

LANGUAGE ACCOMMODATION AND THE RIGHT TO VOTE

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INTRODUCTION

In October 2005, a federal district court approved a settlement agreement between the federal government and the City of Boston that spotlighted both overt discrimination against limited-English-proficient voters and the importance of providing language assistance to those voters – not only as a congressional remedy for past discrimination but as a vehicle for increasing civic engagement and political participation. In *United States v. City of Boston*, the U.S. Department of Justice alleged that the City had violated section 203¹ of the Voting Rights Act of 1965 – the Act’s major language-assistance provision – by failing to provide adequate translation of election materials in Spanish and by failing to recruit, appoint, train, and maintain an adequate pool of bilingual poll workers.² In addition, the complaint alleged that the City of Boston had violated multiple sections of the law, including section 2, the Act’s general antidiscrimination provision, in a variety of ways: by treating limited-English-proficient Latino and Asian American voters disrespectfully; by refusing to permit these voters to be aided by an assistor of their choice; by improperly influencing, coercing, or ignoring the voters’ ballot choices; by failing to make bilingual personnel available to the voters; and by refusing or failing to provide provisional ballots.³

Typical of many recent cases, the court order in *United States v. City of Boston* contains sections applicable to Latino and Asian American voters that require improved translations of elections materials, an adequate supply of bilingual poll workers, greater dissemination of multilingual information, federal election monitoring, the designation of a language assistance coordinator, and the creation of a community-based advisory body.⁴ The case is unusual, however, in that the order extended language-based remedies for section 2 violations to groups of voters that were not explicitly covered by section 203’s protections. Although the Latino population in Boston was large enough to trigger section 203 coverage, the populations of limited-English-proficient Chinese Americans and Vietnamese Americans each fell well below the statistical thresholds necessary to invoke section 203; neither group constituted more than five percent of the voting age citizens in the jurisdiction or more than a total of 10,000 voting age citizens.⁵ As remedies for violations of section 2, the mandates in *United States v. City of Boston* illustrate the central role that language assistance can play in redressing discrimination against

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¹ 42 U.S.C. § 1973aa-1a.

² Complaint, *United States v. City of Boston*, No. 05-11598 WGY (D. Mass. 2005).

³ *Id.*

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

⁵ 42 U.S.C. § 1973aa-1a. Chinese Americans numbered approximately 5,000, while Vietnamese Americans numbered approximately 3,000 <Confirm numbers> Presentation by Susana Lorenzo-Giguere, U.S. Department of Justice, at National Asian Pacific American Bar Association Annual Convention, Chicago, Ill. (Oct. 22, 2005).

limited-English-proficient voters, even if those voters do not constitute a large-enough population to invoke formal coverage under section 203.

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

Yet, moving beyond a strictly remedial basis for language assistance under the Voting Rights Act raises significant political and constitutional questions. Political support for language assistance in voting is hardly universal. Arguments for English-only elections to limit financial costs and to underscore the role of English as a civic *lingua franca* continue to animate opposition to language assistance under the Act. Indeed, there have been numerous attempts in recent years to repeal the language assistance provisions.¹⁰ Additionally, recent U.S. Supreme Court cases have limited the scope of congressional power to remedy constitutional and civil rights violations committed by state governments, and have made antidiscrimination litigation increasingly problematic.¹¹ Without careful limitations and an especially strong factual record to justify congressional action, legislation designed to enforce guarantees of equality under the Fourteenth and Fifteenth Amendments may be constitutionally suspect.

This paper examines the expansion of language assistance under the Voting Rights Act from a structural remedy for past discrimination to a broader vehicle of language accommodation that encourages political participation by limited-English-proficient voters. In doing so, the paper examines constitutional requirements for existing mandates under the Voting Rights Act, while also cautioning against overly expansive measures that might arise in the course of reauthorizing

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

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

⁸ See <http://66.107.4.19/English2004.htm#LanguageASS> (last visited Oct. 30, 2005).

⁹ See <http://www.cityofboston.gov/newbostonians/voterkit.asp> (last visited Oct. 30, 2005).

¹⁰ In August of 1996, for instance, the House of Representatives passed H.R. 123, the “Bill Emerson English Language Empowerment Act of 1996,” which would have declared English to be the official language of the United States and would have repealed the language assistance provisions of the Voting Rights Act. The Senate did not vote on the bill.

¹¹ See *infra* notes __ to __ and accompanying text (discussing constitutional limitations on changes to the Voting Rights Act).

section 203 and the Act’s other language assistance provisions. Part I of the paper examines various antidiscrimination models under the Voting Rights Act, including section 203 and the Act’s more general civil rights protections for limited-English-proficient voters. Part II offers a model of language accommodation that expands current voting rights jurisprudence, drawing on legal theories of language rights and extant antidiscrimination standards outside of voting. Part III suggests a framework for incorporating language accommodation norms into enforcement of the Voting Rights Act, as well as alternative vehicles for protecting language rights, such as Title VI of the Civil Rights of 1964 and election reform legislation such as the Help America Vote Act of 2002.

I. LANGUAGE MINORITIES AND THE VOTING RIGHTS ACT

To outline the growth of language assistance from its roots as a structural antidiscrimination remedy to an evolving norm of language accommodation, this Part discusses the 1975 amendments and later amendments to the Voting Rights Act focusing on language minorities. Although section 203 and other language assistance provisions remain the primary federal mandates requiring assistance to language minorities, other provisions of the Voting Rights Act also provide important, but underutilized, bases for protecting the rights of limited-English-proficient voters. Moreover, the various statutory protections available to limited-English-proficient voters represent significantly different models of civil rights enforcement: language assistance provisions such as section 203 typify a *structural remediation* model of voting rights law that addresses past discrimination against identified groups; section 2 of the Voting Rights Act, which has covered language minorities since 1975, typifies the *traditional antidiscrimination* model found in many civil rights laws prohibiting policies of differential treatment and disparate impact against minorities; and section 208 of the Voting Rights Act, a provision added in 1982 to improve electoral access to disabled and illiterate voters, typifies an *individual accommodation* model that has gained strength in recent years in civil rights enforcement affecting the disabled. Although complementary, none of these models offers a comprehensive approach that fully addresses the rights of limited-English-speaking voters.

A. Language Minorities and the 1975 Amendments

By expanding the reach and requirements of the original Voting Rights Act to include language minorities, the 1975 amendments to the Voting Rights Act were designed to promote two major goals. One goal was to clarify the Act’s coverage of certain racial and ethnic minorities – Latinos in particular – who had suffered discrimination in the political process, but whose group status under the law remained uncertain. Defining the “Hispanic” or “Latino” population was problematic under the original Act because its members, by self-designation or by ascription, often eluded clear racial categorization and transcended strict racial labels such as “black” and “white.” The “language minority” category was created to ensure full voting rights protections for individuals of “Spanish heritage,” as well as for American Indians, Asian Americans, and Alaskan Natives.¹²

¹² 42 U.S.C. § 19731(c)(3); *id.* § 1973aa-1a(e).

The legislative history of the 1975 amendments reveals a clear congressional intent to expand the Act’s coverage beyond black-white racial discrimination.¹³ Although groups such as Asian Americans would have been considered racial groups even under the 1965 Act, their addition, along with the addition of Latinos and Native Americans, through the language minority amendments was grounded in both the Fourteenth Amendment’s equal protection guarantees and the Fifteenth Amendment’s prohibitions on racial discrimination in voting. By relying on equal protection doctrine, under which the courts had already recognized segregative classifications based on national origin, like racial classifications, to be presumptively unconstitutional,¹⁴ Congress could base its extension of coverage on categories that might elude definition based on racial criteria, but were nonetheless the basis for extensive discrimination. However, Congress’ choice to employ “language minority” status, rather than a broader and more commonly used category such as “national origin” or “ethnicity,”¹⁵ effectively limited the Act’s coverage to the enumerated groups and excluded other groups that might have been covered under a differently defined category.

Congress incorporated the language minority categories into the Voting Rights Act by amending the statute to ensure that the Act’s preclearance requirements under section 5, applicable to areas with extensive histories of past discrimination, extended to language minority populations.¹⁶ Moreover, the Act’s ban on the use of a voting “test or device” was extended to include bans on English-only procedures or elections where a language minority group constitutes over five percent of the voting age population.¹⁷ Congress also amended section 2, the general and permanent antidiscrimination provision of the Act, to add coverage for language minorities.¹⁸

A second goal of the 1975 amendments was to establish a set of structural remedies to address both past and ongoing discrimination against limited-English-proficient minorities. Section 4(e) of the original Act had already recognized the connection between English-language-proficiency and voting discrimination in the case of Puerto Rican voters, many of whom had been educated in Spanish-dominant educational environments; the Act prohibits English-only literacy tests for “persons educated in American-flag schools in which the predominant classroom language was other than English.”¹⁹ Congress further determined in 1975

¹³ See S. Rep. No. 94-295, at 35-37 (1975).

¹⁴ *Keyes v. School Dist. No. 1*, 413 U.S. 189, 197 (1973); *Hernandez v. Texas*, 347 U.S. 475, 477-79 (1954).

¹⁵ See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 et seq.

¹⁶ 42 U.S.C. § 1973b(f). Section 5 requires that state and local governments with an extensive history of discrimination that has resulted in depressed minority political participation groups must “preclear” any changes to their electoral procedures either through administrative review by the Department of Justice or a declaratory judgment by a three-judge panel of the U.S. District Court for the District of Columbia; a change must have neither a discriminatory purpose nor a discriminatory effect. 42 U.S.C. § 1973c.

¹⁷ 42 U.S.C. § 1973b(f)(3).

¹⁸ Section 2 provides in part: “No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title [referring to language minorities].” 42 U.S.C. § 1973(a). Section 2 was amended in 1982 to create a “results” standard and effectively reverse Supreme Court case law imposing an intent requirement, but the language minority amendments of 1975 were left intact.

¹⁹ 42 U.S.C. § 1973b(e). The U.S. Supreme Court upheld the constitutionality of section 4(e) in *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

that educational discrimination, including overt segregation and disparities in public school funding and resource allocations, had led to high rates of illiteracy among language minorities throughout the country; these educational inequalities, combined with discrimination and intimidation in the electoral process, produced low rates of voter registration and voting among language minority groups.²⁰ Congress thus recognized the denial of voting rights inherent in many English-only election procedures and created two remedial vehicles requiring translated election materials, oral interpretation and aid, and other language-sensitive assistance: section 4(f) and section 203.²¹ Because of Congress' findings of nationwide discrimination affecting language minorities, neither of the provisions requires proof of intentional discrimination or discriminatory effect by a local jurisdiction; only the satisfaction of appropriate triggering formulas is mandated.

Focusing on areas with more serious histories of discrimination, section 4(f) prohibits English-only materials and requires language assistance in states and political subdivisions that satisfy a triggering formula based on a historical snapshot for the year 1972, which combine a language minority group's size (over five percent), the use of English-only procedures, and low voter registration and turnout.²² Preclearance of changes in election procedures under section 5 of the Act is required in these jurisdictions,²³ as is the appointment of federal examiners under section 6 of the Act.²⁴

Under section 203, a variety of triggering formulas link minority group size and high rates of illiteracy (measured by grade completion below the fifth grade) to determine language

²⁰ Section 4(f)(1) states:

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

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

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).

²¹ Section 4(f) and section 203 were reauthorized in 1982 and 1992, and are scheduled to expire in August 2007 unless reauthorized.

²² Section 4(f) prohibits English-only materials and requires language assistance in states and political subdivisions where (1) over five percent of the voting age citizens were, on November 1, 1972, members of a language minority group, (2) where registration and election materials were provided only in English on that date, and (3) less than 50 percent of the voting age citizens were registered to vote or voted in the 1972 presidential election. 42 U.S.C. § 1973b(f)(4).

²³ 42 U.S.C. § 1973c.

²⁴ 42 U.S.C. § 1973d.

assistance coverage. As originally enacted and amended in 1982, section 203 has mandated language assistance in a state or political subdivision in which more than five percent of the voting age citizens are members of a language minority group and limited-English-proficient, and where the illiteracy rate for that group exceeds the national illiteracy rate.²⁵ To address the problem of excluding coverage for large numbers of language minority voters who might not meet the five-percent test in many of the country's largest population centers, Congress amended section 203 in 1992 to carry an additional test focusing on absolute numbers: a language minority group constituting a population with over 10,000 voting-age limited-English-proficient citizens in a jurisdiction and possessing an illiteracy rate above the national average is covered.²⁶

Although designed to be temporary measures, the language assistance provisions of the Act have been in place for over three decades. And notwithstanding their lengthy history, recent litigation and election monitoring by community-based organizations have illuminated ongoing problems of noncompliance with the Act and its implementing regulations.²⁷ Common problems have revolved around inadequate numbers of trained bilingual poll workers, incomplete or insufficient amounts of translated election materials, and the failure to develop translated materials for the Internet and other electronic media. Group-specific issues such as transposing or incorrectly translating candidate names in Asian languages such as Chinese or Korean, mistranslating ballot initiative and referendum language, and establishing differential screening procedures for language minority voters have also been well-documented.²⁸ In addition, monitoring groups have chronicled numerous instances of voter intimidation, harassment, and discrimination (including the denial of ballots) against limited-English-proficient voters in many areas covered by section 4(f) and section 203.²⁹ Enforcement of section 203 by the Justice Department has been inconsistent as well. As the Department's Voting Rights Section itself divulged in 2005, more litigation had been filed since May 2004 than had been filed in the prior eight years,³⁰ which partly reflects the addition of new jurisdictions and language groups following the decennial census of 2000, but no doubt also reflects significant underenforcement of section 203 in previous years.

B. The Structural Remediation Model and the Language Assistance Provisions

²⁵ 42 U.S.C. § 1973aa-1a(c). 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 led to a reduction in the number of eligible jurisdictions. H.R. Rep. No. 102-655, at 7 (1992).

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

²⁷ Recent language minority litigation by the U.S. Justice Department is highlighted at <http://www.usdoj.gov/crt/voting/litigation/caselist.htm#sec203cases>.

²⁸ See National Asian Pacific American Legal Consortium, *Sound Barriers: Asian Americans and Language Access in Election 2004* (2005); Asian American Legal Defense and Education Fund, *Asian American Access to Democracy in the 2004 Elections* (Aug. 2005); Glenn D. Magpantay, *Asian American Access to the Vote: The Language Assistance Provisions (Section 203) of the Voting Rights Act and Beyond*, 11 *Asian L.J.* 31, 37-48 (2004).

²⁹ Magpantay, *supra* note __.; Barry H. Weinberg & Lyn Utrecht, *Problems in America's Polling Places: How They Can Be Stopped*, 11 *Temp. Pol. & Civ. Rts. L. Rev.* 401, 410-15 (2002).

³⁰ http://www.usdoj.gov/crt/voting/sec_203/activ_203.htm#enforcement

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Like section 5, the Act’s preclearance requirement, section 4(f) and section 203 are predicated on congressional findings of past discrimination and are designed to create structural remedies that are limited both in time (expiring in 2007 unless extended) and in scope. Consistent with their origins as remedial devices, section 4(f) and section 203 restrict their coverage in a number of important ways. First, the definition of “language minority” is limited to specific groups that Congress determined to have suffered significant discrimination in education and in the political process. Only language groups whose members are of Spanish heritage, American Indian, Asian American, or Alaskan Native are covered. Congress chose to omit limited-English-proficient voters from other racial and ethnic groups from the Act because discrimination against other groups was not as serious and did not result in comparably depressed levels of political participation.³¹ Thus, limited-English-proficient voters whose primary language is European (other than Spanish), African, Middle Eastern, or Caribbean – notwithstanding group population size or level of illiteracy – are not covered by the Voting Rights Act’s language assistance mandates.³²

Second, the coverage mechanisms under section 4(f) and section 203 reflect Congress’ employment of cost-benefit tradeoffs that limit assistance to only the largest language minority populations in a particular jurisdiction. The right to receive governmental assistance in one’s primary language is not a core element of a group-based remedy unless one’s group size is substantial and can justify the government’s expense of providing assistance. Surpassing either the five percent benchmark or the numerical benchmark of 10,000 triggers section 203’s language assistance requirements and any attendant rights. But, no statutory right to government-sponsored language assistance attaches – and none can be denied through English-only procedures – if a voter is a member of language minority group that is too small by congressional standards to justify receiving assistance.³³

Third, section 203’s illiteracy preconditions require a clear relationship between educational inequality and language assistance. Congress’ findings have documented the links between discrimination in education, high levels of illiteracy, and depressed political participation. While a sizable language minority group may contain high numbers of adult immigrants who were educated abroad and completed their education beyond the fifth-grade level, large numbers of the same group might lack *English* literacy above the fifth-grade level, which can differ significantly from a figure based on grade-completion. Thus a language group might not satisfy the requirement that the group’s illiteracy rate exceed the national rate, even though many voters might lack the necessary proficiency in English to participate in the political

³¹ See S. Rep. No. 94-295, at 31 (1975) (highlighting census data showing that political participation rates in the 1972 Presidential election for voters of European origin greatly exceeded the rates for language minority groups).

³² These groups can, however, be protected against violations of section 2 of the Voting Rights Act on the basis of racial discrimination, and language assistance may an appropriate remedy to address the section 2 violation.

³³ Even with these various limitations, the number of states and political subdivisions covered by section 4(f) and section 203 is extensive. See 28 C.F.R. pt. 55 & app. All of Alaska (for Alaskan Natives), Arizona (Spanish), and Texas (Spanish) are covered by section 4(f), as are political subdivisions in seven states (Spanish or American Indian languages). Section 203’s coverage extends to jurisdictions in over thirty states, many with multiple language groups. For example, California’s Los Angeles County must provide assistance to Spanish-speakers and five Asian language groups (Chinese, Filipino, Japanese, Korean, Vietnamese); Arizona’s Pima County must provide assistance in Spanish and two American Indian languages (Yaqui, Tohono O’Odham); Alaska’s Lake and Peninsula Borough must provide assistance in Athabascan, Aleut, and Eskimo. See Voting Rights Act Amendment of 1992, Determinations Under Section 203, 67 Fed. Reg. No. 144, 48871 (July 26, 2002).

process.³⁴ The Act’s illiteracy requirements elide this distinction and make the connection between past discrimination in U.S.-based education and language assistance remedies especially strong.

The language assistance provisions thus establish a remedial structure that is by design limited and subject to cost-benefit balancing that weighs group access to voting assistance against governmental resources and expenses. Although the language assistance provisions could be amended to expand coverage in a variety of ways – by lowering threshold statistical benchmarks to a percentage less than five percent or to absolute numbers less than 10,000,³⁵ by eliminating the illiteracy requirement, or by adding language groups against whom there has been significant discrimination³⁶ – the fundamental model revolves around remediation for specified groups and government-subsidized measures that apply only when costs are justified by sufficient numbers of minority voters.³⁷ The remedies are conspicuously incomplete: many voters who may face language barriers because of educational and political discrimination but whose numbers are lacking in a particular geographic location cannot avail themselves of the same statutory rights and government-mandated assistance. Nor are the language provisions, despite popular misconceptions about the law, designed to assist limited-English-speaking immigrant voters as a class, because of the limitations on group eligibility through the enumeration of protected minorities, as well as the requirement of illiteracy traceable to discrimination in the American educational system.

Nonetheless, the Act’s remedial model does have significant parallels with statutes designed to promote language access and multilingual services in non-remedial settings. For example, under California’s Dymally-Alatorre Bilingual Services Act,³⁸ a law enacted in the 1970s to provide multilingual assistance to limited-English-speaking individuals seeking state and local government services, government agencies must hire bilingual personnel, provide oral assistance, and develop and distribute translations of written materials when a “substantial number of non-English-speaking people” must be served by an agency. The state law establishes a statistical trigger of five percent of an agency’s service population to indicate when a “substantial number” of individuals in a language group must receive language-appropriate

³⁴ In the 1990s, for example, Korean American voters in Los Angeles County, despite possessing over twice the population needed to satisfy the 10,000 numerical benchmark, did not qualify for language assistance because their illiteracy rate did not exceed the national rate. See 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, 50 (2004). After the year 2000, Korean Americans were covered under section 203 because census data revealed a group illiteracy rate above the national average.

³⁵ Advocates have proposed that the numerical threshold for section 203 should be lowered to 7,500, which has been estimated to add nine jurisdictions for Asian languages (over 77,000 voters) and six jurisdictions for Spanish (nearly 50,000 voters). See Testimony of Margaret Fung, Asian American Legal Defense and Education Fund Before the U.S. House of Representatives Committee on the Judiciary Subcommittee on the Constitution, Oversight Hearing on the Voting Rights Act: Section 203-Bilingual Election Requirements, Part I (Nov. 8, 2005), at 6, available at <http://judiciary.house.gov/media/pdfs/fung110805.pdf>.

³⁶ See Brenda Fathy Abdelall, *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) (proposing the recognition of Arab Americans as a language minority group).

³⁷ For an analysis of the financial costs of language assistance implementation, see U.S. General Accounting Office, *Bilingual Voting Assistance: Assistance Provided and Costs* (1997).

³⁸ Cal. Gov. Code § 7290 et seq.

services.³⁹ Local ordinances such as San Francisco’s “Equal Access to Services” ordinance, enacted in 2001 to require oral and written translation for a variety of local services and procedures, track section 203’s statistical benchmarks even more closely.⁴⁰ Under the San Francisco law, a “substantial number of limited English speaking persons” is defined by either a five percent trigger or a 10,000 population trigger for limited-English-speaking city residents from the same language group.

Similarly, Executive Order 13166 (“Improving Access to Services for Persons with Limited English Proficiency”), issued by President Clinton in 2000 to prevent national origin discrimination under Title VI of the Civil Rights of 1964,⁴¹ establishes federal compliance standards that require agencies and recipients of federal funding to ensure that limited-English-proficient individuals receive “meaningful access” to federal programs and activities through appropriate assistance.⁴² Agencies typically require language assistance in the form of interpretation services and translated materials, subject to a balancing test focusing on the number of limited-English-proficient persons to be served, the frequency with which individuals come in contact with a program, the importance of the program or service, and the costs and resources borne by the recipient.⁴³ Unlike the Voting Rights Act, the meaningful access guidelines do not rely on a fixed triggering mechanism, but they do employ a metric in which group size and interests are weighed against the costs of providing language-appropriate services. When justified, extensive interpreter services and written translations can be provided, but in some instances, the balancing test may tip in favor of providing limited assistance or no assistance – especially if the group is small, the interest is not deemed important, and the costs significantly outweigh the benefits.

C. Additional Enforcement Models: Section 2 and Section 208

Section 4(f) and section 203 impose the most extensive obligations on state and local governments to provide language assistance, but as structural remedies they are limited by their scope and their lifetimes. The Voting Rights Act offers additional protections to limited-English-proficient voters primarily through two permanent, but largely untapped, models of enforcement: (1) the general antidiscrimination provision contained in section 2 of the Act and (2) the voting assistor provision contained in section 208 of the Act.⁴⁴ Both of these sections – often applied in tandem with section 203 claims – have been employed with increasing frequency in Justice Department litigation designed to promote language assistance in local jurisdictions.

1. Section 2 and the Traditional Antidiscrimination Model

³⁹ *Id.* § 7296.2.

⁴⁰ San Francisco, Cal., Admin. Code ch. 89. The text of the ordinance is available at <http://www.las-elc.org/origin.html>.

⁴¹ 42 U.S.C. §§ 2000d- 2000d-4a.

⁴² Exec. Order 13166, *reprinted in* 65 Fed. Reg. 50121 (Aug. 16, 2000).

⁴³ *See* 65 Fed. Reg. 50123, 50123-25 (Aug. 16, 2000).

⁴⁴ In addition, the Help America Vote Act of 2002 contains provisions ensuring that language minority voters receive appropriate assistance in new voting systems, including those systems using direct-recording electronic technologies, as well as provisions that create funding for increased research related to language accessibility.

By prohibiting policies that can result in a denial or abridgement of the right to vote, section 2 offers the most general scope of protection for racial and language minorities under the Voting Rights Act. Like other federal antidiscrimination statutes such as Title VI⁴⁵ and Title VII⁴⁶ of the Civil Rights Act of 1964, section 2 is applicable nationwide, has no numerical trigger based on group size, and requires a determination of either intentional discrimination or discriminatory effects resulting from a challenged practice. Section 2 ensures that antidiscrimination protections extend, like similar statutes, to racial discrimination, but section 2 is unusual among federal antidiscrimination laws in that its protections beyond race or color are cabined by the definition of language minorities. Unlike Title VI and Title VII, which offer antidiscrimination protection on the basis of national origin – a category that has been interpreted through administrative regulation and case law to include protections against language-based discrimination – section 2’s language minority category is bound by the same definition that applies to section 4(f) and section 203.⁴⁷ Section 2 is thus more explicit than other antidiscrimination laws in protecting against language discrimination, but individuals or groups who fall outside the protected language minority classes cannot assert claims unless the claims are based on race or color.⁴⁸

Section 2 litigation on behalf of language minority plaintiffs has not typically focused on language-related claims; most claims have involved vote dilution, such as challenges to discriminatory at-large election systems or redistricting plans, and have proceeded as if they were race-based claims. But in *United States v. City of Hamtramck*, language assistance did play a central role in the remedial portion of a consent decree involving racial discrimination. The *Hamtramck* case revolved around race- and color-based claims brought on behalf of Arab American and darker-skinned Asian American voters whose citizenship and voter qualifications were challenged by members of a private citizens group during the November 1999 election in Hamtramck, Michigan – a problem that was largely unaddressed by local election officials.⁴⁹ In order to address problems of voter intimidation and harassment, the *Hamtramck* settlement required the training of officials on appropriate procedures for challenging voters and on methods to address voter intimidation; the consent decree went further and required that notices be prepared in English, Arabic, and Bengali to inform voters about the new practices and also required that bilingual workers be hired to assist on election day. Language assistance thus became a significant element of a remedy for section 2 violations based on race and color, but not on language per se.

Section 2 claims predicated on limited-English-proficiency are less common and usually appear in conjunction with language assistance enforcement actions by the Department of

⁴⁵ 42 U.S.C. §§ 2000d- 2000d-4a

⁴⁶ 42 U.S.C. § 2000 et seq.

⁴⁷ In *Hernandez v. Woodard*, 714 F.Supp. 963, 968-69 (N.D. Ill. 1989), a federal district court made clear that section 2 claims on behalf of language minorities need not be coupled with section 203’s statistical (5%) threshold in order to move forward.

⁴⁸ Recent case law interpreting the Fifteenth Amendment’s prohibition on racial discrimination in voting to include ancestry-based classifications may provide support for a broader interpretation of “race” under the Voting Rights Act. See *Rice v. Cayetano*, 528 U.S. 495 (2000).

⁴⁹ *United States v. City of Hamtramck*, No. 00-73541(E.D. Mich. Aug. 7, 2000).

Justice.⁵⁰ In *United States v. City of Boston*, for instance, the Justice Department alleged that the City had violated section 203 by failing to provide adequate Spanish-language assistance, but also alleged several section 2 violations involving not only Spanish speakers but also limited-English-proficient Chinese American and Vietnamese American voters who had been treated disrespectfully by election workers, had been ignored or improperly influenced in making ballot choices, and had been denied provisional ballots pursuant to the Help America Vote Act.⁵¹ The court order in the *Boston* case included a set of policies common in Justice Department section 203 settlement agreements – improved translations of materials, a sufficient number of bilingual poll workers, dissemination of multilingual information, federal monitoring, and the development of a language assistance coordinator position and a community-based advisory body. But the court’s section 2 remedies were merged with the section 203 mandates by applying language assistance to all three groups, even though only one group (Spanish speakers) was sufficiently large to be formally covered by section 203.

The antidiscrimination model available to limited-English-proficient voters under section 2 is thus evolving and may become an important source for the provision of language assistance, even if the claims focus on racial discrimination or on language minority status independent of actual language proficiency. However, language-based rights and remedies in section 2 jurisprudence are not as well developed as in other antidiscrimination laws such as Title VI, and section 2 enforcement has inherent limitations because it requires litigation and has largely been tethered to the law’s remedial language assistance sections – both in the language of the section 2 and in its enforcement.

2. Section 208 and the Individual Accommodation Model

In 1982, Congress added section 208 to the Voting Rights Act, which states in part that “any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter’s choice.”⁵² Although established largely as an accommodation measure for disabled and illiterate voters, section 208 has been applied to limited-English-proficient voters (particularly those whose primary language is unwritten) when those voters require assistance to understand an English-only ballot and to exercise their right to vote. In formulating section 208, Congress recognized that having the assistance of a person of one’s own choice may be “the only way to assure meaningful voting assistance and to avoid possible intimidation or manipulation of the voter.”⁵³ Section 208 is a permanent provision of the Act that applies nationwide, and is not limited to the language minority groups specified in the Act’s remedial language assistance sections.

Although section 208 imposes no affirmative obligations on state or local government to provide language assistance, it does create the basis for a Voting Rights Act violation if election officials impede or deny a voter’s use of an assistor in order to vote. For example, in *United*

⁵⁰ See, e.g., *United States v. City of Boston*, No. 05-11598 WGY (D. Mass. Oct. 18, 2005) (three-judge court); *United States v. Berks County*, 277 F. Supp. 2d 570 (E.D. Pa. 2003).

⁵¹ *United States v. City of Boston*, No. 05-11598 WGY (D. Mass. Oct. 18, 2005) (three-judge court).

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

⁵³ S. Rep. No 97-417, at 62 (1982).

States v. Berks County, a 2003 case that also involved violations of section 4(e) and section 2, a federal district court found that Puerto Rican voters in Reading, Pennsylvania were barred from bringing their assistants of choice into the voting booth, just one form of voting rights violation reflecting an extensive pattern of “hostile and unequal treatment of Hispanic and Spanish-speaking voters by poll officials.”⁵⁴ The court noted that when poll officials deny voters the right to bring their assistant of choice into the voting booth, “voters feel uncomfortable with the process, do not understand the ballot, do not know how to operate the voting machine, and cannot cast a meaningful vote.”⁵⁵ The court ordered multiple remedies, including the development of Spanish-language publicity and election materials and the training of poll workers on the mandates of section 208.

Similarly, in *United States v. Miami-Dade County*, Haitian American voters who needed assistance in Creole were denied the full and effective use of assistants in the November 2000 presidential election.⁵⁶ Poll workers denied the use of assistants to many voters, and when assistance was allowed, it was often limited to demonstrations of voting procedures outside the voting booth. A consent decree between the federal government and Miami-Dade County required, among other things, new training programs for poll workers, voter education policies, and the employment of bilingual election employees in targeted precincts. Despite falling outside the coverage of section 4(f) or section 203, limited-English-proficient speakers of Haitian Creole – like any limited-English-proficient voters who need the help of an assistant – fall within the protection of section 208.

Section 208 typifies an accommodation model of civil rights enforcement that is common in disability law, albeit a weak version that imposes minimal obligations on government.⁵⁷ The law focuses on a legally recognized trait or characteristic (blindness, disability, or the inability to read or write in English) as well as an accompanying limitation which arises from that characteristic, and consequently requires a benefit or service – the accommodation – to help the voter overcome the limitation and gain full access to the ballot. A violation of the statutory right occurs when the accommodation is denied. Like other disability laws, section 208 fosters highly specific and personalized assistance, since the voter determines who will provide the assistance and what will be needed. However, unlike other areas covered by disability law such as the employment sector, where employers bear the cost of providing a reasonable accommodation for a disabled employee as long as there is no undue burden,⁵⁸ the costs under section 208 are carried largely by the private assistant and the affected voter, who bears the responsibility of arranging the assistance. The primary costs that state and local election officials assume is the cost of training their staff on how to prevent violations of the law because of interference with voters and their assistants; jurisdictions bear no significant costs in actually having to provide language

⁵⁴ *United States v. Berks County*, No. 03-CV-1030 (E.D. Pa. Aug. 20, 2003), *available at* http://www.usdoj.gov/crt/voting/sec_2/berks_order.htm.

⁵⁵ *Id.*

⁵⁶ *See United States v. Miami-Dade County*, No. 02-21698, (S.D. Fla. June 17, 2002), *available at* http://www.usdoj.gov/crt/voting/sec_2/miamidade_cd.htm

⁵⁷ For a general discussion of the differences between traditional antidiscrimination law and disability accommodation law, see Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 *Duke L.J.* 1 (1996).

⁵⁸ *See infra* notes ___ to ___ and accompanying text (discussing reasonable accommodations in employment).

assistance to the limited-English-proficient voter. And, the law imposes no standards whatsoever on the quality of the assistance provided to the voter.

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

Nevertheless, weaving together the different Voting Rights Act provisions has already found expression in recent language-assistance litigation, and reconciling the norms that underlie the various sections of the law can lead to a more effective model of voting rights enforcement, which can be further developed through case law, amendments to the Act, and administrative regulations. The next Part attempts to reconcile the strands of language rights models under the Act by offering a language accommodation model that draws on the Voting Rights Act and other antidiscrimination laws that focus on providing language assistance and meaningful access across a variety of settings.

II. FROM REMEDIATION TO LANGUAGE ACCOMMODATION

Language accommodation norms are inherent in various provisions of the Voting Rights Act, but Congress has not attempted to address the needs of limited-English-proficient voters in an integrated or comprehensive way. And such attempts may be problematic, at least in the near future, given recent developments in Supreme Court case law that have limited congressional power to enact civil rights legislation that may compromise principles of federalism, as well as a political climate in which any public policy proposing greater language assistance to minority voters is likely to see significant opposition. But formulating a more coherent basis for language assistance should prove useful in developing future voting rights legislation, and addressing the expansion or contraction of the current law, particularly sections 4(f) and 203, has immediate relevancy because of the debate over reauthorization of the Act's nonpermanent provisions.

A. Accommodation Norms in Theory and Practice

Although section 4(f) and section 203 are designed to be temporary and exceptional measures that address longstanding discrimination against particular groups, they contain the seeds of a broader language accommodation norm that has roots in both normative legal theory and existing laws addressing discrimination on the basis of national origin, religion, and disability. Accompanying this norm is a general legal framework that recognizes significant differences and limitations affecting the ability to participate fully in democratic life, imposes

responsibilities and duties on appropriate actors to correct these limitations (subject to some degree of balancing against exceptional costs and hardships), and establishes civil rights claims when the duties are not satisfied or are impeded.

1. Accommodation and Democratic Participation

The question of providing language assistance to limited-English-proficient voters falls within a set of larger debates about the role of languages other than English in public life, civic unity and the assimilation of newcomers into American society, the responsibilities of government to its citizens and residents, and the basic goals of antidiscrimination law.⁵⁹ Outside of the voting rights context, there have been significant public debates in recent years over the use of bilingual education in the public schools, as well as the mandating of English as the official language of government, with initiatives and proposed statutes populating state ballots and legislative agendas.⁶⁰ The discord over language access and government-sponsored assistance has been particularly acute because it has been tied to ongoing controversies over immigration policy and over linguistic and cultural diversity in American society.

Within these larger debates, language assistance in voting has been especially contentious because of conflicting views over the rights and responsibilities of voters, particularly those who are naturalized citizens. There is little disagreement that voting is essential for democratic governance and that discriminatory barriers to participation in the political process should be eliminated. But the overriding role of English in voting and the electoral process is subject to more heated dispute. Notwithstanding arguments criticizing the administrative and financial costs of providing language assistance, many detractors of language assistance philosophically oppose attempts to diminish the role of English as a civic unifier and a political *lingua franca*. Many see language assistance as a deterrent to learning English and disruptive of assimilation into American society; indeed, opponents of language assistance consider basic fluency in English to be a core element of American citizenship and point specifically to the requirements for naturalized citizenship, which, except for cases involving long-term elderly residents, include minimal literacy in English.⁶¹

On the other hand, support for language assistance policies draws on fundamental values of democratic participation and political empowerment for all citizens, as well as the need to eliminate discrimination and barriers to participation, which include linguistic barriers.⁶² Arguments to make English proficiency a necessary precondition for citizenship and voting have

⁵⁹ See Ronald Schmidt, Sr., *Language Policy and Identity Politics in the United States* (2000); *Language Rights and Political Theory* (Will Kymlicka & Alan Patten eds. 2003).

⁶⁰ See, e.g., Crystal Goodson Wilkerson, Comment, *Patriotism or Prejudice: Alabama's Official English Amendment*, 34 *Cumb. L. Rev.* 253 (2003-2004); William Ryan, Note, *The Unz Initiatives and the Abolition of Bilingual Education*, 43 *B.C. L. Rev.* 487 (2002).

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

⁶² See Cristina M. Rodríguez, *Accommodating Linguistic Difference: Toward a Comprehensive Theory of Language Rights in the United States*, 36 *Harv. C.R.-C.L. L. Rev.* 133 (2001); Cristina M. Rodríguez, *Language and Participation*, ___ *Cal. L. Rev.* ___ (forthcoming 2006).

multiple flaws: While knowledge of basic English is a requirement for most of those seeking naturalized citizenship, the threshold for minimal English literacy required for naturalization falls well below what is needed to fully understand a ballot, particularly one that may contain initiatives or referenda. Moreover, as Congress itself recognized in passing the language assistance provisions in 1975, past and ongoing educational discrimination that leads to low levels of literacy can affect both immigrants and native-born citizens. And in the case of Native Americans, for whom American citizenship is not an issue, maintenance of a native language is not only desirable, it is strongly supported by federal efforts to preserve native languages.⁶³

Normative arguments for language rights and language pluralism suggest that public policies should support multiple objectives that support broad goals of democratic participation: prohibiting language discrimination, such as workplace rules that proscribe the use of languages other than English; encouraging language assistance and English-language education for the limited-English-proficient to foster their incorporation into American society, and providing public support for the use and retention of languages other than English, which is essential in an increasingly globalized society.⁶⁴ Strong versions of these arguments thus pose that both antidiscrimination law and social welfare policies should establish regimes that recognize the right to use a language of one's choice, that prohibit infringements on these rights, and that impose responsibilities to provide language assistance across various sectors. Although antidiscrimination policy is not a substitute for social welfare policies or electoral policies that can mandate language assistance through the appropriation of government dollars, it can recognize sources of discrimination such as English-only rules and policies and impose responsibilities to accommodate language needs to remedy past discrimination and address ongoing discrimination.

Consistent with these normative theories, language assistance within the voting rights arena – independent of remediation predicated on congressional findings of discrimination – can advance two important and parallel goals: (1) promoting equality by preventing the subordination of limited-English-proficient citizens who are unable to participate in the political process because of language barriers, and (2) promoting civic engagement and political participation by voters who might otherwise be deterred or unable to participate in the political process without language assistance.

If one accepts the premise that there are sufficiently strong interests in addressing subordination and promoting civic engagement for limited-English-proficient voters to justify at least some forms of language assistance, the more difficult questions that follow focus on the type of legal regime to impose and on the appropriate allocation of resources and burdens that accompany the provision of language assistance. For instance, if the goal is minimally to provide an opportunity for voters to obtain some form of language assistance, section 208 of the Voting Rights Act already provides the basis for voters to receive language assistance through private, personal assistants and a minimal allocation of public resources. At the other extreme, a legal regime that imposes a governmental duty to provide language assistance to any limited-English-proficient voter who needs the assistance would establish an exceptionally demanding policy and entail very high public costs.

⁶³ See Native American Languages Act of 1992, P.L. 102-524, 104 Stat. 883.

⁶⁴ See Schmidt, *supra* note ___, at 130-162 (comparing linguistic pluralism and assimilationism arguments).

Moreover, establishing a regime that creates significant governmental duties and shifts the costs among various private and public sectors generates thorny questions regarding the appropriate scope of a federal antidiscrimination law – compared to a public services or welfare policy – and could engender claims of unconstitutionality by exceeding Congress’ enforcement powers under the Fourteenth and Fifteenth Amendments.⁶⁵ Between these extremes lies a norm that advances the equality and civic engagement interests, balances competing benefits and costs, and falls within the appropriate and constitutional scope of the Voting Rights Act. The next section draws on existing antidiscrimination laws to help inform this analysis.

2. Accommodation in Antidiscrimination Law

a. Title VI and Executive Order 13166

Compared to the Voting Rights Act, Title VI of the Civil Rights Act of 1964 has a more extensive history of administrative regulation and case law addressing limited-English-proficiency. Title VI does not explicitly proscribe discrimination on the basis of language use or limited English proficiency, but interpretations of the law by federal agencies have treated language-based discrimination as a species of national origin discrimination. Linguistic characteristics are often tightly bound with ethnicity and national origin, and a language-based policy can have discriminatory effects on members of a national origin group; thus, Title VI regulations and policy guidances issued by federal agencies typically prohibit language discrimination and impose obligations on recipients of funding to ensure that limited-English-proficient individuals have meaningful access to federally funded programs.⁶⁶

In *Lau v. Nichols*,⁶⁷ the U.S. Supreme Court recognized the linkage between language and national origin discrimination when it concluded that the failure to provide language assistance to non-English-speaking Chinese American students in the San Francisco Unified School District violated Title VI regulations promulgated by the former Department of Health, Education, and Welfare. The federal regulations stated in part that “[w]here inability to speak and understand the English language excludes national origin-minority group children from

⁶⁵ See *infra* notes ___ to ___ and accompanying text (regarding constitutional limitations on congressional legislation).

⁶⁶ The Department of Justice has issued Title VI implementing regulations for all executive agencies, requiring that grant recipients provide language assistance:

“Where a significant number or proportion of the population eligible to be served or likely to be directly affected by a federally assisted program (e.g., affected by relocation) needs service or information in a language other than English in order effectively to be informed of or to participate in the program, the recipient shall take reasonable steps, considering the scope of the program and the size and concentration of the population, to provide information in appropriate languages to such persons.

28 C.F.R. § 42.405(d)(1); see, e.g., 24 C.F.R. Part 100, App. B. at IV. L & M, V.D., VI.B. (Department of Education instructions to federal fund recipients to accommodate students with limited English proficiency to avoid national origin discrimination under Title VI); 45 Fed. Reg. 82,972 (Department of Health and Human Services observation that grant recipients “have an obligation under Title VI to communicate effectively with persons of limited English proficiency”). The relationship between language status and national origin has also been recognized under Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race or national origin in employment. See 29 C.F.R. § 1606.1 (Equal Employment Opportunity Commission regulations on national origin discrimination).

⁶⁷ 414 U.S. 563 (1974).

effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.”⁶⁸ Inherent in the *Lau* Court’s reasoning is the recognition of a difference and limitation – the inability to speak English – that gives rise to a claim of discrimination if government does not take affirmative steps to address the problem – in other words, if government does not make an accommodation.

President Clinton’s Executive Order 13166 has reinforced the nexus between limited English proficiency and national origin discrimination by requiring federal agencies to examine their services, identify any special needs of limited-English-proficient individuals, and to develop and implement systems to provide those services so that individuals can have meaningful access to them.⁶⁹ The Executive Order also requires that federal agencies ensure that their recipients of federal funding provide meaningful access to limited-English-proficient applicants and beneficiaries. The Order and agency guidelines designed to implement it have led to the creation of structured plans and important developments in interpreter services and written translations across a wide variety of areas, including law enforcement, criminal justice administration, health care, and social services.

Governmental resources are, of course, neither unlimited nor universally guaranteed: the Department of Justice’s policy guidance document for the Executive Order establishes compliance standards for both federal agencies and funding recipients that rely on a four-factor balancing test focusing on (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.⁷⁰ For example, the guidelines for the Department of Health and Human Services, which provides extensive funding for health care services, contemplates a “mix” of services that can range from the use of on-site bilingual staff, access to commercial telephone services, and the use of family members or friends in the case of oral interpretation, and complete, partial, or summary translations in the case of written materials.⁷¹ In some instances, the guidelines suggest that the costs may significantly outweigh the benefits, particularly when the number of individuals needing assistance is small and the service is not vital, and may justify only the most minimal language assistance.

The meaningful access guidelines thus allow a high degree of flexibility compared to the statistical triggering mechanisms of the Voting Rights Act. Yet even the enforcement of language rights under laws such as Title VI can prove to be elusive. Recent case law has limited private rights of action under Title VI to claims of intentional discrimination,⁷² Executive Orders

⁶⁸ *See id.* at 568. Soon after *Lau*, Congress ratified the holding in the Equal Educational Opportunity Amendments of 1974, where Congress stated that “the Federal government, as exemplified by Title VI of the Civil Rights Act of 1964, . . . has a special and continuing obligation to ensure that States and local school districts take appropriate action to provide equal educational opportunities to children and youth of limited English proficiency.” 20 U.S.C. § 7402(a)(15).

⁶⁹ Exec. Order 13166, *reprinted in* 65 Fed. Reg. 50121 (Aug. 16, 2000).

⁷⁰ 65 Fed. Reg. 50123, 50123-25 (Aug. 16, 2000).

⁷¹ 68 Fed. Reg. 47311, 47315-19 (Aug. 8, 2003).

⁷² *Alexander v. Sandoval*, 532 U.S. 275 (2001) (concluding that there is no private right of action to enforce Title VI disparate impact regulations).

can be rescinded, and policy guidances issued by federal agencies, which are hortatory and by themselves do not carry the force of law, can be modified or repealed. Title VI and Executive Order 13166 actually can be applied to voting, but even with the extensive flow of federal funding to state and local governments involved in election administration, they are underutilized as enforcement tools. Government enforcement of Title VI and the Executive Order against election officials has essentially fallen between the cracks of agency responsibility: the voting rights section of the Justice Department does not currently enforce Title VI against state or local governments, and other sections of the Justice Department and other agencies that address program access for limited-English-proficient individuals do not enforce voting-related claims.⁷³

Nonetheless, the Title VI and meaningful access mandates of Executive Order 13166 offer potential alternatives to the current Voting Rights Act regime – making explicit the relationship between national origin discrimination and the failure to provide assistance to limited-English-proficient individuals, and suggesting a more flexible regime of language assistance that provides at some degree of aid to a wide range of individuals.

b. Reasonable Accommodations in Disability Law

The “reasonable accommodation” standard employed in disability law provides an additional source for informing a language accommodation norm in voting rights law. Originating as a concept in employment discrimination law involving religion, where employers must provide an accommodation for an employee’s religious observances or practices unless doing so would create an undue hardship,⁷⁴ the reasonable accommodation standard is well-established in laws such as the Americans with Disabilities Act (ADA) and the regulations for the Rehabilitation Act of 1973. For instance, under Title I of the ADA, which applies to disability discrimination in employment, illegal discrimination occurs when an employer fails to make reasonable accommodations for a disabled employee who can perform the essential functions of a job.⁷⁵ Examples of accommodations listed in the ADA include “job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations.”⁷⁶

Employers are not required to make every possible accommodation requested, however, and it may be appropriate in some instances for the employee to bear some of the costs of the accommodation. Moreover, employers can avoid the accommodation requirement altogether if they can demonstrate that the accommodation would impose an “undue hardship,” which is an “action requiring significant difficulty or expense”⁷⁷ that involves weighing factors such as the

⁷³ Conversation with Merrily Ann Friedlander, Section Chief, U.S. Department of Justice, at National Asian Pacific American Bar Association Annual Convention, Chicago, Ill. (Oct. 22, 2005). <NOTE: Off the record interview; need e-mail to confirm.>

⁷⁴ See 29 C.F.R. § 1605.1. In *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), the U.S. Supreme Court held that religious accommodations need only be made when costs are small and that anything “more than a de minimis cost” would impose an undue hardship. *Id.* at 84.

⁷⁵ 42 U.S.C. § 12111(8).

⁷⁶ *Id.* § 12111(9)(A).

⁷⁷ *Id.* § 12111(10)(A).

cost of the accommodation and the entity’s size and financial resources.⁷⁸ Reasonable accommodation is thus a strongly individualized and case-specific legal regime in which disabled individuals and covered entities negotiate the accommodation in order to balance the interests of both the employee and the employer.

As Pamela Karlan and George Rutherglen have noted, the reasonable accommodation standard can be considered distinctive species of antidiscrimination law compared to the commonly used disparate treatment and disparate impact theories of liability, representing a “difference” model, rather than the more customary “sameness” model.⁷⁹ 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.’”⁸⁰ Disability accommodations theory further suggests that conventional structures and practices in the workplace and other settings are premised on what is perceived to be “normal” and already accommodate the needs of non-disabled individuals; providing a reasonable accommodation for a disabled individual should be considered neither “special” nor “extra,” but simply a way of removing an existing barrier and stopping a different form of discrimination.⁸¹

Although the analogy is not perfect, the barriers encountered by the limited-English-proficient based on the “normal” nature of English language ballots and election materials can function in the same way that barriers in the workplace limit the employment opportunities of the physically or mentally disabled.⁸² The individual who is unable to fully comprehend an English-only ballot, but could exercise an informed and effective vote if the election materials were available in the individual’s first language, is much like the disabled individual who is able to perform the essential functions of job if accommodations such as equipment modifications or interpreter services are made available. Indeed, the legislative history of section 208 of the Voting Rights Act, which covers blindness, disability, and illiteracy in a single sweep, captures some of the parallels between disability and limited English proficiency:

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

⁷⁸ 42 U.S.C. § 12111(10)(B).

⁷⁹ Karlan & Rutherglen, *supra* note ___, at 10. *But cf.* Christine Jolls, *Antidiscrimination and Accommodation*, 115 Harv. L. Rev. 642 (2001) (proposing strong similarities between traditional antidiscrimination models and accommodation models).

⁸⁰ Karlan & Rutherglen, *supra* note ___, at 10 (emphasis added).

⁸¹ Mary Crossley, *Reasonable Accommodation as Part and Parcel of the Antidiscrimination Project*, 35 Rutgers L.J. 861, 890-93 (2004).

⁸² The strength of the analogy rests primarily on a normative judgment about the whether limited-English-proficiency is a trait that is as deserving of recognition and special treatment as a physical or mental disability.

discriminated against at the polls and that their right to vote in state and federal elections will not be protected.⁸³

Like the meaningful access guidelines for limited English proficiency under Executive Order 13166, the reasonable accommodation standards in disability law require both the recognition of difference and affirmative steps to address problems caused by that difference, but they do not impose obligations that are fixed or inescapable. Costs and hardships are weighed and balanced against interests in providing access and the opportunity for meaningful participation in an institution, whether that involves receiving services or gaining employment.

B. A Language Accommodation Norm

While it is possible to develop a voting rights model that closely the meaningful access and accommodations standards that appear in other antidiscrimination laws, an effective model for language accommodation in the voting arena should recognize both the similarities between voting rights and other antidiscrimination guarantees and the differences that make voting a unique and vital element of a democratic society. As a vehicle for ensuring civic engagement and avenues for political participation and empowerment, voting enjoys a venerated position in the constellation of civil rights. The right to vote has been recognized as a fundamental right for purposes of equal protection review and is considered preservative of other basic civil and political rights.⁸⁴ Thus there are strong reasons for ensuring that the basic right to vote is preserved, even beyond the standards imposed to ensure statutory rights to nondiscrimination in laws such as Title VI or the ADA.

Accordingly, a model of language accommodation in voting should encompass the “difference” principle of antidiscrimination law inherent in the meaningful access and reasonable accommodations standards and incorporate the cost-benefit analyses that inevitably arise with the imposition of responsibilities on government. But, a model of voting rights protection should also militate strongly against infringements of the basic right to vote arising from the burdens that might be borne by government. In other words, where “undue hardship” in the voting context can create the functional equivalent of voter disenfranchisement, a language accommodation model should insist on some vehicle for ensuring meaningful access to the vote, even if that means shifting most of the burdens to voters and actors other than government – as does Section 208’s guarantee of aid through private assistors. The model thus revolves around three key elements: (1) difference recognition, (2) appropriate accommodations, and (3) hardship boundaries.

1. Difference Recognition

Recognizing that limited-English-proficiency constitutes a basis for discrimination and should be addressed through some type of language assistance is an essential first step in articulating a language accommodation norm. The current language minority definitions of the Voting Rights Act reflect Congress’ determination in 1975 that language status can closely track

⁸³ S. Rep. No. 97-417, at 62 (1982).

⁸⁴ See *Harper v. Virginia Bd. of Elec.*, 383 U.S. 663 (1966) (the right to vote is fundamental right subject to strict scrutiny review under the equal protection clause).

race and color as bases for discrimination in voting. The recognition of difference is inherent in the creation of the language minority category: Congress determined that language characteristics – specifically for Latinos, Asian Americans, and Native Americans – formed the basis for extensive voting discrimination that was unaddressed through the wording of the original 1965 statute. Section 4(f) and section 203 are thus grounded in a difference principle focusing on characteristics involving English-language ability and literacy, imposing structural remedies that address language barriers caused by differences arising from discrimination in education and the political process.

But these differences need not be the only ones that are recognized. The current language minority definitions, when applied to general antidiscrimination provisions like section 2, are both overinclusive and underinclusive of limited-English-proficient voters.⁸⁵ As analogues to race, the definitions cover a spectrum of speakers and language communities ranging from monolingual English speakers to monolingual speakers of languages other English to those with varying degrees of bilingual ability – what Cristina Rodríguez has labeled a “mutability continuum”⁸⁶ – but not all language minority voters require assistance in order to cast a meaningful and effective vote. The definitions are overinclusive because they include voters who may suffer race-like discrimination because of status and group membership, but are not necessarily limited-English-proficient. Employed outside of the remediation mechanisms of sections 4(f) and 203 and applied to section 2, the definitions are underinclusive of limited-English-proficient voters who fall outside the enumerated groups; Arabic and Haitian Creole are just two examples of languages whose speakers fall outside the definitions.

When deployed as part of a structural remedy, the language minority category need not include groups that Congress has not found to have faced discrimination. But if a difference principle focusing on language is to apply to the general and permanent provisions of the Act, then another type of definition could be deployed. One method is through the category of “national origin,” which has an established basis in equal protection jurisprudence and is well developed in antidiscrimination laws such as Title VI. Language proficiency is not directly implicated on the face of a national origin category, but agency regulations and guidances that draw on existing guidelines found in Title VI and Executive Order 13166 enforcement could ensure coverage. A second method is to address limited-English-proficiency directly, through a category that recognizes the barriers facing voters with limited English ability and that has an independent definition, such as “voters who are limited-English-proficient” or “voters who possess a language-based disability that limits their ability to meaningfully access the vote.” Although a category based specifically on language proficiency may raise constitutional questions on the scope of congressional power (as discussed in Part III of this paper), they could provide more clarity to the current definitions attached to section 2 and foster more fitting accommodations.

⁸⁵ To say that the language minority definitions are both underinclusive and overinclusive does not make them constitutionally defective, however. Underinclusive legislation is constitutionally tolerable, since legislatures may choose to address one or limited elements of a problem rather than attack it comprehensively. *See, e.g.,* *Railway Express Agency v. New York*, 336 U.S. 106 (1949). Overinclusiveness, in this instance, reflects the dual nature of the language minority definitions; as analogues to race, they are not overinclusive at all, but with respect to the subset of individuals who are limited-English-proficient, the category does not fit as tightly as a category such as “limited-English-proficient language minorities.”

⁸⁶ Rodríguez, *Accommodating Linguistic Difference*, *supra* note ____, at 142-43.

2. Appropriate Accommodations

As a consequence of difference recognition, a language accommodation norm must create mechanisms for both individual and group access to the vote and shift the costs of assistance away from the voter alone. A strong accommodation norm can impose significant costs on government, while a weaker norm might simply create vehicles to prevent the denial of privately offered accommodations. Individual accommodation mechanisms already exist within the Voting Rights Act under section 208, while group-based accommodations are available under the language assistance provisions of section 4(f) and section 203. But even in combination the accommodations fall short of an ideal regime. Section 208 guarantees accommodation rights to any voter who needs a voting assistor, but the law imposes no checks on the quality of the assistance, nor does it impose any responsibility on local officials to provide assistance. The language assistance provisions of sections 4(f) and 203 establish a structural accommodation regime that is triggered by a combination of group definitions and statistical benchmarks, but like a light that is switched either on or off, the structural remedy either requires full-scale remedies or none at all. The expansion of litigation remedies to sub-benchmark populations in cases such as *United States v. Boston*, as well as voluntary efforts of local election officials to provide assistance to a growing number of language groups, demonstrate that accommodations need not be limited to populations that satisfy current triggers.

Subject to constitutional limitations, the Voting Rights Act can incorporate a wide range of accommodation mechanisms beyond the status quo. Disability law guidelines offer highly individualized accommodations, but they also create common categories of assistance that might engender parallel categories in the voting sector. The meaningful access guidelines for Executive Order 13166 also suggest that an array of measures short of full interpreter services and ballot translations can be adopted to provide some measure of assistance to language minority voters who fall below statistical benchmarks of section 203. In the context of voting, the four-factor meaningful access guidelines (numbers, frequency of contact, importance of interest, costs) can focus on key inquiries around the size and needs of language groups and the appropriate mechanisms based on the cost-effectiveness of assistance. For instance, when looking at groups whose size falls below the section 203 triggers, a sliding scale of interpreter services and written translations could be developed based on group size, need, and the costs of hiring interpreters and creating translations. A relatively small group, such as one constituting between 1,000 and 3,000 voters, might justify a reduced pool of interpreters who are located only at key precincts or at a centralized location, along with more limited number of translated materials and centralized distribution areas; a larger group, but one still falling below the 10,000 benchmark might require a larger deployment of interpreters and more widespread availability of written translations. Some costs, such as transportation or accessing materials through the Internet could be borne by the voter, while others would be borne by government or by government contractors.

Moreover, if language-based differences are recognized as a basis for discrimination, language accommodations can be incorporated into potential remedies for violations of section 2. The language assistance remedies found in section 2 cases such as *United States v. Hamtramck* and *United States v. Boston* recognize that assistance mechanisms can be key components of make-whole remedies for both intentional discrimination and public policies that result in discrimination. A nascent language jurisprudence involving the general antidiscrimination

provisions of the Voting Rights Act can rely on the recent case law to develop language assistance remedies that mandate government-sponsored aid and create incentives for voters to employ language assistors.

3. Hardship Boundaries

Because of the basic nature and importance of voting, the cost-benefit calculus of a language accommodation regime must provide a baseline for language assistance that prevents the disenfranchisement of limited-English-proficient voters through claims of “undue hardship” by local jurisdictions. Under the current mandates of section 4(f) and section 203, the hardship calculation is built implicitly into the language of the statute: a jurisdiction with a language minority population falling below the statistical benchmark (5% or 10,000) necessarily incurs a hardship if it had to provide language assistance, because the costs of providing an accommodation to a population less than the trigger would be excessive.

But the hardships in addressing the needs of a smaller population need not be undue if appropriate mechanisms are in place. For example, even the smallest number of limited-English-proficient voters can receive an accommodation by requiring jurisdictions to provide simple translated notices that voters can use individual assistors pursuant to section 208. The financial costs of such accommodations would be minimal if they merely entailed translating a small number of sentences and printing them on election materials designed for the general populace, as well as materials targeted to the language group; oral notices, particularly for voters whose language with no written component, could be distributed via recorded public service announcements or to community organizations that work closely with the relevant populations.

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

III. IMPLEMENTING LANGUAGE ACCOMMODATION

Implementing a language accommodation norm within the Voting Rights Act requires amendments to the current statute, as well as parallel developments in administrative regulations and case law. Nevertheless, expanding voting rights standards beyond the status quo is also subject to strong constitutional and political constraints. This Part discusses the constitutional limitations on implementing a language accommodation norm and suggests a strategy that focuses on both the reauthorization of the current language assistance provisions and potential legislation to expand other areas of the law. It concludes with recommendations for stronger enforcement of Title VI of the Civil Rights Act of 1964 and the Help America Vote Act of 2002.

A. Constitutional Limitations

At first glance, the basic constitutionality of language assistance under the Voting Rights Act would seem uncontroversial. Congressional exercises of power to enforce the protections of the Fourteenth and Fifteenth Amendments via the Act have been almost entirely upheld as constitutional, and have been used as judicial benchmarks for comparing other legitimate exercises of congressional powers. In *South Carolina v. Katzenbach*,⁸⁷ the U.S. Supreme Court upheld the constitutionality of major sections of the Voting Rights Act as consistent with Congress’ powers to address discrimination pursuant to the Fifteenth Amendment, and in *Katzenbach v. Morgan*,⁸⁸ the Court specifically upheld the constitutionality of section 4(e), which in *Morgan* had been used to prohibit enforcement of a New York law that required English literacy as a precondition for voting and thus discriminated against limited-English-speaking Puerto Rican voters educated in Spanish-dominant schools. The *Morgan* Court concluded that Congress had broad powers to ban literacy tests consistent with both its findings of past discrimination and its interpretation of the equal protection clause – even though the Supreme Court had previously upheld the constitutionality of literacy tests⁸⁹ – and concluded that section 4(e) was “a proper exercise of the powers granted to Congress by § 5 of the Fourteenth Amendment.”⁹⁰

Recent case law, however, has circumscribed Congress’ powers to breach state sovereign immunity and remedy discrimination pursuant to section 5 of the Fourteenth Amendment, casting doubt on *Morgan*’s vitality as a general precedent.⁹¹ Moreover, the powers of Congress to address language-based discrimination directly, rather than as a species of racial and national origin discrimination, remain problematic because the status of language groups under the Fourteenth Amendment is poorly defined by Supreme Court case law. Each of these constricting factors must be considered in developing any language accommodation regime.

1. Congruence and Proportionality Requirements

Since the late 1990s, the Supreme Court’s “new federalism” jurisprudence has imposed significant limits on congressional powers to create remedies against the states in order to address discrimination. In *City of Boerne v. Flores*, the Court distinguished legislation that is “remedial” and falls within the powers of Congress under section 5 and legislation that makes a “substantive change” in rights and thus exceeds congressional powers.⁹² The Court stated:

⁸⁷ 383 U.S. 301 (1966).

⁸⁸ 384 U.S. 641 (1966).

⁸⁹ *Lassiter v. Northampton Elec. Bd.*, 360 U.S. 45 (1959).

⁹⁰ *Morgan*, 384 U.S. at 652-53. Congressional power over voting rights enforcement was tempered in *Oregon v. Mitchell*, where a divided Court upheld several of the 1970 amendments to the Voting Rights Act, but struck down the section of the Act that lowered the minimum age in state and local elections from 21 to 18 as exceeding congressional powers.

⁹¹ See generally Richard L. Hasen, Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After *Tennessee v. Lane*, 66 Ohio St. L.J. 177 (2005); Michael E. Waterstone, *Lane*, *Fundamental Rights, and Voting*, 56 Ala. L. Rev. 793 (2005).

⁹² 512 U.S. 507 (1997). *City of Boerne* focused on the constitutionality of the Religious Freedom Restoration Act (RFRA), which was enacted in 1993 in response to the Supreme Court’s decision in *Employment Div., Dept. of Human Resources v. Smith*, 494 U.S. 872 (1990), where the Court relaxed the protections of the First Amendment’s free exercise clause in upholding a state drug law that Native Americans challenged as an infringement on their religious beliefs and their ceremonial use of peyote. The *City of Boerne* Court concluded that Congress’ attempt to overturn the *Smith* case through the RFRA exceeded its § 5 powers.

“Congress does not enforce a constitutional right by changing what the right is. It has been given the power ‘to enforce,’ not the power to determine what constitutes a constitutional violation.”⁹³ The Court further concluded that “[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect.”⁹⁴ In *Kimel v. Florida Board of Regents*,⁹⁵ the Court ruled that Congress’ authorization of damages lawsuits against the states through the Age Discrimination in Employment Act exceeded Congress’ section 5 powers because there had been no historical pattern of age discrimination and because age is not a “suspect class” subject to heightened review under the equal protection clause – and indeed can be a legitimate basis for government classifications. Congress’ abrogation of sovereign immunity therefore lacked congruence and proportionality.

The congruence and proportionality test was further coupled with a heightened evidentiary standard in *Board of Trustees of the University of Alabama v. Garrett* to require that Congress thoroughly document state discrimination against a protected group in order justify the piercing of sovereign immunity.⁹⁶ The *Garrett* Court held that Congress had exceeded its powers by authorizing individual lawsuits for damages against state governments for violations of Title I of the ADA, which contains the ADA’s reasonable accommodation standards for employment. Reasoning that because disability discrimination is not subject to heightened review under the equal protection clause, and because the ADA’s reasonable accommodation mandate goes far beyond what the constitution requires, the *Garrett* Court concluded that Congress’ response lacked proportionality and congruency. The majority found Congress’ legislative record on disability-based discrimination by states to be insufficient, particularly when compared to the extensive legislative record for the Voting Rights Act. A pattern of widespread state discrimination in employment against the disabled, going beyond the record of private employment discrimination, would have been necessary to support such a strong congressional remedy.

Some of the Court’s most recent cases have weakened *Garrett*’s evidentiary requirements to some extent, at least in cases involving gender discrimination and the fundamental interest in gaining access to the courts, which are both subject to heightened review under the equal protection clause. In *Nevada Department of Human Resources v. Hibbs*,⁹⁷ the Court upheld the authorization of lawsuits against states under the Family Medical Leave Act, which entitles eligible employees to take up to twelve weeks of unpaid annual leave from work for, among other things, serious health conditions affecting a spouse. The *Hibbs* Court did not insist on a strong empirical basis for the contention that gender-role stereotyping and discrimination often occur through differential state employment policies, relying on the fact that the Court had already recognized gender should be subject to heightened equal protection review; thus, the congruence and proportionality requirements of *City of Boerne* were readily satisfied. Similarly, in *Tennessee v. Lane*,⁹⁸ the Court upheld congressional powers authorizing lawsuits against states

⁹³ 512 U.S. at 519.

⁹⁴ *Id.* at 520.

⁹⁵ 528 U.S. 62 (2000).

⁹⁶ 531 U.S. 356 (2000).

⁹⁷ 538 U.S. 721 (2003).

⁹⁸ 124 S. Ct. 1978 (2004).

for violating Title II of the ADA, which prohibits the exclusion of disabled individuals from public services and programs, where the disabled plaintiff was denied the fundamental right of access to courts.

The Court’s federalism jurisprudence continues to evolve,⁹⁹ so there are few clear answers to the question of whether a language accommodation regime under the Voting Rights Act would necessarily satisfy the most recently developed standards. The recent cases have involved damages lawsuits against the states in abrogation of sovereign immunity, and the cases have not obstructed longstanding avenues for injunctive relief against state officials,¹⁰⁰ as well as suits against local governments, which are not protected by sovereign immunity. Damages actions are outside the Voting Rights Act’s purview, but there is no guarantee that the Court would not apply similar standards of congruence and proportionality to the remedial mandates of the Act. There are strong parallels between language assistance in voting and the principles in recent cases such as *Hibbs* and *Tennessee v. Lane*. Like access to the courts, the basic right to vote is a fundamental interest that can invoke strict scrutiny under the equal protection clause. *Hibbs* also suggests that the Court is willing to accept at least weak versions of accommodations as proportional responses to equal protection violations. Requiring employers to grant unpaid leave time is a mild form of accommodation designed to shift some of the costs of family-related leaves to the employer; the failure to provide the leave time creates a statutory violation.

Under any circumstance, Congress must establish a solid predicate for structural remediation mandates such as section 203 and section 4(f). Even without amending the language assistance provisions, reauthorization efforts must focus on documenting educational discrimination and its effects on literacy and political participation, as well as discrimination in the electoral process itself. The literature demonstrating educational inequalities affecting language minorities and limited-English-proficient students in particular is broad; and, recent litigation and reports by groups monitoring implementation of section 203 and section 4(f) document that discrimination against language minorities is still a significant problem. But Congress must consider the empirical evidence and compile a sufficient record to establish the proportionality of its response.

Any accommodations measures that go beyond the existing mandates should also be especially well supported. In finding a lack of proportionality between the ADA’s reasonable accommodation requirements and the record of state government discrimination against the disabled, the *Garrett* Court noted that the accommodation duty under the ADA “far exceeds what is constitutionally required in that it makes unlawful a range of alternate responses that would be reasonable but would fall short of imposing an ‘undue burden’ upon the employer. The Act also makes it the employer’s duty to prove that it would suffer such a burden, instead of requiring (as the Constitution does) that the complaining party negate reasonable bases for the employer’s decision.”¹⁰¹ Even with the more relaxed standards implied by *Hibbs* and *Lane*, the

⁹⁹ In its most recent term, the Court held that it was within Congress’ powers to create a cause of action for damages under Title II of the ADA for conduct that *actually* violates the Fourteenth Amendment. *United States v. Georgia*, No. 04-1203 (Jan. 10, 2006). The case focused on a pro se prisoner’s claims of Eighth Amendment and Title II violations arising from his prison conditions and his being a paraplegic.

¹⁰⁰ *Ex Parte Young*, 209 U.S. 123 (1908).

¹⁰¹ 531 U.S. at 372.

Court’s admonition against unusually strong accommodation remedies argues in favor of creating a strong evidentiary record of past discrimination in the language arena.

2. Language Classification Limits

Another key constitutional question is whether accommodations measures that create statutory rights on the basis of language proficiency alone would satisfy the congruence and proportionality tests. As currently defined, the language minority category closely tracks race and national origin; however, adding a new definition such “discrimination based on language proficiency” poses another set of questions regarding Congress’ expansion of the equal protection clause beyond its current constellation of rights. The Supreme Court’s equal protection jurisprudence regarding language status, untethered from race or national origin, is not well developed, and the Court has never held that limited-English-proficiency alone is a suspect classification deserving heightened scrutiny. Indeed, a number of lower federal courts have held that language does not identify members of a suspect class and have upheld English-only public services and conditions as constitutional.¹⁰² This is not to say that Congress cannot prohibit discrimination on the basis of English proficiency; the legislative response must be proportional, and the Court’s recent treatment of antidiscrimination laws based on the non-suspect classes of age and disability suggests that there may be strong restrictions for measures based solely on language ability.

The Court’s equal protection jurisprudence on race and national origin is well established, but the Court has offered only glancing analysis to the relationship between language and race and to the status of language as an independent basis for heightened judicial review. Unlike agency regulations that have established a clear connection between language and disparate impacts on national origin groups, the Court’s equal protection jurisprudence, which only covers claims of intentional discrimination, has been almost silent on the subject. While the Supreme Court has struck down bans on the use of languages other than English as violative of due process,¹⁰³ it has had little to say about protections for limited-English-proficient individuals. In *Hernandez v. New York*, the Supreme Court’s only modern case addressing language-based discrimination under the equal protection clause, the Court upheld the use of peremptory strikes by prosecutors who argued that striking potential jurors from a jury venire was based on their bilingual ability and their potential inability to listen and follow a court interpreter, not on race or national origin.¹⁰⁴ Justice Kennedy’s plurality opinion in *Hernandez* rejected a connection between bilingual ability and race under the specific facts of the case, but did indicate that language could serve as proxy for race:

¹⁰² In *Soberal-Perez v. Heckler*, for instance, the Second Circuit rejected a claim that the Secretary of Health and Human Services’ failure to provide forms in Spanish violated equal protection, and stated: “A classification is implicitly made, but it is on the basis of language, i.e., English-speaking versus non-English-speaking individuals, and not on the basis of race, religion or national origin. Language, by itself, does not identify members of a suspect class.” 717 F.2d 36, 41 (2d Cir. 1983), *cert. denied*, 466 U.S. 929 (1984); *see* *Frontera v. Sindell*, 522 F.2d 1215, 1219 (6th Cir.1975) (“We are not dealing here with a suspect nationality or race.); *Carmona v. Sheffield*, 475 F.2d 738, 739 (9th Cir.1973) (the state’s choice “to deal only in English has a reasonable basis”).

¹⁰³ *See Meyer v. Nebraska*, 262 U.S. 390 (1923); *Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1926).

¹⁰⁴ 500 U.S. 532 (1991).

Just as shared language can serve to foster community, language differences can be a source of division. Language elicits a response from others, ranging from admiration and respect, to distance and alienation, to ridicule and scorn. Reactions of the latter type all too often result from or initiate racial hostility. In holding that a race-neutral reason for a peremptory challenge means a reason other than race, we do not resolve the more difficult question of the breadth with which the concept of race should be defined for equal protection purposes. We would face a quite different case if the prosecutor had justified his peremptory challenges with the explanation that he did not want Spanish-speaking jurors. It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis.¹⁰⁵

Without a square holding that limited-English-proficiency forms the basis for a suspect classification, a language accommodation measure must either be coupled analytically with race and national origin or be evaluated through the lens of rationality review, which implies that the *City of Boerne/Garrett* line of cases may constrain the remedies and accommodations developed on the basis of language. Consequently, a wiser course to help ensure the constitutionality of an accommodations measure under the Voting Rights Act may be to rely on a group definition such as national origin, which rests on more solid constitutional ground as a suspect classification, and to employ administrative regulations to help cement the relationship between limited-English-proficiency and national origin discrimination.

B. Enforcing Accommodations Norms

There has not been a groundswell of legislative activity in the language rights area, and it would be naive to ignore the political opposition to subsidizing governmental language assistance of any kind, whether in the voting arena or in areas such as education and social services. Indeed, the depth of the controversies over language assistance crystallized in the mid-1990s after Congress passed the 1992 amendments to the Voting Rights Act, which extended the remedial language assistance provisions for an additional fifteen years. Only four years after the 1992 amendments were enacted, the House of Representatives, by a 259 to 169 vote, passed H.R. 123, which would have established English as the official language of the federal government and would have repealed section 4(f) and section 203. Senate inaction on H.R. 123 led to its eventual demise during the 104th Congress, but similar bills have been consistently introduced in Congress, and current opposition to language assistance measures is well beyond token.¹⁰⁶ A pragmatic strategy for legislative change should focus on incremental changes to the language assistance provisions, documented by adequate research and evidence of ongoing discrimination against language groups, as well as modest changes to the permanent provisions of the Act and implementing regulations.

Reauthorization of Section 4(f) and Section 203. As discussed above, the language assistance provisions offer no safety net for language minority voters whose numbers fall below the statistical triggers. Lowering numerical thresholds to a figure such as 7,500 is a useful

¹⁰⁵ *Id.* at 371.

¹⁰⁶ See <http://ourworld.compuserve.com/homepages/JWCRAWFORD/langleg.htm> (summarizing recent legislation and discussing H.R. 123).

amendment that will lead to coverage of more jurisdictions and more voters, but it would still replicate a model that offers no protections for sub-trigger populations. A flexible, sliding scale approach would offer a preferable regime – not as a substitute, but as an adjunct to a threshold mechanism that requires full accommodations to a large-enough language group in a jurisdiction. Sub-trigger groups could be ordered by categories and appropriate accommodations could be deployed with each category. For purposes of structural remediation, the basic definitions of the language minority groups do not have to be amended, except to reflect Congress’ addition of groups that have been shown to have suffered comparable levels of discrimination in education and the political process.

Section 2 and General Antidiscrimination Measures. The permanent provisions of the Voting Rights Act raise a different set of issues, with the Supreme Court’s recent federalism cases posing limits on the creation of accommodations that might exceed congressional powers, and would require separate amendment. The language minority classification in section 2, drawn from the Act’s remedial provisions, creates race-like categories to address status-based discrimination, but employing national origin as a basis for illegal discrimination would remove the limits imposed by the current definitions and allow the importation of standards from other civil rights laws. If the Act were to incorporate national origin protections within section 2, imposing a broader regime of accommodations would need to be justified by a strong predicate that documents problems of national origin and language discrimination in the political process.

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

Coordination with Title VI and the Help America Vote Act. Both Title VI and the Help America Vote Act of 2002 offer additional mechanisms to enforce language accommodation norms. Title VI and the Executive Order already offer statutory and regulatory bases for developing flexible language accommodations measures. Although private rights of action to enforce Title VI’s disparate impact regulations can no longer be initiated because of recent Supreme Court case law, agency enforcement is still available and can be applied by the Department of Justice and attach through funding from various agencies, including the Federal Election Assistance Commission, which administers payments and grants in support of the Help America Vote Act (HAVA).¹⁰⁷

HAVA itself offers a system of government payments and grants that allows language accommodation measures to be incorporated into voting systems improvements and technological innovations by states. The law already contains provisions for payments to the states for “improving the accessibility and quantity of polling places, including providing

¹⁰⁷ 42 U.S.C. § 15301 et seq.

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.”¹⁰⁸ Moreover, HAVA requires that voting systems for federal elections must “provide alternative language accessibility pursuant to the requirements of [section 203 of the Voting Rights Act].”¹⁰⁹

Although still viewed with some skepticism and still possessing problems involving security and accessibility, new technologies such as direct record electronic voting systems do have the potential to lower the costs and burdens imposed upon government to implement written translations. The lack of appropriations to support the HAVA mandates has been a major stumbling block to developing voting systems with strong language accommodations.¹¹⁰ But HAVA and other election assistance laws based on congressional appropriations still have the potential to provide greater access to limited-English-proficient voters, as well as the advantage of bypassing the strictures of the courts’ recent decisions on congressional enforcement of the Fourteenth Amendment by being attached to Congress’ spending powers.

CONCLUSION

When Congress amended the Voting Rights Act in 1975 to recognize discrimination against language minorities, it created powerful mechanisms to ensure the right to vote and to increase the participation of minority voters. Yet, the guarantees have been uncertain and often incomplete. The current law has limitations, and the proposed model of language accommodation attempts to improve the statute and its implementation, and to place the Voting Rights Act in greater alignment with other federal antidiscrimination laws. But implementing a small but important set of changes in a single law must also be supported by a broader norm that acknowledges the linguistic diversity of the United States and an overriding goal of increasing civic engagement and electoral participation by all Americans. An antidiscrimination policy is not a substitute for an agenda that also includes public policies under which both language assistance and English-language learning are integrated into public services and the educational system. The proposed model is simply one step in advancing that agenda.

¹⁰⁸ *Id.* § 15301(b)(1)(G).

¹⁰⁹ *Id.* § 15481(a)(4).

¹¹⁰ See Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help American Vote Act*, 73 *Geo. Wash. L. Rev.* 1206, 1219 (2005).