

## Language Protections for All? Extending and Expanding the Language Protections of the Voting Rights Act

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On October 18, 2005, former Republican Congressman and Vice Presidential candidate Jack Kemp testified before the House Judiciary Constitutional Subcommittee on the reauthorization of the Voting Rights Act<sup>1</sup> about what, in his view, were the “primary and most egregious mechanisms that prevent minorities from fully participating today.”<sup>2</sup> Kemp’s response: language barriers.<sup>3</sup> Kemp argued that in Los Angeles County, his home, “there [are] probably 60–75 different languages spoken from Vietnamese to Korean to Chinese to Russian to Persian . . . [and] the jurisdiction is not providing them with access to voting lists and the information that they deserve as American citizens.”<sup>4</sup> The lack of adequate translated election materials provided for voting-age citizens who speak languages other than English was, in Kemp’s eyes, “one of the biggest barriers to making this democratic experiment work . . . for all people.”<sup>5</sup>

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<sup>1</sup> See Voting Rights Language Assistance Act of 1992, Pub. L. No. 102–344 (1992).

<sup>2</sup> Questioning from Congressman Trent Franks (R-AZ) to Jack Kemp, House Judiciary Committee, *Oversight Hearing on the Voting Rights Act: To Examine the Impact and Effectiveness of the Act*, (October 18, 2005) available at: <http://judiciary.house.gov/oversight.aspx?ID=194>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

Section 203 of the Voting Rights Act<sup>6</sup> (“VRA”) requires localities and states with high concentrations of language minority citizens to provide election materials in the native languages of those citizens.<sup>7</sup> The provision was added to the VRA in 1975 after Congress found that “language minorities have been effectively excluded from participation in the electoral process” as the result of “unequal educational opportunities” that resulted in “high illiteracy and low voting participation.”<sup>8</sup> Congress meant the provision to remain in place so long as educational and other inequalities harmed the protected populations,<sup>9</sup> and created Section 203 with a “sunset” provision that requires Congress to reauthorize it periodically in accordance with a continuing need for its protections.<sup>10</sup> Since its 1975 enactment, Sec-

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<sup>6</sup> Codified as 42 U.S.C. § 1973aa-1a (2000).

<sup>7</sup> *Id.* Section 203 as codified states in part that:

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

(b) (1) Generally. Before August 6, 2007, no covered State or political subdivision shall provide voting materials only in the English language.

(2) Covered States and political subdivisions. (A) Generally. A State or political subdivision is a covered State or political subdivision for the purposes of this subsection if the Director of the Census determines, based on census data, that—(i) (I) more than 5% of the citizens of voting age of such State or political subdivision are members of a single language minority and are limited-English proficient; (II) more than 10,000 of the citizens of voting age of such political subdivision are members of a single language minority and are limited-English proficient; or (III) in the case of a political subdivision that contains all or any part of an Indian reservation, more than 5% of the American Indian or Alaska Native citizens of voting age within the Indian reservation are members of a single language minority and are limited-English proficient; and (ii) the illiteracy rate of the citizens in the language minority as a group is higher than the national illiteracy rate.

<sup>8</sup> Voting Rights Act Amendments of 1975, Pub. L. No. 94-73 (1975).

<sup>9</sup> S. REP. NO. 94-295, at 34 (1975) (explaining that the language protections of Section 203 would be temporary as they were as “necessary to fill that hiatus until genuinely equal educational opportunities are afforded language minorities” through more permanent federal protections for bilingual education).

<sup>10</sup> In addition to Section 203, Section 4(f)4, codified as 42 U.S.C. § 1973b(f)(4) (2000), provides permanent protections for certain language minorities. Section 4(f)(4) states,

Whenever any State or political subdivision . . . provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the lan-

tion 203 has been amended and reauthorized on three occasions: for ten years in 1982,<sup>11</sup> for fifteen years in 1992,<sup>12</sup> and for twenty-five years in 2006.<sup>13</sup>

Section 203 requires that a state or smaller political subdivision (such as a county or parish) provide language assistance if over 5% *or* more than 10,000 of the voting-age citizens in the jurisdiction are members of one of the covered language minority groups *and* have an illiteracy rate higher than the national average.<sup>14</sup> For purposes of Section 203, illiteracy is measured by the rate of the voting-age population that has failed to complete the fifth grade.<sup>15</sup> Currently, under Section 203(e), the provision only applies to Latino, Asian American, Alaskan Native, and American Indian citizens.<sup>16</sup> Based on 2000 census data interpreted by the U.S. Census Bureau, the protections currently apply to voters of the following descents: Hispanic, Chinese, Filipino, Japanese, Korean, Vietnamese, American Indian, and Native Alaskan.<sup>17</sup>

Conspicuously absent from this list are other language minorities who may face similar barriers but are not afforded similar protections in federal legislation. To some extent, states and local jurisdictions have stepped in to respond to these

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guage of the applicable language minority group as well as in the English language: Provided, That where the language of the applicable minority group is oral or unwritten or in the case of Alaskan Natives and American Indians, if the predominant language is historically unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.

42 U.S.C. § 1973b(f)(4) (2000). The language minority requirements of Section 4(f)(4) and Section 203(c) are essentially identical; however, unlike Section 4(f)(4), Section 203(c) provides for a changing determination of coverage based on census data whereas protections provided by Section 4(f)(4) are limited to language minorities present and recorded prior to the November 1, 1972, election. *See* 28 C.F.R. § 55.8 (1999) (discussing the relationship between Sections 4(f)(4) and 203(c)); 28 C.F.R. § 55.5 (discussing the coverage formula pursuant to Section 4(f)(4)).

<sup>11</sup> Voting Rights Act Amendments of 1982, Pub. L. No. 97–205 (1982).

<sup>12</sup> Voting Rights Language Assistance Act of 1992, Pub. L. No. 102–344 (1992).

<sup>13</sup> The Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109–246 (2006).

<sup>14</sup> *See* full text of Section 203, codified as 42 U.S.C. §1973 aa-1a (2000), *supra* note 6.

<sup>15</sup> 42 U.S.C. § 1973 aa-1a(B)(3)(E) (2000) (“the term ‘illiteracy’ means the failure to complete the 5th primary grade.”) *See also*, 28 CFR §55.6(b) (2000) (“illiteracy means the failure to complete the fifth primary grade”).

<sup>16</sup> 42 U.S.C. §1972aa-1a(e) (2000) (“For purposes of this section, the term ‘language minorities’ or ‘language-minority group’ means persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage.”).

<sup>17</sup> After the completion of each decennial census, the Director of the Bureau of the Census publishes a revised list of areas covered under Section 203. *See* 42 U.S.C. § 1973aa-1a(b)(A). For the most recent list of covered areas, *see* Voting Rights Act Amendments of 1992, Determinations under Section 203, 67 Fed. Reg. 48871, 48871–77 (July 26, 2002).

omissions. Miami-Dade County in Florida requires that ballots be available in Creole in precincts where a significant portion of the electorate is Haitian American.<sup>18</sup> Voters in Maine who speak French as their primary language can, through their local clerk, request ballot instructions from the Maine secretary of state that can be attached to a sample ballot.<sup>19</sup> But there are no states, nor local jurisdictions, nor federal statutes that provide language accommodations for American citizens of Arab descent, or “Arab Americans,” who speak Arabic as their primary language and are not fully literate in English.<sup>20</sup>

Arab-American citizens comprise a growing population in various areas of the United States, most notably in Wayne County, Michigan, and Los Angeles, California.<sup>21</sup> They are also members of a minority-language group that has encountered various forms of discrimination, often resulting in barriers to electoral participation, particularly in recent years.<sup>22</sup> This study examines the omission of Arab Americans from the federal language protections provided in Section 203 in an effort to suggest that the provision’s definition of language minorities omits groups who deserve coverage. The analysis suggests that extensive research could reveal that broadening the definition of language minority to include groups such as Arab Americans, Haitian Americans, and others is necessary to ensure that a renewed Section 203 reflects the goals of its original drafters and that language minorities experiencing discrimination in the educational and electoral realms receive the benefits of the provision.

The analysis presented here represents an initial phase in the research required to demonstrate that Arab Americans endure similar disparities and barriers to po-

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<sup>18</sup> Metropolitan Dade County, Florida, Sec. 12–16, Ord. No. 99–160, §§ 1–4, 11–16–99 (1999) (providing that “those precincts in which the Supervisor of Elections determines that a significant portion of the electorate is Haitian-American, the Supervisor of Elections shall provide voting booths containing Creole translations in addition to booths containing Spanish translations [and] ballots in Creole, . . . advertised in a Creole language newspaper selected by the Supervisor of Elections.”).

<sup>19</sup> ME. REV. STAT. ANN. 21-A § 603(5) (2005) (“The Secretary of State shall prepare ballot instructions in the French language, to be printed on a separate sheet of paper that may conveniently be attached to sample ballots. The Secretary of State shall furnish these ballot instruction sheets upon request by the clerk of a municipality.”)

<sup>20</sup> See text associated with notes 186–95, *infra*, for discussion on the U.S. Census definition of the term “Arab American.”

<sup>21</sup> U.S. CENSUS BUREAU. THE ARAB POPULATION: 2000. (December 2003) available at: [www.census.gov/prod/2003pubs/c2kbr-23.pdf](http://www.census.gov/prod/2003pubs/c2kbr-23.pdf), at 2, 4–7. (“The Arab population, which numbered over 1 million in 2000, increased by nearly 40% during the 1990s. In 2000, 1.2 million people reported an Arab ancestry in the United States, up from 610,000 in 1980 (when data on ancestry were first collected in the decennial census) and 860,000 in 1990.”); see also *id.* at 4 (noting that from 1990 to 2000, the Arab-American population in California “increased by 48,000, more than any other state”, and “the Arab population in Michigan grew by 51 percent, from 77,000 in 1990 to 115,000 in 2000.”).

<sup>22</sup> See discussion of *U.S. v. Hamtramck* No. 0073541 (E.D. Mich. 2000), *infra* notes 226–59.

litical participation that Latinos, Asian Americans, Native Americans, and Alaska Natives experience today. It speaks to a need to extend Section 203 coverage to Arab Americans—a change that, as the evidence implies, would be welcomed by the Arab-American community in Wayne County.<sup>23</sup> Indeed, the lack of Arabic election materials “is a big problem” that suppresses turnout of Arab-American voters in Michigan, according to Rana Abbas, deputy director of the Michigan Arab American Anti Discrimination Committee (ADC), one of the largest Arab-American community groups in the country.<sup>24</sup> Abbas believes that “[m]any citizens who are eligible to vote, choose not to, simply because of the language barrier. . . . Translated ballots would make this task a lot easier and would increase voter turn out.”<sup>25</sup>

Prior to examining the issues affecting Arab-American voters, however, it is helpful to consider the general benefits and importance of Section 203 and to examine the congressional decisions in 1982 and 1992 that led to the inclusion or exclusion of certain language minority groups from the provision. A subsequent comparison with the current situation of Arab Americans in the United States, following that discussion, will illustrate why Arab-American citizens are similarly positioned to other language minorities who are covered under Section 203. Such an analysis invites consideration of an amendment to Section 203 to include Arab Americans within its scope of protections. There is strong support for such an amendment within the leadership of the Arab-American community, as reflected in the testimony Ihsan Al-Khatib, president of the Detroit area ADC, who recently called upon the National Commission on the Voting Rights Act to consider expanding the VRA “to include areas with concentrations of Arab Americans.”<sup>26</sup>

## I. The Continued Relevance of Section 203

As mentioned above, the language assistance provisions of Section 203 currently include four language groups, as defined by the U.S. Census: Americans

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<sup>23</sup> See, e.g., interview with Dawud Walid, executive director, CAIR (Council on American-Islamic Relations) (October 14, 2005) (“I do believe in the need for including Arabic at polling areas where there are large concentrations of Arabs, especially in . . . Detroit and Dearborn.”).

<sup>24</sup> Email from Rana Abbas (October 6, 2005) (on file with author). The American Arab Anti-Discrimination Committee (ADC) was founded in Washington, D.C. by U.S. Senator Jim Abourezk and has members in all fifty U.S. States. See “What is ADC?” at: <http://adc.org/index.php?id=119>.

<sup>25</sup> *Id.*

<sup>26</sup> National Commission on the Voting Rights Act: Midwest Regional Hearing 1 (July 22, 2005) (testimony of Ihsan Alkhatib, president, Detroit Chapter, Arab American Anti-discrimination Committee), available at [http://www.votingrightsact.org/hearings/pdfs/alkhatib.lhsan\\_testimony.pdf](http://www.votingrightsact.org/hearings/pdfs/alkhatib.lhsan_testimony.pdf).

Indians, Asian Americans, Alaskan Natives, and Latino citizens.<sup>27</sup> As of July 22, 2002, over 335 jurisdictions were covered under the determinations under 2000 census figures: 220 jurisdictions required to provide language assistance in Spanish and about 115 required to provide assistance to Asian Americans, Alaskan Natives, or Native Americans.<sup>28</sup>

Any jurisdiction “covered” under Section 203 must provide election materials and assistance in the language of the applicable minority group.<sup>29</sup> Covered areas are given some discretion as to how to comply with the requirements of Section 203 in accordance with local voting procedures.<sup>30</sup> The statute itself requires that any voting materials (including ballots and directions to polling locations) that the government entity provides in English must also be provided in the covered language.<sup>31</sup> Otherwise, covered areas seeking to comply with the provision must only show: (1) whether the materials and assistance are provided in a way that allows members of the applicable language minority group to be effectively informed of and participate in voting connected activities; and (2) whether the affected jurisdiction has taken all reasonable steps to achieve that goal.<sup>32</sup> If the predominant language in the covered area is historically unwritten, as in the case of many Alaska Native or American Indian languages, the state or political subdivision only need furnish oral instructions, assistance, or other information relating to registration and voting.<sup>33</sup>

In addition, a covered jurisdiction is expected to take appropriate steps to publicize the availability of materials and assistance in the minority language.<sup>34</sup> Such steps may include the display of notices in the minority language at voter registra-

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<sup>27</sup> 42 U.S.C. § 1973aa-1a(e) (2000).

<sup>28</sup> Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 144, 48871–77 (July 26, 2002).

<sup>29</sup> *Generally see* 28 CFR §§55.18–55.20 (2000).

<sup>30</sup> 28 C.F.R. § 55.14(c) (1999) (“It is the responsibility of the jurisdiction to determine what actions by it are required for compliance” with Section 203) and § 55.11 (“It is the responsibility of covered jurisdictions to determine what languages, forms of languages, or dialects will be effective and 28 C.F.R. § 55.11 (1999).

<sup>31</sup> 42 U.S.C. § 1973aa-1a(c) (2000) (defining voting materials as “registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots.”) Examples of voting materials given in the federal regulations include machine ballots, sample ballots, affidavit ballots, petitions, notifications, announcements, and other informational materials concerning the opportunity to register, the deadline for voter registration, upcoming elections, and absentee voting. *See* 28 C.F.R. §§ 55.15, 55.19.

<sup>32</sup> 28 C.F.R. § 55.2 (b)(1),(2) (1999).

<sup>33</sup> 42 USCS § 1973aa-1a(c) (2005) (“[W]here the language of the applicable minority group is oral or unwritten or in the case of Alaskan natives and American Indians, if the predominant language is historically unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.”)

<sup>34</sup> 28 C.F.R. § 55.18(e) (1999).

tion offices or polling places, announcements over minority language radio or television stations, publication of notices in minority language newspapers, and direct contact with language-minority-group organizations.<sup>35</sup> Jurisdictions may also use trained interpreters at poll sites<sup>36</sup> and are permitted to “target” their assistance to certain areas or precincts where the language minority voters reside.<sup>37</sup>

Because of these malleable guidelines, methods and costs of compliance vary among jurisdictions. An evaluation of 292 of the 422 covered jurisdictions in the 1996 general election found that some areas provided only written materials, Alaska provided only oral assistance, and others provided both.<sup>38</sup> Thirteen jurisdictions employed a rather innovative method of providing minority-language tapes describing the ballot and voting instructions.<sup>39</sup> While several counties reported that they incurred no additional costs for providing oral-language assistance because they were able to use bilingual workers and volunteers at polling stations,<sup>40</sup> Los Angeles County, California, claimed to provide written and oral bilingual assistance in Spanish, Chinese, Vietnamese, Japanese, and Tagalog at over 5,600 polling places at costs exceeding \$1.1 million.<sup>41</sup> In New York City, Spanish and Chinese written and oral bilingual voting assistance was available at 788 of the 1280 polling places for a total cost of \$586,400—or approximately 4% of the city’s entire election budget.<sup>42</sup> Yet in Suffolk County, New York, Spanish written assistance totaled only \$1,000, but comprised over 50% of the county’s overall election costs.<sup>43</sup>

An emphasis on costs, however, limits the focus of the debate over Section 203 to its most literal elements while ignoring the great symbolic and practical benefits it affords Americans who, for reasons pertaining to their own heritage and ethnicity, need assistance in exercising their fundamental right to vote.<sup>44</sup> The sym-

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<sup>35</sup> *Id.*

<sup>36</sup> 28 C.F.R. §§ 55.18(d), 55.20 (1999).

<sup>37</sup> 28 C.F.R. § 55.17 (1999).

<sup>38</sup> Jurisdictions in Arizona, California, Connecticut, Hawaii, Massachusetts, New Mexico, and Texas provide both written and oral assistance. Jurisdictions in Florida, Michigan, New Jersey, and Rhode Island reported providing written assistance only, and covered areas in Alaska provide only oral assistance. See GENERAL ACCOUNTING OFFICE, REPORT TO THE HONORABLE JOHN EDWARD PORTER, HOUSE OF REPRESENTATIVES: BILINGUAL VOTING ASSISTANCE: ASSISTANCE PROVIDED AND COSTS, at 9 (May 1997) (indicating that 258 jurisdictions had responded to the GAO survey reporting that they provided written assistance, and 231 reported providing bilingual ballots).

<sup>39</sup> *Id.* at 9.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 20–21.

<sup>44</sup> See, e.g., Kenneth Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 332 (1986) (“Political party activity makes [cultural minorities] feel like insiders. . . . Local ethnic power produces the belief that ‘the system works for us,’ further strengthening national allegiance.”).

bolic effects of efforts by the federal government to ensure inclusion of such groups leads, some argue,<sup>45</sup> to increased acceptance and tolerance of the language minority by the dominant culture.<sup>46</sup> Indeed, the provision has proven crucial to increasing participation in electoral politics for many language minority populations already covered<sup>47</sup> and fosters inclusion<sup>48</sup> while sending the message that the bedrock principle of “one person, one vote”<sup>49</sup> applies to all citizens in American society.<sup>50</sup> Rodolfo De la Garza and Louis DiSipio, two of the foremost scholars on the Hispanic electorate, note that “at a symbolic level, the bilingual provisions [of the VRA] still serve as a signal that Latinos are welcome in the American political

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<sup>45</sup> Kathy Feng, et al., *Voting Matters: APIAs, Latinas/os and Post-2000 Redistricting in California*, 81 OR. L. REV. 849, 850–51 (2002) (“[Voting] matters more to members of ethnic and racial minority groups such as Asian Pacific Islander Americans (APIAs), Latina/os, and African Americans who have until recently been marginalized electorally and have often been the object of political animus and overt racial discrimination.”).

<sup>46</sup> See Karst, *supra* note 44, at 335–36 (“When the enforced separation of a cultural minority ends and its members come to participate in the activities and institutions of the wider society [such as voting], that participation itself promotes assimilation. At the same time, the need [for cultural minorities] to seek refuge in a ‘defensive’ cultural identity decreases. Correspondingly, as a cultural minority becomes more assimilated, its members find more tolerance among the majority for the cultural differences that may remain.”). During the 1992 debate over whether to reauthorize Section 203, Congressman Jose Serrano (D-NY) emphasized the assimilation benefits of the provision, noting that it “facilitate[s] the integration of immigrants into the diverse culture of this nation and help[s] to integrate non-English speaking citizens into our system of democracy.” S. 2236 Hearings, 102d Cong., (1992); S. REP. NO. 102–1066, at 25 (1992).

<sup>47</sup> See, e.g., Keith Aoki, *A Tale of Three Cities: Thoughts on Asian American Electoral and Political Power after 2000*, 8 ASIAN PAC. AM. L. J. 1, 44 (2002) (referring to Section 203 as an “important tool to help assure Asian-American electoral participation”).

<sup>48</sup> Karst, *supra* note 44 at 347 (“Voting is not just an expression of political preferences; it is an assertion of belonging to a political community.”). The importance of participation in promoting a feeling of inclusion in the greater polity is also referred to in Aristotle’s *Politics*: “The very conception of one’s self . . . is shaped by participation in the political realm.” See Sanford Levinson, *Suffrage and Community: Who Should Vote?* 41 FLA. L. REV. 545, 546 (1989).

<sup>49</sup> *Reynolds v. Sims*, 377 U.S. 533, 558 (1964) (solidifying the phrase “one person, one vote” as a bedrock of the American democratic system).

<sup>50</sup> Karst, *supra* note 44, at 372. (“It is not much of an exaggeration to say that today, in theory, every citizen belongs, as a full member of the society. . . . One major success of the civil rights movement was that it contributed to the development of the American civic culture, providing both a theoretical foundation and a behavioral model for other egalitarian movements. In today’s prevailing ideology, we have settled the question, ‘Equality for whom?’ by answering, ‘For everyone.’”)



system.”<sup>51</sup> The presence of these ballots, they contend, “reminds voters that Spanish speakers are a part of the nation and were consciously excluded from participation for almost 100 years.”<sup>52</sup>

Beyond this symbolic relevance are the very real and continuing practical benefits of Section 203 protections, which provide real and mostly cost-efficient mechanisms that engage voters who otherwise would be very unlikely to participate in the electoral system.<sup>53</sup> De la Garza and DiSipio note that many Mexican Americans and Puerto Ricans are not functional in English as a result of either migration to the United States later in life or a discriminatory educational system that “denied them education in English.”<sup>54</sup> In the twelve years following the passage of Section 203, Latino voters went from comprising just 2.4% of the national electorate to 3.6%—a 50% increase.<sup>55</sup> In addition, Latino citizens living in areas covered by Section 203 were 4.4% more likely to vote in 1996 and 2000 than Latino citizens living in noncovered areas.<sup>56</sup> Similar patterns are evident among Asian Americans. In 1992, the numerical triggers of Section 203 were amended to cover more communities with large Asian populations.<sup>57</sup> As a result, after the 2000

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<sup>51</sup> See Rodolfo de la Garza and Louis DiSipio, *Regulating the Electoral Process, Save the Baby, Change the Bathwater, and Scrub the Tub: Latino Electoral Participation After Seventeen Years of Voting Rights Act Coverage*, 71 TEX. L. REV. 1479, 1518 (1993).

<sup>52</sup> *Id.*

<sup>53</sup> See, e.g., *id.* at 1491 (“The extension of the VRA to language minorities . . . changed the nature of the debate over voting and nonvoting in the Mexican American and the larger Latino communities.”).

<sup>54</sup> *Id.* at 1518. De La Garza and DiSipio also dismiss the argument that Cuban Americans and new immigrants from Central and South America have not faced similar educational barriers and as such should not benefit from a program, like Section 203, designed to rectify past discrimination: “We do not find this argument convincing for two reasons. First, Congress specifically included all Spanish ‘language-minority’ residents of the United States (assuming the jurisdictions met the 5% threshold). It could have limited the coverage of the act to Mexican Americans or to the Southwest but did not. Second, the elimination of coverage for Cubans, Central and South Americans, and Latinos from the Caribbean would create an undue and perhaps impossible bureaucratic burden.” *Id.* at 1519. Elsewhere in their article, they note that “Spanish-speaking Cuban voters were more likely than the Spanish-speaking Mexican voters to use the Spanish ballots.” *Id.* at 1506. Additionally, a 1984 report by the GAO found that of 283,000 Latino voters surveyed in Texas in 1984, most were “a native-born U.S. citizen . . . [who] lacked a high school education.” U.S. GENERAL ACCOUNTING OFFICE, *Bilingual Voting Assistance: Cost of and Use During the November 1984 General Election* at 61 (1986).

<sup>55</sup> De La Garza and DiSipio, *supra* note 51, at 1499. They are quick to emphasize, however, that the Latino adult population increased nearly 100% during the same twelve-year period.

<sup>56</sup> Michael Jones-Correa, *Language Provisions under the Voting Rights Act: How Effective Are They?*, 86 SOCIAL SCIENCE QUARTERLY 549, 558 (Sept. 2005).

<sup>57</sup> See Voting Rights Language Assistance Act of 1992, Pub. L. No. 102-344 (1992).

Census, over 672,000 citizens of Asian descent in seven states were eligible to receive minority language assistance under Section 203.<sup>58</sup> Census data from 1998 and 2004 shows a 61% growth in registration rates and a 98% increase in turnout rates among self-identifying Asian-American citizens between November 1998 and November 2004.<sup>59</sup>

Beyond increased participation rates, Section 203 provisions also promote accountability among elected officials to language-minority voters, can lead to the election of representatives who share language-minority voters' heritage and identity, and encourage overall government responsiveness to the concerns of the community.<sup>60</sup> In November 2005, Margaret Fung, executive director of the Asian American Legal Defense Fund (AALDEF) testified before the House Judiciary Constitution Subcommittee that Section 203 coverage can be directly linked to an increase in the number of elected officials from the Asian-American community:

In New York City, the municipality with the nation's largest Asian American population, the first Asian American, John Liu, was elected to the New York City Council in 2001. Jimmy Meng was elected the first Asian American member of the NY State Assembly in 2004. Both Liu and Meng were elected in Queens County, one of three counties in New York City covered by section 203. In Cali-

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<sup>58</sup> Testimony of Margaret Fung, executive director of the Asian American Legal Defense Fund, *Oversight Hearing on the Voting Rights Act: Section 203—Bilingual Election Requirements (Part I)*, at 2 (November 8, 2005) available at <http://judiciary.house.gov/oversight.aspx?ID=204>.

<sup>59</sup> See Testimony of Eugene Lee, Asian Pacific American Legal Center to the National Commission on the Voting Rights Act, Western Regional Hearing (Sept. 27, 2005): [http://www.votingrightsact.org/hearings/pdfs/eugene\\_lee.pdf](http://www.votingrightsact.org/hearings/pdfs/eugene_lee.pdf). Lee's testimony also noted that the increase in voting and registration among Asian-American citizens "ha[s] outpaced the increase in both the overall APIA voting age population and the overall APIA citizen voting age population". *Id.* at 3. See also Fung, *supra* note 58, at 4 ("Section 203 has also aided grass-roots efforts to increase voter registration among eligible Asian Americans. As compared to a decade ago, when only a small number of non-partisan groups did voter registration, there are now scores of new Asian-American groups and coalitions throughout the country doing voter education and registration in the Korean, Filipino, Asian Indian, Pakistani, Bangladeshi, Cambodian, Laotian, and Vietnamese communities.").

<sup>60</sup> See de la Garza and DiSipio, *supra* note 51, at 1505. ("[Section 203] has offered Latinos the option to elect co-ethnics to office. The LNPS [Latino National Political Survey] offers several measures of the degree to which Latinos feel government officials are responsive, how the presence of a co-ethnic on the ballot influences their decision about whether to vote and for whom to vote, and how useful bilingual election materials are to voters. Overwhelmingly, LNPS respondents believe that they were treated fairly by the last public official with whom they interacted. Also, . . . large majorities of those who did report interaction [with their elected representatives] find that both Latino and non-Latino public officials treat them fairly. Surprisingly, perceptions of governmental fairness are even stronger among Spanish speakers.")

ifornia, the state with the largest Asian American population, there were no Asian Americans serving on the state legislature in 1990, and now, there are nine. In Houston, Texas, the first Vietnamese American, Hubert Vo, was elected to the state legislature in 2004, within years after Vietnamese language assistance was required in Harris County under Section 203.<sup>61</sup>

Nevertheless, a common argument against Section 203 is that language-minority citizens—be they native born or naturalized<sup>62</sup>—should be expected to speak English at a level sufficient for their participation in the electoral process.<sup>63</sup> English proficiency, however, does not necessarily mean that language-minority voters can decipher complex referenda or ballot initiatives that can confuse even native speakers of English.<sup>64</sup> More importantly, significant evidence exists among all currently covered language-minority groups that many otherwise eligible voters maintain low levels of English proficiency.<sup>65</sup> A 2004 exit poll of 11,000 Asian-American voters conducted by the Asian American Legal Defense Fund (AAL-DEF) found that 80% of Asian-American citizens surveyed in Manhattan’s China-

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<sup>61</sup> *Id.* See also Lee, *supra* note 59, at 2 (“With the recent election of Ted Lieu to the State Assembly, there are now nine APIA state legislators in California. This stands in marked contrast with 1990 when that number was zero. One factor in this electoral success has been Section 203 language assistance allowing limited English proficient voters (or voters who speak English less than very well) to fully exercise their right to vote. . . . [E]very county in California that is covered under Section 203 for an Asian language has at least one APIA legislator from a district in such county.”).

<sup>62</sup> While naturalized citizens who emigrate from Asian or Spanish speaking countries are, of course, covered by Section 203, the vast majority of U.S. citizens of Spanish or Asian descent are native-born. See U.S. Census Bureau, *We the People: Hispanics in the United States*, at 1, 8 (Dec. 2004) (reporting that 84.2% of the 35.2 million citizens of Spanish descent are native born); and U.S. Census Bureau, *We the People: Asians in the United States*, at 9 (Dec. 2004) (reporting that a majority of Asian citizens of Japanese, Cambodian, and other Asian descents are born in the United States).

<sup>63</sup> See, e.g., John J. Miller, “English is Broken Here,” *Policy Review* at 1 (Sept.—Oct. 1996), available at <http://www.policyreview.org/sept96/miller.html> (“Allowing voters to cast foreign-language ballots degrades the idea of citizenship.”).

<sup>64</sup> Angelo Ancheta, RACE, RIGHTS, AND THE ASIAN AMERICAN EXPERIENCE 113–14 (1998). (“Even those who possess sufficient English fluency to gain naturalization may still lack the higher level of English comprehension that is necessary to understand ballot language, particularly language explaining complex initiatives and referenda. Without bilingual ballots and other language assistance, these citizens might not be able to participate in the electoral process at all.”)

<sup>65</sup> See, e.g., Barry H. Weinberg and Lyn Utrecht, *The Problems of Access & Ambiguity Facing the American Voter: Problems in America’s Polling Places: How They Can Be Stopped*, 11 TEMP. POL. & CIV. RTS. L. REV. 401, 414 (2002) (citing *U.S. v. Cibola County*, No. 93 1134 (D.N.M. Apr. 21, 1994)) (“According to the 1990 Census, 57.8% of the Navajo voting age population and 18.1% of the Pueblo voting age population in Cibola County[New Mexico] do not speak English well enough to participate effectively in English language elections.”).

town and Flushing, Queens, did not speak or read English well and would vote regularly if bilingual assistance were provided.<sup>66</sup> These responses are supported by data from the 2000 census that indicated that approximately 40% of all citizens of Spanish or Asian descent over the age of five speak English less than “very well” and need language assistance to vote.<sup>67</sup>

In addition to the practical and symbolic importance of Section 203, constitutional issues and federalism concerns have lingered over the provision,<sup>68</sup> but are even more relevant following the Supreme Court’s 1995 decision in *City of Boerne v. Flores*.<sup>69</sup> Under *Boerne*, any congressional enforcement action passed under the guise of enforcing the protections of the Fourteenth and Fifteenth Amendments to the U.S. Constitution must be “congruent and proportional” to the discrimination it is seeking to remedy.<sup>70</sup> Linda Chavez, president of One Nation Indivisible, suggested in testimony to the House Judiciary Constitutional Subcommittee in November 2005 that the U.S. Supreme Court would not consider the act of “printing ballots in English and not in foreign languages” and educational disparities faced by language minorities to be an issue of discrimination in violation of the Equal Protection Clause.<sup>71</sup> Chavez argued that there is “a lack of congruence and proportionality between the asserted discrimination in education and the bilingual ballot mandate in Section 203” because it is “much more likely that this lack of fluency” in English is rooted in reasons other than

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<sup>66</sup> See Fung, *supra* note 58, at 3 (also noting that AALDEF’s exit poll found “almost one-third of all respondents needed some form of language assistance in order to vote, and the greatest beneficiaries of language assistance (46%) were first-time voters. Of those polled, over 51% of Asian-American voters got their news about politics and community issues from the Asian-language media.”).

<sup>67</sup> U.S. CENSUS BUREAU, LANGUAGE USE AND ENGLISH-SPEAKING ABILITY: 2000, at 2 (Oct. 2003).

<sup>68</sup> See generally *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (rejecting a constitutional challenge to Section 4(e) of the VRA, and generally finding language assistance requirements to be a valid exercise of Congress’s power to enforce the Fourteenth and Fifteenth Amendments).

<sup>69</sup> 521 U.S. 507 (1997) (holding that any congressional enforcement effort under the Fourteenth Amendment must be “congruent and proportional” to the remedy it is seeking to address).

<sup>70</sup> For a more in-depth discussion about the constitutional conundrum in the post-*Boerne* world, see Michael Pitts, *Section 5 of the Voting Rights Act: A Once and Future Remedy?*, 81 DENV. U. L. REV. 225, 238–49 (2003).

<sup>71</sup> Testimony of Linda Chavez, president of One Nation Indivisible, *Oversight Hearing on the Voting Rights Act: Section 203—Bilingual Election Requirements (Part I)*, (November 8, 2005) available at <http://judiciary.house.gov/OversightTestimony.aspx?ID=510>. (“The rather garbled text of Section 203, however, apparently says that . . . the poorer education that, say, Latinos receive [was discriminatory and] is what makes bilingual ballots necessary.”)

lack of equal educational opportunity, such as “recent immigration, most obviously, or growing up in an environment where English is not spoken enough.”<sup>72</sup>

This argument ignores the fact, of course, that the United States Supreme Court has previously upheld the constitutionality of Section 203’s predecessor and partner, Section 4(e) of the VRA, which provided for language assistance to Puerto Rican citizens;<sup>73</sup> a decision that Congress relied upon nearly a decade later when it adopted Section 203.<sup>74</sup> It also omits reflection on the extensive record of educational disparities and other types of discrimination that Congress considered when it enacted Sections 4(f)(4) and 203 in 1975<sup>75</sup>—disparities and discrimination that still exist today.<sup>76</sup> One disturbing recent incident occurred in Passaic City, New Jersey, during a June 2001 primary election. A federal election monitor observing the city’s compliance with a consent decree recalls:

Someone allegedly stole the flag from outside the polling place. . . . [A Police] officer entered the polling place [to investigate] and asked who had called the police. No one responded. The officer barked comments in substance to the poll workers as follows, “Can’t you read? What country do you come from?” When a municipal worker of Indian origin came to see what the problem was, the officer then asked, “And what country do you come from?” When a Latino federal observer tried to explain the dictates of the consent decree [requiring the placement of federal monitors in Passaic City polling locations], the officer asked for [his] credentials. When the observer showed his credentials, the officer found them inadequate because they lacked a picture and detained the observer. The officer told the observer, “I could arrest you for this.” . . . When a Sergeant from the Passaic Police department responded at the scene and learned what had happened, he apologized to the federal observer and told him he thought some sensitivity training might be in order for the officer. Notably, this discriminatory behavior took place in a city where the Latino population is at 62 percent.<sup>77</sup>

Such accounts indicate the continued relevance of the language protections provided by Section 203 and stress the ongoing need for federal accommodations that seek to equalize the opportunities for all citizens to participate in the electoral process. The above arguments, disparities, and incidents suggest that other simi-

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<sup>72</sup> *Id.*

<sup>73</sup> *Katzenbach v. Morgan*, 384 U.S. 641, 658 (1966). *See also Oregon v. Mitchell*, 400 U.S. 112, 147 (1970) (finding literacy tests to directly discriminate against language minority voters and “used at times as a discriminatory weapon against some minorities, not only Negroes but Americans of Mexican ancestry, and American Indians”).

<sup>74</sup> S. REP. NO. 94–295, at 34 (1975).

<sup>75</sup> *Id.* at 28 (noting that high illiteracy rates among language minorities were the result of “the failure of state and local officials to afford equal educational opportunities”).

<sup>76</sup> *See, e.g., U.S. CENSUS BUREAU, WE THE PEOPLE: HISPANICS IN THE UNITED STATES* at 11 (Dec. 2004) (reporting that just over 50% of all Latino citizens have education beyond the high school level, compared with the United States average of 80%).

<sup>77</sup> Weinberg, *supra* note 65, at 413.

larly situated language-minority communities, most notably individuals of Arab descent who are not covered by Section 203, may be experiencing similar inequities that require similar accommodations from the federal government. Before delving further into that issue, however, it is worth taking a closer look at congressional decisions, intentionally or inadvertently, to include or exclude certain language-minority communities from Section 203 protections. Such an examination offers a more complete understanding of how the provision arrived at Congress's doorstep in 2006 in its current form and breadth.

## **Part II: The Inclusion of Latinos, Asian Americans, American Indians, and Alaska Natives in Section 203**

In 1975,<sup>78</sup> Congress engaged in an extensive debate over whether to broaden the scope of the VRA to protect language minorities.<sup>79</sup> After much discussion, both houses passed Section 203 to apply only to states, counties, or towns where the voting-age citizen population of a single language minority was greater than five percent,<sup>80</sup> provided the illiteracy rate of the citizens in the jurisdiction was higher than the national illiteracy rate.<sup>81</sup> The provision was enacted in response to the efforts of several language-minority constituency groups<sup>82</sup> that presented Congress with overwhelming evidence of educational disparities, low turnout rates, and discriminatory barriers to voting that members of their communities faced. The reports from both the House and Senate Judiciary committees and the 1975 floor debate demonstrate that Congress was clearly acting in response to this evidence while limiting the reach of language groups covered by the protections.<sup>83</sup>

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<sup>78</sup> Voting Rights Act Amendments of 1975, §203, Pub. L. No. 94-73 (1975).

<sup>79</sup> *Id.* at § 207 (codified as amended at 1973aa-1a(e).)

<sup>80</sup> For a critique of the 5% threshold, see, e.g., Sandra Guerra, *Voting Rights and the Constitution: The Disenfranchisement of Non-English Speaking Citizens*, 97 YALE L. J. 1419, 1423 (1988) (“Although [Section 203, as passed in 1975] cover[ed] a large number of jurisdictions, the use of a trigger calculated as a percentage of the voting population is problematic. Jurisdictions with millions of voters can deny multilingual voting assistance to tens of thousands of non-English speakers so long as they fall below the 5% threshold.”).

<sup>81</sup> See 42 U.S.C. §1973aa-1a(b)(2)(A)(ii) (2000).

<sup>82</sup> de la Garza and DiSipio, *supra* note 51, at 1482-84 (recounting testimony describing methods employed to exclude minority language voters from the voting booth); *id.* at 1492 (“In the testimony before Congress in both 1975 and 1982, Latino leaders offered many examples of the conscious exclusion of Mexican Americans from the vote. Techniques reminiscent of the pre-VRA South spiced the testimony.”).

<sup>83</sup> See, e.g., H.R. REP. NO. 94-296, at 16-25 (1975); S. REP. NO. 94-295, at 24-28 (1975); 121 Cong. Rec. 13, at 16246-47 (1975).

The result was legislation that included a specific definition of “language minority” that only included groups—Latinos, Asian Americans, American Indians, and Alaskan Natives<sup>84</sup>—whose representatives provided to Congress evidence of severe language barriers and other disparities that limited equal access to the political process.<sup>85</sup> The decision to limit Section 203 coverage to these four groups was based on three factors:

1. evidence that members of the groups encountered discriminatory barriers to participation in electoral politics;<sup>86</sup>
2. qualitative and anecdotal educational disparities correlating with high levels of illiteracy;<sup>87</sup>
3. data indicating comparatively low turnout and registration rates.<sup>88</sup>

Both the House and Senate Judiciary committees spent the bulk of their time examining evidence of electoral barriers and discriminatory tactics endured by Latino, Asian American, Native American, and Alaska Native citizens.<sup>89</sup> Though both committee reports cited general evidence of “substantial” discriminatory

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<sup>84</sup>A letter from the head of the Population Division of the Bureau of the Census and included in the Senate Judiciary Committee report enumerated the covered groups as follows: [T]he category of Asian American includes persons who indicated their race as Japanese, Chinese, Filipino, or Korean. The category of American Indian includes persons who indicated their race as Indian (American) or who did not indicate a specific race category but reported the name of an Indian tribe. The population designated as Alaskan Native includes persons residing in Alaska who identified themselves as Aleut, Eskimo, or American Indian. Persons of Spanish heritage are identified as (a) ‘persons of Spanish language’ in 42 States and the District of Columbia; (b) ‘persons of Spanish language’ as well as ‘persons of Spanish surname’ in Arizona, California, Colorado, New Mexico and Texas; and (c) ‘persons of Puerto Rican birth of parentage in New Jersey, New York and Pennsylvania.’ S. REP. NO. 94–295, at 24 n.14 (1975) (citing a Letter from Meyer Zitter, Chief, Population Division, Bureau of the Census, to House Judiciary Committee, April 29, 1975.)

<sup>85</sup> Guerra, *supra* note 80, at 1423.

<sup>86</sup> H.R. REP. NO. 94–296, at 22 (1975); (“The definition of those groups included in language minorities was determined on the basis of the evidence of voting discrimination.”); S. REP. NO. 94–295, at 25 (1975) (“The extensive record . . . is filled with examples of the barriers to registration and voting that language minority citizens encounter in the electoral process. Testimony was received regarding inadequate numbers of minority registration personnel, uncooperative registrars, and the disproportionate effect of purging laws on non-English speaking citizens because of language barriers.”).

<sup>87</sup> H.R. REP. NO. 94–296, at 20 (1975) (“[O]ver fifty percent of all Mexican American children in Texas who enter the first grade never finish high school.”).

<sup>88</sup> *Id.* at 22–24.

<sup>89</sup> *Id.* at 16–25; S. Rep. No. 94–295, at 25–28 (1975) (comparing the high turnout rates of German, Polish, Italian, and Russian citizens with correspondingly low rates among Mexican Americans and Asian Americans).

practices aimed at all four groups,<sup>90</sup> admittedly the reports<sup>91</sup> primarily cite specific tactics that kept Latino citizens from the ballot box. These tactics included physical violence,<sup>92</sup> economic threats,<sup>93</sup> and more general lack of assistance on election day.<sup>94</sup> The committee reports also emphasized the lack of the ability of the Latino community to elect their candidates of choice,<sup>95</sup> coupled with the presence of severe vote dilution in predominantly Latino areas.<sup>96</sup>

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<sup>90</sup> H.R. REP. NO. 94–296, at 17 (1975); S. Rep. No. 94–295, at 26 (1975): (“Many obstacles placed by [local officials] frighten, discourage, frustrate, or otherwise inhibit language minority citizens from voting. Outright exclusion and intimidation are only two of the problems they face. Other problems . . . are denial of the ballot by such means as failing to locate voters’ names on precinct lists, location of polls at places where minority voters feel unwelcome or uncomfortable, or which are inconvenient to them, and the inadequacy of voting facilities.”)

<sup>91</sup> H.R. REP. NO. 94–296, at 22–23 (1975) (“Persons of Spanish heritage was the group most severely affected by discriminatory practices, while the documentation concerning Asian Americans, American Indians, and Alaskan Natives was substantial.”).

<sup>92</sup> S. REP. NO. 94–295, at 26 (1975) (“Witnesses testified that local law enforcement officials in areas of Texas patrol only Mexican American voting precincts, and harass and intimidate Mexican American voters.”) (citing *Allee v. Medrano*, 416 U.S. 802 (1974)).

<sup>93</sup> *Id.* (“A witness from Texas indicated that an Anglo candidate who was a loan officer at the bank went to each Mexican American who had loans with the bank and told them he expected their votes.”)

<sup>94</sup> *Id.* (“Some of the other barriers to voting which language minority citizens face are the underrepresentation of minority persons as poll workers; unavailability or inadequacy of assistance to illiterate voters; lack of bilingual materials at the polls for these non-English speaking persons; and problems with the use of absentee ballots.”)

<sup>95</sup> *Id.* at 26–27 (“The proportion of elected officials who are Mexican American or Puerto Rican . . . is substantially lower than their proportion of the population. In Texas, although Mexican Americans comprise 16.4% of the population, they hold only 2.5 percent of the elective positions. In New York, where Spanish heritage citizens comprise 7.4 percent of the population, they hold less than 0.1 percent of elective positions.”).

<sup>96</sup> *Id.* at 27–28 (“Election law changes which dilute minority political power in Texas are widespread in the wake of recent emergence of minority attempts to exercise the right to vote. The following communities have adopted such changes in the face of growing minority voting strength: Corpus Christi, Lufkin and Waco, in addition to a number of local school districts throughout the state. . . . The at-large structure, with accompanying variations of the majority run-off, numbered place system, is used extensively among the 40 largest cities in Texas. And, under state statute, the countless school districts in Texas elect at-large with an option to adopt the majority run-off, numbered place system. These structures effectively deny Mexican Americans and black voters in Texas political access in terms of recruitment, nomination, election and ultimately, representation.”) *Id.*, citing *White v. Regester*, 412 U.S. 755 (1973) (finding that the use of multimember districts for the election of state legislators in Bexar and Dallas counties, Texas, unconstitutionally diluted and otherwise cancelled the voting strength of Mexican American and African American citizens in those counties.)



The House Judiciary Committee report next linked experiences of electoral discrimination to other types of inequalities—particularly in educational opportunities.<sup>97</sup> The report cited the low educational attainment of members of the language-minority groups<sup>98</sup> and emphasized the link between poor educational attainment and illiteracy.<sup>99</sup> The committee discussed at length the 1974 *Lau v. Nichols* opinion,<sup>100</sup> which concluded that the San Francisco Board of Education's failure to provide bilingual education to Chinese students denied the students the opportunity to participate in public schools.<sup>101</sup> In attempting to express the connection between education, illiteracy, and voting, the report cited the *Lau* Court's conclusion that "[w]e know that those who do not understand English are certain to find their classroom experiences wholly incomprehensible and in no way meaningful"<sup>102</sup> and added: "if we substitute the word 'voting' for the word 'classroom' . . . we can appreciate the difficulties which Asian Americans face when they seek to engage in the political process."<sup>103</sup>

The 1975 House and Senate Committee reports went on to cite high rates of illiteracy among the four language-minority groups as a strong indication that language accommodations were necessary to encourage their political participation.<sup>104</sup> They emphasized a connection between educational barriers and low voter participation, citing, as an example, the low educational attainment of Mexican Americans in Texas (according to the 1970 census, over 33% had not completed the fifth grade)<sup>105</sup> and their correspondingly low electoral participation (less than 50% had participated in the early 1970s elections).<sup>106</sup> The committee reports cited large disparities in voter registration rates between the protected language-minority communities and nonminority communities.<sup>107</sup> The committee found that 44.4% of Latino citizens were registered to vote in the 1972 general election,

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<sup>97</sup> H.R. REP. NO. 94-296, at 21 (1975) (citing a multitude of lawsuits brought by the Department of Justice against state and local governments that were enacting discriminatory policies against language minorities in "public schools, employment, voting rights, and penal institutions").

<sup>98</sup> H.R. REP. NO. 94-296, at 20 (1975) ("Of all Spanish heritage citizens over 25 years old, . . . more than 18.9 percent have failed to complete five years of school, compared to 5.5 percent for the total population.").

<sup>99</sup> *Id.* ("The Committee found that these high illiteracy rates are not the result of choice . . . [t]hey are the product of the failure of state and local officials to afford equal educational opportunities to members of language minority groups.")

<sup>100</sup> 414 U.S. 563 (1974).

<sup>101</sup> *Id.* at 566.

<sup>102</sup> H.R. REP. NO. 94-296, at 21 (1975) (citing *Lau* at 566).

<sup>103</sup> *Id.*

<sup>104</sup> H.R. REP. NO. 94-296, 94th Cong., at 22-23 (1975) ("The evidence before the Committee indicated a close and direct correlation between high illiteracy among these groups and low voter participation.")

<sup>105</sup> S. REP. NO. 94-295, at 28 (1975).

<sup>106</sup> *Id.* at 30.

<sup>107</sup> *Id.* at 31.

compared to a whopping 73.4% of non-language-minority citizens.<sup>108</sup> In 1974, only 34.9% of persons of Spanish origin were registered to vote compared to 63.5% of eligible non-language-minority citizens.<sup>109</sup> And in the 1974 national election, only 22.9% of eligible Latino citizens voted, which was “less than one-half the rate of participation” for white voters.<sup>110</sup>

Notably, the evidence of low turnout and participation rates seemed to be central to Congress’s decision to set the four language minority groups apart from others for Section 203 coverage. Both the House and Senate Judiciary Committee reports acknowledge that other language minorities—such as German or Polish citizens—could likely suffer from racial and ethnic discrimination.<sup>111</sup> But neither committee received evidence that members of those groups experienced “voting difficulties” or low turnout and registration rates.<sup>112</sup> To the contrary, 85.7% of eligible Russian citizens had registered to vote in the 1972 presidential election, as compared with only 44.4% of eligible Latino citizens.<sup>113</sup>

Despite both the Senate and House Judiciary Committees’ extensive and coherently documented rationale, there was some minor opposition to the decision to limit the definition of language minority to Latino, Asian American, Native American, and Alaska Native citizens. In fact, all dissenting members of the House Judiciary Committee argued for the need to expand the definition to include other language minorities.<sup>114</sup> Dissenting from the House report, representatives Henry Hyde, John Ashbrook, Carlos Morehead, Charles Wiggins, Edward Hutchinson, and Robert McClory wrote: “[t]here is no reason to deny bilingual relief to other national origin groups if they are ‘illiterate’ within the terms of the statute,”<sup>115</sup> while in a separate dissent, Representative Jack Brooks cautioned that “the titles—being limited to American Indians, Asian Americans, Native Alaskans, and person of Spanish heritage—do not provide similar protection to many minority-

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<sup>108</sup> *Id.* at 30 (citing *Current Population Reports: 1972. Population Characteristics, Voting and Registration Statistics in the Election of November 1972*. Series p. 20, No. 263, Table 1, at 22.)

<sup>109</sup> S. REP. NO. 94–295, at 30 (1975).

<sup>110</sup> *Id.* (citing unpublished data from the Current Population Survey: 1974, provided by the Bureau of the Census.)

<sup>111</sup> *Id.* (“As noted earlier, the hearing record did not disclose any evidence of voting discrimination against other language minority groups. . . . [This] signifies only that we had no such evidence at the time this bill was drafted. It is not the intention of Congress to preclude other language minority groups from presenting their evidence of voting discrimination to the courts or to the Attorney General for appropriate relief.”)

<sup>112</sup> *Id.* at 22 (“No evidence was received concerning the voting difficulties of other language groups. Indeed, the voter registration statistics for the 1972 Presidential election showed a high degree of participation by other language groups: German, 79 percent, Italian, 77.5 percent; French, 72.7 percent; Polish, 79.8 percent; and Russian, 85.7 percent.”)

<sup>113</sup> *Id.*

<sup>114</sup> H.R. REP. NO. 94–296, at 22–23 (1975).

<sup>115</sup> *Id.* at 89.

language groups that also seem to deserve protection.”<sup>116</sup> Similar concerns were voiced by then-Assistant Attorney General Pottinger to the Senate Judiciary Committee.<sup>117</sup> And when Section 203 reached the floor of the House, two representatives from New York proposed separate amendments to broaden the Judiciary Committee’s definition of “language minority” to include all citizens who were limited English proficient.<sup>118</sup> The House rejected both amendments<sup>119</sup> and went on to pass Section 203 and other amendments to the VRA in a vote of 341 to 70.<sup>120</sup> The Senate approved Section 203 and other amendments to the act by a vote of seventy-seven to twelve.<sup>121</sup>

Some concern about the limits of Congress’s “language minority” definition for Section 203 continued after the 1975 debates,<sup>122</sup> but only one member of Congress—Representative Robert McClory of Illinois, raised the issue again in Congress. In 1981, on the floor of the House of Representatives, McClory complained that Section 203 “is too sensitive to specific constituencies to the exclusion of others”<sup>123</sup> He then proposed an amendment to repeal Section 203 altogether.<sup>124</sup>

During the 1982 reauthorization, apart from McClory’s attempt to repeal the provision, little time was spent on discussing changes to Section 203. At that time, the biggest concern among voting rights advocates centered upon the fear that, with the election of Ronald Reagan in 1980 and Republicans in control of the U.S. Senate, it would be difficult to push for a renewal of Section 5 (set to expire in 1982) or Section 203 (set to expire in 1985) in a new conservative political climate.<sup>125</sup> Testimony regarding Section 203 in hearings before the House and Senate

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<sup>116</sup> *Id.* at 67.

<sup>117</sup> *Id.*

<sup>118</sup> 121 Cong. Rec. 16898, 16907 (1975) (recording the defeat of the Biaggi amendment); *id.* at 16907 (recording the defeat of the Solarz amendment).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 16916.

<sup>121</sup> 121 Cong. Rec. 24781 (1975).

<sup>122</sup> See Guerra, *supra* note 80, at 1423 (“[A]ll non-English speakers, regardless of race or ethnicity, are effectively disenfranchised by elections held only in English. The voting rights of all non-English speaking American citizens are infringed when the state denies voting assistance in a language they can understand.”).

<sup>123</sup> 121 Cong. Rec. 23178 (1975). Rep. McClory was also one of the lone dissenting voices to Section 203 in the House Judiciary Committee. See H.R. REP. NO. 94–296, at 35 (1975).

<sup>124</sup> 127 Cong. Rec. 17, 23177 (1981). Rep. McClory’s amendment was defeated in a vote of 128–284. *Id.* at 23190.

<sup>125</sup> See, e.g., David Kusnet, *Introduction* in VOTING RIGHTS IN AMERICA: CONTINUING THE QUEST FOR FULL PARTICIPATION 1, 11 (Karen McGill Arrington and William L. Taylor, eds., 1992) (“A Republican Senate had been elected in the Reagan landslide of 1980, and instead of Edward Kennedy, the Senate Judiciary Committee was now chaired by Strom Thurmond, who had left the Democratic Party in 1948 in protest against its strong civil rights platform plank. Moreover, the Senate Subcommittee on the Constitu-

Committees in 1981 and 1982 focused on the costs of the provisions and their effectiveness in facilitating the participation of language minorities in the electoral process.<sup>126</sup> The committee reports primarily reviewed testimony on these issues from a multitude of community groups<sup>127</sup> documenting the continued need for the provisions<sup>128</sup> and noting the impact of the protections in increasing the electoral participation of the covered language minorities.<sup>129</sup> In particular, the House and Senate reports cited surveys conducted in 1976 and 1980 that indicated a strong link between providing bilingual registration and voting materials and oral assistance at the polls and increased voter participation among members of the Latino community,<sup>130</sup> emphasizing in particular the benefits of these materials for elderly voters who had lower levels of English proficiency compared with their younger counterparts.<sup>131</sup>

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tion, which had jurisdiction over voting rights, was now chaired by Orrin Hatch, who had recently opposed strengthening the Fair Housing Act.”)

<sup>126</sup> See, e.g., H.R. REP. NO. 97-227, at 24-26 (1981).

<sup>127</sup> The Senate heard from groups such as the Mexican American Legal Defense and Educational Fund, the League of United Latin American Citizens, Chinese for Affirmative Action, the National Congress of American Indians, and various state officials, who all spoke in favor of Section 203. S. REP. NO. 97-205, at 65-66 (1982). The House Judiciary Committee Report cited similar testimony from the Southwest Voter Registration Education Project, the Mexican American Equal Rights Project, the Texas Labor Council for Latin American Advancement, the National Congress of American Indians, Chinese for Affirmative Action, and the Mexican American Legal Defense Fund. H.R. REP. NO. 97-227, at 27 n.85 (1981).

<sup>128</sup> Henry Der, executive director of Chinese for Affirmative Action, delivered particularly compelling testimony to the House Committee. According to the House Committee report, Der’s testimony “pointed out that persons who oppose these provisions ‘do not understand the discriminatory experiences that Chinese Americans have had to suffer and which have made it difficult for Chinese Americans, particularly the elderly, to learn English.’” H.R. REP. NO. 97-227, at 27 (1981) (citing Testimony of Henry Der, *House Judiciary Committee Hearings*, June 10, 1981).

<sup>129</sup> *Id.* Testimony from David Dunbar, General Counsel for the National Congress of American Indians, for example, emphasized the positive effects of Section 203 in the American-Indian community: “the provision of oral language assistance in the electoral process is of particular importance to American Indian communities.” *Id.*

<sup>130</sup> H.R. REP. NO. 97-227, at 27 (1981). According to a survey conducted by the Mexican American Legal Defense Fund and the Southwest Voter Registration and Education Project, 23% of surveyed Latino voters received assistance from a bilingual poll worker and 32% said they would be less likely to vote if Spanish language assistance were not available. S. REP. NO. 97-205, at 66 (1982).

<sup>131</sup> S. REP. NO. 97-205, at 66 (1982). (“Among those who participated in the survey [by MALDEF and SVREP] who are between 18 and 25, 6 out of 100 persons speak only Spanish. Among those over 65, 34 persons, or more than 33 percent, speak only Spanish.”).

Both the House and Senate reports stressed that implementation costs for Section 203 decreased as jurisdictions became more adept at complying with the provision.<sup>132</sup> According to the Senate Judiciary Committee report, California, for example, spent roughly \$126,000 in 1976 on bilingual election materials and less than half that, \$54,000, four years later in 1980.<sup>133</sup> The Senate report noted, however, that “even if the costs of bilingual elections were higher, when viewed in proper perspective . . . certain costs should be willingly incurred to make our most fundamental political rights a reality for all Americans.”<sup>134</sup> In addition, the 1981 House report set forth specific suggestions to improve implementation of the protections, including recommendations that covered jurisdictions work more closely with community organizations that serve and represent language minorities<sup>135</sup> and advertise the availability of bilingual ballots and election materials to ensure increased effectiveness.<sup>136</sup>

After the committees issued their reports recommending reauthorization, Congress voted overwhelmingly in favor of extending the Section 203 bilingual election requirements for an additional ten years.<sup>137</sup> The only amendment to the provision related to language coverage was proposed by Alaska Senator Theodore Stevens, who had in 1975 fought unsuccessfully to limit the definition of Alaskan Natives to include only those whose “predominant *written* Alaskan language is other than English.”<sup>138</sup> In the 1982 debate on the Senate floor, Senator Stevens

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<sup>132</sup> H.R. REP. NO. 97-227, at 26 (1981).

<sup>133</sup> S. REP. NO. 97-205, 65 (1982).

<sup>134</sup> *Id.* Such rhetoric of the importance of protecting access to the ballot box peppered the debates in the House and the Senate. The Senate report noted that, during debates over Section 203 and the VRA in general on the floor of the House, Majority Leader Jim Wright declared “We have never made a mistake, when we broadened the franchise . . . we have never made a mistake when we let more people vote.” *Id.* at 65.

<sup>135</sup> H.R. REP. NO. 97-227, at 25 (1981) (citing a Federal Elections Commission study that criticized many of the covered jurisdictions for not making contact with local language minority organization, and suggesting that covered jurisdictions that made contact and worked with language minority groups incurred lower implementation costs and experienced a greater impact on increased participation).

<sup>136</sup> *Id.* at 26 (Central to the FEC’s report was the conclusion that more bilingual election materials would be utilized if election administrators worked with local community organizations to publicize their availability).

<sup>137</sup> The renewed act passed the House in a vote of 389 to 24, and the Senate by 85 to 8. See Kusnet, *supra* note 126 at 11–12.

<sup>138</sup> 121 Cong. Rec. 24764 (1981). (emphasis added). In 1975, there was extensive debate in the Senate over how to define the term “Alaskan Native,” and Senator Stevens talked at length about the problems of assuming the census definition of Alaska Natives in the legislation. He explained: “Based upon the usage of the Bureau of the Census, Alaska Natives include people who identify themselves as Aleuts, Eskimos, or American Indians. But this bill combines them all into one category, Alaska Natives. We have among those three categories some 18 languages and some 35 dialects . . . we go back and let the Bureau of the Census define what is a single language minority to include

sought to extend Section 203 coverage to Native American citizens whose language was historically unwritten.<sup>139</sup> Senator Stevens's amendment was accepted with little debate, but failed to be included in the final version of the renewed provision.<sup>140</sup>

When Section 203 came before Congress ten years later in 1992, advocates from community groups came prepared to address the shortcomings emerging regarding the application of the 5% coverage determination of Section 203.<sup>141</sup> As applied, the 5% threshold requirement did not reach many Asian American<sup>142</sup> or American Indian communities or voters.<sup>143</sup> Thus, the focus of community groups in 1992 was to extend coverage in two ways: (1) to any jurisdiction containing all or part of an Indian reservation on which 5% or more of voting-age citizens are limited English proficient and have an illiteracy rate higher than the national average, and (2) to any jurisdiction in which more than 10,000 voting-age citizens are limited English proficient and have an illiteracy rate higher than the national average.<sup>144</sup>

The 1992 House and Senate Judiciary Committee reports both fully embraced the importance and continued relevance of Section 203.<sup>145</sup> The 1992 House report states that "the type of discrimination previously encountered by these language minority populations [chosen in 1975] still exists and the need for S[ection] 203 continues,"<sup>146</sup> reiterating that language minorities "generally receive a poor education which often manifests . . . in the form of high illiteracy rates. The inability or limited ability to read English obviously thwarts any attempt to knowledgeably

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people who use 18 different languages in my State, because their numbers are so few they are all lumped together [and expected to speak one language under this determination]." *Id.*

<sup>139</sup> *Id.* at 14147.

<sup>140</sup> *Id.* at 14147–48.

<sup>141</sup> Voting Rights Act Amendments of 1982, Pub. L. No. 97–205 (1982).

<sup>142</sup> Feng et al. *supra* note 45, at 867–68 (noting that, even after the 1990 Census, because the 5% threshold to qualify for bilingual assistance was too high, no Asian American language community outside of Hawaii could qualify for protection under Section 203).

<sup>143</sup> See, e.g., Danna R. Jackson, *Eighty Years of Indian Voting: A Call to Protect Indian Voting Rights*, 65 MONT. L. REV. 269, 278–79 (2004) ("Indians did not exceed five percent of most counties. . . . Many reservations encompassed two or more counties and sometimes crossed state boundaries. Therefore, the artificial lines imposed over reservation boundaries kept Indians who spoke limited English from receiving help at the polls. Indians argued that the 1982 amendments exempting counties from applying language assistance to needy Indians needed to be corrected.").

<sup>144</sup> See, e.g., S. REP. NO. 102–315, at 12 (1992) (citing testimony from Margaret Fung of the Asian American Legal Defense Fund that indicated the 10,000 benchmark coverage standard would extend Section 203 coverage to "approximately 53,000 Asian-American citizens in three counties in the State of New York").

<sup>145</sup> See, generally *id.* 3–14; H.R. REP. NO. 102–655, at 3–11 (1992).

<sup>146</sup> H.R. REP. NO. 102–655, at 3 (1992).

participate in the electoral process.”<sup>147</sup> Citing several state-based efforts to promote English-only laws, the House report noted that “without a federal mandate, much needed bilingual assistance in the voting process, meant to ensure the guarantees of the Fourteenth and Fifteenth Amendments, may disappear.”<sup>148</sup> Likewise, the 1992 Senate Judiciary Committee Report declared that “the four language minority groups covered by Section 203—Hispanics, Asian Americans, American Indians and Alaska Natives—continue to experience educational inequities, high illiteracy rates and low voting participation.”<sup>149</sup>

The bulk of both reports detailed the “severe” and ongoing educational disparities faced by Latino,<sup>150</sup> Asian American,<sup>151</sup> and American Indian<sup>152</sup> citizens. For example, the empirically rich reports stated that:

- In 1991, only 51.3% of Latino citizens over the age of twenty-five had completed high school, compared with 80.5% of non-Latino citizens.<sup>153</sup>
- In 1988, 12.2% of Latino citizens over the age of twenty-five had not completed five years of schooling (the definition of illiteracy under Section 203), compared with 2% of white citizens and 4.8% of African Americans of the same age.<sup>154</sup>
- Latino children were far more likely than non-Latinos to attend segregated schools within big city school systems that suffer from limited tax bases and inadequate resources devoted to education.<sup>155</sup>

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<sup>147</sup> *Id.* See also *id.* at 5 (“The problems suffered by language minorities include state and local school funding disparities and *de facto* segregation. . . . Unfortunately, it will be years before changes in education systems demonstrate positive results for the relevant language populations. Furthermore, the unavailability of adequate English as a Second Language programs for both school age children and adults prevents them from learning English. These deficiencies are especially problematic for the elderly.”).

<sup>148</sup> *Id.* at 3.

<sup>149</sup> S. REP. NO. 102–315, at 4 (1992).

<sup>150</sup> *Id.* (Citing, among other things, testimony from Gloria Molina, a member of the Board of Supervisors of Los Angeles County, that the educational disparities Congress found for Latinos in 1975 persist today); see also *id.* at 5 (“[E]qual education opportunity for Hispanics is still only a goal, not a reality. Hispanics still feel the vestiges of past educational discrimination and lag behind the non-Hispanic population in almost every objective indicator of economic and educational success”).

<sup>151</sup> *Id.* at 6. (“Although heralded popularly as ‘The Model Minority,’ for Asian Americans the everyday reality is something far less attractive. This is particularly true for new immigrants and refugee communities. Limited English proficiency is prevalent among the voting-age U.S. citizens in these communities.”).

<sup>152</sup> *Id.* at 6–7. (“An October 1991 U.S. Department of Education Task Force report on the status of Native American education found that Native American children continue to face discrimination in education.”)

<sup>153</sup> *Id.* at 4 (citing U.S. Bureau of the Census, *The Hispanic Population in the United States: March 1991, Current Population Reports*, series P-20, No. 455; U.S. Bureau of the Census, *School Enrollment—Social & Economic Characteristics of Students: Oct. 1989, Current Population Reports*, series P-20, No. 452).

<sup>154</sup> *Id.*

- 69% of all Laotians living in the United States do not speak English well, along with 38% of Vietnamese, 24% of Koreans, and 23% of Chinese.<sup>156</sup>
- Discriminatory educational barriers endured by American Indian citizens including “overt and subtle racism” in educational settings, poorly financed school systems, and “poorly trained teachers and inadequate resources.”<sup>157</sup>
- In 1991, the high school drop out rate for American Indian citizens hovered at 36 percent, “higher than that of virtually every demographic group studied in the United States.”<sup>158</sup>

Both reports emphasized the important effect of translated election materials on increasing the political participation of these disenfranchised communities.<sup>159</sup> The House report cited Section 203 as a “catalyst for increased voter participation.”<sup>160</sup> Among the changes in the covered language-minority communities in the years following the passage of Section 203:

- Between 1980 and 1990, voter participation among Latinos increased at a rate five times the rest of the nation, and the number of registered Latino voters nationwide increased by approximately 500,000 during the period 1990 to 1992.<sup>161</sup>
- Voter turnout in seven precincts on tribal reservations in Arizona rose from 11,789 in 1972 to 15,982 in 1980.<sup>162</sup>
- Between 1972 and 1990, voter turnout among American Indians increased by 120% in Navajo County, Arizona, and 88% in Apache County, Arizona.<sup>163</sup>
- Areas with high turnout among Latino voters directly correlated with the production and use of bilingual election materials.<sup>164</sup>

<sup>155</sup> *Id.* (citing Orfield and Monfort, *Racial Change & Desegregation in Large School Districts: Trends Through the 1986-87 School Year*, National School Board Association, (Council of Urban Boards of Education and the National School Desegregation Project of the University of Chicago, 1988)).

<sup>156</sup> *Id.* at 6 (citing U.S. Census Bureau, *We, the Asian & Pacific Islander Americans*, (1991)).

<sup>157</sup> *Id.* at 7 (citing U.S. Department of Education, *Indian Nations at Risk: An Educational Strategy for Action* (1991)). See also H.R. Rep. No. 102-655, at 6 (1992). (noting that “in its recently released report, the U.S. Department of Education concluded that “it is evident that the existing educational systems, whether they be public or federal, have not effectively met the educational, cultural, economic, and social needs of Native communities”) (Citing U.S. Dept. of Education, *Indian Nations at Risk: An Educational Strategy for Action* (1991)).

<sup>158</sup> S. REP. NO. 102-315, at 7 (1992).

<sup>159</sup> H.R. REP. NO. 102-655, at 6-8 (1992); S. Rep. No. 102-315, at 10-12 (1992).

<sup>160</sup> S. REP. NO. 102-315, at 6 (1992).

<sup>161</sup> H.R. REP. NO. 102-655, at 7 (1992); S. Rep. No. 102-315, at 12 (1992).

<sup>162</sup> H.R. REP. NO. 102-655, at 7 (1992).

<sup>163</sup> S. REP. NO. 102-315, at 12 (1992) (citing testimony from Marshall Plummer, vice president of Navajo Nation).

<sup>164</sup> *Id.* at 8 (“Voter registration and turnout data comparing Hispanics and non-Hispanics show that the educational sectors of the Hispanic community with participation rates closest to the total population have the most bilingual ballot users”) (citing the U.S. Bureau of the Census, “Voting & Registration in the Elections of November 1990,”



In 1992, the only jurisdictions required under Section 203 to provide language assistance for Asian Americans were in Hawaii and San Francisco, California.<sup>165</sup> Data collected in exit polls of Asian-American voters in Los Angeles and New York revealed an overwhelming desire for translated materials—approximately 80% of those surveyed in both cities agreed that bilingual ballots would provide significant help in the voting process and stated that they would vote more often if bilingual assistance were provided.<sup>166</sup> In response to the urging of advocacy groups like the Asian American Legal Defense Fund, which provided the committees with evidence of the overwhelming support in the Asian-American community for Section 203 despite the lack of effective coverage,<sup>167</sup> both houses of Congress amended the triggering mechanism of the provision to include jurisdictions with 10,000 or more limited English proficient voting-age citizens of a single language minority.<sup>168</sup> In explaining the change, the Senate Report noted:

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Washington, D.C.); *see also id.* (“The General Accounting Office, in its study of bilingual election services provided under Section 203, found a strong correlation between language ability and the use of bilingual materials. . . . Based on a 1984 exit poll survey in 1102 Texas counties, GAO estimated that 73% of Latino voters who used only the Spanish language ballot had less than a high school education. Among those voters who read only Spanish or read Spanish better than they read English, 56% used bilingual voting materials. Among those who read and spoke Spanish and English at the same level, 41% used bilingual materials. Among those who read only English or read English better than Spanish, 87% reported using only the English language voting materials.”) (citing U.S. General Accounting Office, *Bilingual Voting Assistance: Cost of and Use During the November 1984 General Election*, (1986); and *see id.* at 11–12 (“[I]n places where Section 203 does not apply, the Hispanic voter registration rate is far lower than that of other voters. In the State of Illinois, the Hispanic voter registration rate is less than half of the Anglo rate. In the State of New Jersey, the same is true. In California, where the largest cities—Los Angeles, San Diego, San Francisco, San Jose, Oakland—have large Hispanic populations, but are not now covered by section 203, the Hispanic voter registration rate is also less than half of the Anglo rate.”).

<sup>165</sup> H.R. REP. NO. 102–655, at 7 (1992); S. Rep. No. 102–315, at 17 (1992) (“After 1982 reauthorization, no Asian American community outside of Hawaii qualified for assistance. Under the 1990 census, only Chinese Americans in San Francisco County would qualify on the mainland.”).

<sup>166</sup> H.R. REP. NO. 102–655, at 7 (1992); *see also* S. Rep. No. 102–315, at 12 (1992) (“In New York City, for example, four out of five voters surveyed in that city’s Chinatown had language difficulties. These voters stated that they would vote more often if bilingual assistance were provided. In Queens County, N.Y., four out of every five limited English proficient Asian-American voters indicated they would vote more if bilingual assistance were provided.”).

<sup>167</sup> S. REP. NO. 102–315, at 12 (1992).

<sup>168</sup> H.R. REP. NO. 102–655, at 4 (1992) (“During the period from 1982 until the present, the need for a numerical benchmark became clear, so that jurisdictions with large language minority populations that do not meet the 5% trigger would be covered under Section 203. With a 10,000 person benchmark, 38 additional language minority communities will receive assistance.”); S. REP. NO. 102–315, at 16–17 (1992) (“[A]n alternative,

[T]he committee believes that the original percentage formula inadvertently fails to include . . . the intended beneficiaries of [S]ection 203. In some highly populated metropolitan areas, many language minority citizens in need of assistance are not covered because they do not make up a large enough percentage of the local population to trigger coverage. For instance, [in 1990], over 87,000 Hispanic citizens with limited English proficiency live in Cook County, Ill., but they account for only 2.5 percent of the voting age citizen population. Similarly, 39,000 Chinese-American citizens in Los Angeles County, Calif., and 37,000 Asian-American citizens in Honolulu County, Hawaii, are not covered despite their limited English proficiency because they fail to meet the 5 percent threshold.<sup>169</sup>

Though support was not as unanimous once the amended Section 203 reached the floor of the House and Senate,<sup>170</sup> advocates succeeded in ensuring the amendment was included in a reauthorized Section 203 that extended the bilingual voting assistance procedures another fifteen years, through 2007.<sup>171</sup> As a result of the changes, several major metropolises—including New York and Los Angeles—were required to provide bilingual election materials to their Latino, Asian American, Alaska Native, and American Indian voting populations.<sup>172</sup> Subsequent to the 2002 census bureau determinations, there are currently three states<sup>173</sup> and 367 political jurisdictions<sup>174</sup> individually covered by Section 203 for numerous American Indian and Alaska Native languages as well as Spanish, Chinese, Filipino, Vietnamese, Korean, and Japanese.<sup>175</sup>

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numerical trigger for Section 203 coverage—jurisdictions with over 10,000 language minority citizens of voting age will be required to provide language assistance in the applicable minority language. According to 1990 census data, the addition of a 10,000 citizen benchmark coverage trigger will make the right to vote a reality for over 860,000 language minority citizens in the United States in 34 counties.”).

<sup>169</sup> S. REP. NO. 102–315, at 16–17 (1992).

<sup>170</sup> See de la Garza and DiSipio, *supra* note 51, at 1486 (citing Kitty Dumas, *Bilingual Voting Help Extended After Partisan Scrap in House*, 50 CONG. Q. 2179, 2179 (1992)).

<sup>171</sup> *Id.* at 1486–87.

<sup>172</sup> See, e.g., Fung, *supra* note 58, at 2 (noting that after the 1992 amendments to Section 203, an additional 200,000 Asian-American voters nationwide, in ten counties in California, Hawaii and New York, became eligible to receive minority-language assistance under the provision); see also *id.* (“The number of covered jurisdictions increased again after Census 2000, expanding language assistance to over 672,000 Asian Americans residing in 16 counties in 7 states, with some jurisdictions providing assistance in one or more Asian languages.”)

<sup>173</sup> California, Texas, and New Mexico are currently covered in their entirety for Spanish language. 67 Fed. Reg. 144, 48872–48876 (July 26, 2002).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

### Part III: Arab Americans and Section 203.

“The irony is that . . . [Arab Americans] are considered White when actually we face the discrimination that Black and other non-white communities face . . . [particularly] in the aftermath of the September 11 terrorist attack on the U.S.”<sup>176</sup>

On February 23, 1978, Majid Ghaidan Al-Khazraji, an associate professor in the Department of Behavioral Science at Pennsylvania’s St. Francis College, was denied tenure by the St. Francis Board of Trustees.<sup>177</sup> Al-Khazraji, a Muslim and a United States citizen of Iraqi descent, subsequently filed suit in federal court, alleging he was denied tenure because of his identity as a Muslim and an Arab American, in violation of 42 U.S.C. §§ 1981<sup>178</sup> and 1983.<sup>179</sup> In evaluating a summary judgment motion to deny Al-Khazraji’s Section 1981 claim that he was denied tenure on the basis of his Arab ancestry, the district court held that discrimination based on national origin or ancestry was not actionable under Section 1981.<sup>180</sup>

The Court of Appeals reversed the district court’s determination, declaring that “ethnic Arabs may depend upon Section 1981 to remedy racial discrimination against them.”<sup>181</sup> The United States Supreme Court affirmed,<sup>182</sup> noting in particu-

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<sup>176</sup> Alkhatib, *supra* note 26.

<sup>177</sup> *Al-Khazraji v. Saint Francis College*, 523 F. Supp. 386, 386–87 (W.D. Pa. 1981).

<sup>178</sup> 42 U.S.C. §1981 explicitly protects the right of all individuals to make and enforce contracts without regard to race:

“All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.”

<sup>179</sup> *Al-Khazraji v. Saint Francis College*, 523 F. Supp. at 387. Al-Khazraji specifically alleged that he was denied tenure “due to his national origin (Iraqi), religion (Muslim), or race (Arabian)” in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., and 42 U.S.C. §§1981, 1983, 1985(3), 1986, and the Pennsylvania Human Relations Act, 43 P.S. §951 et seq. *Id.* All but the §1981 and §1983 claims were dismissed for lack of timeliness. *See St. Francis College et al v. Allan Al-Khazraji*, 481 U.S. 604, 605 (1987) (“The District Court dismissed the §§ 1986 and 1985(3) and Title VII claims as untimely but held that the §§ 1981 and 1983 claims were not barred by the Pennsylvania 6-year statute of limitations.”)

<sup>180</sup> *Al-Khazraji*, 481 U.S. at 606 (“Even if racial discrimination was deemed to have been alleged, the District Court ruled that § 1981 does not reach claims of discrimination based on Arabian ancestry.”); *see also Al-Khazraji v. St. Francis College*, 784 F.2d 505, 509 (3rd Cir. 1985) (noting that the district court judge “held that a claim of discrimination on the basis of being an Arab is not cognizable under Section 1981.”)

<sup>181</sup> *Al-Khazraji*, 784 F.2d at 514.

<sup>182</sup> *Al-Khazraji*, 481 U.S. at 607.

lar that the evolving definition of “race” over time that can lead a group, though excluded at the time of a law’s initial passage, to require coverage as a protected group in later years.<sup>183</sup> The Supreme Court concluded that “[b]ased on the history of § 1981, we have little trouble in concluding that Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics.”<sup>184</sup>

In a parallel vein, preliminary research into the current experiences of Arab-American citizens suggests that the language accommodations of the provision should be extended to individuals of Arab descent.<sup>185</sup> The following analysis provides a starting point for this argument for inclusion, illustrating the low voter participation rates, electoral barriers, and educational disparities afflicting the Arab community in areas of its highest concentration that mirror similar problems afflicting Asian-American and Latino communities throughout the United States.

The immigration of Arab Americans to the United States began in the 1880s,<sup>186</sup> but it was not until the years following World War II when United States citizens with heritage in countries such as Egypt, Lebanon, Yemen, and Syria began to develop a common identity as “Arab Americans.”<sup>187</sup> In 2000, the U.S. Census estimated that approximately 1.2 million individuals living in the United States were of Arab descent.<sup>188</sup> That number included people reporting ancestries in

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<sup>183</sup> *Id.* at 610 (“Petitioner’s submission rests on the assumption that all those who might be deemed Caucasians today were thought to be of the same race when § 1981 became law in the 19th century. . . . The understanding of ‘race’ in the 19th century, however, was different. Plainly, all those who might be deemed Caucasian today were not thought to be of the same race at the time § 1981 became law.”).

<sup>184</sup> *Id.* at 613 (Holding that if “respondent . . . can prove that he was subjected to intentional discrimination based on the fact that he was born an Arab . . . he will have made out a case under § 1981”).

<sup>185</sup> Because Section 203 bases its language coverage determinations on the U.S. Census, a mere interpretation of the provision to include Arab Americans in, perhaps, the umbrella of “Asian Americans” is not sufficient unless the U.S. Census alters the Asian racial subgroups category to include individuals of Arab descent. See discussion accompanying note 84, *supra*. The U.S. Census counts and registers Arab citizens under its “ancestry” category, separate from the racial classifications used to identify Asian Americans. See U.S. Census Bureau, *The Arab Population: 2000* (2003) at 2. As such, a formal amendment to Section 203 would be required to ensure coverage of Arab Americans.

<sup>186</sup> Elizabeth Booshada, ARAB-AMERICAN FACES AND VOICES: THE ORIGINS OF AN IMMIGRANT COMMUNITY at 2–3 (2003).

<sup>187</sup> *Id.* at 3 (“The period after World War II saw a growing consciousness of Arab identity, and it was common that more people nationally saw themselves as Arab American, although others often continued to refer to themselves as being of Lebanese, Syrian, or Palestinian ancestry.”).

<sup>188</sup> For a listing of all ancestries included under the “Arab American” heading by the U.S. Census Bureau, see *The Arab Population: 2000* (2003) at 3. See also *id.* at 1

thirty-three countries throughout the Middle East region.<sup>189</sup> The Arab American Institute (AAI), believes the Arab-American population could be as large as three times that, estimating the number as closer to 3.5 million.<sup>190</sup> Under both 2000 U.S. Census figures and AAI estimates, nearly half of the population lives in California, New York, Florida, New Jersey, and Michigan.<sup>191</sup>

A 2004 survey of 1,016 Arab Americans in Michigan conducted by the University of Michigan's Institute for Social Research<sup>192</sup> found that two-thirds of Arab

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("For the purposes of this report . . . a person is included in the Arab ancestry category if he or she reported being Arab, Egyptian, Iraqi, Jordanian, Lebanese, Middle Eastern, Moroccan, North African, Palestinian, Syrian, and so on. It is important to note, however, that some people from these countries may not consider themselves to be Arab, and conversely, some people who consider themselves Arab may not be included in this definition. More specifically, groups such as Kurds and Berbers who are usually not considered Arab were included in this definition for consistency with 1990 census and Census 2000 data products. In the same manner, some groups such as Mauritanian, Somalian, Djiboutian, Sudanese, and Comoros Islander who may consider themselves Arab were not included, again for consistency.")

<sup>189</sup> *Id.* at 2 ("In 2000, more than one-third of those reporting an Arab ancestry were Lebanese. . . . The next largest specific groups were Syrian and Egyptian (12% each). Among the nearly half-million people who reported other specific Arab ancestries, the largest proportion was Palestinian (6.1% of the total Arab population). The Jordanian, Moroccan, and Iraqi populations were also sizable (3.3 percent, 3.3 percent, and 3.2 percent, respectively). An additional 4.3% of the Arab population identified themselves as Yemeni, Kurdish, Algerian, Saudi Arabian, Tunisian, Kuwaiti, Libyan, Berber, or other specific Arab ancestries, each of which accounted for 1% or less of the total Arab population. A substantial portion of the Arab population (20 percent) identified with general Arab ancestries, such as 'Arab' or 'Arabic' (17 percent), 'Middle Eastern' (2.4 percent), or "North African" (0.3 percent). This population was second in size only to the Lebanese ancestry group.")

<sup>190</sup> Arab American Institute Foundation Census Information Center, available at <http://www.aaiusa.org/foundation/34/census-information-center> (explaining that flaws in census methodology, including a failure of many Arab respondents to self-identify as Arab, lead the census to underestimate the number of individuals of Arab descent in the country, and estimating based on polling conducted by Zogby International that the Arab population is over 3.5 million.) See also *Arab American Census Report* at 2 ("The information on ancestry was collected on the 'long form' of the census questionnaire, which was sent to approximately one-sixth of all households."). For further discussion on how underreporting of the U.S. Census affects various minority groups, see Glenn D. Magpan-tay, *Asian American Voting Rights and Representation: A Perspective from the North-east*, 28 *FORDHAM URB. L. J.* 739, 741-44 (2001).

<sup>191</sup> U.S. Census Bureau, *The Arab Population: 2000* (2003) at 4.

<sup>192</sup> University of Michigan Institute for Social Research, *Preliminary Results: Detroit Arab American Study* (2004) available at <http://www.umich.edu/news/Releases/2004/Jul04/daas.pdf> (The study surveyed 1,016 Arabs and Chaldeans and 508 members of the general population in Wayne, Oakland, and Macomb counties in 2003).

Americans are U.S. citizens, though 75% were born outside of the United States.<sup>193</sup> The report revealed that nearly 90% of Arab Americans over the age of five speak Arabic at home,<sup>194</sup> which is particularly compelling considering census figures that estimate nearly 35% of all individuals who speak Arabic at home speak English less than “very well.”<sup>195</sup>

The ability to speak English less than “very well” is crucial to coverage under Section 203. The 1992 House Judiciary Committee Report described how, in addition to the numerical trigger and literacy tests, Section 203 coverage would be determined in part by the language ability of the covered group:

The Director of the Census determines limited English proficiency based upon information included on the long form of the decennial census. . . . The form requests that [respondents answer] a question inquiring how well they speak English by checking one of the four answers provided—“very well,” “well,” “not well,” or “not at all.” . . . [T]hose who answer other than “very well” are deemed [limited English proficient].<sup>196</sup>

Based on their responses to the above language proficiency question, the four covered language groups share rates of limited English proficiency close to that of the Arab-American community. Data from the 2000 census reveals that 40.6% of Latino respondents and 39.5% of Asian-American respondents over the age of five spoke English less than “very well.”<sup>197</sup> Alaska Natives and American Indians over the age of five responded with even higher rates of English proficiency; only 11% of both groups indicated that they spoke English less than “very well.”<sup>198</sup> Thus with approximately 34.4% of Arab Americans over the age of five indicating that they spoke English less than “very well,” the language proficiency of the Arab

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<sup>193</sup> *Id.* at 5.

<sup>194</sup> *Id.* at 6–7. The survey also revealed that 56% of Arab-American respondents stated they received some of their news and information from Arabic broadcasts. *Id.* at 27.

<sup>195</sup> U.S. Census Bureau, *Language Use and English Speaking Ability: 2000* (2003) at 4 (citing Census 2000 Summary File 3). Census figures also show that Arabic is one of the ten languages most frequently spoken at home in the United States, other than English and Spanish. *Id.* at 2, Fig. 3.

<sup>196</sup> H.R. REP. NO. 102–655, at 8 (1992).

<sup>197</sup> U.S. Census Bureau, *Language Use and English-Speaking Ability: 2000* (2003) at 2.

<sup>198</sup> U.S. Census 2000, Summary File 3. There are some local areas, however, where the percentage is much higher. *See* Weinberg, *supra* note 65, at 414 (“According to the 1990 Census, 57.8% of the Navajo voting age population and 18.1% of the Pueblo voting age population in Cibola County do not speak English well enough to participate effectively in English-language elections. Thus, a significant proportion of the Native-American population of Cibola County, [New Mexico] and a significant majority of Navajos, cannot function in the electoral process except in the Navajo or Keresan languages.”).

community is at relatively similar levels to that of most Section 203 covered communities.

### A. Educational Disparities

Similar parallels between Arab Americans and the four covered language-minority groups appear in the realm of educational attainment and literacy.<sup>199</sup> In all but one of the six counties in the United States with over 10,000 Arab-American voting-age citizens (AVAC), illiteracy rates among Arab Americans are higher than the national rate of 2.2%. Arab Americans residing in the two counties with the highest number of AVAC in the country—Los Angeles County, California, and Wayne County, Michigan—experience some of the worst rates of educational achievement in the country.

Table 12.1 details the rates of 5th grade completion for Arab Americans (citizens and noncitizens) over the age of 25 and other language minorities nationally, as well as in Los Angeles County, California, and Wayne County, Michigan, the two counties with the highest numbers of Arab-American citizens. The chart reveals that while nationally 2.64% of all Arab Americans are functionally illiterate (close to the national rate of 2.20%), nearly 4% of all Arab Americans in Los Angeles County (3.41%) have not completed the 5th grade. This figure is close to the percentage of Asian Americans in Los Angeles county who are functionally illiterate (5.37%). The figures for Wayne County are most striking—Arab Americans (citizens and noncitizens) have lower rates of educational attainment than *any* covered language minority group. Nearly 12% of Arab Americans in Wayne County are functionally illiterate—almost double the rate of Latinos (6.95%) and Asian Americans (5.83%) and almost three times that of American Indians and Alaska Natives (3.36%).

Table 12.2 compares the educational attainment rates for Arab Americans over the age of 25 nationally and in Los Angeles and Wayne Counties, with that of the general population. It shows that Arab Americans in Wayne County, Michigan, experience the greatest educational disparities. Nearly 12% of Arab Americans over the age of 25 in Wayne County have not completed the fifth grade—almost 10% higher than the national rate.<sup>200</sup> Conversely, the general population in Wayne County over the age of 25 has a 5th grade completion rate, 1.96%, that is *better* than the national rate of 2.2%. This indicates the striking disparity that while the general population in Wayne County experiences some of the best rates of fifth grade completion, Arab Americans in the county experience some of the worst.

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<sup>199</sup> For the purposes of Section 203 coverage educational disparities and literacy rates are measured by the rate of citizens who have not completed the fifth grade. *See* Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 144 at 48871 (July 26, 2002).

<sup>200</sup> *Id.*

**Table 12.1. Rates of Completion of Fifth Grade for Population Age 25 and Over\***

Location	Total Population	Arab Americans	Latinos	Asian Americans	American Indian/ Alaska Native
United States	2.20%	2.64%	10.70%	5.52%	4.20%
Los Angeles County, Calif.	6.74%	3.41%	14.61%	5.37%	9.78%
Wayne County, Mich.	1.96%	11.62%	6.95%	5.83%	3.36%

\* U.S. Census 2000, Summary File 4. These figures include responses from citizens and noncitizens in all categories.

Table 12.2 also illustrates that the educational disparities for Wayne County Arab Americans continue through the high school level. A full quarter (25.76%) of Arab Americans over the age of 25 in Wayne County have not completed the ninth grade, compared to only 8% of the general population in the county and 10% of the general population nationwide. And nearly 40% have not earned a high school degree, compared to a rate of nearly half that nationwide. Results of the University of Michigan “Detroit Arab American Study” produced similar results, estimating that 28% of Michigan-based Arab Americans did not have a high school degree, compared to 13% of the general population.<sup>201</sup>

A closer look at the educational opportunities of Arab Americans in Wayne County sheds some light on these disparities and offers a helpful case study to illuminate the experiences of Arab Americans for the purposes of determining Section 203 inclusion. As stated above, Wayne County, Michigan, has one of the largest populations of Arab-American voting-age citizens (AVAC) in the country—second only to Los Angeles County, California.<sup>202</sup> Of the 23,619 Arab-American voting-age citizens (AVAC) in Wayne County, nearly half, 10,928, reside in

<sup>201</sup> University of Michigan Institute for Social Research, *supra* note 193 at 8.

<sup>202</sup> Wayne County has 23,619 Arab-American voting-age citizens, compared to 36,360 residing in Los Angeles County. U.S. Census 2000, Summary File 4.



**Table 12.2. Educational Attainment Rates for Arab Americans and Total Population Age 25 and Over\***

Location	% Arab Americans age 25+ not completing 5th grade	% total population age 25+ not completing 5th grade	% Arab Americans age 25+ not completing 9th grade	% total population age 25+ not completing 9th grade	% Arab Americans age 25+ not completing High School	% total population age 25+ not completing High School
National	2.64%	2.20%	7.42%	10.01%	13.83%	21.80%
Los Angeles County, California	3.41%	6.74%	9.73%	19.50%	17.05%	36.84%
Wayne County, Michigan	11.62%	1.96%	25.76%	8.85%	38.07%	24.98%

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\* U.S. Census 2000. Summary File 4. These figures include responses from citizens and noncitizens in all categories.

the city of Dearborn, Michigan.<sup>203</sup> The second highest concentration of AVAC within Wayne County is in the small town of Hamtramck.<sup>204</sup> Arab Americans in both of these towns have experienced various barriers to both the educational and electoral systems, as well as other forms of discrimination.

Over a third (6,000 of 16,200) of Dearborn's students was classified as limited English proficient in 1999.<sup>205</sup> While some schools in East Dearborn, where most Arab Americans are concentrated,<sup>206</sup> have attempted to address these disparities with bilingual education programs,<sup>207</sup> those programs are often at risk for losing funding in the state education budget.<sup>208</sup>

Moreover, in 2002, a coalition of 13 Arab-American organizations fought successfully for increased funding for schools in Dearborn, after describing schools in predominantly Arab areas of the city as "overcrowded" and "outdated," and declared "[o]ur children cannot learn in this situation and they deserve better."<sup>209</sup> While that effort yielded two new schools,<sup>210</sup> overcrowding and lack of funding remains a problem for Arab-American students.<sup>211</sup>

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<sup>203</sup> 46.3% of the Wayne County AVAC is in Dearborn, Michigan. U.S. Census 2000, Summary File 4. See, e.g., Wes Smith, *Reclaiming their US Rights: One Year Later, Arab Americans are Saying: "We are Americans, So Let's Start Acting Like it,"* SUN-SENTINEL (Fort Lauderdale, Fla.), Sept. 1, 2002 (describing the connection between Dearborn, Michigan and the Arab-American Community: "For generations, Arab men and women quietly immigrated to Dearborn and metropolitan Detroit. Fleeing wars, oppressors and barren uteres at home, they came at first for Motor City assembly line jobs that required strong backs and no mastery of English. More recent arrivals came for the welcoming and established community formed by the largest concentration of Arab-Americans in the United States.").

<sup>204</sup> 694 Arab-American voting-age citizens, or 3% of the total Wayne County AVAC, reside in Hamtramck. U.S. Census 2000. Summary File 4.

<sup>205</sup> James Borchunk, *Dearborn Schools Carry Burden of Cultural Divide*, THE DETROIT NEWS, Nov. 3, 1999 at 1A.

<sup>206</sup> *Id.* ("More than 6,000 of Dearborn's 16,200 students are classified as Limited English Proficient, and . . . [t]hey are largely concentrated in east and south Dearborn. . . . When you cross the [Southfield Freeway] . . . [o]nly 20 of Howard's 344 students need bilingual education.").

<sup>207</sup> *Id.* (describing Salina Elementary School, located in a predominantly Arab-American section of the city, as a place where "[b]ilingual education . . . isn't part of the school, 'it's the whole school'").

<sup>208</sup> Sheri Hall, *Districts Face Loss of \$3.5 Billion*, THE DETROIT NEWS, Oct. 15, 2001 at 1A (Noting that although one-third of Dearborn students speak a language other than English at home, under then-Governor Engler's proposed budget, "[t]he bilingual program at Dearborn Public Schools . . . is in jeopardy, along with dozens of other special programs in Metro Detroit schools").

<sup>209</sup> See, e.g., Lama Bakri, *Coalition Seeks Bond Vote Delay*, THE DETROIT NEWS, June 11, 2000, 3B. (documenting a dispute between a coalition of Arab-American organizations in Dearborn and the Dearborn Public Schools Board of Education over a \$52

Added to these difficulties are more blatant instances of discriminatory treatment of Arab-American students. In March 2004, for example, a teacher in the Dearborn Public Schools referred to a group of unruly students, which included some Arab Americans, as “terrorists,” and several of the teacher’s colleagues and staff members applauded.<sup>212</sup> Local Arab-American organizations complained, and the school principal responded by “taking appropriate action,” which appeared to include “professional training and a series of follow-up conversations with the teacher,” but no serious punishment for the teacher who made the offending remark.<sup>213</sup>

Unfortunately, this sort of incident occurs in various settings throughout Wayne County and has only increased in the years following the terrorist attacks of September 11, 2001. One study reported that 15% of Arab Americans in the Detroit Metro area reported personally having a “bad experience” after the attacks, including “verbal insults, workplace discrimination, targeting by law enforcement or airport security, vandalism, and, in rare cases, vehicular and physical assault.”<sup>214</sup> In addition, the study found that “[i]n the two years since 9/11, a fourth (24%) report that they or a member of their household suffered a verbal insult due to their ethnicity or religion, and 13% report threatening gestures.”<sup>215</sup> Similar incidents were documented in a report by the FBI that found a 324% increase in the number of hate crimes against Arab Americans in the year following September 11, “from 354 in 2000 to 1,501 in 2001 across the U.S.”<sup>216</sup> In addition, a forty-one-page report from the Human Rights Watch “documented a seventeen-fold increase in hate crimes against Muslims in six cities with large Arab populations or large numbers of hate crimes” including Los Angeles, California, and Dearborn, Michigan.<sup>217</sup>

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million school bond election that the groups claimed “doesn’t address the needs of our students”).

<sup>210</sup> Karen Bouffard, *Dearborn Schools Fight Congestion*, THE DETROIT NEWS, Jan. 11, 2005 at 3D (describing the 2002 voter-approved \$150 million school bond to build several new schools and reduce overcrowding in predominantly Arab American districts).

<sup>211</sup> *Id.*

<sup>212</sup> Gregg Krupa, *Teacher’s Remark Irks Rights Group*, THE DETROIT NEWS, Mar. 28, 2004 at 4B.

<sup>213</sup> *Id.*

<sup>214</sup> University of Michigan Institute for Social Research, *supra* note 192, at 18.

<sup>215</sup> *Id.*

<sup>216</sup> David Sheppardson, *Crimes Against Muslims Increase*, DETROIT NEWS, Nov. 26, 2002 3B; Alkhatib, *supra* note 26 at 1–2 (citing “Report on Hate Crimes and Discrimination Against Arab Americans: The Post September 11 Backlash, Sept. 11, 2001—Oct. 11, 2002”) (noting that in the first nine weeks following the attacks there were “over 700 violent incidents reported targeting Arab Americans,” in addition to an increase in employment discrimination, denial of service, discriminatory service and housing discrimination).

<sup>217</sup> Arianne Aryanpur, *Group Urges Steps to Prevent Anti-Muslim Hate Crimes*, LOS ANGELES TIMES, Nov. 14, 2002.

## B. Electoral Discrimination

These incidents, predictably, spill over into the world of political participation. Michael Guido, the mayor of Dearborn, has a “testy relationship with Arab Americans in his city,”<sup>218</sup> dating back to when he complained about the “Arab problem” during his first re-election campaign in 1985.<sup>219</sup> On September 11, 2001, the Arab-American community was organizing to elect one of their own, Abed Hammoud, to challenge Guido in the general election that November.<sup>220</sup> Though Hammoud won the primary in September, Arab-American voters did not vote in high numbers that November, which some argue was due to the “anti-Arab backlash that followed the terrorist attacks.”<sup>221</sup> Mayor Guido won re-election in November 2001, defeating Abed Hammoud 79% to 21%.<sup>222</sup>

But the most blatant incident of electoral discrimination against Arab Americans in Wayne County occurred in 1999 a few miles from Dearborn in Hamtramck, Michigan.<sup>223</sup> In what one local newspaper called “one of the ugliest shows of bigotry in Hamtramck since the racial conflicts of the 1960s,”<sup>224</sup> a citizen group calling itself “Citizens for a Better Hamtramck” (CCBH) registered with the city clerk to provide challengers for the November 1999 city elections in an effort to, as the group stated in its application to the clerk, keep the election “pure.”<sup>225</sup>

On election day, working in over half of Hamtramck’s thirty-six polling locations,<sup>226</sup> CCBH challengers challenged the citizenship of over forty dark-skinned

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<sup>218</sup> Niraj Warikoo, *Metro Arabs Don’t feel France’s Alienation, Discrimination Here*, DETROIT FREE PRESS, Nov. 28, 2005.

<sup>219</sup> *Id.*

<sup>220</sup> Smith, *supra* note 203.

<sup>221</sup> *Id.*

<sup>222</sup> Bill McGraw, *Dearborn Mayor Is Ready for Another Term*, DETROIT FREE PRESS, Nov. 1, 2005 at 1.

<sup>223</sup> See U.S. Complaint, *U.S. v. Hamtramck*, No. 0073541 (E.D. Mich. 2000). According to some accounts, Arab-American voters faced intimidation at the polls in years prior to 1997 as well. See Joseph Hong, *Voter Discrimination Allegations Bring Election Scrutiny*, ASIAN WEEK, Nov. 17, 2000, available at: [http://www.asianweek.com/2000\\_11\\_17/news2\\_votediscrim\\_michigan.html](http://www.asianweek.com/2000_11_17/news2_votediscrim_michigan.html) (“Some Hamtramck officials believe that racial tensions flared as early as 1997 when allegations were made that some members of the opposition party, who took on a mayoral challenger, threatened to intimidate Arab Americans and South Asians from voting. The contentious mayoral race between then-incumbent Robert Kozaren and Gary Zych had some poll workers challenging South Asian and Arab Americans, allegedly to deter them from supporting Zych at the polls.”)

<sup>224</sup> Cecil Angel, *Now They Call him Councilman Ahmed; First Bangladeshi American Wins Hamtramck Office*, DETROIT FREE PRESS, Nov. 8, 2003, at 3A.

<sup>225</sup> Consent Decree at 3, *U.S. v. Hamtramck*, No. 0073541 (E.D. Mich. 2000).

<sup>226</sup> Hong, *supra* note 223 (noting challengers were in nineteen of thirty-six polling locations throughout Hamtramck).

voters with distinctly Arabic-sounding names.<sup>227</sup> Some voters were challenged upon their arrival to the polling location based on physical appearance alone, while others were challenged after they had revealed their names, often distinctly Arabic, and signed their applications to vote.<sup>228</sup> One Yemeni American voter arrived at the polls with his wife, who was wearing a traditional Muslim headscarf, and was asked to take an oath of citizenship despite the fact that he had lived in Hamtramck for fourteen years.<sup>229</sup> A Bangladeshi American, who had immigrated to the United States twenty-six years earlier and lived in Hamtramck for nearly a decade, was stopped when he tried to vote in a polling site located in the city's heavily Arab southern region.<sup>230</sup> When a CCBH challenger asked whether he was a U.S. citizen, the voter recalled thinking "What kind of question is that? They don't ask any other people. Why they ask me?"<sup>231</sup> Other Arab citizens recall poll workers handing them a sheet of paper and asking them to read an oath of allegiance to the United States.<sup>232</sup> One such voter, who had been a citizen since 1992 and had voted in city elections for years, reasoned: "Maybe I look like I'm a foreigner . . . I have a beard and I'm not too white."<sup>233</sup> The implications of these incidents stretched beyond those who showed up to vote as word of the discriminatory challenges spread throughout the Arab community in Hamtramck, and some citizens decided not to vote and risk being "subjected to the embarrassment of being challenged as noncitizens."<sup>234</sup>

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<sup>227</sup> U.S. Complaint at 1, *U.S. v. Hamtramck*, No. 0073541 (E.D. Mich. 2000) ("This action arises out of the general election that took place in Hamtramck, Michigan, on November 2, 1999. In that election, more than forty dark skinned or Arab-American citizens were required to take an oath as a condition to voting, a requirement that was not imposed on white voters.").

<sup>228</sup> Consent Decree at 4, *U.S. v. Hamtramck*, No. 0073541 (E.D. Mich. 2000) ("Some voters were challenged before they signed their applications to vote, and therefore appear to have been challenged based on their physical appearance alone. Other voters were challenged after they had signed their applications and their names had been announced. The challenged voters had dark skin and distinctly Arabic names, such as Mohamed, Ahmed, and Ali. The challengers did not appear to possess or consult any papers or lists to determine who to challenge.").

<sup>229</sup> See Hong, *supra* note 223. See also Christopher M. Singer, *Activists Face Charges in Hamtramck Voter Intimidation Case*, THE DETROIT NEWS, Mar. 22, 2000 at 8S (also noting that one member of CCBH admitted during a Hamtramck City Council meeting that "she challenged a voter she knew personally and knew to be an American citizen").

<sup>230</sup> *Voters Claim Harassment*, THE DETROIT NEWS, Nov. 3, 1999 at 1C.

<sup>231</sup> *Id.* See also Anne-Marie Cusac, *Counted Out*, THE PROGRESSIVE, Sept. 20, 2004 at <http://www.alternet.org/story/19917>. (describing voters standing in line waiting to vote being challenged by CCBH members and certain voters being asked to "step aside and say an oath of citizenship, even if they were capable of producing a U.S. passport").

<sup>232</sup> Hong, *supra* note 223.

<sup>233</sup> *Id.*

<sup>234</sup> U.S. Complaint at 4, *U.S. v. Hamtramck*, No. 0073541 (E.D. Mich. 2000).

The United States Department of Justice, once apprised of the events, filed suit in federal court alleging violations of Section 2 of the Voting Rights Act,<sup>235</sup> 42 USC §§ 1971(a)(1) and (a)(2)(A),<sup>236</sup> and the Fourteenth and Fifteenth Amendments of the United States Constitution.<sup>237</sup> The complaint alleged that members of CCBH singled out only dark-skinned voters<sup>238</sup> and voters with Arabic surnames,<sup>239</sup> requiring some to take an oath of citizenship in order to vote,<sup>240</sup> even if the challenged voter was able to produce an American passport.<sup>241</sup> The complaint indicated that the state of Michigan and the Hamtramck city clerk's office were informed of the challengers' discriminatory actions "early on election day,"<sup>242</sup> but the government authorities failed to halt the practices or expel the challengers.<sup>243</sup> In one polling location, the government authorities may have even encouraged the challengers—according to the complaint, the chairman of one precinct went so far as to direct poll workers to require anyone who "looks Arabic" to show a driver's license and voter registration card.<sup>244</sup>

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<sup>235</sup> 42 USC §§ 1973(a) *et seq.* (2000) (outlawing prerequisites to voting that result in denial or abridgement of the right to vote on account of race or color).

<sup>236</sup> The text of 42 USC §§1971(a)(a) and (a)(2)(A) prohibit anyone acting under color of law from applying different standards, practices or procedures in determining whether dark-skinned voters were qualified to vote than are applied to white voters.

<sup>237</sup> For deliberately applying different standards, practices, and procedures to voters on account of race or color, and intentionally imposing prerequisites to voting in a manner that denies or abridges the right to vote. *See* U.S. Complaint at 5, *U.S. v. Hamtramck*, No. 0073541 (E.D. Mich. 2000).

<sup>238</sup> No white voters were challenged. *See i.e.*, at 3

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* ("Some dark-skinned voters produced their American passports to identify themselves to election officials. Nevertheless, these persons were challenged by CCBH, and the election inspectors required them to take a citizenship oath as a prerequisite to voting.")

<sup>242</sup> *Id.* at 3–4. ("Members of the Zych Committee complained repeatedly to the City Clerk and the Deputy City Clerk that the CCBH challengers were targeting voters because of their skin color or because they were Arab, without any other reason to believe that the voters were not citizens.")

<sup>243</sup> *Id.* at 4. ("Despite the complaints, the City gave no additional instructions to the election inspectors regarding evaluation of challenges; the City did not require challengers to set forth evidence of a reason to believe that voters were not qualified. . . . [T]he City did not prevent challenges of dark-skinned voters from continuing, and the election inspectors continued to require all voters who were challenged for 'citizenship' to take a citizenship oath as a prerequisite to voting.") *See also id.* (noting that some representatives from a candidate's campaign were rebuffed after asking the City Clerk's office to expel the CCBH challengers for misconduct based on repeated discriminatory challenges).

<sup>244</sup> *Id.* at 4.

The Court evaluated the claims and found that “neither the City nor the State prevented the challenges of dark-skinned voters from continuing, and the election inspectors continued to require any voters who were challenged for ‘citizenship’ to take a citizenship oath as a prerequisite to voting.”<sup>245</sup> In August 2000, the Court entered a consent decree that enjoined the city of Hamtramck from discriminating against voters in future elections<sup>246</sup> and ordered the city to establish a training program to train election officials and private citizens regarding the proper grounds for election challenges.<sup>247</sup> The consent decree required the placement of at least one bilingual poll worker at every polling location in Hamtramck on election day,<sup>248</sup> with two workers required in the fifteen precincts where the CCBH challengers worked,<sup>249</sup> and authorized the assignment of federal observers to ensure the city’s compliance with the order.<sup>250</sup>

Despite the continual presence of federal oversight during elections,<sup>251</sup> the consent order was only loosely implemented by local officials in the years following the incident.<sup>252</sup> In November 2000, for example, the city clerk failed to recruit sufficient numbers of Arabic-speaking poll workers, hiring only eight when fifty-

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<sup>245</sup> Consent Decree at 5, *U.S. v. Hamtramck*, No. 0073541 (E.D. Mich. 2000).

<sup>246</sup> *Id.* at 2 (“The City and the City Clerk hereby commit to ensure that the challenge process, like all electoral processes in the City of Hamtramck, will be free from discrimination in all future election, and that all citizens, without regard to race, color, or ethnic origin, are treated with equal dignity and respect in all matters related to voting.”)

<sup>247</sup> *Id.* at 6 (“The City Clerk shall establish a training program for all election officials . . . at which the officials shall be trained in voting assistance procedures and voter challenge procedures.”). *See also id.* at 7 (“The city clerk . . . shall establish a training manual for all challengers and other persons permitted to be present in polling places on election day on behalf of citizens’ associations or candidates.”).

<sup>248</sup> *Id.* at 10 (“Defendants shall appoint at least one bilingual Arab-American election inspector or one bilingual Bengali-American election inspector for each of the . . . polling places.”).

<sup>249</sup> *Id.* at 9 (“Defendants shall appoint at least two bilingual Arab-American election inspectors . . . for each of the polling places containing . . . precincts where challengers of dark-skinned voters occurred in the November 1999 election.”).

<sup>250</sup> The original consent decree required the placement of a federal examiner in Hamtramck “through December 21, 2003.” *Id.* at 8.

<sup>251</sup> Oralandar Brand-Williams, *Feds Monitor Hamtramck Polling Places*, THE DETROIT NEWS, Nov. 5, 2002 at 1C (reporting the continued presence of federal observers in Hamtramck, Michigan). *See also* Press Release, U.S. Department of Justice, Monitoring in 2005: Justice Department to Monitor Elections in States Across the Nation (Nov. 7, 2005) available at: <http://releases.usnewswire.com/GetRelease.asp?id=56330>. (announcing that the U.S. Department of Justice sent federal observers to Hamtramck, Michigan, on election day 2005).

<sup>252</sup> Christopher Singer, *Hamtramck Failed to Diversify Poll Force*, THE DETROIT NEWS, Nov. 10, 2000 at 8A (noting that the city clerk failed to hire sufficient numbers of Arabic speaking poll workers in the first election following the consent order).

five were required.<sup>253</sup> Such lax compliance prompted the extension of the agreement in January of 2004<sup>254</sup> and an acknowledgement that there was “more work to be done.”<sup>255</sup> The amended consent order required the city to appoint at least two Arabic-speaking poll workers in every precinct, who must be available at all times during the election “to provide assistance as needed, including at the voting booth, in demonstrating the use of voting equipment, and in handling voter challenges should an Arab American voter . . . need assistance or have his or her eligibility to vote challenged.”<sup>256</sup>

Some small gains have occurred in Hamtramck since the institution of the consent decree, most notably the election of the city’s first Muslim American to the Hamtramck City Council in 2003.<sup>257</sup> The incidents prompted community groups such as the Arab American Anti-Discrimination Committee, the Arab American Institute, and the Arab American Political Action Committee to coordinate “Election Protection” efforts in Dearborn and Hamtramck<sup>258</sup>—an effort that enables volunteers to witness and attempt to stop efforts to discourage Arab citizens from voting. One Dearborn resident who volunteered with the groups’ 2004 program, Kenwah Dabaja, witnessed the endemic confusion that Arab-American voters in the area often experience:

Last year, I was helping coordinate the AAI efforts for getting out the vote and assisting Election Protection at the polls. . . . I received word that a Challenger was at a busy site in East Dearborn so I went over to check it out and try to handle any problems that arose. We were trained that if someone approached us to help them vote we could. I had 2 Arab Americans ask me to translate something while in the voting area. I was not necessarily in the booth but the Challenger made a

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<sup>253</sup> *Id.* In addition, Nancy Rue, a Justice Department attorney involved in the case, was reportedly “very concerned some Arab individual showed up at the polls and walked out [on election day]. Some Arabs were subjected to rudeness when they, themselves, were very polite.” *Id.*

<sup>254</sup> Second Amended Decree at 1, *U.S. v. Hamtramck*, No. 0073541 (E.D. Mich. 2004) (“Based on discussions of the effectiveness of the City’s prior efforts to fulfill the terms of the consent decree . . . the parties have agreed to a limited extension of the terms pertaining to assignment of bilingual election inspectors and the authorization of federal observers to monitor compliance with these terms.”).

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 3.

<sup>257</sup> Angel, *supra* note 224, at 3A. Shahab Ahmed, a Bangladeshi American, was the first nonwhite person ever to be elected to the Hamtramck City Council. He called his election a “victory for those who were stopped in 1999,” referring to the actions of CCBH. *Id.*

<sup>258</sup> See, e.g., “2004—ADC Bulletin: American-Arab Anti-Discrimination Committee, Election 2004- Know your Rights!,” available at <http://www.arabvoices.net/know%20your%20voting%20rights.pdf> (listing harassment at the polls, discriminatory identification requirements, and “lack of accessibility to translators or translated ballots” as the “top risks facing Arab-American voters in 2004”).



big fuss and started to urge the poll workers to do something. The poll workers did not know what to do. The challenger insisted that the ballots were now void. I resisted and stated the law. She countered saying that the ballots could not be entered. So I gave her the alternative of canceling the ballots and letting the voters revote. She again resisted and started yelling and threatening to call the police. The argument was only finally resolved when a mutual friend in a high ranking city level told us to cool it before the cops came. They ended up voting but with limited assistance to avoid any more problems.<sup>259</sup>

### C. Turnout and Participation Disparities

Correlating with these anecdotal accounts of barriers to electoral participation are quantifiable turnout disparities similar to those Congress has found for other groups covered by Section 203.<sup>260</sup> While one poll suggests that nationally Arab Americans enjoy high turnout rates,<sup>261</sup> an examination of the participation patterns of Arab Americans in Dearborn, Michigan—the area with the highest concentration of Arab Americans in the country<sup>262</sup>—suggests that Arab Americans turn out at much lower rates than the general population in that city.

Of the 23,619 Arab-American voting-age citizens (AVAC) in Wayne County, nearly half—or 10,928—reside in Dearborn.<sup>263</sup> As the following maps demonstrate,<sup>264</sup> the vast majority of those residents are located in the eastern end of the

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<sup>259</sup> Email correspondence from Kenwah H. Dabaja, local political activist in Dearborn, Mich. (October 28, 2005) (on file with author). Similar incidents of intimidation have occurred against other language minorities. *See, e.g.*, Weinberg, *supra* note 65, at 413 (detailing a report by a federal election monitor in Passaic City, New Jersey, discussed in Part I, *supra*.)

<sup>260</sup> *See* discussion associated with notes 111–13, *supra*. (comparing the low turnout rates of citizens in the four covered language minority groups to the higher turnout rates of language minorities such as German, Italian, French, and Polish).

<sup>261</sup> Press Release, Arab American Institute, Michigan Rally Mobilizes Arab American Voters, (August 2, 2002), *available at* <http://www.aaiusa.org/press-room/967/pr080202> (“Americans of Arab descent vote in greater percentages (62% in 1996) and are more politically active than average Americans.”).

<sup>262</sup> Arab Americans comprise 30% of the entire population in Dearborn—the highest proportion in the country. U.S. Census Bureau, *The Arab Population: 2000* (2003) at 7, Table 3. The U.S. Census estimates indicate that at least 18% of the voting-age citizen population in the city of Dearborn is Arab American. U.S. Census Bureau, Census 2000 Summary File 4.

<sup>263</sup> U.S. Census Bureau, Census 2000 Summary File 4. 46.3% of the Wayne County AVAC is in Dearborn, and 694 AVAC, or 3% of the total AVAC for Wayne County, reside in Hamtramck. *Id.*

<sup>264</sup> U.S. Census Bureau, Census 2000 Summary File 3 and Summary File 4.

city.<sup>265</sup> Map 12.1 illustrates the percentage of the total population (citizen and non-citizen) that is of Arab descent throughout the city, with a concentration as high as 68.7% in the eastern most areas of Dearborn and a concentration as low as 1.0% in the west.

Map 12.2 depicts the percentage of individuals who speak a language other than English at home, with concentrations as high as 83.2% in the east areas of the city and as low as 6.1% in the west.

A comparison of participation rates in east and west Dearborn in 2000 and 2004 reveals great disparities.<sup>266</sup> In the 2004 general election, the average turnout of registered voters in east Dearborn, the area with the highest concentration of Arab-American voting-age citizens (AVAC),<sup>267</sup> was 53.5%, while the average turnout of registered voters in precincts located in west Dearborn was ten percentage points higher: 63.2%.<sup>268</sup> Similar ten-point gaps occurred in the 2004 primary election (17.4% to 26.6%)<sup>269</sup> and the 2000 general election (49.4% to 59.1%).<sup>270</sup>

A closer look at turnout patterns in Dearborn suggests even more differences in the east and west areas of the city. For example, the precinct with the highest turnout of registered voters in the 2004 general election, 71.15%, was P31, located in west Dearborn,<sup>271</sup> while the precinct with the lowest turnout, 37.6%, was P15, located in east Dearborn.<sup>272</sup> Of the top twenty precincts with the lowest turnout in

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<sup>265</sup> Bakri, *supra* note 209 (describing East Dearborn as an areas “where many Arab Americans live”). *See also* note 206, *supra* (describing Dearborn’s demographic makeup).

<sup>266</sup> The Southfield Freeway, which runs North-South through Dearborn, is typically considered the geographic divide of the eastern and western sides of the city. *See* note 206, *supra* (describing east and west Dearborn).

<sup>267</sup> *See* note 265, *supra*, and Maps 12.1 and 12.2.

<sup>268</sup> City of Dearborn Unofficial Canvass of Voters, General Election November 2, 2004 (December 3, 2004).

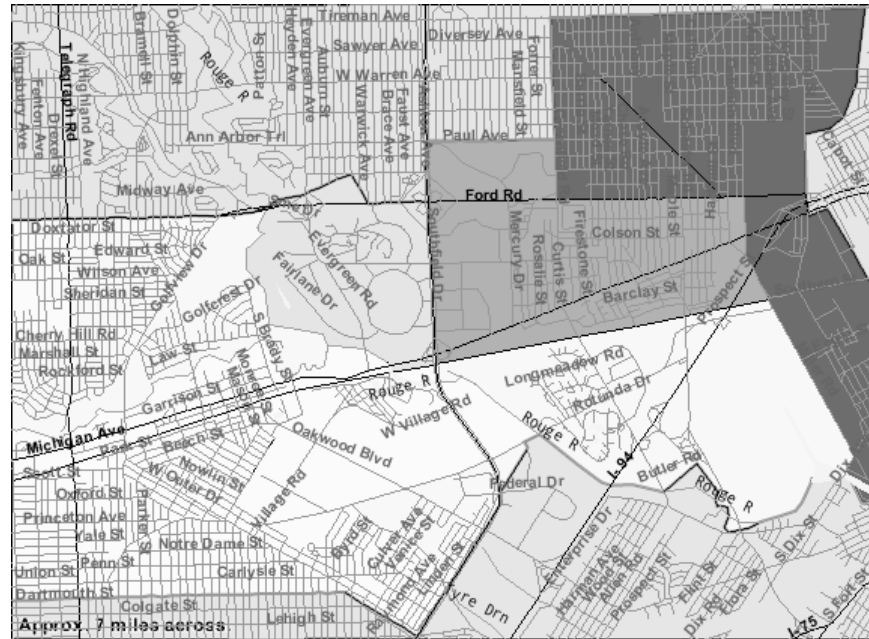
<sup>269</sup> In the primary election held on August 3, 2004, the average turnout of registered voters in East Dearborn was 17.37%, compared with 26.6% in West Dearborn. City of Dearborn Unofficial Canvass of Voters, Primary Election August 3, 2004 (August 4, 2004).

<sup>270</sup> In the general election held on November 7, 2000, the average turnout of registered voters in east Dearborn was 49.4%, compared with 59.1% in west Dearborn. City of Dearborn Unofficial Canvass of Voters, general election November 7, 2000 (November 8, 2000). The 2000 primary election saw a slightly lower disparity of 2% between the east and west precincts, where the average turnout of registered voters in east Dearborn was 10.5%, compared with 12.7% in the west. City of Dearborn Unofficial Canvass of Voters, Primary Election August 8, 2000 (August 8, 2000).

<sup>271</sup> City of Dearborn Unofficial Canvass of Voters, general election November 2, 2004 (November 3, 2004).

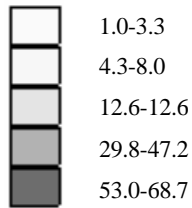
<sup>272</sup> *Id.*

**Map 12.1. Location of Arab Americans in Dearborn, Michigan by Percentage of Total Population** <sup>273</sup>



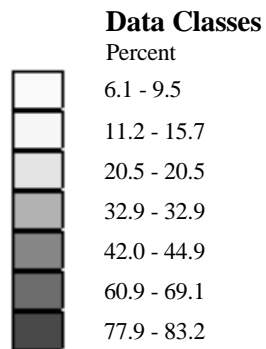
**Data Classes**

Percent



<sup>273</sup> U.S. Census Bureau, Census 2000 Summary File 4.

**Map 12.2. Percentage of Individuals Who Speak a Language Other than English at Home** <sup>274</sup>



<sup>274</sup> U.S. Census Bureau, Census 2000 Summary File 3.

the same election, eighteen were in east Dearborn,<sup>275</sup> while all of the top twenty precincts with the highest turnout rates were in west Dearborn.<sup>276</sup>

There were also more incidents of spoiled ballots, or ballots that were cast but not counted due to voter error, in east Dearborn in the 2004 general election. On average, 2% of all ballots that were cast in east Dearborn precincts were not counted—with rates as high as 5.9% in one east Dearborn precinct.<sup>277</sup> Conversely, average spoiled ballot rates were nearly a full point lower—1.3%—in west Dearborn.<sup>278</sup> Indeed, eight of the ten precincts with the lowest rate of spoiled ballots were in west Dearborn,<sup>279</sup> while eight of the ten precincts with the highest rate of spoiled ballots were in east Dearborn.<sup>280</sup>

As with average turnout, these disparities were not limited to the 2004 general election. In the primary election earlier that same year, the precinct with the highest turnout rate in the city was P31 in west Dearborn, with a turnout rate of 37.2%.<sup>281</sup> The precinct with the lowest turnout rate in that election was P7, located in east Dearborn, with a turnout of only 11.6%.<sup>282</sup> Also similar to the 2004 general election, eighteen of the twenty precincts with the lowest turnout were located in

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<sup>275</sup> *Id.* The following eighteen precincts, located in East Dearborn, experienced the lowest turnout rates on November 2, 2004: P15 (37.6%); P22 (39.1%); P7 (49.2%); P17 (49.9%); P13 (52.0%); P20 (52.1%); P9 (52.6%); P24 (52.7%); P2 (52.7%); P16 (53.3%); P12 (53.4%); P18 (53.4%); P23 (53.9%); P8 (53.9%); P10 (55.7%); P14 (55.9%); P5 (56.2%); P19 (56.8%). Two precincts located in west Dearborn also experienced low turnout rates in that same election: P43 (42.1%) and P25 (54.7%).

<sup>276</sup> *Id.* The twenty precincts with the highest turnout of registered voters, all located in west Dearborn, were: P28 (63.3%); P62 (63.6%); P53 (63.7%); P54 (63.7%); P33 (63.7%); P41 (64.1%); P60 (64.1%); P51 (64.2%); P56 (64.4%); P32 (64.8%); P35 (65.3%); P57 (66.3%); P47 (66.6%); P40 (67.0%); P29 (68.1%); P37 (69.0%); P30 (69.1%); P46 (69.6%); P39 (69.8%); P45 (70.1%); P31 (71.1%).

<sup>277</sup> *Id.* The precinct with the highest rate of spoiled ballots (twenty-seven ballots of 431 cast were not counted) was P24, located near Salina Elementary school. *See Dearborn Schools Carry Burden of Cultural Divide*, *supra* note 205.

<sup>278</sup> City of Dearborn Unofficial Canvass of Voters, general election November 2, 2004 (November 3, 2004).

<sup>279</sup> *Id.* In the 2004 general election, the eight precincts in west Dearborn with the lowest spoiled ballot rates in the city were P26 (0.84%); P41 (0.83%); P38 (0.78%); P46 (0.76%); P51 (0.70%); P56 (0.68%); P34 (0.55%); P25 (0.45%); P40 (0.43%). Two of the ten precincts with the lowest spoiled ballot rates were in east Dearborn: P13 (0.9%) and P22 (0.5%).

<sup>280</sup> *Id.* In the 2004 general election, the eight precincts in east Dearborn with the highest spoiled ballot rates in the city were P24 (5.9%); P15 (3.5%); P7 (2.7%); P20 (2.6%); P1 (2.5%); P6 (2.5%); P2 (2.43%); P17 (2.4%). Two of the ten precincts with the highest spoiled ballot rates were in west Dearborn: P36 (2.56%); P49 (2.43%).

<sup>281</sup> City of Dearborn Unofficial Canvass of Voters, primary election August 3, 2004. (08/04/2004).

<sup>282</sup> *Id.*

east Dearborn,<sup>283</sup> and nineteen of the twenty precincts with the highest turnout were situated in west Dearborn.<sup>284</sup> Similarly, in the general election of 2000, of the twenty precincts with the lowest turnout in that election, eighteen were on the east side of the city,<sup>285</sup> while a full twenty-nine of the thirty precincts with the highest turnout rates were in west Dearborn.<sup>286</sup>

These turnout disparities dovetail with strong indications from Arab Americans in Dearborn that their political participation would increase if ballots and election information were provided in Arabic.<sup>287</sup> A November 2005 survey of 211 Arab-American voting-age citizens in Wayne County sponsored by the Arab American Political Action Committee (AAPAC) found that over 90% of those who did not vote in the general election of 2004 claimed they would have voted if

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<sup>283</sup> *Id.* The following eighteen precincts, located in east Dearborn, experienced the lowest turnout rates in the 2004 primary election in Dearborn: P7 (11.64%); P17 (13.42%); 13 (13.52%); P22 (13.65%); P16 (14.48%); P6 (14.88%); P18 (15.53%); P2 (16.2%); P4 (16.41%); P1 (16.5%); P12 (16.65%); P3 (16.67%); P9 (17.03%); P10 (17.32%); P20 (17.4%); P5 (17.8%); P23 (18.0%); P8 (18.0%). Two precincts located in west Dearborn also experienced low turnout rates in that same election: P43 (15.0%) and P25 (14.7%). These were the same two precincts from west Dearborn that experienced low turnout rates in the general election later that year.

<sup>284</sup> *Id.* The nineteen precincts in west Dearborn were: P32 (26.53%); P34 (26.56%); P60 (26.81%); P54 (26.9%); P57 (26.9%); P62 (27.3%); P29 (28.77%); P42 (29.3%); P35 (29.6%); P28 (29.85%); P45 (30.97%); P30 (32.13%); P40 (32.3%); P36 (32.7%); P41 (34.02%); P46 (34.7%); P37 (35.05%); P39 (35.86%); P31 (37.16%). One precinct located in east Dearborn also experienced high turnout rates in that same election: P15 (27.01%). The general election in 2000, saw nearly identical participation patterns. The precinct with the highest turnout was again P31 in west Dearborn, with a turnout rate of 68.2%, and the precinct with the lowest turnout rate was P22 in east Dearborn, where 37.4% of registered voters turned out to vote. *See* City of Dearborn Unofficial Canvass of Voters, general election (November 7, 2000).

<sup>285</sup> *Id.* The eighteen precincts in east Dearborn with the lowest turnout rates were: P22 (37.41%); P17 (44.15%); P12 (44.32%); P24 (45.36%); P15 (45.86%); P7 (46.52%); P10 (47.65%); P23 (47.8%); P11 (48.24%); P18 (48.33%); P13 (48.52%); P9 (49.32%); P16 (49.62%); P2 (50.16%); P8 (50.82%); P6 (50.94%); P20 (51.83%); P5 (51.99%); P1 (52.41%). In west Dearborn, the lowest turnout rates were in P25 (46.43%); and P43 (37.97%).

<sup>286</sup> *Id.* The 29 precincts with the highest turnout rates in west Dearborn were: 36 (56.23%); P56 (56.45%); P33 (57.26%); P58 (57.61%); P27 (57.78%); P60 (58.49%); P54 (58.5%); P28 (58.9%); P62 (59.01%); P59 (59.42%); P41 (59.6%); P42 (59.71%); P52 (59.8%); P55 (60.63%); P35 (60.69%); P49 (60.99%); P61 (61.01%); P51 (61.34%); P40 (61.6%); P47 (61.79%); P29 (62.61%); P30 (62.68%); P26 (63.35%); P57 (64.95%); P39 (65.42%); P32 (65.89%); P45 (66.0%); P37 (66.2%); P46 (67.81%); P31 (68.24%). One precinct in east Dearborn, P21, shared a high turnout rate of 57.26%.

<sup>287</sup> *See* Appendix A, Results of AAPAC November 2005 survey. (154 out of 161 respondents indicated they believed more members of the Arab-American community in Dearborn would vote if Arabic ballots and voting instructions were provided at the polling place on election day).

they had received ballots and other election information in Arabic.<sup>288</sup> A 1991 survey of Asian-American citizens cited in the 1992 Senate Judiciary Report revealed similar sentiments among voters in that language minority group: 90% of respondents in San Francisco, 84% respondents in Los Angeles, and 80% of respondents in New York City said they believed bilingual ballots were important and helpful.<sup>289</sup>

The AAPAC survey also indicate that 65% of Arab-American voters who did vote in November 2004 felt that voting would be easier if Arabic ballots or translators were available at polling sites,<sup>290</sup> and 27% claimed they needed a translator or translated materials when they voted previously.<sup>291</sup> These results are consistent with the findings of an exit poll conducted by the Asian American Legal Defense Fund during the 2004 general election, which found that 24% of Arab-American voters in Hamtramck needed translated written materials in order to vote.<sup>292</sup>

Similarly, a 1980 survey conducted by the Mexican American Legal Defense Fund and Education Fund and the Southwest Voter Registration and Education Project, cited in the 1981 Senate Judiciary Committee Report, found that 23% of all responding Latino voters received assistance from a bilingual poll worker and 24% used a translated ballot in the 1980 general election.<sup>293</sup> The 1992 Senate Judiciary Report noted a survey of Latino voters that found that bilingual assistance was used by 25% of Latino voters in the Texas and 18% of Latino voters in California during the 1990 general election.<sup>294</sup>

#### IV. Conclusion: Expanding Coverage under Section 203

If Arab Americans were considered a language minority under Section 203, no more than six jurisdictions could be required to provide translated election materials. According to 2000 census data, Arab-American voting-age citizens (AVAC) do not comprise 5% of the voting age population in any state or

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<sup>288</sup> See Appendix A: Results of AAPAC November 2005 survey. (101 out of 105 respondents who did not vote in November 2004 answered “yes” to the question: “Would you have voted if the government provided ballots in Arabic and Arabic speaking translators at the polls?” 99 out of 105 respondents answered “yes” to the question: “Would you have voted if you had received Election information and directions in Arabic?”)

<sup>289</sup> S. REP. NO. 102-315, at 12 (1992).

<sup>290</sup> See *id.* Response to question 2.b.

<sup>291</sup> *Id.* Question 2.a. (44 out of 161 respondents indicated they voted in 2004 and used a translator or translated materials).

<sup>292</sup> ASIAN AMERICAN LEGAL DEFENSE FUND, THE ASIAN AMERICAN VOTE 2004: A REPORT ON THE MULTILINGUAL EXIT POLL IN THE 2004 PRESIDENTIAL ELECTION 14 (2005).

<sup>293</sup> S. REP. NO. 97-205, at 66 (1982).

<sup>294</sup> S. REP. NO. 102-315, at 12 (1992).

county,<sup>295</sup> but six counties have over 10,000 Arab-American voting-age citizens (AVAC): Los Angeles County, California, with 36,360 AVAC; Wayne County, Michigan, with 23,619 AVAC; Kings County, New York, with 16,088 AVAC; Cook County, Illinois, with 15,631 AVAC; Oakland County, Michigan, with 10,560 AVAC; and Orange County, California, with 12,962 AVAC.<sup>296</sup> Notably, three of these counties are currently required to provide language assistance to language minorities covered under Section 203: Kings County, New York, and Cook County, Illinois, are required to provide materials to the Latino and Chinese-American voters, and Los Angeles County, California, is required to provide language assistance to the Latino, Chinese, Filipino, Japanese, Korean, and Vietnamese voters.<sup>297</sup>

In 1975, the House and Senate reports implied that if Congress had received evidence of disparities for other language-minority groups, they would have been included in Section 203 and did not preclude the addition of groups in the future.<sup>298</sup> The foregoing analysis is intended as a starting point over whether, as our country grows increasingly diverse, it is time again to consider additional language-minority groups that deserve attention and federal protections under Section 203. And in a moment in history when the United States is actively and literally fighting to spread democracy in Iraq, the above anecdotal and empirical data indicates that Arab Americans should be prominent on the list of groups to receive such attention. It also suggests that further research could uncover additional language minorities that, under the standards established by Congress in 1975, should arguably also receive language accommodations. Congress could, at the very least, provide funding and mandates for additional research into this area, perhaps to be conducted by the Election Assistance Commission. Such research has proven costly and prohibitive for advocate groups, but support from Congress could ensure that no group is left behind in Section 203 coverage.

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<sup>295</sup> See 42 USCS § 1973aa-1a (2)(A) (2000) (explaining 5% threshold).

<sup>296</sup> If the Section 203 coverage benchmark were lowered to include jurisdictions where at least 7,500 voting-age citizens are of a language minority, an additional six counties with between 8,000–10,000 AVAC may qualify for coverage. See Fung, *supra* note 58 (arguing for an amendment to Section 203 that will lower the numerical trigger from 10,000 to 7,500). Those counties would be: San Diego, California, with 9,665 AVAC; Macomb County, Michigan, with 9,634 AVAC; Harris County, Texas, with 8,475 AVAC; Cuyahoga County, Ohio, with 8,136 AVAC; Fairfax, Virginia, with 8,112 AVAC; and Miami-Dade County, Florida, with 7,639 AVAC. US Census 2000, Summary File 4.

<sup>297</sup> Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 144, 48871–77 (July 26, 2002).

<sup>298</sup> S. REP. NO. 94–295, at 30 (1975) (“As noted earlier, the hearing record did not disclose any evidence of voting discrimination against other language minority groups. . . . [This] signifies only that we had no such evidence at the time this bill was drafted. It is not the intention of Congress to preclude other language minority groups from presenting their evidence of voting discrimination to the courts or to the Attorney General for appropriate relief.”)



## Appendix A

### Results from a Survey of 211 Arab-American Voting-Age Citizens in Wayne County, Michigan. October 28 – November 8, 2005

*Sponsored by the Arab American Political Action Committee*

**1. Did you vote in Dearborn in the 2004 election?**

Yes—71.09% (150 out of 211 respondents)

No—28.91% (61 out of 211 respondents)

**2. If you did vote in 2004:**

a. Did you use a translator or translated materials?

Yes—27.33% (44 out of 161 respondents)

No—72.67% (117 out of 161 respondents)

b. Would voting be easier for you if Arabic ballots or translators were available?

Yes—65.41% (104 out of 159 respondents)

No—34.59% (55 out of 159 respondents)

c. Would more members of your community vote if Arabic ballots and voting instructions were provided at the polling place on Election Day?

Yes—95.65% (154 out of 161 respondents)

No— 4.35% (7 out of 161 respondents)

**3. If you did not vote in 2004**

a. Would you have voted if the government provided ballots in Arabic and Arabic speaking translators at the polls?

Yes—96.19% (101 out of 105 respondents)

No—3.81% (4 out of 105 respondents)

b. Would you have voted if you had received Election information and directions in Arabic?

Yes—93.40% (99 out of 106 respondents)

No—6.60% (7 out of 106 respondents)



## Appendix B

### Rates of fifth grade completion for Arab Americans and the total population

<b>Location</b>	<b>% Arab Americans age 25+ not completing 5th grade</b>	<b>% total population age 25+ not completing 5th grade</b>
United States	2.64%	2.20%
Los Angeles County, California	3.41%	6.74%
Orange County, California	1.80%	4.32%
Cook County, Illinois	4.95%	2.90%
Oakland County, Michigan	4.17%	0.97%
Wayne County, Michigan	11.62%	1.96%
Kings County, New York	4.81%	4.75%