

# Voting Equality and Educational Equality: Is the Former Possible Without the Latter and Are Bilingual Ballots A Sensible Response to Education Discrimination?

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## *Introduction*

In the late 1960s and early 1970s, Congress confronted the fact that many people in this country—a huge proportion of them native-born

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citizens—were unable to functionally speak, read, and write in English, affecting their ability to gain a meaningful education and therefore to participate in the political process in any meaningful way. The Congressional record for the debates over the Bilingual Education Act of 1968<sup>1</sup> noted that "[t]here are many thousands of people in this land who do not speak English even though their families have been here for many generations."<sup>2</sup> Congress wanted to remedy that problem by trying to meet "the special education needs of the large number of children with limited English-speaking ability in the United States."<sup>3</sup>

However, the problems did not evaporate when those children reached adulthood; the problems of education simply transitioned into other spheres as those children grew. In 1975, Congress confronted the same problems as applied to voting.<sup>4</sup> The 1975 extension of the Voting Rights Act of 1965<sup>5</sup> (VRA), added new requirements pertaining to "language minorities"—persons who are of American Indian, Asian, Alaskan Native, or Spanish heritage—which required that, among other things, when the illiteracy rate for those groups was higher than that of the majority and there was specific population density, election materials be distributed bilingually.<sup>6</sup> Section 203 of the VRA was meant to address the fact that "high illiteracy rates [in these communities] are not the result of choice or mere happenstance. They are the product of the failure of

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1. Bilingual Education Act (Title VII of the Elementary and Secondary Education Amendments of 1967), Pub. L. No. 90-247, 81 Stat. 816 (1968) (codified as amended in scattered sections of 20 and 42 U.S.C.).

2. ARNOLD H. LEIBOWITZ, *THE BILINGUAL EDUCATION ACT: A LEGISLATIVE ANALYSIS* 16 (1980). The bill was introduced by Texas Senator Ralph Yarborough. *Id.* at 21. This makes sense given the large population of Spanish-speaking persons in Texas. *Id.* at 15. However, it is interesting because Texas raised opposition to the introduction of § 203 of the Voting Right Act and has accounted for 21.4% of the litigation under that Act since its passing. See *Voting Section Litigation*, U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., <http://www.justice.gov/crt/about/vot/litigation/caselist.php> (last visited on January 24, 2011) (listing the cases brought under the language minority provisions of the Voting Rights Act in Texas) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

3. LEIBOWITZ, *supra* note 2, at 20.

4. See Act of June 22, 1970, Pub. L. No. 91-285, Title II, § 203, 84 Stat. 814, 817 (1970), as amended by Pub. L. No. 94-73, Title III, § 301, 89 Stat. 400, 404 (1975) (codified at 42 U.S.C. § 1973aa-1a) (stating that "language minorities have been effectively excluded from participation in the electoral process" as a result of unequal educational opportunities).

5. Act of August 6, 1975, Pub. L. No. 94-73, 89 Stat. 400 (1975).

6. *Id.*

state and local officials to afford equal educational opportunities to members of language minority groups."<sup>7</sup>

Nearly fifty years later, the same problems still exist. While Congress has renewed and even strengthened its focus on these issues in the voting booth, it has not done so in the classroom.<sup>8</sup> There is good reason for this: while the Supreme Court has upheld Congress' ability to pass sweeping legislation to protect voting rights under the Fourteenth and Fifteenth amendments, the Court's own decisions in the education field have been restrictive.<sup>9</sup> This Article will focus on these issues, using the State of California as an example. California has been a fertile ground for education litigation and its counties have accounted for 21.4% of the cases brought by the Department of Justice (DOJ) to enforce § 203.<sup>10</sup> Part I of this Article will look at how litigation has demonstrated the unequal educational opportunities available to language minorities, and how the inequality of education opportunities prompted § 203 and structured the debate behind the enactment of the language minority provisions. Part II will then look at how the protection of voting rights and the protection of education rights have diverged, and how this has weakened voting rights as a result. Part III will examine the efficacy of the VRA in its current form as pertains to language minorities, and discuss whether the next version of the VRA should implement new provisions to assist language minorities given anticipated developments in education in the year 2032 when the language minority provisions next expire.

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7. S. REP. NO. 94-295, at 28 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 794.

8. *See* Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577 (2006) (recognizing the continued presence of voting discrimination against language minorities and aiming to mitigate the same); *cf.* No Child Left Behind Act of 2001, Pub. L. No. 107-111, 115 Stat. 1425 (2002) (disadvantaging language minorities by largely relying on standardized tests given in English as the measure of school performance).

9. *See* *Katzenbach v. Morgan*, 384 U.S. 641, 657-58 (1966) (holding that § 4e of the Voting Rights Act comports with the Equal Protection Clause and no person who has successfully completed the sixth grade in an American school in which the primary language is something other than English shall be disqualified from voting by a literacy test); *cf.* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 55 (1973) (holding that the Texas school financing model based on local property taxation does not violate Equal Protection).

10. *See* *Voting Section Litigation*, *supra* note 2 (listing the cases brought under the language minority provisions of the Voting Rights Act in Texas). Texas counties account for the same percentage. *Id.* Cases have also been brought in New Jersey, Illinois, Pennsylvania, Massachusetts, Arizona, New York, Washington, Florida, New Mexico, and Utah. *Id.*

I. "Abide some unknown, distant time"<sup>11</sup>

The language minorities Congress identified in the 1975 amendments to the Voting Rights Act were singled out because they had historically been discriminated against in the educational sphere.<sup>12</sup> There was ample evidence of this fact, both in the statistical information Congress relied on and in the amount of litigation that had been brought challenging the educational policies of schools and school districts that served these language minorities. In Part A of this section I discuss the cases that were brought by language minorities in California prior to the 1975 amendments. These cases demonstrate that there were serious deficiencies in the education provided to language minorities. Since these deficiencies were not remedied, it became necessary for Congress to address these problems in the voting sphere. The history behind the original remedies, as presented in Part B of this section, clearly connects the educational problems to the voting problems. In Part C I discuss how twenty years later the same problems in education prompted Congress to renew the language minority protections in the Voting Rights Act, and the current status of the Act today.

A. *Fighting for Educational Equality in California*

On January 5, 1931, in California, Lemon Grove School District's integrated student body returned from winter break to find the principal preventing the schools seventy-five Mexican-American students from entering the school.<sup>13</sup> They were told to go to a two-room, hastily built building in the largely Mexican section of town.<sup>14</sup> This move was prompted by the Lemon Grove School District's decision that "because of 'overcrowding, sanitary and moral' conditions, children of Mexican descent

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11. See S. REP. NO. 94-295, at 34 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 801 ("[This bill] is a temporary measure to allow [language minorities] to register and vote immediately; it does not require language minorities to abide some unknown, distant time when local education agencies may have provided sufficient instruction to enable them to participate meaningfully in an English-only election.").

12. See *id.* at 795.

13. See Leonel Sanchez, *Before Brown*, SAN DIEGO UNION TRIB., May 18, 2004, at A1 (explaining that Principal Jerome Green refused to allow the Mexican-American students at Lemon Grove Grammar School to return to classes after winter break in 1931).

14. See *id.* (stating that Principal Green ordered the children to attend a newly constructed school across the railroad tracks in the primarily Mexican area of town).

should be separated and sent to their own school."<sup>15</sup> Only three students went to the new school, the other seventy-two went home to tell their parents.<sup>16</sup> On February 13, 1931, their parents, with help from the Mexican consulate, sued the school board, claiming that the board was trying to racially segregate their (mostly) U.S. citizen children.<sup>17</sup> On March 11, 1931, San Diego Superior Court Judge Claude Chambers ruled that the school board lacked authority to segregate the children: "to separate all the Mexicans in one group can only be done by infringing the laws of the state of California."<sup>18</sup> Chambers said of segregation that it "denies the Mexican children the presence of the American children, which is so necessary to learn the English language."<sup>19</sup> The school board did not appeal the decision, meaning that the children could return to school, but also that no high court precedent came out of the Lemon Grove cases, leaving it open for other school districts to try to segregate their schools.<sup>20</sup>

In the early 1940s in Westminster, California, Gonzalo Mendez tried to enroll his children in the nearby public school; they were refused admission.<sup>21</sup> They were instead assigned to Hoover, the Mexican elementary school.<sup>22</sup> The Mexican schools in California were markedly inferior, just as were the African American schools in Topeka, Kansas which would be challenged in *Brown v. Board of Education*.<sup>23</sup> Mendez took his complaints to the school board, asking them to construct an

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15. *Id.*

16. *See id.* (explaining that many of the parents feared that the new school offered inferior educational opportunities for their children).

17. *See id.* (stating that the parents sued the school board with the help of the Mexican consulate for attempting to racially segregate their children).

18. *Id.* At the time, California allowed segregation of Asian Americans and Native Americans but not Mexican Americans because the latter group was considered white. *Id.*

19. *Id.*

20. *See id.* (explaining that the school district failed to appeal the decision, and thus, higher courts never had occasion to review the ruling).

21. *See* Vicki L. Ruiz, *We Always Tell Our Children They Are Americans: Mendez v. Westminster*, BROWN Q., Fall 2004, at 1 (2004), available at <http://brownvboard.org/sites/default/files/BQ-Vol6-3.pdf> (explaining that when a tenant farmer in Westminster, California, Gonzalo Mendez, tried to enroll his children in the public school he attended as a child, his request was denied).

22. *See id.* (stating that the Mendez children were assigned to Hoover, the Mexican elementary school).

23. *See* Ruiz, *supra* note 21, at 1 ("With shabby facilities and inadequate supplies, Mexican schools did not seem conducive for learning . . ."); *see also* *Brown v. Board of Education*, 347 U.S. 483, 495 (1954) (holding separate educational facilities inherently unequal and in violation of the Equal Protection Clause).

integrated school; the board refused to move.<sup>24</sup> In March of 1945, Mendez, William Guzman, Frank Palomino, Thomas Estrada, and Lorenzo Ramirez sued four school districts in California for segregating their children.<sup>25</sup> They alleged that the school districts had enacted policies of discrimination against Latino schoolchildren, thereby depriving them of equal protection.<sup>26</sup> The school districts admitted that they segregated the children, not on a racial basis, but by requiring that non-English-speaking children (who were nearly all Mexican or Mexican-American) attend separate schools until they had acquired some proficiency in English.<sup>27</sup> The court found that the vast majority of the time, the districts' "language tests" were unreliable and that language was simply a proxy for race.<sup>28</sup> The Court also made the following findings:

The evidence clearly shows that Spanish-speaking children are retarded in learning English by lack of exposure to its use because of segregation, and that commingling of the entire student body instills and develops a common cultural attitude among the school children which is imperative for the perpetuation of American institutions and ideals. It is also established by the record that the methods of segregation prevalent in the defendant school districts foster antagonisms in the children and suggest inferiority among them where none exists.<sup>29</sup>

The Court held that the California Constitution and the California Education Code prohibited the segregation of Mexican and Mexican-

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24. See Ruiz, *supra* note 21, at 4 (explaining that the board refused to act after the bond issue for an integrated school failed). During the trial, the Garden Grove Superintendent said, "Mexicans are inferior in personal hygiene, ability, and in their economic outlook. Youngsters need separate schools because of their lack of English proficiency." *Id.*

25. See *id.* (stating that Mr. Mendez and four other men sued Westminster, Garden Grove, Santa Ana and El Modena school districts on behalf of their children and 5,000 others).

26. See *Mendez v. Westminster Sch. Dist. of Orange Cnty.*, 64 F. Supp. 544, 551 (D.C. Cal. 1946) (holding the allegations of the complaint sufficient to justify injunctive relief against the defendants and restrain further discriminatory action against pupils of Mexican descent in public schools of the defendant school districts), *affirmed by Westminster Sch. Dist. of Orange Cnty. v. Mendez*, 161 F.2d 774 (9th Cir. 1947).

27. See *id.* at 546 (citing official action taken by the Westminster, Garden Grove and El Modeno school districts to segregate non-English-speaking children, almost all of whom were of Mexican ancestry or descent, in schools separate and apart from English-speaking pupils until they developed some English language proficiency).

28. See *id.* at 550 ("The tests applied to beginners are shown to have been generally hasty, superficial and not reliable.").

29. *Id.* at 549.

American schoolchildren because such segregation violated equal protection.<sup>30</sup>

In the late 1960s, an East Los Angeles elementary school principal told John Serrano, Jr. that he should move his family outside of the Los Angeles Unified School District so that his son would receive a better education.<sup>31</sup> Then, like today, the population of East Los Angeles was primarily Latino.<sup>32</sup> In 1968, the same year that over 30,000 students (mostly Latino) from five East Los Angeles high schools walked out in protest of the conditions of their campuses and the unequal educational opportunities given them,<sup>33</sup> Serrano became the named plaintiff in a class-action lawsuit that challenged California's school funding system.<sup>34</sup> The lawsuit alleged that "substantial disparities in the quality and extent of availability of educational opportunities . . . [and] [t]he educational opportunities made available to . . . plaintiff children, are substantially inferior to the educational opportunities made available to children attending public schools in many other districts."<sup>35</sup> In addition, "a disproportionate number of school children who are . . . children with Spanish surnames . . . reside in school districts in which a relatively inferior educational opportunity is provided."<sup>36</sup>

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30. *See id.* at 547 ("We think that the pattern of public education promulgated in the Constitution of California and effectuated by provisions of the Education Code of the State prohibits segregation of pupils of Mexican ancestry in the elementary schools from the rest of the school children.").

31. *See* Valerie J. Nelson, *Obituary of John Serrano Jr.*, 69, LOS ANGELES TIMES, December 6, 2006, at 8 (describing the advice that Mr. Serrano was given by his son's elementary school principal in East Los Angeles that he move to a wealthier community to give his promising son the best chance of success).

32. *See* Tomas Benitez, *East L.A.: Past and Present*, AM. FAM., available at <http://www.pbs.org/americanfamily/eastla.html> (stating that by the mid-1960s East Los Angeles was home to the largest Hispanic community in the United States).

33. *See id.* ("In 1968, over 30,000 students from five local high schools walked out in protest of the conditions of their campuses and the status of their education, the largest ever demonstration of its kind in the nation's history.").

34. *See* Nelson, *supra* note 31, at 8 ("In 1968, Serrano lent his name to the class-action lawsuit that challenged California's century-old method of school financing."); *Serrano v. Priest*, 5 Cal. 3d 584, 614–15 (1971) (holding that public school financing which relies on local property taxes denies the poor equal protection under the law).

35. *Serrano*, 5 Cal. 3d at 590.

36. *Id.* at 590 n.1. In 1971, the California Supreme Court held for the plaintiffs, finding that the funding system, which conditioned the right to a public education on wealth, violated the California and Federal Constitutions. *Id.* at 614–15. The federal constitutional basis was overturned two years later in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). *Rodriguez* was initiated by Mexican-American parents of schoolchildren who attended elementary schools that were ninety percent Mexican-

In 1974, a case from California dealing with limited educational opportunities given to Chinese-American students who were not proficient in English reached the Supreme Court. In *Lau v. Nichols*,<sup>37</sup> the Supreme Court held that San Francisco's failure to provide English language instruction to Chinese and Chinese-American children who did not speak English violated the Civil Rights Act of 1964.<sup>38</sup> The Court found that giving the same textbooks, curriculum, teachers, and facilities did not constitute equality of treatment, "for students who do not understand English are effectively foreclosed from any meaningful education."<sup>39</sup> The Court said, "[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>40</sup>

When Congress determined that language minorities needed voting protections, it looked to that language in *Lau* to explain why.<sup>41</sup>

### B. 1975: Not "Mere Happenstance"

When Congress amended the VRA in 1975, it expanded the Act to cover language minorities, defining the group to include persons of Asian, American-Indian, Alaskan-Native, or Spanish heritage.<sup>42</sup> Congress found

American and which were drastically underfunded as a result of Texas' school funding system. *Id.* at 4, 12.

37. *See* *Lau v. Nichols*, 414 U.S. 563, 566–69 (1974) (holding that the school's failure to provide English language instruction denied students a meaningful opportunity to participate in public education in violation of § 601 of the Civil Rights Act of 1964).

38. *See id.* (holding that the school's failure to provide English language instruction denied students a meaningful opportunity to participate in public education in violation of § 601 of the Civil Rights Act of 1964). The Court did not reach the Equal Protection Clause argument because it found it unnecessary to reach the constitutional question. *Id.* at 566.

39. *Id.*

40. *Id.* In its report on the 1975 amendments adding language minorities as a protected group under the VRA, Congress cited this language, substituting "voting" for "classroom experiences." S. REP. NO. 94-295, at 24 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 790.

41. *See* S. REP. NO. 94-295, at 29 (1975), *reprinted in* 1975 U.S.C.C.A.N. 774, 795 (citing language from *Lau* and substituting "voting" for "classroom experiences").

42. *See id.* ("The term language minority citizens refers to those persons who are Asian American, American Indian, Alaskan Natives, or Spanish heritage."). The report further discusses who specifically falls within each ancestral classification. *See id.* at 25 n.14 (defining, for example, Asian-Americans as people who indicated their race as Japanese, Chinese, Filipino, or Korean). Congress limited the extension of the VRA to these language groups because "no evidence was received concerning the voting difficulties of other language groups." *Id.* at 31.



that those language minorities had been excluded from participation in the vote due to restrictive voter registration procedures, outright exclusion and intimidation at the polls, unavailability or inadequacy of assistance to illiterate voters, and lack of bilingual materials and poll workers.<sup>43</sup>

While Congress noted that there were many overt actions taken to prevent language minorities from exercising their franchise, one of the major problems was the use of English-only election materials.<sup>44</sup> Congress found that "[o]f 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>45</sup> In addition:

[O]ver 50 percent of all Mexican American children in Texas who enter first grade never finish high school. . . . [T]he practices of Mexican American education reflect a systematic failure of the educational process, which not only ignores the educational needs of Chicano students but also suppresses their culture and stifles their hopes and ambitions.<sup>46</sup>

The "high illiteracy rates are not the result of choice or mere happenstance. They are the product of the failure of state and local officials to afford equal educational opportunities to members of language minority groups."<sup>47</sup>

Congress found, however, that despite the high levels of illiteracy among language minorities, most jurisdictions in which they were residing conducted voter registration and voting only in English.<sup>48</sup> Given this, it was:

[N]ot surprising that the registration and voting statistics [were] significantly below those of the Anglo majority. In 1972, for example,

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43. *See id.* at 25–26 (discussing the variety of obstacles encountered by language minorities at polling places). These obstacles have translated into disproportionate representation among language minorities in comparison to whites. *Id.* at 26–27. For example, in 1974 Texas, Mexican-Americans held only 2.5% of elective offices despite comprising 16.4% of the population. *Id.* at 27.

44. *See id.* at 28 (noting that English-only elections, coupled with high illiteracy rates among language minorities, resulted in exclusion from the electoral process).

45. *Id.* at 28.

46. *Id.* (citations and internal quotation marks omitted).

47. *Id.*

48. *See id.* at 30 (describing the political effects of adhering to a uniform language system in local and state districts, which contain predominantly non-English speaking citizens). Local jurisdictions that maintain English-only registration and voting effectively restrict language minorities' voting rights and thus, limit their participation in the political process. *Id.*

only 44.4 percent of persons of Spanish origin were registered compared to 73.4 percent for Anglos . . . . Only 22.9 percent of Spanish origin persons voted in the 1974 national election, less than one-half the rate of participation for Anglos.<sup>49</sup>

Newly added section 203 of the VRA covered jurisdictions in which there was more than a five percent population of one of the protected language minorities and where there was a low voter turnout or registration in the 1972 presidential election.<sup>50</sup> In these jurisdictions, the section prohibited English-only elections and mandated bilingual elections in order to give "meaningful assistance to allow the voter to cast an effective ballot [which is] implicit in the granting of the franchise."<sup>51</sup> Congress noted that many states had already taken voluntary steps to accommodate non-English-speaking voters: in California, the state legislature enacted legislation requiring county officials to make reasonable efforts to recruit bilingual deputy registrars and election officials in those precincts with three percent or more non-English-speaking voting age population, and required the posting of a Spanish-language ballot with instructions on how to request one for use during voting.<sup>52</sup>

Congress found that while it had tried to improve the educational opportunities available to language minorities, including the passage of the Bilingual Education Act of 1968,<sup>53</sup> the opportunities had "not yet been in operation long enough to reduce the illiteracy rate of certain language

49. *Id.*

50. *See id.* at 31–32 (outlining a "two-trigger" test for extending VRA's coverage to jurisdictions that contain a substantial population of language minorities). Section 203 applies, in short, when two factors exist: First, a local district provided English-only voter materials in a jurisdiction that included more than a five percent of citizen population of American-Indians, Alaskan-Natives, Asian-Americans, or persons of Spanish heritage. And second, that jurisdiction also had a low voter registration or turnout for the 1972 presidential election. *Id.* at 32. Section 203 has been amended to cover jurisdictions where there are comparatively smaller percentages of language minorities but greater populations, such as in large cities. *See* 42 U.S.C. § 1973aa-1a(b)(2)(A) (2006) (requiring bilingual materials for any "covered" state and political subdivision). Covered areas include any political subdivision with either more than five percent representation of a single language minority or more than 10,000 citizens who belong to a single language minority *and* an illiteracy rate of that language minority greater than the national rate. *Id.* § 1973aa-1a(b)(2)(A)(i)–(ii).

51. S. REP. NO. 94-295, at 32.

52. *See id.* at 33 (elaborating on California's bilingual voter registration and information initiative following the California Supreme Court's ruling in *Castro v. California*, 466 P.2d 244, 258 (1970), which found the state's English-language literacy requirement violated the Fourteenth Amendment).

53. Elementary and Secondary Education Amendments of 1967, Pub. L. No. 90-247, 81 Stat. 816 (codified at 20 U.S.C. §§ 3381, 3382, 3384 (2006)) (since eliminated).

minorities below the national average for all citizens of voting age, and thus allow free and full participation in the political life of the Nation."<sup>54</sup> It found, therefore, that even without the other problems that prevented language minorities from voting, the "unequal educational opportunities which state and local officials have afforded language minority groups" would be enough to require the remedy of bilingual election materials.<sup>55</sup> It said that this remedy was "not to correct the deficiencies of prior educational inequality," but to "permit persons disabled by such disparities to vote now."<sup>56</sup> Congress stated that the measure would be temporary, allowing these citizens to register and vote immediately: "[I]t does not require language minorities to abide some unknown, distant time when local education agencies may have provided sufficient instruction to enable them to participate meaningfully in an English-only election."<sup>57</sup>

### C. 2006: When "Temporary" Exceeds Half a Century

Thirty one years later, Congress returned to the language provisions for the third time, and found that while "[s]ignificant progress [had] been made in eliminating first generation barriers experienced by minority voters . . . [as] the direct result of the Voting Rights Act of 1965 . . . vestiges of discrimination in voting continue to exist, as demonstrated by second generation barriers constructed to prevent minority voters from fully participating in the electoral process."<sup>58</sup>

Congress found that "the evidence before the Committee resemble[d] the evidence before Congress in 1965, and the evidence that was present again in 1970, 1975, 1982, and 1992. In 2006, the Committee [found] abundant evidentiary support for reauthorization of VRA's temporary provisions."<sup>59</sup>

The news was not all bad; some progress had been made: "Since 1975 and 1992 (when § 203 was last authorized), the number of language

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54. S. REP. NO. 94-295, at 34.

55. *See id.* (suggesting that the prohibition of English-only elections serves as a temporary measure until language minorities' education opportunities are improved through more permanent measures undertaken by the legislature).

56. *Id.*

57. *Id.*

58. H.R. REP. NO. 109-478, at 2 (2006), *reprinted in* 2006 U.S.C.C.A.N. 618. Congress addressed the renewal of the temporary provisions in 1975, when the language minority provisions were added, 1982, and 1992. *Id.* at 9-11.

59. *Id.* at 6.

minority citizens who have registered to vote, turned out to vote, and who are casting ballots for preferred candidates of their choice has increased."<sup>60</sup> However, "Latinos, Asian Americans, Alaskan Natives, and Native Americans continue to suffer from discrimination in voting."<sup>61</sup>

Fueling the need for the provisions, "citizens who are unable to speak English proficiently [still] have encountered degraded educational opportunities."<sup>62</sup> Congress found that:

Asian American and Hispanic children in California have lower rates of educational attainment than white students. . . . The Committee was informed that 1.6 million language minority students in California are considered to be English language learners, and that a significant portion of these students have trouble maintaining similar levels of academic achievement as their English proficient counterparts.<sup>63</sup>

Congress noted that English Language Learners (ELLs) had been adversely affected by decisions made by the states and local school boards, and therefore had been forced to seek protection from the federal courts.<sup>64</sup> Congress found that the need for continued bilingual voting support was demonstrated by:

(1) the increased number of linguistically isolated households, particularly among Hispanic and Asian American communities; (2) the increased number of language minority students who are considered to be [ELLs], such that the students do not speak English well enough to understand the required curriculum and require supplemental classes; (3) the continued disparity in educational opportunities as demonstrated by the disparate impact that budget shortfalls have on language minority citizens, and the continued need for litigation to protect [ELLs]; and (4) the lack of available literacy centers and English as a Second Language programs.<sup>65</sup>

The "Committee restate[d] its position that Section 203 is intended to remedy the 'denial of the right to vote of such minority group citizens . . . [that is] directly related to the unequal educational opportunities

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60. *Id.* at 18–19.

61. *Id.* at 45.

62. *Id.* at 50.

63. *Id.* at 51.

64. *See id.* (discussing the disparate treatment incurred by language minority students, and the use of federal courts as an avenue for redress). Between 1975 and 2006, ELLs had filed twenty-four suits in fifteen states, fourteen of which were covered jurisdictions under the VRA. *Id.*

65. *Id.* at 59 (internal citations omitted).

afforded them, resulting in high illiteracy and low voting participation."<sup>66</sup> Congress found that, while in the past thirty years the educational systems in the country had improved, there were still disparities between the treatment of Native and non-Native English speakers, and therefore the protections of section 203 were still required.<sup>67</sup> Congress concluded that "without the continuation of the Voting Rights Act of 1965 protections, racial and language minority citizens will be deprived of the opportunity to exercise their right to vote, or will have their votes diluted, undermining significant gains made by minorities in the last 40 years."<sup>68</sup>

Emphasizing the role educational inequalities played in the decision to renew, the Congressional findings in the statute state that "[a]mong 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."<sup>69</sup> The current law prohibits English-only elections and requires bilingual voting materials in jurisdictions where census data demonstrates that:

- (i)(I) [M]ore than 5 percent 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 percent 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

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66. *Id.* ("Section 203's assistance is a remedy for the past and present failures of States and jurisdictions to remedy educational disparities, putting language minority citizens on an equal footing in exercising the right to vote.")

67. *See id.* at 60 ("Thirty years later, the Committee finds that our Nation's educational system has improved. However, disparities in education continue to exist, resulting in disparate treatment of language minority citizens and students."). Congress also noted that "[f]or non-Native English speakers, learning English take several years to obtain a fundamental understanding of the English language—certainly not enough to understand complex ballots that native English speaking citizens often do not understand." *Id.* at 61.

68. *Id.* at 2.

69. 42 U.S.C. § 1973aa-1a(a).

(ii) the illiteracy rate of the citizens in the language minority as a group is higher than the national illiteracy rate.<sup>70</sup>

There is an exception for "any political subdivision that has less than 5% voting age limited-English proficient citizens of each language minority which comprises over 5% of the statewide limited-English proficient population of voting age citizens, unless the political subdivision is a covered political subdivision independently from its State."<sup>71</sup> The prohibition on English-only materials applies to "registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots."<sup>72</sup> "[L]imited-English proficient" is defined as "unable to speak or understand English adequately enough to participate in the electoral process"<sup>73</sup> and "illiteracy" as "the failure to complete the 5th primary grade."<sup>74</sup> This section was extended until 2032, when it will again be considered for renewal.<sup>75</sup>

## II. Disparate Treatment: Voting and Education

Since the language minority provisions of the VRA were passed in 1975, the Department of Justice has used the federal courts to ensure that those groups are being protected.<sup>76</sup> In fact, the use of the courts to protect language minorities has actually increased over the past thirty years. Between 1978 and 2009, the Department of Justice brought forty-two claims in federal courts to ensure that the bilingual provisions were being complied with in covered jurisdictions; twenty-nine of those cases have occurred since 2002.<sup>77</sup> This is likely the reason that the percentage of language minority voters has increased since the passage of the language

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70. *Id.* § 1973aa-1a(b)(2)(A); see S. REP. NO. 94-295, at 31–32 (1975), reprinted in 1975 U.S.C.C.A.N. 774, 795 (elaborating on the bilingual election requirements in prescribed, or "covered," political subdivisions).

71. *Id.* § 1973aa-1(b)(2)(B).

72. *Id.* § 1973aa-1a(b)(3)(A).

73. *Id.* § 1973aa-1a(b)(3)(B).

74. *Id.* § 1973aa-1a(b)(3)(E).

75. See H.R. REP. NO. 109-478, at 58 (urging the extension of bilingual voting requirements for another twenty-five years, resulting in sixty-seven years since the 1982 extension). Congress also extended other provisions, but because this paper focuses on language minorities, I will not discuss the extension of the other provisions.

76. See *Voting Section Litigation*, *supra* note 2.

77. See *id.*

minority provisions.<sup>78</sup> However, there are still violations of the law, as demonstrated by the fact that the most recent consent decree was entered into in 2009.<sup>79</sup> When Congress renewed the VRA in 2007, it considered the continuing rights violations.<sup>80</sup> However, once again, one of the main factors prompting the renewal was the fact that unequal educational opportunities were still provided to language minorities. In this section I look at how the law regarding education rights has shifted from the protections gained prior to the enactment of the initial language minority provisions in 1975. I look at how the development of case law has affected language minorities due to the correlations between English-proficiency, race, wealth, and educational opportunities, and how this has continually necessitated the extension of the VRA's protection of language minorities.

#### A. *San Antonio: The Law Shifts*

When the language minority provisions of the VRA originated, protections of voting and education appeared to be coordinated. After all, seven years prior to those provisions, Congress had enacted the Bilingual Education Act of 1968 to protect the educational opportunities available to children in the U.S. who were neither proficient in spoken English nor literate in written English.<sup>81</sup> In addition, it appeared as though some state courts, and both the lower federal courts, and the Supreme Court were

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78. See e.g., H.R. REP. 109-478, at 20 (noting that Native American voter turnout has increased by more than fifty to one-hundred fifty percent in some instances). Congress further noted that steady increases in registration not only beget increased voter participation but also electoral representation. *Id.* Another example illustrates the relationship between section 203 compliance and increased voter participation: Voter registration among Spanish and Filipino residents is up twenty-one percent in San Diego. *Id.*

79. See *Voting Section Litigation*, *supra* note 2 (describing consent decree order issued against Fort Bend County, Texas, for non-compliance with section 203).

80. See H.R. REP. 109-478, at 7-8 (describing the need for reauthorization of the Voting Rights Act of 1965, as amended, in light of continuous state and local violations).

81. See LEIBOWITZ, *supra* note 2, at 15, 17 (The bill was introduced "[i]n recognition of the large numbers of students in the United States whose mother tongue is Spanish and to whom English is a foreign language"). Leibowitz goes on to explain that the final law as adopted was expanded to address all children who came from environments where the first language was other English. See also generally *Cintron v. Brentwood Union Free Sch. Dist.*, 455 F. Supp. 57, 64 (E.D.N.Y.1978) (indicating that, in at least one community, it is clear that both the VRA provisions and the Education provisions are necessary; in 1978, the Brentwood Union Free School District was found to have violated the rights of its Spanish-speaking students); *Voting Section Litigation*, *supra* note 2 (proving further indication of the necessity of the provisions above; in 2003, the DOJ brought a suit for violating the language minority provisions of the VRA).

vigorously protecting the rights of ELLs.<sup>82</sup> Even more recently, at least on paper, Congress seemingly affirmed its position on providing equal educational opportunities to language minorities: when the Bilingual Education Act of 1968 expired in 2002, it was replaced by the English Language Acquisition, Language Enhancement, and Academic Achievement Act,<sup>83</sup> which guarantees that "[n]o State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by . . . the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."<sup>84</sup>

So if the federal courts were protecting language minorities in schools by requiring that they be given instruction in English so that their educational opportunities were meaningful,<sup>85</sup> and equal educational opportunities are guaranteed to language minorities by federal statute,<sup>86</sup> why is it that thirty years later, in 2006, Congress concluded that unequal educational opportunities were still provided to language minorities and therefore § 203 was still necessary?

The answer is that while the Supreme Court protected the education of language minorities, it stopped protecting the education of the poor. The year before *Lau* was decided, the Supreme Court decided *San Antonio Independent School District v. Rodriguez*.<sup>87</sup> The plaintiffs in *Rodriguez* were Mexican-American parents whose children attended schools in San Antonio, acting on behalf of all minority and poor students attending

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82. See *supra* Part I.A. (providing examples of courts' repeated efforts to thwart segregation attempts in schools).

83. English Language Acquisition, Language Enhancement, and Academic Achievement Act, 20 U.S.C. § 6811–6871 (2006).

84. Bruce Evans & Nancy Hornberger, *No Child Left Behind: Repealing and Unpeeling Federal Language Education Policy in the United States*, 4 LANGUAGE POL'Y 87, 92 (2005) ("After three decades as the Bilingual Education Act, the title of the section concerned with the education of children with limited English proficiency has been changed to the English Language Acquisition, Language Enhancement, and Academic Achievement Act. In addition, the term 'bilingual' has been removed from the law."); see also generally 20 U.S.C. § 1703(f) (2006).

85. See *supra* Part I.A (detailing several court battles for the rights of ELL students).

86. See Evans & Hornberger *supra* note 84 (noting that ELL students are required by law to have access to equal educational opportunities).

87. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 55 (1973) (holding that the Texas system of financing public education "rationally furthers a legitimate state purpose or interest" and thus, "abundantly satisfies" the constitutional standard under the Equal Protection Clause).



schools in underfunded districts.<sup>88</sup> In a three-part majority opinion, the Court held, first, that wealth was not a suspect class;<sup>89</sup> second, that education was not a fundamental right under the United States Constitution;<sup>90</sup> and third, having determined that neither a suspect class nor a fundamental right was involved, that rational basis review required upholding Texas' system of public school funding, which, because based on local property taxes, allocated less money to children in poor neighborhoods than those in wealthy neighborhoods.<sup>91</sup>

*B. A Case About Wealth Becomes a Case About Much More*

Because the plaintiffs in *Rodriguez* brought the claims under a theory of wealth,<sup>92</sup> the decision does not discuss the plaintiffs' children's language abilities.<sup>93</sup> Despite this, however, it has fundamentally affected the ability of language minority students to access equal educational opportunities and thus necessitated the renewal of the language minority provisions of the

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88. *See id.* at 4–5 (describing the parents who brought suit).

89. *See id.* at 28 ("[I]t is clear that appellee's suit asks this Court to extend its most exacting scrutiny to review a system that allegedly discriminates against a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts."). The Court continues:

The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process. We thus conclude that the Texas system does not operate to the peculiar disadvantage of any suspect class.  
*Id.*

90. *See id.* at 37 ("We have carefully considered each of the arguments supportive of the District Court's finding that education is a fundamental right or liberty and have found those arguments unpersuasive.").

91. *See id.* at 40 ("A century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the application of the traditional standard of review, which requires only that the State's system be shown to bear some rational relationship to legitimate state purposes."); *see also id.* at 46 ("Those districts that have more property, or more valuable property, have a greater capability for supplementing state funds . . . [T]he primary distinguishing attributes of schools in property-affluent districts are lower pupil-teacher ratios and higher salary schedules.").

92. *See supra* note 89 and accompanying text (noting that plaintiffs' case was based on the disparate distribution of school money, which was based on local, taxable income).

93. *See generally* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 55 (1973) (noting a lack of discussion on the language abilities of plaintiffs' children).

VRA.<sup>94</sup> This is because race, English language abilities, and poverty are all strongly correlated with each other and with educational opportunities.<sup>95</sup>

A 2003 study of ELLs in California schools found that educational achievement of ELLs lags significantly behind native speakers.<sup>96</sup> This is despite the fact that about 85% of California's ELLs were born in this country and thus—due to the fact that school attendance is mandatory—have most likely attended schools here since kindergarten.<sup>97</sup> The 2003 study showed that the achievement gap between native and non-native English speakers increases as students progress through school.<sup>98</sup> In fifth grade, ELLs read at a third to fourth grade level, about a year and a half behind native speakers, but by eleventh grade, the ELLs are four and a half years behind, reading at a seventh or eighth grade level.<sup>99</sup> These deficiencies carry into adulthood. In 2000, fifty percent of limited English proficient adults reported having nine or fewer years of education, and sixty-four percent had less than a high school degree; only eighteen percent had any post-secondary education.<sup>100</sup>

The correlation between education and poverty is strong: the median weekly income of a person who has not graduated high school is only 44.3% of the median weekly income of a person who has graduated

94. See *infra* Part II.B (discussing the impact the *Rodriguez* case has had on language minority education).

95. See *id.* (discussing the intersection of race, poverty, language skills, and educational background).

96. See Joaquin G. Avila et al., *Voting Rights in California: 1982–2006*, 17 S. CAL. REV. L. & SOC. JUST. 131, 173 (2007) ("According to a 2003 study of English learners in California schools, the academic achievement of English learners lags significantly behind the achievement levels of English-only students.").

97. See *id.* at 172–73 ("Contrary to common perception, approximately 85% of California's English learners are born in the United States."); see also CHRISTOPHER JEPSEN & SHELLEY DE ALTH, PUB. POLICY INST. OF CAL., *ENGLISH LEARNERS IN CALIFORNIA SCHOOLS* 10 (2005) (indicating more than 85% of ELLs have been here since kindergarten).

98. See Avila et al., *supra* note 96, at 173 ("The Study found that the achievement gap puts English learners further and further behind English-only students as the students progress through school grades.").

99. See *id.* ("For example, in grade 5, current and former English learners read at the same level as English-only students who are between grades 3 and 4, a gap of approximately 1.5 years.").

100. See *Adult Language and Literacy*, MIGRATION POLICY INST., <http://www.migrationinformation.org/integration/language.cfm> (last visited Jan. 25, 2011) ("Fifty percent of limited-English-proficient (LEP) adults report having nine or fewer years of education, and 64 percent have less than a high school degree. Only 18 percent have any post-secondary education.") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

college.<sup>101</sup> The limited educational opportunities available to language minorities are reflected in higher poverty rates of those groups. According to the U.S. Census Bureau, in 2008, the poverty rates for Asian Americans and Latinos, two groups covered by the VRA's language provisions, were, respectively, 11.8% and 23.2%, while the rate for whites was 8.6%.<sup>102</sup> The comparatively high poverty rates for these two groups, as compared to whites, are important to the VRA, given that they are both groups covered by § 203. Obviously, the income earning opportunities available to limited English proficient adults are significantly more restricted than the opportunities available to those who have the advantage of postsecondary education, which in the United States requires English proficiency.

The correlation between wealth and per pupil spending has been clearly documented.<sup>103</sup> Even the Court in *Rodriguez* accepted this fact. The Court noted that in Edgewood School District, where ninety percent of the students were Mexican-American and the median family income was \$4,686, the district spent \$356 per pupil, while in Alamo Heights School District, where the student population was about eighty-one percent white and the median family income was \$8,001, the district spent \$594 per pupil, sixty-six percent more than Edgewood.<sup>104</sup>

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101. *Education Pays . . .* BUREAU OF LABOR STATISTICS, U.S. DEP'T. OF LABOR, [http://www.bls.gov/emp/ep\\_chart\\_001.htm](http://www.bls.gov/emp/ep_chart_001.htm) (last visited Jan. 25, 2011) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

102. See CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2008, at 14 (2009), available at <http://www.census.gov/prod/2009pubs/p60-236.pdf> (stating the poverty rate for African Americans was 24.7%).

103. See James Tucker, *The Battle over "Bilingual Ballots" Shifts To the Courts: A Post-Boerne Assessment of Section 203 of the Voting Rights Act*, 45 HARV. J. ON LEGIS. 507, 552 (2008) ("Education discrimination is compounded by under-funding for public schools with large numbers of ELL students.").

104. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 12–13 (1973). School spending is a hotly contested issue and there are those who contend that more money does not equal better schools. See DAN LIPS ET AL., THE HERITAGE FOUNDATION, DOES SPENDING MORE ON EDUCATION IMPROVE ACADEMIC ACHIEVEMENT?, Sep. 8, 2008, <http://www.heritage.org/research/reports/2008/09/does-spending-more-on-education-improve-academic-achievement> (last visited Feb. 3, 2011) ("[T]here is a lack of consistent evidence on whether Education expenditures are related to academic achievement. Eric Hanushek has studied the effect of per-pupil expenditures on academic outcomes, finding either no relationship or a relationship that is either weak or inconsistent.") (on file with the Washington and Lee Journal of Civil Rights and Social Justice). However, it remains a fact that better schools spend more money per pupil. See *id.* "However, researchers Larry V. Hedges and Rob Greenwald analyzed the same data used by Hanushek and concluded that increasing per-pupil expenditures has a significant positive impact on student achievement." *Id.*

In addition, there is a clear correlation between the wealth of the students attending a school and the educational opportunities available. Data available from California demonstrates this.<sup>105</sup> In California, schools are given an Academic Performance Index ("API") number, ranging from 200 to 1000, which reflects the results of state standardized test scores.<sup>106</sup> At Samuel Gompers Middle School in Los Angeles, eighty-six percent of students are eligible for the free lunch program;<sup>107</sup> Gompers has a 2009 API of 558.<sup>108</sup> At Palos Verdes Intermediate School, one percent of the students are eligible for free lunches;<sup>109</sup> the school has a 2009 API of 947.<sup>110</sup> That difference means that while Gompers is in the lowest decile ranking in the state; Palos Verdes is in the highest.<sup>111</sup>

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105. See California Dep't of Educ., DATAQUEST, <http://dq.cde.ca.gov/dataquest/> (last visited Feb. 3, 2011) (providing "facts about California schools and districts") (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

106. See CAL. DEP'T. OF EDUC. 2009-2010 ACADEMIC PERFORMANCE INDEX REPORTS INFORMATION GUIDE 6 (2010), available at <http://www.cde.ca.gov/ta/ac/ap/documents/infoguide09.pdf> ("The API is a single number, ranging from a low of 200 to a high of 1000, that reflects a school's, an LEA's, or a subgroup's performance level, based on the results of statewide testing.").

107. *Student Teacher Ratio, Samuel Gompers Middle School*, GREATSCHOOLS, <http://www.greatschools.org/cgi-bin/ca/other/2109#students> (last visited Jan. 25, 2011) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

108. Cal. Dep't. of Educ., Academic Accountability & Awards Div., *School Report—API Growth and Targets Met: Samuel Gompers Middle School*, DATAQUEST, <http://data1.cde.ca.gov/dataquest/AcntRpt2009/2009GrowthSch.aspx?allcds=19647336058028> (last visited Jan. 25, 2011) (on file with the Washington and Lee Journal of Civil Rights and Social Justice). The population of Gompers is seventy-one percent Hispanic, twenty-nine percent African-American. *Id.* See *School Environment Report on Samuel Gompers Middle School*, GREATSCHOOLS, <http://www.greatschools.org/modperl/achievement/ca/2109#api> (last visited Jan. 25, 2011) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

109. *Student Teacher Ratio, Palos Verdes Intermediate School*, GREATSCHOOLS, <http://www.greatschools.org/cgi-bin/ca/other/2849#students> (last visited Jan. 25, 2011) (on file with the Washington and Lee Journal of Civil Rights and Social Justice). The school is sixty-eight percent white. *Id.*

110. Cal. Dep't. of Educ., Academic Accountability & Awards Div., *School Report—API Growth and Targets Met: Palos Verdes Intermediate School*, DATAQUEST, <http://data1.cde.ca.gov/dataquest/AcntRpt2009/2009GrowthSch.aspx?allcds=19648656021257> (last visited Jan. 25, 2011) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

111. See *Test Scores Samuel Gompers Middle School*, GREATSCHOOLS, <http://www.greatschools.org/modperl/achievement/ca/2109#api> (last visited Jan. 25, 2011) (noting API Statewide Rank in the bottom decile) (on file with the Washington and Lee Journal of Civil Rights and Social Justice); see also *Test Scores, Palos Verdes Intermediate School*, GREATSCHOOLS, <http://www.greatschools.org/modperl/achievement/ca/2849#api> (last visited Jan. 25, 2011) (noting API Statewide Rank in the top decile) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

Because of the correlations between education status and English proficiency, the correlations between education and earning ability, and the correlations between wealth and educational opportunity, many ELLs in California, but also elsewhere, are concentrated in lower performing schools.<sup>112</sup> This can be seen on a micro level by the fact that while only four percent of Palos Verdes' students are classified as ELLs,<sup>113</sup> thirty-five percent of the students at Gompers are classified as ELLs.<sup>114</sup> Therefore, while the Supreme Court did protect language minorities in its decision in *Lau*, because wealth can be a proxy for limited English proficiency, the decision the year before in *Rodriguez* undermined much of the ability of ELLs to obtain equal educational opportunities. This likely explains, at least to some extent, why the evidence presented to Congress in 2006 was the same evidence as was presented in 1975.<sup>115</sup>

### C. Congress and the Court: Differing Protections for Different Spheres

An additional explanation is that while Congress' protections of language minorities in school have remained essentially the same, the Supreme Court's interpretations of those protections have been more vague. While in *Lau* the Court did strongly state that the students must be given the ability to access a meaningful education, and that English must be taught to them, it did not explain what a school must do in order to be compliant with the statutory protections of language minority students, or what would comprise a meaningful education, leaving the remedy open.<sup>116</sup> In 2009, the

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and Lee Journal of Civil Rights and Social Justice).

112. See Avila, et al., *supra* note 96, at 177 ("The Study found that English learners are highly segregated among California's schools and classrooms."). Avila goes on to explain that highly segregated ELLs are at greater risk of academic failure. *Id.* at 177. During the 1999-2000 school year, twenty-five percent of California's students attended schools where the majority of the students were ELLs, but fifty-five percent of ELLs attended such schools. *Id.* The classrooms and schools in which they are segregated typically have inadequate facilities and untrained teachers. *Id.* at 177-78.

113. See *School Environment Report on Samuel Gompers Middle School*, *supra* note 108 and accompanying text.

114. See CAL. DEP'T. OF EDUC. 2009-2010 ACADEMIC PERFORMANCE INDEX REPORTS INFORMATION GUIDE, *supra* note 106 and accompanying text.

115. See generally H.R. REP. NO. 109-478, at 7 (2006), *reprinted in* 2006 U.S.C.C.A.N. 698.

116. See *Lau v. Nichols*, 414 U.S. 563, 569 (1974) ("Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination."). "We accordingly reverse the judgment of the Court of Appeals and remand the case for the fashioning of

Court addressed the provisions in the U.S. Code that require schools to take "appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."<sup>117</sup> The Court found that "appropriate action" did not require that test scores be equalized between native and non-native speakers.<sup>118</sup> Therefore, while the students must, under *Lau*, be able to access a meaningful education, it remains acceptable for them to perform below the rates of other students,<sup>119</sup> throwing into question what the phrase a "meaningful education" really means.<sup>120</sup>

While Congress has tried to ensure that voting rights are meaningful for language minorities, those protections cannot be effective without curing the underlying educational problem; this is clear from the fact that educational inequalities have been the basis for the language minority provisions since their inception. It is also made clear by the fact that many of the communities where the Department of Justice has brought cases alleging violations are also communities with schools with lower API scores.<sup>121</sup> However, because the Supreme Court has determined that

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appropriate relief." *Id.*

117. *Horne v. Flores*, 129 S. Ct. 2579, 2589 (2009) (citing 20 U.S.C. § 1703).

118. *See id.* at 2605 ("In any event, the EEOA requires 'appropriate action' to remove language barriers, not the equalization of results between native and nonnative speakers on tests administered in English—a worthy goal, to be sure, but one that may be exceedingly difficult to achieve, especially for older ELL students.").

119. *See id.* (commenting on continued educational gaps between native and non-native English speakers).

120. *Id.* at 566.

121. The cases brought by the DOJ in 2005 in California are representative of this. *See About Language Minority Voting Rights*, U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., <http://www.justice.gov/crt/voting/litigation/caselist.php#sec203cases> (noting cases brought by the DOJ in California in 2005 were in communities with schools with lower API scores) (last visited on April 30, 2010). In Paramount Unified School District, the 2005 API was 650. *Local Educational Agency Report – Base API for Paramount Unified 2005*, CAL. DEP'T OF EDUC., POLICY & EVALUATION DIV., [http://data1.cde.ca.gov/dataquest/APIBase2006/2005Base\\_DstApi.aspx?cYear=&allcds=1964873&cChoice=2005BApiD](http://data1.cde.ca.gov/dataquest/APIBase2006/2005Base_DstApi.aspx?cYear=&allcds=1964873&cChoice=2005BApiD). The 2004 API for all of San Diego Unified was 710, but the API for Latino students was 636; demonstrating an even greater disparity, the API for White (non-Hispanic) students was 807. *Local Educational Agency Report – Base API for San Diego Unified 2004*, CAL. DEP'T OF EDUC., POLICY & EVALUATION DIV., [http://dq.cde.ca.gov/dataquest/API2005/2004Base\\_DstApi.aspx?cYear=&cSelect=3768338&cChoice=2004BApiD](http://dq.cde.ca.gov/dataquest/API2005/2004Base_DstApi.aspx?cYear=&cSelect=3768338&cChoice=2004BApiD). There are of course exceptions; in 2007 the DOJ brought a suit against the City of Walnut, where the School District had an overall API of 869 that year. *See About Language Minority Voting Rights*, U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., <http://www.justice.gov/crt/voting/litigation/caselist.php#sec203cases> (last visited on April 30, 2010); *see Local Educational Agency Report–Base API for Walnut Valley Unified 2007*, CAL. DEP'T OF EDUC., POLICY & EVALUATION DIV.,

education is not a fundamental right, Congress cannot use its § 5 powers under the Fourteenth Amendment to enforce education rights the way it has been able to enforce voting rights, which are protected by the Fifteenth Amendment.<sup>122</sup> In addition, while it is recognized that the federal government has a role in voting, education has been a matter historically relegated to states and localities.<sup>123</sup> Thus, the ability of the federal government to try to solve the educational inequalities in this country is limited, and Congress is stuck in the position of having to attempt to create a remedy for the problem within its jurisdiction without being able to remedy the underlying problem.

### III. Conclusion: Reaching the Goal

#### A. Successes of the Prior Versions of the VRA

There are not yet statistics that demonstrate the effectiveness of the continuation of the language minority provisions of the VRA since 2008. However, there are statistics from the previous iterations of these sections of the Act that do demonstrate its impact.<sup>124</sup> While it is nearly impossible

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[http://data1.cde.ca.gov/dataquest/AcntRpt2008/2007Base\\_DstApi.aspx?cYear=&allcds=1973460&cChoice=2007ApiD](http://data1.cde.ca.gov/dataquest/AcntRpt2008/2007Base_DstApi.aspx?cYear=&allcds=1973460&cChoice=2007ApiD). However, the Latino students had a 2007 API of 765, a hundred points lower. *Local Educational Agency Report – Base API for Walnut Valley Unified 2007*, CAL. DEP'T OF EDUC., POLICY & EVALUATION DIV., [http://data1.cde.ca.gov/dataquest/AcntRpt2008/2007Base\\_DstApi.aspx?cYear=&allcds=1973460&cChoice=2007ApiD](http://data1.cde.ca.gov/dataquest/AcntRpt2008/2007Base_DstApi.aspx?cYear=&allcds=1973460&cChoice=2007ApiD). This same disparity was also seen in San Diego, where the DOJ brought suit in 2004. *About Language Minority Voting Rights*, U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., <http://www.justice.gov/crt/voting/litigation/caselist.php#sec203cases> (last visited on April 30, 2010).

122. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18 (1973) ("We are unable to agree that this case, which in significant aspects is *sui generis*, may be so neatly fitted into the conventional mosaic of constitutional analysis under the Equal Protection Clause."); see also *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997) ("We have also concluded that other measures protecting voting rights are within Congress' power to enforce the Fourteenth and Fifteenth Amendments, despite the burdens those measures placed on the States."). For a discussion of how § 203 fits within Congress's section 5 powers, see James Tucker, *The Battle over "Bilingual Ballots" Shifts To the Courts: A Post-Boerne Assessment of Section 203 of the Voting Rights Act*, 45 HARV. J. ON LEGIS. 507, 552 (2008).

123. See generally *Katzenbach v. Morgan*, 384 U.S. 641, 642–47 (1966) (indicating that the federal government plays a role in voting legislation); see also *Casteneda v. Pickard*, 648 F.2d 989, 1008–09 (5th Cir. 1981) (leaving discretion to the states in enacting both the Bilingual Educational Act and the EEOA).

124. See generally H.R. REP. NO. 109-478, at 19–52, reprinted in 2006 U.S.C.C.A.N. 618, 629–52 (reporting on the results of the Voting Rights Act and its future reauthorization

to separate which provisions of the VRA are doing the work, because there are so many parts of the Act and so many problems to combat,<sup>125</sup> it is clear that the VRA is effective on increasing language minority participation in elections.<sup>126</sup>

The 2006 House Report on the reauthorization of the VRA stated that:

Racial and language minority citizens register to vote, cast ballots, and elect candidates of their choice at levels that well exceed those in 1965 and 1982. The success of the VRA is also reflected in the diversity of our Nation's local, State, and Federal Governments. These successes are a direct result of the extraordinary steps that Congress took in 1965 to enact the VRA and in reauthorizing the temporary provisions in 1970, 1975, 1982, and 1992.<sup>127</sup>

The Report also found that "section...203 [has] been instrumental in fostering progress among language minority citizens."<sup>128</sup> For example, the evidence showed that "[s]ection 203 has removed barriers to voting and opened up the political process to Asian Americans, many of them first time voters and new citizens."<sup>129</sup> In addition, "[i]n jurisdictions that are brought into compliance with Section 203, there can be an immediate impact."<sup>130</sup> The Report cites to Harris County, Texas, where a Memorandum of Agreement between the county and the DOJ, enacted after the DOJ brought proceedings for non-compliance, doubled the Vietnamese voter turnout, giving rise to the election of the first Vietnamese representative to the Texas legislature.<sup>131</sup>

and amendments).

125. *See supra* part II.B & II.C (discussing several problems facing language minority students).

126. *See id.* at 11 ("In addition, the Committee received numerous reports and written documentation describing personal experiences with regard to voting discrimination and the effectiveness of the temporary provisions in protecting voters from such conduct over the last 25 years.").

127. *Id.* at 7.

128. *Id.* at 18.

129. *Id.* at 19 (internal quotation marks omitted) (citing Letter from Karen K. Narasaki, President & Exec. Dir., Asian Am. Justice Ctr. to the Honorable Steve Chabot, Chairman, Subcomm. on the Constitution (November 22, 2005) (describing the impact of Section 203 on Asian-American citizens)).

130. *Id.*

131. *See* H.R. REP. NO. 109-478, at 19 ("A recent Memorandum of Agreement between the Department of Justice and Harris County, Texas helped double Vietnamese voter turnout, allowing the first Vietnamese candidate in history to be elected to the Texas legislature—defeating the incumbent chair of the Appropriations Committee by 16 votes out of 40,000 cast.").



It was not just the Asian American community that saw gains in voting power.<sup>132</sup> In 2000, there were 7.6 million registered Latino voters in the United States; in 2004, there were 9 million.<sup>133</sup> While the growth does not, by itself, prove that the VRA was working, the evidence established a link between the VRA's provisions and the increase in registered voters.<sup>134</sup> There were reports that "Latino citizens attach [importance] to having election materials, especially registration cards in Spanish."<sup>135</sup> In addition, as in the Vietnamese community, where enforcement actions were brought by the DOJ, voter registration in the Latino community increased dramatically.<sup>136</sup> The Report cites the impact of the enforcement action in Yakima County, Washington, where the voter registration of Latinos went up twenty-four percent just one year after the DOJ sued the county.<sup>137</sup> Finally, gains were made in both the Alaskan Native and Native American communities as well: "in certain cases, the increase in Native American voter turnout has increased by more than 50 to 150 percent."<sup>138</sup>

The increases in registered voters in language minority populations are likely due to Congress's ability, pursuant to the VRA, to prevent situations such as occurred in Osceola County, Florida, where there was:

[W]idespread violation of minority voting rights, including poll workers making hostile comments to Spanish-speaking voters to discourage them from voting, the failure of poll officials to communicate effectively with Spanish-speaking voters, failure to staff polling places with bilingual poll officials, and failure to translate ballots and other election materials in Spanish.<sup>139</sup>

Or in City of Seguin, Texas, where officials "attempt[ed] to dismantle a fifth Latino district in its new redistricting plan" to prevent Latinos from

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132. *See id.* ("The Committee received similar testimony from the Latino and Hispanic community indicating the number of registered Latino voters grew from 7.6 million in 2000 to 9 million in 2004.").

133. *Id.*

134. *See id.* ("Consistent with the findings reported by the Asian American community, a link was also established between the assistance provided to citizens under Section 203 and the increased participation of Hispanic citizens.").

135. *Id.* (internal quotation marks omitted).

136. *See* H.R. REP. NO. 109-478, at 20 ("It is likewise consistent with the impact of enforcement actions brought by the Department of Justice, such as in Yakima County, Washington, where Hispanic voter registration was up over 24 percent 1 year after the Department sued the County.").

137. *Id.*

138. *Id.* (internal quotation marks omitted).

139. *Id.* at 52.

gaining a majority of seats on the city council.<sup>140</sup> Because increased voter participation has been demonstrated as a result of enforcement of the provisions of the VRA, it seems likely that increases will again be documented in 2032 when Congress revisits section 203.<sup>141</sup> However, most of the enforcement addresses the outward manifestations of the discrimination faced by Latino voters when registering to vote and at the polls.<sup>142</sup> Those manifestations were, in large part, what motivated Congress to pass the original VRA in 1965, and amend and reauthorize in years after.<sup>143</sup> Addressing them is likely not enough to ensure that language minorities vote at the same rate as whites because Congress found not only that tactics meant to disenfranchise voters prevent language minorities from voting, but also—the focus of this paper—that the diminished educational opportunities available to language minorities prevented them from fully exercising the franchise.<sup>144</sup> The question that the final section of this Paper will address is how well the VRA's bilingual election provisions address the educational inequalities, and how the VRA might be amended in 2032 to better address this issue.

### B. Where to Go in 2032

The scholarship shows that there are clear indications that bilingual ballots are important.<sup>145</sup> For example, when one jurisdiction asked registered voters whether they wanted their materials in the covered language, the voter file increased from 250 to 1650.<sup>146</sup> With findings like

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140. *Id.* at 45.

141. *See* H.R. REP. NO. 109-478, at 12 ("The direct testimony provided by the witnesses, together with the investigative reports submitted, support the Committee's conclusion that the gains made under the VRA are the direct result of the VRA's temporary provisions, and that reauthorization of these provisions is both justified and necessary.").

142. *See id.* at 19 (discussing remedies and results of the VRARA on citizens of Hispanic Origin).

143. *See id.* at 8–12 (discussing the history and amendments of the VRA and its remedies of discrimination for minority voters).

144. *See* James Tucker and Rodolfo Espino, *Government Effectiveness and Efficiency? The Minority Language Provisions of the VRA*, 12 TEX. J. ON C.L. & C.R. 163, 177 ("The 2002 Census determinations illustrate the compelling need for language assistance among LEP voters who experience high rates of low educational attainment.").

145. *See id.* at 164 ("Contrary to the criticisms leveled against the minority language assistance provisions of the VRA, our study actually shows that these studies are not costly and can be efficiently implemented by election officials.").

146. *See id.* at 229 ("A postcard was sent to all registered voters on file. This postcard asked if they wanted their voting materials in [the covered language]. The response

that, it is unsurprising that while there are those who criticize the VRA's language minority provisions, much of the scholarship on the provisions is in accord with the acclaim given the provisions by Congress, and supported the most recent renewal of the VRA and the language minority provisions.<sup>147</sup> It is additionally clear from the scholarship that the provisions as they are currently written would function much more effectively if they were better enforced, a concept which is extremely simple, yet thus far elusive.<sup>148</sup> Because any issues with the current provisions appear to involve non-enforcement, I would not suggest that any of the current requirements and protections be deleted from the 2032 version of the VRA unless there are drastic changes in the attitudes and practices of the covered jurisdictions in the next twenty-two years.

However, that does not mean that I think § 203 should be renewed in a form identical to the current statute. I would suggest that in the 2032 version, Congress extend the protections to groups of language minorities that have greater than a fifth grade education. James Tucker argues that limited-English proficiency is correctly defined as the ability to speak English even "well," because:

Voters who speak English "well" often struggle with the complicated terms they encounter. The difficulty that these voters experience is due, in part, to the low threshold in the section 203 trigger for English literacy, "the failure to complete the 5th primary grade," which applies to many voters who speak English "well." A fifth grade education falls

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increased the voter file of [the covered language] requests from 250 to approximately 1650.").

147. *See id.* at 164 (discussing a study that dispelled criticism of the Voting Rights Act Reauthorization Act of 2006); Tucker, *supra* note 103, at 507 ("In the debates and legislative hearings leading up to reauthorization of the Voting Rights Act in 2006, critics of section 203 argued that it is unconstitutional . . . [t]his Article responds that Congress has broad power to regulate state or local election practices under the authority of the enforcement section of the Fifteenth Amendment."); Avila et al., *supra* note 96, at 131–32 ("This chronicle indicates that two important provisions of the VRA have played a pivotal role in assisting racial and ethnic minority communities, as well as language minority groups, to secure greater access to the political process and, in some instances, to increase minority electoral representation."); Barry H. Weinberg & Lynn Utrecht, *Problems in America's Polling Places: How They Can Be Stopped*, 11 TEMP. POL. & CIV. RTS. L. REV. 401, 412 (2002) ("The need for the language minority provisions of the Voting Rights Act continues to be demonstrated in areas of the country where English is not persons' primary language.").

148. *See* Tucker, *supra* note 103, at 526 ("One respondent explained, '[t]he results of this questionnaire would be a moot issue since the federal government will do what they want to anyway' . . . [s]imilarly, four respondents criticized enforcement efforts by the Department of Justice.").

far short of what is needed to understand a ballot proposition, typically drafted at the high school level or greater.<sup>149</sup>

According to Tucker, "[s]tudies demonstrate that the sort of listening, reading, and comprehension skills required to cast an effective ballot require the highest level of English abilities; namely, English fluency close to the level of a college graduate, which limited-English proficient (LEP) voting age citizens routinely lack."<sup>150</sup> If the level of English on the ballots is as high as Tucker indicates, then it would be completely out of the grasp of an ELL adult who graduated the sixth, seventh or eighth grade.<sup>151</sup> In addition, as discussed in Part II.B., the education that a "typical" ELL receives is inferior to that of a typical native speaker.<sup>152</sup> The 2003 study cited in Part II.B. found that in fifth grade, ELLs read at a third to fourth grade level, about a year and a half behind native speakers, but by eleventh grade, the ELLs are four and a half years behind, reading at a seventh or eighth grade level.<sup>153</sup> Therefore, even if Congress was to amend § 203 to encompass ELLs who had graduated high school, the likelihood would be that those persons would still be unable to grasp the information as written in current ballots, especially when those ballots go beyond candidates and contain propositions.<sup>154</sup> It makes sense for Congress to abandon the Census' definition that more than a fifth grade graduation is equivalent to literacy, and craft a definition of its own that acknowledges both the realities of voting and the lack of educational opportunities given language minorities. Changing the definition to eighth grade, when most states finish middle school, or even high school, would allow far more language minorities the ability to participate in elections.

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149. *Id.* at 535.

150. *Id.*; *see also supra* Part II.B (discussing a 2003 ELL study in California).

151. *See id.* ("Studies demonstrate that the sort of listening, reading, and comprehension skills required to cast an effective ballot require the highest level of English abilities; namely, English fluency close to the level of a college graduate, which LEP voting age citizens routinely lack.").

152. *See Avila et al., supra* note 96, at 173 ("According to a 2003 study of English learners in California schools, the academic achievement of English learners lags significantly behind the achievement levels of English-only students.").

153. *See id.* ("For example, in grade 5, current and former English learners read at the same level as English-only students who are between grades 3 and 4, a gap of approximately 1.5 years. By grade 11, current and former English learners read at the same level as English-only students who are between grades 6 and 7, a gap of approximately 4.5 years.").

154. *See id.* at 170 ("Language minorities still face unequal educational opportunities, and the continuing existence of these inequalities constitutes a sufficient basis for Congress to renew Section 203 for an additional twenty-five years."). This is especially important in states like California that rely heavily on the initiative process.

Additionally, I see two problems in the Act for which I do not have a clear solution, but I believe Congress must address if these provisions are ever to actually expire. First, while it is clear that bilingual elections are very effective in indicating to language minorities that they are welcome at the polls, and clearly do assist many voters, there are a growing number of voters whom they are unlikely to help.<sup>155</sup> As discussed in Part II.B., eighty-five percent of California's ELLs were born in this country and have attended schools here since kindergarten.<sup>156</sup> This statistic is not singular to California—across the country even high school children are not proficient in English despite the fact that they have always attended schools in the United States.<sup>157</sup> If these students have always attended schools in the United States, it is unlikely they have attended classes in their native languages. Therefore, it is unlikely that they are literate in their primary languages at the level needed to comprehend the ballots once translated.<sup>158</sup> In this case, it may be that bilingual ballots are not functionally useful, and, if this is true, Congress should shift its focus to bilingual poll workers and translators who could be made available. However, more research on the literacy of language minorities in their primary languages is needed to determine the specific effectiveness of each bilingual method.

Finally, it is clear from the Congressional Record that voting problems will not be solved until educational inequalities are.<sup>159</sup> Therefore, if Congress wants to be able to fully retire the language minority provisions at any time in the future, it must address educational inequalities in this country. However, because as discussed *supra*, it is clear that the Supreme Court has been far less protective of education than it has of voting, Congress must confront this problem head-on.<sup>160</sup> The history of § 203 and

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155. See Tucker, *supra* note 103, at 536 ("[B]allots should be simplified because even voters who are native-speakers of English have difficulty understanding them.").

156. See Avila at al., *supra* note 96, at 172–73 ("Contrary to common perception, approximately 85% of California's English learners are born in the United States.").

157. See *id.* at 164 ("Some language minority voters, even though they were born in the United States or came to the United States at an early age, are limited-English proficient because they attended substandard schools that did not afford them an adequate chance to learn English.").

158. From personal experience teaching ELLs in South Los Angeles, I know that very few of my Spanish-speaking students were literate in Spanish even at a third grade level.

159. See H.R. REP. 109-478, at 9 ("By expanding the temporary provisions to include Sections 4(f) and 203 under its 14th amendment enforcement power, Congress sought to remedy the voting inequities resulting from the disparate treatment experienced by language minority citizens in educational opportunities.").

160. See *supra*, Part II.C. (discussing the Supreme Court's treatment of education in several decisions).

the history of persistent educational inequalities in this country discussed in this paper makes it clear that until Congress mandates comprehensive education reform, there will always be a need for the language minority provisions and the temporary provisions will eventually become permanent.