

# LANGUAGE ASSISTANCE AND LOCAL VOTING RIGHTS LAW

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## INTRODUCTION

In 2007, the City of Beverly Hills, California became entangled in a heated controversy over a local election policy designed to assist a major segment of its citizenry—one that by some estimates had grown to over one-quarter of the city's population of 35,000.<sup>1</sup> For the March 2007 municipal election, the city clerk's office had taken steps to translate the absentee and sample ballots into Farsi, the language commonly read and spoken by individuals of Iranian descent. Although Farsi translations of voting materials had first been employed two years earlier to assist Iranian American voters, the materials for the upcoming election ignited a new debate because of the city clerk's decision to mail multilingual ballots—with Farsi characters in large print on the cover and throughout the booklet—to all registered Beverly Hills voters, not simply to those who had requested translated ballots.

The city clerk's office was quickly flooded with telephone calls from hundreds of voters complaining about the materials for the upcoming election. Speaking to the local press, one Beverly Hills voter stated, "We got the ballot in the mail and there were all kinds of languages splattered over the front page and I got offended by it."<sup>2</sup> Another resident added, "It sends a bad message. It's a message which is divisive, which I believe is designed to separate as opposed to unite. In fact, it's done that."<sup>3</sup> And one voter who felt especially affronted—and threw away the ballot immediately after casting an absentee vote—bluntly stated, "It really looked like a menu from a Farsi restaurant with a translation in English."<sup>4</sup>

In defense of the policy, the city clerk countered, "We don't want to disenfranchise any section of our community from voting. We're trying not to exclude. If writing the information in their language helps them to vote without anyone assisting them, we're going to do it."<sup>5</sup> Reinforcing the Beverly Hills City Council's interest in promoting civic engagement, the city attorney commented that the council had requested Farsi translations three years earlier because "there

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1. See Tony Barboza, *For Some, Beverly Hills Ballots Went Too Farsi*, L.A. TIMES, Feb. 23, 2007, at A1; Ryan Vaillancourt, *Translated Sample Ballots Spark Community Backlash*, BEVERLY HILLS WKLY., Feb. 15, 2007, at 3.

2. Vaillancourt, *supra* note 1, at 3.

3. Barboza, *supra* note 1.

4. *Id.*

5. *Id.*

was a need in the community and it would encourage more and better informed political participation. Technically, Beverly Hills is not required by federal law to translate [election materials] into Farsi.<sup>6</sup>

However, Jimmy Delshad, an Iranian American member of the city council who became the mayor of Beverly Hills after the 2007 election,<sup>7</sup> offered a more guarded opinion of the translated materials: “It’s possible that this ballot has gone overboard. We want to reach out to others, but at the same time make it one unified community[.] To the extent that it might be divisive, I don’t like it.”<sup>8</sup> Councilman Delshad’s skepticism ultimately signaled a shift in the city’s election policy: the council voted in August 2007 to have the city clerk mail out ballots primarily in English during subsequent election cycles; separate Farsi ballots would continue to be printed, but would only be made available to voters upon request.<sup>9</sup>

Beverly Hills—a city more renowned for its glamour and affluence than for its immigrant communities and election laws—may have a unique political landscape, but comparable demographic changes, public policies, and shifts in local power dynamics have developed in cities and suburbs across the country. Communities ranging from major urban centers such as New York, Chicago, Philadelphia, Miami, and Minneapolis to small cities with immigrant enclaves such as Beverly Hills and West Hollywood in Southern California have enacted policies that offer voluntary language assistance to local voters. In Miami-Dade County, for example, translations are available in Creole to assist the local Haitian American population. In Southern California, ballots are offered in Armenian in Glendale, in Russian in West Hollywood, and in Khmer (Cambodian) in Long Beach. And in Chicago, forms of voter assistance are available in English and fifteen additional languages. These recent developments are particularly significant because they reflect policy initiatives that go well beyond federal language assistance mandates contained in the Voting Rights Act

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6. Vaillancourt, *supra* note 1, at 5. Local institutions also voiced support for the policy. A *Los Angeles Times* editorial article, for instance, noted, “There’s nothing new about hostile reaction to foreign languages appearing alongside English on signs, pamphlets and other official reading material. But there’s something more comical about it when it happens in Beverly Hills. . . . [where the] clash isn’t about (comparatively) rich versus poor but rather (comparatively) rich versus rich.” Editorial, *Beverly Hills Is Within Its Rights, and Maybe Its Obligations, to Print Voting Materials in Persian*, L.A. TIMES, Feb. 24, 2007, at A20. The editorial concluded, “Beverly Hills is completely justified in printing its ballots in Persian. Foreign tongues don’t taint the ballot, they demonstrate the values it stands for.” *Id.*

7. See Sonya Geis, *Iran Native Becomes Mayor of Beverly Hills; Bridging Cultures Is a Big Part of His Role*, WASH. POST, Apr. 1, 2007, at A3.

8. Barboza, *supra* note 1, at A1. Councilman Delshad later asserted that the Farsi ballot had magnified resentment against Iranian Americans and that despite his eventual success in the 2007 election, he had lost several hundred votes because of the backlash. Elisa Osegueda, *Council Says Farsi Ballot Issue Misunderstood—System to Be Changed for the 2009 Elections*, BEVERLY HILLS WKLY., Aug. 23, 2007, at 3.

9. Osegueda, *supra* note 8, at 3.

of 1965 (“the Act”).<sup>10</sup>

Local language assistance policies offer important insights into the strengths and weaknesses of federal voting rights law, as well as into larger questions about anti-discrimination law and the role of language assistance in helping communities integrate immigrants into civic life. The Voting Rights Act’s primary language assistance mandates are structured largely to remedy discrimination in both the electoral process and in education—a root cause of depressed political participation by language minorities. However, the Act’s mandates are not designed to address the needs of limited-English proficient voters as a whole. Recent state and local policies have therefore begun to fill significant gaps in federal law.

Language assistance policies also provide insights into the expansion of voting rights jurisprudence more generally, a trend that is reflected both in local legislation and in remedies adopted in federal litigation involving local governments. Unlike the language assistance provisions of the Act, many recent policies are more aptly classified as accommodation measures, comparable to those developed in laws that address discrimination on the basis of disability or religion. Prospective rather than strictly remedial, these measures require the removal of impediments to participation in order to prevent discrimination against protected individuals.<sup>11</sup> In addition, language assistance policies offer insights into broader policy agendas that promote civic engagement and address the integration of immigrant populations into local communities. Language assistance in voting is often one of several tools—including offering greater opportunities for immigrants to learn English and providing language assistance in other key sectors such as education, social services, health care, and the justice system—that form a network of rights and services which promote civic participation.

At the same time, language assistance is still a hotly contested political issue regardless of whether the underlying goal is remedying discrimination or promoting civic engagement. Federal, state, and local policymaking have been colored by longstanding debates between advocates of assimilation, who typically require English fluency as a precondition for civic activities such as voting, and those endorsing ethnic pluralism and the maintenance of non-English languages among minority groups.<sup>12</sup> Many policymakers and citizens remain

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10. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006)).

11. I have previously argued that trends at the federal level, including litigation under sections 203 and 2 of the Voting Rights Act, have pushed federal voting rights law in the direction of increased legal accommodations for language minorities. See Angelo N. Ancheta, *Language Accommodation and the Voting Rights Act*, in *VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER* 293 (Ana Henderson ed., 2007). My analysis here builds on that discussion and focuses on state and local developments as sources of movement toward greater language accommodations.

12. See generally RONALD SCHMIDT, SR., *LANGUAGE POLICY AND IDENTITY POLITICS IN THE UNITED STATES* 130-62 (2000) (comparing assimilationist and pluralist arguments); Juan F. Perea,

resistant to change, and some governments have moved in the opposite direction of promoting language assistance, enacting English-only policies and significant restrictions on immigrants' rights.<sup>13</sup> Language assistance, as illustrated by the recent controversy in Beverly Hills over Farsi ballots, will no doubt remain a highly contentious issue in communities throughout the country.

In this Article, I explore these developments through an analysis of federal, state, and local voting rights law. In Part I, I examine the scope of language needs nationwide and discuss the limits of the language assistance provisions of the Act. In Part II, I focus on state and local policymaking in a number of contexts: as elements of settlement agreements in federal litigation; in anticipation of impending mandates under the Act; and as voluntary efforts that respond to local populations and community needs. Although my analysis covers several states and localities, it is designed merely to be illustrative; I have made no attempt to engage in a comprehensive survey of the jurisdictions that provide language assistance. In Part III, I discuss the implications of local language assistance policies in advancing broader goals in anti-discrimination law, civic engagement, and immigrant integration.

#### I. THE LIMITS OF FEDERAL LANGUAGE ASSISTANCE

The Act is unusual among major civil rights laws in that it contains explicit protections for language minority groups. Widely used anti-discrimination statutes such as Title VI<sup>14</sup> and Title VII<sup>15</sup> of the Civil Rights Act of 1964 contain prohibitions on national origin discrimination. These prohibitions have been interpreted through agency regulations and by Executive Order to encompass forms of language discrimination, including speak-English-only policies.<sup>16</sup> The Act, however, contains no direct references to national origin discrimination. Instead, the Act contains several sections that address past and ongoing discrimination against specific language minority groups and promote electoral accessibility for limited-English proficient voters.<sup>17</sup>

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*Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269 (1992) (outlining legal history of tensions between linguistic pluralism and assimilation).

13. See Pratheepan Gulasekaram, *Sub-National Immigration Regulation and the Pursuit of Cultural Cohesion*, 77 U. CIN. L. REV. 1441 (2009); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008).

14. 42 U.S.C. §§ 2000d-2000d-4a (2006) (prohibiting discrimination by recipients of federal funding).

15. *Id.* §§ 2000e-2000e-17 (2006 & Supp. 2008) (prohibiting discrimination in employment).

16. See, e.g., Exec. Order No. 13,166, 3 C.F.R. § 289 (2000) (establishing standards for services to limited-English proficient individuals by federal agencies and recipients of federal funding); 29 C.F.R. § 1606.7 (2009) (addressing English-only rules in the workplace).

17. See 42 U.S.C. § 1973b(f) (2006) (congressional findings of voting discrimination against language minorities; prohibition of English-only elections; other remedial measures); *id.* § 1973aa-1a (bilingual election requirements); *id.* § 1973aa-6 (voting assistance for blind, disabled, or

The language rights provisions of the Act embody three distinct but related models of anti-discrimination enforcement.<sup>18</sup> One model—a structural remediation model—is embodied in the requirements of sections 4(f)(4)<sup>19</sup> and 203<sup>20</sup> of the Act. Designed to be temporary and limited in scope, the mandates in these sections address the electoral and educational discrimination that Congress has documented against language minorities by requiring oral and written assistance in communities with large minority populations. A second model—a traditional anti-discrimination model—is embodied in section 2 of the Act, which is a permanent provision that prohibits discrimination on the basis of race, color, or membership in a language minority group. A third model—an accommodation model—is embodied in section 208,<sup>21</sup> which Congress added in 1982 primarily to assist disabled and illiterate voters, but which has evolved into a guarantee of assistance for limited-English proficient voters as well. Together, these provisions form a network of language rights under the Act, but as census data and other empirical studies make clear, the needs of limited-English-speaking voters are considerably larger than the scope of the Act's coverage. Many of the basic limitations of the Act thus form the backdrop for the enactment of local policies designed to meet unaddressed language assistance needs.

#### A. *The Scope of Language Needs*

With numbers fueled by immigration, as well as by insufficient opportunities to learn English through public schools<sup>22</sup> and adult education programs,<sup>23</sup> limited-English proficient individuals constitute a large and growing segment of the American population. According to 2007 U.S. Census Bureau data, 19.7% of the American population aged five or over—over fifty-five million people—spoke a language other than English at home.<sup>24</sup> Of this number, approximately 24.5

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illiterate persons). The Act's general antidiscrimination provision, contained in section 2 of the Act, prohibits the denial or abridgement of the right to vote based on membership in a language minority group, in addition to prohibiting discrimination on account of race or color. *Id.* § 1973(a) (cross-referencing language minority group rights contained in § 1973b(f)(2)).

18. *See* Ancheta, *supra* note 11, at 300-05.

19. 42 U.S.C. § 1973b(f).

20. *Id.* § 1973aa-1a.

21. *Id.* § 1973aa-6.

22. *See* H.R. REP. NO. 109-478, at 50-52 (2006), *available at* 2006 WL 1403199 (summarizing congressional findings on educational inequalities facing language minorities).

23. *See* JAMES THOMAS TUCKER, THE ESL LOGJAM: WAITING TIMES FOR ADULT ESL CLASSES AND THE IMPACT ON ENGLISH LEARNERS 1 (2006), *available at* <http://www.naleo.org/downloads/ESLReportLoRes.pdf>. Data collected on English as a Second Language (ESL) adult education classes have revealed that waiting periods for enrolling in ESL classes can range from several weeks to a number of years; moreover, many ESL providers do not maintain waiting lists at all because the demand for classes far exceeds the supply. *Id.* at 1-2.

24. HYON B. SHIN & ROBERT A. KOMINSKI, U.S. CENSUS BUREAU, LANGUAGE USE IN THE

million people spoke English less than “very well,”<sup>25</sup> thus meeting the definition of “limited-English proficient” under the Act.<sup>26</sup> The largest number of Americans who spoke English less than “very well” in 2007 were Spanish speakers—nearly 16.4 million people—with significant numbers of Chinese (1.37 million), Vietnamese (over 744,000), and Korean speakers (over 618,000) falling into the less-than-very-well categories.<sup>27</sup> Other language groups have undergone major increases in recent years: from 1990 to 2000, the number of Russian speakers nearly tripled from 242,000 to 706,000, and, in 2000, approximately 57% (over 400,000) spoke English less than very well.<sup>28</sup> During the same period, the number of French Creole speakers, covering Haitian Americans, more than doubled from 188,000 to 453,000, and approximately 46% (over 200,000) spoke English less than very well.<sup>29</sup>

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UNITED STATES: 2007, at 2 tbl.1 (Apr. 2010) [hereinafter CENSUS—LANGUAGE USE 2007], available at <http://www.census.gov/prod/2010pubs/acs-12.pdf>. The figures for 2007 marked an increase from 17.8% (46.9 million people) in 2000, 13.8% (31.8 million people) in 1990, and 11% (23.1 million people) in 1980. See *id.* at 6 tbl.2.

25. *Id.* at 2 tbl.1. The U.S. Census Bureau categorizes English language ability under the headings “very well,” “well,” “not well,” and “not at all.” *Id.* at 1. The Bureau also calculates the number of households that are “linguistically isolated” as a measure of how well an individual can communicate with public officials, medical personnel, and other service providers. HYON B. SHIN & ROSALIND BRUNO, U.S. CENSUS BUREAU, LANGUAGE USE AND ENGLISH-SPEAKING ABILITY: 2000, at 9 (Oct. 2003) [hereinafter CENSUS—LANGUAGE USE 2000], available at <http://www.census.gov/prod/2003pubs/c2kbr-29.pdf>. A linguistically isolated household is “one in which no person aged [fourteen] or over speaks English at least [‘v]ery well.” In 2000, over 4.4 million households—covering 11.9 million people—were considered linguistically isolated. *Id.* at 10.

26. See 42 U.S.C. § 1973aa-1a(b)(3)(B) (2006) (defining limited-English proficient voters as individuals who are “unable to speak or understand English adequately enough to participate in the electoral process”). The House Report on the 1992 Amendments to the Act identifies the manner by which the Census Director determines the number of limited-English proficient (LEP) individuals:

The Director of the Census determines limited English proficiency based upon information included on the long form of the decennial census. . . . The form requests that they respond to a question inquiring how well they speak English by checking one of the four answers provided—“very well,” “well,” “not well,” or “not at all.” The Census Bureau has determined that most respondents over-estimate their English proficiency and therefore, those who answer other than “very well” are deemed LEP.

H.R. REP. NO. 102-655, at 6 (1992), reprinted in 1992 U.S.C.C.A.N. 766, 772.

27. See CENSUS—LANGUAGE USE 2007, *supra* note 24, at 7 tbl.3.

28. CENSUS—LANGUAGE USE 2000, *supra* note 25, at 4 tbl.1.

29. *Id.* Non-English-language speakers are further concentrated in key areas of the country, particularly in states and localities that are entry points for immigrants. In 2007, ten states had over one million non-English-language speakers, led by California (14.4 million), Texas (7.4 million), New York (5.2 million), Florida (4.5 million), and Illinois (2.6 million). CENSUS—LANGUAGE USE 2007, *supra* note 24, at 9 tbl.4. Counties with high proportions of non-English-language speakers included large cities such as New York City, Chicago, and Los Angeles. Los Angeles County alone

Many limited-English proficient individuals are non-citizens who are not yet eligible to vote, but significant blocs of voters—including both U.S.-born citizens and naturalized citizens—lack the requisite English skills needed to participate meaningfully in the electoral process. Congress has long recognized that many Puerto Ricans, who are American citizens by birth, have been educated in Spanish-dominant schools and face barriers in English-only electoral procedures.<sup>30</sup> According to 2000 census figures, over one-quarter of Puerto Ricans are limited-English proficient.<sup>31</sup> Similarly, many Pacific Islander groups, including Native Hawaiians and Guamanians, are citizens by birth, yet high rates of limited-English proficiency persist among these populations—approximately one in seven Pacific Islanders according to census data.<sup>32</sup> And among Alaska Natives and American Indians, who are also citizens by birth, significant numbers of the population are limited-English proficient;<sup>33</sup> moreover, Congress has recognized the importance of preserving Native American languages, and the use of native languages is strongly supported by federal policy.<sup>34</sup>

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had over 2.5 million residents who were limited-English proficient in 2000; of these, 1.8 million were Latino and over 500,000 were Asian American. ASIAN PAC. AM. LEGAL CTR. OF S. CAL., L.A. SPEAKS: LANGUAGE DIVERSITY AND ENGLISH PROFICIENCY BY LOS ANGELES COUNTY SERVICE PLANNING AREA 6 (2008) [hereinafter APALC—L.A. SPEAKS], available at <http://demographics.apalc.org/wp-content/uploads/2008/03/la-speaks-final-031908.pdf>.

Studies of state and local data have also revealed high rates of limited-English proficiency among members of particular ethnic groups. See *id.* at 6-9 (presenting data on limited-English proficient populations in Los Angeles County); ASIAN PAC. AM. LEGAL CTR. OF S. CAL., CALIFORNIA SPEAKS: LANGUAGE DIVERSITY AND ENGLISH PROFICIENCY BY LEGISLATIVE DISTRICT 6-8 (2006), available at [http://apalc.org/demographics/wp-content/uploads/2006/09/apalc\\_californiaspeaks.pdf](http://apalc.org/demographics/wp-content/uploads/2006/09/apalc_californiaspeaks.pdf) (presenting data on limited-English proficient populations in California). For instance, in Los Angeles County, among adults aged eighteen to sixty-four, 71% of Guatemalans, 70% of Hondurans, 67% of Vietnamese, 66% of Cambodians, 66% of Salvadorans, 63% of Koreans, 55% of Chinese, 52% of Mexicans, and 49% of Armenians were limited-English proficient. APALC—L.A. SPEAKS, *supra*, at 8.

30. See 42 U.S.C. § 1973b(e) (2006) (prohibiting English-only literacy tests for persons educated in “American-flag schools” where predominant classroom language was not English).

31. ROBERTO R. RAMIREZ, U.S. CENSUS BUREAU, WE THE PEOPLE: HISPANICS IN THE UNITED STATES 10 (Dec. 2004), available at <http://www.census.gov/prod/2004pubs/censr-18.pdf>.

32. PHILIP M. HARRIS & NICHOLAS A. JONES, U.S. CENSUS BUREAU, WE THE PEOPLE: PACIFIC ISLANDERS IN THE UNITED STATES 11 (Aug. 2005), available at <http://www.census.gov/prod/2005pubs/censr-26.pdf>.

33. According to 2000 census data, approximately 10% of American Indians and Alaska Natives spoke English less than very well and were therefore limited-English proficient. STELLA U. OGUNWOLE, U.S. CENSUS BUREAU, WE THE PEOPLE: AMERICAN INDIANS AND ALASKA NATIVES IN THE UNITED STATES 7 (Feb. 2006), available at <http://www.census.gov/population/www/socdemo/race/censr-28.pdf>. Some groups have considerably higher rates of limited-English proficiency; for example, among Navajo speakers, one in four were limited-English proficient, while among Eskimo speakers, over 15% were limited-English proficient. *Id.*

34. See Native American Languages Act of 1992, Pub. L. No. 102-524, 106 Stat. 3434

While the federal immigration and naturalization laws have long contained English language requirements for gaining naturalized citizenship, the degree of English proficiency needed to qualify for citizenship is only a level of basic comprehension.<sup>35</sup> Informed and meaningful voting, particularly in states and localities that employ direct democracy mechanisms such as referenda and initiatives, may require considerably higher levels of English fluency. There are also important exceptions in the naturalization laws for long-term residents of the United States who are elderly; these individuals need not demonstrate knowledge of English as a prerequisite to naturalization.<sup>36</sup> Empirical data suggest that limited-English proficient elderly citizens are among the voters most in need of language assistance.<sup>37</sup>

Community-based surveys underscore the need for language assistance among limited-English proficient voters. In one multistate survey of voters conducted during the November 2008 election, data showed that high rates of limited-English proficiency persist among several groups and that many voters have strong preferences for language assistance.<sup>38</sup> In New York City, where the Act mandates assistance for multiple language minority groups, 62% of Chinese American voters surveyed in Brooklyn were limited-English proficient and 43% preferred voting with language assistance; in Queens, 75% of Korean American voters were limited-English proficient and 29% preferred voting with language assistance.<sup>39</sup> The survey also found that voters' needs and interest in language assistance were comparable in localities without mandated Act coverage. In Chicago (Cook County), 81% of Korean American voters were limited-English proficient and 43% preferred voting with language assistance; in New Orleans, 63% of Vietnamese American voters were limited-English proficient and 45% preferred voting with language assistance.<sup>40</sup>

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(codified as amended at 42 U.S.C. §§ 2991b-3, 2992d(e) (2006)).

35. 8 U.S.C. § 1423(a)(1) (2006).

36. The naturalization laws create exceptions for an applicant who is over the age of fifty and has resided in the U.S. as a lawful permanent resident for over twenty years, as well as for an applicant who is over the age of fifty-five and has resided in the United States for over fifteen years. Applicants need not demonstrate English proficiency, but they must still fulfill other requirements, including demonstrating a basic knowledge of American government and civics. *Id.* § 1423(b)(2).

37. See APALC—L.A. SPEAKS, *supra* note 29, at 9. Among particular ethnic groups of seniors aged sixty-five or older in Los Angeles County, the proportions of individuals who were limited-English proficient were especially high; the groups with the ten highest percentages of limited-English proficiency were as follows: Taiwanese—93%, Vietnamese—88%, Cambodian—86%, Salvadoran—85%, Iranian—84%, Guatemalan—83%, Chinese—82%, Chinese (Non-Taiwanese)—81%, Korean—81%, Armenian—78%. *Id.*

38. GLENN D. MAGPANTAY, ASIAN AM. LEGAL DEFENSE & EDUC. FUND, ASIAN AMERICAN ACCESS TO DEMOCRACY IN THE 2008 ELECTIONS 15 (2009) [hereinafter ASIAN AMERICAN ACCESS TO 2008 ELECTIONS], available at <http://aaldef.org/docs/AALDEF-AA-Access-to-Democracy-2008.pdf> (survey focused on Asian American voters in eleven states and the District of Columbia).

39. *Id.*

40. *Id.*



The language assistance provisions of the Act cover many of the voters who fall within these clusters and categories, but numerous limited-English proficient voters do not receive assistance either because they do not trigger the Act's coverage or because they fall outside the Act's formal definitions of language minority groups. Cambodian Americans, for instance, lacked a sufficiently large population in Los Angeles County after the 2000 census to trigger section 203 coverage,<sup>41</sup> while Arab Americans, Armenians, Iranians, Russians, and Haitians are among the many groups whose languages are simply not covered by the Act. The omissions are not oversights; the Act has particular goals and circumscribed procedures that extend coverage in only limited instances.

### *B. Structural Remediation and Language Assistance*

In 1975, Congress amended the Voting Rights Act of 1965 in a number of significant ways to address discrimination against language groups. First, Congress recognized that denials of voting rights were not limited to black voters in the South and expanded the Act's basic prohibitions to include discrimination against members of "language minority" groups. The 1975 amendments ensured that individuals of Spanish heritage, as well as Asian Americans, American Indians, and Alaska Natives, were also protected by the Act.<sup>42</sup> Second, the amendments established a set of structural remedies, contained in sections 4(f)(4) and 203, to address longstanding discrimination against language minorities.<sup>43</sup> Congress recognized that discrimination in education—including segregation and disparities in school financing and resources—had caused minority communities

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41. *Informational Hearing on the Federal Voting Rights Act: Hearing Before the S. Comm. Elections, Reapportionment & Const. Amendments Comm.* 2005-06 Reg. Sess. 3-4 (Cal. 2005) (statement of Karin Wang, V.P. Programs, Asian Pac. Am. Legal Ctr.), available at [http://www.sen.ca.gov/reapportionment/HearingsTestimony/KarinWang12\\_5\\_2005.pdf](http://www.sen.ca.gov/reapportionment/HearingsTestimony/KarinWang12_5_2005.pdf).

42. 42 U.S.C. § 1973l(c)(3) (2006); *id.* § 1973aa-1a(e). The legislative history of the 1975 amendments shows a clear congressional intent to extend the Act's coverage beyond anti-black racial discrimination. See S. REP. NO. 94-295, at 24-35 (1975), reprinted in 1975 U.S.C.C.A.N. 774, 790-801. However, Congress chose to employ "language minority" status rather than the category of "national origin" as the operative language, which ultimately limited the Act's coverage to the four enumerated groups. *Id.*

Both the Act's general anti-discrimination provisions under section 2, 42 U.S.C. § 1973, and its preclearance provisions under section 5, 42 U.S.C. § 1973c, were amended to include language minorities. Section 5 requires state and local governments with a long history of discrimination and depressed minority political participation to "preclear" any changes to their electoral procedures either through administrative review by the Department of Justice or a declaratory judgment by a three-judge panel of the U.S. District Court for the District of Columbia. *Id.*

43. Section 4(e) of the original 1965 Act recognized the connection between English-language-proficiency and voting discrimination in the case of Puerto Rican voters, many of whom had been educated in Spanish-dominant educational environments. The Act now prohibits English-only literacy tests for "persons educated in American-flag schools in which the predominant classroom language was other than English." 42 U.S.C. § 1973b(e).

throughout the nation to suffer from high rates of illiteracy, which was measured by failure to complete the fifth grade. In tandem with discrimination in the electoral process itself, educational inequalities and illiteracy had led to low rates of voter registration and voting by language minorities. Congress concluded that electoral procedures conducted only in English would therefore be inherently discriminatory and established requirements for translated voting materials, oral assistance, and other language-based remedies.<sup>44</sup> At the same time, Congress found that problems of discrimination and low political participation were not as severe among other populations and limited the scope of the Act's remedies to the four enumerated language minority groups.<sup>45</sup>

The persistence of discrimination against language minorities has led Congress to reauthorize sections 4(f)(4) and 203 multiple times, with the most recent reauthorization in 2006 extending the language assistance sections for an additional twenty-five years.<sup>46</sup> Section 4(f)(4) applies to a small number of

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44. Section 203(a) states:

The Congress finds that, through the use of various practices and procedures, citizens of language minorities have been effectively excluded from participation in the electoral process. Among other factors, the denial of the right to vote of such minority group citizens is ordinarily directly related to the unequal educational opportunities afforded them resulting in high illiteracy and low voting participation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting these practices, and by prescribing other remedial devices.

42 U.S.C. § 1973aa-1a(a); *see also id.* § 1973b(f)(1) (documenting similar findings to justify section 4(f)(4)).

45. The Senate Judiciary Committee considered the inclusion of other language groups but declined to do so because of the lack of evidence of substantial discrimination or depressed political participation for other groups, as well as because of significant differences in the histories of the four language minority groups compared to European immigrants. S. REP. NO. 94-295, at 31 (1975), *reprinted in* 1975 U.S.C.A.N. 774, 797-98. The House also rejected amendments to the Voting Rights Act that would have added coverage for other language groups. 121 CONG. REC. H16,898 (daily ed. June 4, 1975) (rejecting amendment of Rep. Biaggi); *id.* at H16,907 (daily ed. June 4, 1975) (rejecting amendment of Rep. Solarz). *See generally* JAMES THOMAS TUCKER, *THE BATTLE OVER BILINGUAL BALLOTS* 60-62 (2009). Since 1975, Congress has not added any new language groups to the Act's coverage. *Id.* at 62-64.

46. *See* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577. The House Judiciary Committee's report summarized its findings regarding ongoing discrimination against language minorities as follows:

The continued need for bilingual support is reflected by: (1) the increased number of linguistically isolated households, particularly among Hispanic and Asian American communities; (2) the increased number of language minority students who are considered to be English language learners, such that students do not speak English well enough to understand the required curriculum and require supplemental classes; (3) the continued disparity in educational opportunities as demonstrated by the disparate impact

jurisdictions with longstanding histories of discrimination,<sup>47</sup> while section 203 applies nationally through a variety of triggering formulas that cover multiple jurisdictions and language groups based on census data. Under one test, section 203 requires language assistance in a state or political subdivision in which more than 5% of the voting-age citizens are members of a language minority group, are limited-English proficient, and have an illiteracy rate that exceeds the national illiteracy rate.<sup>48</sup> Under a similar test, the 5% trigger is replaced with a numerical benchmark requiring that the language group have over 10,000 limited-English proficient voting-age citizens in a jurisdiction.<sup>49</sup>

The section 203 formulas recognize the relationships among education, language ability, and voting, as well as Congress's conclusion that discrimination against language minorities is a widespread problem that requires no particularized showing of past discrimination in a covered jurisdiction. The formulas also illuminate the cost-benefit calculations that are inherent in providing language assistance to limited-English proficient voters. Minority populations must be sufficiently large—satisfying either a 5% population trigger

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that budget shortfalls have on language minority citizens, and the continued need for litigation to protect English language learners; and (4) the lack of available literacy centers and English as a Second Language programs.

H.R. REP. NO. 109-478, at 29 (2006), *available at* 2006 WL 1403199.

Support for the language assistance provisions of the Voting Rights Act has not, however, been universal. In 2006, an amendment offered by Representative Steve King to reauthorization legislation would have eliminated section 203 of the Act, but it was defeated by a vote of 238-185 in the House of Representatives. *See The U.S. Congress Votes Database*, WASH. POST, <http://projects.washingtonpost.com/congress/109/house/2/votes/372> (last visited Oct. 17, 2010).

47. Section 4(f)(4) prohibits English-only materials and requires language assistance in states and political subdivisions where: (1) over 5% of the voting-age citizens were, on November 1, 1972, members of a language minority group; (2) registration and election materials were provided only in English on that date; and (3) less than 50% of the voting-age citizens were registered to vote or voted in the 1972 presidential election. 42 U.S.C. § 1973b(f) (2006); *id.* § 1973b(b). By using information from 1972, the section focuses on areas with more serious histories of discrimination. In addition, jurisdictions that satisfy the triggering formula must obtain preclearance of changes in election procedures under section 5 of the Act. 42 U.S.C. § 1973c.

48. 42 U.S.C. § 1973aa-1a(b)(2)(A). Congress amended section 203 in 1982 to require that a language minority group also be limited-English proficient in order to satisfy the statistical benchmark, which actually led to a reduction in the total number of eligible jurisdictions. *See* H.R. REP. NO. 102-655, at 7 (1992), *reprinted in* 1992 U.S.C.C.A.N. 766, 773.

49. 42 U.S.C. § 1973aa-1a(b)(2)(A)(i)(II). The numerical figure was designed to cover language groups with significant numbers who might not trigger the 5% test because they reside in a high-population county. The 1992 amendments to the Act expanded section 203's coverage to include political subdivisions that contain all or any part of an American Indian reservation in which over 5% of the residents are members of a single language group, are limited-English proficient, and have an illiteracy rate exceeding the national average. Act of Aug. 26, 1992, Pub. L. No. 102-344, § 2, 100 Stat. 921 (codified as amended at 42 U.S.C. § 1973aa-1a(b)(2)(A)(i)(III) (2006)).

or a 10,000-citizen population trigger—in order to justify the expense to local government of providing language assistance. The benefits to voters whose group populations fall below the numerical triggers are not adequately justified, at least in Congress's view, by the costs of providing translated election materials and oral assistance to those voters.

Sections 4(f)(4) and 203 reach a wide range of states, counties, American Indian reservations, and language groups. Based on 2000 census data, over 500 jurisdictions are covered by one or both provisions of the Act, and nearly fifty jurisdictions must provide assistance in more than one language.<sup>50</sup> Among the most common language groups covered are speakers of Aleut, Apache, Chinese, Eskimo, Japanese, Korean, Navajo, Sioux, Spanish, Tagalog (Filipino), and Vietnamese.<sup>51</sup> Nationally, over four million limited-English proficient voters were protected by the language assistance provisions in accordance with the federal government's 2002 determinations of coverage; nearly 82% of these voters spoke Spanish, and nearly 17% spoke an Asian language.<sup>52</sup>

Regulations to enforce the Act have also generated an array of language assistance practices that apply to materials sent by mail, voter registration, public notices, polling place activities, and publicity;<sup>53</sup> various practices include forms of targeted oral assistance<sup>54</sup> and translations of written materials such as official ballots, sample ballots, informational materials, and petitions.<sup>55</sup> Compliance litigation by the Department of Justice has added to the regulatory mandates, and common remedies contained in court orders and consent decrees include requirements that localities develop outreach plans, hire bilingual poll workers and a language-assistance coordinator, and create a community advisory body to work with local officials.<sup>56</sup>

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50. See TUCKER, *supra* note 45, at 114-15 (505 political subdivisions covered by one or both provisions).

51. See Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 48,871, 48,872-922 (July 26, 2002).

52. See TUCKER, *supra* note 45, at 126 (total of 4,026,381 limited-English proficient voters covered (Spanish (3,290,018), Asian American (672,750), American Indian (56,679), and Alaska Native (6934)).

53. 28 C.F.R. § 55.18 (2006).

54. *Id.* § 55.20.

55. *Id.* § 55.19(a); see generally U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-182, BILINGUAL VOTING ASSISTANCE: SELECTED JURISDICTIONS' STRATEGIES FOR IDENTIFYING NEEDS AND PROVIDING ASSISTANCE (2008), available at <http://www.gao.gov/new.items/d08182.pdf> (overview of procedures adopted in a sample of covered jurisdictions).

56. See, e.g., Memorandum of Agreement, United States v. Riverside Cnty. (C.D. Cal. Jan. 26, 2010) (No. 2:10-CV-01059), available at [http://www.justice.gov/crt/voting/sec\\_203/documents/riverside\\_moa2.pdf](http://www.justice.gov/crt/voting/sec_203/documents/riverside_moa2.pdf); Agreement and Order, United States v. City of Walnut (C.D. Cal. Nov. 9, 2007) (No. 2:07-cv-02437-PA-VBK), available at [http://www.justice.gov/crt/voting/sec\\_203/documents/walnut\\_cd.pdf](http://www.justice.gov/crt/voting/sec_203/documents/walnut_cd.pdf); Settlement Agreement, United States v. City of Phila. (E.D. Pa. Apr. 26, 2007) (No. 06-4592), available at [http://www.justice.gov/crt/voting/sec\\_203/documents/phila\\_settlement.pdf](http://www.justice.gov/crt/voting/sec_203/documents/phila_settlement.pdf); Order, United States v. City of Bos. (D. Mass. Oct. 18, 2005) (No. 1:05-cv-

Although there are persistent problems arising from flawed implementation of the law by covered jurisdictions—including inadequate training of poll workers, mistranslations of ballot language and candidate names, and insufficient assistance at poll sites<sup>57</sup>—there have been strong, positive effects on voter participation because of the language assistance provisions.<sup>58</sup> During the 2006 reauthorization of the Act, for example, the House Judiciary Committee Report concluded that “increases in language minority citizen registration and turnout rates are most significant in jurisdictions that are in compliance with Section 203’s election assistance requirements” and that “enforcement of Section 203 has resulted in significantly narrowed gaps in electoral participation.”<sup>59</sup>

Notwithstanding the impact of the language assistance provisions, there are inherent limits in the Act regardless of whether jurisdictions are in full compliance with the law. First, the inflexibility of the formulas that trigger coverage makes the congressional remedies incomplete because the statistical formulas operate like toggle switches to initiate language assistance within a jurisdiction. If a group satisfies a statistical benchmark—either the 5% figure or the 10,000 numerical figure—then the full array of language assistance mandates go into effect; however, if a benchmark is not satisfied, then no federal mandates are deployed at all. If a language minority population lacks a critical mass in a jurisdiction to trigger coverage because of its size, then the Act does not require even limited or partial assistance.<sup>60</sup>

Second, because the “language minority” definition has been tethered to congressional findings of discrimination and reduced political participation among the four enumerated groups, assistance for all other language groups falls outside the coverage of the Act. Even though there has been recent evidence showing that language groups such as Arab Americans<sup>61</sup> and Haitian Americans<sup>62</sup>

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11598-WGY), available at [http://www.justice.gov/crt/voting/sec\\_203/documents/boston\\_cd2.pdf](http://www.justice.gov/crt/voting/sec_203/documents/boston_cd2.pdf).

57. See, e.g., 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 (2007); ASIAN AMERICAN ACCESS, *supra* note 38, at 4; NAT’L ASIAN PAC. AM. LEGAL CONSORTIUM, SOUND BARRIERS: ASIAN AMERICANS AND LANGUAGE ACCESS IN ELECTION 2004 (2005), available at [http://65.36.162.215/files/sound\\_barriers.pdf](http://65.36.162.215/files/sound_barriers.pdf).

58. See TUCKER, *supra* note 45, at 229-31.

59. H.R. REP. NO. 109-478, at 12 (2006), available at 2006 WL 1403199 (internal citations and quotations omitted).

60. A related problem is that the Act’s triggering formulas may not take into account the growth of local populations between official census data collections. The Act was amended in 2006 to require data from the U.S. Census Bureau’s American Community Survey, which are to be applied every five years to determine section 203 coverage; prior to 2006, data for determining coverage was collected through the decennial census. 42 U.S.C. § 1973aa-1a(b)(2)(A) (2006). Nevertheless, federal data collected at five-year intervals may not reflect the latest demographic changes in faster-growing immigrant communities.

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

have suffered comparable discrimination and exhibit depressed levels of political participation, Congress has declined to add any new groups to the language minority categories since 1975. These and other shortcomings in the language provisions of the Act<sup>63</sup> seem unlikely to be revised in the immediate future because Congress's most recent reauthorization of the Act was in 2006, and many of these problems surfaced in committee hearings and floor debates but were ignored in the final legislation.<sup>64</sup>

*C. Additional Language Assistance: Anti-Discrimination and Accommodation Models*

The Act offers language rights protections through two other provisions: section 2 and section 208. Section 2 is the Act's primary vehicle for anti-discrimination litigation and differs from the Act's structural language assistance remedies in several ways: it is a permanent provision of the Act, applies nationwide, and does not employ a statistical trigger as a prerequisite for coverage.<sup>65</sup> While section 2 protects members of language minority groups based on their group status—in other words, because they are of Spanish heritage or are Asian American, American Indian, or Native Alaskan—section 2 does not prohibit discrimination on the basis of limited-English ability or language usage per se. Section 2 has been employed, nonetheless, in recent anti-discrimination cases to obtain language-based remedies designed to assist limited-English

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Brenda Fathy Abdelall, Note, *Not Enough of a Minority?: Arab Americans and the Language Assistance Provisions (Section 203) of the Voting Rights Act*, 38 U. MICH. J.L. REFORM 911 (2005).

62. See JoNel Newman, *Unfinished Business: The Case for Continuing Special Voting Rights Act Coverage in Florida*, 61 U. MIAMI L. REV. 1, 32-36 (2006).

63. See generally Jocelyn Friedrichs Benson, *¡Su Voto Es Su Voz! Incorporating Voters of Limited English Proficiency into American Democracy*, 48 B.C. L. REV. 251 (2007) (discussing multiple weaknesses in language assistance provisions).

64. The language assistance provisions are also circumscribed because of constitutional limits on the powers of Congress to legislate remedial action. Recent U.S. Supreme Court case law has checked congressional authority under section 5 of the Fourteenth Amendment to ensure that legislative responses are fully documented and form a congruent and proportional response to constitutional violations. See *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001); *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997); cf. *Nw. Austin Mun. Util. Dist. No. 1 v. Holder*, 129 S. Ct. 2504 (2009) (declining to review constitutionality of provisions in section 5 of the Voting Rights Act). While the fact finding predicates for Congress's most recent reauthorizations of sections 4(f)(4) and 203 should readily satisfy constitutional standards, see James Thomas Tucker, *The Battle Over "Bilingual Ballots" Shifts to the Courts: A Post-Boerne Assessment of Section 203 of the Voting Rights Act*, 45 HARV. J. ON LEGIS. 507 (2008), adding coverage to new groups or extending remedies beyond documented needs could raise constitutional questions should Congress further amend the Act.

65. See *Hernandez v. Woodard*, 714 F. Supp. 963, 968-69 (N.D. Ill. 1989) (concluding that section 2 claims on behalf of language minorities need not be coupled with section 203's statistical prerequisites).

proficient voters.<sup>66</sup>

In *United States v. City of Hamtramck*, for instance, the Department of Justice asserted multiple section 2 violations arising from racial discrimination perpetrated by a government-approved citizen group who challenged the citizenship and voter qualifications of Arab American and darker-skinned Asian American voters.<sup>67</sup> During the course of the November 1999 election in Hamtramck, Michigan, over forty voters were confronted on the basis of physical appearance or because they had “Arab-sounding” names. As a core remedy, the *Hamtramck* consent decree required that officials be trained on proper procedures for addressing voter intimidation and challenging voter qualifications. The consent decree went further, however, and mandated that bilingual election inspectors be hired to assist in future elections and that notices be prepared in Arabic and in Bengali to inform voters about the new election practices.<sup>68</sup>

The development of language-based remedies in cases like *United States v. Hamtramck* suggests that section 2 could become a broader source of assistance for limited-English proficient voters even when the basis for the discrimination is race or membership in a language minority group. Section 2 also carries the advantage of being applicable to any jurisdiction, regardless of the size of a group’s population within the jurisdiction. However, section 2 litigation is limited by the infrequency of cases that are filed, and litigation-based remedies have inherent constraints because they require specific findings of discrimination and do not extend beyond the particular defendants bound by the case.

Section 208 differs from both section 2 and the Act’s structural language assistance provisions because it can be invoked by any limited-English proficient voter and is not confined to the Act’s definition of “language minorities.” Section 208 states in part 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.”<sup>69</sup> Originally designed as an accommodation measure for disabled voters, this section has been applied to limited-English proficient voters who require assistance to understand an English-only ballot.<sup>70</sup> Section 208 imposes no affirmative obligations on

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66. See, e.g., Complaint, *United States v. Salem Cnty.*, No. 1:08-cv-03726-JHR-AMD (D. N.J. July 24, 2008); Amended Complaint, *United States v. City of Phila.*, No. 2:06-4592 (E.D. Pa. April 26, 2007); Complaint, *United States v. Long Cnty.*, No. CV206-040 (S.D. Ga. Feb. 8, 2006); Complaint, *United States v. City of Bos.*, No. 05-11598 WGY (D. Mass. July 29, 2005); Complaint, *United States v. City of Hamtramck*, No. 00-73541 (E.D. Mich. Aug. 4, 2000).

67. Complaint, *Hamtramck*, No. 00-73541.

68. Consent Order and Decree, *Hamtramck*, No. 00-73541

69. 42 U.S.C. § 1973aa-6 (2006). Section 208 contains an exception precluding an assistor who is “the voter’s employer or agent of that employer or officer or agent of the voter’s union.” *Id.*

70. The legislative history of section 208 highlights some of the parallels between disability and limited-English proficiency:

Certain discrete groups of citizens are unable to exercise their rights to vote without obtaining assistance in voting including aid within the voting booth. These groups

localities to provide language assistance, but it does allow an enforcement action if election officials impede or deny a voter's access to an assistor.<sup>71</sup>

Section 208 has the potential to be a far-reaching mechanism for enforcing language rights under the Voting Rights Act because it applies nationwide and enables any limited-English proficient voter to receive assistance in voting.<sup>72</sup> Section 208 also allows personalized aid because the voter determines who will provide the assistance and what will be needed to cast a meaningful vote. A major problem with the law, however, is that it establishes no standards on the quality of assistance provided to the voter, nor does it impose significant obligations on federal, state, or local governments. The costs are borne almost entirely by the private assistor and the affected voter, who also carries the responsibility of arranging the assistance in the first place. Election officials primarily assume costs for training staff to prevent violations of the law, such as denying or interfering with assistors; localities bear no real costs in providing aid to voters.

Read together, the various sections of the Voting Rights Act offer a mix of language rights tools with significant gaps—both in theory and in practice. The “language minority” definition delimits the structural remedies of the Act, but basic barriers persist for voters whose language groups fail to satisfy the Act's triggers or who fall outside the basic definitions needed for coverage. Litigation under section 2 offers only piecemeal remedies, and the personal assistance

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include the blind, the disabled, and those who either do not have a written language or who are unable to read or write sufficiently well to understand the election material and the ballot. Because of their need for assistance, members of these groups are more susceptible than the ordinary voter to having their vote unduly influenced or manipulated. As a result, members of such groups run the risk that they will be discriminated against at the polls and that their right to vote in state and federal elections will not be protected.

S. REP. NO. 97-417, at 53 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 240, 1982 WL 25033.

71. *See, e.g.*, Consent Decree, Judgment, and Order, *United States v. Fort Bend Cnty.*, No. 4:09-cv-1058 (S.D. Tex. Apr. 13, 2009); Settlement Agreement, *City of Phila.*, No. 06-4592; Revised Agreed Settlement Order, *United States v. City of Springfield*, No. 06-301-23-MAP (D. Mass. Sept. 13, 2006); Consent Decree, Judgment, and Order, *United States v. Brazos Cnty.*, No. H-06-2165 (S.D. Tex. June 27, 2006); Order, *United States v. Berks Cnty.*, No. 03-CV-1030 (E.D. Pa. Aug. 20, 2003); *United States v. Miami-Dade Cnty.*, No. 02-21698 (S.D. Fla. June 7, 2002). In *United States v. Miami-Dade County*, for example, Haitian American voters who needed assistance in Creole were denied the use of assistors, and even when assistance was allowed, it was often limited to demonstrations of voting procedures outside the voting booth. Consent Order at 2, *Miami-Dade Cnty.*, No. 02-21698. The consent decree's requirements included training programs for poll workers, voter education policies, and the employment of Creole-speaking election employees in targeted precincts. *Id.* at 5. Haitian Americans are covered by section 208 even though they fall outside the Act's formal definition of language minorities.

72. *See* Terin M. Barbas, Note, *We Count Too! Ending the Disenfranchisement of Limited English Proficiency Voters*, 37 FLA. ST. U. L. REV. 189, 204-08 (2009) (suggesting that amending section 208 would provide an optimal solution to meeting language assistance needs).



available to voters under section 208 offers a weak form of accommodation that relieves local election officials of any significant role. As the next Part illustrates, several states and local governments have taken a more active role in providing language assistance and have implemented measures to bridge the gaps in federal law.

## II. STATE AND LOCAL LANGUAGE ASSISTANCE POLICIES

Because of the constraints of the Act, many limited-English proficient voters continue to face language barriers in the electoral process. A number of state and local governments have developed language access policies to address voter needs, but the responses vary widely. Some policies simply require compliance with the Act<sup>73</sup> or parallel federal law,<sup>74</sup> while others have gone beyond the Act's requirements to extend assistance to multiple language groups. State and local policies have arisen in a variety of contexts: as responses to federal litigation under the Act, as additions to extant requirements under section 203, and as policy initiatives where few or no federal mandates are in place.

### A. Federal Litigation and Local Remedies

A number of recent lawsuits have served as catalysts for local policies that extend language assistance beyond the requirements of the Act. For instance, *United States v. San Diego County* involved multiple violations of section 203 arising out of San Diego County's inadequate language assistance to Latino and Filipino American voters, which included "failing to provide an adequate pool of bilingual poll officials . . . failing to make available . . . election-related announcements, instructions, and notices at election sites . . . [and] failing to translate . . . election-related information" on the registrar of voters' website.<sup>75</sup> The settlement between the federal government and the county included a common set of remedies in section 203 litigation: translating election materials,

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73. See, e.g., FLA. STAT. ANN. § 101.2515 (West, Westlaw through 2010 2d Reg. Sess.); LA. REV. STAT. ANN. § 18:106(D) (West, Westlaw through 2009 Reg. Sess.); R.I. GEN. LAWS ANN. § 17-19-54 (West, Westlaw through Ch. 319 of Jan. 2010 Sess.); S.D. CODIFIED LAWS § 12-3-6 (2010); see generally Brian J. Sutherland, *The Patchwork of State and Federal Language Assistance for Minority Voters and a Proposal for Model State Legislation*, 65 N.Y.U. ANN. SURV. AM. L. 323, 339-45 (2009).

74. Several state laws offer voter assistor guarantees comparable to the provisions contained in section 208 of the Voting Rights Act. See, e.g., COLO. REV. STAT. § 1-7-112(1)(a) (LEXIS through 2010 legislation); GA. CODE ANN. § 21-2-409(a) (2010); 10 ILL. COMP. STAT. ANN. 5/17-14 (West, Westlaw through 2010 Reg. Sess.); KAN. STAT. ANN. § 25-2909(a) (2000 & Supp. 2009); MASS. GEN. LAWS ANN. ch. 54, § 79 (West, Westlaw through Ch. 347 of 2010 2d Ann. Sess.); TEX. ELEC. CODE ANN. § 64.031 (West, Westlaw through 2009 legislation); WIS. STAT. ANN. § 6.82(2)(a) (West, Westlaw through 2009 Act 406); see generally Sutherland, *supra* note 73, at 346-51.

75. Complaint at 4, *United States v. San Diego Cnty.*, No. 04-CV-1273IEG (S.D. Cal. June 23, 2004), available at 2004 WL 5690558.

hiring bilingual poll workers, distributing multilingual information, hiring a language-assistance coordinator, and creating a community-based advisory body for each language.<sup>76</sup>

Particularly noteworthy in the *San Diego County* case, however, was the voluntary inclusion of Vietnamese language assistance in the consent decree, paralleling the terms of the Spanish and Filipino requirements imposed on San Diego County. The memorandum of agreement stated that “the 2000 Census also showed a Vietnamese-speaking voting age population with limited-English proficiency of [9915], or only 85 below the 10,000 person statutory threshold, and San Diego County wishes to serve this growing community.”<sup>77</sup> Immediately after the county’s implementation of the settlement agreement, the effects of the language assistance were significant: Spanish and Filipino registration increased by more than 21% during the six-month period after the resolution of the lawsuit, and Vietnamese registration increased by more than 37%.<sup>78</sup> Moreover, even though the settlement agreement expired on March 31, 2007, and San Diego County was no longer obligated to provide Vietnamese language assistance, election officials continued to provide assistance in all three languages.<sup>79</sup>

In *United States v. City of Boston*, the Department of Justice asserted multiple violations of the Act and other federal laws by city election workers: treating limited-English proficient Latino, Chinese American, and Vietnamese American voters disrespectfully; refusing to permit voters to be aided by an assistor; improperly influencing, coercing, or ignoring voters’ ballot choices; and refusing or failing to provide provisional ballots.<sup>80</sup> The complaint alleged violations of section 203, but only with respect to Spanish-speaking voters; the Chinese and Vietnamese populations were not large enough to trigger section 203 coverage.<sup>81</sup> Nevertheless, the remedies in the consent decree included guarantees

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76. Memorandum of Agreement at 2-10, *San Diego Cnty.*, No. 04-CV-1273IEG.

77. *Id.* at 2.

78. See H.R. REP. NO. 109-478, at 12 (2006), available at 2006 WL 1403199. Anecdotal evidence also supports the importance of language assistance in promoting voter participation. A former chief of the Department of Justice’s voting section relayed the following anecdote from San Diego County: “A Vietnamese voter, thrilled to find a Vietnamese-speaking poll worker, exclaimed that ‘America is the greatest country in the world! I’m going to tell everyone!’ The voter later brought more Vietnamese voters to the polls.” John Tanner, *Federal Enforcement of the Language Assistance Provisions*, in TUCKER, *supra* note 45, at 317-18.

79. Because of the numbers (the 2000 census showed the Vietnamese population just a few citizens short of the 10,000 benchmark, and the population is highly likely to satisfy the benchmark under 2010 census data), the county may simply have been anticipating the inevitable. However, the timing of the settlement, occurring eight years prior to the imposition of federal mandates in 2012, suggests that the county was engaging in good faith efforts to satisfy local goals of serving the Vietnamese American community, and not simply to comply early with federal law.

80. Complaint at 4-6, *United States v. City of Bos.*, 497 F. Supp. 2d 263 (D. Mass. 2007) (No. 05-11598-WGY).

81. Chinese American voting-age citizens in Boston numbered 9825; Vietnamese American voting-age citizens numbered 4220. *Id.* at 3.

of language assistance to all three groups.<sup>82</sup> The inclusion of Vietnamese language assistance was especially notable because the target population of Vietnamese Americans was only 4220, less than half the number needed to trigger section 203 coverage.

The *City of Boston* litigation parallels the *San Diego County* litigation in several ways, with a variety of language assistance remedies that expanded the city's efforts to recruit bilingual Chinese and Vietnamese poll workers for targeted precincts. Implementation of multilingual assistance has been more convoluted in Boston, however, because of state and local politics following the expiration of the consent decree in 2008. In 2007, both the Department of Justice and community groups advocating multilingual assistance supported the translation of the candidates' names on ballots into Chinese through "transliteration," a procedure by which names are converted phonetically from their alphabetic spelling to Chinese characters.<sup>83</sup> The Massachusetts Secretary of the Commonwealth opposed transliteration, however, and a federal court declined to rule that transliteration was required under the settlement agreement.<sup>84</sup> The Boston City Council later voted to pursue a home-rule petition to continue Chinese and Vietnamese language assistance in federal and state elections.<sup>85</sup> State legislation to implement the home-rule petition was eventually enacted in 2010, establishing requirements that the City of Boston provide Chinese assistance (including transliteration) and Vietnamese assistance beginning in 2011.<sup>86</sup>

### *B. Near-Coverage and Anticipatory Compliance*

The *City of San Diego* and *City of Boston* lawsuits illustrate how the institutional power of the Act, coupled with federal enforcement and local advocacy, can lead jurisdictions to expand language assistance efforts.<sup>87</sup> Short

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82. Memorandum of Agreement and Settlement at 3, *City of Bos.*, 497 F. Supp. 2d 263.

83. See Frank Phillips, *Ballot Translations Could Mean Too Much*, BOS. GLOBE, June 26, 2007, at A1; Andrea Stone, *Candidates Lost in Chinese Translation*, USA TODAY, July 11, 2007, at A3.

84. See Order, *City of Bos.*, 497 F. Supp. 2d 263; Frank Phillips, *Candidates' Names Won't Be Transliterated-Dispute Centered on Chinese Voters*, BOS. GLOBE, Aug. 8, 2007, at B2.

85. Maria Sacchetti, *Fresh Fight Over Bilingual Ballots; Council to Pursue State Law Ordering Names in Chinese*, BOS. GLOBE, May 14, 2008, at B1.

86. H.R. 4880, 186th Leg., 2d Ann. Sess. (Mass. 2010).

87. A parallel development is the maintenance of language assistance by a jurisdiction even when it is no longer required to provide assistance under federal law. See U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-97-81, BILINGUAL VOTING ASSISTANCE: ASSISTANCE PROVIDED AND COSTS 15 (1997), available at <http://www.gao.gov/archive/1997/gg97081.pdf>. The City and County of San Francisco, for example, was first required to offer assistance in Chinese and Spanish in the 1970s, but it was not obligated under federal law to provide assistance in either language during the 1980s or in Spanish during the 1990s. Election officials continued to provide both Chinese and Spanish language assistance—including trilingual ballots—throughout the 1980s and 1990s. *Id.*

of litigation, a number of local governments have initiated coverage for large and politically influential language groups who missed coverage under the Act in one census cycle but were likely to be covered in the future. For example, during the 1990s, California's Santa Clara County was required under section 203 to provide assistance in Spanish, but in no other minority languages, even though the county contained one of the nation's largest concentrations of Southeast Asian immigrants and sizable populations of other Asian American groups. Assistance to Vietnamese American voters was a particular concern because the Vietnamese American figure for targeted voting-age citizens fell just short of the 10,000 numerical benchmark needed to trigger section 203 coverage.

Advocacy by local civil rights groups led to San Jose County to deploy multiple stages of language assistance. In 1993, the county voluntarily printed ballots translated into Vietnamese and mailed bilingual ballots to all voters who indicated that they had been born in Vietnam.<sup>88</sup> Following an assessment of needs and recommendations by a citizen advisory committee,<sup>89</sup> as well as the acknowledgement of "a swell of new citizens from mainland China, Hong Kong and Taiwan during the [previous] two years, and requests by those immigrants," the registrar of voters added Chinese language translations in 1996.<sup>90</sup> After the 2000 census, Santa Clara County was legally mandated under section 203 to provide assistance in Spanish, Vietnamese, Chinese, and Tagalog.

Similar developments transpired in Los Angeles County in the 1990s. Beginning in 1992, Los Angeles County was required to offer assistance in five languages: Chinese, Japanese, Spanish, Tagalog, and Vietnamese. The Korean language, however, was not included because the Korean American illiteracy rate—measured by completion of a fifth-grade education, not by English language proficiency—did not exceed the national average. The hurdle of a lower illiteracy rate was especially vexing for the local community because the target population of Korean Americans in Los Angeles County was more than double the number necessary to trigger section 203.<sup>91</sup> Unlike Santa Clara County, however, efforts to win voluntary assistance in Los Angeles County lasted several years, even though Korean Americans had a strong base of community advocates and numerous surveys demonstrated high rates of need and interest in Korean language assistance.<sup>92</sup> The county board of supervisors ultimately voted in September 1998 to begin printing election materials in

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After the 2000 census data determinations, both Chinese and Spanish were mandated under section 203 in San Francisco.

88. See Glenn D. Magpantay, *Asian American Access to the Vote: The Language Assistance Provisions (Section 203) of the Voting Rights Act and Beyond*, 11 *ASIAN L.J.* 31, 52 (2004).

89. See *id.*

90. Edwin Garcia, *Demand Rising for Non-English Voting Materials*, *SAN JOSE MERCURY NEWS*, Nov. 5, 1996, at 4B (quoting Elma Rosas Martinez, Spokeswoman, Office of Santa Clara Cnty. Registrar of Voters).

91. Magpantay, *supra* note 88, at 50 (noting that 1990 census data showed that a target population of 21,611 Korean American citizens resided in Los Angeles County).

92. *Id.*

Korean.<sup>93</sup> After the 2002 determinations of section 203 coverage, Los Angeles County was legally mandated to provide assistance in Korean.

Community efforts to gain voluntary assistance, however, are not always entirely successful. In 1995, the New York City Board of Elections agreed in response to local advocacy efforts to begin adding Korean language interpreters at selected precincts in Queens.<sup>94</sup> Nonetheless, the board declined to add written translations of materials into Korean. Despite strong community support for expanded language assistance, the board even resisted offers by Korean American community groups to help translate basic materials such as voter registration forms and voting machine instructions. A full complement of Korean language assistance in Queens was only added after the 2002 determinations of section 203 coverage.

### *C. State and Local Policy Initiatives*

Responding to community advocacy and the growth of immigrant populations, several states and cities have adopted language assistance policies that go beyond the coverage limits of the Act. States, counties, and larger cities typically have multiple language groups that receive varying levels of assistance based on the size of the language group, whereas smaller cities and suburbs may have immigrant enclaves composed of one or two ethnic groups requiring focused assistance. A number of local policies have concentrated on providing voter registration forms and other basic informational materials, which are available in print and on websites. Some localities have gone further by offering a range of services, including the translation of ballots and the recruitment of bilingual poll workers to assist limited-English proficient voters in targeted precincts.

*1. State Laws and Practices.*—A number of states have adopted laws and policies that are more generous than the Act in extending assistance to language groups.<sup>95</sup> Maine, for instance, offers ballot instructions in French to voters who request the translated materials from local election officials.<sup>96</sup> Over 5% of Maine's population speaks French, and the state has a history of past discrimination involving Francophone immigrants from Canada.<sup>97</sup> Other states offer assistance based on statistical formulas that trigger coverage at a lower level than section 203 of the Act. In California, state law requires that in counties where 3% of the voting-age citizens “lack sufficient skill in English to register without assistance,” county officials must make reasonable efforts to

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93. *Supervisors Move to Publish Voter Booklets in Korean*, L.A. TIMES, Sept. 16, 1998, at 4B.

94. See Magpantay, *supra* note 88, at 52.

95. See Sutherland, *supra* note 73, at 352-62.

96. See ME. REV. STAT. ANN. tit. 21-A, § 603(5) (West, Westlaw through 2009 2d Reg. Sess.).

97. See Pam Belluck, *Long Scorned in Maine, French Has Renaissance*, N.Y. TIMES, June 4, 2006, at 1.26.

recruit voting registrars who are fluent in the language.<sup>98</sup> A similar trigger applies to the recruitment of bilingual election officials for non-English-speaking citizens who need assistance in voting.<sup>99</sup> In North Carolina, which currently has no section 203 coverage within the state, any county or municipality whose Latino population is at least 6% of the population must print and distribute Spanish language ballot instructions.<sup>100</sup> The statistical trigger is notably generous because it is based on the total population of Latinos in a county or municipality, not just the population of limited-English proficient voting-age citizens.

Extended assistance has also been legislated through more expansive definitions of language groups than the Act's definition of "language minority."<sup>101</sup> For example, in the District of Columbia, which currently has no section 203 obligations, a broader definition of "non-English-speaking person" is employed to include anyone "whose native speaking language is a language other than English, and who continues to use his or her native language as his or her primary means of oral and written communication."<sup>102</sup> The District goes on to require written language assistance in election wards where non-English-speaking persons are 5% or more of the voting population, and it allows the D.C. Board of Elections and Ethics to establish language assistance in wards with lower percentages of non-English-speaking persons.<sup>103</sup>

As matters of agency practice, secretaries of state and other state election administrators have voluntarily offered basic informational services and materials in non-English languages. California's secretary of state, for example, offers

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98. CAL. ELEC. CODE § 2103(c)-(d) (2009). The subsections state in pertinent part:  
(c) It is also the intent of the Legislature that non-English-speaking citizens, like all other citizens, should be encouraged to vote. Therefore, appropriate efforts should be made to minimize obstacles to registration by citizens who lack sufficient skill in English to register without assistance.

(d) Where the county elections official finds that citizens described in subdivision (c) approximate 3 percent or more of the voting age residents of a precinct, or in the event that interested citizens or organizations provide information which the county elections official believes indicates a need for registration assistance for qualified citizens described in subdivision (c), the county elections official shall make reasonable efforts to recruit deputy registrars who are fluent in a language used by citizens described in subdivision (c) and in English.

99. *Id.* § 12303(b)-(c).

100. N.C. GEN. STAT. § 163-165.5A (LEXIS through 2009 Reg. Sess.).

101. *See, e.g.*, COLO. REV. STAT. § 1-2-202(4) (LEXIS through 2010 legislation) (requiring the county clerk and recorder to recruit bilingual staff members if 3% trigger for non-English-speaking electors is met); D.C. CODE § 1-1031.01 (2010) (defining "non-English-speaking" as "a person whose native speaking language is a language other than English, and who continues to use his or her native language as his or her primary means of oral and written communication"); N.J. REV. STAT. § 19:12-7.1(b) (2010) (requiring voter notices to be printed in any language other than English if 10% trigger is met).

102. D.C. CODE § 1-1031.01.

103. *Id.* § 1-1031.02(b).

telephonic assistance and written materials (voter registration forms, voter guides, and ballot-by-mail applications) in six languages: Chinese, Japanese, Korean, Spanish, Tagalog, and Vietnamese.<sup>104</sup> The state as a whole is only bound by federal law to provide assistance in Spanish. In the State of Washington, which has three counties covered for Spanish and one county covered for Chinese under section 203,<sup>105</sup> the secretary of state offers voter registration and voter informational materials in seven non-English languages: Cambodian, Chinese, Korean, Laotian, Russian, Spanish, and Vietnamese.<sup>106</sup> Minnesota similarly offers voter registration materials in five non-English languages—Hmong, Russian, Somali, Spanish, and Vietnamese—even though neither the state nor any of its political subdivisions triggers section 203 coverage and neither Russian nor Somali falls within the “language minority” definition of the Act.<sup>107</sup> Furthermore, several state election offices offer websites<sup>108</sup> that link to the language assistance website of the U.S. Election Assistance Commission, which offers national voter registration forms in Spanish and five Asian languages.<sup>109</sup>

Secretaries of state have also engaged in significant outreach and education efforts to increase voter participation. For example, in Connecticut, where Spanish-language assistance is required in a number of urban counties under section 203, the secretary of state engaged in an extensive voter outreach and registration campaign in 2008 to increase the number of Latino registered voters statewide. The “¡Tu Voto Sí Cuenta!” (“Your Vote *Does* Count!”) program included an aggressive Spanish-language media campaign and translated voter education materials on the use of paper ballots with new optical scan technology and on proper forms of identification for registering and voting. The “¡Tu Voto

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104. See *Multilingual Voter Services*, CAL. SEC’Y OF STATE, [http://www.sos.ca.gov/elections/elections\\_multi.htm](http://www.sos.ca.gov/elections/elections_multi.htm) (last visited Oct. 17, 2010).

105. See Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 48,871, 48,877 (July 26, 2002).

106. *Elections & Voting*, WASH. SEC’Y OF STATE, <http://www.sos.wa.gov/elections> (last visited Oct. 17, 2010).

107. See *Voting Information in Other Languages*, MINN. SEC’Y OF STATE, <http://www.sos.state.mn.us/index.aspx?page=638> (last visited Oct. 17, 2010). Voting instructions at polling sites were first offered in Minnesota in 2002 in three languages: Hmong, Somali, and Spanish. See *Citizen Outreach Advisory Taskforce Urges New Citizens to Vote*, ASIAN PAGES, Nov. 14, 2002, at 6, available at 2002 WLNR 11553301.

108. See, e.g., *Elections Division*, SEC’Y OF MASS., <http://www.sec.state.ma.us/ele> (last visited Oct. 17, 2010); *Forms and Publications*, VA. STATE BD. OF ELECTIONS, [http://www.sbe.virginia.gov/cms/Forms\\_Publications/Index.html](http://www.sbe.virginia.gov/cms/Forms_Publications/Index.html) (last visited Oct. 17, 2010); *National and N.C. Voter Registration Forms*, N.C. STATE BD. OF ELECTIONS, <http://www.sboe.state.nc.us/content.aspx?id=48> (last visited Oct. 17, 2010); *Voter Registration*, R.I. BD. OF ELECTIONS, <http://www.elections.ri.gov/voting/registration.php> (last visited Oct. 17, 2010).

109. See *Register to Vote*, U.S. ELECTION ASSISTANCE COMM’N, [http://www.eac.gov/voter\\_resources/register\\_to\\_vote.aspx](http://www.eac.gov/voter_resources/register_to_vote.aspx) (last visited Oct. 17, 2010) (making available registration forms in Chinese, English, Japanese, Korean, Spanish, Tagalog, and Vietnamese).

*Sí Cuenta!*” project registered over 21,000 new voters, more than double the original goal of the campaign.<sup>110</sup>

2. *Local Policies and Practices.*—A wide range of voluntary policies and practices also exists at the county and city levels. Among the most common efforts are recruitment and hiring of bilingual staff to serve as poll workers in targeted districts. For example, several jurisdictions provided voluntary assistance to Asian American voters through bilingual interpreters and poll workers during the November 2008 elections as follows: Chicago hired election judges who spoke Gujarati, Hindi, Korean, Tagalog, Urdu, and Vietnamese; New Orleans hired Vietnamese interpreters and election commissioners; Lowell, Massachusetts hired Khmer and Vietnamese interpreters; Quincy, Massachusetts hired Chinese and Vietnamese poll workers; Middlesex, New Jersey appointed Chinese, Gujarati, and Hindi-speaking poll workers; and Philadelphia appointed Chinese, Khmer, Korean, and Vietnamese interpreters.<sup>111</sup>

Another common practice is providing translated voter registration forms and basic voter information materials. In the City of Cambridge, Massachusetts, which is not covered by section 203 in any language, voter registration materials are available in English and eight other languages: Arabic, Chinese, Haitian Creole, Korean, Portuguese, Russian, Spanish, and Vietnamese.<sup>112</sup> In Washington’s King County, which includes Seattle and is only required under section 203 to provide assistance in Chinese, voter registration materials are also available in Cambodian, Korean, Laotian, Russian, Spanish, and Vietnamese.<sup>113</sup> And although Los Angeles County is required to provide language assistance in Spanish and five Asian languages, it also offers a voter information brochure that is translated into Armenian, Khmer, and Russian.<sup>114</sup>

A variation on these local policies is the law enacted in New York to require Russian-language assistance in New York City, where there were over 243,000 individuals of Russian ancestry living in the year 2000.<sup>115</sup> The state legislation

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110. See JOCELYN F. BENSON, STATE SECRETARIES OF STATE 93-94 (2010); Press Release, Susan Bysiewicz, Sec’y of the State of Conn., Bysiewicz: More Than 21,000 Latinos Become Newly Registered Voters During ¡Tu Voto Sí Cuenta! Campaign (Oct. 29, 2008), available at [http://www.sots.ct.gov/sots/lib/sots/releases/2008/10.29.08\\_tu\\_voto\\_si\\_cuenta\\_a\\_success.pdf](http://www.sots.ct.gov/sots/lib/sots/releases/2008/10.29.08_tu_voto_si_cuenta_a_success.pdf) (last visited Oct. 17, 2010).

111. See *Lessons Learned from the 2008 Election: Hearing Before the H. Subcomm. on the Constitution, Civil Rights, and Civil Liberties*, 111th Cong. 93 (2009) (testimony of Glenn D. Magpantay, Staff Attorney, Asian Am. Legal Defense & Educ. Fund).

112. See *Voter Registration*, CITY OF CAMBRIDGE ELECTION COMM’N, <http://www.cambridgema.gov/ELECTION/ProgramsServices.cfm> (last visited Oct. 17, 2010).

113. See *Voter Registration*, KING CNTY. ELECTIONS, <http://www.kingcounty.gov/elections/registration.aspx> (last visited Oct. 17, 2010).

114. See L.A. CNTY. REGISTRAR-RECORDER/CNTY. CLERK, <http://www.lavote.net> (last visited Oct. 17, 2010).

115. See *QT-P13. Ancestry: 2000, New York City, New York*, U.S. CENSUS BUREAU, <http://factfinder.census.gov> (follow “DATA SETS” hyperlink, select “Census 2000 Summary File 3,” and follow “Enter a table number” hyperlink; search “QT-P13” and follow “Go” hyperlink;



requires Russian-language assistance in every city in the state that has a population exceeding one million people, which currently applies only to New York City.<sup>116</sup> The law requires that the New York City Board of Elections provide information in Russian on its website and that the board produce and disseminate Russian-language booklets containing voter registration, absentee ballot instructions, and general voter information citywide.<sup>117</sup>

Providing focused language assistance to an immigrant group that comprises a sizable portion of a city's population is a recurring theme in local policymaking. For example, Florida's Miami-Dade County has required assistance in Creole to the local Haitian American community since 2000. Because it contains one of the largest Cuban American communities in the country, Miami-Dade has been required under section 203 to provide Spanish-language assistance since the mid-1970s. The Haitian American population has become a major segment of South Florida's population as well, driven by the migration of refugees and other immigrants from Haiti since the 1970s. According to 2000 census data, the Haitian American population in Miami-Dade County numbered over 95,000 and constituted 4.2% of the county's population.<sup>118</sup>

In 1999, the Miami-Dade Board of County Commissioners unanimously passed an ordinance which requires Creole translations to be posted in voting booths, that publicity be generated in appropriate Creole-language media, and, as appropriate, that ballots be translated into Creole.<sup>119</sup> When extensive problems

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select ". . . Place" under "Select a geographic type," then select "New York" and then "New York city"; follow "Add" hyperlink, then follow "Show Result" hyperlink (last visited Oct. 17, 2010).

116. Since the population of the state's next largest city, Buffalo, was less than 300,000 in the year 2000, it is unlikely that any other city will be covered in the near future.

117. N.Y. ELEC. LAW § 3-506 (McKinney 2009 & Supp. 2010). The section states:

A board of elections in a city of over one million shall provide the same information in Russian that it provides in languages other than English on its website. It shall also produce and disseminate citywide a booklet that includes: (a) a voter registration form in English with instructions in Russian; (b) instructions in Russian regarding the criteria and application process for obtaining an absentee ballot; and (c) a section with general voter information in Russian including frequently asked questions. Such board may include other languages on its website and in such booklet.

118. See *QT-P13 Ancestry: 2000, Miami-Dade County, Florida*, U.S. CENSUS BUREAU, <http://factfinder.census.gov> (follow "DATA SETS" hyperlink, select "Census 2000 Summary File 3," and follow "Enter a table number" hyperlink; search "QT-P13" and follow "Go" hyperlink; select ". . . County" under "Select a geographic type," then select "Florida" and then "Miami-Dade County"; follow "Add" hyperlink, then follow "Show Result" hyperlink) (last visited Oct. 17, 2010).

119. MIAMI-DADE CNTY., FLA., CODE OF ORDINANCES § 12-16 (1999). The ordinance states:

(a) In those precincts in which the Supervisor of Elections determines that a significant portion of the electorate is Haitian-American, the Supervisor of Elections shall provide voting booths containing Creole translations in addition to booths containing Spanish translations.

with voter assistance arose during the November 2000 election, the Department of Justice initiated a lawsuit under section 208's assistor provisions because Haitians are not a language minority group under section 203. The 2002 consent decree bolstered the original Miami-Dade language assistance policies by adding requirements that local officials engage in best efforts to assign bilingual poll workers to assist Haitian voters in appropriate precincts and make multilingual ballots available at every polling place in the County.<sup>120</sup> Nearby Palm Beach County followed Miami-Dade's lead and began providing language assistance in Creole in 2002; Broward County added Creole assistance in 2008.<sup>121</sup>

Another important site for voluntary language assistance has been Southern California, where several cities in the region have a major immigrant group that forms a significant and politically active segment of the population. Among the first cities to provide language assistance to groups falling outside of the Act's mandatory coverage was Monterey Park, whose city council first voted to print election materials in Chinese and Spanish in 1991.<sup>122</sup> The Chinese American population has been a significant political bloc within Monterey Park since the 1980s; at the time, it constituted 36% of the city's population of over 60,000.<sup>123</sup> Chinese American community activists played a key role in the enactment of the local policy, which was seen as an important tool for incorporating local immigrant populations into the political process.<sup>124</sup> As one local advocate commented to the press, "This is a process through which we can bring (immigrants) into the mainstream of America . . . to bring the old and new

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(b) In those elections in which the Supervisor of Elections determines that it is appropriate to provide ballots in Creole, those ballots shall be advertised in a Creole language newspaper selected by the Supervisor of Elections.

(c) The provisions of this ordinance shall apply only to ballots provided at voting booths in the precincts described in subsection (a) hereof and shall apply only to county-wide elections and other appropriate elections as determined by resolution of the Board of County Commissioners.

(d) The provisions of this section shall become operative only upon a written finding provided to this Board by the Supervisor of Elections that a certified Creole translator exists who can perform the translations mandated by this section.

The board of county commissioners subsequently passed a resolution directing the supervisor of elections to identify precincts in Homestead and Florida City with significant Haitian populations and to prepare ballots for those precincts. See MIAMI-DADE CNTY., FLA., RES. R-296-00 (2000).

120. Consent Order at 6, *United States v. Miami-Dade Cnty.*, No. 02-21698 (S.D. Fla. June 17, 2002); see JoNel Newman, *Ensuring That Florida's Language Minorities Have Access to the Ballot*, 36 STETSON L. REV. 329, 361-62 (2007).

121. See Alva James-Johnson, *Creole Ballots on Course for '08: Elections Officials Aim to Lure More Haitian-American Voters to Polls*, S. FLA. SUN-SENTINEL, Apr. 7, 2007, at 1B.

122. Irene Chang, *City Ballots in Chinese, Spanish Are Approved*, L.A. TIMES, Dec. 12, 1991, at J2.

123. *Id.*

124. *Id.*

together.”<sup>125</sup> Sam Kiang, the mayor of Monterey Park who sponsored the measure, added, “This is something that will encourage more participation in the democratic system.”<sup>126</sup>

Similar policies have developed in Southern California cities with substantial immigrant populations, including Beverly Hills and its large Iranian American community that forms approximately one-quarter of the city’s population.<sup>127</sup> In the year 2000, Russian Americans made up nearly 14% of West Hollywood’s population of over 35,000;<sup>128</sup> Armenian Americans constituted nearly 28% of Glendale’s population of nearly 200,000;<sup>129</sup> and over 20,000 Cambodian Americans—the largest Cambodian community in the United States—formed a sizable portion of Long Beach’s population of over 460,000.<sup>130</sup> Each of these cities has relied on bilingual poll workers for several years, and each city offers website information and printed election materials in the relevant languages. These cities also offer fully translated sample ballots for local elections.<sup>131</sup> Additionally, they offer a variety of non-electoral municipal services in the targeted language and provide opportunities for participation in the governance of the city. For example, West Hollywood has employed a bilingual Russian outreach coordinator since the mid-1990s and since 2000 has utilized a Russian

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125. *Id.*

126. *Id.*

127. *See supra* notes 1-9 and accompanying text.

128. *See QT-P13 Ancestry: 2000, West Hollywood City, California*, U.S. CENSUS BUREAU, <http://factfinder.census.gov> (follow “DATA SETS” hyperlink, select “Census 2000 Summary File 3,” and follow “Enter a table number” hyperlink; search “QT-P13” and follow “Go” hyperlink; select “. . . Place” under “Select a geographic type,” then select “California” and then “West Hollywood city”; follow “Add” hyperlink, then follow “Show Result” hyperlink) (last visited Oct. 17, 2010).

129. *See QT-P13 Ancestry: 2000, Glendale City, California*, U.S. CENSUS BUREAU, <http://factfinder.census.gov> (follow “DATA SETS” hyperlink, select “Census 2000 Summary File 3,” and follow “Enter a table number” hyperlink; search “QT-P13” and follow “Go” hyperlink; select “. . . Place” under “Select a geographic type,” then select “California” and then “Glendale city”; follow “Add” hyperlink, then follow “Show Result” hyperlink) (last visited Oct. 17, 2010).

130. *See DP-1 Profile of General Demographic Characteristics: 2000, Long Beach City, California*, U.S. CENSUS BUREAU, <http://factfinder.census.gov> (follow “DATA SETS” hyperlink, select “Census 2000 Summary File 2” and follow “Enter a table number” hyperlink; search “DP-1” and follow “Go” hyperlink; select “. . . Place” under “Select a geographic type,” then select “California” and then “Long Beach city”; follow “Add” hyperlink, then follow “Show Result” hyperlink; follow “Population Groups” hyperlink under “Quick Tables”; select “. . Cambodian alone or in any combination,” then follow “Add” and “Show Result” hyperlinks) (last visited Oct. 17, 2010).

131. *See Election Home Page*, CITY OF LONG BEACH CITY CLERK, <http://www.longbeach.gov/cityclerk/elections/default.asp> (last visited Oct. 17, 2010); *Election Results*, CITY OF W. HOLLYWOOD, <http://www.weho.org/index.aspx?page=83> (last visited Oct. 17, 2010); *City of Glendale, CA Election Info*, GLENDALE VOTES, <http://www.glendalevotes.org> (last visited Oct. 17, 2010).

advisory board that makes policy recommendations to the city council.<sup>132</sup>

Larger cities and counties typically have multiple immigrant populations whose needs are addressed through a range of policies. Chicago, for example, has provided voting assistance in several languages in recent years and employs a tiered approach to language assistance tied to the relative sizes of its limited-English-speaking populations. As the major city within Cook County, Chicago is required under section 203 to provide language assistance in Chinese and Spanish. The Chicago Board of Election Commissioners offers several accommodations: a website that has fully translated versions in three languages other than English (Chinese, Polish, and Spanish); oral assistance in these three languages through dedicated telephone lines; and voter registration forms in the three languages plus Korean.<sup>133</sup> In addition, the city provides a set of basic voter information materials in Arabic, Assyrian, Bosnian, Croatian, Gujarati, Korean, Romanian, Russian, Serbian, Tagalog, Urdu, and Vietnamese, and it recruits bilingual election judges to cover these languages.<sup>134</sup>

The City of Minneapolis offers voluntary assistance in multiple languages—Hmong, Somali, and Spanish—and has taken a broader approach to language assistance that considers translations and oral assistance provided by local government as a whole. Under a city council resolution passed in 2003, a citywide limited-English proficiency plan was developed the following year to create strategies for assisting multiple language groups in the city.<sup>135</sup> The city clerk later developed a separate plan addressing language assistance for local voters, including the recruitment and hiring of bilingual poll workers.<sup>136</sup> The language assistance available to limited-English proficient voters in Minneapolis is not as extensive as in some other cities, but the integration of voting assistance with other city services has promoted a number of benefits, such as coordinated translations of services in Hmong, Somali, and Spanish through specialized telephone lines and the city's website.<sup>137</sup>

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132. See *Russian Outreach*, CITY OF W. HOLLYWOOD, <http://www.weho.org/index.aspx?page=869> (last visited Oct. 17, 2010).

133. See BD. OF ELECTION COMM'RS FOR THE CITY OF CHI., <http://chicagoelections.com> (last visited Oct. 17, 2010).

134. See *id.*

135. See CITY OF MINNEAPOLIS, MINNEAPOLIS IN ANY LANGUAGE: POLICIES AND PROCEDURES TO ENSURE EQUAL ACCESS TO CITY SERVICES FOR PEOPLE WITH LIMITED ENGLISH PROFICIENCY 3, 3 (Nov. 2004) [hereinafter MINNEAPOLIS IN ANY LANGUAGE], available at [http://www.ci.minneapolis.mn.us/policies/MplsLEP\\_Plan.pdf](http://www.ci.minneapolis.mn.us/policies/MplsLEP_Plan.pdf) (last visited Oct. 17, 2010).

136. See CITY OF MINNEAPOLIS, CITY CLERK'S DEP'T 2007-2011 BUSINESS PLAN 12 (2006), available at [http://www.ci.minneapolis.mn.us/results-oriented-minneapolis/docs/CityClerkBusinessPlan\\_2007.pdf](http://www.ci.minneapolis.mn.us/results-oriented-minneapolis/docs/CityClerkBusinessPlan_2007.pdf) (last visited Oct. 17, 2010).

137. See *Elections & Voter Registration*, CITY OF MINNEAPOLIS, <http://www.ci.minneapolis.mn.us/elections> (last visited Oct. 17, 2010).

*D. Patterns, Problems, and Effective Practices*

Each state and local government that engages in language assistance has a nuanced legal and political environment, and I have made no attempt to engage in a detailed political investigation, whether through case studies or quantitative data analyses, that might provide deeper insights into the formation of local policies. Yet it is clear from a cursory analysis that legal, institutional, and interest group pressures, as well initiatives of state and local election officials, have affected the expansion of voluntary language assistance across governmental bodies. Many of the jurisdictions that have provided voluntary services to a language group that is not covered by section 203 have also been required to provide mandatory language assistance to at least one group that is covered by the Act. Indeed, several jurisdictions only began engaging in voluntary language assistance because of the Act's federal requirements, and community-based advocacy has been essential to spur localities to expand language assistance to other groups.

Institutional pressures stemming from the enforcement of other federal anti-discrimination laws have also played a role in local governments' adoption of language assistance policies. Title VI of the Civil Rights Act of 1964 prohibits national origin discrimination by recipients of federal funding, and along with its implementing regulations, mandates that recipients provide language accessibility. Accordingly, state and local governments receiving federal funds have taken steps to assist limited-English proficient individuals in a wide range of governmental services. The Minneapolis language access plan, for example, makes clear that Title VI and its implementing regulations form the legal backbone of the city's provision of services to limited-English proficient citizens, and that federal law requires Minneapolis to "provide meaningful access to services for city residents with limited English."<sup>138</sup>

It is also clear that state and local policies provide tangible benefits to limited-English proficient voters and that these benefits can be especially useful for language groups whose voters fall outside the coverage of the Act's language assistance provisions. Some of the policies, such as the procedures used in Chicago, are particularly revealing because they show that there can be variations in assistance to multiple groups depending on size and needs. These policies offer more flexibility than the Act's mandates, which guarantee no assistance to groups that do not satisfy the Act's statistical triggers. The policies are also instructive because they show that some cities, such as West Hollywood and Minneapolis, are adopting more comprehensive measures to address the needs of limited-English proficient individuals. In those cities, language assistance in voting is one of several governmental services in which translations and other types of assistance are employed to eliminate barriers to civic participation.

Nevertheless, there are weaknesses in many of these state and local policies. Despite large immigrant communities within their boundaries, some cities and counties have been resistant to providing a full array of language assistance

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138. See MINNEAPOLIS IN ANY LANGUAGE, *supra* note 135, at 10.

measures. Queens County in New York offered poll worker assistance in Korean in the mid-1990s, but written translations were not available until several years later. Los Angeles County similarly delayed providing written language assistance in Korean until 1998. The New York City Board of Elections and local officials did not originally support Russian-language assistance prior to the passage of a state law in 2009.<sup>139</sup> This legislation was necessary to require the development of Russian materials, and the law only requires the board to develop basic informational materials, not to provide oral assistance or fully translated ballots.

Moreover, the standards for many forms of voluntary assistance are not consistent, and local requirements are often less rigorous than the mandates of the Act. State and local policies may lack clear triggering mechanisms to determine when language assistance should be provided in the first place, and although some local governments have developed tiers of services for multiple language groups, they do not necessarily articulate the numerical criteria used to differentiate among language groups. State and local election policies may also lack the enforcement machinery, such as private rights of action and civil rights offices charged with administrative or litigation powers, that are available under federal civil rights laws.

Local demographics and politics vary significantly, but optimal legislation can draw on both federal compliance standards and leading practices at the state and local levels. For example, in response to weaknesses in federal and state law, Brian Sutherland has proposed model state legislation that attempts to address problems arising in the current constellation of election policies. Among the recommendations are the following: (1) creating an office of minority language assistance within the state's chief election official's office; (2) developing structural solutions to coverage formula problems, such as delegating authority for coverage determinations to appropriate agencies; (3) establishing relaxed statistical triggers for minority group coverage; (4) employing annual or biennial coverage determinations to address demographic changes; (5) amending state assistor laws to be consistent with section 208; and (6) drawing on the Act's enforcement structures to create parallel programs at the state level.<sup>140</sup>

Localities can also go further by providing a sliding scale of interpreter services and written translations based on group size and need. Costs must be considered in setting any language assistance standards, but addressing voters' needs may not be unduly burdensome if an appropriate range of mechanisms is in place. For instance, cities such as Cambridge and Chicago have opted to focus on voter registration and voter information pamphlets to provide the widest array of language assistance through translated forms—eight languages in Cambridge, fifteen in Chicago. Similarly, the recruitment of bilingual poll workers is a widespread practice that can cover a multitude of languages, and, if done strategically, without large additional costs. More extensive services paralleling

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139. See Walter Ruby, *Bloomberg Blamed for Russian Ballot Failure*, JEWISH WK. (July 27, 2007), [http://www.thejewishweek.com/news/new\\_york/bloomberg\\_blamed\\_russion\\_ballot\\_failure](http://www.thejewishweek.com/news/new_york/bloomberg_blamed_russion_ballot_failure).

140. Sutherland, *supra* note 73, at 364-79.

section 203 compliance can then be reserved for the largest language group populations.

Cost considerations may limit services to smaller language groups, but even the smallest groups can receive assistance if local jurisdictions provide translated notices that inform voters of their right to use individual assistors pursuant to section 208 of the Act. The financial costs of such basic notices would be minimal if they entail translating a small number of sentences, printing them on election materials designed for the general populace, and distributing additional translated materials that are strategically targeted to appropriate language groups. Oral and video notices could also be distributed via recorded public service announcements, websites, or community organizations that work closely with the relevant populations.

Moreover, state and local government need not bear all of the costs of language assistance. Federal support under the Help America Vote Act (HAVA),<sup>141</sup> which offers a system of grants and government payments for language assistance to be incorporated into state voting systems, provides one basis for expanding state and local programs.<sup>142</sup> The U.S. Election Assistance Commission, which is the primary agency charged with implementing HAVA, has recognized the importance of language assistance and has itself developed voter education and voter registration materials in six languages: Chinese, Japanese, Korean, Spanish, Tagalog, and Vietnamese.<sup>143</sup> The expansion of HAVA grants and materials generated through the Election Assistance Commission could play key roles in the growth of local assistance policies.<sup>144</sup>

Although states and localities have made strides in addressing the needs of limited-English proficient voters, language assistance policies nationwide remain less than ideal. Local policies can be easily revised—or even repealed—and ongoing debates over immigration and immigrants' rights suggest that local policymaking can quickly shift in directions that disfavor language assistance. The Iowa Secretary of State, for example, provided voter registration forms in Bosnian, Laotian, Spanish, and Vietnamese on its website until 2008, when a state court ruled that Iowa's English-only law, known as the Iowa English Language Reaffirmation Act,<sup>145</sup> prohibited the distribution of voter materials in

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141. 42 U.S.C. §§ 15301-15545 (2006 & Supp. 2008).

142. HAVA contains provisions for payments to the states for “[i]mproving the accessibility and quantity of polling places, including providing physical access for individuals with disabilities, providing nonvisual access for individuals with visual impairments, and providing assistance to Native Americans, Alaska Native citizens, and to individuals with limited proficiency in the English language.” *Id.* § 15301(b)(1)(G).

143. See *Voting Accessibility*, U.S. ELECTION ASSISTANCE COMM’N, [http://www.eac.gov/voter\\_resources/voting\\_accessibility.aspx](http://www.eac.gov/voter_resources/voting_accessibility.aspx) (last visited Oct. 17, 2010).

144. For a discussion of some of the limitations of HAVA, see Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206 (2005); Daniel P. Tokaji, *The Future of Election Reform: From Rules to Institutions*, 28 YALE L. & POL’Y REV. 125 (2009).

145. IOWA CODE § 1.18 (West, Westlaw through 2010 Reg. Sess.). The law requires that “the

languages other than English.<sup>146</sup> And, of course, many localities that have no obligations under the Act have chosen not to provide voluntary language assistance at all. Nonetheless, as I discuss in the next Part, recent developments in state and local election policies may be signaling more lasting trends in anti-discrimination law and in public policies addressing civic participation and the integration of immigrants into local communities.

### III. TRENDS IN VOTING RIGHTS, ELECTION ADMINISTRATION, AND LANGUAGE ASSISTANCE

The expansion of local language assistance policies in recent years reflects an incremental but upward trend towards greater recognition of language differences and language needs in voting rights jurisprudence. Even though the Act is one of the few federal statutes to address language-based discrimination explicitly and has had significant and lasting effects on the participation of minorities in the electoral process, its provisions are largely limited to remedying discrimination against specific language groups. In many ways, the Act lags behind other federal anti-discrimination policies that recognize group differences and establish governmental obligations to address these differences. Many state and local policymakers have been engaged in anti-discrimination projects to fill the gaps that Congress has declined to address through federal legislation.

Local voting policies thus offer important insights into the evolving nature of language rights, anti-discrimination law, and election administration. Most local policies have not been enacted to correct longstanding educational and electoral discrimination in the same way that Congress sought to create structural remedies within the Act. Local policies have instead been designed to address growing community needs and eliminate barriers to political participation facing large numbers of limited-English proficient citizens, especially immigrants and the elderly. In this Part, I discuss language assistance policies as evidence of larger trends in the law to address the subordination of limited-English proficient citizens who cannot exercise a meaningful vote without language assistance and, more broadly, to promote civic engagement and political participation in communities with large populations of immigrants.

#### *A. Language Accommodation and Local Anti-discrimination Law*

Although they are not always framed as formal civil rights laws, local election policies reflect an expansion of anti-discrimination norms to recognize language differences and accommodate those differences through oral and

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English language shall be the language of government in Iowa” and that “[a]ll official documents, regulations, orders, transactions, proceedings, programs, meetings, publications, or actions taken or issued . . . [by the State] . . . shall be in the English language.” *Id.* § 1.18(3).

146. *King v. Mauro*, No. CV6739 (Iowa Dist. Ct., Mar. 31, 2008); see also Michael A. Zuckerman, *Constitutional Clash: When English-Only Meets Voting Rights*, 28 *YALE L. & POL'Y REV.* 353 (2010).



written assistance.<sup>147</sup> The accommodation of group differences is already an established principle that operates in a number of areas of anti-discrimination law, particularly in federal laws requiring “reasonable accommodations” to address religious discrimination and disability discrimination in the workplace.<sup>148</sup> The voter who is unable to understand an English-only ballot, but who could exercise a meaningful vote if the election materials were available in another language, is not unlike the disabled individual who can perform the essential functions of a job if office practices or equipment are modified, or who can cast a vote if provided access to polling sites and offered appropriate voting technologies to accommodate the disability.<sup>149</sup>

Accommodation laws function as a form of anti-discrimination enforcement distinct from traditional civil rights laws because they embody a “difference” model rather than the more common “sameness” model that prohibits differentiation on the basis of a group characteristic or trait.<sup>150</sup> A difference model “assumes that individuals who possess the quality or trait at issue are different in a relevant respect from individuals who don’t and that ‘treating them similarly can itself become a form of oppression.’”<sup>151</sup> Accommodations are also bounded by cost-benefit considerations affecting both the individual requiring an accommodation and the entity providing the accommodation. Once a group-based difference is recognized, there is a legal duty to provide an appropriate accommodation, but only up to the point that the provider faces no undue hardship.<sup>152</sup>

Standards for language accommodation, although not as thoroughly developed as the reasonable accommodation standards in religion and disability discrimination statutes, do have a basis in federal case law and agency regulations. Interpretations of Title VI of the Civil Rights Act of 1964, along with its implementing regulations and compliance guidelines, recognize that failure to address language barriers among recipients of federal funding can be

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147. I have argued previously that the accommodation of language differences is an ascendant trend in federal voting rights jurisprudence. *See generally* Ancheta, *supra* note 11.

148. *See, e.g.*, 42 U.S.C. § 12111 (2006 & Supp. 2010) (describing standards and forms of disability-based reasonable accommodations within the Americans with Disabilities Act); 29 C.F.R. § 1605.2 (2010) (regulating the reasonable accommodations necessary to prevent religion-based employment discrimination under Title VII of the Civil Rights Act of 1964).

149. *See* Daniel P. Tokaji & Ruth Colker, *Absentee Voting by People with Disabilities: Promoting Access and Integrity*, 38 MCGEORGE L. REV. 1015 (2007); Michael Waterstone, *Constitutional and Statutory Voting Rights for People with Disabilities*, 14 STAN. L. & POL’Y REV. 353 (2003).

150. *See* Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 10 (1996).

151. *Id.*

152. *See, e.g.*, *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 84 (1977) (holding that religious accommodations need only be made when costs are small and that anything “more than a de minimis cost” would impose an undue hardship).

a form of national origin discrimination requiring action by the recipient.<sup>153</sup> In *Lau v. Nichols*, the U.S. Supreme Court linked language access to national origin discrimination when it concluded that the failure to provide English instruction to non-English-speaking Chinese American students in San Francisco public schools violated Title VI regulations.<sup>154</sup> Guidelines to the regulations stated, in part, that “[w]here inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency. . . .”<sup>155</sup> Implicit in the *Lau* Court’s reasoning was the recognition of a significant group-based difference that resulted in a deprivation of rights based on that difference—specifically, the Chinese American students’ inability to understand English led to discrimination resulting from the government’s failure to take adequate steps to instruct the children in English and other basic subjects.<sup>156</sup>

Issued by President Clinton in 2000, Executive Order 13,166 expands on the notion of accommodation within Title VI through compliance standards that require federal agencies and recipients of federal funding to ensure that limited-English proficient individuals receive meaningful access to programs through appropriate forms of assistance.<sup>157</sup> In coordination with Executive Order 13,166, the Department of Justice issued guidelines that do not rely on a fixed trigger like the Act. Instead, they weigh group size and interests against the costs of providing language-appropriate services. Federal agencies and recipients of funding are required under agency regulations to balance multiple factors: (1) the number or proportion of limited-English proficient persons to be served; (2) the frequency with which these individuals come in contact with the program; (3) the nature and importance of the program or service to people’s lives; and (4) the costs and resources available to the recipient.<sup>158</sup>

Employing these guidelines, agencies and recipients of federal funds provide oral interpretation services and written translations when they are justified, but in some instances the balance may tip in favor of providing minimal assistance. This is especially true when the group is small, the interest is less important, and the costs significantly outweigh the benefits. For instance, guidelines for one

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153. 42 U.S.C. §§ 2000d-2000d-4a (2006).

154. 414 U.S. 563, 566-68 (1974).

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

156. The *Lau* decision led to the passage of the Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1701-1721 (2006), which states in part: “No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by . . . 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.” *Id.* § 1703(f).

157. Exec. Order No. 13,166, 3 C.F.R. § 289, 290 (2001).

158. Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons with Limited English Proficiency; Policy Guidance, 65 Fed. Reg. 50,123, 50,124-25 (Aug. 16, 2000).

federal agency contemplate a mix of services, including on-site bilingual staff, commercial telephone translation services, use of family members or friends for oral interpretation, and complete, partial, or summary translations in the case of written materials.<sup>159</sup> Unfortunately, Executive Order 13,166 has not been a significant source of voting rights enforcement even though large amounts of federal funding flow to state governments to finance election reforms via laws such as the Help America Vote Act.<sup>160</sup>

Election policies can nonetheless encompass the difference principle inherent in accommodation laws, and they can employ language assistance measures that address barriers to voting while still allocating fair and appropriate costs to the government. Indeed, a weak form of language accommodation already exists in section 208 of the Act, which recognizes the legally significant difference of being an illiterate or limited-English proficient voter and accommodates that difference by guaranteeing the voter's right to have a personal assistor.<sup>161</sup> Although they are not asked to bear the costs of providing assistors, local governments can be held liable for denying assistance to voters who need the help to cast a meaningful vote.<sup>162</sup>

Local language assistance policies reflect even more robust forms of language accommodation. These policies typically recognize the basic difference that attaches to limited-English proficiency by acknowledging that voters who lack the skills necessary to fully comprehend English-only election materials face barriers to participation in the electoral process. Local governments accommodate these differences in a variety of ways through language assistance, including oral interpretation and translations of various written election materials. Election policies also balance the hardships of providing accommodations by limiting both the forms of assistance and the number of language groups receiving assistance. Oral assistance and written translations are

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159. Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 68 Fed. Reg. 47,311, 47,315-19 (Aug. 8, 2003) (providing guidelines for U.S. Department of Health and Human Services).

160. 42 U.S.C. §§ 15301-15545 (2006 & Supp. 2008); 36 U.S.C. §§ 152601-152612. Government enforcement of Title VI against local election officials has largely fallen between the cracks of agency responsibility; the Voting Section of the Department of Justice does not enforce Title VI against state or local governments, and other sections of the federal government that address program access for limited-English proficient individuals do not enforce voting-related claims.

161. 42 U.S.C. § 1973aa-6 (2006). The Act's structural remedies are also manifestations of an accommodation norm, but they are constrained by the requirement of past discrimination against enumerated groups and the triggering mechanisms that limit coverage. The "difference" recognized in sections 4(f)(4) and 203 of the Act is cabined by the definition of language minorities, and measurements of hardships on government are implicitly assessed through statistical triggers that impose full duties on government to provide assistance if they are satisfied, but no duties if the triggers are not met. *Id.* § 1973b.

162. *See supra* note 71 (citing U.S. Department of Justice litigation to enforce § 208).

not necessarily offered to every limited-English proficient voter who needs aid, but there are often gradations in assistance. Section 203, in contrast, requires either full language assistance to a specified language minority group covered by the Act or no assistance at all.

Many local language assistance policies are thus more closely aligned to the meaningful access standards under Executive Order 13,166 than to the structural remedies of the Act, and they offer more flexible forms of language accommodation that reach a wider scope of limited-English proficient voters. The City of Chicago, for example, limits full translations of its written ballots to the two languages required under the Act, offers translated versions of its website in three languages, and provides links to voter information pamphlets in an additional twelve languages.<sup>163</sup> Similarly, Los Angeles County provides full written and oral assistance in Spanish and four Asian languages pursuant to section 203, but the county also distributes a voter information brochure that is translated into three non-required languages. Armenian, Khmer, and Russian.<sup>164</sup>

More than a few language assistance policies have arisen through the actions of state or local election officials, rather than through the creation of legally enforceable civil rights and governmental duties. The enforcement of language accommodations may therefore be problematic in practice. Nevertheless, the simple acknowledgement of language differences and the affirmative steps taken by many state and local election officials reflect an extension of anti-discrimination norms beyond the basic remedial rationales contained in the Act. The growth in state and local laws sends a clear signal to both the federal government and other states and municipalities that language accommodation can and should be expanded, whether through stronger enforcement of federal policies such as Title VI and Executive Order 13,166 or greater voting accommodations by states, counties, and cities.

### *B. Language Assistance and Civic Engagement*

The provision of language assistance to limited-English proficient voters is not merely a matter of anti-discrimination enforcement; it cannot be isolated from a set of larger debates over the role of non-English languages in public life and the responsibilities of government in promoting the civic engagement of immigrants. Disputes over language assistance in elections have been especially contentious because of polar views on the rights and responsibilities of voters who are naturalized citizens, and the various arguments have been covered in great detail in both policy debates and legal and social science literature.<sup>165</sup> Critics argue that English proficiency is a core element of American citizenship

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163. BD. OF ELECTION COMM'RS FOR THE CITY OF CHI., *supra* note 133.

164. *See* L.A. CNTY. REGISTRAR-RECORDER/CNTY. CLERK, *supra* note 114.

165. *See generally* SCHMIDT, *supra* note 12; Cristina M. Rodríguez, *Language and Participation*, 94 CAL. L. REV. 687 (2006) [hereinafter Rodríguez, *Language and Participation*]; Cristina M. Rodríguez, *Accommodating Linguistic Difference: Toward a Comprehensive Theory of Language Rights in the United States*, 36 HARV. C.R.-C.L. L. REV. 133 (2001).

and point to the basic requirements for naturalization, which, except for cases involving long-term elderly residents, include English literacy.<sup>166</sup> Critics further suggest that language assistance generally diminishes the role of English as a civic unifier and deters immigrants from learning English in the first place.<sup>167</sup> In contrast, supporters of language rights invoke basic values of democratic participation and contend that public policies should support multiple objectives, such as encouraging transitional language assistance and increasing opportunities for English-language acquisition to incorporate the limited-English proficient into American society.<sup>168</sup> In spite of this debate, an increasing number of state and local governments have opted to provide voluntary language assistance as part of larger agendas to promote civic engagement and immigrants' participation in the political process. Language access policies adopted in cities such as West Hollywood, Minneapolis, and San Francisco provide useful examples.

Approximately one in seven residents in California's City of West Hollywood is Russian American,<sup>169</sup> and the local Russian population plays a significant role in the city's political, social, and cultural life. In order to coordinate key bilingual services to the local population, West Hollywood has employed a full-time bilingual Russian outreach coordinator in its department of public safety and community services since 1995 and has utilized an active Russian advisory board that makes policy recommendations to the city council since 2000.<sup>170</sup> Composed of eleven Russian speakers appointed by the city council, the advisory board provides information on issues relating to the development and coordination of services to the Russian American community and makes recommendations to the city council on programs and policies that could benefit West Hollywood's Russian-speaking residents.<sup>171</sup> Among its primary goals is ensuring that "new immigrants participate actively in the civic life of the City," which West Hollywood has accomplished by providing "translation services, familiarization with the inner workings of local government, assistance in obtaining City and social services, and special cultural events."<sup>172</sup> Voting assistance is just one of several governmental services offered in Russian.<sup>173</sup>

In Minneapolis, where growth of the Hmong, Latino, Somali, and other immigrant communities has created an increasingly diverse population, language assistance in voting is a key element of a centralized plan to provide multilingual assistance in a range of city services. The "Minneapolis in Any Language" plan was developed in 2004 in response to a city council mandate to address language

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166. 8 U.S.C. § 1423(a)(1) (2006).

167. See generally Perea, *supra* note 12; SCHMIDT, *supra* note 12.

168. See Rodríguez, *Language and Participation*, *supra* note 165.

169. See *QT-P13 Ancestry: 2000, West Hollywood City, California*, *supra* note 128.

170. *Russian Outreach*, *supra* note 132.

171. *Russian Advisory Board*, CITY OF W. HOLLYWOOD, <http://www.weho.org/index.aspx?page=731> (last visited Oct. 17, 2010).

172. *Russian Outreach*, *supra* note 132.

173. *Election Results*, *supra* note 131.

needs among the city's multiple immigrant populations.<sup>174</sup> Designed both as a Title VI compliance measure and as a civic engagement tool, the plan contains a clear commitment to the elimination of language barriers, a commitment that “stems from overall city goals of responsive government, community engagement, and customer service.”<sup>175</sup> The plan also states that “[a]s residents, workers or visitors who contribute to city life, people with limited English proficiency are entitled to fair and equal access to service,” reflecting the plan's parallel anti-discrimination objectives.<sup>176</sup> The plan contains detailed implementation guidelines, including formulas for language coverage, timelines for city departments—including the city clerk's office, which is charged with the administration of local elections—to develop departmental implementation plans, and overall oversight by the city's multicultural services coordinator, housed in the Minneapolis Department of Civil Rights.<sup>177</sup> Services such as language lines and translated websites cut across areas, including voter assistance, to cover Hmong, Somali, and Spanish.<sup>178</sup>

The City and County of San Francisco have a longstanding commitment to recognizing immigrants' civil rights and coordinating multilingual services. Election officials there have employed trilingual ballots in Chinese, English, and Spanish since the 1970s. In addition, the city and county provide translated voter education materials to other immigrant groups. San Francisco's fifteen-member immigrant rights commission was created in 1997 as an advisory body to the mayor and the board of supervisors with a mission to “[i]mprove[,] enhance[,] and preserve[] the quality of life and civic participation of all immigrants in the City and County of San Francisco.”<sup>179</sup> The commission has oversight over the implementation of San Francisco's language access ordinance, which was originally enacted in 2001 as a broad language rights policy designed to guarantee that municipal services, including services in the department of elections, are accessible to limited-English-speaking residents.<sup>180</sup> The language access ordinance contains coverage formulas paralleling the Act's section 203 provisions, but it makes them applicable to any language group.<sup>181</sup> The ordinance also contains a full set of implementation measures: oral assistance and written translations of city documents; dissemination of multilingual state and federal

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174. MINNEAPOLIS IN ANY LANGUAGE, *supra* note 135, at 10.

175. *Id.* at 4.

176. *Id.*

177. *Id.* at 39-42.

178. *Id.* at 42.

179. CITY & CNTY. OF S.F. IMMIGRANT RIGHTS COMM'N, <http://www.sfgov2.org/index.aspx?page=120> (last visited Oct. 17, 2010).

180. S.F., CAL., ADMIN. CODE §§ 91.1-18 (municode current through March 2010). The law was originally called the Equal Access to Services Ordinance but was renamed in 2009. S.F., CAL. ORDINANCE 202-09 (Aug. 28, 2009).

181. S.F., CAL., ADMIN. CODE § 91.2. Section 91.2(k) defines a “Substantial Number of Limited English Speaking Persons” as “either 10,000 City residents, or 5 percent of those persons who use the Department's services.” *Id.*

documents; compliance plans for individual city departments; and enforcement mechanisms and complaint procedures for the public.<sup>182</sup> The San Francisco Office of Civic Engagement and Immigrant Affairs, an administrative arm of local government, serves as a centralized infrastructure for providing technical assistance and coordinating language services across departments.<sup>183</sup>

Not all states and cities that provide language assistance to voters employ immigrant advisory bodies or comprehensive language rights plans, but the growth of immigrant populations has necessitated the coordination of services to local residents, whether they are voters or non-citizens. Voter education and electoral assistance have become two of the many manifestations of language policies and practices that promote the civic engagement of limited-English proficient populations. Immigrant communities will continue to expand throughout the country, but local governments will ultimately face difficult choices in how they incorporate limited-English-speaking immigrants into civic life. Indeed, the future of many cities and suburbs may turn on whether local governments opt to be more inclusive and tolerant of language differences or whether they choose to employ English-only laws and other policies that lead to linguistic exclusion and disenfranchisement.

#### CONCLUSION

State and local language assistance policies have proven to be important complements to the structural remedies of the Act, but the needs of many voters requiring oral assistance and translations of election materials may still be unaddressed or underserved. The obligation to meet these needs should be one shared by all levels of government, but whether more jurisdictions ultimately choose to take on these responsibilities remains to be seen. Nevertheless, as immigrant populations continue to grow and more local governments move toward developing election policies that include language assistance for their limited-English proficient citizens, the norms of language accommodation should solidify and extend to more jurisdictions. Congress and the federal government may in time follow the lead of local governments and begin treating language assistance as an essential practice that ensures meaningful access to the vote rather than merely as a remedy for past discrimination. Local voting rights laws will no doubt continue to fuel an agenda that envisions accommodation and civic engagement policies as critical investments in the nation's future.

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182. *Id.* §§ 91.4-11.

183. *Id.* § 91.14.