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COMMENTARY

THE 1975 VOTING RIGHTS ACT AND LANGUAGE MINORITIES

*David H. Hunter**

The 1975 amendments[1] to the Voting Rights Act of 1965[2] expand the safeguards for minority voting contained in the 1965 Act in three ways. First, expiration of certain provisions of the Act is delayed. Second, the coverage of the Act is expanded geographically. Third, a new remedy—the requirement of bilingual elections—is applied to a large part of the country. Continuing the coverage of provisions enacted in the past and expanding the geographical reach of these provisions presents few difficulties of interpretation.[3] The bilingual requirement, on the other hand, because it does not build directly on past experience[4] and because it suffers from a number of drafting infelicities, is more problematical and will provide the focus for this article. The 1975 amendments also raise several constitutional issues that

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1. 42 U.S.C.A. §§ 1973 to 1973bb-1 (Supp., Oct. 1975).

2. 42 U.S.C. §§ 1973 to 1973bb-4 (1970).

3. This, of course, is not to suggest that no problems remain in the construction and application of the old Act. Reconciling the federal preclearance of changes with respect to voting of section 5, 42 U.S.C. § 1973c (1970), *as amended*, 42 U.S.C. § 1973c (Supp., Oct. 1975), with the normal allocation of responsibility between state and federal government and between branches of the federal government is not easy. *See* Richmond v. United States, 422 U.S. 358 (1975); Connor v. Waller, 421 U.S. 656 (1975); Georgia v. United States, 411 U.S. 526 (1973); Connor v. Johnson, 402 U.S. 690 (1971); Perkins v. Matthews, 400 U.S. 379 (1971); Hadnott v. Amos, 394 U.S. 358 (1969); Allen v. State Bd. of Elections, 393 U.S. 544 (1969); South Carolina v. Katzenbach, 383 U.S. 301 (1966). The interpretation of section 5 is again before the Supreme Court during the October 1975 term in three separate cases. United Jewish Organizations v. Carey, 510 F.2d 512, *cert. granted*, 96 S. Ct. 354 (1975); East Carroll Parish School Bd. v. Marshall, *cert. granted*, 422 U.S. 1055 (1975); Beer v. United States, *prob. juris. noted*, 419 U.S. 822 (1974) (argued Oct. 1974 term, reargued Nov. 13, 1975). *See* authorities cited note 17 *infra*.

4. *But see* notes 26, 36, 38-41 & accompanying text *infra*.

are deserving of attention but which will be examined only in passing.[5]

The Voting Rights Act of 1965 was enacted in response to decades of exclusion of blacks from the electoral processes of Southern States, exclusion that prior litigation and legislation had been unable to cure.[6] It provided the stronger remedies that experience under the Civil Rights Acts of the previous decade[7] had shown were needed. While the earlier Acts relied on litigation to remove the barriers that prevented blacks from registering to vote and voting,[8] the 1965 Act added automatic and administrative remedies.[9]

Because literacy tests and similar tests or devices[10] had frequently been used to keep literate and otherwise qualified blacks off the registration rolls without deterring the registration of illiterate whites,[11] Congress banned their use in states and political subdivisions in which they presumably had contributed to low registration or voting rates.[12] Based upon their use of such devices, six Southern States, part of a seventh, and a few jurisdictions outside

5. *See* notes 24, 25, 37 & 41 *infra*.

6. *See* South Carolina v. Katzenbach, 383 U.S. 301, 309-15 (1966). The 1965 Act is carefully analyzed in Christopher, *The Constitutionality of the Voting Rights Act of 1965*, 18 STAN. L. REV. 1 (1965), and Comment, *Voting Rights Act of 1965*, 1966 DUKE L.J. 463. The century of experience leading to the passage of the Act, as well as its subsequent construction and application, is extensively reviewed in R. CLAUDE, THE SUPREME COURT AND THE ELECTORAL PROCESS (1970), and Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523 (1973).

7. Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (codified in scattered sections of 28, 42 U.S.C.); Civil Rights Act of 1960, 42 U.S.C. §§ 1971(c), 1971(e), 1974-74e (1970); Civil Rights Act of 1964, 42 U.S.C. §§ 1971(a)(2), 1971(a)(3), 1971 (c), 1971(g) (1970).

8. *See* South Carolina v. Katzenbach, 383 U.S. 301, 313 (1966).

9. The 1965 Act also refined the litigative approach of the earlier Acts. *See, e.g.*, Voting Rights Act of 1965 § 3, 42 U.S.C. § 1973a(c) (1970), which authorized the courts to impose the special remedies of the 1965 Act, and Act of Aug. 6, 1965, Pub. L. No. 89-110 § 15, 79 Stat. 445, which amended the earlier Civil Rights Act by deleting all references to "federal" so as to provide remedies for voting rights violations in state as well as federal elections.

10. Section 4(c) defines "test or device" to include any requirement that a voter (1) demonstrate literacy, (2) demonstrate educational achievement, (3) possess good moral character, or (4) "prove his qualifications by the voucher of registered voters or members of any other class." 42 U.S.C. § 1973b(c) (1970). For the history of federal efforts to enforce voting rights, see Derfner, *supra* note 6, at 525-52.

11. *See* South Carolina v. Katzenbach, 383 U.S. 301, 312-13 (1966).

12. The ban on the use of tests or devices and the other special provisions of the Act applied in states (and in political subdivisions in states not covered as a whole) in which a test or device was maintained on November 1, 1964 and in which fewer than 50 percent of the persons of voting age were registered on November 1, 1964 or voted in the November 1964 presidential election. Voting Rights Act of 1965 § 4(b), 42 U.S.C. § 1973b(b) (1970). The former determination was made by the Attorney General and the latter by the Director of the Census. These determinations were not subject to judicial review. *Id.*

the South were designated for "special coverage."[13] In these jurisdictions, the Act authorized the Attorney General to send federal examiners to list eligible voters if local registrars still discriminated against blacks attempting to register[14] and to send federal observers to monitor elections in jurisdictions in which examiners were serving.[15]

Congress, by passing the 1965 Act, indicated an awareness that the number of ways in which a group of people can be effectively disenfranchised is practically endless.[16] As a further safeguard, it specified that before any of the affected jurisdictions could make any changes that might affect the right to vote, they would have to convince either the Attorney General or the United States District Court for the District of Columbia that the new practice or procedure was not discriminatory in its purpose and would not be discriminatory in its effect.[17] Under the terms of the original Act, a state, or a political subdivision in a state not covered as a whole, would remain specially covered until it could prove to the District Court for the District of Columbia that for five years it had not used a test or device having either

13. The states of Alabama, Alaska, Georgia, Louisiana, Mississippi, South Carolina, and Virginia, 40 counties in North Carolina, four counties in Arizona, and one county each in Hawaii and Idaho were specially covered by the 1965 "trigger." Alaska, one North Carolina county, three Arizona counties, and the Idaho county obtained exemption through a lawsuit under section 4(a), 42 U.S.C. § 1973b(a) (1970). Testimony of J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division, Department of Justice [hereinafter cited as Pottinger Testimony], Exhibit 1, *Hearings on Extension of the Voting Rights Act of 1965 Before the Subcomm. on Constitutional Rights of the Senate Judiciary Comm.*, 94th Cong., 1st Sess. 535, 595 (1975) [hereinafter cited as *Senate Hearings*].

14. Voting Rights Act of 1965 § 6, 42 U.S.C. § 1973d (1970). The Attorney General has designated 73 counties in 5 states for the appointment of examiners. Pottinger Testimony, Exhibit 10, *Senate Hearings* 631-32.

15. Voting Rights Act of 1965 § 8, 42 U.S.C. § 1973f (1970). Observers have been sent to 61 counties in five states. U.S. COMM'N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER 398-401 (1975) [hereinafter cited as TEN YEARS AFTER]. *See also* Pottinger Testimony, Exhibits 14 & 15, *Senate Hearings* 635-37.

16. *See generally* South Carolina v. Katzenbach, 383 U.S. 301 (1966).

17. Voting Rights Act of 1965 § 5, 42 U.S.C. § 1973c (1970). Statistics on section 5 submissions and objections can be found in Pottinger Testimony, Exhibits 3-6, *Senate Hearings* 597-600, and in TEN YEARS AFTER 402-09. Section 5 has been the most important and the most controversial provision of the Voting Rights Act. *See* TEN YEARS AFTER 25-31; D. HUNTER, FEDERAL REVIEW OF VOTING CHANGES: HOW TO USE SECTION 5 OF THE VOTING RIGHTS ACT (2d ed. rev. 1976); WASHINGTON RESEARCH PROJECT, THE SHAMEFUL BLIGHT: THE SURVIVAL OF RACIAL DISCRIMINATION IN VOTING IN THE SOUTH 136-69 (1972); Derfner, *supra* note 6, at 576-81; Halpin & Engstrom, *Racial Gerrymandering and Southern State Legislative Redistricting: Attorney General Determinations Under the Voting Rights Act*, 22 J. PUB. L. 37 (1973); Parker, *County Redistricting in Mississippi: Case Studies In Racial Gerrymandering*, 44 MISS. L.J. 391 (1973); Roman, *Section 5 Of The Voting Rights Act: The Formation of an Extraordinary Federal Remedy*, 22 AM. U.L. REV. 111 (1972).

the purpose or the effect of discriminating on account of race or color.[18]

Although substantial progress was made under the 1965 Act,[19] it was apparent to Congress in 1970 that special provisions were still needed.[20] Congress therefore extended the "bailout" provision, requiring 10 years of freedom from the discriminatory use of a test or device,[21] and at the same time enlarged the coverage formula, bringing under special coverage a number of jurisdictions in the North and the West.[22] Congress also decided to apply one of the special provisions—the prohibition of the use of tests and devices—to the entire nation for a 5-year period.[23]

I. The 1975 Amendments

On August 6, 1975, President Gerald R. Ford signed Public Law No. 94-73, amending the Voting Rights Act. The new law extends the principal provisions of the 1965 Act (Title I), expands the coverage of the special provisions to additional areas (Title II), requires bilingual elections in certain areas (Titles II and III), and contains a number of miscellaneous provisions (Title IV).

Extension. Deciding for a second time that the 1965 Act's special provisions could not yet be abandoned, Congress tacked an additional seven years onto their life.[24] Congress also made permanent the national ban on

18. Voting Rights Act of 1965 § 4(a), 42 U.S.C. § 1973b(a) (1970), *as amended*, 42 U.S.C.A. § 1973b(a) (Supp., Oct. 1975).

19. For an assessment of the Act's implementation and initial effectiveness, see U.S. Comm'n on Civil Rights, Political Participation (1968).

20. *See* H.R. Rep. 91-397, 91st Cong., 2d Sess. 5 (1969).

21. 42 U.S.C. § 1973b(a) (1970).

22. 1970 Voting Rights Act Amendments §§ 4(a), 5, 42 U.S.C. §§ 1973b(a), 1973c (1970). The 1970 trigger covered for the first time five Arizona counties, two California counties, three New York counties, one Wyoming county, and numerous towns in Connecticut, Maine, Massachusetts, and New Hampshire. Four Alaska election districts, three Arizona counties, and an Idaho county were re-covered. Pottinger Testimony, Exhibit 1, *Senate Hearings* 595-96. The Alaska election districts and the New York counties brought successful bailout suits under section 4(a), 42 U.S.C. § 1973b(a) (1970). *Senate Hearings, supra*, Exhibit 2. The New York counties were subsequently returned to the special coverage of the Act. New York v. United States, 65 F.R.D. 10 (D.D.C.), *aff'd mem.* 419 U.S. 888 (1974). *See* notes 36 & 50 *infra*.

23. Section 6 of the 1970 Amendments, 84 Stat. 315, added section 201 to the Voting Rights Act of 1965, now codified as 42 U.S.C. § 1973aa (1970). In addition, section 6 enabled all voters to vote for the offices of President and Vice President, notwithstanding state durational residence requirements, *id.* § 202, 42 U.S.C. § 1973aa-1 (1970), and lowered the voting age to 18. *Id.* § 302, 42 U.S.C. § 1973bb-1 (1970). *See* note 57 *infra*.

24. 42 U.S.C.A. § 1973b(a) (Supp., Oct. 1975), *amending* Voting Rights Act of 1965 § 4(a), 42 U.S.C. § 1973b(a) (1970). The House of Representatives and the Senate Judiciary Committee favored a 10-year extension, in order to require preclearance of

tests and devices that was about to expire.[25]

Expansion. Little thought had been given in previous congressional consideration of voting rights legislation to the problems of minority groups other than blacks.[26] But between 1965 and 1975, the development of the Chicano

changes made in district lines following the 1980 census. *See* H.R. 6219, 94th Cong., 1st Sess. (received in the Senate, June 5, 1975); S. REP. No. 295, 94th Cong., 1st Sess. 15-18 (1975) [hereinafter cited as S. REP.]. The House subsequently accepted the 7-year extension adopted by the Senate. *See* 121 CONG. REC. S 13,399-405 (daily ed. July 23, 1975); *id.* S 13,673-74 (daily ed. July 24, 1975); *id.* H 7629-34 (daily ed. July 28, 1975).

The 1965 Act raised the question of justification under the Constitution of intrusion of the federal government into matters that had previously been the responsibility of the states. In South Carolina v. Katzenbach, 383 U.S. 301 (1966), the Supreme Court upheld under the fifteenth amendment the federal intrusion mandated by the special provisions of the Act. In 1976, the question arises whether conditions are such that a continued federal role is constitutionally justifiable. This same question was posed by the 1970 extension of the Voting Rights Act, but it was not brought before a court for resolution. The continued constitutionality of the Act's special provisions is supportable on two theories. First, under the standards of South Carolina v. Katzenbach, *supra*, and especially under the more liberal standards of Katzenbach v. Morgan, 384 U.S. 641, 653-56 (1966), the basis for federal action still exists. Second, once it is determined that Congress has the power under the Constitution to remedy a problem, how long a remedy should apply is a legislative judgment. *See* Katzenbach v. Morgan, *supra*, at 653-56 (1966).

25. 42 U.S.C.A. § 1973aa (Supp., Oct. 1975), *amending* 42 U.S.C. § 1973aa (1970). The 5-year national ban was upheld in Oregon v. Mitchell, 400 U.S. 112 (1970). All nine Justices, in four opinions, agreed that Congress has power under section 2 of the fifteenth amendment to impose the ban. Most of the Justices found such power under the fourteenth amendment as well. The opposite result with respect to the permanent ban would require acceptance of the argument that because some day racial discrimination will be eliminated and educational disparities between the races will be eliminated, Congress may only enact temporary legislation. The acceptance of this argument would be the equivalent of standing the hypothetical basis argument of *Katzenbach v. Morgan* on its head. In addition, the force of Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959), which had been diluted by the time of *Oregon v. Mitchell,* is even weaker now.

> The basic principle [of Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969), Cipriano v. City of Houma, 395 U.S. 701 (1969), and City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970)] is that as long as the election in question is not one of special interest, any classification restricting the franchise on grounds other than residence, age, and citizenship cannot stand unless the district or State can demonstrate that the classification serves a compelling state interest.

Hill v. Stone, 421 U.S. 289, 297 (1975).

26. One exception is section 4(e) of the 1965 Act, 42 U.S.C. § 1973b(e) (Supp. I, 1965), which was designed to enable Puerto Ricans residing in New York, but educated in Puerto Rico, to pass New York's literacy test. *See* note 38 *infra.* Additionally, some states and political subdivisions containing minority groups other than blacks were inadvertently caught by the 1965 and 1970 triggers. These jurisdictions were usually allowed by the Department of Justice to exempt themselves from special coverage. *See, e.g.*, New York v. United States, Civil No. 2419-71 (D.D.C., order of April 13, 1972)

political movement[27] and continued voting rights litigation in Texas[28] convinced many of the need for the protections of the Voting Rights Act in Texas.[29] Although Texas had shared much of the experience of other Southern States in denying a role in the political process to blacks,[30] it had not used a test or device as a prerequisite to voting and therefore was not included under the 1965 Act's special coverage.[31]

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declaratory judgment rescinded, 65 F.R.D. 10 (D.D.C.), *aff'd mem.*, 419 U.S. 888 (1974) (action on behalf of Bronx, Kings, and New York counties); Alaska v. United States, Civil No. 2122-71 (D.D.C., July 2, 1972) (action on behalf of Election Districts 8, 11, 12 and 13); Alaska v. United States, Civil No. 1198-66 (D.D.C., Aug. 17, 1966); Apache County v. United States, 256 F. Supp. 903 (D.D.C. 1966).

27. *See generally*, J. SHOCKLEY, CHICANO REVOLT IN A TEXAS TOWN (1974); Navarro, *The Evolution of Chicano Politics*, 5 AZTLAN: CHICANO J. OF SOC. SCI. & THE ARTS 57 (1974).

28. *See* Hill v. Stone, 421 U.S. 289 (1975) (property requirement for voting in bond elections); Robinson v. Commissioners Court, 505 F.2d 674 (5th Cir. 1974) (racial gerrymandering of commissioners' districts); Lipscomb v. Jonsson, Civil No. CA3-4571-E (N.D. Tex., Mar. 25, 1975) (method of city council election in Dallas); David v. Garrison, Civil No. T4-73-Ca-113 (E.D. Tex., Jan. 27, 1975) (method of city council election in Lufkin); Weaver v. Muckleroy, Civil No. 5524 (E.D. Tex., Jan. 27, 1975); Graves v. Barnes (II), 378 F. Supp. 640 (W.D. Tex. 1974), *remanded for determination of mootness sub nom.* White v. Regester, 422 U.S. 935 (1975) (per curiam) (multimember districts); Graves v. Barnes (I), 343 F. Supp. 704 (W.D. Tex. 1972), *aff'd in relevant part sub nom.* White v. Regester, 412 U.S. 755 (1973); Carter v. Dies, 321 F. Supp. 1358 (N.D. Tex. 1970) (restrictive filing fees); Beare v. Smith, 321 F. Supp. 1100 (S.D. Tex. 1971), *aff'd per curiam sub nom.* Beare v. Briscoe, 498 F.2d 244 (5th Cir. 1974) (registration system); Garza v. Smith, 320 F. Supp. 131 (W.D. Tex. 1970), *remanded*, 401 U.S. 1006, *dismissed*, 450 F.2d 790 (5th Cir. 1971) (assistance to illiterates; continuing jurisdiction in district court noted).

29. *See, e.g.*, Testimony of Dr. Charles I. Cotrell, Professor of Political Science, St. Mary's University, San Antonio, Texas, *Senate Hearings* 452; Testimony of Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, *id.* at 73; Testimony of George Korbel, Attorney, *id.* at 452; Testimony of Vilma S. Martinez, President and General Counsel, Mexican American Legal Defense and Educational Fund, *id.* at 756; Testimony of Modesto Rodriguez, *id.* at 726.

The frustration of Mexican-American political efforts in California led some to a similar conclusion with respect to that state. *See, e.g.*, Testimony of Hon. Edward R. Roybal, Congressman from California, *Hearings on Extension of the Voting Rights Act Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong., 1st Sess., ser. 1, pt. 1, at 922 (1975) [hereinafter cited as *House Hearings*].

30. The *White Primary Cases* arose in Texas. *See* Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); Grovey v. Townsend, 295 U.S. 45 (1935); Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927). Texas also used a poll tax. *See* United States v. Texas, 252 F. Supp. 234 (W.D. Tex.), *aff'd per curiam*, 384 U.S. 155 (1966). For an analysis of the similarities and differences between Texas and other southern states, see J. KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH 1880-1910, at 196-209 (1974).

31. *See* Testimony of Arthur S. Flemming, Chairman, U.S. Commission on Civil Rights, *Senate Hearings* 97.

Title II is designed to apply the special provisions to Texas and to scattered political subdivisions in other states.[32] Coverage is provided if a state, or a political subdivision of a state not covered as a whole, meets three criteria: (1) more than five percent of the citizens of voting age of the jurisdiction are members of a single language minority group;[33] (2) fewer than 50 percent of the voting age citizens[34] of the jurisdiction voted in the 1972 presidential election;[35] and (3) that election was conducted only in English.[36] Title II jurisdictions are required to provide election materials in the lan-

32. The following jurisdictions have been designated for coverage under Title II thus far: Alaska, Texas, and Arizona (statewide); California (Kings, Mercer, and Yuba Counties); Colorado (El Paso County); Florida (Hardee, Hillsborough and Monroe Counties); New Mexico (Curry, McKinley, and Otero Counties); New York (Bronx and Kings Counties); North Carolina (Jackson County); Oklahoma (Choctaw and McCurtain Counties); and South Dakota (Shannon and Todd Counties). 40 Fed. Reg. 43746, 49422 (1975); 41 Fed. Reg. 783-84, 1503 (1976).

33. 42 U.S.C.A. § 1973b(f)(3) (Supp., Oct. 1975). This determination is made by the Director of the Census and is not subject to judicial review. *Id.* § 1973b(b). For the definition of the phrase "language minorities," see p. 262 *infra*. The procedures and standards for the determination of coverage have been challenged unsuccessfully by the State of Texas. Briscoe v. Levy, Civil No. 75-1464 (D.D.C., Sept. 12, 1975), *appeal docketed*, No. 75-1903, D.C. Cir., Sept. 16, 1975.

34. The criterion in the 1965 Act refers to "persons," presumably for convenience and because the southern states, primarily affected by the 1965 Act, have small noncitizen populations. Using citizens as a base here (and in the first criterion) makes sense because noncitizens cannot vote. A countervailing factor is that census data are more readily available for all persons than for citizens. As reported out of the House Judiciary Committee, this criterion referred to "persons" rather than to "citizens". The change was made on the floor of the House. *See* 121 CONG. REC. H 4884-93 (daily ed. June 4, 1975).

35. 42 U.S.C.A. § 1973b(b) (Supp., Oct. 1975). This determination is made by the Director of the Census and is not subject to judicial review. *Id.*

36. *Id.* § 1973b(f)(3). This determination is made by the Attorney General and is not subject to judicial review. *Id.* § 1973b(b). "English-only election" is a shorthand expression that refers to an election not conducted in the language of the applicable language minority group. Thus, if a jurisdiction has two language minority groups and publishes materials in the language of one of them, that would not prevent the jurisdiction from being covered with respect to the second group, although a literal reading of the statute would lead to that result. If the language minority group's only language is English, then English-only elections should not be considered to trigger Title II coverage. The prohibition of English-only elections had its origin in court decisions holding jurisdictions' failure to provide election materials in Spanish to be discriminatory against Puerto Rican voters under section 4(e) of the Voting Rights Act, 42 U.S.C. § 1973b(e) (1970). *See* Torres v. Sachs, 381 F. Supp. 309 (S.D.N.Y. 1974); cases cited note 39 *infra*. On the basis of *Torres*, the Department of Justice asked the District Court for the District of Columbia to return the New York counties to special coverage, on the theory that New York City's failure to provide Spanish language election materials constituted a test or device with respect to the city's Puerto Rican voters. *See* note 50 *infra*.

guage(s) of the language minority group(s) present as well as in English.[37]

Although coverage is based on the presence of language minorities, the special provisions will also protect racial minorities that are not language minorities. Thus, blacks as well as Mexican Americans in Texas will be protected.

Bilingual Elections. In recent years there has been an increasing trend toward facilitating the registration and voting of those whose primary language is other than English. Courts have used section 4(e) of the Voting Rights Act of 1965[38] as a basis for requiring that election materials be provided in Spanish,[39] and several states provide for bilingual materials legislatively or administratively.[40] In requiring bilingual materials and assistance,

37. 42 U.S.C.A. § 1973b(f)(4) (Supp., Oct. 1975). Congress has power under section 2 of the fifteenth amendment to enact Title II if the objective of the Title is legitimate under the Constitution and if the means employed are appropriate. There are two main differences between the constitutional issues presented by the enactment of Title II and those addressed in South Carolina v. Katzenbach, 383 U.S. 301 (1966). First, a different factual basis exists. The discrimination on which Title II is based is not as serious in terms of scope or effect as that which originally compelled Congress to enact the 1965 Act. However, the Court did not imply in *South Carolina v. Katzenbach* that a weaker factual basis would have been insufficient to justify the congressional enactment. Second, while the bilingual election requirement is a new remedy, it is analogous to the literacy test ban contained in the 1965 Act. Indeed, some courts have interpreted the 1965 Act and 1970 amendments themselves to require bilingual elections. *See* cases cited note 39 *infra.* For a discussion of the constitutional issues raised by Title II, see *Senate Hearings* 1043. For an analysis of the evidence concerning the need for the protections of Title II in Texas, see U.S. Commission on Civil Rights, Staff Memorandum, Expansion of the Coverage of the Voting Rights Act, June 5, 1975 (on file at the *Catholic University Law Review*).

38. 42 U.S.C. § 1973b(e) (1970). Under this provision, a person cannot be denied the right to register on the basis of failure to satisfy a literacy test if he has completed the sixth grade in an American-flag school. Section 4(e) was designed to enable Puerto Ricans in New York City to register without satisfying New York's literacy requirement. *See* Katzenbach v. Morgan, 384 U.S. 641, 645 n.3 (1966). The section was superseded by the national ban on literacy tests passed in 1975, 42 U.S.C.A. § 1973aa (Supp., Oct. 1975).

39. *See* Puerto Rican Organization for Political Action v. Kusper, 490 F.2d 575 (7th Cir. 1973) (Chicago); Ortiz v. New York State Bd. of Elections, Civil No. 74-455 (W.D.N.Y., July 10, 1975) (New York State other than New York City); Torres v. Sachs, 381 F. Supp. 309 (S.D.N.Y. 1974) (New York City); Arroyo v. Tucker, 372 F. Supp. 764 (E.D. Pa. 1974) (Philadelphia); Coalition for Educ. in Dist. One v. Board of Elections, 370 F. Supp. 42 (S.D.N.Y.), *aff'd*, 495 F.2d 1090 (2d Cir. 1974) (New York City); Marquez v. Falcey, Civil No. 1447-73 (D.N.J. Oct. 9, 1973) (New Jersey); Lopez v. Dinkins, 73 Civ. 695 (S.D.N.Y. Feb. 14, 1973) (New York City).

40. These include the following states (or parts of states having a substantial population in need of bilingual materials): Arizona, California, Florida, Illinois, New Mexico, New York, and Pennsylvania. *See* Library of Congress, Congressional Research Service, Memorandum, Bilingual Voter Assistance in the United States: Results of a Telephone Survey of Election Officials in the Fifty States and the District of Columbia, Mar.

Congress not only built on this experience, but also determined that the states were not meeting their responsibilities adequately or as rapidly as desired.[41]

The bilingual requirements of Title III supplement those of Title II. Title III requires bilingualism if more than five percent of the voting age citizens of a political subdivision are members of a single language minority group whose illiteracy rate is higher than the national rate.[42]

11, 1975 (on file at the *Catholic University Law Review*). *See also* TEN YEARS AFTER 23-25. The bilingual provisions and experiences of Alaska, Florida, and New Mexico were discussed during congressional debate. *See* 121 CONG. REC. H 4807 (daily ed. June 3, 1975), S 13648 (daily ed. July 24, 1975), S 13589-92 (daily ed. July 24, 1975).

41. The House and Senate Committees, however, had before them very little information on bilingual elections in the various states. What information was available is summarized in H.R. REP. No. 94-196, 94th Cong., 1st Sess. 20-22, 29-30 (1975) [hereinafter cited as H.R. REP.] and S. REP. 32-34, 39. It would seem logical that, if Congress has power under the fourteenth and fifteenth amendments to ban the use of literacy tests, it should likewise have the power to ban English-only elections. *See* notes 25 & 37 *supra*. Any possible constitutional infirmity in Title III is contained in its apparently restrictive bailout provision. *See* p. 266 *infra*.

42. The same groups are considered language minorities for Title III as for Title II. For a definition of the phrase "language minorities," see p. 262 *infra*.

The relevant section reads as follows:

> Prior to August 6, 1985, no State or political subdivision shall provide registration or voting notices . . . only in the English language if the Director of the Census determines (i) that more than 5 percent of the citizens of voting age of such State or political subdivision are members of a single language minority and (ii) that the illiteracy rate of such persons as a group is higher than the national illiteracy rate: *Provided*, That the prohibitions of this subsection shall not apply in any political subdivision which has less than five percent voting age citizens of each language minority which comprises over five percent of the statewide population of voting age citizens.

42 U.S.C.A. § 1973aa-1a(b) (Supp., Oct. 1975). These determinations are made by the Director of the Census and are not subject to judicial review. *Id.* Illiteracy is defined as "the failure to complete the fifth primary grade." *Id.* By its language, this provision requires (in a state in which members of a single language minority group constitute more than five percent of the state's voting age citizens, when that group in that state has an illiteracy rate greater than the national rate) the coverage of a five percent language minority county in which the illiteracy rate is *not* higher than the national illiteracy rate. Such a county, however, presumably can bail out from coverage immediately. *See* p. 267 *infra*. This section should be interpreted to call for a comparison of the illiteracy rate of voting age citizens of the jurisdiction in question who are members of the language minority groups with the illiteracy rate of all voting age citizens in the United States. *See* S. REP. 39. Title III has been determined to cover some or all of the political subdivisions in 30 states. 40 Fed. Reg. 41827-28, 43044-45, 49587-88 (1975).

Titles II and III leave in doubt the status of non-English-speaking groups in jurisdictions not covered by these titles and of non-English-speaking groups who are not in-

Bailout. The special provisions of the Voting Rights Act and the bilingual requirements of the 1975 Act were intended to apply only where they are needed and only for a limited period of time. Jurisdictions can remove themselves from coverage ("bail out") by making an appropriate showing to an appropriate court. In addition, Title III automatically expires on August 6, 1985.[43]

A jurisdiction covered under the Act as originally passed, or as amended in 1970, can bail out by proving to the United States District Court for the District of Columbia that during the 17 years preceding the filing of the action no test or device was used with a discriminatory purpose or effect.[44] The use of a test is disregarded if "(1) incidents of such use have been few in number and have been promptly and effectively corrected by state or local action, (2) the continuing effect of such incidents has been eliminated, and (3) there is no reasonable probability of their recurrence in the future."[45] Although a number of jurisdictions have bailed out from the 1965 or 1970

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cluded in the definition of language minorities. Sections 4(e) and 201 of the Voting Rights Act, 42 U.S.C. §§ 1973b(e), 1973aa (1970), have been interpreted together to prohibit the use of English-only elections when they discriminate against Puerto Ricans. *See* Puerto Rican Organization for Political Action v. Kusper, 490 F.2d 575, 579 (7th Cir. 1973). Because literacy tests have now been abolished nationwide, no continuing significance can be attached to section 4(e), which regulated their use. When Congress made the national test ban permanent, it did not amend the definition of test or device to include English-only elections, as it did for most purposes the definition contained in section 4(c). Instead, it enacted Titles II and III as temporary measures requiring bilingual materials for certain groups in certain jurisdictions. These Titles are now the sole federal statutory bases for requiring bilingual elections. For other groups and other jurisdictions, relief must be sought under the Constitution or under state law. *Cf.* note 50 *infra.* It should be noted, however, that this result was not deliberately intended, or even considered, by Congress. *See* S. REP. 31-37.

43. *See* 42 U.S.C.A. § 1973aa-1a(b) (Supp., Oct. 1975).

44. 42 U.S.C.A. § 1973b(a) (Supp., Oct. 1975). A jurisdiction that previously bailed out by proving 10 (or 5) years of nondiscrimination required by earlier provisions of the Act will not have proved the 17 years now required. Such a jurisdiction arguably should be automatically re-covered and required to bring a new bailout action. The Act, however, has never been interpreted to require this. Jurisdictions that bailed out between 1965 and 1970 were allowed to remain uncovered after the passage of the 1970 amendments, unless they were caught by the new trigger. *See* Pottinger Testimony, Exhibit 1, *Senate Hearings* 595-96. In considering the 1975 amendments, Congress did not discuss the possibility that jurisdictions that have bailed out would be re-covered even if they were not caught by the 1975 trigger. *See* 121 CONG. REC. H 4806-07, H 4827-29 (daily ed. June 3, 1975) (discussion of coverage of Alaska); *id.* at S 13329-30 (daily ed. July 22, 1975) (congressional staff memorandum).

45. 42 U.S.C.A. § 1973b(d) (Supp., Oct. 1975). The Attorney General is directed to consent to a bailout declaratory judgment if he "determines that he has no reason to believe that any such test or device" has been used to discriminate. *Id.* § 101(a), 42 U.S.C.A. § 1973b(a) (Supp., Oct. 1975).

coverage,[46] no Southern State covered as a whole has bailed out.[47]

Title II bailout differs only in the proof that is required. The absence of a discriminatory use of English-only elections must be proved,[48] and 10 years of nondiscrimination are required rather than 17.[49] A jurisdiction can bail out from Title III coverage by proving to the local federal district court that "the illiteracy rate of the applicable language minority group within the State or political subdivision is equal to or less than the national illiteracy rate."[50]

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46. *See* notes 13 & 22 *supra.*

47. Both the state of Virginia and Gaston County, North Carolina made unsuccessful attempts to bail out. Virginia v. United States, 386 F. Supp. 1319 (D.D.C. 1974), *aff'd per curiam,* 420 U.S. 901 (1975); Gaston County v. United States, 395 U.S. 285 (1969). Both cases rested on the theory that a literacy test has a discriminatory effect when the state provided an unconstitutionally inferior education to blacks. The Voting Rights Act, however, was based on the finding that literacy tests were used directly as discriminatory devices and that this discriminatory use of literacy tests indicated the existence of discrimination in voting generally. The enactment of a permanent national ban on the use of literacy tests provides an appropriate occasion for the reconsideration of the *Gaston* doctrine. The Senate, however, rejected an amendment to repeal the *Gaston* doctrine. *See* 121 CONG. REC. S 13658-60 (daily ed. July 24, 1975).

48. 42 U.S.C.A. § 1973b(a) (Supp., Oct. 1975). The jurisdiction must also prove the absence of discrimination on account of race, color, or membership in a language minority group in the use of other tests and devices. *Id.*

49. *Id.*

50. 42 U.S.C.A. § 1973aa-1a(d) (Supp., Oct. 1975). *But see* p. 266 *infra.* The bill reported by the House Judiciary Committee specified the United States District Court for the District of Columbia. The specification of that court was deleted in the House. See 121 CONG. REC. H 4897 (daily ed. June 4, 1975). *See also id.* at H 7632 (daily ed. July 28, 1975) (remarks of Mr. Edwards). A Title III bailout action is not restricted, however, to the local federal court, since a jurisdiction might find it more convenient to ask for a Title II and a Title III bailout in the same proceeding which would have to be brought in the District Court for the District of Columbia.

Because the proof requirements for bailout are different under the three Titles, bailout from one Title leaves unaffected a jurisdiction's status under the others. In this regard, the position of the New York counties is unique. Bronx, Kings and New York Counties are covered under determinations made under the 1970 amendments to the 1965 Act solely because of the discriminatory use of English-only elections. *See* note 36 *supra.* Because the 1975 Act excluded English-only elections from the definition of test or device for the purpose of determinations for the 1965 and 1970 triggers, 42 U.S.C.A. § 1973b(f)(3) (Supp., Oct. 1974), the New York counties should only be considered covered under Titles II and III. As a result, section 5 should not apply to New York County, because that county, unlike the other two, is not expected to be covered by Title II. S. REP 66. Moreover, coverage for the counties under the 1970 amendments presumably would last until 1991, 17 years after the order returning them to special coverage, New York v. United States, 65 F.R.D. 10 (D.D.C.), *aff'd mem.,* 419 U.S. 888 (1974), while coverage under Title II presumably, and under Title III definitely, lasts only until 1985. This result of the 1975 Act was not considered by Congress.

Although Congress excluded English-only elections from the definition of test or de-

Other Amendments. Private enforcement of voting rights is facilitated by Title IV, which authorizes private parties to use the authority of section 3 of the Voting Rights Act to apply the special remedies to any jurisdiction in the country,[51] whether previously covered or not.[52] Section 3 authority previously had been restricted to the Attorney General and had remained unused.[53] To further facilitate private enforcement, Title IV authorizes the payment of attorneys' fees to prevailing parties in voting rights cases.[54] This provision is intended to apply only when the prevailing party is seeking to vindicate or safeguard minority voting rights.[55]

In addition, in order to provide a basis for measuring progress under the Voting Rights Act, Title IV directs the Census Bureau to conduct biennial surveys of registration and voting by race in specially covered jurisdictions. The Civil Rights Commission can ask the Census Bureau to conduct additional surveys in other jurisdictions.[56]

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vice for the purpose of determinations under the 1965 and 1970 triggers, it did not make a similar exclusion for the purpose of bailout. *See* § 4(a), 42 U.S.C.A. § 1973b (a) (Supp., Oct. 1975). Thus, if English-only elections discriminated against American Indians in Neshoba County, Mississippi, that state, arguably, would not be able to bail out until 1992. (Any previously covered jurisdiction could be in a similar situation.) However, this interpretation, which was not considered by Congress, conflicts with the scheme created by Congress of establishing separate requirements and separate bailouts under the three Titles.

51. 42 U.S.C.A. § 1973a (Supp., Oct. 1975). The 1975 Act also amends section 3 by providing for its use to protect language minorities. The combined effect of these amendments was an overbreadth in section 3, which was only partially cured by section 410, added in the House. *See* 121 CONG. REC. H 4900-01 (daily ed. June 4, 1975); Pottinger Testimony, *Senate Hearings* 593.

52. When use of section 3 was restricted to the Attorney General, it was only relevant in jurisdictions not specially covered, since preclearance and the suspension of tests and devices were automatically required by the Act and the Attorney General could use federal examiners and observers without seeking court approval. Private parties will now be authorized to ask a court to send examiners and observers to a specially covered jurisdiction in the absence of action by the Attorney General. *See* H.R. REP. 33-34.

53. *See* Pottinger Testimony, *Senate Hearings* 566.

54. 42 U.S.C.A. § 1973*l*(e) (Supp., Oct. 1975).

55. This section is designed to be interpreted similarly to the attorneys' fees provisions in other civil rights statutes. A prevailing party on the other side will be awarded fees only when the suit was "frivolous, vexatious, or brought for harassment purposes." S. REP. 41; 121 CONG. REC. H 4720 (daily ed. June 2, 1975) (remarks of Mr. Edwards). *But cf.* 121 CONG. REC. H 4900-01 (daily ed. June 4, 1975) (remarks of Mr. Butler).

56. 42 U.S.C.A. § 1973aa-5(a) (Supp., Oct. 1975). This survey provision supersedes Title VIII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(f) (1970). Fiscal considerations prevented the Title VIII surveys from being carried out. *See House Hearings* 1607-25. It should be noted that the passage of the 1975 provisions did not guarantee the funding of the directed surveys. *See* S. REP. 64.

Other provisions of the 1975 Act codify the effect of constitutional amendments and Supreme Court decisions with respect to the 18-year-old vote[57] and the poll tax,[58] codify the Department of Justice regulation permitting expedited consideration of section 5 submissions for preclearance,[59] and fill minor gaps in the 1965 Act.[60]

II. Problems of Implementing Bilingualism

Although the broad requirements of the 1975 amendments are clear, problems of interpretation are apparent when the additions to the Act that resulted from the new legislation are closely examined.

Language Minorities. The Act defines language minority group to mean Asian Americans, American Indians, Alaskan natives, or persons of Spanish heritage.[61] "Asian American" is further defined, in the legislative history, to mean Chinese, Japanese, Korean, or Filipino American.[62]

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57. In the 1970 amendments, the voting age was lowered to 18. 42 U.S.C. §§ 1973bb to 1973bb-4 (1970). The Supreme Court upheld this provision only with respect to federal elections. Oregon v. Mitchell, 400 U.S. 112 (1970). Since the twenty-sixth amendment later completed the work attempted by Congress in 1970, the 1975 amendments substituted a new 18-year-old Title empowering the Attorney General to enforce the twenty-sixth amendment. 42 U.S.C.A. § 1973bb (Supp., Oct. 1975).

58. 42 U.S.C.A. § 1973h (Supp., Oct. 1975). This section was amended to take into account the twenty-fourth amendment, which prohibits the use of the poll tax as a prerequisite to voting in federal elections, and Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), which similarly prohibits its use in state elections. The change also adds the twenty-fourth amendment as a basis for the congressional authorization of enforcement by the Attorney General.

59. 42 U.S.C.A. § 1973c (Supp., Oct. 1975), *codifying* 28 C.F.R. § 51.22 (1975). The Department's interpretation of the 60-day requirement was upheld in Georgia v. United States, 411 U.S. 526, 536, 540-41 (1973).

60. The Act amends section 11 of the Voting Rights Act to prohibit multiple voting in federal elections and provides criminal penalties for violation of the provision, 42 U.S.C.A. § 1973i(e)(1) (Supp., Oct. 1975), and to protect the elections for delegates to Congress from Guam and the Virgin Islands. *Id.* § 1973i(e)(2).

61. *Id.* §§ 1973*l*(c)(3), 1973aa-1a(e). Providing protection for "language minorities" was a compromise between those who wanted to protect only persons of Spanish origin and those who wanted the bill to be drafted to protect any minority race or color group whose mother tongue is other than English. The first approach was taken in H.R. 3501 and H.R. 5552, 94th Cong., 1st Sess. (1975). For the latter approach, see Pottinger Testimony, Exhibit 37, *Senate Hearings* 710-11, and Flemming Testimony, *id.* 77-78. The second approach depended for its success on considering Mexican Americans and other persons of Spanish-speaking background to be a group protected under the fifteenth amendment because of their race or color. Although the Department of Justice had administered the Act on this assumption, which appeared to have a sound legal basis, *see* Pottinger Testimony, Exhibit 32, the fifteenth amendment approach was rejected by Congress.

62. *See* H.R. Rep. 16 n.16, which also gives a more precise definition of the other groups.

Of the four language minority groups, only one, persons of Spanish heritage, has a single language.[63] Although the Act specifies that five percent of a jurisdiction's citizen voting age population must be members of a single language minority group before Title II or Title III coverage will attach, it does not give directions for a jurisdiction that is, for example, three percent Japanese American and three percent Korean American. Although the legislative history suggests a congressional expectation that both languages be used,[64] a more reasonable interpretation would be that bilingual materials are required only if a group sharing a common language satisfies the five percent test.[65] Otherwise, a jurisdiction that was three percent Japanese American and had no residents of Korean origin would have no obligation to provide materials in Japanese, while a jurisdiction with three percent of each would be required to provide bilingual materials to both groups.[66]

The legislation does not specify which groups are to count as Asian Americans, but the intent of Congress apparently was to use that term to refer only to the four groups listed above since these are the groups of Asian origin counted by the census.[67] Because these are the principal Asian American groups, there is no pressing need to question the restriction made in the legislative history. Nevertheless, should the 1980 census reveal,[68] for

63. The Census Bureau definition of Spanish heritage, in the five southwestern states, includes persons who are of Portuguese origin, because Spanish and Portuguese surnames are indistinguishable. *See* note 62 *supra*. Thus the statement in the text is overly broad.

64. *See* 121 CONG. REC. H 4718 (daily ed. June 2, 1975) (remarks of Mr. Edwards); *id.* at H 4886 (daily ed. June 4, 1975). *But cf.* 121 CONG. REC. H 4892 (daily ed. June 4, 1975) (remarks of Mr. Duncan).

65. This interpretation should be adopted for Asian Americans but not for American Indians or Alaskan natives. For the latter groups, oral assistance, which is easier to provide, will generally be sufficient. *See generally* note 71 *infra*. In addition, the census makes separate determinations for the four Asian American groups but not for individual tribes. *See* H.R. REP. 16 n.16; BUREAU OF THE CENSUS, 1970 CENSUS OF POPULATION, CHARACTERISTICS OF THE POPULATION, UNITED STATES SUMMARY, pt. 1, § 2, at app. 15.

66. Other complications arise both for the determination of coverage and for the provision of bilingual materials. Several different languages are spoken in the Philippines. Various dialects of Chinese differ in their oral, but not their written, forms. Different versions of Spanish are spoken by persons of different national origins. Because the census gathers no information relating to these distinctions, it is reasonable to ignore them for the purposes of determining coverage. It is more difficult to ignore them, however, when the bilingual requirements are implemented. *See* note 70 *infra*.

67. *See* note 65 *supra*. Hawaiians are apparently excluded from the Asian American category even though they are counted as a group by the census because "the Hawaiian language is seldom, if ever, used . . . ." 121 CONG. REC. H 4716 (daily ed. June 2, 1975) (remarks of Mr. Edwards). *But cf.* 121 CONG. REC. H 4886 (daily ed. June 4, 1975) (remarks of Mr. Matsunaga).

68. Title III, unlike Title II and the 1970 and 1965 triggers, does not specify a de-

example, that five percent of some jurisdiction's population are Vietnamese American, a strong case could be made for requiring the provision of election materials in Vietnamese.[69]

Bilingual Elections. If a jurisdiction is covered with respect to a particular language group, whenever it "provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots," it must provide them in the language of that group.[70] An exception is made if the language historically has been unwritten, as American Indian and Alaskan native languages frequently have been. With respect to such languages, the jurisdiction is only required "to furnish oral instructions, assistance or other information relating to registration and voting."[71]

Congress did not specify how a bilingual election system was to operate, apparently preferring to allow the covered jurisdictions, the Department of Justice, and the courts to work out the details.[72] In many precincts there will be no, or very few, voters who are members of the language minority

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termination at a particular time. Coverage, therefore, should not be considered locked in by the results of the 1970 census.

69. For the bilingual provisions to be workable, there must either be a restriction on the groups to which they apply, or on the percentage of a group that must be present before the provisions are activated. There is no need, however, for both restrictions.

70. 42 U.S.C.A. § 1973aa-1a(c) (Supp., Oct. 1975). When a particular language group has a language with more than one form (*e.g.*, Chinese), or has more than one language (*e.g.*, Filipino), the covered jurisdiction must implement the bilingual requirements in a way that effectively provides for the needs of various substantial subgroups. The view was expressed during the debate that bilingual materials or assistance would only be provided in the single form, dialect, or language "generally used" by the members of the language group. 121 CONG. REC. H 4890 (daily ed. June 4, 1975) (remarks of Mr. Edwards). When two forms are in common use, the intent of the Act would not seem to allow so restrictive an interpretation.

71. 42 U.S.C.A. §§ 1973b(f)(4), 1973aa-1a(c) (Supp., Oct. 1975). Although it is not stated in the Act, the oral assistance must be in the language of the language minority group. *See* 121 CONG. REC. H 7631-32 (daily ed. July 28, 1975) (remarks of Mr. Edwards). Title III, but not Title II, contains an additional, but superfluous, clause, which was added during the Senate debate, relating to historically unwritten Alaskan native languages. *See* 121 CONG. REC. S 13654-58 (daily ed. July 24, 1975). On this provision's lack of effect, see *id.* H 7631 (daily ed. July 28, 1975) (remarks of Mr. Edwards).

72. *See* 121 CONG. REC. S 13588-89 (daily ed. July 24, 1975) (remarks of Mr. Tunney). Jurisdictions covered under Title II must satisfy the preclearance requirements of section 5, 42 U.S.C.A. § 1973c (Supp., Oct. 1975). The Department of Justice has the authority to enforce the bilingual requirements of Title II under 42 U.S.C. § 1973j (d) (1970), and to enforce Title III under 42 U.S.C.A. § 1973aa-2 (Supp., Oct. 1975). Private parties can also enforce the bilingual requirements. *See* H.R. REP. "Interim Guidelines Regarding Language Minority Groups" have been published by the Department of Justice. 40 Fed. Reg. 46080 (1975).

group or who need bilingual materials. It would be reasonable, therefore, for a jurisdiction to identify which voters require the bilingual materials and to provide the materials only for them. When different materials must be printed for each precinct, moreover, they could be printed only for those precincts in which a significant number of language minority voters reside.[73]

Inconsistent Requirements of Titles II and III. Titles II and III were intended to work together to provide bilingual elections in some jurisdictions and not only bilingual elections, but also the other special remedies of the Voting Rights Act, in other jurisdictions.[74] The scheme created by the Act, however, does not always successfully carry out this intent. Under Title II, a state as a whole apparently can be required to provide bilingual materials,[75] while Title III operates only at the county level.[76] This leads to the result that more than 100 Texas counties, covered by Title II but not by Title III, would be required to provide election materials in Spanish although less than five percent of their voting age citizens are of Spanish origin.[77] Because neither a need nor a rationale for this result was demonstrated by Congress,[78] it would be reasonable not to require bilingual elections in jurisdictions covered under Title II only because of statewide coverage and not covered under Title III, or in Title II jurisdictions which have bailed out from Title III coverage.[79]

Termination of Bilingual Requirements. A jurisdiction can bail out from Title II coverage if it can prove that its use of English-only elections was not

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73. *See* 121 CONG. REC. S 13588-89 (daily ed. July 24, 1975) (remarks of Mr. Tunney); S. REP. 39.

74. *See* H.R. REP. 22-24, 30-31.

75. 42 U.S.C.A. § 1973b(b) (Supp., Oct. 1975).

76. *Id.* § 1973aa-1a(b).

77. S. REP. 67.

78. While the legislative history contains no discussion of this issue, one possible justification for this distinction between Titles II and III might be that certain Texas counties (Dallas and Tarrent) contain large Mexican American populations although their percentage of the total is less than five. However, it is difficult to understand why Dallas and Fort Worth should be treated differently than Chicago, whose Spanish heritage population is at least as large, but also constitutes less than five percent of the total. *See* Puerto Rican Organization for Political Action v. Kusper, 490 F.2d 575, 578 n.8 (7th Cir. 1973). *Cf.* note 43 *supra.*

79. There is some indication in the legislative history that this is how the two Titles were intended to be interpreted. The Alaskan language amendment, discussed in note 71 *supra,* was placed only in Title III, although Alaska is covered under Title II. Presumably it was intended to supersede the Title II requirement, to the extent that there is a conflict. Likewise, correspondence between Senator Tunney and Assistant Attorney General Pottinger, 121 CONG. REC. S 13588-89 (daily ed. July 24, 1975), refers only to Title III, although it was intended as a general interpretation of the bilingual requirements of the Act.

discriminatory in either purpose or effect.[80] Although this should be a reasonable basis for permitting a jurisdiction to return to the use of English-only elections, a Title II bailout does not have that result since most Title II jurisdictions will also be covered by Title III.[81] And, since bailout from Title III requires proof that the literacy rate of the language minority group present in the jurisdiction is equal to, or higher than, the national rate,[82] which could be a nearly impossible test to meet even if practically all of the language minority citizens in the jurisdiction were completely literate in English,[83] a jurisdiction could remain covered under Title III despite its satisfaction of Title II requirements. However, since this result conflicts with the assessment by Congress that Title II jurisdictions had more severe problems than Title III jurisdictions,[84] it would be reasonable to interpret Title III to require the court to allow bailout if the literacy rate test is met and to authorize the court to allow bailout if the court is satisfied that there is no need for bilingual materials.[85]

Two provisions of the Act support this interpretation. First, the precise definition of literacy in the subsection specifying the coverage formula is restricted to that subsection alone,[86] which suggests that a court in a bailout

80. *See* pp. 259-60 *supra.*

81. The exceptions are the states of Alaska and Texas, which are covered as states under Title II, but some of whose political subdivisions are not covered under Title III, and Todd County, South Dakota. *See* 40 Fed. Reg. 41827, 41828, 43746, 49422, 49587, 49588 (1975); 41 Fed. Reg. 783, 1503 (1976).

82. 42 U.S.C.A. § 1973aa-1a(d) (Supp., Oct. 1975).

83. Only 4.6 percent of American citizens of voting age have not completed the fifth grade. U.S. Bureau of Census, Press Release CB75-196 (Sept. 3, 1975). Thus, 95 percent of a language group could satisfy this requirement and bilingual materials and assistance would be required for the one person in 20 who does not. On the other hand, many people who have completed the fifth grade do not know how to read and write; if the schooling was in a different country, fifth grade completion has no relationship to English literacy. The problem of finding a relevant criterion for the need for bilingual materials arises because the census does not provide statistics on the language that people actually speak but only on the "mother tongue," the language spoken in a person's home during childhood. BUREAU OF THE CENSUS, *supra* note 65, at appendix 17.

84. *See* H.R. REP. 31.

85. In addition, a jurisdiction that has bailed out from Title III, but not from Title II, should be allowed to reinstate English-only elections, although the other special remedies of the Act would apply. The Title II bailout test looks at historical rather than present discrimination, which is relevant for the other special remedies, but not for the bilingual requirement. Title II bailout, moreover, for a state covered as a whole, is not allowed for political subdivisions. Requiring one county to have bilingual elections because they are needed in another county is a result that conflicts with the desire of Congress to minimize the expense and burden of the bilingual requirements. See 12 CONG. REC. S 13588-89 (daily ed. July 24, 1975) (remarks of Mr. Tunney); S. REP. 39.

86. 42 U.S.C.A. § 1973aa-1a(b) (Supp., Oct. 1975).

action could be more flexible. Second, in contrast to bailout from pre-1975 coverage or from Title II, bailout actions under Title III are brought in the local federal district court rather than in the United States District Court for the District of Columbia.[87] This suggests that Congress wished to have a court familiar with local conditions decide whether bilingual elections are needed.[88]

There are seven states in which one or more language minority groups constitute five percent or more of the state's citizen voting age population and in which the illiteracy of those groups exceeds the national average.[89] Individual counties are not covered under Title III if the state's five percent language minority group constitutes less than five percent of the county's population.[90] There is no such exemption if the literacy rate of such a group is equal to or exceeds the national rate.[91]

This creates a dilemma. The liberal interpretation of Title III bailout advocated above only makes sense if counties can bail out individually. Otherwise a county would remain covered when there is no need for bilingual elections. However, if a county could bail out individually, then a covered county with a language minority group literacy rate equal to, or above, the national rate could bail out immediately and automatically. This would make Congress' determination that such a county should be covered a nullity.

Keeping such a county covered, however, conflicts with the clear expression of policy that individual political subdivisions should not be covered under Title III if there is no need for that coverage.[92] Consequently, individual political subdivisions should be allowed to bail out when the language minority group's literacy rate is equal to or exceeds the national rate, even if they are in one of the seven states covered by the five percent provision.[93]

Not only should individual county bailout under Title III be allowed, it

87. *Id.* § 1973aa-1a(d). *See* note 50 *supra.*

88. Moreover, a jurisdiction can be covered under Title III even if the language of the language minority group in the county is extinct. It would make no sense to prohibit such a jurisdiction from bailing out. *See* CONG. REC. S 13340-44 (daily ed. July 22, 1975) (discussion of the Chickahominy in Charles City County, Virginia).

89. These are Alaska, Arizona, California, Colorado, Hawaii, New Mexico, and Texas. 40 Fed. Reg. 41827, 43044-45 (1975). This is characterized in the Federal Register, inaccurately, as "statewide" coverage.

90. 42 U.S.C.A. § 1973aa-1a(b) (Supp., Oct. 1975).

91. *Id.*

92. *Id.*

93. The legislative history fails to indicate that a distinction between these seven states and the other states in which Title III jurisdictions are located was even intended. *See* 121 CONG. REC. H 4719 (daily ed. June 2, 1975) (remarks of Mr. Edwards).

should be required. That is, a state in which all counties are covered[94] should not be allowed to bail out in a statewide suit unless each county within it satisfies the bailout requirement. Otherwise, a county with a language minority group with a high literacy rate could balance out a county with a group with a low rate, defeating the congressional purpose of covering individual counties even if a state is not covered as a whole.[95]

Coverage under the pre-1975 Act is not triggered by the presence of any particular minority group.[96] Protection is provided for any minority race or color group, and is terminated only if there has not been discrimination through the use of tests or devices against any such group.[97] Coverage under Titles II and III, however, is based on the presence of a particular language minority group,[98] which suggests that bailout from the bilingual requirements should be allowed with respect to a particular group. There is no purpose in requiring a jurisdiction to provide materials in Spanish solely because, for example, Navajos in the jurisdiction cannot read English (or Spanish). Thus, Title III bailout should be allowed with respect to individual language minority groups.[99] Partial bailout, however, should not be allowed under Title II, for Title II coverage has, in addition to the bilingual election requirement, all the consequences of special coverage. Any racial or language minority group present in the jurisdiction is protected by the special provisions of the Act.[100]

III. CONCLUSION

The problems surrounding the bilingual election requirements of the 1975 amendments to the Voting Rights Act are largely attributable to the lack in

94. The only states in which all counties are covered are Arizona, Hawaii, and New Mexico. 40 Fed. Reg. 41872, 43045 (1975).

95. 42 U.S.C.A. § 1973aa-1a(b) (Supp., Oct. 1975). A state cannot bail out from 1965 or 1970 coverage or from Title II unless each of its counties satisfies the bailout requirement.

96. *Id.* § 1973b(b).

97. *Id.* § 4(a); *see* text accompanying note 44 *supra.*

98. 42 U.S.C.A. §§ 1973b(f)(3), 1973aa-1a(b) (Supp., Oct. 1975). The determinations of coverage have all been made with respect to particular language minority groups.

99. For the Act to be consistent, bailout should be allowed by a jurisdiction with respect to the same language minority groups that triggered coverage.

100. Representative Don Edwards, in his exposition on H.R. 6219 at the beginning of the House debate, stated that Title III bailout would be possible with respect to various groups or subgroups. His remarks concerning Title II bailout could be interpreted similarly, but there he was focusing on the problem of providing materials in several Asian languages. *See* 121 CONG. REC. H 4718 (daily ed. June 2, 1975). As a result of an amendment subsequently adopted, no jurisdiction will be covered under Title II because of the presence of Asian Americans. *See* note 34 *supra. See also* the discussion at 121 CONG. REC. H 4884-92 (daily ed. June 4, 1975), which indicates unresolved confusion about the status under the bill of language minority groups and subgroups.

Congress of a clear notion of the problem to be remedied. Congress had before it little information concerning the extent to which members of various groups cannot communicate effectively in English and the extent to which this language disability is a deterrent to effective exercise of the franchise. Congress also had little information on the effectiveness of the bilingual requirements recently imposed by state laws and court decisions.[101]

The primary concern of the early advocates of expansion of the coverage of the Voting Rights Act was not bilingual elections, but the preclearance requirement of section 5. Specifically, it was believed that Mexican Americans residing in Texas needed this protection.[102] A criterion was sought, therefore, that would single out Texas, and court cases requiring bilingual elections suggested a means to that end.[103] Thus, early drafts of the legislation used the English-only criterion to provide coverage for Mexican Americans and were designed especially to ensure coverage for Texas.[104] To overcome objections to this narrowness, the principles of the early drafts were later generalized to provide coverage for other language minority groups and to provide bilingual elections, but not section 5 coverage, for additional jurisdictions.[105]

While the voting legislation was before Congress, from January to August 1975, congressional supporters of expanded legislation were more concerned with the political implications of the legislation than with the administrative and judicial problems that would arise when Congress had finished its work. The result was greater attention to assuring that a bill showing concern for the voting problems of Mexican Americans would pass than to carefully delineating these problems (and those of other minority groups) and drafting a bill to meet them.

The 1975 Act should be interpreted with this history in mind. Greater

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101. *See, e.g.*, 121 CONG. REC. H 4733 (remarks of Mr. Butler), H 4738 (remarks of Messrs. Badillo and Goldwater), H 4747 (remarks of Mr. McClory) (daily ed. June 2, 1975), H 4747 (remarks of Mr. Frenzel), H 4825-26 (remarks of Messrs. McClory and Drinan) (daily ed. June 3, 1975), S 13642 (remarks of Mr. Tower), S 13646-47 (remarks of Mr. Bayh) (daily ed. July 24, 1975). *See also* notes 40, 41 *supra*.

102. *See* Letter and Memorandum from the Mexican American Legal Defense and Education Fund to J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division, Jan. 22, 1975, in *Senate Hearings* 771.

103. *See* note 39 *supra*.

104. H.R. 3247 and H.R. 3501, 94th Cong., 1st Sess. (1975). The latter bill explicitly protected only persons of Spanish origin. The former bill was more generally drafted but had the same effect. *See* U.S. Commission on Civil Rights, Staff Memorandum, *House Hearings* pt. 2, at 938. H.R. 3501 was designed to provide coverage for California as well as Texas, but this attempt was abandoned because a satisfactory formula could not be found. *See id.* Neither bill contained a provision like Title III.

105. *See* note 61 *supra*.

weight should be given to the clear congressional purpose—to remedy the voting problems of language minorities—than to the particular language used by Congress to fulfill this purpose. It is too early to speculate whether the bilingual requirements will be made permanent after the 10-year trial period has ended. An important distinction between the bilingual requirement and the suspension of literacy tests, which was made permanent after a 5-year trial, is that the former creates substantial administrative burdens and requires significant expenditures while the latter is practically cost free. Just as permitting illiterates to vote and providing them with assistance is not intended to encourage illiteracy, providing election materials in a language other than English is not intended to compromise the role of English as the national language but to prevent the exclusion of qualified citizens from the electoral process. The right of non-English-speaking citizens to vote can be expected to remain protected to the extent that bilingual requirements do not place unreasonable burdens on the nation's registration and voting systems.