asked for assistance was directed to a Korean interpreter.”)).

125. *Id.*

126. Magpantay & Yu, *supra* note 123, at 6.

127. AALDEF, THE ASIAN AMERICAN VOTE IN THE 2006 MIDTERM ELECTIONS, available at <http://www.aaldef.org/docs/AALDEF2006ExitPollReportMay2007.pdf>.

128. Magpantay, *supra* note 121, 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.”)

129. *Id.* (“The Voting Rights Act has its own private right of action, but litigating under the Act can sometimes be prohibitively expensive.”); *see also id.* at 39 n.73 (“Law-suits 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.”)

trigger coverage. The fact that Section 203 defines “language minority” to only include Latino, Asian American, Alaska Native, or American Indian citizens leads to the exclusion of several other groups that face similarly discriminatory barriers, such as Haitian Americans or Arab Americans.¹³⁰ The numerical trigger, which calculates coverage based on the number of language minority citizens in one group, as opposed to collectively, also leads to problems for Asian American citizens. Because citizens of Asian descent speak a variety of languages and dialects, there may collectively be over 5% or 10,000 voting age citizens of Asian descent in a particular jurisdiction, but Section 203 coverage will only be triggered if a single language group, such as citizens of Korean or Japanese descent, independently meets the numerical threshold.¹³¹ 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.¹³²

These issues—the lack of compliance, problems with how coverage is determined, and the many English-learning citizens who do not receive any accommodation under Sections 4(f)4 or 203—raise some concerns about the efficacy of Section 203 as the primary accommodation for English-learning citizens in electoral politics. They suggest that language accommodations are a concept that is welcome and needed in American democracy, while emphasizing that additional work and tinkering is needed to ensure that the provisions do in fact accomplish Congress’ goal of reducing language barriers to the political process.

130. See Jocelyn Benson, *Language Protections for All? Extending and Expanding the Language Protections of the Voting Rights Act*, in *VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION AND POWER* 327, 329–31 (Ana Henderson ed., 2007).

131. April Chung, *Noncitizen Voting Rights and Alternatives: A Path Toward Greater Asian Pacific American and Latino Political Participation*, 4 *ASIAN PAC. AM. L.J.* 163, 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.”)

132. Magpantay, *supra* note 121, at 53–54 (Localities not covered under Section 203 with large Asian American populations post 2000: Los Angeles, California: Khmer, Thai, Samoan; Honolulu, Hawai’i: Korean and Filipino; Bergen, New Jersey: Korean Middlesex, Chinese; City of Boston, Massachusetts: Chinese Dorchester, Vietnamese Lowell, Khmer; Pennsylvania, Philadelphia: Chinese.) In addition, though currently only nine languages of Asian descent are covered (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 United States.” Chung, *supra* note 131, at 171 n.53.

IV. Conclusion

The language assistance provisions of the Voting Rights Act are among the most important federal protections for voters, as the requirements seek to ensure that English-learning citizens are able to cast a vote that is as accurate and as informed as the vote of any other citizen. It is clear, however, that the federal mandate alone will not achieve this goal. State, local, and nongovernmental actors also play a pivotal role in ensuring the underlying protections of the provisions are achieved. The Section 203 case study thus serves as an apt illustration of the broader theme of this article—that each of these entities occupy an important roles in ensuring that the outcome of elections accurately reflect the will of the voters. Whether poll workers, party officials, state administrators or the federal government, each actor is responsible for respecting and fulfilling their role in promoting and protecting democracy.