Santa Clara University School of Law

Santa Clara Law
Santa Clara Law Digital Commons

Faculty Publications | Faculty Scholarship

1-1-2007

Language Accommodation and the Voting Rights Act

Angelo N. Ancheta
Santa Clara University School of Law, aancheta@scu.edu

Follow this and additional works at: http://digitalcommons.law.scu.edu/facpubs

 Part of the Law Commons

Automated Citation
Angelo N. Ancheta, *Language Accommodation and the Voting Rights Act* (2007),
Available at: http://digitalcommons.law.scu.edu/facpubs/623

This Article is brought to you for free and open access by the Faculty Scholarship at Santa Clara Law Digital Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.

Chapter 11

Language Accommodation and The Voting Rights Act

Angelo N. Ancheta
Santa Clara University School of Law

Introduction

In *United States v. City of Boston*, a federal district court approved a settlement agreement between the U.S. Department of Justice and the city of Boston that spotlighted overt discrimination against minority voters and the importance of providing language assistance to those voters—not only as a congressional remedy for past discrimination but as a vehicle for increasing civic engagement and political participation. The Justice Department had alleged that the city of Boston had violated Section 203[1] of the Voting Rights Act of 1965—the act's major language-assistance provision—by failing to provide adequate translation of election materials in Spanish and by failing to recruit, appoint, train, and maintain an adequate pool of bilingual poll workers.[2] In addition, the complaint alleged that the city had violated Section 2, the act's general antidiscrimination provision, and other sections of the law in a variety of ways: by treating limited-English-proficient Latino and Asian-American voters disrespectfully; by refusing to permit these voters to be aided by an assistor of their choice; by improperly influencing, coercing, or ignoring the voters' ballot choices; by failing to make bilingual personnel available to the voters; and by refusing or failing to provide provisional ballots.[3]

[1] 42 U.S.C. § 1973aa-1a.

[2] Complaint, United States v. City of Boston, No. 05–11598 WGY (D. Mass. July 29, 2005).

[3] *Id.*

Typical of recent cases, the order in *United States v. City of Boston* requires improved translations of election materials, an adequate supply of bilingual poll workers, greater dissemination of multilingual information, federal election monitoring, the designation of a language-assistance coordinator, and the creation of a community-based advisory body.[4] The case is noteworthy, however, because the order extended language-based remedies for Section 2 violations to groups of voters that were not explicitly covered by Section 203's protections. Although the Latino population in Boston was large enough to trigger Section 203 coverage, the populations of limited-English-proficient Chinese Americans and Vietnamese Americans each fell below the statistical thresholds necessary to invoke Section 203.[5] As remedies for violations of Section 2, the mandates in *City of Boston* illustrate the central role that language assistance can play in redressing discrimination against limited-English-proficient voters, even if those voters do not constitute a large enough population to invoke formal coverage under Section 203.

Cases such as *United States v. City of Boston* illuminate an important trend in voting rights law, one in which language assistance is not simply a structural remedy bound by the four corners of the act, but a vehicle designed more broadly to accommodate differences among minority voters and to promote meaningful access to the political process. In other recent cases, the Justice Department has obtained settlements that have required language assistance to groups falling below the statistical benchmarks for Section 203 coverage,[6] as well as to groups that are not covered by Section 203, such as Arab Americans.[7] Moreover, voluntary assistance to noncovered groups has become increasingly common in major cities with growing immigrant populations. The Chicago Election Board, for example, is required under Section 203 to provide language assistance in Spanish and Chinese, but also provides voluntary assistance in languages such as Polish, Russian, Greek, German, Korean, and Serbian.[8] And the city of Boston, notwithstanding the Justice Department's 2005 lawsuit, had already made commitments to provide voter materials in Spanish, Haitian Creole, Vietnamese, Cape Verdean Creole, Portuguese, Chinese, and Russian.[9]

---

[4] United States v. City of Boston, No. 05–11598 WGY (D. Mass. Oct. 18, 2005) (three-judge court).

[5] Chinese-American voting age citizens in Boston numbered 9,825, while Vietnamese-American voting age citizens numbered 4,220. *See* Complaint, *United States v. City of Boston*, *supra* note 2, at ¶ 10.

[6] *See* Memorandum of Agreement, United States v. San Diego County, No. 04CV1273JEG (S.D. Cal. 2004) ¶ 26 (requiring language assistance in Vietnamese where population numbers fell just below 10,000).

[7] *See* United States v. City of Hamtramck, No. 00–73541(E.D. Mich. Aug. 7, 2000) (requiring language assistance in Arabic and Bengali as a remedy for voter intimidation and harassment).

[8] *See* http://www.chicagoelections.com/table_of_contents.htm (last visited Sept. 13, 2006).

[9] *See* http://www.cityofboston.gov/newbostonians/voterkit.asp (last visited Sept. 13, 2006).

Yet moving beyond a strictly remedial basis for language assistance under the Voting Rights Act raises significant political and constitutional questions. Political support for language assistance in voting is hardly universal. Arguments for English-only elections to limit financial costs and to underscore the role of English as a civic *lingua franca* continue to animate opposition to language assistance under the act. Indeed, there have been numerous attempts in recent years to repeal the act's language assistance provisions, including a proposed amendment in 2006 to H.R. 9, the bill that reauthorized the language assistance provisions for an additional twenty-five years.[10] Moreover, recent U.S. Supreme Court cases have limited the scope of congressional power to remedy constitutional and civil rights violations committed by state governments and have made antidiscrimination litigation increasingly problematic. Without a strong evidentiary record to justify congressional action, legislation designed to enforce guarantees of equality under the Fourteenth and Fifteenth Amendments may be constitutionally suspect.

This chapter examines the expansion of language assistance under the Voting Rights Act from a structural remedy for past discrimination to a broader vehicle of language accommodation that encourages political participation by limited-English-proficient voters. Part I of the chapter examines various antidiscrimination models under the Voting Rights Act, including Section 203 and the act's more general civil rights protections for limited-English-proficient voters. Part II offers a model of language accommodation that expands current voting rights jurisprudence, drawing on legal theories of language rights and extant antidiscrimination standards outside of voting. Part III suggests a framework for incorporating language-accommodation norms into enforcement of the Voting Rights Act, as well as additional vehicles for protecting language rights, such as Title VI of the Civil Rights of 1964 and election laws such as the Help America Vote Act of 2002.

I. Language Minorities and the Voting Rights Act

To trace the growth of language assistance from its roots as a structural antidiscrimination remedy to an evolving norm of language accommodation, this section discusses various language-assistance mandates under the Voting Rights Act. Section 203 of the act is the primary federal mandate requiring assistance to language minorities, but other provisions of the Voting Rights Act provide addi-

[10] In July of 2006, during floor votes on the reauthorization of the Voting Rights Act, the House of Representatives defeated, by a vote of 238–185, an amendment offered by Representative Steve King to H.R. 9 that would have eliminated Section 203 of the Voting Rights Act. *See* http://projects.washingtonpost.com/congress/109/house/2/votes/372/ Similarly, in August of 1996, the House of Representatives passed H.R. 123, the "Bill Emerson English Language Empowerment Act of 1996," which would have declared English to be the official language of the United States and would have repealed the language assistance provisions of the Voting Rights Act. *See* http://thomas.loc.gov/cgi-bin/query/z?c104:H.R.123: The Senate did not vote on the bill.

tional, but underutilized, bases for protecting the rights of limited-English-proficient voters. The various protections also represent significantly different models of civil rights enforcement. Language assistance provisions such as Section 203 typify a *structural remediation model* of voting rights law that addresses past discrimination against identified groups. Section 2 of the Voting Rights Act, which has covered language minorities since 1975, typifies the *traditional antidiscrimination model* found in many civil rights laws prohibiting policies of differential treatment and disparate impact against minorities. Finally, Section 208 of the Voting Rights Act, a provision added in 1982 to improve electoral access to disabled and illiterate voters, typifies an *individual accommodation model* that has gained strength in recent years in civil rights enforcement affecting the physically or mentally disabled. Although complementary, the combination of these models nonetheless fails to offer a systematic approach that fully addresses the rights of limited-English-proficient voters.

A. Language Minorities and the 1975 Amendments

By expanding the reach and requirements of the original Voting Rights Act to include language minorities, the 1975 amendments to the Voting Rights Act were designed to promote two major goals. One goal was to clarify the act's coverage of certain racial and ethnic minorities—Latinos in particular—who had suffered discrimination in the political process, but whose group status under the law remained uncertain. Defining the "Hispanic" or "Latino" population was problematic under the original act because its members, by self-designation or by ascription, often eluded clear racial categorization and transcended strict racial labels such as "black" and "white." The "language minority" category was created to ensure full voting rights protections for individuals of "Spanish heritage," as well as for American Indians, Asian Americans, and Alaska Natives.[11]

[11] 42 U.S.C. § 1973l(c)(3); *id.* § 1973aa-1a(e). The legislative history of the 1975 amendments also reveals a clear congressional intent to expand the act's coverage beyond black-white racial discrimination. *See* S. Rep. No. 94–295, at 35–37 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 802–04. Although groups such as Asian Americans would have been considered racial groups even under the 1965 act, their addition through the language-minority amendments, along with the addition of Latinos and Native Americans, was grounded in both the Fourteenth Amendment's equal protection guarantees and the Fifteenth Amendment's prohibitions on racial discrimination in voting. Congress relied on equal protection doctrine, under which the courts had already recognized that classifications based on national origin, like racial classifications, were presumptively unconstitutional, as the basis for extending the act to categories that eluded definition based on racial criteria, but were nonetheless the basis for extensive discrimination. *See* Keyes v. School Dist. No. 1, 413 U.S. 189, 197 (1973); Hernandez v. Texas, 347 U.S. 475, 477–79 (1954). However, Congress's choice to employ "language minority" status, rather than a broader and more commonly used category such as "national origin" or "ethnicity," ef-

Congress amended the Voting Rights Act to incorporate the language minority categories in a manner that ensured that the act's Section 5 preclearance requirements extended to language minority populations.[12] Congress also amended Section 2, the general and permanent antidiscrimination provision of the act, to add coverage for language minorities.[13]

A second goal of the 1975 amendments was to establish a set of structural remedies to address both past and ongoing discrimination against limited-English-proficient minorities.[14] Congress determined that educational discrimination, including overt segregation and disparities in public school funding and resource allocations, had led to high rates of illiteracy among language minorities throughout the country.[15] These educational inequalities, combined with discrimination

---

fectively limited the act's coverage to the enumerated groups, excluding other groups that might have been covered under a category defined differently.

[12] 42 U.S.C. § 1973b(f). Section 5 requires state and local governments with an extensive history of discrimination that has resulted in depressed minority political participation to "preclear" any changes to their electoral procedures either through administrative review by the Department of Justice or a declaratory judgment by a three-judge panel of the U.S. District Court for the District of Columbia. A change must have neither a discriminatory purpose nor a discriminatory effect. 42 U.S.C. § 1973c. Moreover, the act's ban on the use of a voting "test or device" was extended to ban English-only procedures for elections where a language-minority group constitutes over 5% of the voting age population. 42 U.S.C. § 1973b(f)(3).

[13] 42 U.S.C. § 1973(a).

[14] Section 4(e) of the original Act had already recognized the connection between English-language-proficiency and voting discrimination in the case of Puerto Rican voters, many of whom had been educated in Spanish-dominant educational environments; the act prohibits English-only literacy tests for "persons educated in American-flag schools in which the predominant classroom language was other than English." 42 U.S.C. § 1973b(e). The U.S. Supreme Court upheld the constitutionality of Section 4(e) in *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

[15] Section 4(f)(1) states:

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

42 U.S.C. § 1973b(f)(1). In addition, Section 203(a) states:

and intimidation in the electoral process, produced low rates of voter registration and voting among language-minority groups.[16] Congress thus recognized the denial of voting rights inherent in many English-only election procedures and created two remedial vehicles requiring translated election materials, oral interpretation and aid, and other language-sensitive assistance: Section 4(f) and Section 203. Because Congress found nationwide discrimination affecting language minorities, neither of the provisions requires proof of intentional discrimination or discriminatory effect by a local jurisdiction; implementation requires only that the jurisdiction satisfy the appropriate triggering formula.

Section 4(f), which targets a limited number of jurisdictions with long histories of discrimination, prohibits English-only materials and requires language assistance in areas that satisfy a triggering formula that combines a language-minority group's size (over 5%), the use of English-only procedures, and low voter registration and turnout.[17] Under Section 203, which applies nationwide, a variety of triggering formulas assess minority group size and high rates of illiteracy (measured by educational completion below the fifth grade) to determine language-assistance coverage. As originally enacted and as amended in 1982, Section 203 mandates language assistance in a state or political subdivision in which more than 5% of the voting-age citizens are members of a language-minority group and are limited-English-proficient, and where the illiteracy rate for that group exceeds the national illiteracy rate.[18] To address the problem of excluding coverage for

---

> 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.

42 U.S.C. § 1973aa-1a(a).

[16] See *id.*

[17] Section 4(f) prohibits English-only materials and requires language assistance in states and political subdivisions where (1) over 5% of the voting age citizens were, on November 1, 1972, members of a language-minority group, (2) where registration and election materials were provided only in English on that date, and (3) less than 50% of the voting-age citizens were registered to vote or voted in the 1972 presidential election. 42 U.S.C. § 1973b(f)(4); 42 U.S.C. § 1973b(b). By using information from 1972, the section focuses on areas with more serious histories of discrimination. Additionally, jurisdictions that satisfy the triggering formula must obtain preclearance of changes in election procedures under Section 5 of the Act, *See* 42 U.S.C. § 1973c.

[18] 42 U.S.C. § 1973aa-1a(b)(2)(A). Congress amended Section 203 in 1982 to require that a language-minority group also be limited-English-proficient in order to satisfy

large numbers of language-minority voters who might not meet the 5% test in many of the country's largest population centers, Congress amended Section 203 in 1992 to impose an additional test, focusing on absolute numbers: a jurisdiction with a language-minority group constituting a population with over 10,000 voting-age limited-English-proficient citizens and possessing an illiteracy rate above the national average is also covered.[19]

Although designed to be temporary measures, the language-assistance provisions of the act have been in place for over three decades and were extended in 2006 for an additional twenty-five years.[20] Notwithstanding this history, recent litigation and election monitoring by community-based organizations have illuminated ongoing problems of noncompliance with the act and its implementing regulations.[21] Common problems have revolved around inadequate numbers of trained bilingual poll workers, incomplete or insufficient amounts of translated election materials, and the failure to develop translated materials for the Internet and other electronic media. Group-specific issues such as transposing or incorrectly translating candidate names in Asian languages such as Chinese or Korean, mistranslating ballot initiative and referendum language, and establishing differential screening procedures for language-minority voters have also been well documented.[22]

In addition, monitoring groups have chronicled numerous instances of voter intimidation, harassment, and discrimination (including the denial of ballots) against limited-English-proficient voters in many areas covered by Section 4(f) and Section 203.[23] Enforcement of Section 203 by the Justice Department has been inconsistent as well. As the department's Voting Rights Section itself has divulged, more litigation had been filed since

---

the statistical benchmark, which led to a reduction in the number of eligible jurisdictions. *See* H.R. Rep. No. 102–655, at 7 (1992), *reprinted in* 1992 U.S.C.C.A.N. 766, 771.

[19] 42 U.S.C. § 1973aa-1a(b)(2)(A). The 1992 amendments also expanded Section 203's coverage to include political subdivisions that contain all or any part of an Indian reservation in which over 5% of the residents are members of a single language group, are limited-English-proficient, and possess an illiteracy rate exceeding the national average. *Id.*

[20] 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 (2006). President Bush signed the reauthorization bill into law on July 27, 2006.

[21] Recent language minority litigation by the U.S. Justice Department is highlighted at http://www.usdoj.gov/crt/voting/litigation/caselist.htm#sec203cases (last visited Sept. 13, 2006).

[22] *See* National Asian Pacific American Legal Consortium, Sound Barriers: Asian Americans and Language Access in Election 2004 (2005); Asian American Legal Defense and Education Fund, Asian American Access to Democracy in the 2004 Elections (2005); 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, 37–48 (2004).

[23] Magpantay, *supra* note 22; Barry H. Weinberg & Lyn Utrecht, *Problems in America's Polling Places: How They Can Be Stopped,* 11 TEMP. POL. & CIV. RTS. L. REV. 401, 410-15 (2002).

May 2004 than had been filed in the prior eight years,[24] which partly reflects the addition of new jurisdictions and language groups following the decennial census of 2000, but no doubt also reflects significant underenforcement of Section 203 in previous years.

B. The Structural Remediation Model and the Language-Assistance Provisions

Like the Voting Rights Act's preclearance requirement, Section 4(f) and Section 203 are predicated on congressional findings of past discrimination and are designed to create structural remedies that are limited in time and scope. Consistent with their origins as remedial devices, Section 4(f) and Section 203 restrict their coverage in a number of important ways. First, the definition of "language minority" is limited to specific groups that Congress determined to have suffered significant discrimination in education and in the political process. Only language groups whose members are of Spanish heritage, American Indian, Asian American, or Alaska Native are covered. Congress has chosen to omit limited-English-proficient voters from other racial and ethnic groups from the act because discrimination against other groups has not been as serious and has not resulted in comparably depressed levels of political participation.[25] Thus, limited-English-proficient voters whose primary language is European (other than Spanish), African, Middle Eastern, or Caribbean are not covered by the Voting Rights Act's language-assistance mandates, group population size or level of illiteracy notwithstanding.[26]

Second, the coverage mechanisms under Section 4(f) and Section 203 reflect Congress's employment of cost-benefit tradeoffs that limit assistance to the largest language-minority populations. The right to receive governmental assistance in one's primary language is triggered only if one's group size is substantial and can justify the government's expense of providing assistance. Surpassing either the 5% benchmark or the numerical benchmark of 10,000 invokes Section 203's language assistance requirements and any attendant rights. However, no statutory right to government-sponsored language assistance attaches—and thus none can be denied through English-only procedures—if a voter is a member of a language-minority group that is too small by congressional standards.[27]

---

[24] http://www.usdoj.gov/crt/voting/sec_203/activ_203.htm#enforcement (last visited Sept. 13, 2006).

[25] *See* S. Rep. No. 94–295, at 31 (1975), *reprinted at* 1975 U.S.C.C.A.N. 774, 798 (highlighting census data showing that political participation rates in the 1972 presidential election for voters of European origin greatly exceeded the rates for language-minority groups).

[26] These groups can, however, be protected against violations of Section 2 of the Voting Rights Act on the basis of racial discrimination, and language assistance may be an appropriate remedy to address the Section 2 violation.

[27] Even with these various limitations, many states and political subdivisions are covered by Section 4(f) and Section 203. *See* 28 C.F.R. pt. 55 & app. All of Alaska (for

Third, Section 203's illiteracy preconditions require a clear relationship between educational inequality and language assistance. Congress's findings have documented the links between discrimination in education, high levels of illiteracy, and depressed political participation. While a sizable language-minority group may contain high numbers of adult immigrants who were educated abroad and completed their education beyond the fifth-grade level, large numbers of the same group might lack *English* literacy above the fifth-grade level, which can differ significantly from a figure based solely on grade completion. Thus a language group might not satisfy the requirement that the group's illiteracy rate exceed the national rate, even though many voters might lack the necessary proficiency in English to participate in the political process.[28] The act's illiteracy requirements ignore this distinction and make the connection between past discrimination in U.S.-based education and language-assistance remedies especially strong. The language assistance provisions thus establish a remedial structure that is inherently cabined and subject to cost-benefit balancing.

C. Alternative Enforcement Models: Section 2 and Section 208

The act offers additional protections to limited-English-proficient voters through two other enforcement models: (1) the general antidiscrimination provision contained in Section 2 of the act and (2) the voting assistor of choice provision contained in Section 208 of the act. Both of these sections—applied in tandem with Section 203 claims—have been employed in recent Justice Department litigation designed to promote language assistance in local jurisdictions. Neither model, however, provides sufficient protections to limited-English-proficient voters to ensure widespread and meaningful access to the vote.

Alaskan Native languages), Arizona (for Spanish), and Texas (for Spanish) are covered by Section 4(f), as are political subdivisions in seven states (for Spanish or American Indian languages). Section 203's coverage extends to jurisdictions in over thirty states, with some covered for multiple language groups. For example, California's Los Angeles County must provide assistance to Spanish-speakers and five Asian-language groups (Chinese, Filipino, Japanese, Korean, and Vietnamese); Arizona's Pima County must provide assistance in Spanish and two American Indian languages (Yaqui and Tohono O'Odham); and Alaska's Lake and Peninsula Borough must provide assistance in Athabascan, Aleut, and Eskimo. *See* Voting Rights Act Amendment of 1992, Determinations Under Section 203, 67 Fed. Reg. 48871 (July 26, 2002).

[28] In the 1990s, for example, Korean-American voters in Los Angeles County, despite possessing over twice the population needed to satisfy the 10,000 numerical benchmark, did not qualify for language assistance because their illiteracy rate did not exceed the national rate. *See* Magpantay, *supra* note 22, at 50. After the 2000 census, Korean Americans were covered under Section 203 because census data revealed a group illiteracy rate above the national average. *See* Voting Rights Act Amendment of 1992, Determinations Under Section 203, 67 Fed. Reg. 48871 (July 26, 2002).

1. Section 2 and the Traditional Antidiscrimination Model

By prohibiting policies that can result in a denial or abridgement of the right to vote, Section 2 offers the most general scope of protection for language minorities under the Voting Rights Act. Like other federal antidiscrimination statutes such as Title VI[29] and Title VII[30] of the Civil Rights Act of 1964 and their accompanying regulations, Section 2 applies nationwide, has no numerical trigger based on group size, and requires a determination of either intentional discrimination or discriminatory effects resulting from a challenged practice. Section 2 is unusual among federal antidiscrimination laws, however, in that its protections beyond race or color are circumscribed by the definition of language minorities; Section 2 is bound by the same definition that applies to Section 4(f) and Section 203.[31] Section 2 is thus more explicit than other antidiscrimination laws in recognizing language minority discrimination, but individuals or groups who fall outside the protected language-minority classes cannot assert claims unless their allegations are based on race or color.[32]

In practice, Section 2 litigation on behalf of language minority plaintiffs has not typically focused on language-based discrimination. Most claims have involved vote dilution, such as challenges to discriminatory at-large election systems or redistricting plans and have proceeded as if they were race-based claims. However, in *United States v. City of Hamtramck*, language assistance did play a central role in the remedial portion of a consent decree involving racial discrimination. The *Hamtramck* case revolved around race- and color-based claims brought on behalf of Arab-American and darker-skinned Asian-American voters whose citizenship and voter qualifications were challenged by members of a private citizens group during the November 1999 election in Hamtramck, Michigan—a problem that local election officials did not address.[33] In order to address voter intimidation and harassment, the *Hamtramck* settlement required the training of officials on appropriate procedures for challenging voters and on methods to address voter intimidation. The consent decree went further and required that notices be prepared in English, Arabic, and Bengali to inform voters about the new practices and that bilingual workers be hired to assist on election day. Language assistance thus became a significant element of a remedy for Section 2 violations based on race and color, but not on language discrimination *per se*.

---

[29] 42 U.S.C. §§ 2000d- 2000d-4a.

[30] 42 U.S.C. § 2000e et seq.

[31] In *Hernandez v. Woodard*, 714 F.Supp. 963, 968–69 (N.D. Ill. 1989), a federal district court found that Section 2 claims on behalf of language minorities need not be coupled with Section 203's statistical threshold (5%) in order to move forward.

[32] Recent case law interpreting the Fifteenth Amendment's prohibition on racial discrimination in voting to include ancestry-based classifications may provide support for a broader interpretation of "race" under the Voting Rights Act. *See, e.g.*, Rice v. Cayetano, 528 U.S. 495 (2000).

[33] United States v. City of Hamtramck, No. 00–73541 (E.D. Mich. Aug. 7, 2000).

Section 2 claims predicated on limited-English-proficiency are uncommon and have only recently appeared in conjunction with section 203 enforcement actions by the Department of Justice.[34] In *United States v. City of Boston*, for instance, the Justice Department alleged that the city had violated Section 203 by failing to provide adequate Spanish-language assistance, but also alleged several Section 2 violations involving Spanish speakers, as well as limited-English-proficient Chinese-American and Vietnamese-American voters who had been treated disrespectfully by election workers, had been ignored or improperly influenced in making ballot choices, and a Help America Vote Act violation that these voters had been denied provisional ballots.[35] The consent decree resolving the *Boston* case included a set of policies common in Section 203 settlement agreements—improved translations of materials, employment of a sufficient number of bilingual poll workers, dissemination of multilingual information, federal monitoring, and the development of a language-assistance coordinator position and a community-based advisory body. However, the Section 2 remedies were merged with Section 203 mandates by requiring language assistance to all three groups, even though only one group (Spanish speakers) was sufficiently large to be covered by Section 203.

The antidiscrimination model available under Section 2 is evolving and may become a more significant source for language assistance, even when claims focus on racial discrimination or on language-minority group membership independent of actual language proficiency. Nevertheless, Section 2's language-assistance jurisprudence remains underdeveloped, and Section 2 enforcement has inherent limitations because it requires litigation and is tethered to the law's remedial language assistance definitions.

2. Section 208 and the Individual Accommodation Model

In 1982, Congress amended the Voting Rights Act by adding Section 208, which states in part that "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."[36] Although established primarily as an accommodation measure for disabled and illiterate voters, Section 208 has been applied to limited-English-proficient voters when those voters require assistance to understand an English-only ballot. In formulating Section 208, Congress recognized that having the assistance of a person of one's own choice may be "the only way to assure meaningful voting assistance and to avoid possible intimidation or manipulation of

---

[34] *See, e.g.*, United States v. City of Boston, No. 05-11598 WGY (D. Mass. Oct. 18, 2005) (three-judge court); United States v. Berks County, 277 F. Supp. 2d 570 (E.D. Pa. 2003).

[35] United States v. City of Boston, No. 05–11598 WGY (D. Mass. Oct. 18, 2005) (three-judge court).

[36] 42 U.S.C. 1973aa-6. Section 208 contains an exception precluding an assistor who is "the voter's employer or agent of that employer or officer or agent of the voter's union." *Id.*

the voter."[37] Section 208 applies nationwide and is not bound by the group definitions specified in the act's remedial language assistance sections.

Although Section 208 imposes no affirmative obligations on state or local governments to provide language assistance, it does create the basis for a Voting Rights Act violation if election officials impede or deny a voter's use of an assistor in order to vote. For example, in *United States v. Berks County*, a federal district court found that barring Puerto Rican voters in Reading, Pennsylvania, from bringing their assistors of choice into the voting booth reflected an extensive pattern of "hostile and unequal treatment of Hispanic and Spanish-speaking voters by poll officials."[38] The court noted that when poll officials deny voters the right to bring their assistor of choice into the voting booth, "voters feel uncomfortable with the process, do not understand the ballot, do not know how to operate the voting machine, and cannot cast a meaningful vote."[39] The *Berks County* court ordered multiple remedies, including the development of Spanish-language publicity and election materials and the training of poll workers on the mandates of Section 208.

Similarly, in *United States v. Miami-Dade County*, Haitian-American voters who needed assistance in Creole were denied the full and effective use of assistors of choice in the November 2000 presidential election.[40] Poll workers denied the use of assistors to many voters, and when assistance was allowed, it was often limited to demonstrations of voting procedures outside the voting booth. A consent decree required, among other things, new training programs for poll workers, voter education policies, and the employment of bilingual election employees in targeted precincts. Despite falling outside the coverage of Section 4(f) or Section 203, limited-English-proficient Haitian Creole speakers—like any limited-English-proficient voters who need the help of an assistor—fell within the protection of Section 208.

Section 208 typifies an accommodation model of civil rights enforcement that is common in disability law, although Section 208 is a weak version that imposes minimal obligations on government.[41] Section 208 focuses on a legally recognized trait or characteristic (blindness, disability, or the inability to read or write in English) as well as the accompanying limitation in casting a meaningful vote that arises from that trait or characteristic and requires a benefit or ser-

---

[37] S. Rep. No 97–417, at 62 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 240–41.

[38] Order, United States v. Berks County, No. 03-CV-1030 (E.D. Pa. Aug. 20, 2003), *available at* http://www.usdoj.gov/crt/voting/sec_2/berks_order.htm (last visited Sept. 13, 2006).

[39] *Id.*

[40] *See* Consent Order, United States v. Miami-Dade County, No. 02-21698, (S.D. Fla. June 17, 2002), *available at* http://www.usdoj.gov/crt/voting/sec_2/miamidade_cd.htm (last visited Sept. 13, 2006).

[41] For a general discussion of the differences between traditional antidiscrimination law and disability accommodation law, see Pamela S. Karlan and George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L. J. 1 (1996).

vice—an accommodation—to help the voter overcome the limitation and gain full access to the ballot. A violation of the statutory right occurs when the accommodation is denied.

Like other disability laws, Section 208 fosters highly specific and personalized assistance, since the voter determines who will provide the assistance and what will be needed. However, the law imposes no standards on the *quality* of the assistance provided to the voter, nor does it impose significant obligations on government to ensure meaningful access to voting. The costs under Section 208 are borne almost entirely by the private assistor and the affected voter, who also bears the responsibility of arranging the assistance. The primary costs that state and local election officials assume are expenses relating to training staff to prevent violations of the law, such as interference with voters and their assistors. Jurisdictions bear no costs in actually having to provide language assistance to the limited-English-proficient voter.

Taken in combination, the remedial language assistance provisions in Sections 203 and 4(f), the antidiscrimination requirements of Section 2, and the accommodation provision in Section 208 provide an array of potential enforcement tools, but form a network of laws with significant theoretical and practical gaps. Section 4(f) and Section 203 offer structural remedies that do not require individual findings of discrimination, but they are temporary and incomplete remedies. Section 2 jurisprudence on language rights is inchoate and bound by a definition of language-minority groups that is specific but underinclusive; moreover, claims must be litigated and language assistance does not necessarily follow as a remedy. Section 208 is arguably the broadest enforcement mechanism for language assistance in the Voting Rights Act as it allows any limited-English-proficient voter to have assistance in voting, but the responsibilities for providing the accommodation fall largely on voters themselves, not on the government entities that administer elections.

The potential for weaving together the different Voting Rights Act provisions has found partial expression in recent litigation, however, and reconciling the norms that underlie the various sections of the law can lead to a more effective model of voting rights enforcement. The next section attempts to reconcile the strands of language rights enforcement under the act by offering a theory of language accommodation drawing on antidiscrimination laws that focus on providing language assistance and meaningful access in a variety of settings.

II. From Remediation to Language Accommodation

While various provisions of the Voting Rights Act address language-accommodation norms, Congress has not attempted to address the needs of limited-English-proficient voters in a systematic or integrated way. In its 2006 reauthorization of the remedial language assistance provisions for an additional twenty-five years, Congress instituted only minor substantive amendments, focused primarily on the type of demographic data to be employed in determining

coverage, and made no changes to the language-assistance triggering mechanisms or to the scope of coverage for language-minority groups.[42] Formulating a more coherent basis for language assistance is essential to ensure meaningful access to the vote and to develop future voting rights enforcement strategies and legislation.

A. Accommodation Norms in Theory and Practice

Although Section 4(f) and Section 203 are designed to be temporary measures that address longstanding discrimination against particular groups, they contain the seeds of a broader language-accommodation norm that has roots in both normative legal theory and existing laws addressing discrimination on the basis of religion and disability. Following from this norm is a legal regime that must recognize significant differences and limitations affecting the ability to participate fully in democratic life, imposes responsibilities and duties on appropriate actors to correct these limitations (subject to some degree of balancing against exceptional costs and hardships), and establishes civil rights causes of action when the duties are not satisfied or are impeded.

1. Accommodation and Democratic Participation

The question of providing language assistance to limited-English-proficient voters falls within a set of larger debates about the role of languages other than English in public life; civic unity and the assimilation of newcomers into American society; the responsibilities of government to its citizens and residents; and the basic goals of antidiscrimination law.[43] Outside of the voting rights context, there have been significant public debates in recent years over the use of bilingual education in the public schools, as well as the mandating of English as the official language of government, with initiatives and proposed statutes populating state ballots and legislative agendas.[44] The discord over language access and government-sponsored assistance has been particularly acute, because it has been tied to

---

[42] Section 8 of H.R. 9 states: "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.'" 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 (July 26, 2006).

[43] *See* Ronald Schmidt, Sr., LANGUAGE POLICY AND IDENTITY POLITICS IN THE UNITED STATES (2000); LANGUAGE RIGHTS AND POLITICAL THEORY (Will Kymlicka and Alan Patten eds., 2003).

[44] *See*, e.g., Crystal Goodson Wilkerson, Comment, *Patriotism or Prejudice: Alabama's Official English Amendment*, 34 CUMB. L. REV. 253 (2003–2004); William Ryan, Note, *The Unz Initiatives and the Abolition of Bilingual Education*, 43 B.C. L. REV. 487 (2002).

ongoing controversies over immigration policy and over linguistic and cultural diversity in American society.

Within these larger debates, language assistance in voting has been especially contentious because of conflicting views over the rights and responsibilities of voters, particularly those who are naturalized citizens. There is little disagreement that voting is essential for democratic governance and that discriminatory barriers to participation in the political process should be eliminated. Yet the role of English in voting and the electoral process is subject to more heated dispute. Notwithstanding arguments criticizing the administrative and financial costs of providing language assistance, many detractors of language assistance philosophically oppose attempts to diminish the role of English as a civic unifier and a political *lingua franca.* Many see language assistance as a deterrent to learning English and a disruption to assimilation into American society. Indeed, opponents of language assistance consider basic fluency in English to be a core element of American citizenship and point specifically to the requirements for naturalized citizenship, which, except for cases involving long-term elderly residents, include minimal literacy in English.[45]

On the other hand, support for language-assistance policies draws on fundamental values of democratic participation and political empowerment for all citizens, as well as the need to eliminate discrimination and barriers to participation, including linguistic barriers.[46] Arguments to make English proficiency a necessary precondition for citizenship and voting have multiple flaws. While rudimentary knowledge of English is a requirement for most of those seeking naturalized citizenship, the threshold for minimal English literacy required for naturalization falls well below what is needed to fully understand a ballot, particularly one containing complicated initiatives or referenda. Moreover, as Congress itself recognized in passing the language assistance provisions in 1975, past and ongoing educational discrimination that leads to low levels of literacy can affect both immigrants and native-born citizens, including Puerto Ricans educated in Spanish-dominant schools and Native Americans.[47]

---

[45] 8 U.S.C. § 1423. The naturalization laws create exceptions for citizenship applicants who are over the age of 50 and have resided in the United States as a lawful permanent resident for over 20 years, or are over the age of 55 and have resided in the U.S. for over 15 years. These individuals need not demonstrate English literacy, but must still fulfill other statutory requirements, including demonstrating knowledge of American government and civics.

[46] *See* Cristina M. Rodríguez, *Accommodating Linguistic Difference: Toward a Comprehensive Theory of Language Rights in the United States*, 36 HARV. C.R.-C.L. L. REV. 133 (2001); Cristina M. Rodríguez, *Language and Participation*, 94 CAL. L. REV. 687 (2006).

[47] In the case of Native Americans, maintenance of native languages is not only desirable, but strongly supported by federal policies. *See* Native American Languages Act of 1992, Pub. L. No. 102–524, 106 Stat. 3434 (codified as amended at 42 U.S.C. §§ 2991b-3, 2992d(e) (2001)).

Normative arguments for language rights and language pluralism thus suggest that public policies should support multiple objectives that broaden democratic participation, such as: prohibiting language discrimination; encouraging language assistance and English-language education for the limited-English-proficient to foster their incorporation into American society; and providing public support for the use and retention of languages other than English, which is essential in an increasingly globalized society.[48] Strong versions of these arguments propose that both antidiscrimination law and social welfare policies should establish regimes that recognize the right to use a language of one's choice, that prohibit infringements on these rights, and that impose responsibilities to provide language assistance across various sectors. Although antidiscrimination policy is not a substitute for social welfare policies or electoral policies that mandate language assistance through budget appropriations, it can recognize sources of discrimination, like English-only rules, and impose responsibilities to accommodate language needs and address discrimination.

Consistent with these normative theories, language assistance within the voting rights arena—independent of remediation—can advance two important and parallel goals: (1) promoting equality by preventing the subordination of limited-English-proficient citizens who are unable to participate in the political process because of language barriers, and (2) promoting civic engagement and political participation by voters who might otherwise be deterred or unable to participate in the political process without language assistance. These goals are fully complementary: empirical evidence on recent enforcement of the language assistance provisions in Section 203 jurisdictions suggests that language-based remedies create incentives to greater democratic participation, leading to increased voter registration and voter turnout.[49]

If one accepts the premise that there are sufficiently strong interests in addressing subordination and promoting civic engagement for limited-English-proficient voters to justify language assistance, the more difficult questions that follow focus on the type of legal regime to impose and on the appropriate alloca-

---

[48] *See* Schmidt, *supra* note 46, at 130–62 (comparing linguistic pluralism and assimilationism arguments).

[49] *See* H.R. Rep. No. 109–478, at 20 (2006) (House Judiciary Committee Report finding "increases in language minority citizen registration and turnout rates are most significant in jurisdictions that are in compliance with Section 203's election assistance requirements" and reporting Justice Department data that "enforcement of Section 203 has resulted in 'significantly narrowed gaps in electoral participation. [For example, in] San Diego County, California, Spanish and Filipino registration are up over 21 percent and Vietnamese registration is up 37 percent."); *see also* National Commission on the Voting Rights Act, Protecting Minority Voters: The Voting Rights Act at Work, 1982–2005, at 74–75, *available at* http://www.votingrightsact.org/report/finalreport.pdf (last visited Sept. 13, 2006) (summarizing recent increases in voter registration and turnout in Latino, Native American, and Asian American communities).

tion of the resources and burdens that accompany language assistance. For instance, if a minimal goal is to provide an opportunity for voters to obtain some measure of language assistance, Section 208 of the Voting Rights Act already provides the basis for voters to receive language assistance through private, personal assistors, and a token allocation of public resources. On the other hand, a legal regime that imposes governmental duties to provide language assistance to any limited-English-proficient voter who needs it would entail significant public costs and could generate thorny questions regarding the appropriate scope of a federal antidiscrimination law compared to a public services or welfare policy.

Between the poles lies a norm that advances the equality and civic engagement interests, balances competing benefits and costs, and falls within the appropriate and constitutional scope of the Voting Rights Act. The next section examines the insights and limitations of existing antidiscrimination laws to help inform this analysis.

2. Accommodation in Antidiscrimination Law

Two sources of current antidiscrimination law are particularly useful in informing a language accommodation norm: (1) Title VI of the Civil Rights Act of 1964 and its attendant regulations and federal compliance guidelines, and (2) the reasonable accommodation standards established under disability laws such as the Americans with Disabilities Act (ADA). Although neither source of law provides an ideal model for voting rights enforcement, they do provide normative support for an overarching language accommodation norm and offer alternatives to the fixed and bounded enforcement mechanisms contained in the Voting Rights Act's current language assistance provisions.

a. Title VI and Executive Order 13166

Title VI has an extensive history of administrative regulation and case law addressing limited-English-proficiency. Title VI does not explicitly proscribe discrimination based on language use or limited English proficiency, but federal agencies' interpretations of the law have treated language-based discrimination as a species of national origin discrimination. Linguistic characteristics are often tightly woven with ethnicity and national origin, and a language-based policy can have discriminatory effects on members of a national origin group; thus, Title VI regulations and policy guidance typically prohibit language discrimination and impose obligations on funding recipients to ensure that limited-English-proficient individuals have meaningful access to federally funded programs.

In *Lau v. Nichols*,[50] the U.S. Supreme Court reaffirmed the linkage between language and national origin discrimination when it concluded that the failure to provide language assistance to non-English-speaking Chinese-American students in the San Francisco Unified School District violated Title VI regulations promulgated by the Department of Health, Education, and Welfare. The federal regulations stated in part that "[w]here inability to speak and understand the English lan-

[50] 414 U.S. 563 (1974).

guage excludes national origin-minority group 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."[51] Inherent in the *Lau* Court's reasoning is the recognition of a legally significant difference and a limitation based on that difference—the inability to understand English—that gives rise to a claim of discrimination if government does not take affirmative steps to address the problem. In other words, there is a legally cognizable right that is violated if the government does not make an accommodation.

President Clinton's Executive Order 13166 ("Improving Access to Services for Persons with Limited English Proficiency"), issued in 2000, establishes specific compliance standards that require agencies and recipients of federal funding to ensure that limited-English-proficient individuals receive "meaningful access" to federal programs and activities through appropriate assistance.[52] Unlike the Voting Rights Act, the meaningful access guidelines of Executive Order 13166 do not rely on a fixed triggering mechanism, but they do employ a metric in which group size and interests are weighed against the costs of providing language-appropriate services. The Department of Justice's policy guidance document for the Executive Order establishes compliance standards for federal agencies and funding recipients that balance four factors: (1) the number or proportion of limited-English-proficient persons to be served; (2) the frequency with which these individuals come in contact with the program; (3) the nature and importance of the program or service to people's lives; and (4) the costs and resources available to the recipient.[53]

When justified, extensive interpreter services and written translations can be provided, but in some instances, the balancing test may tip in favor of providing very limited assistance—especially if the group is small, the interest is not deemed important, and the costs significantly outweigh the benefits. For example, the guidelines for the Department of Health and Human Services (which provides extensive funding for health care services) contemplates a "mix" of services including on-site bilingual staff, commercial telephone translation services, family members or friends for oral interpretation, and complete, partial, or summary translations in the case of written materials.[54] In some instances, the guidelines suggest that the benefits may justify only the most minimal assistance, particularly when the number of individuals needing language assistance is small and the service is not vital.

The enforcement of language rights under laws such as Title VI can, however, prove elusive. Recent case law has limited private rights of action under Title VI

---

[51] *See id.* at 568 (quoting 35 Fed. Reg. 11595 (1970)).

[52] Exec. Order 13166, *reprinted in* 65 Fed. Reg. 50121 (Aug. 11, 2000).

[53] 65 Fed. Reg. 50123, 50123–25 (Aug. 16, 2000).

[54] 68 Fed. Reg. 47311, 47315–19 (Aug. 8, 2003).

to claims of intentional discrimination,[55] Executive Orders can be rescinded, and policy guidance issued by federal agencies, which are hortatory and by themselves do not carry the force of law, can be modified or repealed. Title VI and Executive Order 13166 can be applied to voting, but even with the flow of federal funding to state and local governments involved in election administration, they are not adequately utilized as enforcement tools. Government enforcement of Title VI and the Executive Order against election officials has essentially fallen between the cracks of agency responsibility: the Voting Rights Section of the Justice Department does not currently enforce Title VI against state or local governments, and other sections of the federal government that address program access for limited-English-proficient individuals do not enforce voting-related claims.

b. Reasonable Accommodations in Disability Law

The "reasonable accommodation" standard employed in disability law provides another source for informing a language-accommodation norm in voting rights law.[56] The standard is well-established in laws such as the Americans with Disabilities Act (ADA) and the regulations for the Rehabilitation Act of 1973. For instance, under Title I of the ADA, illegal discrimination occurs when an employer fails to make reasonable accommodations for a disabled employee who can perform the essential functions of a job.[57] Examples of accommodations listed in the ADA include "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations."[58]

As Pamela Karlan and George Rutherglen have noted, the reasonable accommodation standard can be considered a species of antidiscrimination law distinct from the more common disparate treatment and disparate impact theories of liability, because it represents a "difference" model, rather than the more customary "sameness" model that prohibits differentiation on the basis of a quality or trait.[59] A difference model "assumes that individuals who possess the quality or

---

[55] Alexander v. Sandoval, 532 U.S. 275 (2001) (concluding that there is no private right of action to enforce Title VI disparate impact regulations).

[56] The reasonable accommodation standard originated as a concept in employment discrimination law involving religion. *See* 29 C.F.R. § 1605.1. Employers must provide an accommodation for an employee's religious observances or practices unless doing so would create an undue hardship. In *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), the U.S. Supreme Court held that religious accommodations need only be made when costs are small and that anything "more than a de minimis cost" would impose an undue hardship. *Id.* at 84.

[57] 42 U.S.C. § 12111(8).

[58] *Id.* § 12111(9)(A).

[59] Karlan & Rutherglen, *supra* note 44, at 10. *But cf.* Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642 (2001) (proposing strong similarities between traditional antidiscrimination models and accommodation models).

trait at issue are different in a relevant respect from individuals who don't and that treating them similarly can itself become a form of oppression."[60] Disability accommodations theory further suggests that conventional structures and practices in the workplace and other settings are premised on what is perceived to be "normal" and already accommodate the needs of nondisabled individuals. Providing a reasonable accommodation for a disabled individual thus should be considered neither "special" nor "extra," but simply a way of removing an existing barrier and stopping a different form of discrimination.[61]

In practice, though, employers are not required to make every possible accommodation requested, and it may be appropriate in some instances for the employee to bear some of the costs of the accommodation. Reasonable accommodation is thus a strongly individualized and case-specific standard in which disabled individuals and covered entities negotiate the accommodation in order to balance the interests of both the employee and the employer. Moreover, employers can avoid the accommodation requirement altogether if they can demonstrate that the accommodation would impose an "undue hardship," which is an "action requiring significant difficulty or expense,"[62] based on weighing factors such as the cost of the accommodation and the entity's size and financial resources.[63]

Although only partly analogous, the barriers encountered by the limited-English-proficient based on the "normal" nature of English language ballots and election materials can function in the same way that barriers in the workplace limit the employment opportunities of the physically or mentally disabled. The individual who is unable to comprehend fully an English-only ballot, but could exercise an informed and effective vote if the election materials were available in the individual's first language, is much like the disabled individual who is able to perform the essential functions of a job, if accommodations such as equipment modifications or interpreter services are made available.[64]

---

[60] Karlan & Rutherglen, *supra* note 44, at 10 (emphasis added) (internal quotation marks and alteration omitted).

[61] Mary Crossley, *Reasonable Accommodation as Part and Parcel of the Antidiscrimination Project*, 35 RUTGERS L. J. 861, 890–93 (2004).

[62] 42 U.S.C. § 12111(10)(A).

[63] *Id*. § 12111(10)(B).

[64] Indeed, the legislative history of Section 208 of the Voting Rights Act, which covers blindness, disability, and illiteracy in a single sweep, captures some of the parallels between disability and limited English proficiency:

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

S. Rep. No 97–417, at 62 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 240.

B. A Language Accommodation Norm

While it is possible to develop a voting rights model that tracks the meaningful access guidelines under Title VI or the reasonable accommodations standards in disability law, an effective model for language accommodation in voting must recognize both the similarities between voting rights and other antidiscrimination guarantees and the differences that make voting a unique and vital element of a democratic society. As a vehicle for promoting civic engagement and avenues for political participation and empowerment, voting enjoys a venerated position in the array of civil and political rights. The right to vote has been recognized as a fundamental right for purposes of equal protection review and is considered preservative of other basic civil and political rights.[65] Balancing competing claims of government cost or "hardship" against access to the vote seem especially inapt when basic franchise rights are at stake. Thus there are strong reasons for ensuring that the right to vote—which includes exercising a meaningful vote in which ballots and campaign issues are sufficiently understood—is preserved even more vigilantly than can be achieved through the standards of laws such as Title VI or the ADA.

An ideal model of language accommodation in voting should encompass both the "difference" principle of antidiscrimination law and incorporate the cost-benefit analyses that inevitably arise with the imposition of responsibilities on government. However, a model of voting rights protection should also militate strongly against any infringement of the basic right to vote, even where the financial burden on government is significant. In other words, where "undue hardship" in the voting context could create the functional equivalent of voter disenfranchisement, the balance should tip in favor of guaranteeing access to the vote. An ideal model should revolve around three key elements: (1) difference recognition, (2) appropriate accommodations, and (3) hardship boundaries.

1. Difference Recognition

Recognizing that limited-English-proficiency constitutes a basis for discrimination and should be addressed through some type of language assistance is an essential first step in creating and implementing a language-accommodation norm. The current language-minority definitions of the Voting Rights Act reflect Congress's determination in 1975 that language status can closely track race and color as bases for discrimination in voting. The recognition of difference is thus inherent in the creation of the language-minority category: Congress determined that limited-English-language proficiency, specifically among Latinos, Asian Americans, and Native Americans, formed the basis for extensive voting discrimination. Section 4(f) and Section 203 are grounded in group differences involving English-language ability and literacy.

---

[65] *See* Harper v. Virginia Bd. of Elec., 383 U.S. 663 (1966) (the right to vote is fundamental right subject to strict scrutiny review under the equal protection clause).

But the differences articulated in the limited definition of "language minority" need not be the only ones that are recognized under the law. The current definitions, particularly when applied to general antidiscrimination provisions like Section 2, are both overinclusive and underinclusive of limited-English-proficient voters.[66] As analogues to race, the definitions cover a spectrum of speakers and language communities ranging from monolingual English speakers to monolingual speakers of languages other than English to those with varying degrees of bilingual ability.[67] But not all language minority voters require assistance in order to cast a meaningful and effective vote. The definitions are overinclusive because they include voters who may suffer race-like discrimination because of status and group membership, but are not necessarily limited-English-proficient. On the other hand, the definitions are underinclusive of limited-English-proficient voters who fall outside the enumerated groups for purposes of the act beyond remediation for past discrimination; Arabic and Haitian Creole, languages that have been included in recent litigation remedies, are just two examples of languages whose speakers fall outside the formal definitions of a language minority.

When articulated as part of a structural remedy, the language-minority category need only include groups that Congress has found to have faced sufficient discrimination. But if a difference principle focusing on language is to apply to the general and permanent provisions of the act, then another type of definition needs to be deployed. One method is through the category of "national origin," which has an established basis in equal protection jurisprudence and is well developed in the enforcement of antidiscrimination laws such as Title VI. Language proficiency is not directly implicated on the face of a national origin category, but agency regulations and guidance that parallel existing guidelines found in Title VI and Executive Order 13166 enforcement could ensure coverage. A second method is through limited-English-proficiency *per se*, via a distinct antidiscrimination category that recognizes the barriers facing voters with limited English ability and an independent definition, such as "voters who are limited-English-proficient" or "voters who possess a language-based disability that limits their ability to meaningfully access the vote." Although an antidiscrimination category based specifically on language proficiency may raise constitutional questions about the scope

---

[66] To say that the language-minority definitions are both underinclusive and overinclusive does not make them constitutionally defective, however. Underinclusive legislation is constitutionally tolerable, since legislatures may choose to address one or limited elements of a problem rather attack it comprehensively. *See, e.g.*, Railway Express Agency v. New York, 336 U.S. 106 (1949). Overinclusiveness, in this instance, reflects the dual nature of the language-minority definitions; as analogues to race, they are not overinclusive at all, but with respect to the subset of individuals who are limited-English-proficient, the category does not fit as tightly as a category such as "limited-English-proficient language minorities."

[67] Rodríguez, ACCOMMODATING LINGUISTIC DIFFERENCE, *supra* note 49, at 142–43 (describing this as a "mutability continuum").

of congressional power (as discussed in Part III), it could provide more clarity to the current definitions used in Section 2 and foster more fitting accommodations.

2. Appropriate Accommodations

As a consequence of recognizing that language is a characteristic in which treating differently situated people the same can itself constitute discrimination, a language-accommodation norm must create mechanisms for both individual and group access to the vote and must shift the costs of assistance away from the voter alone. A weak form of individual accommodation already exists within the Voting Rights Act under Section 208, while group-based accommodations are available under the language assistance provisions of Section 4(f) and Section 203. But even in combination these accommodations fall far short of an ideal regime. Section 208 imposes no checks on the quality of the assistance, nor does it impose any responsibility on local officials to provide assistance. Sections 4(f) and 203 establish an accommodation system that is triggered by a combination of group definitions and statistical benchmarks, but like a light that is switched either on or off, the structural remedy either requires full-scale remedies or none at all. The expansion of litigation remedies to subbenchmark populations, as well as voluntary efforts by local election officials to provide assistance to an increasing number of language groups, demonstrate that accommodations need not be limited to populations that satisfy statistical triggers.

The Voting Rights Act could incorporate a wide range of accommodation mechanisms beyond the status quo. For instance, an array of measures short of full interpreter services and ballot translations could provide some measure of assistance to language-minority groups that fall below the statistical benchmarks of Section 203. Allocating language-assistance resources could be based on inquiries into the size and needs of language groups and the appropriate, cost-effective mechanisms of assistance. When looking at groups whose size falls below the Section 203 triggers, a sliding scale of interpreter services and written translations could be developed based on group size, need, and the costs of hiring interpreters and creating translations.

For example, a relatively small group, such as one containing between 2,500 and 5,000 voting-age citizens, might justify a reduced pool of interpreters who are located only at key precincts or at a centralized location, along with more limited number of translated materials and centralized distribution areas. A larger group, but one still falling below the 10,000 benchmark, might require a larger deployment of interpreters and more widespread availability of translated written materials. The voter could bear some costs, such as transportation or accessing materials through the Internet, while the government or government contractors would bear others.

Moreover, if language-based differences are recognized as a basis for voting discrimination, language accommodations can be incorporated into potential remedies for violations of Section 2. The language-assistance remedies found in recent Section 2 cases recognize that assistance mechanisms can be key components of make-whole remedies for past discrimination, even for smaller groups or

groups that fall outside the formal definition of "language minority." In *City of Boston*, for example, the city agreed to provide an adequate supply of bilingual poll workers and to disseminate bilingual information to Asian-American populations that fell below the triggers of Section 203; in *Miami-Dade County*, the remedies for Haitian Creole speakers included training programs for poll workers, voter education policies, and the deployment of bilingual election employees in targeted precincts. A nascent jurisprudence involving the act's general antidiscrimination provisions can turn to recent cases such as *City of Boston* and *Miami-Dade County* to develop remedies that mandate governmental assistance and create incentives for voters to employ personal assistors.

3. Hardship Boundaries

Governmental resources to provide language assistance are not unlimited, so costs and the concept of "hardship" must be taken into account for any language accommodation standard. But because of the basic importance of voting in a democratic society, the cost-benefit calculus of a language-accommodation regime must provide a baseline for language assistance that prevents the disenfranchisement of limited-English-proficient voters through competing claims of hardship by local jurisdictions. Under the current mandates of Section 4(f) and Section 203, the hardship calculation is built implicitly into the language of the statute: a jurisdiction with a language-minority population falling below the statistical benchmark (5% or 10,000) necessarily incurs a hardship if it had to provide language assistance, because the costs of providing an accommodation to a population that is smaller than the trigger would be excessive. But "hardship" within a broader norm of language accommodation need not be defined or bounded solely by numbers.

The costs to government in providing interpreters and written materials are not insignificant, but the burdens in addressing the needs of relatively small populations or populations outside the strict language-minority definitions need not be onerous if an appropriate *range* of language-assistance mechanisms are in place. Applying the same degree of language assistance to all limited-English-proficient voters in a city or county that are applied to Section 203 groups could impose very high costs on a jurisdiction, but measures short of deploying cadres of interpreters and translating ballots into dozens of languages could be employed without serious hardship.

For example, even the smallest number of limited-English-proficient voters can receive an accommodation by requiring jurisdictions to provide translated notices that voters can use individual assistors pursuant to Section 208. The financial costs of such basic notices would be minimal if they entailed translating (1) a small number of sentences and printing them on election materials designed for the general populace, and (2) more extensive materials that are strategically targeted for distribution to the appropriate language group. Oral notices, particularly for voters whose language has no written component, could be distributed via recorded public service announcements or to community organizations that work closely with the relevant populations. With the basic right to vote at stake, mini-

mally burdensome measures should be employed so that at least some accommodation exists for all limited-English-proficient voters in a jurisdiction.

Taken together, the difference recognition, appropriate accommodations, and hardship boundaries of a language-accommodation norm are rooted in antidiscrimination law, drawing on theories and standards that are well established in both the Voting Rights Act and related areas of law. As discussed in the next section, staying within the boundaries of antidiscrimination law is essential for offering language assistance through the Voting Rights Act and still staying within recent constitutional constraints imposed upon Congress by the courts.

III. Implementing Language Accommodation

Implementing a language-accommodation norm within the Voting Rights Act requires amendments to the current statute, as well as parallel developments in administrative regulations and case law. This section discusses the constitutional limitations on implementing a language-accommodation norm and suggests a strategy that focuses on both amending the current language-assistance provisions and creating legislation to expand other areas of the law. It concludes with recommendations for stronger enforcement of Title VI of the Civil Rights Act of 1964 and the Help America Vote Act of 2002.

A. Constitutional Limitations

At first glance, the basic constitutionality of language assistance under the Voting Rights Act would seem uncontroversial. Congressional exercises of power to enforce the protections of the Fourteenth and Fifteenth Amendments via the act have been almost entirely upheld as constitutional and have been used as judicial benchmarks for comparing other legitimate exercises of congressional powers. In *South Carolina v. Katzenbach*,[68] the U.S. Supreme Court upheld the constitutionality of major sections of the Voting Rights Act as consistent with Congress's powers to address discrimination pursuant to the Fifteenth Amendment. In *Katzenbach v. Morgan*,[69] the Court specifically upheld the constitutionality of using Section 4(e) to prohibit enforcement of a New York law that required English literacy as a precondition for voting and that discriminated against limited-English-speaking Puerto Rican voters educated in Spanish-dominant schools. The *Morgan* Court concluded that Congress had broad powers to ban literacy tests consistent with both congressional findings of past discrimination and congressional interpretation of the equal protection clause.[70] The court thus concluded that Section 4(e)

[68] 383 U.S. 301 (1966).

[69] 384 U.S. 641 (1966).

[70] The *Morgan* Court upheld congressional powers pursuant to the Voting Rights Act, even though the Supreme Court had previously ruled that literacy tests were not

was "a proper exercise of the powers granted to Congress by § 5 of the Fourteenth Amendment."[71]

However, congressional power over voting rights enforcement is not unlimited and was tempered in *Oregon v. Mitchell*, where a divided Court upheld several of the 1970 amendments to the Voting Rights Act, but struck down the section of the act that lowered the minimum age in state and local elections from twenty-one to eighteen as exceeding congressional powers.[72] More recent case law outside of the voting arena has further circumscribed Congress's powers to breach state sovereign immunity and to remedy discrimination pursuant to Section 5 of the Fourteenth Amendment, casting some doubt on *Morgan's* vitality as a general precedent.[73] Moreover, the powers of Congress to address language-based discrimination *per se*, rather than as a species of racial and national origin discrimination, remain problematic because the status of language groups under the Fourteenth Amendment is poorly defined by Supreme Court case law. Each of these constricting factors must be considered in developing any language accommodation regime.

1. Congruence and Proportionality Requirements

Since the late 1990s, the Supreme Court's "new federalism" jurisprudence has imposed significant limits on congressional powers to create remedies against the states in order to address discrimination. In *City of Boerne v. Flores*, the Court distinguished legislation that is "remedial" and falls within the powers of Congress under Section 5 and legislation that makes a "substantive change" in rights and thus exceeds congressional powers.[74] The Court stated: "Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation."[75] The Court further concluded that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means

---

prohibited under the federal constitutional itself. *Id*. at 652–53; *see* Lassiter v. Northampton Elec. Bd., 360 U.S. 45 (1959).

[71] *Morgan*, 384 U.S. at 652–53.

[72] 400 U.S. 112 (1970).

[73] *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); Michael E. Waterstone, *Lane, Fundamental Rights, and Voting*, 56 ALA. L. REV. 793 (2005).

[74] 521 U.S. 507 (1997). *City of Boerne* focused on the constitutionality of the Religious Freedom Restoration Act (RFRA), which was enacted in 1993 in response to the Supreme Court's decision in *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990), where the Court relaxed the protections of the First Amendment's free exercise clause in upholding a state drug law that Native Americans challenged as an infringement on their religious beliefs and their ceremonial use of peyote. The *City of Boerne* Court concluded that Congress's attempt to overturn the *Smith* case through the RFRA exceeded its § 5 powers. 521 U.S. at 508–34.

[75] 521 U.S. at 519.

adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect."[76]

The congruence and proportionality test was further coupled with a heightened evidentiary standard in *Board of Trustees of the University of Alabama v. Garrett* to require that Congress thoroughly document state discrimination against a protected group in order to justify the piercing of sovereign immunity.[77] The *Garrett* Court held that Congress had exceeded its powers by authorizing individual lawsuits for damages against state governments for violations of Title I of the ADA, which contains the ADA's reasonable accommodation standards for employment. Arguing that because disability discrimination is not subject to heightened review under the equal protection clause, and because the ADA's reasonable accommodation mandate goes far beyond what the constitution requires, the *Garrett* Court concluded that Congress's response lacked proportionality and congruency. The majority found Congress's legislative record on disability-based discrimination by states to be insufficient; a pattern of widespread state discrimination against the disabled, going beyond the record of private discrimination, would have been necessary to support a strong congressional remedy.

Some of the Court's most recent cases have lessened *Garrett's* evidentiary requirements, at least in cases involving gender discrimination and the fundamental interest in gaining access to the courts, which are both subject to heightened review under the equal protection clause. In *Nevada Department of Human Resources v. Hibbs*,[78] the Court upheld the authorization of lawsuits against states under the Family Medical Leave Act, which entitles eligible employees to take up to twelve weeks of unpaid annual leave from work for, among other things, serious health conditions affecting a spouse. The *Hibbs* Court did not insist on a strong empirical basis for the contention that gender-role stereotyping and discrimination often occur through differential state employment policies, relying on the fact that the Court had already recognized that gender should be subject to heightened equal protection review. Similarly, in *Tennessee v. Lane*[79] the Court upheld congressional action authorizing lawsuits against states for violating Title II of the ADA, which prohibits the exclusion of disabled individuals from public services and programs, where the disabled plaintiff was denied the fundamental right of access to courts.

The Court's federalism jurisprudence continues to evolve, so there are no absolute answers to the question of whether a language accommodation regime would necessarily satisfy the Court's most recently developed standards. There are, nevertheless, strong parallels between language assistance in voting and the factual and legal predicates of *Hibbs* and *Lane*. Like access to the courts, the right to vote is a fundamental interest that can invoke strict scrutiny under the equal protection clause. Moreover, both the courts and Congress have documented dis-

---

[76] *Id.* at 520.
[77] 531 U.S. 356 (2000).
[78] 538 U.S. 721 (2003).
[79] 541 U.S. 509 (2004).

crimination against members of language-minority groups, and national origin has been squarely recognized as a suspect classification for equal protection purposes. *Hibbs* itself also suggests that the Court is willing to accept weak versions of accommodations as proportional responses to equal protection violations. Requiring employers to grant unpaid leave time is a mild form of accommodation designed to shift some of the costs of family-related leaves to the employer.

In any case, any accommodation requirements that go beyond the existing requirements of the Voting Rights Act must be well supported by evidence of discrimination.[80] In 2006, Congress compiled an extensive record to establish the proportionality of its response in reauthorizing Sections 4(f) and 203. For instance, the House Judiciary Committee's report on H.R. 9 summarized several of its findings in this way:

> The continued need for bilingual support is reflected by: (1) the increased number of linguistically isolated households, particularly among Hispanic and Asian American communities; (2) the increased number of language minority students who are considered to be English language learners, such that students do not speak English well enough to understand the required curriculum and require supplemental classes; (3) the continued disparity in educational opportunities as demonstrated by the disparate impact that budget shortfalls have on language minority citizens, and the continued need for litigation to protect English language learners; and (4) the lack of available literacy centers and English as a Second Language programs.[81]

This type of evidence, along with additional evidence on discrimination and growing needs among limited-English-proficient voters outside the current language-minority groups, would lead many courts to uphold language mandates as constitutional.[82]

---

[80] In finding a lack of proportionality between the ADA's reasonable accommodation requirements and the record of state government discrimination against the disabled, the *Garrett* Court noted that the accommodation duty under the ADA "far exceeds what is constitutionally required in that it makes unlawful a range of alternate responses that would be reasonable but would fall short of imposing an 'undue burden' upon the employer. The Act also makes it the employer's duty to prove that it would suffer such a burden, instead of requiring (as the Constitution does) that the complaining party negate reasonable bases for the employer's decision." 531 U.S. at 372. Even with the more relaxed standards implied by *Hibbs* and *Lane*, the Court's admonition against unusually strong accommodation remedies argues in favor of creating a strong evidentiary record of past discrimination in the language arena.

[81] H.R. Rep. No. 109–478, at 59 (2006).

[82] *See, e.g.,* Abdelall, *supra* note 30, at 924–32 (discussing discrimination and language assistance needs among Arab Americans).

2. Language as a Suspect Classification

Another key question is whether accommodations that create statutory rights on the basis of language proficiency alone would satisfy constitutional requirements. As currently defined, the act's language-minority category closely tracks race and national origin; however, adding a new definition such as "discrimination based on language proficiency" poses another set of questions regarding Congress's expansion of the equal protection clause beyond its current constellation of rights. The Supreme Court's equal protection jurisprudence regarding language status, untethered from race or national origin, is not well developed, and the Court has never held that limited-English-proficiency alone is a suspect classification deserving heightened scrutiny.[83]

Unlike agency regulations that have enunciated a connection between language and disparate impacts on national origin groups, the Court's equal protection jurisprudence has been nearly silent on the relationship between language and national origin. While the Supreme Court has struck down bans on the use of languages other than English as violating due process,[84] it has had little to say about protections for limited-English-proficient individuals. In *Hernandez v. New York*, the Supreme Court's only modern case addressing language-based discrimination under the equal protection clause, the Court upheld the use of peremptory strikes by prosecutors who argued that they had struck potential jurors in a jury venire based on their bilingualism and their potential inability to listen and follow a court interpreter, not on race or national origin.[85] Justice Kennedy's plurality opinion in *Hernandez* rejected a connection between bilingual ability and race under the specific facts of the case, but he did make clear that language could in some instances serve as proxy for race:

> Just as shared language can serve to foster community, language differences can be a source of division. Language elicits a response from others, ranging from admiration and respect, to distance and alienation, to ridicule and scorn. Reactions of the latter type all too often result from or initiate racial hostility. . . . It may well

[83] Indeed, a number of lower federal courts have held that language does not identify members of a suspect class and have upheld English-only public services and conditions as constitutional. In *Soberal-Perez v. Heckler*, for instance, the Second Circuit rejected a claim that the Secretary of Health and Human Services' failure to provide forms in Spanish violated equal protection, and stated: "A classification is implicitly made, but it is on the basis of language, i.e., English-speaking versus non-English-speaking individuals, and not on the basis of race, religion or national origin. Language, by itself, does not identify members of a suspect class." 717 F.2d 36, 41 (2d Cir. 1983), *cert. denied*, 466 U.S. 929 (1984); *see also* Frontera v. Sindell, 522 F.2d 1215, 1219 (6th Cir. 1975) ("We are not dealing here with a suspect nationality or race."); Carmona v. Sheffield, 475 F.2d 738, 739 (9th Cir. 1973) (holding that the state's choice "to deal only in English has a reasonable basis").

[84] *See* Meyer v. Nebraska, 262 U.S. 390 (1923); Yu Cong Eng v. Trinidad, 271 U.S. 500 (1926).

[85] 500 U.S. 352 (1991).

> be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis.[86]

Without a square holding that limited-English-proficiency forms the basis for a suspect classification, a language-accommodation measure must either be coupled analytically with race or national origin or it must be evaluated through the lens of rationality review, which implies that the *City of Boerne/Garrett* line of cases may constrain the remedies and accommodations developed on the basis of limited-English-proficiency. This is not to say that Congress cannot prohibit discrimination on the basis of English proficiency; the legislative response must be proportional, and the Court's more searching review of antidiscrimination laws based on the nonsuspect classes of age[87] and disability suggests that there may be comparable restrictions on congressional measures addressing language discrimination. Consequently, a safer course to help ensure the constitutionality of an accommodations measure under the Voting Rights Act may be to rely on a group definition such as national origin, which rests on solid constitutional ground as a suspect classification, and to employ administrative regulations to help cement the relationship between limited-English-proficiency and national origin discrimination.

B. Enforcing Accommodations Norms

In recent years, there has not been a groundswell of legislative activity to expand language rights, and it would be naive to ignore the political opposition to subsidizing governmental language assistance of any kind, whether in the voting arena or in areas such as education and social services. Indeed, the depth of the controversies over language assistance crystallized in 2006 during the House of Representatives' floor debates on H.R. 9, which reauthorized Sections 4(f) and 203 for an additional twenty-five years. An amendment offered by Representative Steve King would have eliminated the act's language assistance provisions, but was defeated by a 238–185 vote—an indication that current opposition to language assistance measures is well beyond token. Given present-day political constraints, a pragmatic strategy for legislative change could focus on modest changes to the language-assistance provisions, documented by adequate

---

[86] *Id.* at 371.

[87] In *Kimel v. Florida Board of Regents*, the Court ruled that Congress's authorization of damages lawsuits against the states through the Age Discrimination in Employment Act exceeded Congress's Section 5 powers because there had been no historical pattern of age discrimination and because age is not a "suspect class" subject to heightened review under the equal protection claus—and indeed can be a legitimate basis for government classifications. 528 U.S. 62 (2000). Congress's abrogation of sovereign immunity therefore lacked congruence and proportionality.

research and evidence of ongoing discrimination against language groups, as well as changes to the permanent provisions of the act and its implementing regulations.

Amending Section 4(f) and Section 203. As discussed above, the language-assistance provisions offer no safety net for language-minority voters whose numbers fall below the statistical triggers. Lowering numerical thresholds to a figure such as 7,500 offers a useful amendment that could lead to coverage of more jurisdictions and more voters, but it would still replicate a model that offers no protections for subtrigger populations. A more flexible, sliding scale approach would offer a preferable regime—not as a substitute, but as an adjunct to a threshold mechanism that requires full accommodations for large-enough language-minority groups in a jurisdiction. Subtrigger groups could be ordered by categories—for example, (A) 9,999–7,500, (B) 7,499–5,000, (C) 4,999–2,500, and (D) 2,499 or below—and appropriate accommodations, such as partial or targeted language assistance, could be deployed with each category. For purposes of structural remediation, the basic definitions of the language-minority groups do not have to be amended, except to reflect Congress's addition of groups that have been shown to have suffered comparable levels of discrimination in education and the political process.

Section 2 and Regulatory Enforcement. The permanent provisions of the Voting Rights Act raise a different set of issues, particularly with the Supreme Court's recent cases posing limits on the creation of accommodations that might exceed congressional powers. The language minority definition in Section 2, drawn from the act's remedial provisions, creates race-like categories to address status-based discrimination, but it does not adequately address language proficiency as a distinct source of voting discrimination. Adding "national origin" as a basis for illegal discrimination would remove the limits imposed by the current definitions and allow the importation of administrative standards from other federal civil rights laws.

Along with an amendment to the statute, regulations comparable to the Title VI and Executive Order 13166 agency mandates would add greater clarity to Section 2's general prohibition on discrimination and provide additional support for litigation remedies. Without duplicating the requirements under Section 203 and Section 4(f), regulations could focus on mandates and recommendations that cover all limited-English-speaking voters in a jurisdiction and do not require that illiteracy levels for language groups exceed the national average. A regulatory scheme could also include mechanisms for jurisdictions to provide notices of the Section 208 assistor provisions to all voters in their ballot materials and to translate notices based on cost-benefit calculations. This is an example of a minimally intrusive requirement that should conform to constitutional limits.

Applying Title VI to Voting Rights. Title VI and Executive 13166 Order offer statutory and regulatory bases for developing flexible language-accommodation measures. Although private rights of action to enforce Title VI's disparate impact regulations can no longer be initiated because of recent Supreme Court case law,

agency action is still available to enforce the regulations.[88] The Department of Justice can enforce these regulations and guidelines directly, while various federal agencies can attach requirements through their funding programs, including the payments and grants in support of the Help America Vote Act, which offers substantial federal dollars for improvements to state and local election systems.[89]

Election Assistance Laws. Given the constitutional limitations on congressional remedies under the antidiscrimination laws, election laws such the Help America Vote Act that are predicated on federal funding offer additional mechanisms to enforce language-accommodation norms. HAVA itself offers a system of government payments and grants that allows language measures to be incorporated into states' voting system improvements and technological innovations. The law already contains provisions for payments to the states for "[i]mproving the accessibility and quantity of polling places, including providing physical access for individuals with disabilities, providing nonvisual access for individuals with visual impairments, and providing assistance to Native Americans, Alaska Native citizens, and to individuals with limited proficiency in the English language."[90] Moreover, HAVA requires that voting systems for federal elections must "provide alternative language accessibility pursuant to the requirements of section 203 of the Voting Rights Act of 1965."[91]

Although still viewed with some skepticism and still presenting security and accessibility problems, new technologies such as direct record electronic voting systems do have the potential to lower the costs and burdens imposed upon government to implement written translations. The lack of appropriations to support the HAVA mandates has been a major stumbling block to developing voting systems with strong language accommodations.[92] But HAVA and other election assistance laws based on congressional appropriations still have the potential to provide greater access to limited-English-proficient voters, as well as the advantage of bypassing the strictures of the Supreme Court's recent decisions on congressional enforcement by being attached to Congress's spending powers, rather than Congress's powers pursuant to the Fourteenth Amendment.

Conclusion

When Congress amended the Voting Rights Act in 1975 to recognize discrimination against language minorities, it created powerful mechanisms to ensure the right to vote and to increase the participation of minority voters. Yet, the guaran-

---

[88] Private rights of action remain viable as well, as long as intentional discrimination is alleged. *See* Alexander v. Sandoval, 532 U.S. 275, 279–80 (2001).

[89] 42 U.S.C. § 15301 et seq.

[90] *Id.* § 15301(b)(1)(G).

[91] *Id.* § 15481(a)(4).

[92] See Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1219 (2005).

tees have been uncertain and often incomplete. The current law has limitations, and the proposed model of language accommodation attempts to improve the statute and its implementation and to place the Voting Rights Act in greater alignment with other federal antidiscrimination laws. But implementing a small yet important set of changes in a single law must also be supported by a broader norm that acknowledges the linguistic diversity of the United States and an overriding goal of increasing civic engagement and electoral participation by all Americans. An antidiscrimination policy is not a substitute for an agenda that also includes public policies under which both language assistance and English-language learning are integrated into public services and the educational system. The proposed model is simply one step in advancing that agenda.