

ARTICLE

THE BATTLE OVER “BILINGUAL BALLOTS” SHIFTS TO THE COURTS: A POST-*BOERNE* ASSESSMENT OF SECTION 203 OF THE VOTING RIGHTS ACT

JAMES THOMAS TUCKER*

Can Congress prohibit a state or local jurisdiction from conducting elections in English only and require that it provide “bilingual ballots” at the polls? Section 203 of the Voting Rights Act requires certain jurisdictions—those meeting specified demographic criteria—to provide language assistance to voters who have limited English language abilities. Section 203 only covers four language groups: Alaskan Natives, American Indians, Asians, and Hispanics. In the debates and legislative hearings leading up to reauthorization of the Voting Rights Act in 2006, critics of section 203 argued that it is unconstitutional because it violates principles of federalism and equal protection, among other reasons. This Article responds that Congress has broad power to regulate state or local election practices under the authority of the enforcement section of the Fifteenth Amendment. It analyzes how section 203 is limited in scope and duration by a statutory formula that uses Census data to determine which jurisdictions must provide language assistance. The Article also documents evidence of education discrimination against each of the four language groups in jurisdictions covered by section 203. The Article concludes that when the battle over the constitutionality of section 203 shifts to the courts, they should find that it is a congruent and proportional means to remedy the disenfranchisement resulting from a long history of education discrimination against language minorities.

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* Policy Counsel, ACLU National Legislative Office, Washington, D.C. B.A., Arizona State University Barrett Honors College, 1988; M.P.A., University of Oklahoma, 1995; J.D., University of Florida, 1994; LL.M., University of Pennsylvania, 1998; S.J.D., University of Pennsylvania, 2001. The author is a former Senior Trial Attorney with the United States Department of Justice and serves as an Adjunct Professor at the Barrett Honors College at Arizona State University. During the Voting Rights Act reauthorization hearings, he testified before Congress three times on the language assistance and federal observer provisions as a Voting Rights Consultant to the National Association of Latino Elected and Appointed Officials (NALEO).

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I. INTRODUCTION

During the 2006 reauthorization of the Voting Rights Act ("VRA" or the "Act"),¹ some of the most heated debate² surrounded the extension of what critics derisively refer to as the "bilingual ballot mandate."³ The Act's

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

² See James Thomas Tucker, *The Politics of Persuasion: Passage of the Voting Rights Act Reauthorization Act of 2006*, 33 J. LEGIS. 205, 235–36, 238–45, 250, 256–57, 259–60 (2007) [hereinafter Tucker, *Politics of Persuasion*].

³ John J. Miller, *English Is Broken Here: Bilingual Ballots Are Bad for Democracy*, 79 POL'Y REV. 54, 54 (1996). "Bilingual ballots" is an inaccurate term that is both under inclusive and over inclusive. It is under inclusive because all covered jurisdictions must provide oral language assistance at every stage of the election process where it is needed. See *infra* notes 9–11 and accompanying text. It is over inclusive because bilingual voting materials are not

minority language assistance provisions were enacted in 1975⁴ to remove language barriers to voting and to provide voters that have limited English language abilities with a full and meaningful opportunity to cast ballots.⁵ The basic mandate, contained in section 203 of the Act, prohibits jurisdictions that have defined levels of limited-English proficient (“LEP”) voting age citizens in covered language groups⁶ from conducting public elections in English only.⁷ Under section 203, all “voting materials”⁸ provided in English generally must be available in written translations of the language of each covered group triggering coverage.⁹ Covered jurisdictions have to ensure that they have effective bilingual voter registration programs¹⁰ and give language assistance at polling places where it is needed on Election Day.¹¹ Oral language assistance also must be given to the extent necessary to allow language minority citizens to participate effectively.¹²

Some commentators criticize the requirements, contending that “[b]ilingual ballots remain as controversial today as they were in 1975—perhaps even more so.”¹³ Anti-immigrant rhetoric underlies many such at-

required where they are not needed, such as for unwritten languages. *See infra* note 9. For purposes of this article, my use of “bilingual ballots” will be placed in quotes to indicate the term coined by critics, despite its inaccuracies.

⁴ *See* Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400 (codified as amended in scattered sections between 42 U.S.C. §§ 1973 to 1973bb-1). The bilingual election provisions originally were to be in effect for ten years, until August 6, 1985. *See* § 301, 89 Stat. at 402–03. The language assistance requirements were modified and extended in 1982, 1992, and 2006. *See* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131; Voting Rights Language Assistance Act of 1992, Pub. L. No. 102-344, 106 Stat. 921; Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (“VRARA”), Pub. L. No. 109-246, 120 Stat. 577 (2006).

⁵ For more background on the VRA’s language assistance requirements, see James Thomas Tucker, *Enfranchising Language Minority Citizens: The Bilingual Election Provisions of the Voting Rights Act*, 10 N.Y.U. J. LEGIS. & PUB. POL’Y 195 (2006) [hereinafter Tucker, *Enfranchising Minority Citizens*].

⁶ *See* 42 U.S.C. § 1973aa-1a(e) (2000); *see also infra* notes 170–176 (describing the coverage formula for section 203); *infra* Part III.D (addressing criticism that section 203 should apply to other language groups). Jurisdictions that are covered under section 4 of the Act, 42 U.S.C. § 19731(c)(3) (2006), also have to comply with section 203 in addition to other requirements. *See infra* note 24.

⁷ *See* 42 U.S.C. §§ 1973b(f)(4), 1973aa-1a (2000). Section 4(e) of the VRA, a permanent provision of the Act, also provides for protection of language minorities. *See* 42 U.S.C. § 1973b(e); *see also infra* notes 114–128 and accompanying text.

⁸ 42 U.S.C. § 1973aa-1a(b)(3)(A) (2000) (defining “voting materials” as “registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots”).

⁹ *Id.* § 1973aa-1a(c) (“[W]here the language of the applicable minority group is oral or unwritten or in the case of Alaskan natives and American Indians, if the predominant language is historically unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.”); *see also id.* § 1973b(f)(4) (including a similar proviso for jurisdictions covered under section 4(f)(4)).

¹⁰ *See id.* § 1973aa-1a(c) (2000); 28 C.F.R. § 55.18(c) (2007).

¹¹ *See* 42 U.S.C. § 1973aa-1a(c) (2000); 28 C.F.R. § 55.20 (2007).

¹² *See* 42 U.S.C. § 1973aa-1a(c) (2000); 28 C.F.R. § 55.20 (2007).

¹³ English First Foundation, *Bilingual Ballots: Election Fairness or Fraud?* (2000), <http://www.englishfirst.org/eff/efbb.htm>.

tacks.¹⁴ Some contemporary critics echo arguments made during prior renewals of the Act¹⁵ that “bilingual ballots” threaten to balkanize the country into language enclaves by purportedly creating a disincentive to learn English.¹⁶ Others argue that “bilingual ballots” are neither needed nor used by naturalized citizens, who are required to know English.¹⁷ A few contend that using languages other than English at the polls promotes voter fraud by non-citizens.¹⁸ Detractors also maintain that “bilingual ballots” are costly and

¹⁴ For further discussion of the unsuccessful attempts to use anti-immigrant rhetoric to derail reauthorization of section 203, see generally Terry M. Ao, *When the Voting Rights Act Became Un-American: The Misguided Vilification of Section 203*, 58 ALA. L. REV. 377 (2006); Tucker, *Politics of Persuasion*, *supra* note 2.

¹⁵ See generally S. REP. NO. 102-315, at 29 (1992) (dissenting views of Sens. Simpson (R-Wyo.) and Thurmond (R-S.C.) (“Who uses bilingual ballots? Immigrants use bilingual ballots The United States does not ask very much of a new immigrant to this country, but immigrants are expected to accept the U.S. system of Government and our common language—English.”); H.R. REP. NO. 97-227, at 59-60 (1981) (supplemental views of Rep. McClory (R-Ill.)); 138 CONG. REC. 19,337 (1992) (statement of Rep. Rohrabacher (R-Cal.)) (“[T]his bilingual nonsense is leading to linguistic segregation of the new immigrants of America.”); 121 CONG. REC. 16,898 (1975) (statement of Rep. Dent (R-Pa.)) (arguing that bilingual ballots would cause the country to “be a hodge-podge of ethnic speaking and thinking and voting foreigners”). See also Tucker, *Politics of Persuasion*, *supra* note 2, at 208–09; Tucker, *Enfranchising Language Minority Citizens*, *supra* note 5, at 230, 246–47 (summarizing efforts to repeal the language assistance provisions and the arguments in favor of doing so).

¹⁶ See *Continuing Need for Section 203’s Provisions for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 8–9 (2006) [hereinafter *S. Hearing on Continuing Need for Section 203*] (testimony of Mauro Mujica, Chairman of the Board and Chief Executive Officer, U.S. English, Inc.); *Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (Part I): Hearing on H.R. 9 Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 109th Cong. 14 (2006) [hereinafter *H.R. 9 Hearing Part I*] (testimony of Roger Clegg, President and General Counsel, Ctr. for Equal Opportunity); *Voting Rights Act: Section 203—Bilingual Election Requirements (Part I): Hearing Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 109th Cong. 22, 26 (2005) [hereinafter *H. Hearing on Bilingual Election Requirements Part I*] (testimony and prepared statement of Linda Chavez, President, One Nation Indivisible); *Voting Rights Act: Section 203—Bilingual Election Requirements (Part II): Hearing Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 109th Cong. 64–65 (2005) [hereinafter *H. Hearing on Bilingual Election Requirements Part II*] (testimony of K.C. McAlpin, Executive Dir., ProEnglish); Tucker, *Politics of Persuasion*, *supra* note 2, at 236, 238, 241–42.

¹⁷ See *Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 (Part II): Hearing on H.R. 9 Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 109th Cong. 14–15 (2006) [hereinafter *H.R. 9 Hearing Part II*] (testimony of Chris Norby, Supervisor, Orange County, Cal. Bd. of Supervisors); *S. Hearing on Continuing Need for Section 203*, *supra* note 16, at 8, 26 (testimony of Mauro Mujica); *H. Hearing on Bilingual Election Requirements Part I*, *supra* note 16, at 28–29 (testimony of Linda Chavez); *H. Hearing on Bilingual Election Requirements Part II*, *supra* note 16, at 64–65, 69–70 (testimony of K.C. McAlpin); Tucker, *Politics of Persuasion*, *supra* note 2, at 236, 238, 241–42, 256–57 (collecting citations).

¹⁸ See *S. Hearing on Continuing Need for Section 203*, *supra* note 16, at 11–12 (testimony of Peter Kirsanow, Member, U.S. Civil Rights Comm’n); *H. Hearing on Bilingual Election Requirements Part I*, *supra* note 16, at 27–28 (testimony of Linda Chavez); Tucker, *Politics of Persuasion*, *supra* note 2, at 236, 256–57 (collecting citations).

ineffective.¹⁹ Yet to the extent that evidence can be collected for these criticisms—a difficult proposition when addressing loaded terms raised by section 203 opponents such as “balkanization” and a bogeyman-like “voter fraud”²⁰—the available evidence refutes their contentions. Language assistance is generally used where offered, it promotes assimilation, it combats fraud through official translations, and it can be provided at a low cost proportional to the great need.²¹

Opponents also contend that the temporary language assistance provisions are unconstitutional.²² In the broadest terms, a constitutional challenge to the provisions could take one of two forms:²³ an attack on section 4(f)(4), under which three states and parts of six others are covered by section 5 for language minority groups;²⁴ or an attack on section 203, under which five states and parts of twenty-six others are required to provide language assis-

¹⁹ See *H.R. 9 Hearing Part II*, *supra* note 17, at 15, 95–96 (testimony of Chris Norby); *H. Hearing on Bilingual Election Requirements Part II*, *supra* note 16, at 64, 71–72 (testimony of K.C. McAlpin); Tucker, *Politics of Persuasion*, *supra* note 2, at 236, 256 (collecting citations).

²⁰ See, e.g., JUSTIN LEVITT, BRENNAN CTR. FOR JUSTICE, *THE TRUTH ABOUT VOTER FRAUD* (2007), available at http://brennan.3cdn.net/e20e4210db075b482b_wcm6ib0hl.pdf; SPENCER OVERTON, *STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION* 148–167 (2006); Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631 (2007); Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689 (2006). On January 9, 2008, the Supreme Court heard oral arguments in *Crawford v. Marion County Election Board*, a challenge to Indiana’s voter ID law. Many of the amicus briefs in that case discuss the lack of evidence of voter fraud supporting the law. See Brennan Ctr. for Justice, *Crawford v. Marion County Election Bd.* (2008), http://www.brennancenter.org/content/resource/crawford_v_marion_county_election_board.

²¹ See Tucker, *Enfranchising Language Minority Citizens*, *supra* note 5, at 229–59. The Government Accountability Office relied upon the study I co-directed with Dr. Rodolfo Espino in deciding not to evaluate the cost efficiency of providing language assistance because most jurisdictions failed to track the costs associated with their language assistance programs. See U.S. GOVT. ACCOUNTABILITY OFFICE, *BILINGUAL VOTING ASSISTANCE: SELECTED JURISDICTIONS’ STRATEGIES FOR IDENTIFYING NEEDS AND PROVIDING ASSISTANCE* 2–3, 11 (2008). Among those jurisdictions that were able to report costs, a majority indicated that they incurred no additional expense for providing language assistance. See James Thomas Tucker & Rodolfo Espino, *Government Effectiveness and Efficiency? The Minority Language Assistance Provisions of the VRA*, 12 TEX. J. C.L. & C.R. 163, 215 (2007) [hereinafter Tucker & Espino, *Government Effectiveness and Efficiency*]. Among the minority of jurisdictions that did report additional costs, 90% reported average oral language assistance costs of 1.5% and average bilingual written materials costs of 3.0% out of all election expenses. See *id.* at 217–19.

²² See *infra* notes 40–47, 51–56, 167–169, 198–199, 214–215, 226–228, 245–246, 251–253, 265–268, 281–283, 298–301, 482–485, 578 and accompanying text.

²³ The Supreme Court has already rejected a constitutional challenge to section 4(e) of the VRA, which is permanent. See *infra* notes 114–128 and accompanying text.

²⁴ See 28 C.F.R. § 55 app. (2007); see also *infra* note 171; Tucker, *Enfranchising Language Minority Citizens*, *supra* note 5, at 206–14 (summarizing the section 4(f)(4) trigger, covered jurisdictions, and preclearance requirements). The Justice Department’s regulations note that “[the statutory requirements of section 4(f)(4) and 203(c) regarding minority language material and assistance are essentially identical.” 28 C.F.R. § 55.8(a) (2007). In addition, section 4(f)(4) covered jurisdictions “are also subject to the Act’s special provisions, such as section 5 (regarding preclearance of changes in voting laws)” 28 C.F.R. § 55.8(b) (2007).

tance to voting age citizens in covered languages.²⁵ There is some overlap between the two challenges, particularly in jurisdictions covered under section 4(f)(4) that are subject to both the section 5 preclearance and section 203 language assistance requirements.²⁶

To date, section 5 has been a favorite target of the VRA's detractors.²⁷ Prior to the 2006 reauthorization of the VRA, a small but vocal group of pundits vigorously attacked the broad protections of federal preclearance in section 5.²⁸ The constitutionality of section 5 had been challenged several times and upheld on three occasions by the Supreme Court.²⁹ Academics and litigators widely debated two other Supreme Court decisions that narrowly interpreted the statutory language of section 5³⁰ and the constitutionality of congressional fixes for those decisions in the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 ("VRARA").³¹ Many commentators examined whether the reauthorized section 5 would be upheld if the Supreme Court considers it again,³² and a constitutional challenge already has been filed.

²⁵ See Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 48,871 (July 26, 2002) (to be codified at 28 C.F.R. pt. 55); see also Tucker, *Enfranchising Language Minority Citizens*, *supra* note 5, at 214–28; Tucker & Espino, *Government Effectiveness and Efficiency*, *supra* note 21, at 168–72; *infra* Part III (summarizing the section 203 trigger and responding to criticism of it).

²⁶ See 42 U.S.C. § 1973b(f)(4) (2000). In addition, many jurisdictions are covered under both section 4(f)(4) and section 203. See 28 C.F.R. § 55 app. (2007) (listing such jurisdictions); Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. at 48,871 (July 26, 2002) (updating the list of jurisdictions covered under section 203).

²⁷ Section 5 requires a covered jurisdiction to submit for approval, or "preclearance," any proposed change affecting voting to either the U.S. Attorney General or the U.S. District Court for the District of Columbia before the change can be implemented. See 42 U.S.C.A § 1973c (West 2000 & Supp. 2007); 28 C.F.R. § 51.2 (2007). "Change affecting voting" is broadly defined as "any voting qualification, prerequisite to voting, or standard, practice, or procedure with respect to voting" adopted after the coverage date. 28 C.F.R. § 51.2. For additional discussion of section 5's requirements, see Tucker, *Politics of Persuasion*, *supra* note 2, at 218–23.

²⁸ See, e.g., ABIGAIL THERNSTROM, *WHOSE VOTES COUNT?* (1987); Tucker, *Politics of Persuasion*, *supra* note 2, at 210 (collecting citations).

²⁹ See *infra* notes 72–84, 166 and accompanying text.

³⁰ See generally *Georgia v. Ashcroft*, 539 U.S. 461 (2003) (adopting a new totality of the circumstances standard for determining discriminatory effect that does not rest on whether minority voters' ability to elect is diminished in a new redistricting plan); *Reno v. Bossier Parish Sch. Bd. (Bossier II)*, 528 U.S. 320 (2000) (holding that section 5 does not apply to an intentionally discriminatory voting change if minority voters are not worse off than they were before it went into effect).

³¹ See, e.g., Bernard Grofman, *Operationalizing the Section 5 Retrogression Standard of the Voting Rights Act in the Light of Georgia v. Ashcroft: Social Science Perspectives on Minority Influence, Opportunity, and Control*, 5 ELECTION L.J. 250 (2006); Pamela S. Karlan, *Georgia v. Ashcroft and the Retrogression of Retrogression*, 3 ELECTION L.J. 21 (2004); Peyton McCrary et al., *The End of Preclearance as We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act*, 11 MICH. J. RACE & L. 275 (2006).

³² See, e.g., Kristen Clarke, *Reports of My Demise Have Been Overstated: Assessing the Constitutionality of the Recently Renewed Section 5 Preclearance Provision of the Voting Rights Act*, in *AMERICA VOTES! A GUIDE TO MODERN ELECTION LAW AND VOTING RIGHTS* 129–45 (Benjamin E. Griffith ed., 2008); Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act after Tennessee v. Lane*, 66 OHIO ST. L.J.

Less than one month after the reauthorized VRA was signed into law, a section 4(f)(4) covered jurisdiction attacked the constitutionality of the triggering formula and the criteria for bailing out from section 5 coverage.³³

In contrast, litigators have paid little attention to the constitutionality of the "bilingual ballots" requirement. Why? Can we take the lack of challenges as acquiescence that this is an easy constitutional call? The critics of the temporary language assistance provisions suggest this is not the case. In their efforts to block reauthorization of the provisions and to substitute English-only requirements, critics questioned the provisions' constitutionality.³⁴ Is the lack of legal challenges due to recognition that Congress has broader powers to enact remedial legislation addressing the impact of English-only elections on language minorities who are the victims of education discrimination, than it does to address voting discrimination against racial minorities under Section 5? Is there agreement that language assistance provisions intrude less upon basic principles of federalism, and are therefore less susceptible to a challenge? Are "bilingual ballots" and the triggering formula for section 203 coverage simply supported by a better legislative record? Not if you believe the provision's detractors.³⁵ So why have no lawsuits been brought to challenge the constitutionality of section 203 since it was enacted in 1975? Linda Chavez, then President of One Nation Indivisible and an opponent of section 203, offered one explanation: "[M]aybe it's because I've been busy . . . [I]t may be that there simply has not been someone who has been aggressively interested in challenging it."³⁶ The latter point seems highly unlikely, given the resources English-only groups expended during reauthorization³⁷ and their efforts to repeal other federal bilingual mandates

177 (2005); Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710 (2004); Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 Hous. L. REV. 1 (2007); Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174 (2007); Michael J. Pitts, *Let's Not Call the Whole Thing Off Just Yet: A Response to Samuel Issacharoff's Suggestion to Scuttle Section 5 of the Voting Rights Act*, 84 NEB. L. REV. 605 (2005); Paul Winke, *Why the Preclearance and Bailout Provisions of the Voting Rights Act Are Still a Constitutionally Proportionate Remedy*, 28 N.Y.U. REV. L. & SOC. CHANGE 69 (2003).

³³ See *Northwest Austin Mun. Util. Dist. No. 1 v. Gonzales*, No. 06-01384 (D.D.C. filed Aug. 4, 2006) (before a three-judge panel). The Northwest Austin Municipal Utility District is a political subdivision of Texas covered under the section 5 preclearance provisions as a result of Texas's statewide coverage for Spanish language minorities under section 4(f)(4) of the Act. See 28 C.F.R. § 55 app. (2007) (listing Texas as a covered state); *id.* § 51.6 (providing that all subdivisions of a covered state are required to comply with section 5); Complaint, *Northwest Austin Mun. Util. Dist. No. 1 v. Gonzales*, No. 06-01384, (D.D.C. Aug. 4, 2006).

³⁴ See Tucker, *Politics of Persuasion*, *supra* note 2, at 208–10, 235–36, 238–46, 248–50, 256–57.

³⁵ See *supra* note 22.

³⁶ *H. Hearing on Bilingual Election Requirements Part I*, *supra* note 16, at 44 (testimony of Linda Chavez).

³⁷ See *supra* note 34.

through litigation.³⁸ Despite the lack of past challenges, Chavez suggested that section 203 “will, in fact, probably be challenged if it is reauthorized.”³⁹

If we take Chavez at her word, what would a constitutional challenge of section 203 look like? The reauthorization hearings that were held in 2005 and 2006 offer some guidance. Although many opponents describe “bilingual ballots” as unconstitutional,⁴⁰ only Chavez and Roger Clegg, General Counsel at Chavez’s Center for Equal Opportunity, detailed the roadmap they would use to challenge the requirements. Preliminarily, they suggested that Congress does not have the power to require state and local jurisdictions to conduct elections in languages other than English.⁴¹ Even if it did, they argued, the legislative record was insufficient to support extension of section 203 under the 1997 Supreme Court decision of *City of Boerne v. Flores*.⁴² Specifically, they maintained that “bilingual ballots” are not a congruent and proportional remedy to the effects of education discrimination at which section 203 is targeted.⁴³ They claimed that the triggering formula for coverage does not correspond to states where education discrimination against language minorities has occurred.⁴⁴ They criticized the definition used to determine whether language minority voting age citizens are LEP and need language assistance, suggesting that it leads to unlawful racial and ethnic profiling.⁴⁵ They also asserted that “bilingual ballots” are not a proper remedy if they do not cure the underlying education discrimination.⁴⁶ In the end, they contended that section 203 has nothing to do with remedying discrimination and everything to do with what they described as “identity politics.”⁴⁷

This Article will respond to the arguments offered by Chavez and others who oppose the language assistance provisions. Part II examines the scope of congressional power to enact the language assistance provisions. Part III assesses the constitutionality of the coverage formula, or trigger, in determining where language assistance in voting must be provided. Part IV

³⁸ See generally *Alexander v. Sandoval*, 532 U.S. 275 (2001) (dismissing a case brought under Title VI of the Civil Rights Act against Alabama’s policy of administering driver’s license examination in English only, in which English Language Advocates, English First Foundation, and U.S. English filed amicus briefs in support of the state); *ProEnglish v. Bush*, 70 F. App’x 84 (4th Cir. 2003) (dismissing a challenge to Executive Order 13,166, 65 Fed. Reg. 50,121–22 (Aug. 16, 2000) (to be codified in 3 C.F.R.), which requires federal agencies to ensure that limited-English proficient persons have meaningful access to federal services).

³⁹ *H. Hearing on Bilingual Election Requirements Part I*, *supra* note 16, at 45 (testimony of Linda Chavez).

⁴⁰ See *supra* note 22.

⁴¹ See *infra* notes 51–56, 198 and accompanying text.

⁴² 521 U.S. 507 (1997).

⁴³ See *infra* notes 167–169, 298–301, 484–485, 578 and accompanying text.

⁴⁴ See *infra* notes 167–169, 298–301, 484–485, 578 and accompanying text.

⁴⁵ See *infra* notes 198–199 and accompanying text.

⁴⁶ See *infra* notes 167–169, 578 and accompanying text.

⁴⁷ *H. Hearing on Bilingual Election Requirements Part I*, *supra* note 16, at 33 (testimony of Linda Chavez); see also THERNSTROM, *supra* note 28, at 58–62 (describing the main concern of the 1975 amendments that added sections 4(f)(4) and 203 as “electoral arrangements that gave minority voters,” particularly Latinos in Texas, “unequal” electoral power”).

describes the history of education discrimination against language minority citizens in the covered jurisdictions. Part V shows the linkage between discrimination against language minorities and depressed political participation. Part VI evaluates whether that evidence is sufficient to justify section 203 and uphold its constitutionality under *Boerne*. When the battle over “bilingual ballots” shifts to the courts, the evidence available to Congress at the time of reauthorization in 2006 will establish that section 203 of the VRA is constitutional.

II. CONGRESSIONAL POWER TO REQUIRE “BILINGUAL BALLOTS”

The principal argument made by opponents of language assistance under the VRA is that Congress lacks the authority to require it. Congress enacted section 203 pursuant to enforcement sections of the Fourteenth and Fifteenth Amendments to remedy depressed political participation among language minorities “directly related to the unequal educational opportunities afforded them.”⁴⁸ Congress found that failing to provide language assistance to illiterate, non-English speaking voters amounted to an English literacy test that compounded the detrimental effects of prior education discrimination.⁴⁹ The disenfranchising effects of not providing language assistance were particularly severe where voters could not get assistance from persons of their choice.⁵⁰

In criticizing this rationale, Linda Chavez contends that education discrimination is not a sufficient basis under the Fourteenth and Fifteenth Amendments for Congress to mandate “bilingual ballots.” In her view, Congress only has the power to legislate to correct an underlying violation of the Reconstruction Amendments. She argues that “only purposeful discrimination—actually treating people differently on the basis of race or ethnicity”—violates the Constitution.⁵¹ According to Chavez, providing English-only election materials is very unlikely to “be rooted in a desire to deny people the right to vote because of race or ethnicity.”⁵² She concludes, therefore, that Congress is powerless to prohibit English-only elections and mandate language assistance through legislation.

Chavez supports her argument with citations to three cases:⁵³ *Washington v. Davis*,⁵⁴ *City of Mobile v. Bolden*,⁵⁵ and *Village of Arlington Heights v.*

⁴⁸ 42 U.S.C. § 1973aa-1a(a) (2000); *see also id.* § 1973b(f)(1) (stating a similar basis for section 4(f)(4) of the VRA).

⁴⁹ *See id.* §§ 1973aa-1a(a), 1973b(f)(1) (2000); S. REP. NO. 94-295, at 28–29 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 794–95.

⁵⁰ *See* S. REP. NO. 94-295, at 39.

⁵¹ *H. Hearing on Bilingual Election Requirements Part I*, *supra* note 16, at 30–31 (testimony of Linda Chavez).

⁵² *Id.* at 31.

⁵³ *Id.*

⁵⁴ 426 U.S. 229 (1976).

⁵⁵ 446 U.S. 55 (1980).

*Metropolitan Housing Development Corp.*⁵⁶ Her reliance on these cases, however, is misplaced. Two of the decisions do not address the enforcement sections of the Reconstruction Amendments, the source of Congress's authority to pass the VRA. Rather, these cases addressed the evidence required to demonstrate a violation of the self-executing constitutional provisions governing the right to vote, namely, the first sections of the Fourteenth and Fifteenth Amendments. In *Washington*, the Court held that constitutional challenges brought under the Equal Protection Clause required proof of discriminatory purpose and effect.⁵⁷ *Arlington Heights* merely elaborated on the evidence necessary to prove racially discriminatory purpose under the Equal Protection Clause.⁵⁸ The third case, *Bolden*, does not apply to section 203 because it pertains to a statutory construction of section 2 of the Act, and when viewed in the context of the 1982 amendments to the VRA that corrected the Court's construction, it actually contradicts Chavez's argument.⁵⁹

Chavez's reliance on *Washington* and *Arlington Heights*, cases dealing with the self-executing provisions of the Fourteenth Amendment, is misplaced because Congress passed the VRA under the authority of the enforcement provisions of the Fifteenth Amendment. Congress's power to legislate under the enforcement sections of the Fourteenth and Fifteenth Amendments is broad. Although it is the Court's role and not Congress's to interpret the self-executing constitutional provisions of the Fourteenth and Fifteenth Amendments,⁶⁰ those provisions are not the constitutional basis of the VRA. Instead, the proper question in determining the constitutionality of section 203 is the extent of congressional power to pass remedial legislation under the enforcement sections of the Fourteenth and Fifteenth Amendments.⁶¹ This Part examines the extent of that power by examining the Court's interpretation of the enforcement sections of the Fourteenth and Fifteenth Amendments in its voting rights decisions. It also discusses to what extent, if any, *Boerne* changes that constitutional analysis.⁶²

⁵⁶ 429 U.S. 252 (1977).

⁵⁷ See 426 U.S. at 239–45.

⁵⁸ See 429 U.S. at 265–68.

⁵⁹ See *infra* notes 130–138 and accompanying text.

⁶⁰ James Thomas Tucker, *Tyranny of the Judiciary: Judicial Dilution of Consent Under Section 2 of the Voting Rights Act*, 7 WM. & MARY BILL RTS. J. 443, 490 (1999) [hereinafter Tucker, *Tyranny of the Judiciary*] (arguing that “[j]udges may establish both the floor and the ceiling (that is, the minimum and maximum extents) of rights secured under these sections.”) (emphasis in original).

⁶¹ See U.S. CONST. amend. XIV, § 5; U.S. CONST. amend. XV, § 2 (providing that “[t]he Congress shall have power to enforce by appropriate legislation, the provision of this article” protecting equal treatment under the law and the right to not have the right to vote denied “on account of race, color, or previous condition of servitude.”)

⁶² For the perspectives of other civil rights attorneys on the subject, see generally Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 WM. & MARY L. REV. 725 (1998); Daniel P. Tokaji, *Intent and Its Alternatives: Defending the New Voting Rights Act*, 58 ALA. L. REV. 349 (2006).

A. *Broad Congressional Enforcement Powers: South Carolina v. Katzenbach*

Analysis of section 203’s constitutionality under the correct Constitutional provisions, the enforcement sections of the Fourteenth and Fifteenth Amendments, yields a different result than Chavez’s analysis under the Court’s jurisprudence on the self-executing provisions. The legislative history of the Reconstruction Amendments highlights that Congress intended to limit the courts’ power to restrict congressional legislation properly enacted under the enforcement sections.⁶³ Specifically, broad enforcement powers were added under the Reconstruction Amendments because “[f]rom at least *Dred Scott* onward the Court was in ill repute.”⁶⁴ Given that the States refused to enforce the remedial legislation such as the Civil Rights Act of 1866, a majority in Congress felt that the federal legislative branch needed to have greater discretion to enact appropriate remedial legislation through the enforcement sections of the Fourteenth and Fifteenth Amendments.⁶⁵

The breadth of congressional enforcement powers was confirmed in *Ex parte Virginia*.⁶⁶ In that case, the Court found that the Reconstruction Amendments were “intended to be . . . limitations of the power of the States and enlargements of the power of Congress.”⁶⁷ The Court explained that although the self-executing provisions were to be enforced by courts, it was the role of Congress, not the judiciary, to enforce the rights protected under the Amendments:

It is not said the *judicial power* of the general government shall extend to enforcing prohibitions and to protecting the rights and immunities guaranteed It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective. Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights . . . if not prohibited, is brought within the domain of congressional power.⁶⁸

⁶³ See JOHN MABRY MATHEWS, LEGISLATIVE AND JUDICIAL HISTORY OF THE FIFTEENTH AMENDMENT 97–126 (1909); Tucker, *Tyranny of the Judiciary*, *supra* note 60, at 479–86 (citing the extensive legislative history).

⁶⁴ RAOUL BERGER, THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 90 (1989).

⁶⁵ See Tucker, *Tyranny of the Judiciary*, *supra* note 60, at 474–77, 486–87, 486 n.206.

⁶⁶ 100 U.S. 339 (1879).

⁶⁷ *Id.* at 345.

⁶⁸ *Id.* at 345–46 (emphasis added).

Therefore, under the enforcement sections of the Fourteenth and Fifteenth Amendments,⁶⁹ “the Court can set the *floor but not the ceiling* of rights.”⁷⁰ In that sense, congressional remedial powers under the enforcement sections are coextensive with those it possesses under the Necessary and Proper Clause of the Constitution.⁷¹

The Court recognized as much in affirming the constitutionality of several of the special provisions of the VRA. In *South Carolina v. Katzenbach*, the Court found that Section 2 of the Fifteenth Amendment allowed Congress to “use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.”⁷² The Court explained, “By adding this authorization [in § 2], the Framers indicated that Congress was to be chiefly responsible for implementing the rights created in § 1 Accordingly, in addition to the courts, Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting.”⁷³ As a result, the expansive test used for congressional enactments under the Necessary and Proper Clause applies to legislation passed pursuant to the Fifteenth Amendment: “Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”⁷⁴

Turning to the constitutionality of the VRA, the Court rejected South Carolina’s contention that the judiciary, not Congress, was solely responsible for “fashioning specific remedies” for voting rights violations.⁷⁵ Instead, the Court found that Section 2 of the Fifteenth Amendment meant what it said. Specifically, the power to legislate under Section 2, “like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution.”⁷⁶ Congress, not the courts, is responsible for passing ameliorative laws protecting the right to vote.

⁶⁹ For purposes of securing the equal right to vote, the scope of the enforcement sections of the Fourteenth and Fifteenth Amendments generally is viewed as identical. Compare *Gomillion v. Lightfoot*, 364 U.S. 339, 344–45 (1960) (striking down racial gerrymander under the Fifteenth Amendment), with *Ex parte Virginia*, 100 U.S. at 349 (Whittaker, J., concurring) (concluding that the gerrymander violated the Equal Protection Clause of the Fourteenth Amendment), and *Shaw v. Reno*, 509 U.S. 630, 658 (1993) (same). After *Gomillion*, “the Court came to interpret the Fourteenth and Fifteenth Amendments together” MARK E. RUSH, DOES REDISTRICTING MAKE A DIFFERENCE?: PARTISAN REPRESENTATION AND ELECTORAL BEHAVIOR 22 (1993); see also *United States v. Guest*, 383 U.S. 745, 783–84 (1966) (Brennan, J., concurring in part and dissenting in part) (asserting that the standards of review for assessing exercise of enforcement powers under the Fourteenth and Fifteenth Amendments are the same).

⁷⁰ Tucker, *Tyranny of the Judiciary*, *supra* note 60, at 492 (emphasis added).

⁷¹ U.S. CONST. art. I, § 8, cl. 18.

⁷² 383 U.S. 301, 324 (1966).

⁷³ *Id.* at 325–26 (citing *Ex parte Virginia*, 100 U.S. at 345–46).

⁷⁴ *Id.* at 326 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)).

⁷⁵ *Id.* at 327.

⁷⁶ *Id.* (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824)).

The Court likewise recognized that Congress could exercise its powers in an "inventive manner," as it did in enacting the VRA.⁷⁷ First, it held that Congress reasonably implemented "remedies for voting discrimination which go into effect without any need for prior adjudication" because of ample problems inherent in a case-by-case approach.⁷⁸ Second, it found that those remedies were properly limited to particular areas of the country "where immediate action seemed necessary."⁷⁹ Use of a triggering formula was permissible because it had been constructed to identify jurisdictions where there was a "significant danger" of voting discrimination.⁸⁰ The formula itself was rational because it depended on voting rates, and "a low voting rate is pertinent for the obvious reason that widespread disenfranchisement [as a result of the discriminatory effect of literacy tests] must inevitably affect the number of actual voters."⁸¹ It did not matter that the formula failed to include all jurisdictions where voting discrimination occurred, particularly given other remedies in the Act.⁸² It also did not matter that the formula covered some jurisdictions where there was no voting discrimination because a bailout provision eliminated the possibility of overbreadth.⁸³ Consequently, the Court held that the VRA's ban on literacy tests, the section 5 preclearance requirements and associated trigger, and the use of federal observers were appropriate methods for Congress to use to enforce the guarantees of the Fifteenth Amendment.⁸⁴ *South Carolina v. Katzenbach* confirms the expansive powers available to Congress under the enforcement sections.

The VRA does not violate the principles of federalism. Although the VRA would seem to intrude on authority reserved to the states under Article I, Section 2 of the Constitution,⁸⁵ the Reconstruction Amendments redefined the boundaries of federal authority. These amendments were meant to dramatically expand the scope of congressional power, at the expense of the states.⁸⁶ What otherwise might be seen as interference with states' rights is necessitated by the states' long history of discrimination and their refusal to comply with Reconstruction Amendments' command to preserve their citizens' fundamental right to vote. When the states fail to preserve this right by engaging in voting discrimination, Congress has tremendous discretion under the enforcement sections to eliminate it.

⁷⁷ *Id.* at 327.

⁷⁸ *South Carolina v. Katzenbach*, 383 U.S. at 327–28.

⁷⁹ *Id.* at 328.

⁸⁰ *Id.* at 329.

⁸¹ *Id.* at 330.

⁸² *Id.* at 330–31.

⁸³ *Id.* at 331–32.

⁸⁴ See *South Carolina v. Katzenbach*, 383 U.S. at 329–37.

⁸⁵ See generally U.S. CONST. art. I, § 2, cl. 1 (providing that the qualifications for voting in congressional elections were the same as those "for Electors of the most numerous Branch of the State Legislature").

⁸⁶ See *supra* notes 63–71 and accompanying text.

B. *Congressional Power to Prohibit State Practices—such as Literacy Tests and English-Only Elections—with Ostensibly Legitimate Purposes: Gaston County, Mitchell, and Morgan*

Chavez also attacks section 203 because “the practice of printing ballots in English and not in foreign languages” allegedly fulfills legitimate government purposes such as preventing fraud, discouraging “balkanization,” and conserving resources.⁸⁷ We can assume, for the sake of argument, that each of the purposes cited by Chavez is legitimate, despite the absence of credible evidence that any English-only ballots fulfills any of these goals.⁸⁸ It does not matter. Under the enforcement sections, Congress can proscribe activities that limit the effective exercise of the right to vote, even if they have what Chavez describes as “perfectly legitimate roots” that are not necessarily the product of intentional discrimination.⁸⁹

Literacy tests are one example of a voting qualification that can have a legitimate purpose. In *Lassiter v. Northampton County Board Of Elections*, the Court upheld a state literacy test, finding that “[t]he ability to read and write likewise has some relation to standards designed to promote the intelligent use of the ballot.”⁹⁰ From an empirical standpoint, that makes sense, or at least it did before the advent of political commentary available through television and radio. If a voter is going to cast a ballot, it seems reasonable to require that voters be capable of making informed decisions. Voters can become informed decision makers by reading political materials, newspapers, and magazines. Therefore, making the franchise contingent on the ability to read would make it more likely that voters have the ability to cast the ballot intelligently. As such, the Court found that literacy tests are not facially invalid because there are at least some legitimate reasons why they might be used.⁹¹ At the same time, the Court observed that they can be unconstitutional where they are used as racially discriminatory devices.⁹²

Yet despite the potential legitimacy of literacy tests, Congress is empowered to ban them outright, which it did initially only in jurisdictions covered by section 5 of the VRA,⁹³ and later nationwide.⁹⁴ In *South Carolina v. Katzenbach*, the Court affirmed the constitutionality of the temporary sus-

⁸⁷ *H. Hearing on Bilingual Election Requirements Part I*, *supra* note 16, at 31 (testimony of Linda Chavez).

⁸⁸ *See supra* notes 20–21.

⁸⁹ *H. Hearing on Bilingual Election Requirements Part I*, *supra* note 16, at 31 (testimony of Linda Chavez).

⁹⁰ *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45, 51 (1959).

⁹¹ *Id.*

⁹² *See id.* at 53–54.

⁹³ *See* Voting Rights Act of 1965, 4(a), Pub. L. No. 89-110, 79 Stat. 437, 438 (codified as amended at 42 U.S.C. § 1973aa (2000)).

⁹⁴ *See* Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314. The nationwide ban originally was in place for five years. *See id.* In 1975, Congress made the ban permanent. *See* section 102 of the Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400 (codified as amended in section 201 of the VRA, 42 U.S.C. § 1973aa (2000)).

pension of literacy tests, even where they were fairly administered.⁹⁵ The ban was necessary because of "the notorious and tragic fact . . . that educational opportunities were pathetically inferior for thousands of Negroes who want to vote today."⁹⁶ Even "wiping the registration books clean and requiring all voters . . . to register anew under a uniformly applied literacy test" would not correct the problem.⁹⁷ Instead, it would permit voting discrimination to continue in jurisdictions that denied equal educational opportunities to black voters, who, as a result of the disabling effects of that discrimination, could not pass a literacy test. Therefore, the Court upheld the ban on literacy tests, which would have "fr[ozen] the effect" of past discrimination by allowing white illiterates to remain on the polls while denying similar opportunities to black illiterates.⁹⁸

In *Gaston County v. United States*, the Court recognized that Section 2 of the Fifteenth Amendment empowered Congress to ban literacy tests that disproportionately disenfranchised the victims of prior education discrimination.⁹⁹ This was the case even if Congress lacked the authority to redress the underlying education discrimination under the Fifteenth Amendment. Congress had been "fully cognizant of the potential effect of unequal educational opportunities upon exercise of the franchise," which it cited as a rationale for temporarily suspending literacy tests in covered jurisdictions.¹⁰⁰ In light of "this obvious relationship," it was "of no consequence that the Act was explicitly designed to enforce the Fifteenth, and not the Fourteenth, Amendment."¹⁰¹ It also did not matter that Congress chose a coverage formula based upon voting or registration data instead of education discrimination.¹⁰² The Court reasoned that "a coverage formula based on educational disparities, or one based on literacy rates, would be administratively cumbersome: the designation of racially disparate school systems is not susceptible of speedy, objective, and incontrovertible determination," and the Census Bureau did not have the literacy data.¹⁰³ The Court further observed that even in covered jurisdictions that had eliminated education discrimination against black students, it did "nothing for their parents" who were voters and who continued to suffer from the effects of past discrimination.¹⁰⁴ Therefore, *Gaston County* held that Congress properly exercised its enforcement powers

⁹⁵ 383 U.S. 301, 334 (1966).

⁹⁶ *Hearings on S. 1564 Before the S. Comm. on the Judiciary*, 89th Cong. 22 (1965) (testimony of Nicholas Katzenbach, U.S. Att'y Gen.).

⁹⁷ *Id.*

⁹⁸ *South Carolina v. Katzenbach*, 383 U.S. at 334.

⁹⁹ 395 U.S. 285 (1969).

¹⁰⁰ *Id.* at 289.

¹⁰¹ *Id.* at 290 n.5.

¹⁰² *Id.* at 291–92.

¹⁰³ *Id.* at 292.

¹⁰⁴ *Id.* at 296–97.

under the Fifteenth Amendment in imposing a localized and temporary ban on literacy tests.¹⁰⁵

In *Oregon v. Mitchell*, the Court unanimously upheld the nationwide ban on literacy tests adopted in the 1970 amendments to the VRA.¹⁰⁶ Although the Justices disagreed on which enforcement section authorized Congress to legislate the ban,¹⁰⁷ they all agreed that Congress had broad discretion to impose it. Justice Black found the ban constitutional because of the discriminatory use of literacy tests, their impact on voter participation, and the “denial of equal protection [in conditioning] the political participation of children educated in a dual school system upon their educational achievement.”¹⁰⁸ Justice Douglas reached the same conclusion, reasoning that the ban was an appropriate response that did not require “findings as to the incidence of literacy.”¹⁰⁹ Justice Harlan agreed by reasoning that “[w]hether to engage in a more particularized inquiry into the extent and effects of discrimination,” either before or after suspending literacy tests, “was a choice for Congress to make.”¹¹⁰

As Justice Stewart explained in *Mitchell*, the justification for making the ban nationwide “need not turn on whether literacy tests unfairly discriminate against Negroes in every State” and Congress did not have to make “state-by-state findings” concerning educational equality and the impact of literacy tests on voting.¹¹¹ Rather, Congress could choose to “paint with a much broader brush than may this Court, which must confine itself to the judicial function of deciding individual cases . . . upon individual records.”¹¹² Congress therefore had great discretion in using the “[e]xperience gained under the 1965 Act” with a localized ban “to conclude it should go the whole distance.”¹¹³

Like a literacy test, an English-only election is another example of a state practice that Congress can prohibit even though the practice has an ostensibly legitimate purpose and notwithstanding a state’s nondiscriminatory reason for adopting it. As Chavez points out, English language ballots can be a voting qualification that is not facially illegitimate. Nevertheless, Congress has sweeping discretion to require “bilingual ballots” and other

¹⁰⁵ *Gaston County*, 395 U.S. at 293, 296–97.

¹⁰⁶ 400 U.S. 112, 118 (1970).

¹⁰⁷ Justices Black, Marshall, and White concluded that the ban was a proper exercise under Section 5 of the Fourteenth Amendment, while the remaining justices concluded it was proper under Section 2 of the Fifteenth Amendment. *See id.* at 132 (plurality opinion of Black, J.); *id.* at 144 (Douglas, J., joined by White and Marshall, JJ., concurring in the judgment); *id.* at 216 (Harlan, J., concurring in the judgment); *id.* at 282 (Stewart, J., joined by Burger, C.J., and Blackmun, J., concurring in the judgment).

¹⁰⁸ *Id.* at 132–33 (plurality opinion).

¹⁰⁹ *Id.* at 147 (Douglas, J., joined by White and Marshall, JJ., concurring in the judgment).

¹¹⁰ *Id.* at 216 (Harlan, J., concurring in the judgment).

¹¹¹ *Id.* at 284 (Stewart, J., joined by Burger, C.J., and Blackmun, J., concurring in the judgment).

¹¹² *Mitchell*, 400 U.S. at 285.

¹¹³ *Id.*

language assistance in public elections where the record supports the need. There is a close relationship between the ban on English-only elections in covered jurisdictions and the nationwide ban on literacy tests. As discussed in Parts IV and V, lack of English fluency and literacy are direct products of unequal educational opportunities for language-minority voters. Like literacy tests, English-only elections in covered jurisdictions would punish the victims of education discrimination instead of holding the state and local governments accountable for that discrimination. Therefore, as with literacy tests, it was necessary for Congress to ban English-only elections in places where they provided language minority voters with unequal voting opportunities because of past discrimination.

Section 203 was modeled on an existing provision of the VRA, section 4(e). That section was permanently added to the Act in 1965¹¹⁴ to enfranchise much of the Puerto Rican population in New York, which was barred from voting by the state’s English literacy requirement.¹¹⁵ Under section 4(e), no person who demonstrates he has successfully completed a sixth grade education in a school in the United States “in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language.”¹¹⁶ Therefore, bilingual voting materials¹¹⁷ and Spanish language assistance had to be provided for illiterate voters.¹¹⁸

In *Katzenbach v. Morgan*, the Court rejected a constitutional challenge to section 4(e) by New York City voters, who argued that the statute violated the Fifth Amendment because it prohibited the use of literacy tests only for persons educated in American schools in which the language of instruction was not English.¹¹⁹ The Court disagreed, reasoning that Congress had made valid legislative choices to limit the scope of the provision to Puerto Ricans.¹²⁰ The Court also rejected New York’s assertion that its English lan-

¹¹⁴ See 42 U.S.C. § 1973b(e) (2000). For a more detailed discussion of the legislative history of section 4(e), see generally Juan Cartagena, *Latinos and Section 5 of the Voting Rights Act: Beyond Black and White*, 18 NAT’L BLACK L.J. 201 (2004–05).

¹¹⁵ *Katzenbach v. Morgan*, 384 U.S. 641, 645 n.3 (1966) (collecting citations); see also REPORT OF THE U.S. COMM’N ON CIVIL RIGHTS 68 (1959) (observing that “Puerto Rican-American citizens are being denied the right to vote, and that these denials exist in substantial numbers in the State of New York.”). Although section 4(e) applied to students educated in languages other than English anywhere in the United States, its practical effect was “limited to enfranchising those educated in Puerto Rican schools.” *Morgan*, 384 U.S. at 645 n.3.

¹¹⁶ 42 U.S.C. § 1973b(e)(2) (2000).

¹¹⁷ See *Torres v. Sachs*, 381 F. Supp. 309 (S.D.N.Y. 1974).

¹¹⁸ See, e.g., *id.*; *Coal. for Educ. in Dist. One v. New York City Bd. of Elections*, 370 F. Supp. 42 (S.D.N.Y. 1974), *aff’d*, 495 F.2d 1090 (2d Cir. 1974); *Lopez v. Dinkins*, No. 73 Civ. 695 (S.D.N.Y. Feb. 14, 1973).

¹¹⁹ *Morgan*, 384 U.S. at 654, 656–57.

¹²⁰ The *Morgan* Court observed:

In the context of the case before us, the congressional choice to limit the relief effected in § 4(e) may, for example, reflect . . . a recognition of the unique historic relationship between the Congress and the Commonwealth of Puerto Rico, an aware-

guage requirement was created to give language minorities an incentive to learn English.¹²¹ Instead, the Court reasoned that Congress may have “questioned whether denial of a right deemed so precious and fundamental in our society was a necessary or appropriate means of encouraging persons to learn English, or of furthering the goal of an intelligent exercise of the franchise.”¹²²

The Court found that section 4(e) was a valid exercise of the enforcement section of the Fourteenth Amendment.¹²³ The Court reasoned that *Lassiter* was “inapposite” because no showing of an Equal Protection violation was necessary to sustain section 4(e) under expansive congressional enforcement powers.¹²⁴ Rather, the Court held that the enforcement sections, “[c]orrectly viewed,” constituted “a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.”¹²⁵ As long as Congress did not exceed its discretion, the Court had no authority to second-guess it:

It was well within congressional authority to say that this need of the Puerto Rican minority for the vote warranted federal intrusion upon any state interests served by the English literacy requirement. It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations—the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected by the nullification of the English literacy requirement as applied to residents who have successfully completed the sixth grade in a Puerto Rican school.¹²⁶

The Court acknowledged that it could not micromanage and “review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it

ness of the Federal Government’s acceptance of the desirability of the use of Spanish as the language of instruction in Commonwealth schools, and the fact that Congress has fostered policies encouraging migration from the Commonwealth to the States.

Id. at 657–58.

¹²¹ *Id.* at 654.

¹²² *Id.* at 658. In *Cardona v. Power*, 384 U.S. 672 (1966), decided the same day as *Morgan*, the Supreme Court suggested that other applications of New York’s English literacy statute might be invalid under section 4(e) of the VRA, even if those applications were not expressly prohibited by section 4(e). 384 U.S. at 674.

¹²³ *Morgan*, 384 U.S. 641, 648–58.

¹²⁴ *Id.* at 648–50.

¹²⁵ *Id.* at 651. The Court noted that “Section 2 of the Fifteenth Amendment grants Congress a similar power.” *Id.*

¹²⁶ *Id.* at 654.

did.”¹²⁷ Therefore, the requirement that the State of New York provide language assistance to Spanish-speaking Puerto Rican voters, like the nationwide ban on literacy tests, was constitutional.¹²⁸

In summary, Chavez’s assertion that there may be legitimate reasons for having English-only elections proves nothing. The Court’s decisions upholding bans on literacy tests and English-only elections that are the functional equivalent of literacy tests demonstrate that congressional enforcement powers are indeed broad. *Gaston County, Mitchell, and Morgan* make it clear that: “Congress may, under the authority of § 2 of the Fifteenth Amendment, prohibit state action that, though in itself not violative of § 1, perpetuates the effects of past discrimination.”¹²⁹ The prevalence of education discrimination against language minorities in jurisdictions covered by section 203 demonstrates a need to suspend English-only elections that transfer discrimination from the school house to the ballot box.

C. *Congressional Power to Correct the Court’s Misconstructions of Legislative Intent and the Limits of that Power: Bolden, Mitchell, and Boerne*

Congress likewise has expansive power to define the scope of its own remedial legislation. When the judiciary narrowly construes the scope of laws, like the VRA, enacted under the enforcement sections of the Fourteenth and Fifteenth amendments, Congress may subsequently enlarge that scope.¹³⁰ That is precisely what happened when Congress passed the 1982 amendments to the VRA in response to the Supreme Court’s narrow interpretation of section 2 of the Act in *Bolden*,¹³¹ the third case on which Chavez relies to challenge the constitutionality of section 203.¹³² Congress clarified that unlike a constitutional vote dilution claim, a claim brought under section 2 required only proof of discriminatory effect.¹³³ It found that discriminatory

¹²⁷ *Id.*

¹²⁸ *Id.* at 657–58.

¹²⁹ *City of Rome v. United States*, 446 U.S. 156, 176 (1980).

¹³⁰ See Tucker, *Tyranny of the Judiciary*, *supra* note 60, at 554–59 (describing the 1982 amendments to the VRA to clarify congressional intent in section 2 of the Act following the *Bolden* decision). I would be remiss if I again failed to mention the two most recent examples of Congress clarifying its legislative intent in the VRA. In 2006, Congress amended the VRA to correct the Court’s statutory misconstruction of section 5 in two cases. See *supra* note 30. For a brief discussion of these VRA amendments, see Tucker, *Politics of Persuasion*, *supra* note 2, at 221–22.

¹³¹ In *Bolden*, a plurality of the Court applied the *Washington v. Davis* standard to vote dilution cases under of the VRA, concluding that section 2 of the Act was to be interpreted in the same manner as the Fifteenth Amendment. See 446 U.S. at 60–61. The plurality therefore adopted the “intent test” which applied to constitutional vote dilution claims, finding “racially discriminatory motivation . . . a necessary ingredient” of a section 2 claim. *Id.* at 60–62.

¹³² See *H. Hearing on Bilingual Election Requirements Part I*, *supra* note 16, at 31 (testimony of Linda Chavez).

¹³³ See generally 42 U.S.C. § 1973(b) (2000) (providing that a vote dilution claim is established under section 2 if it is shown under the totality of the circumstances that the plaintiffs

effects were critical because “voting practices and procedures that have discriminatory results perpetuate the effects of past purposeful discrimination.”¹³⁴ Congress therefore did not overrule *Bolden*, but instead amended the VRA to clarify that it intended the VRA to be “a proper statutory exercise of [its] enforcement power” under Section 2 of the Fifteenth Amendment.¹³⁵ In doing so, Congress noted that it “need not limit itself to legislation coextensive with the Fifteenth Amendment, if there is a basis for the Congressional determination that the legislation furthers enforcement of the amendment.”¹³⁶ If there is such a basis, then Congress can adopt measures that “are appropriate and reasonably adapted to protect citizens against the risk that the right to vote will be denied in violation of the Fifteenth Amendment.”¹³⁷ The Court subsequently upheld the constitutionality of the effects test, confirming Congress’s authority to clarify statutory protections enacted under its extensive remedial powers.¹³⁸

Despite the breadth of congressional power under the enforcement sections, it does have limits. “On the rare occasions when the Court has found an unconstitutional exercise of these powers, in its opinion Congress had attacked evils not comprehended by the Fifteenth Amendment.”¹³⁹ Specifically, the Court has reined in Congress where it has viewed legislation as intruding on the judiciary’s sphere to construe the scope of the self-executing sections. For instance, Congress did not have the authority to define non-racial qualifications on the right to vote, such as age. In *Oregon v. Mitchell*, the Court struck down provisions in the 1970 Voting Rights Act amendments extending the right to vote to eighteen-year-olds in state and local elections.¹⁴⁰ That does not mean, as some commentators have suggested, that the Court in *Morgan* curtailed congressional authority to define the substantive right to vote under the enforcement sections.¹⁴¹ Rather, it merely means that Congress cannot enact legislation that is not within the subject matter of the Reconstruction Amendments, like the affirmative extension of the franchise to eighteen-year-olds struck down in *Mitchell*. The Fifteenth Amendment “did not contain an affirmative grant of universal suffrage, but rather established ‘impartial’ suffrage—that is, a ‘negative injunction that voters could not be disbarred by race *only*.’”¹⁴² Therefore, since eighteen-year-olds were not specifically guaranteed the right to vote, Congress could

have unequal access “in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”)

¹³⁴ S. REP. NO. 97-417, at 40 (1982), reprinted in 1982 U.S.C.C.A.N. 218.

¹³⁵ *Id.* at 41, reprinted in 1982 U.S.C.C.A.N. at 219.

¹³⁶ *Id.* at 39, reprinted in 1982 U.S.C.C.A.N. at 217.

¹³⁷ *Id.* at 40, reprinted in 1982 U.S.C.C.A.N. at 218.

¹³⁸ See *Thornburg v. Gingles*, 478 U.S. 30 (1986).

¹³⁹ *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966).

¹⁴⁰ *Oregon v. Mitchell*, 400 U.S. 112, 118, 124–31 (1970).

¹⁴¹ See Donald Francis Donovan, Note, *Toward Limits on Congressional Enforcement Power Under the Civil War Amendments*, 34 STAN. L. REV. 453 (1982).

¹⁴² Tucker, *Tyranny of the Judiciary*, *supra* note 60, at 485 (quoting WILLIAM GILLETTE, THE RIGHT TO VOTE: POLITICS AND PASSAGE OF THE FIFTEENTH AMENDMENT 57, 78 (1965)).

not create a right for them to vote through its enforcement powers under Section 2 of the Amendment. Only a constitutional amendment could create such a right.¹⁴³

Similarly, Congress cannot exercise its enforcement powers to curtail rights found in the self-executing sections of the Reconstruction Amendments. The Court explained in *Morgan* that "Section 5 [of the Fourteenth Amendment] does not grant Congress power to exercise discretion in the other direction and to enact statutes so as in effect to dilute equal protection and due process decisions of this Court."¹⁴⁴ The question of whether Congress has crossed the line in exercising its enforcement powers is not always clear. Sometimes, it can be answered by examining the plain language of the self-executing sections. "Thus, for example, an enactment authorizing the States to establish racially segregated systems of education would not be—as required by Section 5 [of the Fourteenth Amendment]—a measure 'to enforce' the Equal Protection Clause since that clause of its own force prohibits such state laws."¹⁴⁵

But in other cases, such as *Boerne*, the limitations on congressional power under the self-executing provisions are less clear. In *Boerne*, the Court struck down the Religious Freedom Restoration Act of 1993 ("RFRA") as exceeding the scope of congressional power under Section 5 of the Fourteenth Amendment.¹⁴⁶ Congress enacted RFRA after the Court rejected a Free Exercise Clause claim by Native Americans challenging a state law of general applicability criminalizing the use of peyote.¹⁴⁷ RFRA prohibited the government from placing a substantial burden on a person's free exercise of religion, even through a statute or rule of general applicability, unless the government could demonstrate that it was the least restrictive means of achieving a compelling state interest.¹⁴⁸

The Court found that RFRA exceeded congressional power because it was "not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion."¹⁴⁹ The Court explained:

Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. 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. Were it not so, what

¹⁴³ See generally U.S. CONST. amend. XXVI, § 1 (providing that the right of United States citizens "who are eighteen years of age or older, to vote shall not be denied or abridged . . . on account of age").

¹⁴⁴ 384 U.S. at 651 n.10.

¹⁴⁵ *Id.*

¹⁴⁶ 521 U.S. 507, 536 (1997).

¹⁴⁷ *Id.* at 512–13 (citing *Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990)).

¹⁴⁸ See 42 U.S.C. § 2000bb (1993) (invalidated by *Boerne*, 521 U.S. at 536).

¹⁴⁹ *Boerne*, 521 U.S. at 534–35.

Congress would be enforcing would no longer be, in any meaningful sense, the “provisions of [the Fourteenth Amendment].”¹⁵⁰

In other words, RFRA was “designed to control cases and controversies” to constrain the judiciary’s authority to review free exercise cases under the self-executing section of the Fourteenth Amendment.¹⁵¹ As such, the law violated the principle of separation of powers and was unconstitutional.¹⁵²

Section 203 is consistent with judicial decisions interpreting the VRA and the scope of the Fourteenth and Fifteenth Amendments. The Court repeatedly has upheld requirements with similar corrective purposes.¹⁵³ At the same time, the Court’s construction of the enforcement sections in cases such as *Mitchell* and *Boerne* raises a warning on the limits of what Congress can constitutionally do in exercising its powers. As I will discuss in Part III, Congress has not crossed that constitutional line in reauthorizing the language assistance provisions.

D. The Record Needed to Justify Remedial Legislation Passed under the Enforcement Clauses: Boerne’s Impact on the Renewed Section 203

The scope of congressional enforcement powers raises the question of what impact, if any, the Court’s decision in *Boerne* has on the reauthorized VRA, including section 203. While *Boerne* recognizes a limit for remedial legislation enacted under the Fourteenth and Fifteenth Amendments, it is not a dramatic departure from the constraints already recognized by the Court in *Morgan* and *Mitchell*.¹⁵⁴ Indeed, the contours of the *Boerne* standard make that quite clear. According to the Court, “[w]hile preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved” considered “in light of the evil presented.”¹⁵⁵ *Boerne* cited the evidence of racial discrimination supporting the VRA as the type of record necessary to meet the congruence standard.¹⁵⁶ Where that record is established, Congress has “wide latitude” in determining appropriate deterrent or remedial legislation,¹⁵⁷ “even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into ‘legis-

¹⁵⁰ *Id.* at 519.

¹⁵¹ *Id.* at 536.

¹⁵² *Id.*

¹⁵³ See *supra* Part II(B).

¹⁵⁴ See generally *City of Boerne v. Flores*, 521 U.S. 507, 517–19 (1997) (noting that the “positive grant of legislative power” given to Congress under the Enforcement Clause of the Fourteenth Amendment was “remedial” in nature); *Oregon v. Mitchell*, 400 U.S. 112 (1970); *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

¹⁵⁵ *Boerne*, 521 U.S. at 530.

¹⁵⁶ See *id.* at 530, 532–33.

¹⁵⁷ *Id.* at 519–20.

lative spheres of autonomy previously reserved to the States.”¹⁵⁸ This is particularly true for legislation such as the VRA in which “the possibility of overbreadth” is reduced by limiting its applications “to those cases in which constitutional violations were most likely” and terminating it when the danger subsides.¹⁵⁹

Following *Boerne*, the Court confirmed that congressional power is at its apex for legislation protecting the fundamental right to vote.¹⁶⁰ That is not to say that the Court’s determination of what constitutes a “fundamental right” and what is “congruent and proportional” under the enforcement sections is always consistent and predictable.¹⁶¹ Senator Specter (R-Pa.) expressed frustration with the *Boerne* test during the VRA reauthorization hearings, saying the standard was “plucked out of thin air” and he did not know what it meant, particularly in light of conflicting results in two disability cases.¹⁶² As he explained, “[i]t seemed to be a little, candidly, high-handed to say our method of reasoning was deficient, but since [the Court has] the last word, we have to be pretty careful.”¹⁶³ Senator Specter’s cautionary note is certainly well taken. For purposes of a *Boerne* assessment, however, the VRA appears to be on very solid ground. The Court has long recognized that voting is a fundamental right that is “preservative of all rights.”¹⁶⁴ In addition to the lengthy discussion in *Boerne* identifying the record created by Congress for the VRA as the gold standard,¹⁶⁵ the Court upheld section 5 of the VRA for the third time in a post-*Boerne* decision.¹⁶⁶ That certainly suggests that the Court will be very deferential to Congress on the constitutionality of section 203.

Obviously, the “bilingual ballot” critics disagree. Citing *Boerne*, Chavez rhetorically asks, “is it a congruent and proportional response to education discrimination to force states to make ballots available in foreign

¹⁵⁸ *Id.* at 518 (citing several examples from the VRA that are constitutional, including the language assistance required under section 4(e) of the Act).

¹⁵⁹ *Id.* at 533 (citing several examples from the VRA).

¹⁶⁰ See *Lopez v. Monterey County*, 525 U.S. 266, 283 (1999).

¹⁶¹ Compare *Tennessee v. Lane*, 541 U.S. 509 (2004) (upholding congressional abrogation of state sovereign immunity under Title II of the Americans with Disabilities Act because it protected the fundamental right of access to the courts) and *Nevada Dep’t. of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (upholding the congressional abrogation of state sovereign immunity under the Family Medical Leave Act because the Act prevented sex discrimination), with *Board of Tr. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (striking down congressional abrogation of sovereign immunity under Title I of the Americans with Disabilities Act because a state could make the rational choice to conserve scarce funds by only hiring employees able to use existing facilities).

¹⁶² *S. Hearing on Continuing Need for Section 203*, *supra* note 16, at 32 (statement of Sen. Specter).

¹⁶³ *Id.*

¹⁶⁴ *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); accord *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 667 (1966).

¹⁶⁵ See 521 U.S. 507, 530, 532–33 (1997).

¹⁶⁶ See *Lopez v. Monterey County*, 525 U.S. 266, 283 (1999). The two pre-*Boerne* decisions upholding section 5 are *City of Rome v. United States*, 446 U.S. 156, 182 (1980) and *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

languages?"¹⁶⁷ Apparently so, according to Roger Clegg, who acknowledges that bilingual ballots "are congruent and proportional to [the] problem" that people cannot understand English, though he asserts that people not understanding English "is not a violation of the 14th or 15th amendment."¹⁶⁸ Clegg, like Chavez, asks the wrong question.¹⁶⁹ To the extent that both suggest that English-only ballots are not a per se violation of the self-executing first sections of the Fourteenth and Fifteenth Amendments, there is no doubt that they are correct. But that begs the question of whether Congress has the authority to pass remedial legislation like section 203 pursuant to the enforcement sections. There is nothing in *Boerne* suggesting that the Court would resolve the constitutionality of the language assistance requirements, such as those in section 4(e) of the VRA upheld in *Morgan*, differently today.

Instead, as long as Congress establishes a record that the language assistance required under section 203 is a congruent and proportional remedy to education discrimination that impairs the right to vote, it will pass constitutional muster.¹⁷⁰ The Court's decisions upholding the suspension of literacy tests and English-only elections tell us as at least as much.

III. THE CONSTITUTIONALITY OF THE SECTION 203 TRIGGER

The constitutionality of the section 203 trigger also has come under fire by critics of "bilingual ballots." That raises the question of how the trigger operates. A jurisdiction is covered under section 203 if the Director of the Census determines that two criteria are met, using the most current Census data available.¹⁷¹ First, a population threshold must be met. Within a jurisdiction, limited-English proficient voting age citizens in a single language

¹⁶⁷ *H. Hearing on Bilingual Election Requirements Part I*, *supra* note 16, at 32 (statement of Linda Chavez).

¹⁶⁸ *H. Hearing on Bilingual Election Requirements Part I*, *supra* note 16, at 48 (testimony of Robert Clegg). Clegg also testified that Article I, Section 4 of the Constitution, if it applied, "would give Congress power only to apply something like section 203 to congressional elections" and "would not apply to State elections." *Id.* at 45, 48. Although it is, perhaps, an interesting academic question whether Congress could have enacted section 203 under that constitutional provision, it is of no moment. Congress explicitly stated that it passed the language assistance provisions under the enforcement sections of the Fourteenth and Fifteenth Amendments. See 42 U.S.C. §§ 1973b(f)(1), 1973aa-1a(a) (2000).

¹⁶⁹ See *supra* note 167 and accompanying text.

¹⁷⁰ See *Katzenbach v. Morgan*, 384 U.S. 641, 654 (1966).

¹⁷¹ See 42 U.S.C. § 1973aa-1a(b)(2)(A) (2000). This discussion will not address the constitutionality of the separate formula for coverage under section 4(f)(4) of the VRA, which requires compliance with not only the language assistance provisions of section 203, but also section 5 preclearance and the other special provisions of the Act. See 28 C.F.R. § 55.8(b) (2007). Under Section 4(f)(4), a jurisdiction is covered if three criteria are met as of November 1, 1972: (1) over 5% of voting age citizens were members of a single language group; (2) the jurisdiction used English-only election materials; and (3) less than 50% of voting age citizens were registered to vote or fewer than 50% voted in the 1972 Presidential election. See 42 U.S.C.A. § 1973b(b) (West 2000 & Supp. 2007).

group¹⁷² must either: (a) number more than 10,000; (b) comprise more than 5% of all voting age citizens; or (c) comprise more than 5% of all American Indians or Alaskan Native voting age citizens of a single language group residing on an Indian reservation.¹⁷³ A person is LEP if he or she is “unable to speak or understand English adequately enough to participate in the electoral process.”¹⁷⁴ Second, the illiteracy rate of the language minority voting age citizens meeting the population threshold must exceed the national illiteracy rate.¹⁷⁵ “Illiteracy” means “the failure to complete the 5th primary grade,”¹⁷⁶ and was adopted to conform to the Census definition of that term.¹⁷⁷ In 2002, the national illiteracy rate for voting age citizens was 1.35%.¹⁷⁸

This Part responds to the constitutional attacks made on the section 203 trigger. As an initial matter, I explain why opponents have not questioned the frequency of section 203 coverage determinations. I next respond to criticism of the data selected by the Census Director to identify LEP voting-age citizens. That is followed by a discussion of why the use of surname analysis is not racial profiling, but instead is a proper way to target language assistance to those who need it. I then address arguments that section 203 improperly limits coverage to only certain language groups. That leads to an assessment of the extent to which section 203 covers jurisdictions where language assistance is not needed and the impact, if any, that coverage has on its constitutionality. I conclude with analysis of why the length of time for which the statute has been reauthorized is proper. Taken together, this discussion demonstrates that the section 203 trigger is a congruent and proportional response to voting discrimination and is therefore constitutional.

A. Differences between the Section 5 and Section 203 Triggers

Opponents of language assistance do not argue that the section 203 trigger is outdated, unlike those who challenge the constitutionality of section 5.¹⁷⁹ The reason behind this divergence in tactics is the different manner,

¹⁷² Section 203 applies to four language groups: Alaska Natives, American Indians, persons of Spanish Heritage, and Asian Americans. See 42 U.S.C. §§ 19731(c)(3), 1973aa-1a(e)(2000). In addition, it applies to the distinct languages and dialects within these four language groups. See 121 CONG. REC. H16,244 (June 2, 1975) (statement of Rep. Don Edwards (D-Cal.)); S. REP. NO. 94-295, at 24 n.14 (1975), reprinted in 1975 U.S.C.C.A.N. 790–91 n.14 (quoting Letter from Meyer Zitter, Chief, Pop. Div., Bureau of the Census, to H. Comm. on the Judiciary (Apr. 29, 1975)).

¹⁷³ See 42 U.S.C. § 1973aa-1a(b)(2)(A)(i) (2000).

¹⁷⁴ 42 U.S.C. § 1973aa-1a(b)(3)(B).

¹⁷⁵ See 42 U.S.C. § 1973aa-1a(b)(2)(A)(ii).

¹⁷⁶ 42 U.S.C. § 1973aa-1a(b)(3)(E).

¹⁷⁷ See 121 CONG. REC. H16,244 (June 2, 1975) (statement of Rep. Don Edwards).

¹⁷⁸ See DR. JAMES THOMAS TUCKER ET AL., MINORITY LANGUAGE ASSISTANCE PRACTICES IN PUBLIC ELECTIONS 29 (2006), reprinted in *Voting Rights Act: Evidence of Continued Need: Hearing Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 109th Cong. 2124, 2163 (2006).

¹⁷⁹ See Tucker, *Politics of Persuasion*, supra note 2, at 243–47, 254–58, 260–62, 265–66.

frequency, and purpose in which language assistance coverage is determined. The section 5 trigger covers jurisdictions that used a “test or device”¹⁸⁰ and had either voter registration or turnout of less than 50% of voting age citizens in at least one of the presidential elections held in 1964, 1968, or 1972.¹⁸¹ As a result of that trigger, no section 5 determinations have been made since 1976.¹⁸² Critics who attack the absence of updated section 5 coverage determinations¹⁸³ ignore the purpose of that coverage formula. As Debo Adegbile explains, depressed voter registration and turnout were “a legislative proxy” for identifying “jurisdictions that had entrenched histories of discrimination,” and were not “the evil that Congress sought to remediate.”¹⁸⁴ Since voting discrimination in those jurisdictions has “persisted,” and “there are ways into coverage and ways out of coverage,” updated determinations under section 5 are not needed.¹⁸⁵

Conversely, determinations are made regularly under section 203 because its trigger is tied to changing demographic data.¹⁸⁶ Since the VRA defines the need for language assistance based on the number or percent of voting age citizens who are LEP and illiterate as of the most recent census, jurisdictions will naturally enter and exit from coverage more frequently than they do under the section 5 trigger.¹⁸⁷ The Director of the Census may update census data and publish section 203 coverage determinations as new

¹⁸⁰ A “test or device” includes any requirement as a prerequisite to registering or voting that a person demonstrate “the ability to read, write, understand, or interpret any matter,” (2) educational achievement or knowledge, (3) “good moral character,” or (4) proof of qualifications to vote. 42 U.S.C. § 1973b(c) (2000).

¹⁸¹ See 42 U.S.C.A. § 1973b(b) (West 2000 & Supp. 2007).

¹⁸² See *Voting Rights Act Amendments of 1975*, 41 Fed. Reg. 34,329 (Aug. 13, 1976); see also U.S. Dep’t of Just., Civil Rights Div., Voting Section, Section 5 Covered Jurisdictions, http://www.usdoj.gov/crt/voting/sec_5/covered.htm (last visited Jan. 18, 2008) (listing the coverage dates for all jurisdictions required to comply with section 5).

¹⁸³ See Tucker, *Politics of Persuasion*, *supra* note 2, at 243–45, 251–58, 261–67. For additional discussion of the efficacy of the section 5 trigger, see generally *supra* note 32.

¹⁸⁴ *Reauthorizing the Voting Rights Act’s Temporary Provisions: Policy Perspectives and Views from the Field: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 26 (2006) (testimony of Debo Adegbile, Assoc. Dir. of Litig., NAACP Legal Def. and Educ. Fund).

¹⁸⁵ *Id.*; see also Tucker, *Politics of Persuasion*, *supra* note 2, at 219–20 (summarizing the additional methods by which a jurisdiction can be added to or removed from section 5 coverage); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *supra* notes 72–84 and accompanying text (discussing the Court’s explanation of the constitutional basis for the section 5 trigger in *South Carolina v. Katzenbach*).

¹⁸⁶ See *supra* notes 170–176 and accompanying text.

¹⁸⁷ Following the most recent Census determinations made in July 2002, the number of states covered in whole or in part by section 203 increased from twenty-seven states to thirty-one. TUCKER ET AL., LANGUAGE ASSISTANCE PRACTICES, *supra* note 178, at 6, *reprinted in Evidence of Continued Need Hearing*, *supra* note 178, at 2140 (summarizing Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 48,871 (July 26, 2002) (to be codified at 28 C.F.R. pt. 55)). Two states previously covered in part, Iowa and Wisconsin, were no longer covered, while section 203 coverage was extended to five new states: Kansas, Maryland, Montana, Nebraska, and Washington. *Id.* at 7, *reprinted in Evidence of Continued Need Hearing*, *supra* note 178, at 2141. Twenty-seven jurisdictions exited from coverage and 73 jurisdictions were added. *Id.*

data becomes available.¹⁸⁸ In future censuses, the existing method of collecting the decennial long-form data used for the determinations will be replaced by the American Community Survey (“ACS”), which will “provide long-form type information every year instead of once in ten years.”¹⁸⁹ Coverage determinations will be made using “the 2010 American Community Survey census data and subsequent American Community Survey data in 5-year increments, or comparable census data.”¹⁹⁰ Because section 203 determinations will occur even more frequently than they have in the past, opponents would be hard-pressed to attack the trigger on that basis alone.

The frequency and precision of the section 203 determinations make the case for the trigger’s constitutionality especially strong when compared to other formulas the Court has upheld. Recall that in *Gaston County*, the suspension of literacy tests was affirmed based solely on contemporary political participation data.¹⁹¹ At that time, unlike today, the Census Bureau did not collect illiteracy data.¹⁹² While opponents of “bilingual ballots” also have suggested that a direct linkage to education discrimination is required, presumably on a school district by school district basis,¹⁹³ the Court has said otherwise.¹⁹⁴ In *Mitchell*, all nine justices concluded that such a particularized inquiry was unnecessary because Congress properly established a more general linkage between unequal educational opportunities and depressed voting opportunities on a nationwide basis.¹⁹⁵ Similarly, *Morgan* permitted a permanent ban on English-language ballots in jurisdictions with large numbers of Puerto Rican voters based upon a generalized assessment of the legislative choices that Congress *may have made* in passing it.¹⁹⁶ Regular and frequent section 203 determinations, derived from official Census data of English language and literacy abilities self-reported by the respondents, narrows the scope of the triggering formulas to a greater degree of precision than required of other remedial statutes held to be constitutionally enacted under the enforcement sections of the Fourteenth and Fifteenth Amendments.

¹⁸⁸ See *Doi v. Bell*, 449 F. Supp. 267, 272 (D. Haw. 1978).

¹⁸⁹ U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY: A HANDBOOK FOR STATE AND LOCAL OFFICIALS 1 (2004). Because the American Community Survey is part of the census, residents are required by law to respond to it. *Id.* at 2.

¹⁹⁰ VRARA § 8, enacted as Pub L. No. 109-246 § 8, 120 Stat. 581 (2006).

¹⁹¹ See 395 U.S. 285, 291–92 (1969).

¹⁹² See *id.* at 292.

¹⁹³ See *supra* note 43; *infra* notes 240, 478–491 and accompanying text.

¹⁹⁴ See *Gaston County*, 395 U.S. at 292. A determination based upon such data would continue to be “administratively cumbersome” because even today, “the designation of racially disparate school systems is not susceptible of speedy, objective, and incontrovertible determination.” *Id.*

¹⁹⁵ See *Oregon v. Mitchell*, 400 U.S. 112 (1970); *supra* notes 106–113 and accompanying text.

¹⁹⁶ See *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *supra* notes 119–128 and accompanying text.

B. Definition of “Limited-English Proficient”

Language assistance detractors disagree with the Census Director’s interpretation of “LEP” under the section 203 trigger. The Director determines which jurisdictions meet the population threshold through responses to a Census question “inquiring how well they speak English by checking one of the four answers provided—‘very well,’ ‘well,’ ‘not well,’ or ‘not at all.’” The Census Bureau has determined that most respondents overestimate their English proficiency, and, therefore, those who answer other than ‘very well’ are deemed LEP.¹⁹⁷ Linda Chavez argues that making the determination based upon “people who do not speak English at least ‘very well’ . . . is not a good way of . . . determining how many people it is that need such assistance.”¹⁹⁸ Orange County Supervisor Chris Norby likewise contends that “[s]peaking English well should be good enough, as it was obviously good enough to pass the citizenship test.”¹⁹⁹

The Census Director’s inclusion of those who speak English “well” in determining LEP rates does not render the section 203 trigger unconstitutionally overbroad. Since section 203 does not define which responses to the Census language question qualify as LEP,²⁰⁰ the Census Director has tremendous discretion to make that determination. The Census Bureau found “[t]hose who indicated they spoke English ‘Well,’ ‘Not well,’ or ‘Not at all’ were considered to have difficulty with English—identified also as people who spoke English less than ‘Very well.’”²⁰¹ The Bureau conducted a follow-up study through a series of tests given to a sample of those responding to the language question. It determined that “persons reporting ability levels as ‘well’ or worse had significantly higher levels of failure” than the English-speaking control group.²⁰² Moreover, the data confirmed that persons reporting they spoke English “well” felt more comfortable speaking in their native tongue: 77.9% with family at home and 77.1% with friends.²⁰³ Forty-nine percent spoke their native tongue more frequently than English, with

¹⁹⁷ H.R. REP. NO. 102-655, at 8 (1992), reprinted in 1992 U.S.C.A.N. 766, 772.

¹⁹⁸ S. Hearing on Continuing Need for Section 203, *supra* note 16, at 16 (testimony of Linda Chavez); see also *id.* at 20–21, 34 (elaborating on the argument); accord *id.* at 25 (testimony of Peter Kirsanow) (agreeing with Chavez on the “over-inclusiveness and under-inclusiveness in terms of the definitional predicates to the Act”).

¹⁹⁹ See H.R. 9 Hearing Part II, *supra* note 17, at 14, 16 (testimony of Chris Norby). Norby ignores the millions of native-born LEP voting-age citizens, including Alaska Natives, American Indians, Puerto Ricans, and Asian and Latino voters who grew up in segregated schools or with unequal educational opportunities. See Tucker, *Politics of Persuasion*, *supra* note 2, at 238 (summarizing similar arguments made by then House Judiciary Committee Chairman Rep. Sensenbrenner (R-Wis.) during the House markup on the VRARA); *infra* Part IV.

²⁰⁰ See 42 U.S.C. § 1973aa-1a(b)(3)(B) (2000).

²⁰¹ U.S. CENSUS BUREAU, CENSUS 2000 BRIEF, LANGUAGE USE AND ENGLISH-SPEAKING ABILITY: 2000 2 (2003), <http://www.census.gov/prod/2003pubs/c2kbr-29.pdf>.

²⁰² ROBERT KOMINSKI, U.S. CENSUS BUREAU, POPULATION DIVISION, HOW GOOD IS “HOW WELL”? AN EXAMINATION OF THE CENSUS ENGLISH-SPEAKING ABILITY QUESTION 1 (1989), available at <http://www.census.gov/population/socdemo/language/ASApaper1989.pdf>.

²⁰³ See *id.* at tbl. 4.

another 26% reporting that they spoke it “about the same” amount as English.²⁰⁴ Consequently, the evidence showed that people overestimated their language skills in response to the Census question,²⁰⁵ causing the Director to reasonably conclude that LEP should be defined as anyone speaking English less than “very well.”²⁰⁶

The English proficiency required to understand voting materials and to cast a meaningful ballot buttresses the Director’s findings. Voters who speak English “well” often struggle with the complicated terms they encounter. The difficulty that these voters experience is due, in part, to the low threshold in the section 203 trigger for English literacy, “the failure to complete the 5th primary grade,”²⁰⁷ which applies to many voters who speak English “well.”²⁰⁸ A fifth grade education falls far short of what is needed to understand a ballot proposition, typically drafted at the high school level or greater. For example, Louisiana had a voter identification proposition that was written at the 15.9 grade level.²⁰⁹ Similarly, a “home rule charter question regarding tax increases for infrastructure improvement on the ballot in Fargo, ND in 2006 contains one sentence that is 150 words long and is written at the graduate school level.”²¹⁰ Even shorter and simpler ballot questions require more advanced English skills, such as California’s November 2005 Proposition 77, which was a forty-two word sentence written at the twelfth grade level.²¹¹ Studies demonstrate that the sort of listening, reading, and comprehension skills required to cast an effective ballot require the highest level of English abilities; namely, English fluency close to the level of a college graduate, which LEP voting age citizens routinely lack.²¹²

²⁰⁴ *Id.* at tbl. 5.

²⁰⁵ As one witness explained: “Many times people . . . do not want to admit that they do not speak English very well, so they will state that they know English, but the reality is, they cannot function as well as they might like to. That is just a fact.” *S. Hearing on Continuing Need for Section 203*, *supra* note 16, at 21 (testimony of Margaret Fung, Executive Dir. of the Asian Am. Legal Def. and Educ. Fund).

²⁰⁶ *See id.* at 31 (statement of John Trasviña, Interim President and Gen. Counsel of the Mexican Am. Legal Def. and Educ. Fund).

²⁰⁷ 42 U.S.C. § 1973aa-1a(b)(3)(E) (2000).

²⁰⁸ *See generally infra* Part V(B) (summarizing illiteracy rates for each of the four covered language minority groups).

²⁰⁹ *See* ANA HENDERSON, ENGLISH LANGUAGE NATURALIZATION REQUIREMENTS AND THE BILINGUAL ASSISTANCE PROVISIONS OF THE VOTING RIGHTS ACT 4 (2006) (on file with author). A “15.9 grade level” is equivalent to the education possessed by a college graduate who has obtained a bachelor’s degree. *See id.* at 4, n. 10.

²¹⁰ *Id.* at 4–5.

²¹¹ *Id.* at 4.

²¹² *See generally* JAMES THOMAS TUCKER, THE ESL LOGJAM: WAITING TIMES FOR ADULT ESL CLASSES AND THE IMPACT ON ENGLISH LEARNERS app. C-F at 49–53 (2006) (tables identifying reading comprehension skills at different levels of English proficiency), available at <http://www.naleo.org/downloads/ESLReportLoRes.pdf>; *see also S. Hearing on Continuing Need for Section 203*, *supra* note 16, at 20 (testimony of John Trasviña) (stating that tests such as Flesch-Kincaid that evaluate the level of English skills required to comprehend sentences show that many “[s]tate ballots are written at a tenth, eleventh, twelfth grade English or even higher,” which is much greater than the language skills needed to become a naturalized citizen).

It is commonplace for those who speak English “well” to prefer receiving voting materials in their native language because they are more likely to understand them. That is true regardless of the language group.²¹³ Some opponents of “bilingual ballots” have suggested that expanding Census determinations of LEP to include those who speak English “well” is “addressing the wrong problem.”²¹⁴ Instead, they maintain that ballots should be simplified because even voters who are native-speakers of English have difficulty understanding them.²¹⁵ While ballot simplification might alleviate some of the burden on the fundamental right to vote of language minority citizens, just as it would for all Americans, it does not render the Census determinations of LEP invalid. The absence of such a measure also makes it a moot point.

Additionally, the Census Director’s inclusion of those speaking English “well” in LEP determinations fulfills the statutory purpose of removing literacy barriers for minority-language voters.²¹⁶ The legislative history supports the Director’s decision. During the markup of the VRARA in the Senate, the Judiciary Committee rejected an amendment offered by Senator Thomas Coburn (R-Okla.) that would have redefined LEP to include only voting age citizens who speak English “not well” and “not at all.”²¹⁷ That vote suggests that the Senate Judiciary Committee believes that the Census Director is correctly applying the statute in making determinations under section 203. Therefore, any reviewing court should defer to the Director’s basis for including “well” in the LEP determinations, which Congress has not altered.

That conclusion is inescapable because of another unique attribute of section 203. Ordinarily, determinations made by an administrative agency like the Census Bureau would be subject to the rule that they must be accepted only if they are “based on a permissible construction of the statute.”²¹⁸ However, section 203 expressly provides that the Director’s determinations are not reviewable in any court and are effective upon publication in the Federal Register.²¹⁹ When the Court was confronted with simi-

²¹³ See *H. Hearing on Bilingual Election Requirements Part II*, *supra* note 16, at 5 (statement of Jacqueline Johnson, Executive Dir. of the Nat’l Cong. of Am. Indians) (regarding Alaskan Natives and American Indians); *H.R. 9 Hearing Part II*, *supra* note 17, at 97 (statement of Rep. Linda Sanchez (D-Cal.)) (regarding Spanish-speaking voters); *S. Hearing on Continuing Need for Section 203*, *supra* note 16 at 21 (testimony of Margaret Fung) (regarding voters who speak Asian languages).

²¹⁴ *S. Hearing on Continuing Need for Section 203*, *supra* note 16, at 20 (statement of Sen. Coburn (R.-Okla.)).

²¹⁵ See *id.*; *H.R. 9 Hearing Part II*, *supra* note 17, at 97 (testimony of Chris Norby). Any federal legislation restricting the level of English used by state and local governments on ballot propositions would have to satisfy the *Boerne* congruence and proportionality test. Consideration of whether such a measure would be constitutional is beyond the scope of this article.

²¹⁶ See 42 U.S.C. § 1973aa-1a(a) (2000).

²¹⁷ Tucker, *Politics of Persuasion*, *supra* note 2, at 259.

²¹⁸ *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984).

²¹⁹ 42 U.S.C. § 1973aa-1a(b)(4) (2000).

lar language pertaining to section 5 determinations, it unanimously held that federal courts had no jurisdiction to consider the challenge.²²⁰ The Court noted that “the finality of determinations . . . like the preclearance requirement of section 5, may well be ‘an uncommon exercise of congressional power.’”²²¹ Nevertheless, it reasoned that “there can be no question that in attacking the pervasive evils and tenacious defenders of voting discrimination, Congress acted within its ‘power to enforce’ the Fourteenth and Fifteenth Amendments ‘by appropriate legislation.’”²²² In light of those broad remedial powers, depriving the courts of power to review determinations of who is LEP under section 203 is constitutional.²²³ Accordingly, any effort to challenge the Census Director’s LEP determinations should fail.

C. Surname Analysis: Targeting Assistance, Not Racial Profiling

Opponents of “bilingual ballots” likewise attack the use of surname analysis to identify those who need language assistance. Under surname analysis, the number of registered voters from certain language minority groups may be determined by examining the last name of registered voters.²²⁴ Surname analysis is a methodology accepted by federal courts for determining an accurate estimate of persons of certain ethnicities, particularly for Spanish or Filipino heritage.²²⁵ Critics call that practice “racial profiling,”²²⁶ decrying it as a “stereotype” that language ability could be determined from last names.²²⁷ According to Peter Kirsanow, it “implicates constitutional issues of section 203’s proportionality and congruence.”²²⁸

²²⁰ See *Briscoe v. Bell*, 432 U.S. 404, 410 (1977).

²²¹ *Id.* at 414 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966)).

²²² *Id.* at 414–15.

²²³ See *Doi v. Bell*, 449 F. Supp. 267, 267 (D. Haw. 1978) (rejecting Hawaii’s challenge to the Census Bureau’s illiteracy determinations used to trigger the state’s coverage under section 203). In *Doi*, the United States stipulated to the bailout of Maui County, Hawaii for Japanese because the illiteracy rate for that language group no longer exceeded the national average. See *id.* at 272. The court denied the state relief with regards to all other language groups based upon the Census determinations. See *id.* at 272–74.

²²⁴ See S. REP. NO. 94-295 at 24 n.14 (1975), reprinted in 1975 U.S.C.C.A.N. 774, 790–91 n.14. For a description of the steps in performing Spanish-surname analysis, see *Garza v. County of Los Angeles*, 756 F. Supp. 1298, 1325–26 (C.D. Cal. 1990), *aff’d*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 408 U.S. 1028 (1991).

²²⁵ See, e.g., *Hernandez v. Texas*, 347 U.S. 475, 480 n.12 (1954); *Aranda v. Van Sickle*, 600 F.2d 1267, 1269 (9th Cir. 1979); *Perez v. Pasadena Indep. Sch. Dist.*, 958 F. Supp. 1196, 1212 n. 21 (S.D. Tex. 1997); *Terrazas v. Slagle*, 789 F. Supp. 828, 836 (W.D. Tex. 1991); *Garza*, 756 F. Supp. at 1325–28.

²²⁶ *S. Hearing on Continuing Need for Section 203*, *supra* note 186, at 25 (testimony of Peter Kirsanow); see also *id.*, at 24 (statement of Sen. Specter) (referring to the practice as “racial profiling” and summarizing letters received from government officials complaining about it); *H.R. 9 Hearing Part II*, *supra* note 17, at 14–17 (testimony of Chris Norby) (arguing that “English fluency assumptions must never be based on a voter’s surname”).

²²⁷ *H.R. 9 Hearing Part II*, *supra* note 17, at 17 (testimony of Chris Norby).

²²⁸ *S. Hearing on Continuing Need for Section 203*, *supra* note 16, at 12 (testimony of Peter Kirsanow).

Surname analysis does not raise *Boerne* problems with section 203 coverage. Unlike the persons the Census Director defines as LEP, surname analysis plays absolutely no role in minority language determinations under the section 203 trigger.²²⁹ Instead, it is merely one of many tools used by the Department of Justice and local election officials to target those areas within covered jurisdictions where language assistance is likely needed, after the Census determinations have been made.²³⁰ An Assistant Attorney General testified about how surname analysis could be used to identify Vietnamese voters who need language assistance:

While a particular surname tells a county nothing about the language skills of a particular voter, a county that seeks to locate registered voters who speak Vietnamese logically could most effectively look among those precincts with substantial numbers of Vietnamese-surnamed voters. From that starting point, the local election officials can efficiently conduct further inquiry to determine the actual needs of the voters in those particular precincts. The surname—or ethnicity or place of birth analysis—is a tool that may help election officials comply with Sections 203 and 4(f)(4).²³¹

Surname analysis is “a convenient starting point” in determining which voters need language assistance and how best to provide it to them.²³² That is why many jurisdictions covered by section 203 voluntarily use surname analysis under their own state language assistance statutes.²³³

Although the VRA does not expressly provide for targeting, Congress clearly intended to allow covered jurisdictions flexibility in devising appropriate methods for making language assistance available.²³⁴ Targeting allows a covered jurisdiction to comply with section 203 by providing bilingual materials and assistance “only to the language minority citizens and not to every voter in the jurisdiction.”²³⁵ Where surname analysis is applied prop-

²²⁹ See generally 42 U.S.C. § 1973aa-1a(b) (2000); *supra* notes 170–176 and accompanying text (describing the section 203 trigger).

²³⁰ See *H.R. 9 Hearing Part II*, *supra* note 17, at 12 (statement of Rena Comisac, Principal Deputy Asst. Att’y Gen., Civil Rights Div.).

²³¹ *Modern Enforcement of the Voting Rights Act: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55, 59 (2006) [hereinafter *S. Hearing on Modern Enforcement*] (statement of Wan J. Kim, Asst. Att’y Gen., Civil Rights Div.).

²³² *Id.* at 55, 59 (statement of Wan J. Kim).

²³³ See generally *id.* (noting that Texas “provides Spanish surname analysis to each county elections office in the State to assist local officials in compliance with State law, which requires a bilingual poll worker where five percent or more of registered voters have Spanish surnames.”); N.J. Stat. Ann. § 19:6-1 (West 1999) (requiring at least two bilingual poll workers of Hispanic origin fluent in Spanish present in each designated Spanish Election District, which are those voting precincts “in which the primary language of 10% or more of the registered voters is Spanish,” as determined by Spanish surname).

²³⁴ See 121 CONG. REC. 24,695–96 (1975) (statement of Sen. John Tunney (D-Cal.)).

²³⁵ S. REP. NO. 94-295 at 39 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 806; see also 28 C.F.R. § 55.17 (2007) (stating the Attorney General’s view “that a targeting system will nor-

erly—typically in connection with other targeting methods including outreach to the language minority community²³⁶—it bolsters the congruence and proportionality of section 203. Like other forms of targeting, it lowers the costs of compliance by providing that language assistance is directed only to the “persons who are likely to need [it] or to residents of neighborhoods in which such a need is likely to exist,” and not to every voter in a covered jurisdiction.²³⁷ It would be a strange result, indeed, if an option lowering compliance costs undermined the constitutionality of “bilingual ballots.”

Since surname analysis has nothing to do with the section 203 determinations, its use—or, if you agree with the claims of some critics, abuse—plays no role in the constitutionality of the triggering formula. Rather, questions raised about the utility of surname analysis are germane only to whether a covered jurisdiction is providing effective assistance by targeting it to those who need it. Such questions routinely arise in section 203 enforcement actions in which jurisdictions cannot challenge their coverage,²³⁸ but instead try to demonstrate compliance with the language assistance mandate. If a court accepts a jurisdiction’s argument that surname analysis is not useful in identifying the need for assistance in the covered jurisdiction, that finding has no impact at all on coverage. It simply means that the reviewing court has weighed evidence that surnames are helpful in identifying precincts where assistance is likely needed, and found it unpersuasive. In the process, surname analysis bears no relationship to unconstitutional racial profiling.

D. Language Groups Covered under Section 203

The constitutionality of the language groups selected for coverage under the section 203 trigger also has been questioned in several ways. First, at least one commentator claims that only native-born citizens, and not naturalized citizens, should be covered. According to K.C. McAlpin, the Executive Director of ProEnglish, American Indians have a “unique history and status” requiring that “their rights should not be confused or conflated with

mally fulfill the Act’s minority language requirements if it is designed and implemented in such a way that language minority group members who need minority language materials and assistance receive them.”).

²³⁶ See generally Tucker, *Enfranchising Language Minority Citizens*, *supra* note 5, at 252–53 (describing other targeting methods in addition to surname analysis); *S. Hearing on Continuing Need for Section 203*, *supra* note 16, at 25–26 (testimony of Margaret Fung) (“[S]urname analysis should be one of the tools that is used, but not the only tool, and there should be much greater reliance placed on outreach to community groups that can help to identify where [LEP] voters are located”).

²³⁷ 28 C.F.R. § 55.18(a) (2007). For a discussion on the lower costs that result from effective targeting, see Tucker, *Enfranchising Language Minority Citizens* *supra* note 5, at 256–59; Tucker & Espino, *Government Effectiveness and Efficiency*, *supra* note 21, at 215–20.

²³⁸ See *supra* notes 216–221 and accompanying text.

those of non-English-speaking naturalized citizens.”²³⁹ However, limiting section 203 to native-born voting age citizens would render it unconstitutional. The Supreme Court has flatly rejected the argument that “citizenship obtained through naturalization is . . . a second-class citizenship.”²⁴⁰ Instead, the Court has found that “it is plain that citizenship obtained through naturalization carries with it the privilege of full participation in the affairs of our society.”²⁴¹ That holds true, even though some of the beneficiaries of section 203 are more recent arrivals whose illiteracy may be attributable to “the lack of educational opportunities they experienced in their [n]ative countries,”²⁴² rather than education discrimination in the U.S. The policy choice to include all illiterate LEP voters in the four covered language groups is a reasonable exercise of congressional power,²⁴³ as long as there is evidence that some members of those groups have experienced discrimination in this country.²⁴⁴

Second, some suggest that any language group requiring assistance should be covered, including those who speak English, regardless of where they are located.²⁴⁵ They argue that the failure to include all groups of voters that need assistance “raises a host of equal protection, as well as congruency and proportionality, concerns.”²⁴⁶ Their argument already has been addressed by a different provision of the VRA. Illiterate native English speakers do not have to be covered under the section 203 trigger because of a 1982 amendment to the VRA that requires voter assistance for anyone who needs it.²⁴⁷ Additionally, expanding the trigger to include all language groups

²³⁹ *H. Hearing on Bilingual Election Requirements Part II*, *supra* note 16, at 74 (testimony of K.C. McAlpin).

²⁴⁰ *Knauer v. United States*, 328 U.S. 654, 658 (1946).

²⁴¹ *Id.* The Court has held on several occasions that there is no distinction between native-born and naturalized citizens, except that naturalized citizens are ineligible to serve as President or Vice President. *See, e.g., id.*; *SCHNEIDER v. RUSK*, 377 U.S. 163, 165 (1964); *LURIA v. UNITED STATES*, 231 U.S. 9, 22 (1913); *Osborn v. Bank of the U.S.*, 22 U.S. 738, 827–28 (1824).

²⁴² *H. Hearing on Bilingual Election Requirements Part II*, *supra* note 16, at 64 (testimony of K.C. McAlpin).

²⁴³ *See Katzenbach v. Morgan*, 384 U.S. 641, 658 (1966).

²⁴⁴ *See infra* Part IV (summarizing evidence of voting and education discrimination against the four covered language minority groups).

²⁴⁵ *See generally H.R. 9 Hearing Part II*, *supra* note 17, at 96, 98 (testimony of Chris Norby) (noting the failure to cover Romanians who needed language assistance in Orange County, California); *S. Hearing on Continuing Need for Section 203*, *supra* note 16, at 9 (testimony of Mauro Mujica) (testifying about the lack of coverage for Arabic speaking citizens).

²⁴⁶ *S. Hearing on Continuing Need for Section 203*, *supra* note 16, at 12 (testimony of Peter Kirsanow).

²⁴⁷ *See Voting Rights Act Amendments of 1982*, Pub. L. No. 97-205, § 5, 96 Stat. 131, 134–35 (codified as section 208 of the VRA at 42 U.S.C. § 1973aa-6 (2000)) (providing that “[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter’s choice, other than the voter’s employer or agent of that employer or officer or agent of the voter’s union”). Congress added this amendment because it determined that the blind, disabled, elderly, and illiterate were susceptible to having “their vote unduly influenced or manipulated” without assistance. *S. REP. NO. 97-417*, at 62 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 240.

could render the trigger unconstitutionally overbroad. Congress selected the four language groups because they suffered from voting discrimination and education discrimination that limited their ability to participate in the political process.²⁴⁸ Other language groups were not included because there was no evidence that they experienced similar difficulties in voting.²⁴⁹ Amending section 203 to apply nationwide to all language groups, regardless of whether those groups have suffered from discrimination, would fail to meet *Boerne*'s mandate that Congress support remedial laws enacted under the enforcement sections with a sufficient record.²⁵⁰

A third—and related—argument questions the validity of a numerical trigger providing language assistance for some members of a covered language group, but not others. Mauro Mujica, Chairman of U.S. English, Inc., contends that the section 203 formula sends a message “that English is optional,” but that “message will not be sent to the Spanish speaker in Burlington, Vermont or the Chinese speaker in Wichita, Kansas. It will be sent only to those who live in high enough language concentrations to trigger [s]ection 203's requirements.”²⁵¹ The population triggers are the product of a carefully developed record of the need for language assistance, balanced against the perceived cost of providing it.²⁵² Congruence and proportionality does not require that the trigger be perfect, but instead that it be reasonably related to the purpose of removing discriminatory barriers to language minority voters.²⁵³

Several witnesses and commentators who support section 203 suggested prior to and during the reauthorization hearings that the trigger be expanded to either include other language groups²⁵⁴ or to lower the population trigger to 7,500 or 5,000 instead of the existing 10,000.²⁵⁵ Despite some

²⁴⁸ S. REP. NO. 94-295 at 30–31 (1975), reprinted in 1975 U.S.C.C.A.N. 774, 797.

²⁴⁹ See *id.* at 31, reprinted in 1975 U.S.C.C.A.N. 774, 797.

²⁵⁰ *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997); See also *H.R. 9 Hearing Part II*, *supra* note 17, at 103 (statement of Dr. James Thomas Tucker, Voting Rights Consultant, NALEO Educ. Fund).

²⁵¹ *S. Hearing on Continuing Need for Section 203*, *supra* note 16, at 8 (testimony of Mauro Mujica).

²⁵² For a more detailed explanation of the amendments made to the section 203 population trigger, including a 2006 proposal to lower the numerical trigger that was rejected, see generally Tucker, *supra* note 5 at 224–26; *H.R. 9 Hearing Part II*, *supra* note 17, at 104 (testimony of Dr. James Thomas Tucker).

²⁵³ See *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997); *Katzenbach v. Morgan*, 384 U.S. 641, 658 (1966).

²⁵⁴ See Jocelyn Friedrichs Benson, *¡Su Voto Es Su Voz! Incorporating Voters of Limited English Proficiency into American Democracy*, 48 B.C. L. REV. 251, 311–13 (2007) (arguing for the expansion of section 203 to encompass Arab-Americans and other groups, such as Haitians); Jocelyn Benson, *Language Protections for All? Extending and Expanding the Language Protections of the Voting Rights Act*, in *VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER* 327, 353–73 (Ana Henderson ed. 2007) (regarding Arab-Americans).

²⁵⁵ See *Politics of Persuasion*, *supra* note 2, at 226 (describing a proposed amendment that was not offered that would have lowered the trigger to 7500, which would have added coverage to about 78,000 Cambodian, Hmong, and Laotian voting age citizens); ANA HENDERSON &

evidence supporting the addition of other language groups,²⁵⁶ the problem they face is not necessarily establishing the record of discrimination against them, but rather their small numbers.²⁵⁷ Although I agreed with the proposal

CHRISTOPHER EDLEY, JR., VOTING RIGHTS ACT REAUTHORIZATION: RESEARCH-BASED RECOMMENDATIONS TO IMPROVE VOTING ACCESS 5, 25–26 (2006), *reprinted in H.R. 9 Hearing Part I, supra* note 16, at 266, 270, 290–91 (recommending the trigger be lowered to 7500 and jurisdictions with 25 or fewer LEP voting age citizens be exempted from other covered jurisdictions); Glenn D. Magpantay & Nancy W. Yu, *Asian Americans and Reauthorization of the Voting Rights Act*, 19 NAT'L BLACK L.J. 1, 14–21 (2005), *reprinted in Renewing the Temporary Provisions of the Voting Rights Act: Legislative Options After LULAC v. Perry: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 313, 326–33 (2006) [hereinafter *Hearing on Legislative Options*] (arguing that the trigger be lowered to 5000).

²⁵⁶ I am sympathetic to the need to extend coverage to other groups where there is a sufficient record of discrimination. For example, Jocelyn Benson makes a strong case for including Arab-American citizens based upon well documented evidence of education and voting discrimination against them. *See supra* note 254. Arabic is not covered by section 203. *See S. REP. NO. 94-295*, at 24 n.14 (1975), *reprinted in 1975 U.S.C.C.A.N.* 774, 790–91 n.14; 121 CONG. REC. 16,250 (1975) (noting that the Census Director defines which languages are included in language minority groups such as “Asian”); *see also* U.S. CENSUS BUREAU, 2000 CENSUS OF POPULATION AND HOUSING, SELECTED APPENDIXES: 2000, at B-30 to B-31, (June 2003), *available at* <http://www.census.gov/population/cen2000/phc-2-a-B.pdf> (classifying Arabic as part of “[a]ll other languages” and not as an “Asian” language). Similarly, Haitian-Creoles are another obvious group that is excluded because they are classified by the Census Director in the category of “Other Indo-European Languages,” along with European languages like French, German, and Italian. *See id.* at B-30 to B-31. Haitian-Creoles, like Arabic voters, also have been the victims of discrimination, particularly those who are African-American. *See generally* JoNel Newman, *Unfinished Business: The Case for Continuing Special Voting Rights Act Coverage in Florida*, 61 MIAMI L. REV. 1, 32–37 (2006) (describing voting discrimination against Haitian-Creole voters in south Florida). Newman’s article was included in the House record as one of the fourteen state reports commissioned by the Leadership Conference on Civil Rights (“LCCR”). *See* JO NEL NEWMAN, VOTING RIGHTS IN FLORIDA, 1982–2006 (2006), *reprinted in Evidence of Continued Need Hearing, supra* note 178, at 1456–98.

²⁵⁷ LEP Arabic-speaking voters are perhaps the best example. Although Benson notes that there are six counties in the United States in which there are at least 10,000 Arab-American voting-age citizens and fourteen with at least 7500, *Language Protections for All?*, *supra* note 254, at 373–74, none of those counties would qualify for coverage for Arabic under section 203 even if Arabic were a covered language. The section 203 population trigger is based upon the number or percent of LEP voting-age citizens of a single language group, not merely voting-age citizens. *See supra* notes 171–173 and accompanying text (emphasis added). According to Census 2000 sampled data, no counties in the United States could meet a 10,000 LEP voting-age citizen trigger, or even a much lower 2,000 trigger, for Arabic-speaking LEP voting-age citizens. Among the fourteen counties cited by Benson, the largest population of LEP voting-age Arabic citizens is located in Wayne County, Michigan, which has just 1763 such persons (less than 8% of all the Arabic citizen voting-age population), well short of even a substantially lowered triggering threshold. *See* U.S. Census Bureau, Census 2000 Sample Data File, <http://www.advancedquery.census.gov> (password protected) (using the Demographic Universe of “People 18 Years and Older, All People,” select “Arab/Arabic” as ancestry reported, citizenship status of “yes,” and English ability of “Less than very well”).

In contrast, according to Census 2000 sampled data, LEP voting-age Haitian-Creole citizens would meet the 10,000 person trigger in Miami-Dade County, Florida (with at least 12,944 persons), and would come close to meeting the proposed 7500 person trigger in Broward County, Florida (with at least 6799 persons). *See* U.S. Census Bureau, Census 2000 Sample Data File, <http://www.advancedquery.census.gov> (password protected) (using the Demographic Universe of “People 18 Years and Older, All People,” select “French Creole” as language spoken at home, citizenship status of “yes,” and English ability of “Less than very well”). At least based upon the coverage formula, Haitian-Creole voters have a stronger case

by groups in the civil rights coalition to lower the population trigger to 7500, political realities during reauthorization made that impossible.²⁵⁸ To the extent that the reauthorized trigger may be under inclusive, it does not mean, as Mujica suggests, that groups that cannot satisfy the population requirements, such as Arabic speakers, are left unprotected.²⁵⁹

Section 2 of the VRA is a permanent non-discrimination provision that applies nationwide.²⁶⁰ It has been used to secure assistance and non-discriminatory treatment of language-minority voters even in places that are not covered by section 203, such as Spanish-speaking voters in Osceola County, Florida (shortly before that county became covered),²⁶¹ Arabic-speaking voters in Hamtramck, Michigan,²⁶² and Asian voters in Boston.²⁶³ Section 2 ensures a remedy for those language groups that cannot meet the population trigger, but which nevertheless can establish education and voting discrimination exacerbated by English-only elections. In that manner, the VRA ensures that coverage for language assistance is provided where it is needed, curing any incidents of the section 203 trigger's under inclusiveness or other discrimination impairing the equal access of language minorities to the political process.²⁶⁴ Taken together, the comprehensive remedies offered under

than Arabic voters for being included under section 203 because they presently can meet the population trigger in at least some jurisdictions, and are likely to meet it in even more places in future Census determinations.

In both instances, I assume that the illiteracy portion of the trigger would not be a barrier to coverage by either group based upon the disparities in educational attainment documented by Benson and Newman. *See supra* notes 254, 256.

²⁵⁸ *See* Tucker, *Politics of Persuasion*, *supra* note 2, at 226, 238–39.

²⁵⁹ *See S. Hearing on Continuing Need for Section 203*, *supra* note 16, at 9 (testimony of Mauro Mujica).

²⁶⁰ *See* 42 U.S.C. § 1973 (2000).

²⁶¹ *See* Complaint, *United States v. Osceola County, Fla.*, No. 6:02-CV-738-ORL-22JGG (M.D. Fla. 2002), available at http://www.usdoj.gov/crt/voting/sec_2/osceola_comp.htm. The Osceola complaint was resolved by consent decree on July 22, 2002, just four days before the county became covered for Spanish under section 203. *See* Consent Decree, *Osceola County*, *supra*, (M.D. Fla. July 22, 2002), available at http://www.usdoj.gov/crt/voting/sec_2/osceola_cd.htm; 203 Determinations, *supra* note 25, at 48,873 (listing "Hispanic" as a covered language group in Osceola County).

²⁶² *See* Complaint, *United States v. City of Hamtramck*, No. 00-73541 (E.D. Mich. Aug. 4, 2000). For examples of other non-covered jurisdictions where remedies have been obtained for language minority voters under sections 2 or 4(e) of the VRA, see JAMES THOMAS TUCKER, *THE CONTINUING NEED FOR AND CONSTITUTIONALITY OF SECTION 203 OF THE VOTING RIGHTS ACT*, app. A (June 30, 2006) (on file with author), cited in *Hearing on Legislative Options*, *supra* note 255, at 466.

²⁶³ *See generally* Memorandum of Agreement and Settlement, *United States v. City of Boston*, No. 05-11598-WGY (D. Mass. Oct. 18, 2005), available at http://www.usdoj.gov/crt/voting/sec_203/documents/boston_cd2.pdf (obtaining relief on behalf of Chinese and Vietnamese-speaking voters).

²⁶⁴ *See generally* *South Carolina v. Katzenbach*, 383 U.S. 301, 331–32 (1966) (reaching a similar conclusion in affirming the constitutionality of the section 5 trigger, based in large part on the availability of other remedies under the VRA); *supra* notes 80–84 and accompanying text. For example, the failure to hire bilingual poll workers proportionate to the number of LEP language minority voters in a precinct violates section 2 where it impairs the ability of those voters to cast effective ballots. *See, e.g., Harris v. Graddick*, 593 F. Supp. 128, 132–33 (M.D. Ala. 1984) (reaching a similar conclusion where the state hired a disproportionately small

the VRA, including the language groups and thresholds provided under section 203, sustain the constitutionality of the language assistance requirements.

E. Coverage of Jurisdictions Where Language Assistance is Not Needed

Opponents of “bilingual ballots” also claim that application of the trigger results in the opposite problem: namely, unconstitutional overbreadth, both the scope of coverage and the costs that covered jurisdictions incur.²⁶⁵ According to K.C. McAlpin, “the Justice Department ordered Briny Breezes, Florida to print notices for a local election in Spanish” even though 99% of the residents speak English “very well.”²⁶⁶ In other words, McAlpin asserts that section 203 requires bilingual ballots to be produced even in jurisdictions with no voters who speak the covered language. This assertion is an example of *reductio ad absurdum* logic.

Briny Breezes is located in Palm Beach County, which is covered under section 203 for Spanish.²⁶⁷ Justice Department regulations provide that when a county is covered under section 203, “all political units that hold elections within that political subdivision (such as cities or school districts) are subject to the same requirements” under the Act as is the county.²⁶⁸ As a result, under McAlpin’s reasoning, Briny Breezes must provide “bilingual ballots” in Spanish, even though no one requires them. I do not doubt that the Justice Department sent a notice of coverage to Briny Breezes, as commonly happens when a jurisdiction becomes covered and periodically thereafter.²⁶⁹ But that does not mean, as Chavez asserts,²⁷⁰ that the Department mandates “bilingual ballots” there. As the Department wrote in a notice letter following

number of black poll workers); *see also* *Cottier v. City of Martin*, 466 F. Supp. 2d 1175, 1185, 1193 (D.S.D. 2006) (describing the failure to appoint American Indians as poll workers as evidence supporting a section 2 violation); *United States v. Osceola County*, 475 F. Supp. 2d 1220, 1235 (M.D. Fla. 2006) (reaching a similar conclusion where a county failed to recruit bilingual Spanish-speaking poll workers even before the county became covered by section 203). Hiring bilingual poll workers is one of the most cost effective ways to comply with section 203 because most jurisdictions pay them at the same rate as other poll workers. *See* Tucker & Espino, *Government Effectiveness and Efficiency*, *supra* note 21, at 215, 217–18.

²⁶⁵ As I have written elsewhere, the costs of compliance with section 203 typically will be minimal where a jurisdiction engages in effective targeting. *See supra* note 21.

²⁶⁶ *H. Hearing on Bilingual Election Requirements Part II*, *supra* note 16, at 71 (testimony of K.C. McAlpin) (quoting a *Washington Times* story).

²⁶⁷ *See id.*

²⁶⁸ 28 C.F.R. § 55.9 (2007).

²⁶⁹ *See* USDOJ, About Language Minority Voting Rights, Section 203 Correspondence, http://www.usdoj.gov/crt/voting/sec_203/activ_203.htm#correspondence.

²⁷⁰ *See generally* *H. Hearing on Bilingual Election Requirements Part I*, *supra* note 16, at 29–30 (testimony of Linda Chavez) (providing examples of jurisdictions she contends were forced to produce “bilingual ballots” where they were not needed). “Low use” of bilingual voting materials does not always mean that those materials are unnecessary. In some cases, it is an indication that the jurisdiction has failed to engage in proper outreach to the language minority community, or to otherwise make the materials available to voters. *See* Tucker, *Enfranchising Language Minority Citizens*, *supra* note 5 at 245–46.

the July 2002 Census determinations, section 203 “does not require that information in minority languages be provided to people who have no need for it.”²⁷¹

That is not to say that the section 203 coverage formula does not occasionally lead to some anomalies. For example, the reservation trigger results in coverage of some jurisdictions where there are no members of the covered language minority group.²⁷² A small number of counties are covered for Alaskan Native or American Indian languages because they contain a portion of a reservation that satisfies the 5 percent population trigger; however, there are no voters in those counties who speak these covered languages.²⁷³ Nevertheless, that anomalous coverage does not render the trigger unconstitutional. Like Briny Breezes, the handful of counties covered for languages where there is no need for assistance are not required to provide it. “Instead, use of targeting would allow the jurisdiction[s] to determine that no assistance was needed because there were no voters who needed it.”²⁷⁴ Consequently, assertions that section 203 mandates producing “bilingual ballots” where there is no need misstate the legal requirements and how they are enforced.

Targeting is not the only manner in which the scope of section 203 is narrowed to apply where it is needed. Section 203(d) provides that a covered jurisdiction may bailout from coverage under the bilingual election provisions if it can demonstrate “that the illiteracy rate of the applicable language minority group” that triggered coverage “is equal to or less than the national illiteracy rate.”²⁷⁵ “Having found that the voting barriers experienced by these citizens is in large part due to disparate and inadequate educational opportunities,” this bailout procedure “rewards” jurisdictions that are able to remove these barriers.²⁷⁶ As the Court observed in *Boerne*, this provision ensures “that the reach of the [VRA is] limited to those cases in which constitutional violations were most likely (in order to reduce the possibility of overbreadth),” by terminating coverage where voting and education discrimination and their effects have subsided.²⁷⁷

Coverage also may be terminated without any action by the jurisdiction because of an automatic “bailout” mechanism in place under the section 203

²⁷¹ Letter from Ralph F. Boyd, Jr., Asst. Att’y. Gen., Civil Rights Div., to Ms. Nadine Parkhurst, Clerk of the Board, Cochise County, Ariz. (July 26, 2002), http://www.usdoj.gov/crt/voting/sec_203/july_ltr02.htm.

²⁷² See 42 U.S.C. § 1973aa-1a(b)(2)(A)(i)(III)(2000); see also *supra* notes 170–176 and accompanying text.

²⁷³ See Tucker & Espino, *Government Effectiveness and Efficiency*, *supra* note 21, at 183–84.

²⁷⁴ *Id.* at 183; see also Tucker, *supra* note 5, *Enfranchising Language Minority Citizens*, at 250–59 (describing targeting).

²⁷⁵ 42 U.S.C. § 1973aa-1a(d) (2000).

²⁷⁶ 121 Cong. Rec. 16,253 (1975) (statement of Rep. Don Edwards).

²⁷⁷ 521 U.S. 521, 533 (1997); see also *South Carolina v. Katzenbach*, 383 U.S. 301, 331–32 (1966) (making a similar statement).

trigger.²⁷⁸ Jurisdictions can be removed from coverage as a result of changing demographics revealed during the more frequent Census determinations using ACS data.²⁷⁹ When the need for language assistance drops below the population threshold or the illiteracy rate of a language group no longer exceeds the national average, coverage ends.²⁸⁰ The language assistance requirements are thereby only applied to places where they are actually needed.

F. Length of Section 203's Reauthorization

Finally, some critics of section 203 also question the duration of its renewal. The VRARA provides for a straight reauthorization of the language assistance provisions for twenty-five years until August 6, 2032.²⁸¹ Congress rejected efforts to shorten the renewal of the VRA's temporary provisions—including section 203.²⁸² Nevertheless, noting it had been in effect for over three decades, Senator Cornyn (R-Tex.) asked whether the remedial nature of the statute “is supposed to be a permanent part of our legal requirements.”²⁸³ That question is based on two false premises: first, that education discrimination no longer occurs, and second, that ameliorative measures are not necessary for victims of past education discrimination. Parts IV and V of this Article describe the strong correlation between present education discrimination against language minorities and the jurisdictions that are covered by section 203.

Furthermore, education discrimination is at least as “adaptive and persistent” if not more so than voting discrimination, and has an amplifying affect on the latter form of discrimination. When voting discrimination is remedied, it often is replaced with more sophisticated methods of disen-

²⁷⁸ See 42 U.S.C.A. § 1973aa-1a(b)(2)(A) (West 2000 & Supp. 2007); see also VRARA § 8 (providing for Section 203 determinations to be made using “the 2010 American Community Survey census data and subsequent American Community Survey data in 5-year increments, or comparable census data”).

²⁷⁹ See *supra* notes 186–190 and accompanying text; *S. Hearing on Continuing Need for Section 203*, *supra* note 16, at 29 (testimony of Margaret Fung).

²⁸⁰ Compare Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 48,871 (July 26, 2002) (to be codified at 28 C.F.R. pt. 55) with Voting Rights Act Amendments of 1992, Determinations Under Section 203, 57 Fed. Reg. 43,213 (Sept. 18, 1992) (showing the changes in jurisdictions covered by Section 203 as a result of determinations made on the basis of the 2000 Census and 1990 Census, respectively); see *supra* notes 170–176 and accompanying text; *S. Hearing on Continuing Need for Section 203*, *supra* note 16, at 29 (testimony of Margaret Fung).

²⁸¹ See VRARA, Pub L. No. 109-246, § 7, 120 Stat. 577, 581; 42 U.S.C.A. § 1973aa-1a(b)(1) (West Supp. 2007).

²⁸² See Tucker, *Politics of Persuasion*, *supra* note 2, at 238, 255–56 (rejecting an amendment offered by Rep. Steve King (R-Iowa) to sunset section 203 after six years during the House Judiciary Committee markup and rejecting an amendment offered by Rep. Louie Gohmert (R-Tex.) to sunset all of the VRA's temporary provisions after 25 years during the House floor vote).

²⁸³ *S. Hearing on Continuing Need for Section 203*, *supra* note 16, at 27 (statement of Sen. Cornyn).

franchisement.²⁸⁴ By comparison, even the simplest changes in voting techniques can disenfranchise many functionally illiterate language minority voters, who are incapable of deciphering the written explanations of the change. For example, new voting machines can pose insurmountable barriers to voters who have never used them and are unable to read the accompanying instructions. Similarly, amended rules for casting an absentee ballot may cause a voter who cannot read the instructions to unintentionally void his or her own vote by failing to complete a required section. Without addressing literacy and English-language barriers caused by education discrimination, even seemingly innocuous and non-discriminatory changes in election procedures can disenfranchise illiterate language-minority voters.

Moreover, education discrimination, like voting discrimination, is not eliminated overnight. Even after education discrimination is cured, its long-term effects on its victims remain.²⁸⁵ As John Trasviña, President and General Counsel of the Mexican American Legal Defense and Education Fund ("MALDEF"), explained:

Texas and other states maintained segregated public school systems well into the 1970s. The pervasive impact of *de jure* segregation in public schools persists: many language minority citizens who attended segregated schools have never been able to gain the skills in English reading comprehension necessary to cast an informed ballot in an English-only election.²⁸⁶

The cases challenging the effects of education discrimination are not limited to 1970s, but also include cases brought by a new generation of language minority citizens who experience discrimination today.²⁸⁷ Extending language assistance until the effects of education discrimination are eradicated is necessary to ensure that its victims have equal access to the political process. For this reason, *Morgan* upheld a permanent remedy in section 4(e),²⁸⁸ thereby suggesting that the more limited and temporary relief required by section 203 would probably be held to be congruent and proportional to the harm being addressed.

Two points made at the end of the preceding section are worth repeating here. First, bailout also gives jurisdictions experiencing the effects of past

²⁸⁴ See generally *South Carolina v. Katzenbach*, 383 U.S. 301, 308–15, 328 (1966) (detailing the evidence of new methods of disenfranchisement used to bar minorities from registering and voting even after bringing successful litigation, and concluding that “[a]fter enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims”).

²⁸⁵ See *supra* notes 94–112 and accompanying text.

²⁸⁶ *S. Hearing on Continuing Need for Section 203*, *supra* note 16, at 55 (responses of John Trasviña to questions submitted by Sens. Leahy (D-Vt.), Kennedy (D-Mass.), Coburn (R-Okla.), and Specter (R-Penn.)); see also *supra* notes 94–112 and accompanying text (using similar reasoning to sustain bans on literacy tests).

²⁸⁷ See *infra* Part IV.

²⁸⁸ See *Katzenbach v. Morgan*, 384 U.S. 641, 658 (1966).

and present discrimination substantial incentive to address them and thereby end section 203 coverage.²⁸⁹ Second, a jurisdiction likewise can benefit from “automatic bailout” when the regular determinations made by the Census Bureau show that the thresholds for coverage are no longer met.²⁹⁰ The inventive approach of the section 203 trigger ensures that jurisdictions cannot remain covered for twenty-five years, or much less following the next ACS determination, where the census data does not provide evidence of continuing discrimination. For this reason, the length of section 203’s reauthorization should be constitutional under controlling precedent.²⁹¹

IV. THE RECORD SUPPORTING RENEWAL OF SECTION 203

Boerne instructs courts to examine the record before Congress at the time of legislating in assessing the congruence and proportionality of a statute passed under the authority of the enforcement section of the Fifteenth Amendment, such as section 203.²⁹² Evidence of the continuing need for language assistance comes in two forms.²⁹³ For section 4(f)(4) coverage, it includes voting discrimination “against citizens of language minorities” that Congress found to be “pervasive and national in scope,” especially for those “from environments in which the dominant language is other than English.”²⁹⁴ In addition, for coverage under both sections 4(f)(4) or 203, Congress found that “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.”²⁹⁵ Through the 1992 reauthorization of section 203, Congress acknowledged the substantial record of widespread education discrimination against the covered language minority groups. Congress found two ways in which that discrimination manifested itself: (1) “present day barriers to equal educational opportunities”; and (2) “the current effect that past educational dis-

²⁸⁹ See *supra* notes 275–277 and accompanying text.

²⁹⁰ See *supra* notes 278–279 and accompanying text.

²⁹¹ See *supra* notes 77–84 and accompanying text.

²⁹² See *Boerne*, 521 U.S. at 530.

²⁹³ A summary of the evidence of education discrimination discussed in this section was included in my testimony during the House legislative hearing on the VRARA. See *H.R. 9 Hearing Part II*, *supra* note 17, at 59–92 (statement of Dr. James Thomas Tucker).

²⁹⁴ 42 U.S.C. § 1973b(f)(1) (2000). While I briefly touch on some of the evidence of voting discrimination against language minorities in Part V(C), I do not do so in detail because an examination of the constitutionality of the section 4(f)(4) trigger is beyond the scope of this Article. As section 203(a) makes clear, section 203 was enacted based on findings that education discrimination contributed to unequal voting opportunities; no voting discrimination needed to be proved. See 42 U.S.C. § 1973aa-1a(a) (2000). Consequently, most of my discussion focuses on the record of education discrimination that Congress considered in reauthorizing section 203.

²⁹⁵ 42 U.S.C. § 1973aa-1a(a) (2000); see also 42 U.S.C. § 1973b(f)(1) (2000) (making similar findings of education discrimination to support coverage under section 4(f)(4) of the Act).

crimination has on today's Hispanic adult population."²⁹⁶ Where education barriers are present, they have "a deleterious effect on the ability of language minorities to become English proficient and literate."²⁹⁷

Despite "an extensive evidentiary record demonstrating the prevalence of voting discrimination and high illiteracy rates among language minorities,"²⁹⁸ Linda Chavez has questioned the sufficiency of that record.²⁹⁹ Although this argument had the potential to be the most serious challenge to the constitutionality of section 203 under *Boerne*, it is actually, contrary to Chavez's assertions, one of her weakest arguments.³⁰⁰ Part of its infirmity is attributable to Chavez's contention, supported only by her own anecdotal testimony, that Congress had an inadequate evidentiary basis for enacting section 203 in 1975.³⁰¹ Her characterization of the 1975 record is not only inaccurate,³⁰² but also not entirely germane to the constitutional analysis. Under *Boerne*, the question is not whether the 1975 record supported the original passage of the language assistance requirements, but whether the present record sustains their reauthorization in 2006.³⁰³ Evidence from the past is relevant to the extent that many language minorities who were victims of education and voting discrimination in 1975 continue to suffer from

²⁹⁶ S. REP. NO. 102-315, at 5 (1992). The Senate Report also documented the history of education discrimination against Asian American citizens and American Indian and Alaska Native citizens. *Id.* at 5-7.

²⁹⁷ H.R. REP. NO. 102-655, at 6 (1992), as reprinted in 1992 U.S.C.C.A.N. 766, 770.

²⁹⁸ *H. Hearing on Bilingual Election Requirements Part I*, *supra* note 16, at 1 (statement of Rep. Chabot (R-Ohio)).

²⁹⁹ Other opponents of "bilingual ballots" are more muted in their criticism of the record of education discrimination. See *H. Hearing on Bilingual Election Requirements Part II*, *supra* note 16, at 64 (testimony of K.C. McAlpin).

³⁰⁰ See generally *H. Hearing on Bilingual Election Requirements Part I*, *supra* note 16, at 36-37 (testimony of Linda Chavez). Chavez described it as her "strongest argument" that "you would have had to have established an evidentiary record that showed an English-language ballot was in fact discriminatory and did not provide due process to voters," and she asserted: "[T]hat evidentiary record was not established in 1975" and "has never been seriously established since." *Id.*

³⁰¹ *Id.*; see also *id.* at 23 (testifying that "in the case of language minorities in 1975, that evidentiary record simply is lacking. Therefore, I believe that there is neither a legal basis nor an evidentiary record that would support extension of this Act"); *S. Hearing on Continuing Need for Section 203*, *supra* note 16, at 19 (testimony of Linda Chavez) (testifying that there was "absolutely no record" of discrimination supporting the 1975 addition of section 203); *supra* note 47 and accompanying text (characterizing the enactment of the "bilingual ballots" mandate as motivated by "identity politics" and not discrimination).

³⁰² There is abundant evidence of voting and education discrimination supporting the 1975 enactment of the language assistance requirements. See, e.g., S. REP. NO. 94-295, at 24-31, 37-39 (1975), reprinted in 1975 U.S.C.C.A.N. 790-797, 804-06; 121 CONG. REC. 16,245-16,255 (1975); U.S. COMM'N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER 22-25, 57-59, 85-87, 97-99, 103-04, 108-11, 114-21, 123, 144, 160, 166, 220-30, 242-48, 251-54, 331-32 (1975), reprinted in *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Const. Rights of the H. Comm. on the Judiciary on H.R. 939, H.R. 2148, H.R. 3247, and H.R. 3501*, 94th Cong., 1005-08, 1040-42, 1068-70, 1080-82, 1086-87, 1091-94, 1097-1104, 1106, 1127, 1143, 1149, 1203-13, 1225-31, 1234-37, 1314-15 (1975).

³⁰³ See *supra* notes 154-59 and accompanying text (describing the evidentiary standard necessary to satisfy *Boerne*).

the effects of that discrimination today.³⁰⁴ But the present context cannot be ignored.

Since the 1970s, courts have found that jurisdictions covered by the language assistance provisions of the VRA or school districts in those jurisdictions denied equal educational opportunities to non-English speaking students in the public schools. As early as the turn of the twentieth century, the Court found that language minority students have a right under the Fourteenth Amendment to an equal education that addresses their unique language needs.³⁰⁵ In the landmark case of *Lau v. Nichols*,³⁰⁶ the Supreme Court held that an English-only curriculum violated Title VI of the Civil Rights Act of 1964³⁰⁷ by depriving Chinese-speaking students in San Francisco of equal educational opportunities.³⁰⁸

Many of the post-1975 cases have been brought under the authority of *Lau* and its progeny,³⁰⁹ two decisions from the circuit courts of appeals.³¹⁰ Other statutory bases for education discrimination cases can include section 1703(f) of the Equal Educational Opportunity Act (“EEOA”)³¹¹ and its implementing regulations,³¹² the Education for All Handicapped Children Act of 1975 (EAHCA),³¹³ the Bilingual Education Act³¹⁴ and Title VII of the Elementary and Secondary Education Act of 1965,³¹⁵ section 504 of the Vocational Rehabilitation Act of 1973,³¹⁶ numerous sections of the Individuals

³⁰⁴ See *supra* notes 95–113, 285–88 and accompanying text.

³⁰⁵ See *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (striking down a prohibition against teaching languages other than English in the public schools, the Court observed, “[t]he protection of the Constitution extends to all, to those who speak other languages as well as those born with English on the tongue”); *Farrington v. Tokushige*, 273 U.S. 284 (1927) (striking down a Hawaii law that restricted private foreign language schools such as those of the Japanese plaintiffs).

³⁰⁶ 414 U.S. 563 (1974).

³⁰⁷ See generally 42 U.S.C. § 2000d (2000) (providing that “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance”).

³⁰⁸ See *Lau*, 414 U.S. at 567–69.

³⁰⁹ See, e.g., *Florez v. Arizona*, 48 F. Supp. 937, 939 (D. Ariz. 1999); *Association of Mexican-American Educators (AMEA) v. California*, 836 F. Supp. 1534, 1544 (N.D. Cal. 1993); *Bryan v. Koch*, 492 F. Supp. 212, 230 (D.C.N.Y. 1980).

³¹⁰ See *Castañeda v. Pickard*, 648 F.2d 989 (5th Cir. 1981); *Serna v. Portales Mun. Sch.*, 499 F.2d 1147 (10th Cir. 1974).

³¹¹ The EEOA provides that “No state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by-(f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.” 20 U.S.C. § 1703(f) (2000).

³¹² See 34 C.F.R. pt. 100 (2006).

³¹³ See 20 U.S.C. §§ 1405–1406, 1415–1420 (2000 & Supp. 2004).

³¹⁴ See Pub. L. No. 100-297, §§ 1001–1004, 7001–8001, 102 Stat. 130, 274–93 (1988) (amending Tit. VII of the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (1965), as added by Pub. L. 90-247, 81 Stat. 816 (1968)).

³¹⁵ See 20 U.S.C. §§ 6301, *et seq* (2000 & Supp. 2002).

³¹⁶ See 29 U.S.C. § 794 (Supp. 2002).

with Disabilities Education Act ("IDEA"),³¹⁷ and Title III of the No Child Left Behind Act of 2001 ("NCLB"),³¹⁸ among others.³¹⁹

Unfortunately, as will be shown below, the unequal educational opportunities identified in *Lau* remain in much of the United States, particularly in the thirty-one states covered in whole or in part by section 203.³²⁰ Since 1975, at least twenty-four successful education discrimination cases have been brought on behalf of English Language Learner ("ELL") students in fifteen states, fourteen of which are presently covered in whole or in part by the language assistance provisions.³²¹ Since 1992, when the language assistance provisions were last reauthorized, at least ten successful ELL cases have been brought or plaintiffs have had additional relief granted under existing court decrees.³²² Other cases brought on behalf of ELL students also are still pending as of the publication of this article, including one in Alaska³²³ and one in Illinois.³²⁴ Consent decrees or court orders were in effect as of May 2006 for ELL students statewide in Arizona³²⁵ and Florida,³²⁶ and in the cities of Boston,³²⁷ Denver,³²⁸ and Seattle,³²⁹ each of which is covered by the language assistance provisions.

³¹⁷ See 20 U.S.C. §§ 1400–1482 (Supp. 2004).

³¹⁸ See 20 U.S.C. §§ 6801–7014 (Supp. 2002).

³¹⁹ For a more detailed discussion of some of the federal laws and court decisions requiring equal educational opportunities for ELL students, see Alberto T. Fernández, *Legal Support for Bilingual Education and Language-Appropriate Related Services for Limited English Proficient Students with Disabilities*, 16 BILINGUAL RES. J. 117 (1992). More recent laws impacting ELL students, such as NCLB, are summarized in SERVE, ENGLISH LANGUAGE LEARNERS IN THE SOUTHEAST: RESEARCH, POLICY & PRACTICE 14–24 (2004).

³²⁰ See *supra* note 25 (collecting sources identifying the jurisdictions covered by section 203).

³²¹ See *H.R. 9 Hearing Part II, supra* note 17, at 85–92 (testimony of Dr. James Thomas Tucker). These cases likely represent only a small number of the successful education cases brought because so many of the decisions are unpublished. Nevertheless, the cases provide a compelling basis for concluding that present education discrimination and the effects of past education discrimination require extension of the language assistance provisions.

³²² See *id.*

³²³ See Second Amended Complaint, *Moore v. State*, Case No. 3AN-04-9756-CIV (Alaska Super. Ct.) (alleging that "every Alaska child receives an inadequate education because the funding of that education is grossly inadequate"); see also *infra* notes 349–52 and accompanying text.

³²⁴ See *Leslie v. Bd. of Educ. for Ill. Sch. Dist. U-46*, 379 F. Supp. 2d 952 (N.D. Ill. 2005) (denying motion to dismiss case brought under the EEOA on behalf of LEP Hispanic students and African-American students).

³²⁵ See *Flores v. Arizona*, 405 F. Supp. 2d 1112 (D. Ariz. 2005) (contempt order); *Flores v. Arizona*, 172 F. Supp. 2d 1225 (D. Ariz. 2000); *Flores v. Arizona*, 160 F. Supp. 2d 1043 (D. Ariz. 2000).

³²⁶ See *League of United Latin Am. Citizens et al. v. Fla. Bd. of Educ.*, No. 90-1913-Civ.-Scott (S.D. Fla. 1990) (consent decree); *League of United Latin Am. Citizens et al. v. Florida Bd. of Educ.*, No. 90-1913-Civ.-Moreno (S.D. Fla. Sept. 2, 2003) (amending consent decree).

³²⁷ See *Bilingual Master Parents Advisory Council v. Boston Sch. Comm'n*, 14 Mass. L. Rptr. 612 (Mass. Super. May 15, 2002).

³²⁸ See *People Who Care v. Rockford Bd. of Educ. Sch. Dist. No. 205*, 851 F. Supp. 905 (N.D. Ill. 1994), *aff'd in part and rev'd in part*, 111 F.3d 528 (7th Cir. 1997).

³²⁹ See *Seattle Sch. Dist. et al. v. State of Washington*, No. 81-2-1713-1 (Thurston County Super. Ct. 1983) ("Seattle II").

Education discrimination is compounded by under-funding for public schools with large numbers of ELL students. By mid-2006, successful school funding cases had been brought in all five of the states that are covered in whole by section 203,³³⁰ and in ten of the twenty-six states covered in part by section 203.³³¹ Additional school funding cases were pending in four other states that are partially covered by section 203.³³² These school funding cases cover the overwhelming majority of all ELL students living in section 203 jurisdictions. The top six states with ELL students, which are either covered in whole (California, Texas, and Arizona) or in part (Florida, New York, and Illinois) by the language assistance provisions,³³³ have each had at least one successful education discrimination case or school funding case.³³⁴ The seven school districts with 50,000 or more ELL students in 2004–2005³³⁵ are in jurisdictions covered by section 203, and six of those school districts have had at least one successful education discrimination case or school funding case brought against it.³³⁶ This Part shows the strong relationship between unequal educational opportunities and the groups and jurisdictions covered by the language assistance provisions of the VRA.

³³⁰ See, e.g., *Kasayulie v. State*, 3AN-97-3782-CIV (Alaska Super. Ct., Sept. 1, 1999); *Flores v. Arizona*, 516 F.3d 1140 (9th Cir. 2008); *Zuni School District v. New Mexico*, CV-98-14-II (Dist. Ct., McKinley County Oct. 14, 1999); *William v. State of California*, No. CGC-00-312236 (Sup. Ct. San Francisco, 2000); *West Orange-Cove Consolidated ISD v. Nelson*, 107 S.W.3d 558 (Tex. 2003). The five states are Alaska, Arizona, California, New Mexico, and Texas. See National Access Network, Access Quality Education: [State] Litigation, http://www.schoolfunding.info/states/state_by_state.php3 (listing cases) (click desired state and follow the “school funding litigation in . . .” hyperlink under “Litigation” in the right-hand column) (last visited Feb. 20, 2008).

³³¹ See National Access Network, *supra* note 330. The ten states are Connecticut, Idaho, Kansas, Maryland, Massachusetts, Montana, New Jersey, New York, North Dakota, and Washington. See *id.*

³³² See *id.* The four states are Colorado, Nebraska, Oklahoma, and Oregon. See *id.*

³³³ ANNEKA L. KINDLER, U.S. DEPARTMENT OF EDUCATION, OFFICE OF ENGLISH LANGUAGE ACQUISITION (OELA), LANGUAGE ENHANCEMENT AND ACADEMIC ACHIEVEMENT FOR LIMITED ENGLISH PROFICIENT STUDENTS, SURVEY OF THE STATES’ LIMITED ENGLISH PROFICIENT STUDENTS AND AVAILABLE EDUCATIONAL PROGRAMS AND SERVICES 19 (2002), available at <http://www.nclae.gwu.edu/policy/states/reports/seareports/0001/sea0001.pdf>. The ELL populations in these six states were 1,511,646 in California; 570,022 in Texas; 254,517 in Florida; 239,097 in New York; 140,528 in Illinois; and 135,248 in Arizona. *Id.*

³³⁴ See *supra* notes 324–26 and accompanying text; *infra* notes 380, 434–49, 453–67, 476–80 and accompanying text.

³³⁵ See National Clearinghouse for English Language Acquisition and Language Instruction Educational Programs, Which School Districts in the U.S. Have High LEP Enrollments?, <http://www.nclae.gwu.edu/expert/faq/02districts.html> (last visited Feb. 21, 2008). School districts with more than 50,000 ELL students include: Los Angeles with 328,684; New York with 122,840; Chicago with 82,540; Miami-Dade with 62,767; Houston with 61,319; Clark County (Las Vegas), Nevada, with 53,517; and Dallas with 51,328. *Id.* The top twenty-five districts are all in section 203 covered jurisdictions. See *id.* Twenty-seven of the twenty-eight school districts that had 10,000 or more ELL students in 2004–2005 are in section 203 covered jurisdictions. See *id.*

³³⁶ See *supra* note 324–26 and accompanying text; *infra* notes 392, 434–49, 469–70, 476–80, and accompanying text.

A. *Alaska Natives*

The 1975 Senate Report describes a particularly egregious example of separate and unequal education provided to Alaska Native school-age children.³³⁷ In *Hootch v. State Operated School System*,³³⁸ several Eskimo, Aleut, and American Indian parents and children filed a class-action suit against the state under the Equal Protection Clauses of the United States and Alaska Constitutions for only providing public secondary schooling in urban areas hundreds of miles away from their homes, without providing transportation to get there.³³⁹ If the children did not “wish to leave home, [were] not able to leave home, or refuse[d] to leave home to attend boarding school or the boarding home program, they [were] denied secondary school education,” resulting in “a highly disproportionate number of Alaska Natives . . . not . . . attending secondary schools.”³⁴⁰ In contrast, most non-native children were offered public secondary schools in their communities.³⁴¹ As the lead attorney in the case noted, “the violation had deep historical roots,” including “segregated schools in Bethel, Nome, Egegik, Chitina, Ft. Yukon and a dozen other communities. Whites in one school, Natives in another, right in the same small village.”³⁴² The case was settled in 1976, twenty-two years

³³⁷ See S. REP. NO. 94-295, at 29 (1975), reprinted in 1975 U.S.C.C.A.N. 774, 794–95.

³³⁸ 526 P.2d 793 (Alaska 1975).

³³⁹ See *Hootch*, 526 P.2d at 796.

³⁴⁰ First Amended Complaint at ¶ 51, *Hootch v. State Operated Sch. Sys.*, No. 72-2450-CIV (Alaska Super. Ct. Oct. 5, 1972) (“*Hootch* First Amended Complaint”), available at http://www.alaskool.org/native_ed/law/mhootch.html. There were many reasons why Native students did not want to go to boarding school:

The wrenching experience of going so far from home and family. The pressure to drink. The loneliness. Boarding home parents who themselves drank, abused students and treated them like servants. The lost opportunity to speak their own language, to learn traditional skills[,] just to be at home. Entire villages echoed with the silence of a whole generation of teenagers gone, for 9 months out of the year. It was a rotten system. And a lot of policymakers in Juneau and Anchorage just didn’t get it.

Stephen E. Cotton, *Thirty Years Later: The Molly Hootch Case*, SHARING OUR PATHWAYS (Alaska Native Knowledge Network/Alaska Rural Systemic Initiative, Fairbanks, Alaska), Sept./Oct. 2004, at 7, available at <http://www.ankn.uaf.edu/sop/SOPv9i4.pdf>.

³⁴¹ *Hootch* First Amended Complaint, *supra* note 340, at ¶ 53. In 1976, “there were 2,663 Native kids of high school age in 126 villages which had an elementary school but no high school. There were only 120 non-Native kids, statewide, in a similar situation—and almost all of them were in logging camps in Southeast.” Cotton, *supra* note 340, at 5. That meant that one-third of all Native students in Alaska did not have access to a secondary school in their community. *Id.*

³⁴² Cotton, *supra* note 340, at 5. Cotton illustrated some of the more telling examples of unequal treatment between Native and non-Native students:

The State constructed a new high school for 23 mostly white kids, grades 9–12, in Thorne Bay, in Southeast, complete with a gym, a chemistry lab, a workshop, a home economics room and classrooms—at a time when there were 48 Native villages with larger high-school aged populations and no local high school. The State provided local high school instruction for eight kids in Whittier, five kids in Gustavus, five in Port Alice, one or two in Paxson, but not in the dozens of Native villages

after *Brown v. Board of Education*,³⁴³ when Alaska agreed for the first time to establish a public secondary school in all 126 native villages that wanted one.³⁴⁴ The settlement ultimately cost Alaska \$137 million to open public secondary schools in 105 villages.³⁴⁵

Nonetheless, the State failed to fully comply with the agreement. In a 1999 state court decision, Alaska was found to have a dual, arbitrary, unconstitutional, and racially discriminatory system for funding school facilities.³⁴⁶ As a result of that discrimination, Native Alaskans have the lowest level of educational attainment in the state.³⁴⁷ Over eighty percent of Alaska Native graduating seniors are not proficient in reading comprehension, have failure rates on standardized tests more than twenty percent higher than non-Native students, and have graduation rates that lag more than fifteen percent behind the statewide average.³⁴⁸

In 2004, Alaska Natives brought another class-action suit against the state for unequal educational funding.³⁴⁹ The case was still pending when the VRARA was enacted. In June 2007, the trial court issued a lengthy order in which it denied the plaintiffs' claims with respect to inadequate funding, but held that the State had failed to adequately supervise the maintenance of public school education.³⁵⁰ Specifically, the court found that Alaska had violated the due process rights of Alaska Native students when it failed to sufficiently oversee the quality of secondary education in many Alaska Native villages and to provide a "meaningful opportunity to learn the material" that would be tested on a graduation exam.³⁵¹ The trial court stayed its order to prohibit the use of high school graduation exams until mid-2008 to provide the State with an opportunity to address the issues.³⁵² Nevertheless, it is evident that the efforts by Alaska Native students to obtain equal educational opportunities that began prior to enactment of section 203 in 1975 are far from over due to continuing discrimination and low achievement levels.

with equal or greater numbers of high school aged kids. Barrow didn't get a four-year high school until 1974–75, when the enrollment was 161.

Id.

³⁴³ 347 U.S. 483 (1954).

³⁴⁴ See Agreement of Settlement, *Tobeluk v. Lind ex rel. Hootch v. State Operated Sch. Sys.*, No. 72-2450-CIV (Alaska Super. Ct. Sept. 3, 1976), available at http://www.alaskool.org/native_ed/law/tobeluk.html.

³⁴⁵ See Cotton, *supra* note 340, at 9.

³⁴⁶ *Kasayulie v. State*, No. 3AN-97-3782-CIV (Alaska Super. Ct. 1999).

³⁴⁷ See NATALIE LANDRETH & MOIRA SMITH, *RENEWTHEVRA.ORG, VOTING RIGHTS IN ALASKA 1982-2006*, at 3 (2006), reprinted in *Evidence of Continued Need Hearing*, *supra* note 178, at 1308, 1311.

³⁴⁸ *Id.* at 27–28, reprinted in *Evidence of Continued Need Hearing*, *supra* note 178, at 1308, 1335–36.

³⁴⁹ See Second Amended Complaint, *Moore v. State of Alaska*, No.3AN-04-9756-CIV (Alaska Super. Ct. Dec. 3, 2004).

³⁵⁰ See Decision and Order, *Moore v. State of Alaska*, No.3AN-04-9756-CIV, slip op. at 4–5 (Alaska Super. Ct. June 21, 2007), available at <http://www.law.state.ak.us/unpublished/pdf/mooredecision.pdf>.

³⁵¹ *Id.* at 194–95.

³⁵² *Id.*

Many Alaska Native students who are now voters are the victims of this longstanding discrimination, requiring language assistance because of their high illiteracy and limited-English proficiency rates.³⁵³

B. American Indians

Congress also considered evidence of education discrimination against American Indians.³⁵⁴ It relied upon a well-developed record on Indian education that a Senate Subcommittee had called a "National Tragedy" after an extensive two-year study.³⁵⁵ As one commentator observed in 1973,

After almost 200 years of a federal "civilization" policy, one-half to two-thirds of Indian children enter school with little or no skill in the English language, and only a handful of teachers and administrators speak Indian languages. Even where language itself is not a barrier, very few federal or public school teachers fully understand and share the values of their Indian students. At school, the curriculums, textbooks, and educational philosophy are designed to instill values such as competitiveness and individual self-aggrandizement which are alien to Native American cultures. In short the present education system is simply not equipped to cope with the cultural and linguistic disparities presented by Indian students.³⁵⁶

The Senate found that "American Indians . . . do not obtain the benefits of a public education . . . equal to that of their Anglo classmates."³⁵⁷ Such discrimination persisted when section 203 was renewed in 1992. A Department of Education report found the persistence of "overt and subtle racism" towards American Indians in the schools, along with "inequitable school financing systems; discriminatory ability tracking devices; poorly trained teachers and inadequate resources," all of which resulted in a high school dropout rate of thirty-six percent, higher than nearly every other demographic group.³⁵⁸

³⁵³ See *infra* notes 497–500, 515–517 and accompanying text.

³⁵⁴ See S. REP. NO. 94-295, at 29 (1975), *reprinted in* 1975 U.S.C.C.A.N. at 795.

³⁵⁵ SPECIAL SUBCOMM. ON INDIAN EDUC., COMM. ON LABOR AND PUB. WELFARE, INDIAN EDUCATION: A NATIONAL TRAGEDY—A NATIONAL CHALLENGE, S. REP. NO. 91-501 (1969).

³⁵⁶ Daniel M. Rosenfelt, *Indian Schools and Community Control*, 25 STAN. L. REV. 489, 506-07 (1973). For a similar perspective on the history of education discrimination against American Indians, see Alison McKinney Brown, *Native American Education: A System in Need of Reform*, 2 KAN. J.L. & PUB. POL'Y 105 (1993).

³⁵⁷ S. REP. NO. 94-295, at 29 (1975), *reprinted in* 1975 U.S.C.C.A.N. at 795 (quoting U.S. COMMISSION ON CIVIL RIGHTS, THE UNFINISHED EDUCATION (1971)).

³⁵⁸ S. REP. NO. 102-315, at 7 (1992) (citing U.S. DEP'T OF EDUC., INDIAN NATIONS AT RISK: AN EDUCATIONAL STRATEGY FOR ACTION (1991)); see also H.R. REP. NO. 102-655, at 6 (1992), *reprinted in* 1992 U.S.C.C.A.N. 766, 770 (finding that "it is evident that the existing educational systems, whether they be public or federal, have not effectively met the educa-

Education discrimination against American Indians seems to have been greatest where they are most populous, in the southwestern and mid-western states. In *Natonabah v. Board of Education*, cited in the 1975 Senate Report,³⁵⁹ the court held that the Gallup-McKinley School District in New Mexico had systematically denied Navajo students equal educational opportunities in failing to adequately provide a wide range of services.³⁶⁰ The case had its genesis in a 1971 report by the NAACP Legal Defense and Educational Fund entitled "An Even Chance," which stated that the Gallup-McKinley District "provides the clearest example of inequalities between predominantly Indian and non-Indian schools."³⁶¹ Although the state published a response that confirmed many of the allegations in that report, it failed to correct them.³⁶² The court found that the school district denied Indian students equal protection by disproportionately allocating money for building construction, equipment, and operational and instructional services to non-Indian schools, resulting in severe overcrowding.³⁶³ As a result, the court concluded that Indian students were "deprived of an equal educational opportunity on account of race" by "the consistent policies" of the school district in violation of *Brown v. Board of Education*.³⁶⁴ The impact of this discrimination and the misuse of federal funds was particularly severe because of the high ELL rates, especially among young Indian students.³⁶⁵

As an example of the sort of private efforts that can lead to state discrimination by eliminating funding for Indian schooling, take the case of *Prince v. Board of Education of Central Consolidated Independent School District No. 22.*, in which non-Indians in New Mexico sued a school district in San Juan County to bar the use of school bond funds to provide public education on the Navajo reservation.³⁶⁶ The state Supreme Court rejected their claim, noting that New Mexico had a duty under both federal and state law to provide equal educational opportunities to all of its residents.³⁶⁷ The court reasoned that granting the plaintiffs relief would require thousands of Navajo students to take a 150 mile round-trip bus ride every day to go to school off the reservation.³⁶⁸ According to the court, doing so would make the school district "'so large that school children are unable to make the trip

tional, cultural, economic, and social needs of Native communities") (quoting INDIAN NATIONS AT RISK, *supra*, at 12).

³⁵⁹ S. REP. NO. 94-295, at 29 (1975), reprinted in 1975 U.S.C.C.A.N. 774, 795.

³⁶⁰ 355 F. Supp. 716 (D.N.M. 1973).

³⁶¹ *Id.* at 719.

³⁶² *Id.*

³⁶³ *Id.* at 719-24.

³⁶⁴ *Id.* at 724.

³⁶⁵ *See id.* at 728 (observing that "most of the kindergarten population speaks a language other than English").

³⁶⁶ 543 P.2d 1176 (N.M. 1975).

³⁶⁷ *See id.* at 1183-84.

³⁶⁸ *Id.* at 1184.

to school and back home each day,” thereby denying them “‘a free school just as effectively as if no school existed.’”³⁶⁹

A similar issue arose just across the state border, in San Juan County, Utah. In 1974, Navajo students sued the San Juan School District, San Juan County, and Utah officials for allegedly pursuing “‘a longstanding pattern of deep-rooted racial discrimination’ resulting in ‘unequal educational opportunities for Native American children attending the San Juan public schools.’”³⁷⁰ That case was resolved by a consent decree, which provided that educational facilities had to be available on the reservation, located 120 miles one-way by car from the nearest school operated by the district.³⁷¹ The District did not open any schools on the reservation, however, relying upon a Bureau of Indian Affairs (“BIA”) elementary school that did not open until 1983; secondary school students had to “attend distant BIA boarding schools, reside in BIA dormitories near public schools, or live with friends or relatives near public schools” off the reservation.³⁷² When Indian students sued again in the 1990s, a federal court noted that the off-reservation schooling, particularly for secondary students, did not appear to provide an “equivalent education.”³⁷³ In 1997, the parties resolved the three separate cases by a consent decree requiring the defendants to improve facilities used by Navajo students in Utah and Arizona, to provide bilingual education to address the needs of a large ELL population, and to promote cultural awareness.³⁷⁴ In the meantime, it is likely that countless Navajo children fell through the cracks in the decades while the litigation was pending.

Two cases illustrate Arizona’s legacy of education discrimination against Navajo and other Indian students. Apache County, where approximately three-quarters of the population was Navajo,³⁷⁵ attempted to avoid integration of Indians into its public schools by holding a 1976 special bond election to fund a new school in the almost entirely non-Indian southern part of the county.³⁷⁶ The county did so after eliminating half of the polling places on the Navajo reservation and conducting the election using English-only ballots, effectively disenfranchising Indian voters.³⁷⁷ When the U.S. At-

³⁶⁹ *Id.* (quoting *Strawn v. Russell*, 219 P.2d 292 (N.M. 1950)).

³⁷⁰ *Meyers v. Bd. of Educ.*, 905 F. Supp. 1544, 1552 (D. Utah 1995) (quoting *Complaint for Injunctive and Declaratory Relief (Civil Rights)*, *Sinajini v. Bd. of Educ.*, No. C-74-346, 2 (D. Utah 1974)).

³⁷¹ *Id.* at 1552–53 (citing *Agreement of Parties*, *Sinajini v. Bd. of Educ.*, No. C-74-346 (D. Utah 1974)).

³⁷² *Id.*

³⁷³ *Id.* at 1555–56 (denying motions for summary judgment because of disputed questions of material fact). A separate case was filed by other Navajos in the county. *See Chee v. Bd. of Educ.*, No. 2:94-CV-0386 (D. Utah 1994).

³⁷⁴ *See Sinajini v. Bd. of Educ.*, 964 F. Supp. 319 (D. Utah 1997).

³⁷⁵ U.S. COMM’N ON CIVIL RIGHTS, *supra* note 302, at 251.

³⁷⁶ DR. JAMES THOMAS TUCKER ET AL., *RENEWTHEVRA.ORG, VOTING RIGHTS IN ARIZONA 1982–2006*, at 44–45 (2006), *reprinted in Evidence of Continued Need Hearing*, *supra* note 178, at 1363, 1406–07.

³⁷⁷ *Id.*

torney General objected, the county responded by dissolving its school district and replacing it with six smaller districts that would maintain the segregation of its public schools.³⁷⁸ The case was resolved in 1980 by a judicial opinion, which held that the county violated the Voting Rights Act of 1965 by failing to disseminate voting information in Navajo and failing to open all the polling stations on the Navajo reservation.³⁷⁹ More recently, American Indian students throughout Arizona received relief through a 2005 school funding case seeking adequate ELL services for Latino students.³⁸⁰ Lack of funding undoubtedly played a role in more than three-quarters of all Indian students failing Arizona's mandatory graduation test.³⁸¹

Similarly, American Indian pupils in Montana's public schools lag well behind non-Indian students in every category of educational attainment as a result of education discrimination.³⁸² Although Indians comprised 11.4% of Montana's public school K-12 students in 2006, they constituted 72% of the total junior high dropout rate and 24% of high school dropouts.³⁸³ On average, Indian students scored 30% lower on proficiency exams.³⁸⁴ Many of the state's failing schools were predominately Indian.³⁸⁵

It is unclear whether any successful education cases have been brought on behalf of American Indians in South Dakota, who comprised 9% of the total population in 2000.³⁸⁶ Nevertheless, Indian students lag behind non-Indians in every statistical category. Among Indians who are twenty-five

³⁷⁸ *Id.*

³⁷⁹ See *Apache County High Sch. Dist. No. 90 v. United States*, No. 77-1815, 7-8 (D.D.C. June 12, 1980).

³⁸⁰ See *Florez v. Arizona*, 405 F. Supp. 2d. 1112 (D. Ariz. 2005); *infra* notes 462–467 and accompanying text.

³⁸¹ See TUCKER ET AL., *supra* note 376, at 72, reprinted in *Evidence of Continued Need Hearing*, *supra* note 178, at 1363, 1434.

³⁸² See *Heavy Runner v. Bremner*, 522 F. Supp. 162 (D. Mont. 1981) (denying summary judgment for school districts because of evidence that Blackfeet Indian students labored under language barriers the school districts were required to address). In *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684 (Mont. 1989), the Supreme Court of Montana held that the state's education finance system was unconstitutional. In 2005, the Supreme Court of Montana held that the State's public schools remained underfunded and the State had shown "no commitment in its educational goals to preservation of American Indian cultural identity." *Columbia Falls Elementary Sch. v. State*, 109 P.3d 257 (2005).

³⁸³ MONTANA OFFICE OF PUBLIC INSTRUCTION, AMERICAN INDIAN EDUCATION DATA FACT SHEET 1 (2007), <http://www.opi.mt.gov/pdf/indianed/IEFADDataFactSheet.pdf>. American Indian high school students experienced a dropout rate of 8.2% compared to only 3.0% for non-Indians. *Id.* In the last three years, American Indian students completed high school at an average rate of 66.3% compared to 88.6% for whites. *Id.* Of American Indian students enrolled as freshmen in 2001, only 67% graduated on time in 2005. *Id.* at 1.

³⁸⁴ *Id.* at 2. Only 49% of American Indian students in grades four, eight, and eleven scored proficient or advanced in reading, compared to 79% for non-Indians; the average proficiency was virtually identical for math abilities. *Id.* at 2.

³⁸⁵ *Id.* at 1. Twenty-seven out of sixty-two school districts in the State that failed to make Adequate Yearly Progress (the State's measure for school performance under NCLB) in 2005 had 50–100% American Indian student populations, with thirty-one of those districts identified for Corrective Action. *Id.* at 1.

³⁸⁶ See U.S. CENSUS BUREAU, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2000 5 (2002), <http://www.census.gov/prod/2002pubs/c2kbr01-15.pdf>.

years and older, 29% have not completed high school, over twice the rate of non-Indians.³⁸⁷ The drop-out rate for Indians aged sixteen to nineteen is 24%, four times the rate for non-Indians.³⁸⁸ Taken together, there is strong evidence of the continuing need for language assistance for American Indians because of their unequal educational opportunities caused by past and present discrimination.

C. Asians

Asians have been the victims of education discrimination since their arrival in this country. Nowhere is that more evident than in California, which has by far the largest Asian population in the United States.³⁸⁹ In the early twentieth century, the state legislature repeatedly enacted school segregation laws, which were upheld by the courts.³⁹⁰ The discrimination was based upon racial stereotypes, such as those articulated by the California Supreme Court when it concluded that the Chinese are "a race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point."³⁹¹ The state maintained separate schools for Asian students until they were struck down as a result of a case brought by civil rights attorney and future Supreme Court justice, Thurgood Marshall, on behalf of Latinos in 1947.³⁹² Even then, the state failed to dismantle its segregated school system. In the 1971 case of *Lee v. Johnson*, Justice William Douglas, writing as a circuit justice, found that the San Francisco school board had never changed any school attendance line to reduce or eliminate racial imbalance towards Chinese students as required by *Brown*.³⁹³ In 1975, the Senate found that the "effects of that discrimination against Asian Americans in education continues into the present."³⁹⁴

Following the *Johnson* decision integrating San Francisco's public schools, a class of Chinese students sued the school district in *Lau v. Nichols* for failing to give supplemental English instruction to about 1,800 of the district's 2,856 Chinese ELL students.³⁹⁵ The Supreme Court found that the

³⁸⁷ See LAUGHLIN McDONALD, JANINE PEASE & RICHARD GUEST, VOTING RIGHTS IN SOUTH DAKOTA 1982–2006, at 12 (2006), reprinted in *Evidence of Continued Need Hearing*, *supra* note 178, at 1986, 1997.

³⁸⁸ *Id.*

³⁸⁹ See U.S. CENSUS BUREAU, THE ASIAN POPULATION: 2000 (2002), available at <http://www.census.gov/prod/2002pubs/c2kbr01-16.pdf>. According to the 2000 Census, over 4.1 million Asians, over one-third of all Asians in the United States, resided in California. See *id.* New York has the second highest total of over 1.1 million Asians, or a little more than one-quarter of California's Asian population. See *id.*

³⁹⁰ See *S. Hearing on Continuing Need for Section 203*, *supra* note 16, at 110–11 (statement of Karen K. Narasaki, President and Executive Dir., Asian Am. Justice Ctr.).

³⁹¹ *People v. Hall*, 4 Cal. 399, 405 (1854).

³⁹² See *Westminster Sch. Dist. of Orange County v. Mendez*, 161 F.2d 774 (9th Cir. 1947).

³⁹³ See 404 U.S. 1215, 1215–16 (1971) (Douglas, Circuit Justice).

³⁹⁴ S. REP. NO. 94-295, at 28 (1975), reprinted in 1975 U.S.C.C.A.N. 774, 795.

³⁹⁵ 414 U.S. 563, 564 (1974).

equal treatment requirement was not met simply by providing “the same facilities, textbooks, teachers, and curriculum” because “students who do not understand English are effectively foreclosed from any meaningful education.”³⁹⁶ Otherwise, “those who do not understand English are certain to find their classroom experiences wholly incomprehensible”³⁹⁷ Federal regulations under Title VI of the Civil Rights Act provide,

Where inability to speak and understand the English language excludes national origin-minority children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.³⁹⁸

Since the district failed to take affirmative steps to address the language barrier for its Chinese ELL students, the Court concluded that it violated Title VI.³⁹⁹ Judicial conception of section 203 was greatly informed by *Lau*.⁴⁰⁰

In 1978, the NAACP sued the San Francisco Unified School District for failing to desegregate the public schools, as required by *Johnson*.⁴⁰¹ Five years later, the parties entered into a comprehensive consent decree to resolve the case.⁴⁰² In 1999, the order granting the San Francisco decree was modified to address concerns raised by Chinese students who had been denied enrollment in the public schools of their choice because of the San Francisco consent decree’s ethnically-based student assignment plan.⁴⁰³ Although the San Francisco decree was not intended to supersede the order in *Lau*, the Ninth Circuit recognized the relevance of addressing language issues to “improving the level of academic achievement for students.”⁴⁰⁴ Consequently, the 1999 San Francisco consent decree provided that students could be assigned to a particular school on the basis of race or ethnicity where it was necessary because of “the language needs of the student.”⁴⁰⁵

³⁹⁶ *Id.* at 566.

³⁹⁷ *Id.*

³⁹⁸ *Id.* at 568 (quoting Identification of Discrimination and Denial of Services on the Basis of National Origin, 35 Fed. Reg. 11,595, 11,595 (July 18, 1970)).

³⁹⁹ *See id.* at 568–69.

⁴⁰⁰ *See, e.g.*, S. REP. NO. 94-295, at 28–29 (1975), reprinted in 1975 U.S.C.C.A.N. 774, 795; S. REP. NO. 102-315 at 6, reprinted in 1992 U.S.C.C.A.N. (1992).

⁴⁰¹ *See* San Francisco NAACP v. San Francisco Unified Sch. Dist., No. C-78-1445-WHO (N.D. Cal. June 30, 1978).

⁴⁰² *See* San Francisco NAACP v. San Francisco Unified Sch. Dist., 576 F. Supp. 34 (N.D. Cal. 1983).

⁴⁰³ *See* San Francisco NAACP v. San Francisco Unified Sch. Dist., 59 F. Supp. 2d 1021 (N.D. Cal. 1999).

⁴⁰⁴ *Id.* at 1036 (citing San Francisco NAACP v. San Francisco Unified Sch. Dist., 1994 WL 447279 (9th Cir. 1994) (unpublished order)).

⁴⁰⁵ *Id.* (quoting consent decree).

Asian students in other jurisdictions covered under section 203 for Asian languages have been the beneficiaries of successful education cases in their cities.⁴⁰⁶ All have gained from cases in California on behalf of Spanish students.⁴⁰⁷ Chinese students have benefited from desegregation of ELL students in Cook County (Chicago), Illinois,⁴⁰⁸ and mandated funding for bilingual programs in King County (Seattle), Washington.⁴⁰⁹ Chinese and Korean students in New York have been helped by desegregation cases brought there.⁴¹⁰ Vietnamese students in Harris County (Houston), Texas are included in statewide relief obtained from decades of education litigation by Latino children.⁴¹¹ Filipino students in the Kodiak Island Borough of Alaska are covered by some of the orders remedying discrimination against Alaska Natives.⁴¹²

Successful education discrimination cases have been brought in other cities with growing Asian populations. In Philadelphia, a Cambodian refugee who enrolled in English-only ESL⁴¹³ courses and was placed in a class for mentally handicapped students after failing to make progress for three years, successfully sued the city on behalf of 6800 Asian ELL students.⁴¹⁴ In Boston, a 1975 desegregation order required the city to provide bilingual instruction in any school attended by twenty or more qualifying kindergarten students requiring bilingual education and to ensure that older students were assigned to a language appropriate program.⁴¹⁵ In 1979, Boston entered into a voluntary *Lau* compliance plan, which required that the city provide language appropriate instruction to ELL students in a manner that complied with *Lau v. Nichols* and its construction of Title VI of the Civil Rights Act.⁴¹⁶ In 2002, a court found that Asian and Latino students had established that Boston violated its plan through under-funding and inadequate student-teacher ratios.⁴¹⁷ Although Boston and Philadelphia are not presently covered for any Asian languages, they have benefited from voter assistance cases

⁴⁰⁶ See generally Tucker & Espino, *Government Effectiveness and Efficiency*, *supra* note 21, at 171 nn. 41–45 (listing jurisdictions covered by section 203 for Asian languages).

⁴⁰⁷ See Westminster Dist. Of Orange County v. Mendez, 161 F.2d 774, 774 (9th Cir. 1947); *infra* notes 469–470 and accompanying text.

⁴⁰⁸ See *infra* notes 477–478 and accompanying text.

⁴⁰⁹ See *infra* note 481 and accompanying text.

⁴¹⁰ See *infra* notes 479–480 and accompanying text.

⁴¹¹ See *infra* notes 427–444 and accompanying text.

⁴¹² See *supra* notes 337–353 and accompanying text.

⁴¹³ ESL stands for "English as a second language."

⁴¹⁴ See *Y.S. v. School Dist. of Philadelphia*, No. 85-6924 (E.D. Pa. 1986). A 1986 consent decree, continued by stipulation in 2001, required the district to review placements of ELL Asian students, including assessment and communication in their native language, revisions to the ESL curriculum, recruitment and training of ELL instructors fluent in Asian languages, and all communications with parents in their native languages. See Fernández, *supra* note 319, at 133-34.

⁴¹⁵ See *Morgan v. Kerrigan*, 401 F. Supp. 216, 252 (D. Mass. 1975).

⁴¹⁶ *Bilingual Master Parents Advisory Council v. Boston Sch. Comm'n*, 14 Mass. L. Rptr. 612, 613 (Mass. Super. May 15, 2002).

⁴¹⁷ See *id.* at 621–23.

brought under section 2 of the Fifteenth Amendment⁴¹⁸ and under section 208 of the VRA.⁴¹⁹ Furthermore, because of their growing Asian populations, these cities will likely be covered under section 203 in the future.

D. *Persons of Spanish Heritage*

Congressional hearings in the 1970s uncovered a substantial record of education discrimination against Latinos. A 1975 Senate report cited extreme dropout rates among Latinos that resulted in an illiteracy rate of 18.9% among those 25 years of age and older, including over 33% of all Mexican-Americans in Texas.⁴²⁰ The report found that over half of all Mexican-American children in Texas entering the first grade never finished high school.⁴²¹ That evidence led the U.S. Civil Rights Commission to find “a systemic failure of the educational process, which not only ignores the educational needs of Chicano students but also suppresses their hopes and ambitions,” making “the Chicano . . . the excluded student.”⁴²² The Senate Judiciary Committee concluded that “these high illiteracy rates are not the result of choice or happenstance. They are the product of the failure of state and local officials to afford equal educational opportunities”⁴²³ The strongest evidence of that failure can be seen in the only two states covered statewide by section 4(f)(4) of the VRA for Spanish: Texas and Arizona.⁴²⁴

Texas discriminated against Latinos in education in its earliest days as a republic, and later, as a state.⁴²⁵ Discrimination took two insidious forms. First, the intent of the educational system “was to reproduce the caste society of the Southwest, with Anglos at the top and Mexicans, Indians, and Blacks at the bottom.”⁴²⁶ As one Texas school superintendent remarked in 1930, “[m]ost of our Mexicans are of the lower class. They transplant onions, harvest them, etc. The less they know about everything else the better contented they are If a man has very much sense or education either, he

⁴¹⁸ See Consent Decree, *supra* note 261.

⁴¹⁹ See Amended Complaint, *United States v. City of Philadelphia*, Civil Action No. 2:06-cv-4592 (E.D. Pa. Apr. 26, 2007) (requesting relief for all voters who have been denied assistance), available at http://www.usdoj.gov/crt/voting/sec_203/documents/phillyamended_comp.pdf.

⁴²⁰ S. REP. NO. 94-295, at 28 (1975), reprinted in 1975 U.S.C.C.A.N. at 794.

⁴²¹ *Id.*

⁴²² *Id.* (quoting U.S. Comm’n on Civil Rights, *Toward Quality Education for Mexican Americans*, Report IV, 67 (Feb. 1974)).

⁴²³ S. REP. NO. 94-295, *supra* note 420, at 28.

⁴²⁴ See 28 C.F.R. pt. 55, app. (2007). Much of the discussion on education discrimination in Texas and Arizona was included in the congressional record supporting the VRARA. See NINA PERALES ET AL., *VOTING RIGHTS IN TEXAS 1982–2006* (2006), cited in *Hearing on Legislative Options*, *supra* note 255, at 466; TUCKER, *supra* note 376.

⁴²⁵ PERALES ET AL., *supra* note 424, at 9–10.

⁴²⁶ Juan F. Perea, *Buscando América: Why Integration and Equal Protection Fail to Protect Latinos*, 117 HARV. L. REV. 1420, 1439 (2004).

is not going to stick to this kind of work."⁴²⁷ Consistent with that viewpoint, the state adopted a practice of exempting Latino children from its mandatory school attendance law.⁴²⁸ Second, state officials intentionally segregated Latinos from Anglos in the schools, just as they did in virtually every other facet of public life.⁴²⁹ Their efforts proved so effective that by 1930, ninety percent of all Texas schools were segregated.⁴³⁰ State courts initially sanctioned that discrimination, citing the language needs of Latinos to receive a separate education in their own language.⁴³¹ Although Texas took an incremental step to integrate Latinos into Anglo schools in 1948,⁴³² full integration did not begin in earnest until after 1970.⁴³³

Linguistic segregation and failure to provide adequate resources for Spanish-speaking students in Texas schools has been an ongoing problem. In *United States v. Texas*, a federal court rejected the 1930 state court ruling in *Salvatierra* that endorsed the segregation of Del Rio public schools based on the pretext of providing separate schools for Spanish-speaking students.⁴³⁴ To remedy the stigma of that discrimination, the court ordered Anglos and Latino students alike to receive bilingual and bicultural education in Del Rio public schools.⁴³⁵ Despite this order, a decade later, the defendants "were found to have violated the constitutional and statutory rights of Mexican-American children throughout . . . Texas."⁴³⁶ The court determined that the state did not monitor and enforce compliance with requirements for non-English speaking students, was understaffed, and needed to "commit substantial additional resources" to remedy the discrimination.⁴³⁷ The state also failed to adequately identify LEP students, and—when it did—it only provided "one hour of intensive English per day for grades four through

⁴²⁷ *Id.* (quoting from HERSCHEL T. MANUEL, *THE EDUCATION OF MEXICAN AND SPANISH-SPEAKING CHILDREN IN TEXAS* 77 (1930)).

⁴²⁸ See Lupe S. Salinas & Dr. Robert H. Kimball, *The Equal Treatment of Unequals: Barriers Facing Latinos and the Poor in Texas Public Schools*, 14 *Geo. J. on Poverty L. & Pol'y* 215, 221–222 (2007).

⁴²⁹ See *United States v. Texas*, 506 F. Supp. 405, 412 (E.D. Tex. 1981), *rev'd and remanded on other grounds*, 680 F.2d 356 (5th Cir. 1982); Jorge C. Rangel & Carlos M. Alcalá, *Project Report: De Jure Segregation of Chicanos in Texas Schools*, 7 *HARV. C.R.-C.L. L. REV.* 307 (1972).

⁴³⁰ Rubén Donato, Martha Menchaca, & Richard R. Valencia, *Segregation, Desegregation, and Integration of Chicano Students: Problems and Prospects*, in *CHICANO SCHOOL FAILURE AND SUCCESS* 35 (Richard R. Valencia ed. 1991).

⁴³¹ See *Indep. Sch. Dist. v. Salvatierra*, 33 S.W.2d 790 (Tex. Civ. App. 1930), *cert. denied*, 52 U.S. 28 (1931).

⁴³² See Salinas & Kimball, *supra* note 428, at 223–24.

⁴³³ See generally *Cisneros v. Corpus Christi Indep. Sch. Dist.*, 324 F. Supp. 599, 606 (S.D. Tex. 1970) (holding that Latinos were "an identifiable ethnic minority" for purposes of desegregation under *Brown*); PERALES ET AL., *supra* note 424, at 10 (discussing school desegregation cases in the 1970s). For additional examples of successful school desegregation cases in Texas, see, e.g., *United States v. Midland Indep. Sch. Dist.*, 519 F.2d 60 (5th Cir. 1972); *Tasby v. Estes*, 517 F.2d 92 (5th Cir. 1975) (Dallas schools).

⁴³⁴ See *United States v. Texas*, 342 F. Supp. 24 (E.D. Tex. 1971).

⁴³⁵ See *id.* at 28.

⁴³⁶ *United States v. Texas*, 523 F. Supp. 703, 709 (E.D. Tex. 1981).

⁴³⁷ *United States v. Texas*, 506 F. Supp. 406, 427–28 (E.D. Tex. 1981).

twelve,” which experts concluded was insufficient.⁴³⁸ The court entered a remedial order that required “Texas and its educational agencies to improve and expand their programs of bilingual instruction” for LEP Mexican-American public school students.⁴³⁹ The state’s adoption of comprehensive legislation, the 1981 Bilingual and Special Language Programs Act,⁴⁴⁰ tracked “the court’s eventual remedial order quite closely” and thereby mooted it.⁴⁴¹

Texas has made very slow progress since then. In the wake of the state’s 1981 act, a federal court found the state’s implementation of its bilingual program in the Raymondville schools to be deficient.⁴⁴² At the time of the first trial in the case, only half of the bilingual education teachers were Mexican-American and native Spanish teachers.⁴⁴³ The remaining teachers were certified to teach bilingual classes after taking a 100-hour course that taught them just 700 words in Spanish,⁴⁴⁴ a shortcoming that was not corrected until after the Latino students sued.⁴⁴⁵ In early 2006, Latino plaintiffs moved for further relief under the court orders entered in the *Texas* litigation.⁴⁴⁶ Although the court denied the motion because of the state’s progress since the litigation had begun in 1970, it found that substantial disparities remained in the achievement scores of Latinos and non-Latinos in secondary school.⁴⁴⁷ Inadequate state funding, particularly in poorer school districts, has contributed to Latinos’ lower test scores.⁴⁴⁸ Today over 473,000 native-born voting-age Latinos in Texas are LEP, partly as result of the state’s education discrimination.⁴⁴⁹

In Arizona, like in Texas, segregated schooling was sanctioned by the state Supreme Court⁴⁵⁰ and by the state legislature, which passed a statute permitting school districts “to make such segregation of pupils as they may

⁴³⁸ *United States v. Texas*, 680 F.2d 356, 371 (5th Cir. 1982).

⁴³⁹ *United States v. Texas*, 523 F. Supp. at 709.

⁴⁴⁰ TEX. EDUC. CODE ANN. § 21.451, *et seq.* (Vernon 1981). In 1995, Texas mandated bilingual education and ESL programs in all state schools. *See id.* at § 29.051, *et seq.*

⁴⁴¹ *See United States v. Texas*, 680 F.2d at 372. The 1981 Bilingual and Special Language Programs Act marked the first time Texas provided bilingual education through the elementary grades, mandated bilingual education in districts with twenty or more LEP students in the same grade, and required the state to actively monitor implementation to ensure compliance. *Id.*

⁴⁴² *See Castañeda v. Pickard*, 648 F.2d 989, 1012–13 (5th Cir. 1981).

⁴⁴³ *Id.* at 1005.

⁴⁴⁴ *Id.*

⁴⁴⁵ *See Castañeda ex rel. Castañeda v. Pickard*, 781 F.2d 456, 471 (5th Cir. 1986).

⁴⁴⁶ *See United States v. Texas*, 2007 WL 2177369 at *16 (E.D. Tex. July 27, 2007).

⁴⁴⁷ *See id.* The court found there was evidence “that over eighty percent of LEP students in the seventh through ninth grade failed to perform satisfactorily” on the state achievement exam. *Id.* In addition, the progress “towards closing the achievement gaps between LEP students and students overall is less rapid at the secondary level than the elementary level.” *Id.*

⁴⁴⁸ *See ACCESS*, a Project of the Campaign for Educational Equity, Teacher’s College at Columbia University, Texas historical background of successful education cases, http://www.schoolfunding.info/states/tx/lit_tx.php3 (last visited Apr. 7, 2008).

⁴⁴⁹ PERALES ET AL., *supra* note 424, at 33.

⁴⁵⁰ *See Dameron v. Bayless*, 126 P. 273 (Ariz. 1912) (upholding segregated schools under *Plessy v. Ferguson*).

deem advisable."⁴⁵¹ Spanish-speaking Latino students were specifically targeted for segregation on the basis of their language.⁴⁵² It was not until the 1950s, after *Brown*, that Latino students became fully integrated into Arizona's public schools.⁴⁵³ Latinos suffered from the discriminatory effects of "1C classes" mandated by Arizona from 1919 until 1965, which required that all school courses be taught in English.⁴⁵⁴ Under that policy, Spanish-speaking students only received English lessons at a low-level, simplified curriculum that placed Latinos years behind English-speaking students.⁴⁵⁵ The discriminatory effects of the policy were magnified by the state's English literacy test for voting, which was first enacted in 1912 shortly after Arizona became a state.⁴⁵⁶ That test was adopted "to limit 'the ignorant Mexican vote' . . ." As recently as the 1960s, registrars applied the test to reduce the ability of blacks, Indians, and Hispanics to register to vote, including challenging minorities by asking "them to read and explain 'literacy' cards."⁴⁵⁷

Arizona erected other educational and political barriers for Latino students. In November 1988, Arizona voters narrowly enacted an English-only law, entitled "English as the Official Language," requiring the state to "act in English and in no other language."⁴⁵⁸ In *Ruiz v. Hull*, the Arizona Supreme Court struck down the English-only amendment as unconstitutional under the First and Fourteenth Amendments.⁴⁵⁹ The *Ruiz* court described the amendment as "the *most restrictive* Official English measure" in the nation, noting that "by its express language, it prohibits a public school teacher . . . and a monolingual Spanish-speaking parent from speaking in Spanish about

⁴⁵¹ Ariz. Rev. Code 1913 § 2750 (1913).

⁴⁵² Laura K. Muñoz, *Separate But Equal? A Case Study of Romo v. Laird and Mexican American Education*, at 1 (Organization of American Historians) (2001), available at <http://www.oah.org/pubs/magazine/deseg/munoz.html>.

⁴⁵³ See *Ortiz v. Jack*, No. Civ-1723 (D. Ariz. filed Feb. 20, 1952) (after filing of court case, Glendale Board of Education agreed to discontinue the segregation and discrimination of Mexican school children); *Gonzalez v. Sheeley*, 96 F. Supp. 1004, 1009 (D. Ariz. 1951) (enjoining segregation of Mexican school children by reasoning, "a paramount requisite in the American system of public education is social equality. It must be open to all children by unified school association, regardless of lineage.").

⁴⁵⁴ Kellie Rolstad, Kate S. Mahoney & Gene V. Glass, *Weighing the Evidence: A Meta-Analysis of Bilingual Education in Arizona*, 29 BILINGUAL RES. J. 1, 47-48 (2005).

⁴⁵⁵ *Id.*

⁴⁵⁶ Ariz. Rev. Stat. Ann. §§ 16-101.A.4, 16-101.A.5 (1956). In order to vote, the literacy test required a person to show the ability to: "read the Constitution of the United States in the English language in such manner as to show he is neither prompted nor reciting from memory, unless prevented from doing so by physical disability" and "write his name, unless prevented from so doing by physical disability." *Id.*

⁴⁵⁷ DAVID R. BERMAN, *ARIZONA POLITICS AND GOVERNMENT: THE QUEST FOR AUTONOMY, DEMOCRACY, AND DEVELOPMENT* 48-49 (1998). In *Oregon v. Mitchell*, the Supreme Court found that application of Arizona's literacy test had severely depressed Latino voter participation. See *Oregon v. Mitchell*, 400 U.S. 112, 132-33 (1970). The test was invalidated by the VRA's nationwide ban on literacy tests in the 1970 amendments, which *Mitchell* upheld. See *id.*; 42 U.S.C. § 1973aa (2000).

⁴⁵⁸ *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 924 (9th Cir. 1995) (en banc).

⁴⁵⁹ *Ruiz v. Hull*, 957 P.2d 984 (Ariz. 1998) (en banc).

a child's education⁴⁶⁰ In a 2000 ballot initiative, Arizona voters passed Proposition 203, modeled on California's less restrictive Proposition 227 that banned bilingual education and required schools to use mostly English immersion programs to educate children who have limited English proficiency.⁴⁶¹

Arizona's bilingual education ban and failure to fund ELL programs denied equal educational opportunities to Latino students enrolled in the public schools. In 2000, a federal court found the state liable for its years of "inaction" in addressing the disparity between language minority and Anglo students, which resulted from only providing a third of the necessary educational funding.⁴⁶² The state's *Lau* violations included overcrowded classrooms, inadequate facilities, lack of qualified bilingual teachers, poor tutoring, and insufficient materials for ELL and content area studies.⁴⁶³ In 2005, a federal district court cited Arizona for contempt for continuing to under-fund ELL programs.⁴⁶⁴ In rendering its contempt citation, the *Flores* court found that "thousands of children who have now been impacted by the State's continued inadequate funding of ELL programs had yet to begin school when Plaintiffs filed this case."⁴⁶⁵ The court also observed that many of Arizona's ELL students would continue to experience the long term effects of the state's intransigence.⁴⁶⁶ The state still did not comply, incurring millions of dollars in fines by the end of February 2006 as the Democratic governor and Republican legislature struggled to reach an agreement on funding.⁴⁶⁷

The two states that are covered statewide for Spanish under only section 203—California and New Mexico⁴⁶⁸—also have a lengthy record of education discrimination against Latinos. California's history parallels that of

⁴⁶⁰ *Id.* at 995–96 (emphasis in original). The *Ruiz* court also found that the law impaired the First Amendment rights of elected officials and their constituents to communicate. *Id.* at 988.

⁴⁶¹ See Prop. 203 (Ariz. 2000); Prop. 227 (Cal. 1998). For an extended discussion of Proposition 227 and its impact on English language learners, see Kevin R. Johnson & George A. Martínez, *Discrimination by Proxy: The Case of Proposition 227 and the Ban on Bilingual Education*, 33 U.C. DAVIS L. REV. 1227 (2002).

⁴⁶² *Flores v. Arizona*, 160 F. Supp. 2d 1043, 1044 (D. Ariz. 2000).

⁴⁶³ *Flores v. Arizona*, 172 F. Supp. 2d 1225 (D. Ariz. 2000).

⁴⁶⁴ *Flores v. Arizona*, 405 F. Supp. 2d 1112 (D. Ariz. 2005) (contempt order). The state's own study showed that it needed to spend approximately four and one-half times the funds budgeted per ELL student in 2001, and nearly twice the amount budgeted in 2004 to adequately fund ELL programs. See National Conference of State Legislatures, *Arizona English Language Learner Cost Study* (Feb. 2005).

⁴⁶⁵ *Id.* at 1113.

⁴⁶⁶ *Id.* at 1114.

⁴⁶⁷ See ACCESS, Project of the Campaign for Educational Equity, Teachers College, Columbia University, <http://www.schoolfunding.info/news/litigation/2-28-06azellcoststudy.php3> (last visited Apr. 7, 2008).

⁴⁶⁸ Tucker & Espino, *Government Effectiveness and Efficiency*, *supra* note 21, at 168. Texas is covered statewide for Spanish under both sections 4(f)(4) and 203. *Id.*

Arizona and Texas.⁴⁶⁹ California was under a consent decree for *Lau* violations against ELL Mexican-American students until 2002, when the court reluctantly terminated the decree after noting the state's "disappointing, and even offensive" showing of lackluster compliance.⁴⁷⁰ In one of the first cases applying *Lau*, a New Mexico school district was found in violation of Title VI for not providing English language instruction to Spanish-surnamed students and for failing to hire Latino school personnel.⁴⁷¹ Later, Latino students succeeded in their class action lawsuit against the State of New Mexico and its public education providers for violating section 504 of the Rehabilitation Act in their treatment of students who suffer from a "language handicap."⁴⁷²

Other jurisdictions covered by section 203 for Spanish have been found liable for education discrimination against Latinos. Boston has been subject to a variety of orders to improve its bilingual education program.⁴⁷³ Denver is under a consent decree for failing to provide adequate educational services to 13,000 ELL students,⁴⁷⁴ nearly two decades after being held liable for the same violation.⁴⁷⁵ Florida continues to be under a 2003 statewide decree governing its bilingual education program.⁴⁷⁶ Illinois has been held liable for education discrimination against Latino students,⁴⁷⁷ and a court cited one of its school districts for segregating ELL students from the rest of the student population.⁴⁷⁸ Several New York school districts have provided unequal edu-

⁴⁶⁹ See, e.g., *Westminster Sch. Dist. of Orange County v. Mendez*, 161 F.2d 774, 774 (9th Cir. 1947); *People v. San Diego Unified Sch. Dist.*, 96 Cal. Rptr. 658 (Cal. 4th Cir. 1971), cert. denied, 405 U.S. 1016 (1972); see also Daniel Aaron Rochmes, Note, *Blinded by the White: Latino School Desegregation and the Insidious Allure of Whiteness*, 13 TEX. HISP. J.L. & POL'Y 7, 9-10, 12-14 (2007); Perea, *supra* note 426, at 1420-24, 1428-29, 1437-46 (summarizing evidence of education and language discrimination against Latinos in California).

⁴⁷⁰ *Comite De Padres De Familia v. O'Connell*, 2004 WL 179212, at *4 (Cal. Dist. Ct. App. Jan. 30, 2004).

⁴⁷¹ See *Serna v. Portales Mun. Sch.*, 499 F.2d 1147, 1147 (10th Cir. 1974).

⁴⁷² See *N. M. Ass'n for Retarded Citizens v. State of New Mexico*, 678 F.2d 847 (10th Cir. 1982).

⁴⁷³ See *supra* notes 410-412 and accompanying text.

⁴⁷⁴ See Department of Justice, *Denver Public Schools to Create New Program for Students with Limited English Language Skills*, Feb. 4, 1999, available at 1999 WL 33300905.

⁴⁷⁵ See *Keys v. Sch. Dist. No. 1*, 576 F. Supp. 1503 (D. Col. 1983). The *Keys* decision came ten years after the Supreme Court remanded the case based upon a more relaxed standard for proving school segregation. See *Keys v. Sch. Dist. No. 1*, 413 U.S. 189 (1973) (holding that a finding of intentionally segregative school board actions in a meaningful portion of a school system created a prima facie case of unlawful segregated design on the part of school authorities, shifting to those authorities the burden of proving that other segregated schools within the system were not the result of intentionally segregative actions).

⁴⁷⁶ See *League of United Latin Am. Citizens et al. v. Fla. Bd. of Educ.*, No. 90-1913-Civ.-Scott (S.D. Fla. 1990) (consent decree); *League of United Latin American Citizens et al. v. Florida Bd. of Educ.*, No. 90-1913-Civ.-Moreno (S.D. Fla. Sept. 2, 2003) (amending consent decree).

⁴⁷⁷ *Gomez v. Illinois State Bd. of Educ.*, 811 F.2d 1030 (7th Cir. 1987) (finding that Spanish-speaking LEP students stated a claim under the EEOA because of the state's failure to provide bilingual instruction).

⁴⁷⁸ *People Who Care v. Rockford Bd. of Educ. Sch. Dist. No. 205*, 851 F. Supp. 905 (N.D. Ill. 1994), *aff'd in part and rev'd in part*, 111 F.3d 528 (7th Cir. 1997).

ational opportunities to Latinos,⁴⁷⁹ including discrimination remedied in a 2000 desegregation case in Yonkers, where there were “vestiges of segregation” in areas including “services for LEP students.”⁴⁸⁰ In a 1983 decision, the Seattle school district was cited for failing to adequately fund transitional bilingual education programs.⁴⁸¹ These cases illustrate the ample evidence of education discrimination against Latinos that supports Spanish language assistance under section 203.

V. THE IMPACT OF DISCRIMINATION ON LANGUAGE MINORITY POLITICAL PARTICIPATION

Opponents of “bilingual ballots” dispute the effects of education discrimination on the access of language minorities to the political process. According to K.C. McAlpin, supporters of section 203 “said this lack of [educational] opportunity had caused these groups’ literacy rate to be below the national average, and argued that they needed help while the educational system caught up.”⁴⁸² McAlpin contended that this reasoning no longer applied because the “driving factor behind the literacy rate of the two largest of these groups, Asians and Hispanics, has little to do with educational opportunities in this country.”⁴⁸³ Roger Clegg concurred, asserting that Congress had to “remake the record . . . [showing] that State discrimination, official State discrimination is, A, the cause of disparities in voter turnout and . . . that, B, this law is a congruent and proportional response to the educational discrimination that still exists.”⁴⁸⁴ Clegg demurred about attempting to recreate the record on state discrimination because he claimed that “there is much less State-sponsored discrimination in 2005.”⁴⁸⁵

McAlpin and Clegg are mistaken about the strength of the record and the breadth of congressional enforcement powers. Ongoing education discrimination and the effects of past discrimination continue to impair the ability of language minorities to become literate in English.⁴⁸⁶ Moreover, coverage under section 203 need not be derived from an “administratively

⁴⁷⁹ See, e.g., *Jose P. v. Ambach*, 3 EHLR 551:412 (E.D.N.Y. 1979), *aff’d*, 669 F.2d 865 (2d Cir. 1982), *consolidated with* *United Cerebral Palsy (UCP) v. Bd. of Educ.*, No. 79-C-560 (E.D.N.Y. Aug. 10, 1979) and *Dyrcia S. v. Bd. of Educ.*, No. 79-C-2562 (E.D.N.Y. 1979); *Rios v. Read*, 480 F. Supp. 14 (E.D.N.Y. 1978); *Cintron v. Brentwood Union Free Sch. Dist.*, 455 F. Supp. 57 (E.D.N.Y. 1978); *Aspira of New York, Inc. v. Bd. of Educ. of the City of New York*, 394 F. Supp. 1161 (S.D.N.Y. 1975).

⁴⁸⁰ *United States v. City of Yonkers*, 123 F. Supp. 2d 694, 723 (S.D.N.Y. 2000).

⁴⁸¹ See *Seattle Sch. Dist. et al. v. State of Washington*, No. 81-2-1713-1 (Thurston County Super. Ct. 1983) (“Seattle II”).

⁴⁸² *H. Hearing on Bilingual Election Requirements Part II*, *supra* note 16, at 64 (testimony of K.C. McAlpin).

⁴⁸³ *Id.*

⁴⁸⁴ Nov. 2005 Clegg Testimony, *supra* note 168, at 50.

⁴⁸⁵ *Id.* Neither Clegg nor McAlpin addressed any of the cases successfully demonstrating education discrimination cases brought in jurisdictions covered by section 203. Their silence on this issue suggests that they are unable to provide a response to that evidence.

⁴⁸⁶ See *supra* Part IV.

cumbersome” formula based solely “on educational disparities, or one based on literacy rates.”⁴⁸⁷ Coverage also does not have to be limited only to those who have personally experienced education discrimination.⁴⁸⁸ Contrary to the assertion of some critics such as Mauro Mujica,⁴⁸⁹ the effective exercise of the vote need not be conditioned on understanding English.⁴⁹⁰ As long as Congress establishes that English-only elections impair the ability of language minority groups to cast an effective ballot, it may use a formula for section 203 coverage derived from LEP and illiteracy rates among voting-age citizens from those groups to mandate language assistance.⁴⁹¹

This Part of the Article examines the link between discrimination against language minorities and their depressed political participation. It considers several factors. First, it reviews the most current Census data regarding English proficiency rates among the four language groups covered by section 203. It then documents the illiteracy rates of covered language minority citizens. Although not required to establish the constitutionality of section 203, I briefly describe some of the evidence of voting discrimination against language minorities in the covered jurisdictions because federal observer coverage under section 8 of the VRA, a common remedy for a 203 violation, is premised upon findings of violations of the Fourteenth and Fifteenth Amendments.⁴⁹² Finally, this Part examines how discrimination against language minorities results in decreased voter participation rates among covered language minority citizens. This review reveals that the record before Congress at the time of reauthorization in 2006 was robust, and the additional evidence of voter participation rates further insulates section 203 from a constitutional attack under *Boerne*.

A. Lack of English Proficiency among Covered Language Groups

Pervasive education discrimination in jurisdictions covered by section 203 has had “a deleterious effect on the ability of language minorities to become English proficient and literate.”⁴⁹³ As a result, without the language assistance in voting mandated by section 203, ELL citizens would be effectively deprived by the state of their constitutional right to vote. Unequal educational opportunities in covered jurisdictions are heightened by insufficient English-as-a-Second-Language (ESL) programs for native-born ELL children who were not taught English in public schools⁴⁹⁴ and for adults,

⁴⁸⁷ *Gaston County*, 395 U.S. 285, 292 (1969).

⁴⁸⁸ See *supra* Part II(B).

⁴⁸⁹ See *S. Hearing on Continuing Need for Section 203*, *supra* note 16, at 8 (testimony of Mauro Mujica).

⁴⁹⁰ See *Katzenbach v. Morgan*, 384 U.S. 641, 658 (1956).

⁴⁹¹ See *supra* Parts II(A)-(B).

⁴⁹² See 42 U.S.C. § 1973aa-6 (2000).

⁴⁹³ H.R. REP. NO. 102-655, at 6 (1992).

⁴⁹⁴ Nearly three-quarters of all ELL students in this country are native-born U.S. citizens. See OELA, *supra* note 329, at 4, 19 (observing that immigrant students comprised 1.1 million

including more recent arrivals.⁴⁹⁵ It seems likely that lack of adequate ESL programs for both groups has contributed to very high percentages of voters who lack English proficiency. Among the 403 language groups for which Census data is available in the 367 covered political subdivisions, an average of 13.1% of voting-age citizens are LEP in one or more of the languages triggering coverage.⁴⁹⁶

The percentage of Alaskan Native voting-age citizens who are LEP is among the highest of all covered language groups. Reservations covered for Alaska Native languages have an average of eighty-six voting-age citizens who are LEP.⁴⁹⁷ Although the number may seem small, it must be viewed in light of the fact that the villages are sparsely populated and geographically separated from one another across great distances.⁴⁹⁸ Taken as a percentage of the average number of voting age citizens in each village, the extent of the need for assistance becomes more apparent because section 203 is based in part upon a 5% trigger. In the Alaska boroughs individually covered for Alaska Native languages, an average of 22.6% of voting-age citizens are LEP in the covered language.⁴⁹⁹ Forty percent of covered Alaska Native reservations have LEP rates exceeding 50%.⁵⁰⁰ Therefore, although the number of LEP Alaskan Native voters may seem small, in relative terms it is quite large.

Although American Indians also tend to live in very isolated and sparsely populated areas, the average number of American Indian voters who are LEP in the covered language is much higher than it is for Alaska Natives. Among the 129 reservations triggering American Indian language assistance, an average of 721 voting-age citizens are LEP in the covered language.⁵⁰¹ In jurisdictions covered for American Indian languages, an average of 16.3% of all voting-age citizens are LEP in the covered language.⁵⁰² Over one-quarter of covered American Indian reservations have LEP rates

of the 4.5 million LEP students enrolled in the United States and its territories and possessions).

⁴⁹⁵ See generally TUCKER, *supra* note 212; James Thomas Tucker, *The ESL Logjam: Waiting Times for ESL Classes and the Impact on English Language Learners*, 96 NAT'L CIVIC REV. 30 (Mar. 2007) (discussing lengthy waiting lists and lack of ESL services in twenty-two cities in sixteen states covered by section 203). Data from the 184 ESL providers was included in the congressional record and was cited in the House report. See *H.R. 9 Hearing Part II*, *supra* note 252, at 74-77 (testimony of Dr. James Thomas Tucker); H.R. REP. NO. 109-478, at 60 n.159 (2006).

⁴⁹⁶ Tucker & Espino, *Government Effectiveness and Efficiency*, *supra* note 21, at 177. All of the data presented in *Government Effectiveness and Efficiency* was included in the congressional record. See TUCKER ET. AL., LANGUAGE ASSISTANCE PRACTICES, *supra* note 178. Where the data is available in *Government Effectiveness and Efficiency* (and most is), I will only cite to that article, and not the parallel cite in the congressional record.

⁴⁹⁷ Tucker & Espino, *Government Effectiveness and Efficiency*, *supra* note 21, at 181.

⁴⁹⁸ *Id.*

⁴⁹⁹ *Id.*

⁵⁰⁰ *Id.*

⁵⁰¹ *Id.* at 183.

⁵⁰² *Id.* at 184.

exceeding 50%.⁵⁰³ Apache County, Arizona had the largest single population of language minority voters who need language assistance: 11,245 Navajo LEP voters, in addition to LEP Apache and Hopi voters.⁵⁰⁴

Jurisdictions covered for Asian voters have the lowest LEP rates among all of the language groups, comprising an average of only 2.4% of all voting-age citizens.⁵⁰⁵ However, that low percentage masks a tremendous need among the tens of thousands of Asian voters who live in large urban centers. Indeed, nearly 90% of the twenty-seven jurisdictions covered for Asian languages are covered by the 10,000 population trigger, rather than the 5% trigger.⁵⁰⁶ Los Angeles County provides the best example of Asian voters representing a large number of voters despite comprising a small percentage of the overall population: according to the 2002 Census Determinations, “there were nearly a quarter million Asian LEP voters in the County, including 95,700 Chinese-speaking citizens; 42,930 Korean-speaking citizens; 34,985 Filipino-speaking citizens; 30,340 Vietnamese-speaking citizens; and 12,510 Japanese-speaking citizens.”⁵⁰⁷ These large numbers illustrate why section 203 was amended in 1992 to include not only jurisdictions in which at least 5% of the citizen voting age population is LEP, but also urban areas with 10,000 or more LEP voting-age citizens.⁵⁰⁸ The need for assistance is great in the sixteen jurisdictions covered for Asian languages.

Spanish represents by far the largest single group of LEP voting-age citizens in the covered jurisdictions. For the three states covered statewide under the section 203 trigger for Spanish—California, New Mexico, and Texas—there was “an average of 632,345 Spanish-speaking LEP voters, or 5.8% of all voting age citizens.”⁵⁰⁹ Among the counties, boroughs, and cities individually covered for Spanish, on average there were “14,335 Spanish Heritage LEP voters, comprising an average of 10.4% of all voting age citizens.”⁵¹⁰ Ten covered jurisdictions had more than 75,000 voting-age Spanish-speaking citizens.⁵¹¹

⁵⁰³ *Id.*

⁵⁰⁴ *Id.* at 182–83.

⁵⁰⁵ *Id.* at 185.

⁵⁰⁶ *Id.* at 184–85. My reference to twenty-seven jurisdictions refers to the languages individually covered in the sixteen jurisdictions that are covered for one or more Asian languages. *See id.* at 169–70, 184–85.

⁵⁰⁷ *Id.* at 185.

⁵⁰⁸ *See* S. REP. NO. 102-315 at 16 (adding the 10,000 voting-age citizen trigger to cover “highly populated metropolitan areas” where “many language minority citizens in need of assistance are not covered because they do not make up a large enough percentage of the local population to trigger coverage”); *see also* 42 U.S.C. § 1973aa-1a(b)(2)(A)(i)(II) (2000) (describing the trigger).

⁵⁰⁹ Tucker & Espino, *Government Effectiveness and Efficiency*, *supra* note 21, at 179.

⁵¹⁰ *Id.* at 179.

⁵¹¹ *Id.* at 180.

B. Illiteracy Rates of Covered Language Groups

The combined effects of education discrimination and lack of ESL opportunities contribute significantly to high illiteracy rates for covered language groups. Among the 403 language groups for which complete Census data is available, the average illiteracy rate for covered LEP voting age citizens is 18.8%, nearly fourteen times the national illiteracy rate of 1.35%.⁵¹² Over 15% of all covered language groups had illiteracy rates exceeding 50%, or more than thirty-seven times the national average.⁵¹³ By contrast, few covered jurisdictions had low illiteracy rates among LEP voters. Only about 10% had illiteracy rates of 2.5% or less, which is still nearly double the national average.⁵¹⁴

The illiteracy rates vary greatly among the four covered language groups, with each far exceeding the national average. Alaska Natives have the highest rate.⁵¹⁵ An average of 28.3% of Alaska Native LEP voting-age citizens are illiterate, nearly twenty-one times the national rate.⁵¹⁶ Forty percent of covered Alaska Native reservations have illiteracy rates exceeding 50%.⁵¹⁷

Among covered LEP American Indian voting-age citizens, an average of 11.7% are illiterate, nearly nine times the national rate.⁵¹⁸ Over one-quarter of covered American Indian reservations have illiteracy rates exceeding 50%.⁵¹⁹ Illiteracy rates are especially high in the six Arizona counties covered for the Navajo and Tohono O'dham languages, where over one-quarter of all LEP voters are illiterate, over eighteen times the national average.⁵²⁰ Maverick County, Texas, had one of the highest illiteracy rates for any covered LEP group, 86.2% of all Kikapoo native speakers.⁵²¹

Asian LEP voters had the lowest illiteracy rates among the four covered language groups.⁵²² On average, 8.5% of all voting-age citizens who are LEP in an Asian language are illiterate, more than six times the national rate.⁵²³ However, illiteracy rates are even higher in many jurisdictions covered for Asian languages.⁵²⁴ Low educational attainment among many covered Asian

⁵¹² *Id.* at 178–79.

⁵¹³ *See id.* at 178.

⁵¹⁴ *See id.*

⁵¹⁵ *See id.* at 179, 181, 184, 186.

⁵¹⁶ *Id.* at 181.

⁵¹⁷ *Id.*

⁵¹⁸ *Id.* at 184.

⁵¹⁹ *Id.*

⁵²⁰ *Id.*

⁵²¹ *Id.*

⁵²² *Id.* at 186.

⁵²³ *Id.*

⁵²⁴ *See H.R. 9 Hearing Part II, supra* note 17, at 54 (testimony of Karen Narasaki); *see S. Hearing on Continuing Need for Section 203, supra* note 16, at 118–20 (statement of Karen Narasaki); Magpantay & Yu, *supra* note 255, at 19–21, *reprinted in Hearing on Legislative Options, supra* note 255, at 331–33; PHILIP A. OLAYA ET AL., ASIAN AMERICANS AND THE VOTING RIGHTS ACT: THE CASE FOR REAUTHORIZATION 27–29 (ASIAN AMERICAN LEGAL DE-

language voters shatters the so-called “model minority” myth that some critics have used to attack “bilingual ballots.”⁵²⁵

Voting-age Spanish-speaking citizens who are LEP have the second highest illiteracy rate among the covered language groups, trailing only Alaska Natives. California, New Mexico, and Texas had an average illiteracy rate among LEP Spanish-speaking voting-age citizens of 16.3%, twelve times the national rate.⁵²⁶ Among the 217 political subdivisions separately covered for Spanish, the average illiteracy rate was 20.8%, more than fifteen times the national rate.⁵²⁷ Over half had illiteracy rates exceeding 20%.⁵²⁸

Many of those suffering from illiteracy are victims of segregated schooling and the lack of equal educational opportunities—particularly for English language learning and bilingual programs—following court-ordered integration.⁵²⁹ The strength of the illiteracy data is much greater than what the Court has required in upholding suspensions of illiteracy tests and English-only elections.⁵³⁰ The combined weight of the high LEP and illiteracy rates goes far to establish the record needed to support the constitutionality of section 203.

C. Voting Discrimination against the Covered Language Groups

Evidence of voting discrimination is not required to uphold section 203 under *Boerne* because its trigger rests solely on the effects of education discrimination.⁵³¹ By comparison, section 4(f)(4), which results in coverage under section 5, applies to “those jurisdictions with the more serious problems” of voting discrimination against language minorities.⁵³² Specifically, “the more severe remedies [of section 5 coverage] . . . are premised not only on educational disparities,” like the less stringent provisions under section 203, “but also on evidence that language minorities have been subjected to ‘physical, economic, and political intimidation’ when they seek to participate in the political process.”⁵³³ Although not necessary under the constitutional analysis, if a record of voting discrimination is present in cov-

FENSE & EDUC. FUND 2006), attached to S. Hearing on Continuing Need for Section 203, *supra* note 16, at 229 (testimony of Margaret Fung).

⁵²⁵ See *infra* note 567; S. Hearing on Continuing Need for Section 203, *supra* note 16, at 117 (statement of Karen Narasaki).

⁵²⁶ Tucker & Espino, *Government Effectiveness and Efficiency*, *supra* note 21, at 179.

⁵²⁷ *Id.* at 180.

⁵²⁸ *Id.*

⁵²⁹ See *supra* Part IV, at 59.

⁵³⁰ See *supra* Part II, at 23.

⁵³¹ See *supra* notes 48–50, 295–297, 492–493 and accompanying text.

⁵³² S. REP. NO. 94-295 at 31 (1975), reprinted in 1975 U.S.C.C.A.N. at 798; see also S. REP. NO. 94-295, at 9 (1975), reprinted in 1975 U.S.C.C.A.N. at 775 (stating section 4(f)(4) applies to areas “where severe voting discrimination was documented” against language minorities).

⁵³³ 121 CONG. REC. H16,244 (June 2, 1975) (statement of Rep. Don Edwards).

ered jurisdictions, it should certainly help sustain section 203 just as it does section 4(f)(4).

There is a significant past and present history of racially polarized voting that denies language minority voters an equal opportunity to elect candidates of their choice. As of 2000, no Alaska Natives, American Indians, or Latinos, had been elected to Congress from a district in which they were not a majority of the registered voters.⁵³⁴ Parties in a Florida case stipulated that “that racially polarized voting exists throughout Florida to varying degrees,” encompassing Latinos as well as African-Americans.⁵³⁵ Latinos in Texas and elsewhere have made a similar showing of racially polarized voting.⁵³⁶ American Indians provided “substantial evidence, both statistical and lay, [which] demonstrates that voting in South Dakota is racially polarized among whites and Indians” in two state legislative districts that included several Sioux reservations.⁵³⁷ At least some Asian voters experienced comparable discrimination. A study of state and municipal elections in California between 1998 and 2002 found “evidence of bloc voting in every race where a Vietnamese candidate is pitted against a White candidate,” with Vietnamese voting “regularly as a bloc in order to protect the interests of their community against White majorities inclined to defeat them.”⁵³⁸

The presence of racially polarized voting has supported numerous successful section 2 cases, particularly for American Indian and Spanish language voters who provide the basis for coverage in an overwhelming majority of section 203 jurisdictions.⁵³⁹ Just one month before the VRARA became law, a federal court issued a preliminary finding of racially discriminatory intent in Osceola County as a result of Florida’s adoption and maintenance of an at-large voting system under which no Latino candidate had ever been elected.⁵⁴⁰ Within days of that decision, the Supreme Court struck down the Texas congressional redistricting plan that divided a geographically com-

⁵³⁴ NAT’L COMM’N ON THE VOTING RIGHTS ACT, PROTECTING MINORITY VOTERS: THE VOTING RIGHTS ACT AT WORK, 1982–2005, 43–46 (2006) reprinted in *Evidence of Continued Need Hearing*, *supra* note 178, at 163–66.

⁵³⁵ DeGrandy v. Wetherell, 794 F. Supp. 1076, 1079 (N.D. Fla. 1992), *aff’d in part and rev’d in part on other grounds*, Johnson v. DeGrandy, 512 U.S. 997 (1994).

⁵³⁶ Session v. Perry, 298 F. Supp. 2d 451, 492 (E.D. Tex. 2004), *vacated and remanded on other grounds*, Jackson v. Perry, 543 U.S. 941 (2004); see Yishaiya Absoch et al., *An Assessment of Racially Polarized Voting Both For and Against Latino Candidates*, address at Voting Rights Act Research Roundtable (Feb. 9, 2006), available at http://www.ucdc.edu/faculty/Voting_Rights/Papers/1%20-%20Barreto%20et%20al.pdf, reprinted in *Evidence of Continued Need Hearing*, *supra* note 178, at 2415–50.

⁵³⁷ Bone Shirt v. Hazeltine, 336 F. Supp. 2d 976, 1036 (D.S.D. 2004).

⁵³⁸ Christian Collet, *Bloc Voting, Polarization and the Panethnic Hypothesis: The Case of Little Saigon*, 67 J. OF POL. 907, 925–929 (August 2005), reprinted in *Hearing on Legislative Options*, *supra* note 255, at 175, 176, 195.

⁵³⁹ See Tucker & Espino, *Government Effectiveness and Efficiency*, *supra* note 21, at 169–70; see also *supra* Part III.

⁵⁴⁰ See Order, United States v. Osceola County, 474 F. Supp. 2d 1254 (M.D. Fla. 2006), available at http://www.usdoj.gov/crt/voting/sec_2/osceola_pi_order.pdf; see also Judge Gregory A. Presnall’s ruling, Transcript at 13-16 (June 26, 2006) (on file with author) (describing evidence of racially discriminatory intent).

pact community of 100,000 Latino voters in response to widespread racial bloc voting.⁵⁴¹ In Montana, a court reached a similar finding in Blaine County, where no American Indian had served as a county commissioner in the county’s eighty-six-year history, despite the fact that American Indians comprised over one-third of the population.⁵⁴² Lawrence, Massachusetts agreed to change its at-large method of electing members of its city council and school board only after protracted litigation over the widespread disenfranchisement of Latinos as a result of the city’s section 203 violations.⁵⁴³ South Dakota presented one of the starker examples of deliberate segregation,⁵⁴⁴ drawing a sanitation district that purposefully excluded Indian voters in a district reminiscent of the “uncouth twenty-eight-sided figure” struck down in *Gomillion v. Lightfoot*.⁵⁴⁵ Commentators and witnesses provided Congress with other examples too numerous to describe here.⁵⁴⁶

⁵⁴¹ See *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006).

⁵⁴² See *United States v. Blaine County*, 363 F.3d 897 (9th Cir. 2004).

⁵⁴³ See *United States v. City of Lawrence, Mass.* (D. Mass. 1998). A summary of the Lawrence litigation is available at USDOJ, Recent Section 2 Activities (2007), http://www.usdoj.gov/crt/voting/litigation/recent_sec2.htm#lawrence.

⁵⁴⁴ See *United States v. Day County, S.D. and Enemy Swim Sanitary Dist.* (D.S.D. 1999). A summary of the *Enemy Swim* litigation is available in USDOJ, *New South Dakota Sanitary District Established to Include Native Americans Under Agreement with Justice Department* (2000), <http://www.usdoj.gov/opa/pr/2000/June/363cr.htm>.

⁵⁴⁵ 364 U.S. 339, 341 (1960). The Alabama legislature enacted the racial gerrymander struck down in *Gomillion* to exclude all but four or five black voters from the city limits of Tuskegee, while not excluding any of the white voters or residents. *Id.*

⁵⁴⁶ For a sampling, see generally Jeanette Wolfley, *Jim Crow, Indian Style: The Disenfranchisement of Native Americans*, 16 AM. INDIAN L. REV. 368 (1990), reprinted in *Voting Rights Act Language Assistance Amendments of 1992: Hearings on S. 2236 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 102d Cong. 368–403 (1992); LAUGHLIN McDONALD & DANNY LEVITAS, *VOTE: THE CASE FOR EXTENDING AND AMENDING THE VOTING RIGHTS ACT 727–90* (2006), reprinted in *Evidence of Continued Need Hearing*, *supra* note 178, at 1122–85 (regarding American Indians); Testimony of Laughlin McDonald, Director of the ACLU’s Voting Rights Project, appendix, reprinted in *Voting Rights Act: The Continuing Need for Section 5: Hearing Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 109th Cong. 149–65 (2005) (regarding American Indians); Laughlin McDonald, *The Voting Rights Act of Indian Country: South Dakota, A Case Study*, 29 AM. INDIAN L. REV. 43 (2004–2005) (regarding American Indians); Dan McCool & Susan Olson, *Voting Rights Cases Brought on Behalf of American Indians and/or Interpreting the Voting Rights Act*, in *NATIVE VOTE: AMERICAN INDIANS, THE VOTING RIGHTS ACT, AND THE RIGHT TO VOTE*, reprinted in *H. Hearing on Bilingual Election Requirements Part II*, *supra* note 16, at 259–68 (regarding American Indians); Magpantay & Yu, *supra* note 255, at 3–12, reprinted in *Hearing on Legislative Options*, *supra* note 255, at 315–24 (regarding Asians); CASE FOR ASIANS, *supra* note 524, at 15–24 (regarding Asians); Narasaki Senate Statement, *supra* note 390, at 109–16 (regarding Asians); JAMES THOMAS TUCKER, *NALEO EDUCATIONAL FUND, THE EXPERIENCE OF LATINO ELECTED OFFICIALS AND CIVIC LEADERS WITH VOTING DISCRIMINATION: THE CONTINUING NEED FOR THE TEMPORARY PROVISIONS OF THE VOTING RIGHTS ACT* (Sept. 2006), reprinted in *Hearing on Legislative Options*, *supra* note 255, at 279–311 (Latinos); TUCKER, *supra* note 376 (regarding Latinos and American Indians); PERALES ET AL., *supra* note 424 (regarding Latinos); Newman, *supra* note 256 (regarding Latinos); JUAN CARTAGENA, *VOTING RIGHTS IN NEW YORK 1982–2006*, reprinted in *Evidence of Continued Need Hearing*, *supra* note 178, at 1836–1927 (regarding Latinos and Asians); Joaquin G. Avila, *Voting Rights in California: 1982–2006*, 17 S. CAL. REV. L. & SOC. SCI. 131 (2007) (regarding Latinos and Asians); Alvaro Bedoya, *The Unforeseen Effects of Georgia v. Ashcroft on the Latino Commu-*

There also were widespread violations of the preclearance requirements in the three states completely covered and six states partially covered by section 5.⁵⁴⁷ Monterey County, one of four counties in California covered under section 4(f)(4) for Spanish, refused to submit any of its ordinances for preclearance until a federal court ordered it to do so.⁵⁴⁸ Following the recommendation of the state attorney general who criticized preclearance as a “facial absurdity,”⁵⁴⁹ South Dakota, which had been covered for American Indian languages in two counties since 1976, refused to make all but a handful of section 5 submissions until losing an enforcement action in 2002.⁵⁵⁰ In Arizona, covered statewide for Spanish, over eighty percent of its section 5 objections have occurred since 1982.⁵⁵¹ Those objections have affected nearly half of the state’s counties and included a 2002 statewide redistricting plan that discriminated against Latinos.⁵⁵² Texas, also covered statewide for Spanish, had the second highest total of section 5 objections since 1982 with at least 107, including ten statewide objections.⁵⁵³ Texas also had more successful section 5 enforcement actions and discriminatory voting changes that were withdrawn after submission than any other state as of 2005.⁵⁵⁴

Additionally, there is widespread non-compliance with section 203. Between 1992 and 2006, the Department of Justice brought at least twenty-six successful cases to stop voting discrimination against language minorities in twelve of the states covered in whole or in part by section 203.⁵⁵⁵ In one case, a jurisdiction was placed under a federal monitor as a result of its intractable indifference towards section 203 and efforts by some officials to suppress Latino voter registration and turnout.⁵⁵⁶ In a study of section 203 covered jurisdictions I co-directed with Professor Rodolfo Espino, election

nity, 115 YALE L.J. 2112 (2006), reprinted in *Hearing on Legislative Options*, supra note 255, at 429–63.

⁵⁴⁷ See supra note 24 and accompanying text.

⁵⁴⁸ See *Lopez v. Monterey County*, 525 U.S. 266, 266 (1999).

⁵⁴⁹ 1977 S.D. Op. Atty. Gen. 175, available at 1977 WL 36011.

⁵⁵⁰ See *Quick Bear Quiver v. Hazeltine*, No. 02-5069-KES (D.S.D. Dec. 27, 2002) (consent order) (three-judge court). Based on my knowledge as the attorney assigned to review South Dakota’s section 5 compliance, it seems that the few submissions from South Dakota prior to that order were made only after the Department of Justice directed it to do so.

⁵⁵¹ TUCKER, supra note 376, at 4, 17, 54, 56–57.

⁵⁵² *Id.*

⁵⁵³ PERALES ET AL., supra note 424, at 3.

⁵⁵⁴ *Id.*

⁵⁵⁵ Tucker, supra note 262, at app. A. For a comprehensive listing of voting rights cases brought by the Department of Justice and associated court orders and consent decrees, see generally Bradley J. Schlozman, Acting Assistant Attorney General, Testimony app. (Oct. 25, 2005), reprinted in *Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong., 1st Sess. 2835–57 (2005) (statement of Bradley J. Schlozman, Acting Assistant Attorney General); *H. Hearing on Bilingual Election Requirements Part I*, supra note 16, at 69–1303 (appendix to statement of Bradley J. Schlozman, Acting Asst. Att’y Gen.).

⁵⁵⁶ James Thomas Tucker, *The Power of Observation: The Role of Federal Observers Under the Voting Rights Act*, 13 MICH. J. RACE & L. 227, 254–74 (2007) (describing Passaic County, New Jersey’s widespread voting discrimination against Spanish-speaking LEP voters and the extensive remedies put in place to end it).

officials reported widespread failure to provide effective language assistance.⁵⁵⁷ Disenfranchisement resulting from non-compliance with section 203 was exacerbated by unlawful voter assistance practices violating section 208 reported by ninety percent of the responding jurisdictions.⁵⁵⁸ Other studies found similar violations derived from in-person assessments of section 203 compliance⁵⁵⁹ and through public records requests.⁵⁶⁰ Alaska, which failed to provide language assistance for LEP Alaska Native voters covered statewide,⁵⁶¹ was recently sued by LEP Yup’ik-speaking Eskimos and tribes in the Bethel Census Area for violations under sections 5, 203, and 208 of the VRA.⁵⁶² Evidence of voting discrimination and failure to offer language assistance accentuate the impact of unequal educational opportunities on language minority voters, heightening the need for reauthorization of section 203.

D. Curing the Disparities in Voter Registration and Turnout Rates

In 1975, Congress found that “the denial of the right to vote” of language minority citizens “is ordinarily directly related to the unequal educational opportunities afforded them, resulting in high illiteracy and low voting participation.”⁵⁶³ Those barriers continue to contribute to depressed participation by language minorities covered under section 203. In Alaska, the “largely monolingual elections in Alaska have clearly impacted Alaska Natives’ ability to exercise their right to vote,” resulting in voter turnout that trails the statewide average by nearly 17%.⁵⁶⁴ In Arizona, American Indian turnout remains low, comprising just over 54% of all registered American Indian voters in the 2004 presidential election, compared to the overall statewide turnout rate of 76%.⁵⁶⁵ In November 2004, 57.9% of Hispanic voting-

⁵⁵⁷ See Tucker & Espino, *Government Effectiveness and Efficiency*, *supra* note 21, at 188–220.

⁵⁵⁸ See *id.* at 209; see also *S. Hearing on Continuing Need for Section 203*, *supra* note 16, at 12 (statement of Peter Kirsanow) (describing section 208 of the VRA, which protects the right to receive voter assistance).

⁵⁵⁹ See MICHAEL JONES-CORREA & ISRAEL WAISMEL-MANOR, VERIFYING IMPLEMENTATION OF LANGUAGE PROVISIONS IN THE VOTING RIGHTS ACT (2006) *reprinted in Evidence of Continued Need Hearing*, *supra* note 178, at 2514–36 (statement of Michael Jones-Correa & Israel Waismel-Manor).

⁵⁶⁰ See PERALES ET AL., *supra* note 424, at 37–38.

⁵⁶¹ See *Evidence of Continued Need Hearing*, *supra* note 178, at 1338–44 (statement of Natalie Landreth & Moira Smith); *S. Hearing on Modern Enforcement*, *supra* note 231, at 18–20, 26–30, 77–80, 124–28 (written answers of Wan J. Kim, Asst. Att’y Gen., Civil Rights Div.).

⁵⁶² See First Amended Complaint, *Nick v. City of Bethel*, No. 3:07-cv-00098-TMB (D. Alaska Dec. 31, 2007) (amending a complaint filed on June 11, 2006). I am co-counsel in the *Nick* case, along with the Native American Rights Fund (NARF) and my colleagues from the ACLU’s Alaska affiliate and the ACLU’s Voting Rights Project.

⁵⁶³ 42 U.S.C. § 1973aa-1a(a) (2000).

⁵⁶⁴ *Evidence of Continued Need Hearing*, *supra* note 178, at 1333, 1334 (statement of Natalie Landreth & Moira Smith).

⁵⁶⁵ *Id.* at 1381 (statement of Dr. James Thomas Tucker et al.).

age citizens had registered to vote, compared to 75.1% of all non-Hispanic white voting-age citizens.⁵⁶⁶ In the same election, Asian voting-age citizens had a registration rate of just 52.5%.⁵⁶⁷

Section 203 has proven extraordinarily effective in addressing the effects of education discrimination on language minority voters. While a marked difference in participation rates remains between non-Hispanic whites and language minorities, the gap has narrowed considerably. In many places, American Indian registration and turnout is up between 50% and 150% because of the availability of language assistance.⁵⁶⁸ Between 1996 and 2004, Asians experienced the greatest increase in voter registration and turnout of any group, rising from 58% to 71%,⁵⁶⁹ following increased coverage for language minorities after the 1992 amendments to section 203.⁵⁷⁰ Between 2000 and 2004, the number of registered Latino voters grew from 7.6 million to 9.3 million.⁵⁷¹ Overall, the Latino voter registration rate has nearly doubled following enactment of sections 4(f)(4) and 203. In 1974, only 34.9% of all eligible Latino voting-age citizens were registered to vote, compared to 57.9% in 2004.⁵⁷²

Increased voter participation by covered language minorities has arguably translated into greater electoral success and representation. American Indians provided decisive margins in close statewide elections in Arizona, South Dakota, and Washington between 2000 and 2004.⁵⁷³ In 2006, there were at least 346 Asian-Americans elected officials serving at all levels of government, including six in federal offices, nearly a 300% increase from the number serving 1978.⁵⁷⁴ Similarly, between 1973 and 2006, the number of Hispanic elected officials in six covered states—Arizona, California, Florida, New Mexico, New York, and Texas—increased more than 347% from 1280 to 4532.⁵⁷⁵ As of January 2006, there were more than 5600 Hispanic elected officials serving in the United States.⁵⁷⁶ Following the November 2006 election, Hispanic elected officials included three U.S. Senators,

⁵⁶⁶ See *id.*

⁵⁶⁷ See U.S. CENSUS BUREAU, TABLE 4A, REPORTED VOTING AND REGISTRATION OF THE TOTAL VOTING-AGE POPULATION BY SEX, RACE AND HISPANIC ORIGIN, FOR STATES: NOVEMBER 2004 (2004), available at <http://www.census.gov/population/socdemo/voting/cps2004/tab04a.xls>.

⁵⁶⁸ *H. Hearing on Bilingual Election Requirements Part II*, *supra* note 16, at 17 (testimony of Jacqueline Johnson).

⁵⁶⁹ *H. Hearing on Bilingual Election Requirements Part I*, *supra* note 16, at 13 (testimony of Margaret Fung, Executive Dir. of the Asian Am. Legal Def. and Educ. Fund).

⁵⁷⁰ See Tucker, *Enfranchising Minority Citizens*, *supra* note 5, at 131–32.

⁵⁷¹ See U.S. CENSUS BUREAU, *supra* note 567.

⁵⁷² *Hearing on Continuing Need for Section 203*, *supra* note 16, at 57, 347 (statement of John Trasviña).

⁵⁷³ See Tucker, *Politics of Persuasion*, *supra* note 2, at 207–08.

⁵⁷⁴ See *H.R. 9 Hearing Part II*, *supra* note 17, at 43 (testimony of Karen Narasaki).

⁵⁷⁵ See NALEO EDUCATIONAL FUND, 1985 NATIONAL ROSTER OF HISPANIC ELECTED OFFICIALS xiii (1985); NALEO EDUCATION FUND, 2006 LATINO ELECTION HANDBOOK 11, 15, 25, 37, 41, 45 (2006) [hereinafter 2006 LATINO ELECTION HANDBOOK].

⁵⁷⁶ 2006 LATINO ELECTION HANDBOOK, *supra* note 575, at 7.

twenty-three U.S. Representatives, at least a half dozen state officials, approximately 60 state senators, and 180 state representatives.⁵⁷⁷

VI. THE CONSTITUTIONALITY OF SECTION 203, POST-*BOERNE*

The effects of education and voting discrimination on language minority voter participation brings me back to the question Linda Chavez posed near the beginning of this article: “Is it a congruent and proportional response to education discrimination to force states to make ballots available in foreign languages?”⁵⁷⁸ Leaving aside Chavez’s rather strident language, an examination of the record presented to Congress and controlling authority yields the answer. Section 203 has proven exceedingly successful in providing language minority citizens with meaningful access to the voting process.

Congress has broad authority to enact remedial legislation protecting the right to vote under the enforcement sections of the Fourteenth and Fifteenth Amendments.⁵⁷⁹ That power encompasses mandating “bilingual ballots” to the extent they prevent the effective exercise of the ballot by the victims of education discrimination. If we reach the opposite conclusion from that suggested by Chavez—i.e., that English language ballots do not deny equal voting opportunities to any citizens—we would have to ignore the fact that the denial of equal access in the schools is repeated at the polls.⁵⁸⁰ There is an “obvious relationship” between the two that allows Congress to implement corrective measures, such as “bilingual ballots,” even though it corrects education discrimination, which is traditionally outside the scope of the Fifteenth Amendment.⁵⁸¹ As Rep. Sensenbrenner (R-Wis.), Former Chairman of the House Judiciary, explained:

Should we close the door to understanding a ballot because of a failure of our educational system or because of the fact that people have moved to a place where English is commonly used in the United States from a place in the United States where English is not commonly used? I would answer that question no.⁵⁸²

In *Boerne*, the Court recognized the need to defer to Congress when it enacts legislation protecting the fundamental right to vote that is supported by a strong record of recent state-sanctioned infringements of that right.⁵⁸³ The evidence must show congruence between the ban on English-only elec-

⁵⁷⁷ See Press Release, NALEO Educational Fund, Latinos Achieve New Political Milestones in Congress and State Houses (Nov. 11, 2006), available at <http://www.naleo.org/pr110906.html>.

⁵⁷⁸ H. Hearing on Bilingual Election Requirements Part I, *supra* note 16, at 32 (testimony of Linda Chavez).

⁵⁷⁹ See *supra* Part II.

⁵⁸⁰ See *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966).

⁵⁸¹ *Gaston County*, 395 U.S. at 290, 296–97.

⁵⁸² H.R. REP. NO. 109-478, at 135 (2006) (statement of Rep. Sensenbrenner (R-Wis.)).

⁵⁸³ See *Boerne*, 521 U.S. at 519–20, 530, 532–33.

tions in covered jurisdictions and the need to overcome the effects of education discrimination on voters.⁵⁸⁴ It would be hard to imagine a stronger record to sustain section 203. Each of the covered language groups not only has been the victim of unequal educational opportunities,⁵⁸⁵ but today suffers from the effects of that discrimination in the form of high LEP rates and illiteracy rates ranging from six to nearly twenty-one times the national rate.⁵⁸⁶ When combined with pervasive voting discrimination, English-language barriers have caused substantially depressed political participation by language minority voters.⁵⁸⁷

Section 203 uses a very carefully tailored trigger based upon LEP and illiteracy rates, the two most apparent effects of education discrimination against language minority citizens.⁵⁸⁸ It limits “the possibility of overbreadth” by requiring language assistance to be provided only where needed and by allowing jurisdictions to bailout from coverage after removing the disabling effects of education discrimination.⁵⁸⁹ It addresses both overbreadth and under-inclusiveness through regular determinations based upon the most current Census data.⁵⁹⁰ By adopting such a formula, Congress has crafted a remedy much narrower in time and scope than the nationwide ban on literacy tests unanimously upheld in *Mitchell* and the permanent nationwide ban on English-only elections impacting Puerto Rican voters that the Court affirmed in *Morgan*.⁵⁹¹ If and when the battle over “bilingual ballots” shifts to the courts, the reauthorized section 203 should be sustained as a constitutional exercise of enforcement powers under *Boerne*.

⁵⁸⁴ See *id.* at 530.

⁵⁸⁵ See *supra* Part IV.

⁵⁸⁶ See *supra* Part V(A)–(B).

⁵⁸⁷ See *supra* Part V(C)–(D).

⁵⁸⁸ See *supra* Part III.

⁵⁸⁹ See *supra* Part III(E).

⁵⁹⁰ See *supra* notes 251–79 and accompanying text.

⁵⁹¹ See *supra* Part II(B).