The Proposed English Language Amendment: Shield or Sword?

Introduction

In the past few years attempts to protect the official status of the English language in American life have appeared in a variety of local and national contexts. At the local level, voters in Dade County, Florida, renounced official bilingualism in 1980, replacing it with a prohibition on government use or support of foreign languages.[1] In July, 1983, workers in Elizabeth, New Jersey, were ordered to speak only English while on the job.[2] In November, 1984, voters in California approved a proposition which urged a return to English-only ballots in the state by a 71-29 margin.[3] In all, five states have designated English their official language, Virginia as recently as 1981.[4] At the federal level, an early version of the proposed Immigration Reform and Control Act contained a declaration that "the English language is the official language of the United States,"[5] while the version of the Immigration and Reform Act that died with the 98th Congress included a requirement that applicants for legalization be either proficient in the English language or pursuing a recognized course of English language study.[6]

More important than any of these individual attempts to secure the status of English in the United States is the effort currently underway to give English explicit constitutional protection by declaring it the official language of the United States. An English Language Amendment (ELA) was introduced in the last two Congresses and has been reintroduced early in the 99th.[7] It consists of

1. N. Y. Times, Nov. 9, 1980, at A24, col. 1.
2. N. Y. Times, July 18, 1983, at B1, col. 1.
3. Los Angeles Times, Nov. 8, 1984, at 19, col. 1.
4. *The English Language Amendment, 1984: Hearings on S.J. Res. 167 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. (1984) (opening statement of Sen. Orrin Hatch, Chairman of the Subcomm. on the Constitution) (unpublished statements and testimony, on file with *Yale Law and Policy Review*) [hereinafter cited as *Hearings*].
5. *Hearings*, *supra* note 4 (testimony of Sen. Walter Huddleston at 6).
6. S. REP. No. 62, 98th Cong., 1st Sess. 107 (1983); H.R. 1510, 98th Cong., 2d Sess., 130 CONG. REC. H6065 (daily ed. June 19, 1984).
7. Former Senator S.I. Hayakawa, the author of the official language provision in the Immigration Reform and Control Act, first proposed such an amendment in 1981. In 1983, similar amendments were introduced in the House and the Senate, and the Subcommittee on the Constitution of the Senate Committee on the Judiciary for the 98th

only two sentences:

Sec. 1 The English Language shall be the official language of the United States.

Sec. 2 The Congress shall have the power to enforce this article by appropriate legislation.

Supporters of the ELA and other measures to protect the English language in the United States base their proposals on a venerable idea, one reaching back at least to biblical times: a common language is a strong bond of nationhood.[8] The Select Committee on Immigration and Refugee Policy based its recommendation for continuing the language requirement for naturalization on this idea, simply quoting Noah Webster's famous dictum that "a *national language* is a bond of *national union*."[9] In justifying the additional burden of a requirement that aliens seeking legalization study English, Representative Jim Wright admitted that this demand was inconsistent with the policy of other Federal programs, but stated that such a requirement was necessary to reverse a national trend toward "balkanization" because "language is the thread, the common thread, that ties us all together."[10] In supporting inclusion in the Immigration Reform Act of a declaration that English is the official language of the United States, the Senate Judiciary Committee warned, "If language and cultural separatism rise above a certain level, the unity and political stability of the nation will — in time — be seriously diminished."[11] This truism supports such a declaration, however, only if the Senate Judiciary Committee believes that such a point is already near and that limiting linguistic and cultural "separatism" depends largely on protecting the language.

During the hearings on the ELA before the Senate Subcommittee on the Constitution, Gerda Bikales, the executive director of *U.S. English*, an organization formed to combat the displacement of the English language from official life, described how general cultural and political fragmentation has created a situation in which "English

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Congress held hearings on the proposed amendment on June 12, 1984. *See Hearings*, *supra* note 4. The ELA was reintroduced in the Senate in S.J. Res. 20, 99th Cong., 1st Sess., 131 CONG. REC. S468 (daily ed. Jan. 22, 1985), and in the House in H.R.J. Res. 96, 99th Cong., 1st Sess., 131 CONG. REC. H167 (daily ed. Jan. 24, 1985).

8. J.A. FISHMAN, LANGUAGE AND NATIONALISM 44 (1972); A. OSTROWER, LANGUAGE, LAW, AND DIPLOMACY 589 (1965).

9. STAFF OF COMMITTEES ON THE JUDICIARY: HOUSE OF REPRESENTATIVES AND UNITED STATES SENATE, 97TH CONG., 1ST SESS., FINAL REPORT ON U. S. IMMIGRATION POLICY AND THE NATIONAL INTEREST 289 (Comm. Print 1981).

10. 130 CONG. REC. H6066 (daily ed. June 19, 1984) (statement of Rep. Wright).

11. S. REP. No. 62, 98th Cong., 1st Sess. 7 (1983).

. . . is no longer *a* bond but *the* bond between all of us."[12]

As these statements show, an acceptance of the language/nationhood link can lead to the conclusion that threats to the hegemony of English in the United States may strike at the very heart of our political and cultural institutions. The urgency with which proposals to protect English are being pressed in turn reflects a belief that other national bonds have already been weakened to such an extent that language is our last hope, or that language usage is itself such a powerful determinant of national identity that other national bonds are ineffective without a national language.

Part I of this comment examines the demographic and political changes in American life that lie behind the sudden surge in efforts to protect English and relates the ways the ELA's supporters think the amendment will help reverse these trends. Part II questions the fundamental socio-linguistic assumptions underlying the nationhood/language link and rejects the dark demographic predictions of the ELA's supporters. Part III describes how the present supporters of the ELA resemble the Americanizers of the early 20th Century and recasts the debate in terms of a struggle between two opposing visions of American life: Anglo-conformity and cultural pluralism. Building on the previous sections, Part IV argues that we

12. *Hearings*, *supra* note 4 (testimony of Gerda Bikales at 6). Representative Norman D. Shumway, the sponsor of the ELA in the House, uses the same rhetoric:

> I believe such protection is fitting and proper for the language which has been for over two centuries one of our nation's strongest unifying forces. The U.S. has always prided itself on the national unity it has achieved despite the ethnic, religious, and cultural diversity of our nation. . . .it is therefore past time that the importance of the English language, and the contribution our common tongue has made to our social cohesion and political stability, be officially recognized.

Hearings, *supra* note 4 (testimony of Rep. Norman D. Shumway at 1-2).

Senator Quentin N. Burdick, a co-sponsor of the ELA, similarly discounts other elements of American unity while elevating the English language to a place of precious primacy:

> The English Language has been the centripetal force in American Society, bringing together in the rewards and obligations of citizenship people from all races, religions, and cultural traditions. Americans know instinctively that, without a common language, our differences, now a source of national strength and personal pride, would become unmanageable and irreconcilable.

130 CONG. REC. S385 (daily ed. Jan. 30, 1984) (statement of Sen. Quentin N. Burdick).

Writing in 1916, Edward A. Steiner made much the same point:

> A cleavage in the language now would mean to us a cleavage of the nation in its most vulnerable if not in its most essential part . . . The Hungarian, who equally dislikes the Czesch, will try to make a place for Magyar as the class-room language, and with Scandinavian, Finnish, Yiddish, and other languages clamoring for the same privilege, we may at once say good-bye to the unity of the United States.

Mr. Steiner went on to say, however, that, "The acceptance of this country's language by the immigrant is essential; but it is a mistake to force it upon him." E. STEINER, NATIONALIZING AMERICA 102-105 (1916).

must reject the ELA and the re-emergence of Anglo-conformity that it represents.

I. *Why the ELA?*

A. *The First Problem: The Demographic Threat*

The current debate over the status of the English language in the United States is largely a debate over the nature and seriousness of the problems posed for American political and cultural institutions by Spanish speakers in the United States. Though facially neutral, most attempts to protect English have been specifically targeted at Spanish speakers.[13] Moreover, the supporters of the ELA acknowledge that English needs constitutional protection at this late date in our nation's history because of the unique threat posed by the growing Spanish-speaking population of the United States.

The proponents of the ELA are at least partially correct: the situation of Spanish speakers in the United States may actually be "unique" in several significant respects. First, Spanish speakers are not all immigrants. Some Spanish-speaking populations in the Southwest and California have a longer history than do Anglo-American settlers.[14] Second, Mexico and Latin America provide an apparently unstoppable flow of new Spanish speakers into the United States, some of whom settle permanently, but many of whom move back and forth across the border as economic and political pressures change. Puerto Rico too provides a constant flow of legal residents in both directions. Finally, some Spanish-speaking communities may have become large enough to sustain themselves as essentially monolingual Spanish enclaves within the larger English-speaking society. Substantial Cuban-American communities exist in Florida and other areas of the United States. The largest Hispanic population in the United States, mostly of Mexican origin (legal and illegal), is heavily concentrated in the urban areas of the Southwest. Puerto Ricans provide the greatest number of Spanish-speakers in the Northeast, most of whom live in New York. Each of these enclaves is large enough to be self-supporting. In the face of traditional American hostility to non-Anglo-Saxon immigrant groups, it should be no surprise that these Spanish-speaking communities band tightly together. It is also a safe bet that they are likely to

13. As were the actions taken in Florida, New Jersey and California described in the opening paragraph of this comment, *supra* notes 1-3 and accompanying text.

14. Christian & Christian, *Spanish Language and Culture in the Southwest*, in LANGUAGE LOYALTY IN THE UNITED STATES 1 (J.A. Fishman ed. 1966).

continue to do so.[15]

All these elements — a substantial indigenous population; a continuing influx of new Spanish speakers; large, densely populated areas that are essentially monolingual Spanish; a high percentage of sojourners with no long-term commitment to American society — promote mother-tongue maintenance and may slow English acquisition.[16] A high Hispanic birth rate in the United States and even greater population pressure in Mexico ensure that these trends will continue.[17]

Census and other data seem to confirm that the disincentives to assimilation inherent in the situation of most Spanish speakers in the United States may be overwhelming the traditional economic and political incentives to acquisition of English, namely jobs requiring English, the mass media and social pressure.[18] Though essentially monolingual Spanish speakers, Puerto Ricans are already U.S. citizens, while newcomers from Mexico have an extremely low naturalization rate, probably because of the high numbers of sojourners and the closeness of their homeland.[19] Though the income levels of the different Spanish-origin groups vary, approximately 30 percent of all persons of Spanish origin had incomes below the poverty level in 1982.[20] Despite educational advances, Hispanic educational achievement continues to lag when compared to that of either white or black Americans. So far at least, education, including bilingual education, has not been able to integrate these people into

15. *See* Baily, *Status of the Hispanic Population in the United States*, *reprinted in* CONGRESSIONAL RESEARCH SERVICE FOR THE SUBCOMM. ON CENSUS AND POPULATION OF THE HOUSE COMM. ON POST OFFICE AND CIVIL SERVICE, REPORT ON THE HISPANIC POPULATION OF THE UNITED STATES: AN OVERVIEW, H.R. REP. No. 7, 98th Cong., 1st Sess. 8 (1983).

16. Lieberson, Dalto & Johnston, *The Course of Mother-Tongue Diversity in Nations*, 81 AM. J. SOC. 34-61 (1975). *See also* Forbes & Lemos, *The History of American Language Policy*, *reprinted in* STAFF OF COMMITTEES ON THE JUDICIARY: HOUSE OF REPRESENTATIVES AND UNITED STATES SENATE, 97TH CONG., 1ST SESS., FINAL REPORT ON U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST Appendix A at 20-27 (Comm. Print 1981); Fishman & Hofman, *Mother Tongue and Nativity in the American Population*, in LANGUAGE LOYALTY IN THE UNITED STATES 47 (J.A. Fishman ed. 1966).

17. Baily, *supra* note 15, at 7.

18. For example, according to Gerda Bikales, there are more than 300 Spanish-language television stations and 200 radio stations serving Spanish speakers, a situation qualitatively, as well as quantitatively, different from any experienced by earlier immigrant groups. U.S.A. Today, April 10, 1985 at 8A.

19. S. REP. No. 62, 98th Cong., 1st Sess. 7 (1983).

20. "In 1978, 20 percent of all Spanish-origin families in the Nation, or 559,000 Spanish-origin families, were living below the poverty level." Baily, *supra* note 15, at 11. In 1982, 29.9 percent of all persons of Spanish origin were living below the poverty level. BUREAU OF THE CENSUS, U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 474 (1984) [hereinafter STATISTICAL ABSTRACT].

American society.[21]

In specifically linguistic terms the same picture seems to be emerging. The 1980 census reveals that over eight million adults and almost three million children speak Spanish at home, and of these, 27.6 percent of the adults and 15.4 percent of the children have difficulty speaking English.[22] Of the 310 jurisdictions required to provide multilingual ballots under the Voting Rights Act of 1975,[23] 281 involve Spanish speakers.[24] Spanish-speaking children also make up approximately 80 percent of the total enrollment in bilingual education programs.[25]

B. *The Second Problem: Good Intentions Gone Awry*

If an apparently unstoppable, unassimilable growth of the Spanish-speaking population in the United States is the obvious problem underlying efforts to protect American culture by protecting the English language, the perception that attempts by an activist federal government to solve this problem may actually be making it worse is the second factor behind the current drive to grant official protection to the English language. As the statistics in the section above reveal, Spanish speakers are overwhelmingly the target group of both multilingual ballot provisions and bilingual education programs. The Federal government has responded to the explosive growth of the Spanish-speaking population in the United States with these programs in an attempt to ease and encourage Hispanic assimilation into the mainstream of American culture. Decisions of the judiciary have played a major role in legitimizing, even mandating, greater national governmental involvement in the mechanisms of assimilation. In particular, the revolution in the conception of due process and equal protection symbolized by *Brown v. Board of*

21. STATISTICAL ABSTRACT, *supra* note 20, at 144. *See also Demographic and Socioeconomic Characteristics of the Hispanic Population: Results from the 1980 Census: Hearings Before the Subcomm. on Census and Population of the House Comm. on Post Office and Civil Service*, 98th Cong., 1st Sess. 277 (1983) (statement of Kirk Brown).

22. STATISTICAL ABSTRACT, *supra* note 20, at 43.

23. 42 U.S.C. §§ 1971-1973 (1981 & Supp. 1985).

24. A. LEIBOWITZ, FEDERAL RECOGNITION OF THE RIGHTS OF MINORITY LANGUAGE GROUPS 8 (1982).

25. Boren, *Education of Hispanics: Access and Achievement*, *reprinted* in CONGRESSIONAL RESEARCH SERVICE FOR THE SUBCOMM. ON CENSUS AND POPULATION OF THE HOUSE COMM. ON POST OFFICE AND CIVIL SERVICE, REPORT ON THE HISPANIC POPULATION OF THE UNITED STATES: AN OVERVIEW, H.R. REP. NO. 7, 98th Cong., 1st Sess. 18 (1983) At the same time, however, only approximately one half of the limited-English-speaking (LES) and non-English-speaking children in the United States were being served by bilingual education programs in 1976. *Id.* at 18.

Education[26] has manifested itself in several federal court decisions touching upon language issues and the rights of language minorities.

The most striking thing about these court decisions is that they tread, but do not cross, the line of constitutionalizing language rights, despite the urging of plaintiffs and scholarly commentary to do so.[27] In several cases, the Supreme Court has upheld the power of Congress to pass legislation under the 14th Amendment to remove language barriers to participation in political processes.[28] In *Katzenbach v. Morgan*[29] the Court upheld provision 4(e) of the Voting Rights Act of 1965,[30] which suspended state English literacy requirements if the voter had completed the sixth grade in an American flag school where the language of instruction was other then English. Section 4(e) was enacted largely in response to the large numbers of Spanish-speaking Puerto Ricans disenfranchised by the English literacy requirements in New York State's Constitution.[31] Similarly, a series of other federal and state decisions prompted the Congress to enact the multilingual ballot provisions of the Voting Rights Act Amendments of 1975.[32]

The major case behind the Court Interpreters Act of 1978,[33] *United States ex rel. Negron v. New York*,[34] spoke the language of constitutionally mandated due process without explicitly finding a violation of constitutional proportions in the failure of a criminal court to provide a translator to a non-English-speaking defendant.[35] Other

26. 349 U.S. 294 (1955).

27. Grubb, *Breaking the Language Barrier: The Right to Bilingual Education*, 9 HARV. C.R.-C.L. L. REV. 52 (1974); Comment, *Cultural Pluralism*, 13 HARV. C.R.-C.L. L. REV. 133 (1978); Comment, *Language Discrimination Under Title VII: The Silent Right of National Origin Discrimination*, 15 J. MAR. L. REV. 667 (1982); A. LEIBOWITZ, *supra* note 24, at 11.

28. For a discussion of several decisions, see Leibowitz, *The Official Character of Language in the United States: Literacy Requirements for Immigration, Citizenship, and Entrance into American Life*, *reprinted* in STAFF OF COMMITTEES ON THE JUDICIARY: HOUSE OF REPRESENTATIVES AND UNITED STATES SENATE, 97TH CONG., 1ST SESS., FINAL REPORT ON U. S. IMMIGRATION POLICY AND THE NATIONAL INTEREST Appendix A at 430 (Comm. Print 1981).

29. 384 U.S. 641 (1966).

30. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1976)).

31. Leibowitz, *supra* note 28, at 432.

32. *Id.* at 434, 460 n.143 (cases cited).

33. Court Interpreters Act, 28 U.S.C. § 1827 (1978).

34. 434 F.2d 386 (2d Cir. 1970).

35. In a much more recent case involving an excludable alien's right to translation services during exclusion proceedings, the Second Circuit found violations of the alien's statutory procedural rights and "very likely" violations of constitutional due process as well. Still, the "process due" was not the result of direct constitutional mandate but was the product of Congress's intent, embodied in a rule of positive law, to provide a hearing "without regard to language skills." Augustin v. Sava, 735 F.2d 32 (2d Cir. 1984).

courts have either split on the issue or refused to impose translation requirements on specific governmental programs and services. But whatever decision they did reach, all denied that translation was a constitutional requirement.[36] Though the EEOC has sometimes assumed otherwise, several courts have held that language discrimination is not impermissible national origin discrimination,[37] and some have gone so far as to voice concern about the dangers of linguistic fragmentation.[38]

Like all of the above decisions, the Supreme Court case with the greatest impact on language policy in the United States, *Lau v. Nichols*,[39] managed to resist the explicit constitutionalization of language rights. In *Lau*, Chinese children in San Francisco public schools who had not mastered English claimed that their placement in English-only classrooms violated their constitutional right to equal protection. Both the District Court and the Ninth Circuit rejected the petitioners' equal protection claims. The Supreme Court reversed, but avoided the constititional issue. Instead the Justices gave the force of law to HEW regulations issued under the Civil Rights Act of 1964 that directed school boards to rectify the discriminatory effects of children's language deficiencies. Though the *Lau* decision itself left open the question of specific remedies, HEW reacted with the "Lau Remedies", specific guidelines that imposed a particular form of bilingual education on the nation's public schools.[40] For good measure, Congress itself codified the Court's holding in the Equal

36. Soberal-Perez v. Heckler, 717 F.2d 36 (2d Cir. 1983); Carmona v. Sheffield, 325 F. Supp. 1341 (N.D. Cal. 1971). For other cases, see A. LEIBOWITZ, *supra* note 24, at 17.

37. *See* Comment, *Language Discrimination Under Title VII: The Silent Right of National Origin Discrimination*, 15 J. MAR. L. REV. 667 (1982).

38. In essence, plaintiffs' contention would require the State of California and, presumably, all other States and the Federal Government to provide forms and to conduct its affairs and proceedings in whatever language is spoken and understood by any person or group affected thereby. The breadth and scope of such a contention is so staggering as virtually to constitute its own refutation. If adopted in as cosmopolitan a aociety as ours, enriched as it has been by the immigration of persons from many lands with their distinctive linguistic and cultural heritages, it would virtually cause the processes of government to grind to a halt. The conduct of official business, including the proceedings and enactments of Congress, the Courts and administrative agencies, would become all but impossible.

Carmona v. Sheffield, 325 F. Supp. 1341,1342 (N.D. Cal. 1971). *See also* Guadalupe Org. Inc. v. Tempe Elementary School Dist. No. 3, 587 F.2d 1022, 1027 (9th Cir. 1978) ("Linguistic and cultural diversity within the nation-state, whatever may be its advantages from time to time, can restrict the scope of the fundamental compact. Diversity limits unity.").

39. 414 U.S. 563 (1974).

40. *See* Rotberg, *Some Legal and Research Considerations in Establishing Federal Policy in Bilingual Education*, 52 HARV. EDUC. REV. 303 (May 1982); McFadden, *Bilingual Education and the Law*, 12 J. OF LAW & EDUC. 1 (Jan. 1983); Roos, *Bilingual Education: The Hispanic Response to Unequal Educational Opportunity*, 42 LAW & CONTEMP. PROBS. 111 (AUT. 1979).

Educational Opportunity Act of 1974.[41]

There is a high degree of congruence between judicial expansion of minority language rights and legislative and executive policy in the area. In some instances the courts have applied provisions of enacted civil rights legislation, while in others Congress and the executive branch have reacted quickly and forcefully to judicial initiatives. In the area of bilingual education in particular, the political branches, perhaps for political reasons, have shown an even greater zeal for expanding language rights than have the courts.[42] Nevertheless, it is worth repeating that the judiciary has consistently refused irrevocably to consitutionalize minority language rights in the United States and that the political branches have generally not called for the courts to do so.

Supporters of the ELA, however, seek to constitutionalize majority language rights precisely because they believe that well-intentioned but misguided judicial and political actions have not solved the problems posed by Spanish-speaking populations in the United States; rather these actions have exacerbated the problems to such a degree that only a constitutional amendment can undo the damage already done and prevent similar threats to our national language and national well-being in the future.

Supporters of the ELA argue that bilingual education and multilingual ballots discourage rather than encourage assimilation, send mixed signals about what is important in American life, encourage separatism and hostility toward American ideals, and benefit no one other than Hispanic political leaders and their minions. They see Canada as the dark model of what will happen in the United States if the government continues to promote programs that create disincentives to learn English while doing nothing to protect our common language from the threat of language-based separatism.[43]

In their statements before the Senate Subcommittee on the Constitution, the ELA's supporters listed both what they intend the amendment would do and what it would not. All agreed that multilingual ballots would go. Bicultural and language maintenance elements of bilingual education programs would be purged, and bilingual education would be narrowly restricted to programs whose sole purpose is the rapid acquisition of English.[44] Senator Huddle-

41. 20 U.S.C. § 1703(f) (Supp. V 1975).
42. Rotberg, *supra* note 40.
43. *Hearings*, *supra* note 4 (testimony of Rep. Norman D. Shumway at 2; testimony of Sen. Quentin N. Burdick at 4; testimony of Sen. Walter D. Huddleston at 5).
44. In the words of President Reagan, "It is absolutely wrong and against American

ston stated that the amendment would apply to all governments, state and local as well as federal.[45] At the same time, sponsors of the ELA argue that passage of the amendment will have no effect on the teaching of foreign language courses in the schools or the use of foreign languages in private contexts. Senator Huddleston specifically exempts the use of foreign languages for public safety, claiming such an amendment, "would not deny individuals their civil rights or, as some have referred to them, their linguistic and cultural rights."[46] Of the amendment's supporters, only Gerda Bikales mentions the question of Puerto Rican statehood, asserting that, "it would be wise to settle firmly on the language of the nation before Puerto Rican statehood is up for consideration."[47]

Even after passage, the ELA's supporters believe its symbolic effects would be at least as important as its specific legal ramifications. According to its sponsors, passage would assure the national concensus concerning the importance of a common language, without which even a pluralistic society cannot exist. Most importantly, a post-ELA world would send a clear message to immigrants and non-English speakers that mastery of English is a prerequisite to participation in American society. Instead of sending mixed signals to newcomers, the United States would restore the incentives to assimilation that well-meaning but misguided government programs have destroyed.

II. *Doubtful Assumptions, Doubtful Data*

In an era in which "old-fashioned" patriotism is popular again,[48] prospects of significant immigration reform are rapidly receding, and monolingual English speakers often feel like aliens in their own land,[49] the argument that difficult problems can be eased or solved

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concepts to have a bilingual education program that is now openly, admittedly dedicated to preserving their native language and never getting them adequate in English so they can get out in the job market and participate." *Hearings*, *supra* note 4 (opening statement of Sen. Orrin Hatch at 3).

45. *Hearings*, *supra* note 4 (testimony of Sen. Walter D. Huddleston at 7).

46. *Id.*

47. *Hearings*, *supra* note 4 (testimony of Gerda Bikales at 8). As Ms. Bikales surely knows, passage of the ELA would severely diminish any chance of Puerto Rican statehood in the foreseeable future.

48. Consider the show of American patriotism at the 1984 Summer Olympics in Los Angeles and the popularity of Ronald Reagan, a politician who has capitalized on simple, "old-fashioned" notions of patriotism.

49. In some major metropolitan areas *English is the second language*. Minorities, who speak only English, are being told that they must learn a foreign language in order to be eligible for a job in parts of this country. And, in many stores, non-English languages are the only ones used to conduct business.

simply by granting English the constitutional protection it "obviously" deserves is quite seductive. Unfortunately, the assumptions, arguments, conclusions —and in some cases, the motives — of the ELA's supporters are highly suspect.

A. *Statistical and Linguistic Weaknesses*

First, the statistical arguments made by the amendment's proponents are flawed and unpersuasive. For example, there is serious doubt whether a problem of the kind or magnitude described by the sponsors of the ELA actually exists. Some researchers contend that Spanish speakers are following the traditional pattern of English acquisition, only at a pace slowed somewhat by the continual influx of large numbers of Spanish speakers. Calvin Veltman, a sociolinguist who has studied Spanish-speaking communities in the U.S., concludes that: "Hispanics will survive as an ethnic identity, but not as a language group. If the border closed, Spanish would fade out."[50] If Veltman is correct, then the problem is much smaller than imagined and is more a result of migration patterns than language policy. Attempting to solve the problem with a constitutional language amendment aimed solely at language usage would seem to be inappropriate at best, and at worst, counterproductive.

Second, even accepting the idea that language and nationhood are linked, it does not follow that language is not just *a*, but *the* most important bonding force of a people. Language is only one of a multiplicity of factors that can bind or rend a people, a fact that was manifestly apparent to the Founding Fathers. It is true that the enlightenment theory that lay behind the birth of the United States explicitly embraced the idea that a common language was essential for successful nations.[51] But other forces in our early history led in another direction. The core notions of individual liberty and tolerance upon which the new nation was based (and which arguably justified its very existence), as well as the obvious supremacy of the English language in national life, militated against any inclination to grant English official status or special protection.[52] Also, the fact that the United States was breaking away from a nation that spoke

Hearings, *supra* note 4 (testimony of Sen. Walter D. Huddleston at 4, emphasis in original).

50. Ingwerson, *A Tale of 2 Languages: For Hispanic Immigrants, Shift to English is Slow, but Sure*, Christian Science Monitor, Aug. 22, 1983, at 1, col. 1 (quoting Veltman).

51. Forbes & Lemos, *supra* note 16, at 39-45.

52. Heath, *A National Language Academy? Debate in the New Nation*, 11 INT. J. OF SOCIOLOGY OF LANGUAGE 9,10 (1976).

the same language tended to undermine some aspects of the argument for the link between language and nationhood, even leading to some strained attempts to distinguish English from the American language.[53] The results of a study which examined the voting patterns in linguistically and religiously divided countries also undermine the simple equation of obviousness with importance. Though language was a strong second, religion was found to be the most important determinant of voting behavior.[54]

The sociolinguist Karl Deutsch provides a vivid anecdotal confirmation that language is neither the only nor the most important bond of a people. A prominent German-Swiss editor reported the following experience:

> I found that my German was more closely akin to the French of my [French-Swiss] friend than to the likewise German (Ebenfallsdeutsch) of the foreigner. . . . The French-Swiss and I were using different words for the same concepts, but we understood each other. The man from Vienna and I were using the same words for different concepts, and thus we did not understand each other in the least.[55]

Deutsch explains this seemingly counter-intuitive outcome in this way:

> The Swiss may speak four different languages and still act as one people, for each of them has enough learned habits, preferences, symbols, memories, patterns of landholding and social stratification, events in history, and personal associations, all of which together permit him to communicate more effectively with other Swiss than with the speakers of his own language who belong to other peoples.[56]

Supporters of the ELA seem to be making precisely the mistake of equating the obviousness of language usage with its importance to national unity. Of course, they do not claim that language is the only bond of the American people, but the ease with which they dismiss other elements of national unity and their eagerness to elevate English to a role as the primary (if not the only) guardian of the

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53. Thus, the apocryphal stories that the Founding Fathers appreciated the importance of English in the United States so little and wanted to break with Great Britain so completely that they seriously considered declaring German or Greek the official language of the United States are only slightly less indicative of the colonial attitude toward English than the historically genuine musings of Jefferson on the linguistic dangers to fragile political institutions, the fulminations of Franklin against German speakers in Pennsylvania, and the quixotic quest of Webster to force "Federal English" on an unconcerned nation. *See* D.E. BARON, GRAMMAR AND GOOD TASTE 7 *passim* (1982); Heath, *supra* note 52, at 36.

54. Lijphart, *Religious v. Linguistic v. Class Voting: The Crucial Experiment of Comparing Belgium, Canada, S. Africa, and Switzerland*, 73 AM. POL. SCI. REV. 442 (1979).

55. K. DEUTSCH, NATIONALISM AND SOCIAL COMMUNICATION 97 (1966).

56. *Id.*

American way of life reveal that their allusions to notions of cultural diversity are little more than perfunctory. For instance, before reaching her conclusion that English is "no longer *a* bond but *the* bond between all of us," Gerda Bikales outlines the components of nationhood by reference to the criteria of John Jay:

- A large expanse of connected, contiguous territory;
- Descent from common ancestors;
- A common language;
- Attachment to the same principles of government;
- Similarity of manners and customs;
- A long and common history of war, suffering and a happy outcome;
- Readiness to forget past intergroup conflicts.[57]

Even accepting the continuing validity of such Enlightenment criteria, a list of this sort should serve only as a starting point for a serious inquiry into the health of our national committment. Such an inquiry would involve an analysis of the list for under- or over-inclusiveness, a ranking of relative importance of each element, and a consideration of the precise status of each component in today's society. Even prior to such steps, "unity" and "national commitment" would have to be defined in terms of a coherent vision of American society.

Instead of engaging in such an inquiry, Bikales immediately dismisses all but two of the elements on her list: a common language and a commitment to democratic governance. Doubtful even of our commitment to democratic ideals, she suggests that perhaps only "one and a half" of the necessary components still survive. In Bikales' view, then, we are justified in focusing our energy on defending the English language because English is all that remains.[58]

Admittedly, foreign language use is the most striking symbol of foreignness itself. There is little doubt that acquisition of a nation's language audibly manifests an immigrant's desire to join the mainstream of society, while at the same time removing the veil of incomprehension that appears to threaten both sides. It is not so clear, however, that a mastery of English is a prerequisite for commitment to American ideals or that speaking English assures loyalty to American values. Yet, as Bikales' testimony shows, this fact is easily lost

57. *Hearings*, *supra* note 4 (testimony of Gerda Bikales at 4-5).

58. *Hearings*, *supra* note 4 (testimony of Gerda Bikales at 6). Other supporters of the amendment say even less about the possibility that forces other than language usage can bind a nation together.

when forced to compete with the immediate symbolic impact of language use.

B. *The Canadian Analogy*

Just as supporters of the ELA feel it is unnecessary to delve deeply into their sociolinguistic assumptions and empirical data, they casually depict a nightmarish vision of separatist Quebec as the inevitable future of the United States if we fail to protect English now.[59] Once again, however, the purveyors of these warnings rely completely on their "obvious" correctness and immediate emotional impact, without any careful examination of the cultural, political, historical, religious and linguistic differences between Canada and the United States. Calvin Veltman completely rejects any linguistic comparison between the French-speaking population in Quebec and Spanish speakers in the United States, noting that in Quebec only 2 percent of native speakers of French become primarily English speakers, while in the American Southwest, 60 percent of the Spanish speakers adopt English as their language.[60]

Lawrence H. Fuchs identifies five factors whose different roles in the two societies make Mexican-American separatism of the Quebec sort extremely unlikely in the United States: language itself; territory, political memory, and geographic mobility; the church; politics; and the founding myths. Considering all of these factors, Fuchs concludes that fears of Mexican-American separatism comparable to the movement in Quebec "appear to be groundless."[61]

A potentially destructive irony may also lurk in the reliance on the prospect of a Quebec-like future to promote the English Language

59. *Hearings*, *supra* note 4 (testimony of Rep. Norman D. Shumway at 2; testimony of Sen. Quentin N. Burdick at 4; testimony of Sen. Walter D. Huddleston at 5).

60. Quoted in Ingwerson, *supra* note 50, at 13.

61. (1) *Role of Language*—Unlike the French-speaking Quebecois, Mexican-American leaders strongly favor the acquisition of English even while promoting cultural and ethnic maintenance. (2) *Role of territory, political memory and geographic mobility*—Most Mexican-Americans in the United States are immigrants or descendants of immigrants who feel no historic sense of defeat and loss. At the same time, they do not constitute a majority in any state or region in the United States and have adopted the migratory patterns of other Americans. (3) *Role of the Church*—Unlike the Quebec Catholic Church, the Catholic Church in the United States is national and assimilationist. (4) *Role of Politics*—Unlike the political system in Canada, American politics is integrationist, with involvement in it promoting assimilationist, nationalizing values. (5) *Role of the Founding Myths*—Canada's founding myth is based on the idea of national union between two nations, each with its own separate language, culture and religion; in sharp contrast, the founding myth of the United States is premised on the idea of individuals forming a nation to protect their liberties free from group controls. Fuchs, *Immigration, Pluralism and Public Policy: The Challenge of the Pluribus to the Unum*, in U.S. IMMIGRATION AND REFUGEE POLICY 289, 308-310 (M. Kritz ed. 1983).

Amendment. According to Maxwell Yalden, the commissioner of official languages for Canada, "We do not have the separatist problem in Canada because we have two languages. We have the problem because we refuse to give status to the other [French] language."[62] If Yalden is correct, supporters of the ELA may be playing the role of characters in Greek tragedy who bring about their fate through their efforts to avoid it.

III. *Lessons from The Americanization Movement*

Though the ELA supporters' use of Canadian history and their frequent reverential references to the United States' past performance as a "melting pot" reveal little about the merits of the arguments for promoting national unity through protection of the English language, a deeper look at our actual as opposed to imagined history — specifically that of the Americanization movement of seventy years ago — points to the two least visible but most important elements in the debate over the ELA. The first has to do with the nature of language issues themselves; the second with our vision of ourselves as a society.

A. *Language as an Offensive Weapon*

Language diversity did not become a major issue in American life until the beginning of the twentieth century, when massive waves of immigrants from Southeastern Europe began landing on our shores and crowding our cities. The reaction to these newcomers was far from uniform: some welcomed them and were genuinely concerned for their well-being; others feared and detested them for racial or other xenophobic reasons and hoped to be rid of them, or at least "neutralize" their effect on American society, as quickly as possible. All agreed, however, that the new immigrants already here must be "Americanized" — for their own good, for America's good, or both. From this morass of contradictory impulses and assumptions, the "Americanization" movement of the first two decades of the twentieth century was born with a single goal: making Americans out of foreigners as quickly as possible.

Though in theory only one of several elements important in the definition of an assimilated American, language became in practice the major, if somewhat schizophrenic, focus of the Americanization

62. Turbak, *Bilingualism: Terrible Time Bomb?*, KIWANIS MAGAZINE 21,22 (June-July 1984).

movement. English language education emerged as the chief goal (and perhaps the only lasting product) of its positive program, while the exclusion of the new immigrants from American Society through the use of onerous English language requirements for entry, employment and political participation was a major part of its nativist and restrictionist agenda.[63]

"English First" was accepted as a cornerstone of the Americanization movement by all concerned: progressives who welcomed the new immigrants but feared they would be culturally and politically exploited and physically threatened without knowledge of English; employers who wanted simultaneously to communicate with and socialize a docile work force; nativists who, though resigned to the presence of those immigrants already here, feared the corrupting influence of the foreign ideas carried by foreign tongues; and perhaps most of all, the immigrants themselves, the vast majority of whom truly desired to enter the mainstream of American society. By the end of World War I, in the closing years of the Americanization movement, reporters for *The New Republic* attending the last national Americanization conference concluded that the conference participants thought about Americanization "as chiefly and exclusively a problem in English instruction."[64] To a large extent, this assessment was correct, and if the English language instruction and adult education programs that emerged from the movement were its

63. By 1918, over one hundred national bodies and six Federal government agencies claimed to be dealing with immigrant education, the main thrust of which was the English language. But one should not impose late-twentieth century notions of government involvement on early-twentieth century activities. The motive force for the Americanization movement came from private business, civic and patriotic organizations and from local and state governments. These included such civic and patriotic groups as the Daughters of the American Revolution, the YMCA and the American Legion; business interests such as the Ford Motor Company and the National Association of Manufacturers; organizations formed especially to promote Americanization such as the National Americanization Committee and The North American Civic League; and immigrant organizations such as the Educational Alliance (Jewish), the Society for Italian Immigrants, and the Hungarian-American Loyalty League.

While such groups were teaching English to adult immigrants, state and local institutions were Americanizing their children. As time went on, local governments began providing night classes for adults as well, with New Jersey passing the first state legislation providing schooling in English and civics in 1907. At the same time, only two Federal agencies, the Bureau of Education and the Bureau of Naturalization were major actors in the Americanization movement, and their independent role was actually much smaller than it first appeared. The Bureau of Education was largely financed and staffed by the Committee for Immigrants in America and other private groups. After 1917, the year Congress outlawed such private funding of public agencies, the Bureau of Education repeatedly failed to obtain direct Congressional funding and ultimately disappeared from the scene. *See generally* E. HARTMANN, THE MOVEMENT TO AMERICANIZE THE IMMIGRANT 24 *passim* (1948).

64. *Id.* at 229-230.

only legacy, the Americanization movement might have gone down in history as one of our nation's brighter moments.

Unfortunately, the mix of motives and mentalities that made up the movement was a volatile one, including large doses of fear, racism, and xenophobia.[65] Responding to national and international events, particularly the patriotic excesses of World War I and the post-war "Red Scare", as well as to emergent theories of racialism, these elements came to dominate Americanization in the form of the "100% American movement" and the crusade against "hyphenated Americans."[66] Not surprisingly, this segment of the Americanization movement came to use language issues and the "defense" of the English language as a major weapon against the new immigrants.

Immigration restriction was the direct goal of those who most feared the corrupting influence of the new immigrants, but the opposition of powerful groups such as the National Association of Manufacturers, whose members needed immigrant workers, and politicians who depended upon the votes of newly enfranchised immigrants (or who suffered from attacks of principle) prevented for the moment a frontal attack upon the problem. Language barriers became an obvious, if not wholly satisfactory, substitute for more substantial walls: immigrants could enter the country but not its society. State and local governments continued to play an important part in this darker side of the Americanization endeavor, but the national government's plenary power over immigration and naturalization ensured that it too would be called upon to use the English language to protect the purity of our national union.

Though English language education was the prime carrier of the movement's positive program, education could also be used to reinforce the nativists' narrow notions of patriotism. Nativists rejected the contention that one could keep one's mother tongue yet still be a good citizen of the United States. Learning English was not enough: a committed immigrant must also cast off her alien tongue with her alien status. Some immigrant groups, however, resisted the

65. There were the two sides of the Americanization movement. The impulse of fear and the impulse of love ran throughout its whole course, clashing in principle though in practice sometimes strangely blended. One current tended to soften the movement, orienting it toward the welfare of the immigrant; the other steeled it to an imperious demand for conformity. Out of fear, the Americanization movement fostered a militant nationalism, and by this means it eventually made its widest, most fervent appeal to the native-born public.

HIGHAM, STRANGERS IN THE LAND 237 (1955).

66. *Id.* at 249 *passim*.

idea that deracination was a prerequisite for good citizenship.[67] German speakers, in particular, had a long tradition of mother-tongue maintenance and bilingual education in the United States, a fact not unnoticed by nativists and know-nothings as far back as the middle of the nineteenth century.[68] The coming of World War I reawoke hostility toward the teaching of German and other foreign languages, and by 1919 fifteen states had passed legislation installing English as the sole language of instruction in all public and private primary schools.[69] In striking down such legislation in *Meyer v. Nebraska*,[70] the Supreme Court nevertheless reaffirmed the right of the states to require that instruction be given in English.

States also used more direct language restrictions to exclude foreigners from economic and political participation in American life. As early as 1897, Pennsylvania imposed residency and language requirements on miners.[71] In 1918, New York passed a law requiring foreign-language speakers to be enrolled in educational programs as a condition of continued employment. Other states had similar laws.[72] In a particularly venal move, a Republican administration fearful of Jewish votes amended the New York State Constitution to include a language requirement whose purpose was to disenfranchise over one million Yiddish-speaking citizens. Once again, neither New York's goal nor its method were unique.[73]

In the areas of language requirements for employment and voting, the states often followed the lead of the federal government, which had exclusive control over the imposition of language qualifications for immigration and naturalization. Unfortunately, much federal action was guided by the report of the U.S. Immigration Commission (better known as the Dillingham Commission), issued in 42 volumes in 1911. Beginning with racialist and restrictionist presuppositions and ignoring or distorting much of its own data, the Commission concluded that the new immigrants were inferior intellectually, racially, and educationally; were not learning English, assimilating, or naturalizing quickly enough; and were criminally

67. E. HARTMANN, *supra* note 63, at 253-258. *See also* CULTURAL PLURALISM V. ASSIMILATION: VIEWS OF AGER, WALDEMAR (O. Lovoll ed. —) (opposing relinquishment of Norwegian language and culture in the U.S.).

68. HIGHAM, *supra* note 65, at 8, 54.

69. *Id.* at 260.

70. 262 U.S. 390 (1923).

71. HIGHAM, *supra* note 65, at 72.

72. Forbes & Lemos, *supra* note 16, at 53.

73. Leibowitz, *supra* note 28, at 410, 452 n.65. *See also* Garcia, *Language Barriers to Voting: Literacy Tests and the Bilingual Ballot*, 6 COLUM. H. R. L. REV. 83, 86 (Spring 1974).

inclined.[74]

Literacy tests for admission to the United States early became a goal of immigration restrictionists, who openly admitted that their purpose was to decrease immigration by 25 percent, specifically that 25 percent which came from Southeastern Europe.[75] Some proponents of the literacy test wanted to base admissibility to the United States on knowledge of English itself,[76] but the legislation that emerged merely required literacy in the prospective immigrant's own language. First introduced in 1906, the literacy legislation was not enacted into law until 1917, when war-time enthusiasm enabled the Congress to override President Wilson's veto. However, passage was largely a pyrrhic victory for the restrictionists, for by 1917 most of the immigrants who were still coming to the United States could meet the test's requirements (especially with a little tutoring back home). In any case, the test itself was rendered obsolete by the enactment of straightforward immigration restriction in the early 1920's.[77]

The English language requirement for naturalization had a much easier birth. Recommended by the U.S. Commission on Naturalization in 1905, this requirement was included in the Naturalization Act of 1906.[78] Under the Act's provisions, an applicant for citizenship had to be able to sign his name and speak English to the satisfaction of a naturalization examiner. Even the opponents of the nativists and the 100 % Americanizers regarded these requirements as the minimum necessary to assure the maintenance of American culture and political institutions.[79] In fact, similar requirements had already been imposed by courts who considered English competency a prerequisite to "attachment to the Constitution."[80] Thus when courts later pruned back language requirements in other areas, they explicitly disavowed any concern for language requirements in the area of naturalization.[81]

The fervor of the war years and the growth of the 100% American movement produced more ominous proposals linking English language requirements to naturalization. During the war, the National Americanization Committee proposed requiring all aliens to learn

74. E. HARTMANN, *supra* note 63, at 66.
75. Leibowitz, *supra* note 28, at 427.
76. Forbes & Lemos, *supra* note 16, at 117-118.
77. Leibowitz, *supra* note 28, at 418.
78. *Id.* at 404.
79. Forbes & Lemos, *supra* note 16, at 123.
80. Leibowitz, *supra* note 28, at 449 n.47.
81. *Id.* at 418.

English and apply for citizenship within three years or face deportation.[82] Teddy Roosevelt was more liberal in that he would have allowed the alien five years to learn English before deporting her.[83] Even Woodrow Wilson joined the crusade against "hyphenated Americans."[84]

The imposition of direct immigration restriction in the 1920's removed most of the reasons for worrying about the threat posed by aliens to the American way of life, and so removed the incentive for using English as a weapon against such a threat. The fact that language can be used as an offensive and ugly weapon against foreign-language speakers, whether through political, economic, or educational requirements, is, however, an unavoidable lesson of the Americanization movement.

In the past fifty years, the notions of racial and linguistic inferiority of immigrants that motivated much of both the positive and negative efforts of the Americanizers have been roundly rejected by historical experience and modern thought; likewise the simple equation of foreignness with opposition to American institutions and democratic processes. In fact, the immigrants of the early years of the century showed that same zeal for embracing American ideals and values as their predecessors, and if they in fact turned out to be "unique," such uniqueness lay in the fact that they overcame greater barriers than their predecessors with almost unbelievable speed.

In specifically linguistic terms, the new immigrants' acquisition of English depended more on economic reality and their own motivation than on the impositions of the Americanization movement.[85] This is not to say that the educational programs that grew out of the movement were ineffective or negative, but it is clear that the Founding Fathers' initial reliance on the natural dominance of English in American life was more realistic than the elaborate programs of the Americanizers.

The Americanization movement is an example of the use of language not just as a shield, but also as an offensive weapon against hidden, nonlinguistic targets. This is because language not only uses symbols but is symbolic itself. The apparent solicitude for the national language exhibited by many of the Americanizers was a mask for racial, economic, and political hostility toward users of

82. HIGHAM, *supra* note 65, at 249.
83. Forbes & Lemos, *supra* note 16, at 157.
84. HIGHAM, *supra* note 65, at 199.
85. Forbes & Lemos, *supra* note 16, at 92.

other tongues.[86] Because language issues can easily be loaded with otherwise unsavory or unacceptable agendas, segments of the Americanization movement were able to transform language from a shield against linguistic chaos into a sword against supposed *nonlinguistic* differences as well — even when those supposed differences were arguably beyond the reach of legitimate public debate.

The Americanization movement's strident defense of threatened American institutions from alien influences raises questions about how accurately such threats were gauged. Even more intriguing is the distinct possibility that the real threat to American institutions in this period arose more from the Americanizers themselves than from any alien hordes. This too seems to be a common pattern in American life, one to be watched for in any renewed attempt to raise walls of language around supposedly fragile American institutions. Of course, mere reference to the mistakes of the Americanizers answers no questions about the merit of present claims concerning the status of English in the United States and its role in protecting American institutions and values. But the first important lesson of the Americanization movement must be that attempts to use language for "patriotic ends" must be subjected to the strictest sort of scrutiny, and that elements of jingoism, racism and xenophobia hiding behind expressed concern for linguistic unity must be identified and rooted out of the debate before proposals to impose English on our official and unofficial life are given any serious consideration.

B. *Two Models of American Society*

The second lesson to be derived from the Americanization movement and the responses it provoked is that the debate over the protection of English in the United States can be viewed as a major battle in the ongoing struggle between two normative visions of American society: Anglo-conformity and cultural pluralism.

According to Milton Gordon, the ideal of "Anglo-conformity," of "maintaining English institutions (as modified by the American Revolution), the English language, and English-oriented cultural patterns as dominant in American life," has dominated our history until very recently.[87] During the heyday of the Americanization movement, its requirement that immigrants must completely shed their own identity was accepted by both reformers and racists alike.

Yet the narrowness of the vision of Anglo-conformity underlying

86. *Id.* at 18-19.
87. M. GORDON, ASSIMILATION IN AMERICAN LIFE 89 (1964).

the Americanization movement never commanded complete unanimity, and its harsh prescriptions stimulated the search for more tolerant outlooks.[88] There arose an intellectually well-developed alternative vision of American society which has come to be known as "cultural pluralism." Beginning in 1915, Horace Kallen began to develop this vision of an America in which cultural and linguistic diversity were not a threat to be avoided, but the strength and genius of American democracy. While recognizing the importance of English as the common language of the United States, Kallen sought to promote the maintenance of mother-tongues and ethnic identity as the best way to realize American democratic ideals.[89]

Like the systems of thought with which it competes, cultural pluralism raises problems of definition and historical accuracy. Nevertheless, as a normative vision of American society, it offers a clear alternative to Anglo-conformity and drives policy in a radically different direction. Proponents of cultural pluralism accept the basic proposition that a common language provides social cohesion, but given the ease with which arbitrary language requirements can be used to discriminate, they argue that society should encourage mother-tongue maintenance and individual choice in language usage.[90]

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88. *Id.* at 115 *passim*.

89. H. KALLEN, CULTURE AND DEMOCRACY IN THE UNITED STATES (1924); H. KALLEN, CULTURAL PLURALISM AND THE AMERICAN IDEA (1956). For a summary of Kallen's ideas, see M. GORDON, *supra* note 87, at 141 *passim*.

90. Our political and cultural foundations are weakened when large population groupings do not feel encouraged to express, to safeguard, and to develop behavioral patterns that are traditionally meaningful to them. Our national creativity and personal purposefulness are rendered more shallow when constructive channels of self-expression are blocked and when alienation from ethnic-cultural roots becomes the necessary price of self-respect and social advancement, regardless of the merits of the cultural components of these roots. For those groups and individuals that desire it there must be openly sanctioned and publicly encouraged avenues of linguistic and cultural distinctiveness which will provide both a general atmosphere and specific facilitation for diversity within the general framework of American unity.

Fishman, *Planned Reinforcement of Language Maintenance in the United States: Suggestions for the Conservation of a Neglected National Resource*, in LANGUAGE LOYALTY IN THE UNITED STATES 369, 374-375 (J.A. Fishman ed. 1966).

For other forceful assertions of minority language rights within a cultural pluralism model of society, see McDougal, Lasswell & Chen, *Freedom from Discrimination in Choice of Language and International Human Rights*, 1976 So. ILL. U. L. J. 151-174; Comment, *Cultural Pluralism*, 13 HARV. C.R.-C.L. L. REV. 133 (1978).

In commenting on the retention of the English language requirement for Naturalization, Commissioner Reynoso has said, "In short, America is a *political* union — not a cultural linguistic, religious or racial union." STAFF OF COMMITTEES ON THE JUDICIARY: HOUSE OF REPRESENTATIVES AND UNITED STATES SENATE, 97TH CONG., 1SR SESS., FINAL REPORT ON U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST Appendix B at 407 (Comm. Print 1981).

In the decades since the end of the Americanization movement, cultural pluralism has come to dominate most of the rhetoric and much of the political action of our society. This change in outlook has many complex sources, but among its major components must be included the repudiation of the suspect sociology and race-science which served to legitimate many of the harsher prescriptions of Anglo-conformity, the horrific lessons of World War II about the consequences of obsessive drives for national unity and purity, the flowering of the civil rights movement, and the growing awareness of later generations of Americans of the price paid for their assimilation.[91] Of course, this list is neither exhaustive nor indicative of the complex interactions among these and other sources of our changed conception of American society. What is clear, however, is that our conception has changed and that Anglo-conformity must contend with, and perhaps yield, to something very different.

This change in the normative model of American society has been accompanied by an equally dramatic change in our conception of the role of the national government. Despite the Federal government's control over immigration, the essentially conservative, traditionalist thrust of the Americanizers militated against the national government's playing a dominant role in the Americanization movement. Instead, the Americanizers' attempt to realize the ideal of Anglo-conformity played itself out in areas largely under the control of private individuals and local governments, primarily employment and education. In contrast, cultural pluralism's emphasis on assuring the cultural and linguistic rights of minorities seems to require the active assistance of the Federal government. It is, therefore, not surprising that the national government has not only entered traditionally local and private areas of American life, but has also created such programs as bilingual education, multilingual ballots and translation services in an attempt to promote a culturally pluralistic society.

Once again, however, the pendulum seems to have swung. Just as the theoretical and political excesses of the Americanization movement stimulated a contrary response, the perceived failure of government programs motivated by a vision of cultural pluralism to produce their intended results, and the perception that well-intentioned government programs may actually be exacerbating the

91. Fuchs, *supra* note 61, at 302-304 *passim*.

problems they were intended to solve,[92] have undermined some of the basic assumptions of the cultural pluralism model of American society and made notions of Anglo-conformity attractive again.[93]

IV. *Why We Must Reject the ELA*

Although as a matter of political necessity they speak the language of cultural pluralism, there is no doubt that most supporters of the ELA embrace an astonishingly pure form of Anglo-conformity. Sadly, it appears that in embracing an ideal of Anglo-conformity, some supporters of the ELA have also embraced its affinity for using language issues as a weapon against those who are already the objects of cultural or racial prejudice.

Whereas the Americanizers were afraid of slavic hordes, supporters of the ELA are afraid of Spanish and the people who speak it. It is almost as if we had traveled back in time seventy-five years; once again the United States is facing unprecedented numbers of non-English speakers, seemingly unassimilable, and possibly hostile to American ideals and institutions. In ominous echoes of the Americanizers, the supporters of the ELA not only insist that the problem posed by Spanish speakers is unique (which, as noted in the discussion above, may very well be true), they also view this new situation

92. See the discussion of *Good Intentions Gone Awry*, *supra* text accompanying notes 26-47.

93. Of course, "Anglo-conformity" and "cultural pluralism" are both relative terms. Distinguishing between the two outlooks might be more a matter of degree of tolerance for diversity of different sorts rather than actual polar opposition. Even within the framework of cultural pluralism, strong arguments can be made against some recent programs, or aspects of recent programs, designed to facilitate a culturally pluralistic society. For instance, one could accept the importance of cultural and mother-tongue maintenance yet still question the efficacy and wisdom of a particular form of bilingual education. Or, one could favor the use of multilingual ballots, yet at the same time ask a citizen to begin studying English as a condition of using such a ballot. Telephone conversation with Julio Barreto, Jr., Legislative Assistant, League of United Latin American Citizens (Nov. 6, 1984). Specific positions on these and similar questions would depend on where the line at which linguistic diversity "costs" a society more than it benefits it is drawn.

Most Americans, including the vast majority of Spanish speakers in the United States, would probably draw this line far short of the point at which English was no longer recognized as necessary for assimilation and success in American society. *Hearings*, *supra* note 4 (testimony of Arnold Torres; testimony of Baltasar Corrada). Given this general agreement, the debate should focus on ways to ease social and linguistic assimilation while neither threatening the identity of minority groups nor undermining the supremacy of the English language. At the same time, given the historical, scientific and political developments of the past sixty years, one would not expect modern Americanizers to embrace discredited racial assumptions or to employ xenophobic rhetoric; language, however, remains just as ready as ever to stand-in for other concerns, some of which our society may no longer accept as legitimate objects of debate in their own right.

in the exact way their predecessors viewed the coming of the new immigrants at the turn of the century — as a threat, not as an opportunity or a challenge. In other words, the current supporters of the ELA seem to be reacting to a unique situation in an all too familiar way.

According to Senator Huddleston, "[I]n recent years, we have experienced a growing resistance to the acceptance of our historic language. Increasingly, we have been subjected to an antagonistic questioning of the melting pot philosophy that has traditionally helped speed newcomers into the American mainstream." He then goes on to quote Theodore White for the proposition that, "Some Hispanics have, however, made a demand never voiced by immigrants before: that the United States, in effect, officially recognize itself as a bicultural, bilingual nation."[94]

In remarks placed in the *Congressional Record* and mailed to his constituents in North Dakota, Senator Burdick finds it unnecessary even to mention Spanish by name, referring to it as "that language."[95] Former Senator Hayawaka contrasts the eagerness of other immigrant groups to learn English and assimilate with the failure of Hispanics to do so. In apportioning the blame for this failure, Hayakawa disavows any prejudice or hostility toward Hispanics, blaming the current state of affairs on Hispanic political leaders, not Spanish speakers themselves.[96]

Such rhetoric is disconcerting in an age where blatant racism and xenophobia are unacceptable in public debate, but language issues remain susceptible to use as barely disguised carriers of covert messages. Nevertheless, the language the ELA's supporters use in talking about language issues may help explain the particular path

94. *Hearings*, *supra* note 4 (testimony of Sen. Walter D. Huddleston at 1-2). By "some Hispanics," Congressman Huddleston and Mr. White are probably referring to very small radical Chicano groups in the Southwest whose positions are explicitly and repeatedly disavowed by the Hispanic mainstream. To generalize about the Hispanic population as a whole from these groups is a serious mistake, probably the equivalent of taking Meyer Kahane to be representative of Jews or describing Linden LaRouche as a leader of the Democratic party.

95. 130 CONG. REC. S385 (daily ed. Jan. 30, 1984).

96. *Hearings*, *supra* note 4 (testimony of Sen. S.I. Hayakawa). Calvin Veltman, the researcher cited by both Ingwerson, *supra* note 50, and Turbak, *supra* note 62, disputes the general assumption that Hispanics are not learning English. He argues that English becomes the dominant language for Hispanics in the second or third American generation. Turbak, *supra* note 62, at 23.

Of course, in another parallel to the experience of the Americanization movement, not all supporters of official protection for English have suspect motives or secret racial or xenophobic agendas. Once again many prominent supporters are immigrants themselves and persons sincerely dedicated as much to the welfare of Spanish speakers as to that of the established culture. *See* R. RODRIGUEZ, HUNGER OF MEMORY (1982).

the drive to support the official use of English in the United States has taken.

A. *The Constitutional Path*

In opening the hearing held on the ELA in June of 1984, Orrin Hatch, the Chairman of the Senate Subcommittee on the Constitution, questioned the wisdom of attempting to protect the primacy of English in the United States by means of a constitutional amendment: "Regardless of the merit of current bilingualism policy, a constitutional response to these problems of recent origin may overlook the fundamental character of our Constitution and create more problems than it would resolve."[97] Given the fact that the programs and policies that are the chief targets of the supporters of the ELA — bilingual education and multilingual ballots — have not been constitutionally mandated but are the products of legislative and administrative decision making and judicial statutory interpretation, taking the arduous and uncertain constitutional route just does not seem to make sense.[98]

Nevertheless, supporters of the ELA claim that the drive for the amendment is about much more than simply bilingual education and multilingual ballots. They say it is about the future of unity of American society in such a fundamental way that only a constitutional amendment can express the seriousness of our commitment to that particular future. In practical terms, however, that future unity will be achieved largely through the extinction of multilingual ballots and most forms of bilingual education. Yet, the ELA may not accomplish even these things. Arnold Torres, National Executive Director of The League of United Latin American Citizens (LULAC), thinks that forbidding most forms of bilingual education would just shift such programs from the public to the private sector.[99] Baltasar Corrada argues that the Tenth Amendment would prevent the strictures of the ELA from applying to the States.[100] Similarly, Torres suggests that such an amendment would violate the Treaty of Guadalope with Mexico and would render unconstitutional those sections of the New Mexico constitution giving recogni-

97. *Hearings*, *supra* note 4 (opening statement of Sen. Orrin Hatch at 4).

98. In his testimony, Senator Huddleston himself points out that the Federal government and the states have both imposed English upon certain areas of American life by statute. *Hearings*, *supra* note 4 (testimony of Sen. Walter D. Huddleston at 5). Further concerns could be addressed in the same way without the broad sweep of a constitutional amendment.

99. *Hearings*, *supra* note 4 (testimony of Arnold Torres at 5).

100. *Hearings*, *supra* note 4 (testimony of Baltasar Corrada at 4).

tion and protection to Spanish.[101]

Given that passing a constitutional amendment is no easy task, and that a successful drive for the ELA may not even bring about some of its supporters' major goals, there must be some other reason that the constitutional route has become so attractive to opponents of specific, non-constitutionally mandated governmental language programs.

One possibility is that passage of the ELA is not the true goal of many of its erstwhile supporters. These particular proponents may be using the *idea* of the amendment as simply one part of an attack on despised programs and emergent Hispanic political power. Supporters of the ELA often depict bilingual education as largely Hispanic porkbarreling, a means of providing jobs and influence to the Hispanic population, particularly its political leaders.[102] Faced with what seems to them to be pure self-interest masquerading as part of the civil rights movement, the opponents of such programs might want to trump Hispanic political power by linking their position to an even more powerful, self-evident, patriotic imperative. In this context, wrapping their primary goals in the mantle of support for the English language in the United States changes the terms of the political argument in a way that "naturally" favors their position.[103] Cast in these new terms, the argument is no longer about assuring the civil rights of a minority but rather about protecting the fabric of American society from linguistic and cultural fragmentation. From this perspective actual passage of the Amendment may be largely irrelevant. Just waging the battle — recasting the terms of the political debate in a way that puts opponents on the defensive against a seemingly obvious, patriotic position — may constitute winning it.

Senator Huddleston acknowledges that one of the reasons he chose the constitutional path was to "focus national attention on the problem, and subject it to the type of thorough, national debate which is necessary."[104] Proving that the "problem" is general dissatisfaction with the normative vision of cultural pluralism rather than specific concern about linguistic fragmentation is difficult, but to ignore this possibility would be to neglect both the complexities of the political process in the United States and the malleable nature of the idea of language unity. The fact that Hispanic groups appear

101. *Hearings*, *supra* note 4 (testimony of Arnold Torres at 5).
102. *Hearings*, *supra* note 4 (testimony of Sen. S.I. Hayakawa at 6).
103. *Cf.* Schon, *Generative Metaphor: A Perspective on Problem Setting in Social Policy*, in METAPHOR AND THOUGHT 254 (A. Ortony ed. 1979).
104. *Hearings*, *supra* note 4 (testimony of Sen. Walter D. Huddleston at 7).

to be giving ground on the issue of bilingual education may simply be the result of increasing awareness of the educational deficiencies of some bilingual education programs; on the other hand, it just might indicate that Senator Huddleston's use of the constitutional path to refocus the debate in a way that the issue is not civil rights but national unity is having its intended effect.[105]

There is, however, a deep irony underlying such a symbolic strategy. The explicit claim of the ELA's supporters is that Spanish speakers are failing to enter the American mainstream and that this failure threatens our political and cultural institutions. But supporters of the ELA seem to have chosen the constitutional route for precisely the opposite reason: Hispanic political power is too strong and has been too successful at getting what it wants out of the American political system. Is the problem then really block voting rather than not voting?[106] If it is, if Hispanics are voting "self-interest," why is the exercise of Hispanic political power in traditional American ways threatening to the integrity of the American political system?

It is probably true that Hispanics, like everyone else in American society, may be committed to some governmental programs or aspects of such programs for purely selfish reasons. At the same time, however, Hispanic political leaders and groups have continually reiterated their commitment to American values and institutions — including the necessity of the English language in American society. Given the ease with which language issues may mask other disreputable agendas, the ELA's supporters' choice of political tactics — making language usage the sole determinant of political and cultural unity — may encourage new forms of racial and cultural xenophobia, even if it does not begin explicitly with these elements. When an issue is recast in such simple and dogmatic terms, one no longer need confront the complexities and uncertainties of actual programs or the possibility of debased motives or unintended consequences, but these complexities and pitfalls nevertheless remain.

In their testimony, the opponents of the ELA attempted to demonstrate these complexities and pitfalls. Not surprisingly, given the fact that their model of American society is so different from that

105. *See* Letter from Arnold Torres, National Executive Director of LULAC, to Representatives (July 23, 1984) (urging support for H.R. 5231, The Academic Equity and Excellence Through Bilingual Education Act of 1984) (on file with *Yale Law & Policy Rev.*).

106. Senator Huddleston seems to imply that this is the case. *Hearings*, *supra* note 4 (testimony of Sen. Walter D. Huddleston at 3).

of the supporters of the ELA, they see the ramifications of the ELA very differently even when they acknowledge the legitimacy of some supporters' claims. While admitting that some bilingual programs are ineffective, they reject the broad brush approach of outlawing whole types of programs.[107]

Like the supporters of the ELA, its opponents see the effects of passage largely in symbolic terms. But while the supporters see the ELA protecting the bare minimum that a society — even a culturally pluralistic society — needs to survive, the amendment's opponents see it as a repudiation of the essential ideals of tolerance and respect for diversity that underlie American democracy. They see it as a return to racial and ethnic discrimination and to the xenophobia and provincialism that have marked much of American history.

B. *Secondary Effects of the ELA*

Even accepting the premise that the current paucity of hard sociolinguistic data on assimilation rates and the continuing disagreement over the degree of linguistic and nonlinguistic diversity we should tolerate encourages us to err on the side of protecting the English language in the United States, the likely costs of the ELA are far too high.

Except for areas that fall within Senator Huddleston's exception for "public safety," federal, state, and local governments would probably not be permitted to communicate in a language other than English. Foreign language provisions of other federal programs, including alcohol and drug-abuse rehabilitation, legal services and veterans medical facilities would also be likely to fall.[108]

Mr. Torres' confidence that the ELA would only shift the locus of bilingual education from public to private schools overlooks the fact that such a solution would most likely favor the wealthy and further disadvantage the poor. There may even be something to Senator Hatch's claim that the ELA would constitute a constitutional reversal of *Meyer v. Nebraska*.[109] The avowed purpose of Nebraska's statute was to protect the English language; passage of the ELA might render such a law permissible. As unlikely as this may sound, one

107. In his opening remarks at the Senate Subcommittee hearing, even Senator Hatch questioned what sort of *legal* standard would be able to distinguish between acceptable and unacceptable bilingual education programs. *Hearings*, *supra* note 4 (opening statement of Sen. Orrin Hatch at 4).

108. *Hearings*, *supra* note 4 (testimony of Sen. Walter D. Huddleston; testimony of Sen. Quentin N. Burdick; testimony of Sen. S.I. Hayawaka; testimony of Rep. Norman D. Shumway; testimony of Gerda Bikales).

109. 262 U.S. 390 (1923).

need only look to the favorite nation of the ELA supporters, Canada, to find a court holding that, "Freedom of expression does not include the freedom of choosing the language of expression."[110]

The ELA would surely destroy any chance of Puerto Rican statehood. Members of the statehood movement rely heavily on the proposition that Puerto Rico would be able to choose Spanish as its official language upon entry to the Union. They base this assumption on the Tenth Amendment and the "equal footing" doctrine, and repeatedly asseverate that it would take a constitutional amendment to remove this power.[111] The ELA is just that amendment.

The multilingual ballot provisions of the Voting Rights Act of 1975, as extended in 1982,[112] are intended to prevent the exclusion of minority language *citizens* from the election process.[113] Denying such citizens access to the electoral process may, as the supporters of the ELA claim, increase these citizens' incentive to learn English, or, assuming that English literacy tests are not reinstated, may instead provide an incentive for such citizens to cast uninformed votes. Furthermore, it seems likely that the reinstitution of monolingual English ballots would disenfranchise at least some Spanish-speaking citizens, either through the increased difficulty of casting a vote or discouragement with the system itself. Since such disenfranchisement would in turn reduce Hispanic political power, it is hard to believe that such a result is an unintended or unforeseen consequence for at least some of the ELA's supporters.

The judicial system would be included in the ELA's prohibitions, so the Federal Court Interpretation Act and its state equivalents might be rendered unconstitutional. The end of translation in judicial processes raises still more serious questions. As noted above,[114] the courts have uniformly rejected a constitutional right to receive

110. Devine c. P.G. du Quebec, [1982] Que. C. S. 355, 379 (1982). *See generally* Tetley, *Language and Education Rights in Quebec and Canada (A Legislative History and Personal Political Diary)*, 45 LAW AND CONTEMP. PROBS. 177,204 (Aut. 1982).

111. GRUPO DE INVESTAGADORES PUERTORRIQUENOS, INC., BREAKTHROUGH FROM COLONIALISM: AN INTERDISCIPLINARY STUDY OF STATEHOOD 1399-1478 (1984); Davila-Colon, *Equal Citizenship, Self-Determination, and the U.S. Statehood Process: A Constitutional and Historical Analysis*, 13 CASE W. RES. J. OF INT'L. LAW 315 (1981). *See also Hearings*, *supra* note 4 (testimony of Baltasar Corrada at 4).

112. 42 U.S.C. §§ 1971-1973 (1981 & Supp. 1985).

113. 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. Hunter, *The 1975 Voting Rights Act and Language Minorities*, 25 CATH. U.L. REV. 250, 270 (1977).

114. *See supra* notes 26-41 and accompanying text.

administrative and regulatory notices in a foreign language, but in the areas of criminal procedure and immigration they have employed constitutional due process doctrine in requiring translation for non-English-speaking defendants. Though at this moment it seems highly unlikely that the courts would interpret passage of the ELA as rolling back fundamental due process rights, it is not beyond the realm of imagination or the apparent intentions of the amendment's supporters that the ELA's passage could return non-English speakers to the situation of the appellant in *The Japanese Immigrant Case*: "If the appellant's want of knowledge of the English language put her at some disadvantage in the investigation conducted by that officer, that was her misfortune, and constitutes no reason, under the acts of Congress, or under any rule of law, for the intervention of the Court by *habeas corpus*."[115]

Conclusion

One can understand the impulse behind the movement for official protection of the English language, and one can sympathize with the fears felt by those concerned for our country's future. Nevertheless, passage of the ELA would be a major mistake.

The goal of a unified citizenry committed to democratic ideals is an admirable one, and universal acquisition of the English language by all residents of the United States would no doubt further that goal. But the means by which we promote English should not in themselves run counter to our democratic tradition. Imposing English upon Spanish speakers through a constitutional amendment would likely exclude many from political participation, sacrifice equal justice in the courtroom, narrowly restrict educational alternatives on the basis of political criteria and mark most as "un-American" in the eyes of the rest of society. Based on undocumented fears of separatism and cultural fragmentation, passage of the ELA would insult and alienate a significant portion of our society in the name of national unity.

None of these outcomes would necessarily require bad faith on the part of the majority of Americans, but our history and much of our present rhetoric indicate that the potential to disguise political and racial hostility as solicitude for our national language remains strong within American society. Passage of the ELA would cast a veneer of patriotism over such illegitimate uses of language issues,

115. 189 U.S. 86, 102 (1902).

thereby making such tactics both more frequent and more acceptable in public debate. This is not to say that the concerns of many of the supporters of the ELA and others who want to protect the status of English in the United States are invalid or necessarily inimical to our basic values. But such issues must be addressed within narrow contexts, and responses must be formulated that do not sacrifice either our ideals or our people to unexamined assumptions and patriotic excess. If the supporters are unhappy with bilingual education and other government programs, they should attempt to modify or eliminate those programs directly, not use the blunderbuss of a constitutional amendment. If they are unhappy with the degree of political and cultural fragmentation tolerated by a society committed to some form of cultural pluralism, they should make explicit their points of disagreement and not allow a single issue — language — to cover a mass of messages, including some that could not survive the light of day on their own.

The goal of a society fully committed to democratic processes and individual liberty is an admirable one. And there is plenty of room to debate just how to reach it. The ELA moves us away from, not toward, that goal.

— *Joseph Leibowicz*

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Questions and Answers About The English-Only Movement

This document was prepared by Edward M. Chen, Staff Attorney with the American Civil Liberties Union of Northern California.

- In 1980, Dade County, Florida passed an ordinance barring use of county funds for activities which involve a foreign language or which promoted non-"American" culture. As a result, funding for ethnic festivals, bilingual hospital services, signs, and tourist promotions was terminated.
- In 1984, three municipal court judges in Southern California imposed a workplace rule prohibiting court clerks from speaking to co-workers in Spanish.
- Monterey Park and other cities in Southern California enacted ordinances prohibiting or restricting the use of foreign languages on private business signs.
- English-only advocates have mounted protests against telephone companies for their use of Hispanic Yellow Pages, and multilingual operators and against fast food chains for their use of Spanish language menus.
- In 1986, 1988 and 1990 the voters of California, Florida, Arizona, Colorado and Alabama passed statewide initiatives designating English the "official" state language.

These acts threaten our country's proud heritage of freedom, tolerance and diversity, as well as the civil liberties of millions of Americans. They are manifestations of a growing English-only movement.

The primary focus of this movement is the enactment of laws designating English as the "official" language and limiting the use of foreign languages in the provision of government services and by businesses.

The National Coalition for Language Freedom vigorously opposes the English-only movement and "Official English" laws because they threaten the civil rights and liberties of individuals who are not proficient in English. The intolerance and bigotry they canonize are contrary to the spirit of tolerance and diversity embodied in our Constitution.

With the enactment of city and state laws, and the proposal for an English Language Amendment to the United States Constitution, the debate over English-only has become increasingly intense. Many people are confused about "Official English" laws.

Inside is summary of frequently-asked questions and answers which explain why we oppose English-only legislation.

-1-
What is the English-only movement?

The English-only movement seeks to restrict or terminate the use of languages other than English by the government and in some cases, private businesses. English-only advocates have urged that bilingual voting assistance and ballots be terminated, bilingual education be severely restricted, and that other bilingual services or governmental communications be ended. The ultimate goal of the English-only movement is to amend the U.S. Constitution to make English the nation's "official" language.

English-only advocates argue that our nation is threatened by a "mindless drift toward a bilingual society" and that permitting the use of foreign languages by government and business discourages immigrants from learning English. They argue that there is an increasing number of immigrants who refuse to learn English, thereby threatening the primacy of English the "common bond" which holds our society together. English-Only advocates argue the government's endorsement of bilingualism threaten to divide our society along language and ethnic lines.

-2-
Isn't English already the official language of the United States?

No. Although English is universally acknowledged as our nation's common language, the Constitution does not explicitly make English the nation's "official" language. The Founding Fathers debated whether an official language should be designated. Historians believe an official language was not adopted because many of the Founding Fathers were concerned with its potential impact on religious freedom and immigration, and felt that identification of a national common language should be made by free choice rather than imposed from the top down by law.

Currently, seventeen states have "Official English" laws. Although some were passed at the turn of the century during periods of nativism, most were passed within the last several years. There are few court decisions interpreting these laws and thus their legal effect is not yet clear.

-3-
Is the English Language in America being threatened?

No. Although there has been a large influx of immigrants from Asia and Latin America since the 1960's, the primacy of English as the nation's common language is not threatened. Over 98% of U.S. residents over the age of four speak English "well" or "very well" according to the 1980 Census. In fact, a greater proportion of the American population spoke German in the early 1800's than those who speak Spanish today. Contrary to what some English-only advocates suggest, there is no broad based movement to make Spanish or any other foreign language the "official" language of the United States. Hence there is no need to declare English as our "official" language.

-4-
Is it true that today's immigrants, unlike earlier immigrants, are not learning English?

No. Today's immigrants are assimilating into U.S. society and acquiring English proficiency at the same rate as prior generations of immigrants. Sociologist Calvin Veltman has found that today's Hispanic immigrants are learning English as fast as earlier generations of European immigrants. A 1985 Rand Corporation study found that while roughly half of Mexican immigrants to California speak English, over 95% of first generation Mexican-Americans are English proficient, and that more than 50% second generation Mexican Americans have lost their mother tongue entirely. According to 1980 Census data, nearly 90% of Hispanics ages 5 or older speak English in their households.

Today's immigrants recognize their

-4-
(Continued)

responsibility to learn English. According to a 1985 survey, 98% of Latino parents surveyed, as compared to 94% of Anglo and Black parents, felt it was essential for their children to read and write English perfectly. Latinos, Asians, and other new immigrants fill the long waiting lists for over-enrolled adult English classes. In Los Angeles, the waiting list is over 40,000; in New York the list is over 26,000. In 1987, a group of immigrants filed a lawsuit in Los Angeles Superior Court to force the County to expand English classes for non-English speaking immigrants. The problem is not a lack of desire to learn English, but the lack of educational resources to teach English.

-5-
Isn't it necessary to protect the English language since it serves as the common bond of American society?

The United States is and has always been a nation of immigrants, most of whose native languages are those other than English. Since the founding of our nation, there have been large pockets of German, French, and Spanish-speaking populations in our country. Indeed, the Continental Congress printed many documents, including the Articles of Confederation, in German for the benefit of non-English speaking patriots. In the 18th and 19th centuries, bilingual education in German and Yiddish were common in the Mid-west and Eastern cities. Even the official minutes of some town meetings in the Mid-west were kept in German.

Our nation's history of linguistic and cultural diversity never undermined our national unity. Nor is it a threat today. Today's Hispanic and Asian immigrants, much like yesterday's Italian, Irish, and German immigrants, have come to the United States to escape adverse political or economic conditions. The common heritage shared by new and old immigrants alike is their mutual quest for freedom and opportunity. The bond that holds this nation together is our shared belief and commitment to democracy, freedom and justice. That bond runs far deeper that the English language.

-6-
Won't "Official English" laws unite our country and prevent divisions along language lines as in Canada?

Language diversity need not result in social divisiveness. For instance, Switzerland has four official national languages, and there is no divisiveness between the various linguistic groups. On the other hand, Ireland has long experienced internal violent conflict despite linguistic homogeneity.

More to the point, our nation's long history of linguistic diversity has not prevented national progress and unity. A good example of the positive effects of bilingualism is New Mexico, which has been officially bilingual since 1912. Government documents and ballots are printed in English and Spanish. Rather than linguistic and cultural conflicts, New Mexico enjoys the highest rate of political participation (and hence integration into the political mainstream) by Hispanics in the nation.

The conflict between French-speaking and English-speaking Canadians is often cited by English-only supporters as reason for "Official English" laws. But the Canadian conflict is not the result of official bilingualism. The tension derives from the historical economic, social, and political conflicts particular to Canada. The call to make French the official language was the symptom rather than the result of this historic conflict.

History teaches that the attempt to impose an official language over members of a minority group invariably results in increased divisiveness, whereas tolerance and recognition of minority languages lessens tensions. The Canadian

-6-
(Continued)

experience is relevant in this regard. In 1974, the French-speaking majority in Quebec declared French the exclusive language in order to stifle what it viewed as a threat from the English-speaking minority. Draconian language laws, such as those prohibiting businesses from posting signs in English, caused a great deal of divisiveness.

It is already evident that "Official English" laws in this country have caused division rather than unity. Ethnic tension was exacerbated in Dade County, Florida, Monterey Park, California, and other cities where such measures were introduced.

Unity comes from tolerance and mutual respect, not forced conformity. Many of the world's most virulent wars have been based on religion; yet, despite the diversity of religious faiths within our country we have avoided the intense religious wars and conflicts experienced elsewhere. Why? Because the First Amendment guarantees tolerance and teaches mutual respect of different faiths, rather than allowing the imposition of an official orthodoxy. In contrast, "Official English" laws impose an official orthodoxy that breeds intolerance. It is intolerance not diversity which threatens our nation's unity.

-7- Who is behind the English-only movement?

The main organization leading the English-only movement is U.S. English. U.S. English was organized in 1983 as an offshoot of the Federation for American Immigration Reform (FAIR), a group which advocates tighter restrictions on immigration. Its founders were former Senator S.I. Hayakawa and Dr. John Tanton, a Michigan ophthalmologist and population-control activist. U.S. English claims membership of over 300,000. Its stated purpose is "to defend the public interest in the growing debate on bilingualism and biculturalism."

While not all its members are xenophobic and anti-immigrant, the sentiments of its founder, Tanton, are evident in a memorandum he wrote in 1986 intended as a private paper but which came to light two years later. Tanton's memo attacks Hispanics for their "tradition of the bribe" low "educability," Roman Catholicism, and high fertility all of which he claimed threaten the American way of life. He wrote, "Perhaps this is the first instance in which those with their pants up are going to get caught by those with their pants down."

Another major English-only organization is English First, founded in 1986 as a project of the Committee to Protect the Family. It claims 200,000 members. Its solicitation letter states that "immigrants these days refuse to learn English", "never become productive members of American society," and "remain stuck in a linguistic and economic ghetto." It brands the "'bilingual' movement" as "radical." The founder of English First, former Virginia state legislator Lawrence Pratt, was the secretary of the Council for Inter-American Security which published a report in 1985 warning that Hispanics who support bilingual education pose a national security threat to the United States.

-8-
What effect will "Official English" laws have on bilingual services and programs?

The impact could be almost non-existent or it could be disastrous: the effects will probably depend on the language of the particular laws. In some states, laws which declare English as the state's "official" language may be treated purely as symbolic, much like laws which name the official state bird or flower. Where the laws have more specific prohibitions, they may result in wiping out bilingual services and programs.

For instance, Florida's Dade County passed an ordinance in 1980 which prohibited the County from funding activities which involve a language other than English. As a result, bilingual signs and services ranging from medical services at the county hospital, direction signs in the public transit system, and multi-ethnic cultural festivals were terminated.

Some versions of the English Language Amendment, a proposed amendment to the U.S. Constitution to make English the nation's "official" language, would bar all state and federal laws requiring the provision of services in languages other than English. This could jeopardize bilingual assistance in voting, the right of defendants, victims and witnesses to translators in court and administrative proceedings, bilingual education, and multilingual social services such as employment training and referral, drivers license exams, welfare termination notices, and medical services such as pregnancy counselling and AIDS prevention education.

-9-
Can "Official English" laws affect private businesses?

Most "Official English" laws are directed specifically at government. However, these laws can affect businesses indirectly. For instance, several southern California cities have passed ordinances which prohibit or restrict the use of foreign languages on business signs, and their sponsors have cited the state's "Official English" law to support such restrictions. If sued, the cities may argue that a state's "Official English" law establishes public policy and provides a substantial governmental interest which overrides the right of free speech.

In addition, English-only advocates have directly opposed private firms' use of foreign languages. They have opposed a telephone company's establishment of multilingual operators, F.C.C. licensing of Spanish language radio stations, as well as use of ethnic yellow pages and bilingual menus at fast food outlets.

-10-
Why should there be bilingual ballots since one must be a citizen in order to vote and to be a citizen one must be literate in English?

Naturalization for U.S. citizenship requires only fifth grade English literacy. Todays' ballots and voter materials are far more complicated than the rudimentary literacy requirements for citizenship.

Moreover, U.S. law drops English literacy as a condition for naturalization for those who are over 50 years of age and who have been in the United States for 20 years or more. Most of those who need bilingual ballots are elderly immigrants who are U.S. citizens and who have paid U.S. taxes; they should not be denied the right to vote because of their limited proficiency in English any more than an illerate U.S. born citizen should be denied that right.

-11-
Don't bilingual ballots allow the uninformed to vote and discourage the learning of English?

Information about elections and candidates are commonly available in many languages through ethnic media outlets. Many voters who use bilingual ballots speak and understand English better than they can read and thus obtain information about candidates and issues through radio and television. The assumption that those unable to read ballots are not sufficiently intelligent or informed to vote is similar to earlier arguments used to defend discriminatory literacy requirements imposed against blacks in the South.

Moreover, the purpose of publishing bilingual voting materials and election pamphlets is to increase the information available to limited English-speaking voters. Thus bilingual materials enhance rather than detract from an informed vote.

There is no evidence that bilingual ballots discourage the learning of English. Hispanics are rapidly learning English even though bilingual ballots have been required by federal law in many states since 1975. Bilingual ballots will not discourage the learning of English any more than a ban on literacy requirements discourages literacy.

-12-
Doesn't bilingual education retard the learning of English? Isn't the best method of teaching English the "sink or swim" method by which earlier immigrants made it?

Bilingual education involves the use of two languages (one English, the other the child's native tongue) as mediums of instruction to assist children of limited-English speaking ability. Its primary purpose is to make immigrant students proficient in English.

Although the debate over its effectiveness continues, recent studies show that bilingual education is a successful method of helping students make the transition to instruction in English. Indeed, some show that the more extensive the instruction in the native language, the better the students perform in a variety of subjects, such as math and science, as well as English. These studies indicate that students in bilingual education programs outperform students in classes where no native language instruction is used.

Native language instruction allows students to keep up in math, science, and other courses while they learn English. Also, studies show that increasing proficiency in a child's native language increases his or her cognitive abilities and understanding of grammar and structure, thereby enhancing their ability to acquire a second language (English). Bilingual education also avoids the implied degradation of the child's native language and culture which often accompanied traditional "sink or swim" methods; bilingual education thus fosters immigrant students' self-image and respect.

The argument that experience proves the traditional "sink or swim" method works best since prior immigrants "made it" without bilingual education is illusory. Although some immigrants succeeded, many more sank than swam. In 1911, the U.S. Immigration Service found that 77% of Italian, 60% of Russian Jew, and 51% of German children of immigrant parents were one or more grade levels behind in school, far in excess of the 28% ratio for native white children. Moreover, because educational requirements for jobs are much more demanding now than at the turn of the century when agricultural and manufacturing jobs were prevalent, many of those who "made it" (i.e. survived economically) under the old "sink or swim" method would not have survived in today's economy.

-13-
Were there laws restricting the use of earlier immigrants' native tongues?

Until the late 1800's, our nation had a tolerant policy towards linguistic diversity. Bilingualism in government and education was prevalent in many areas. German language was prevalent in schools throughout the mid-West. But the influx of Eastern and Southern Europeans and Asians gave rise to nativist movements and restrictionist language laws in the late 1800's and early 1900's. The Federal Immigration Commission issued a report in 1911 contrasting the "old" and "new" immigrant. The report argued that the "old" immigrants had mingled quickly with native-born Americans and became assimilated, while "new" immigrants from Italy, Russia, Hungary, and other countries were less intelligent, less willing to learn English, had intentions of not settling permanently in the United States, and were more susceptible to political subversion, arguments not unlike those advanced by today's English-only movement.

In response, English literacy requirements were erected as conditions for public employment, naturalization, immigration, and suffrage in order to "Americanize" these "new" immigrants and exclude those perceived to be lower class and "ignorant of our laws and language." The New York Constitution was amended to disenfranchise over one million Yiddish-speaking citizens by a Republican administration fearful of Jewish voters. The California Constitution was similarly amended to disenfranchise Chinese voters who were seen as a threat to the "purity of the ballot box."

World War I gave rise to intense anti-German sentiment. A number of states, previously tolerant of bilingual schools, enacted extreme English-only laws. For instance, Nebraska and Ohio passed laws in 1919 and 1923 prohibiting the teaching of any language other than English until the student passed the eighth grade. The Supreme Court ultimately held the Nebraska statute unconstitutional as violative of due process in *Meyer v. Nebraska.*

Native Americans were also subject to federal English-only policies in the late 1800's and early 1900's. Native American children were separated from their families and forced to attend English language boarding schools where they were punished for speaking their native language.

Now, as then, the arguments of those advocating English-only laws are based on false stereotypes about the immigrant groups being targeted.

-14-
How do other countries handle the question of official languages?

Approximately one third of 161 national constitutions surveyed contain a declaration of one or more official languages. Slightly less than a third of the national constitutions, including most of those declaring an official language, contain provisions upholding the rights of linguistic minorities and banning discrimination on the basis of language. Virtually none of the national constitutions bars the government from using non-official languages in providing services to or communicating with its citizenry.

The United Nation's Universal Declaration of Human Rights adopted by the U.N. General Assembly in 1948 bans discrimination on the basis of language as well as race, sex, religion and other status. The International Covenant on Economic, Social, and Cultural Rights and the International Convention on the Elimination of All Forms of Racial Discrimination likewise ban discrimination on the basis of language and culture. These protections were adopted in recognition that language discrimination and policies imposing linguistic homogeneity have commonly been used in the subjugation of minority groups.

-15- Why are English-only laws a civil liberties issue?

First, these laws may result in the termination of the rights of non-English speakers to important and essential services, such as an effective and meaningful education, the right to vote, access to the courts, and medical and social services essential to survival. "Official English" laws may abridge certain constitutional rights, such as the right of businesses to free speech, the right of a defendant to a translator, and the right of minority groups to vote and to have equal access to the political process. Ironically, these laws do nothing positive to increase English proficiency. They do not provide for needed educational resources in teaching English.

Second, even if "Official English" laws were only symbolic, they presume the need to "protect" the English language from immigrants who refuse to learn English or who advocate "ethnic separatism". Such a presumption perpetuates false stereotypes and contributes to bigotry and intolerance even by those who may be well intended. As for less benevolent English-only advocates, language politics are easily manipulated as a convenient surrogate for racial politics; for some, the real problem is not the language but the people who speak the language.

Finally, "Official English" laws, particularly those embodied in a constitution, subvert the central mission of the Constitution and the Bill of Rights — a charter of liberties and individual freedom. "Official English" laws transform the Constitution into a bill of restrictions, limiting rather than protecting individual rights. These laws are particularly inconsistent with the spirit of the First Amendment and Equal Protection Clause which protect societal diversity and prohibit discrimination against unpopular and vulnerable minorities.

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DECLARING ENGLISH THE OFFICIAL LANGUAGE: PREJUDICE SPOKEN HERE

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If English was good enough for Jesus Christ it's good enough for me.[1]

Introduction

Two out of three Americans believe that English is the official language of the United States.[2] It is not. In the last five years, however, various organizations have orchestrated a well-financed and well-planned effort to declare English the official language.[3] Despite almost unanimous opposition from political leaders and newspapers,[4] the proponents of the "English-Only" movement have been making extraordinary progress in their quest to make English the official language of the United States. In every state where the electorate has had an opportunity to vote on an initiative or referendum, it has approved the measure making English the official language.[5] The margins of victory are usually overwhelming.[6]

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This Article is dedicated to the memory of my father, Manuel Califa. I thank Ed Chen, Jim Crawford, Morton Halperin, Susan Hansen, Wade Henderson, Martha Jimenez, Jim Lyons and John Trasvina for their help in the preparation of this Article. I am especially thankful to Mary Carol Combs for her generous advice and assistance.

[1] Paul Simon, The Tongue-Tied American 62 (1980) (quoting H.L. Mencken).

[2] Carelli, *Survey: Most Think English is Official U.S. Language*, Assoc. Press, Feb. 14, 1987.

[3] J. Crawford, Bilingual Education: History, Politics, Theory and Practice 52–69 (1989) (describing history of English-Only movement).

[4] S. Diamond, Proposition 63—English Language Initiative, A Brief History 2 (undated) (U.S. English, California English Campaign) (describing media and political opposition to Proposition 63).

[5] *See, e.g.*, Chambers, *California Braces for Change With English as Official Language*, N.Y. Times, Nov. 26, 1986, at A20; Reinhold, *3 State Referendums Give New Impetus to Anti-Abortion Efforts*, N.Y. Times, Nov. 10, 1988, at B1 (Florida, Colorado and Arizona). *See infra* note 55 for a list of states with laws recognizing English as the official language.

[6] Chambers, *supra* note 5 (California, 3-1 margin); Reinhold, *supra* note 5 (Florida—84%, Colorado—61%, Arizona—51%).

To many, it seems counter-intuitive to vote against English-Only proposals. English is indisputably the primary language of the United States. Ninety-eight percent of the inhabitants of this country speak English well or very well.[7] Thus, declaring English the official language seems benign; why not declare "official" what all of us know to be true—that English is the national language?

However benign it may seem, the declaration of an "official" language would also be used as a tool for prejudice. As this Article demonstrates, Hispanics are the chief targets of the English-Only movement.[8] Even though the Hispanic community is acquiring English proficiency as rapidly as other immigrants have,[9] Hispanics are predominantly opposed to the English-Only movement. They believe that the English-Only movement is driven by anti-Hispanic prejudice and fear, and that it will result in discrimination against them.[10]

The leaders of the English-Only movement focus their public arguments on the goal of national unity. Hidden inside this velvet glove is the iron fist of prejudice and discrimination. The English-Only movement is actually an expression of the underlying insecurity about and prejudice towards Hispanics. If courts examine English-Only laws objectively, without accepting at

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[7] U.S. Bureau of the Census, 1980 Census of Population: General Social and Economic Characteristics, table 99, *Nativity and Language* 1–68 (1984).

[8] Hispanics are not the only targets. Asian-Americans have seen considerable animus directed at them as a result of the English-Only movement; *see* Ward, *Language Rift in 'All America City,'* L.A. Times, Nov. 13, 1985, at II-1, and have historically been singled out for discriminatory treatment because of language. *See, e.g.*, Olagues v. Russionello, 797 F.2d 1511 (9th Cir. 1986), *vacated as moot*, 108 S. Ct. 52 (1987) (discussed *infra* at notes 250–253 and accompanying text). It is not surprising, therefore, that Asian-Americans have strongly opposed English-Only laws. *See* Trombley, *English-Only Proposition Kindles Minorities' Fears*, L.A. Times, Oct. 12, 1986, at 1. Despite the impact of these laws on Asian-Americans, this Article is confined to an examination of the effect on Hispanics.

[9] *See infra* notes 142–159 and accompanying text for a discussion of the rate of English acquisition among Hispanics.

[10] "It is our belief that this is a backhanded attempt to further ostracize Hispanics and other language minorities from fully participating in society in the same way that Jim Crow laws ostracized Blacks. It is this separatist movement by these 'Americans' that must be stopped." *The English Language Amendment: Hearing on S.J. Res. 167 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 9 (1984) [hereinafter *Senate Hearing*] (statement of Arnoldo S. Torres, national executive director, League of United Latin American Citizens).

face value the rhetoric of the movement's proponents, they will find that these laws are not a rational way of achieving the legitimate state interest of national unity. This Article demonstrates that Hispanics are acquiring English-language proficiency at the same rate as other immigrants, a fact which undermines the movement's basic assumption to the contrary. In addition, English-Only laws are problematic not only because they do not promote national unity, but because they hinder it. This is true because English-Only laws are divisive and succeed only in stigmatizing Hispanics.

Within the Article I discuss the historical context of the English-Only movement by exploring the xenophobia that has permeated American history during periods of immigration. This cultural insecurity has manifested itself most recently in local and state English-Only laws and has led to a federal English-Only proposal. The structure of this federal bill reveals that prejudice against Hispanics is at the core of the English-Only movement.

Next, I offer a policy analysis of English-Only legislation. This analysis demonstrates that the arguments in favor of English-Only laws are based on incorrect assumptions and faulty reasoning. English-Only laws will not achieve the goals which the movement's proponents claim they will achieve. Furthermore, I assert that the English-Only movement is motivated, at least partially, by prejudice against Hispanics. At the very least, irrational and unfounded fears of Hispanics have prompted the movement to espouse misconceived policies.

Finally, I argue that the proposed federal English-Only law would not survive constitutional attack under the equal protection clause. A detailed analysis of the "means and ends" of English-Only laws shows that the federal bill would not achieve any of the positive objectives it purports to achieve. It would not encourage Hispanics to learn English and it would not strengthen national unity. The bill would have the practical consequence of depriving Hispanics of both bilingual voting assistance and bilingual education. Moreover, this deprivation is intentional, and it is a bare manifestation of the anti-Hispanic prejudice that permeates the English-Only movement.

I. Historical Overview

A. America's Language Policy

The constitutions of many nations contain provisions declaring a language "official."[11] The Constitution of the United States does not contain such a provision, and linguistic historians do not consider this an oversight.[12] The colonial and revolutionary periods left as their legacy a generally tolerant attitude towards language. For example, colonists defeated an attempt to create an academy that would have established standards for proper English usage.[13] This linguistic tolerance existed despite the sizeable number of non-English speakers. In the original thirteen colonies, German and French enjoyed wide use,[14] as did hundreds of American Indian languages.[15]

As the United States expanded westward, many French[16] and Spanish speakers[17] joined the country's population. Those languages had long been spoken in territories which were now being added to the United States.[18] The United States naturalized the citizens of these territories without requiring a proficiency in English.[19]

German speakers were also numerous throughout the late 18th century and most of the 19th century,[20] and there was little linguistic tension between German speakers and English speakers.[21] In 1870, the United States Commissioner of Education

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[11] A. Blaustein & D. Epstein, Resolving Language Conflicts: A Study of the World's Constitutions 6–7 (1986) (listing countries and constitutional provisions).

[12] Heath, *English in Our Language Heritage*, in Language in the USA 6–19 (1981).

[13] *Id.* at 6.

[14] *Id.* at 10–12.

[15] Leap, *American Indian Languages*, in Language in the USA, *supra* note 12, at 116, 129.

[16] Liebowitz, *English Literacy: Legal Sanction for Discrimination*, 45 Notre Dame Lawyer 7, 15 (1969) [hereinafter Liebowitz, *English Literacy*] (the Louisiana Purchase brought in large numbers of French speakers).

[17] Liebowitz, *The Imposition of English as the Language of Instruction in American Schools*, Revista de Derecho Puertorriqueño 175, 199–200 (1970) [hereinafter Liebowitz, *Imposition of English*] (the annexation of Texas and the cessation of the Mexican War both brought in large numbers of Spanish speakers from what is now Texas, New Mexico, Arizona and California).

[18] For example, Spanish had been spoken in many of these areas since 1598. *Id.* at 199.

[19] Liebowitz, *English Literacy*, *supra* note 16, at 14.

[20] Liebowitz, *Imposition of English*, *supra* note 17, at 179.

[21] *Id.* at 179–80.

assessed the national language situation by recognizing the importance of German: "[T]he German language has actually become the second language of our Republic, and a knowledge of German is now considered essential to a finished education."[22]

Beginning in the late 19th century, cultural and political responses to immigration patterns began to change. Increased immigration from southern and eastern Europe created a backlash of anti-foreign sentiment.[23] Non-English speakers, including American Indians, Japanese-Americans and Mexican-Americans, increasingly found the laissez-faire attitude of the 19th century overcome by intolerance and restrictions on the use of their languages.[24] A program called "Americanization," designed to help immigrants learn English and to use it exclusively, soon took on xenophobic and repressive traits by requiring English proficiency for employment, voting and education.[25] In 1906, for the first time, federal law required an alien to speak English in order to become a naturalized citizen.[26]

Typically, language intolerance was directed at physically identifiable immigrant groups. The one exception to this correlation arose in the case of Germans and the German language. In the eyes of native-born Americans, Germans had long been

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[22] Heath, *supra* note 12, at 13.

[23] J. Crawford, *supra* note 3, at 22. Southern and eastern European immigrants were viewed as very undesirable. In 1911, the government-sponsored Dillingham Commission drew a distinction between the "old" (pre-1880) and the "new" (post-1880) immigrants. K. Hakuta, Mirror of Language: The Debate on Bilingualism 16 (1986). The old immigrants, Scandinavians and Germans, were considered easily assimilated, stable and industrious. *Id.* The new immigrants, from southern and eastern Europe, were thought of as harder to assimilate, transient, less intelligent and too urban. *Id.* at 16–17. Francis A. Walker, the president of the Massachusetts Institute of Technology, wrote: "These immigrants are beaten men from beaten races, representing the worst failures in the struggle for existence . . . . Europe is allowing its slums and its most stagnant reservoirs of degraded peasantry to be drained off upon our soil." *Id.* at 16–17.

[24] Liebowitz, *English Literacy*, *supra* note 16, at 187. *See, e.g.*, Farrington v. Tokushige, 273 U.S. 284 (1927) (invalidating a territorial law of Hawaii that would have eliminated private Japanese language schools on the island); D. Montejano, Anglos and Mexicans in the Making of Texas, 1836–1986 220–34 (1987); Liebowitz, *English Literacy*, *supra* note 16, at 190–94. American intolerance of foreign languages also asserted itself in the context of imperialistic conquest: when, in 1898, with the conclusion of the Spanish-American War, the United States acquired Puerto Rico, J. Crawford, *supra* note 3, at 23, it required that English be the language of instruction in Puerto Rican schools. Liebowitz, *English Literacy*, *supra* note 16, at 219.

[25] Current Topics in Law and Policy, *The Proposed English Language Amendment: Shield or Sword?*, 3 Yale L. & Pol'y Rev. 519, 535–39 (1985).

[26] Heath, *supra* note 12, at 15.

the perfect immigrant group. They were white, shared a more-or-less common European culture, and were not considered a threat.[27] The German language was tolerated and proliferated.[28] With the onset of World War I, however, German became the target of repression.[29] Many states which had explicitly recognized a private or religious school's right to teach the German language now repealed those laws and made teaching in German a crime.[30] Thus, even where race was not a factor in language discrimination, the language itself was not the real concern.

In 1965 immigration laws favoring European immigrants over Asian and Hispanic immigrants were repealed.[31] This change, coupled with political events in Asian and Latin American countries, prompted increased immigration from those countries.[32] The Cuban Revolution caused a mass exodus of Cubans to the United States following 1959.[33] The Vietnam War and continuing strife in Southeast Asia increased the flow of people from those countries to the United States.[34] Increasingly, the immigrant tide consisted mainly of non-Europeans.[35]

These new immigrants have caused much concern among immigration restrictionists like the Federation for American Immigration Reform ("FAIR").[36] FAIR particularly feared that the exploding population and stagnant economy of Mexico would lead to ever-increasing immigration.[37] "[A]nalysts cited by FAIR argue [that] the population increase in the United States from Mexico and other parts of the Third World could change the nature of America within a century."[38] While the economy ab-

[27] *See id.* at 13.

[28] *See supra* notes 20–22 and accompanying text.

[29] Liebowitz, *Imposition of English*, *supra* note 17, at 183–86.

[30] J. Crawford, *supra* note 3, at 23. In 1923 the Supreme Court held laws that prohibited teaching German in public schools invalid. Meyer v. Nebraska, 262 U.S. 390 (1923). See also *infra* note 239 for a discussion of *Meyer*.

[31] Pub. L. No. 89-236, § 2, 79 Stat. 911 (1965), *amending* 8 U.S.C. § 1152.

[32] D. Bennett, The Party of Fear, From Nativist Movements to the New Right in American History 363–64 (1988).

[33] *Id.* at 364.

[34] *Id.* at 363–64.

[35] U.S. Dep't of Commerce, Bureau of the Census, Statistical Abstract of the United States 1988, table 8.

[36] D. Bennett, *supra* note 32, at 369–72. FAIR was founded in 1979 by one of the leaders of the English-Only movement, Dr. John Tanton. *See infra* notes 50–51 and accompanying text.

[37] D. Bennett, *supra* note 32, at 370–71.

[38] *Id.*

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[44] J. Crawford, *supra*

[45] *Id.* at 66 n.2.

[46] *See, e.g.*, U.S. Eng
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[47] Pratt, *'Bilingual' Sh*
J., Sept. 24, 1986, at A8.

sorbed millions of immigrants in the late 19th century, immigration restrictionists currently contend that the United States cannot sustain this new influx of immigrants.[39]

Changes in immigration brought additional changes in language use. In 1940, German was still the second most popular language in the United States.[40] By 1960, Italian was the most common non-English language.[41] In 1975, Spanish was the second most common language in this country.[42] Moreover, because this change in language use occurred after the civil rights movement of the 1960's, recent immigrants arrive in the United States with considerably more political empowerment than earlier immigrant groups.[43]

B. Contemporary Xenophobia: The English-Only Movement

The English-Only movement's history is a success story. The group has attracted a large following and significant financial support. While various groups support and further the English-Only cause, the two most prominent organizations are U.S. English ("USE") and English First. In 1988, USE claimed 350,000 members and an annual budget of seven million dollars.[44] English First claimed 200,000 members.[45] Although both USE and English First support the English-Only movement, they are two distinct organizations, which sometimes compete bitterly.[46] The founders of USE and English First have often revealed their hostility toward Hispanic immigrants. English First is headed by Lawrence Pratt, a former Virginia state legislator.[47] In 1985 Mr. Pratt was secretary of the Council for Inter-American Security, which published a report stating that His-

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[39] *Id.* at 371.

[40] R. Brischetto, Bilingual Elections at Work in the Southwest 68 (1982).

[41] *Id.*

[42] *Id.*

[43] *See* Current Topics in Law and Policy, *supra* note 25, at 524–25 (asserting a "greater national governmental involvement in the mechanisms of assimilation" and government's recognition of "the rights of language minorities").

[44] J. Crawford, *supra* note 3, at 54.

[45] *Id.* at 66 n.2.

[46] *See, e.g.*, U.S. English, *N.Y. Assemblyman Disavows "English First,"* Update, Jan.–Feb. 1987, at 2.

[47] Pratt, *'Bilingual' Shouldn't Really Mean Refusal to Speak English*, Montgomery J., Sept. 24, 1986, at A8.

panics who support bilingual education are a national security threat to the United States.[48]

Dr. John Tanton, who started USE, began his career as an ophthalmologist and civic activist.[49] In 1979 he founded FAIR, which has been at the forefront in lobbying for stricter immigration policy.[50] When the FAIR board of directors declined to become involved in the language issue in 1983, he founded USE.[51] Dr. Tanton chose former Senator S.I. Hayakawa as a co-founder of USE; Senator Hayakawa had introduced legislation in 1981 to make English the official language of the United States.[52] Arnold Schwarzenegger, Alistair Cooke, Walter Cronkite and other prominent figures have served on the USE Board of Advisors.[53]

C. State and Local Laws

The English-Only movement has been successful in various states and localities. When USE was founded in 1983, three states had English-Only laws.[54] Today, sixteen states and many local governments have such laws.[55] For example, in 1980 the

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[48] R. Butler, On Creating a Hispanic America: A Nation Within a Nation? 9–13 (1985).

[49] Dr. Tanton began as an environmental advocate in the Sierra Club and other organizations. Crawford, *U.S. English—Agendas Hidden Between the Lines*, Houston Chron., Oct. 30, 1988, Outlook section at 4. He joined and contributed to organizations like Planned Parenthood and Zero Population Growth. *Id.* He became the national chairman of Zero Population Growth in the mid-1970's. Cooper, *Immigration Reformer Stirs the Melting Pot*, Nat'l J., May 17, 1986, at 1210.

[50] Cooper, *supra* note 49.

[51] *Id.*

[52] S. Hayakawa, One Nation . . . Indivisible? 12–13 (1985).

[53] J. Crawford, *supra* note 3, at 55. Walter Cronkite resigned because he feared that English-Only laws would harm minorities. Johnson, *Newsmakers*, L.A. Times, Oct. 16, 1988, at 1-2.

[54] J. Crawford, *supra* note 3, at 66 n.1.

[55] The 16 states are: Arizona (approved 1988, to be codified at Ariz. Const. art. XXVIII); Arkansas (Ark. Stat. Ann. § 1-4-117 (1987)); California (Cal. Const. art. III, § 6 (1986)); Colorado (approved 1988, to be codified at Colo. Const. art. II, § 30a); Florida (approved 1988, to be codified at Fla. Const. art. II, § 9); Georgia (1986 Ga. Laws 529); Illinois (Ill. Ann. Stat. ch. 1, para. 3005 (Smith-Hurd 1980)); Indiana (Ind. Code Ann. § 1-2-10-1 (Burns 1987)); Kentucky (Ky. Rev. Stat. Ann. § 2.013 (Michie 1985)); Mississippi (Miss. Code Ann. § 3-3-31 (1987)); Nebraska (Neb. Const. art. I, § 27 (1985)); North Carolina (N.C. Gen. Stat. § 145-12 (1987)); North Dakota (N.D. Cent. Code § 54-02-13 (Supp. 1987)); South Carolina (S.C. Code Ann. § 1-1-696, 697, 698 (Law. Co-op. 1987)); Tennessee (Tenn. Code Ann. § 4-1-404 (1987)); and Virginia (Va. Code Ann. § 22.1-212.1 (1987)). Hawaii has two official languages, English and Hawaiian. Haw. Const. art. XV, § 4 (1988). If Hawaii is counted the total reaches 17.

voters of Dade County, Florida, enacted an "anti-bilingual" resolution which prohibited funding of projects that involved the use of a non-English language.[56] Although Dade County sought to attract Latin-American tourists, the law originally prohibited the county from placing Spanish-language tourism advertisements, even in Spanish-speaking countries.[57] Even zoo signs identifying an animal's name in Latin violated the law.[58] In 1984, the county commissioners amended the ordinance, to identify certain circumstances under which a language other than English could be used.[59] However, these exceptions only covered the most egregious overextensions of the law: medical services, services for the elderly, services for the handicapped, emergency services and the promotion of world-wide tourism.[60]

California's English-Only law is representative of other states' laws.[61] In 1986, California voters approved Proposition 63, declaring English the official language of the state.[62] Proposition 63 gives the legislature power to enforce the constitutional amendment by appropriate legislation.[63] The amendment also commands the legislature and state officials to take all steps necessary to ensure that the role of English is preserved and enhanced.[64] The legislature is prohibited from making a law which diminishes or ignores the role of English as the common language of the state.[65]

USE, the chief proponent of the measure, has created a center for the implementation of Proposition 63.[66] In addition,

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[56] Dade County, Fla., Ordinance 80-128 (Nov. 4, 1980) (codified as amended at Dade County, Fla. Code § 2-11.18 (Supp. 1988)).

[57] Trombley, *supra* note 8, at 1, 30.

[58] *Id.* at 30.

[59] *Id.*

[60] *Id. See also* Dade County, Fla. Ordinance 84-84 (Oct. 16, 1984) (codified at Dade County, Fla. Code § 2-11.18 (Supp. 1988)).

[61] The California law is not purely symbolic, *see infra* note 74 and accompanying text, as the Illinois law has been declared. PROPA v. Kusper, 490 F.2d 575 (7th Cir. 1973). Neither is it as detailed as the Arizona law, passed as Proposition 106 in 1988, which prohibits all publications in a language other than English and requires use of only English by state employees during performance of government business. Ariz. Const. art. XXVIII, § 1 (1988).

[62] Cal. Const. art. III, § 6.

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *U.S. ENGLISH Creates Center for Implementation of Prop. 63*, Update, Jan.–Feb. 1987, at 1.

USE unsuccessfully requested that the state attorney general stop the use of multilingual ballots in San Francisco and other California cities, since those cities are not covered by the relevant portions of the Voting Rights Act.[67] On another front, USE submitted an amicus brief in *Teresa P. v. Berkeley Unified School Dist.*,[68] an equal educational opportunity case, asserting that Proposition 63 explicitly rejected bilingual education.[69] Proposition 63 was also used by the defendants in *Gutierrez v. Municipal Court*,[70] an employment discrimination case in which the court determined that the plaintiff was wrongfully dismissed for speaking Spanish to a co-worker.

Despite their efforts, USE and other proponents of Proposition 63 have not had great success in eliminating bilingual voting assistance, bilingual education and other bilingual services in California.[71] In response to repeated demands by USE that San Francisco and Los Angeles stop using trilingual ballots, the California attorney general rendered a comprehensive opinion on the meaning of Proposition 63.[72] In it he noted that Proposition 63 made English the official language of California[73] and stated that this attribute was more than just symbolic: in order to have a binding effect, a state act must be published in English.[74] However, the attorney general found no prohibition on the use of other languages in the text of the constitutional amendment.[75] As a result, the government was permitted to publish translations of election materials.[76] Californians who do not speak English currently receive translation and interpreter

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[67] Letter from Richard D. Martland, chief assistant attorney general of California, to Stanley Diamond (May 20, 1987) [hereinafter Martland Letter]. *See infra* notes 95–112 and accompanying text for a discussion of the bilingual voting assistance provisions of the Voting Rights Act, 42 U.S.C. §§ 1973b(f) and 1973aa-1a (1982).

[68] Civ. Action No. C 87 2396 DLJ (N.D. Cal. Feb. 14, 1989).

[69] *Id.*, Brief Amicus Curiae of U.S. English. The district court decided that the school district's curriculum did not violate federal law and thus did not deny the plaintiff equal educational opportunity. The court's holding did not address USE's argument that Proposition 63 required the abolition of native-language instruction. *Id.*, slip op.

[70] 838 F.2d 1031 (9th Cir. 1988). *See also infra* notes 132–133 and accompanying text.

[71] *See, e.g.*, Memorandum from Joseph R. Symkowick to Bill Honig (Nov. 5, 1986) (state superintendent's opinion from counsel stating that Proposition 63 did not affect bilingual education directly).

[72] Martland Letter, *supra* note 67 (discussing Proposition 63).

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.*

assistance in areas such as tax claim forms and emergency 911 services.[77] The attorney general's findings suggest that Proposition 63 will not eliminate all bilingual services. Nevertheless, the English-Only movement in California has been successful in establishing a popular consensus that bilingualism is disfavored.[78] The indirect effects of Proposition 63 have been significant. The Governor has vetoed the bilingual education bill because of Proposition 63, according to one of the leading proponents of that proposition.[79] A rise in complaints about "speak English only" rules in the workplace has been attributed to Proposition 63.[80]

D. Federal English-Only Proposal

On December 8, 1988, USE announced it would support a proposal by U.S. Representative Norman D. Shumway to amend the United States Constitution by declaring English "the official language of the United States."[81]

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[77] *See* Cal. Gov't Code § 53112 (West 1983) ("911" emergency services to be provided in English and a foreign language if U.S. census shows at least five percent of area's population speaks foreign language); Cal. Rev. & Tax. Code § 255.8 (West 1987) (taxation forms available in Spanish at discretion of county assessor).

[78] Gurwit, *English-Only Campaign is Spreading*, Governing, Aug. 1988, at 67.

[79] *Id.* at 68.

[80] *Id.*

[81] Rep. Norman D. Shumway (R-Cal.) introduced the bill on September 15, 1988. H.R.J. Res. 656, 100th Cong., 2d Sess. (1988), reintroduced on January 19, 1989, as H.R.J. Res. 81, 101st Cong., 1st Sess. (1989) [hereinafter Shumway Bill]. The Shumway Bill provides as follows:

> SECTION 1. The English language shall be the official language of the United States.
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> SECTION 2. Neither the United States nor any State shall require, by law, ordinance, regulation, order, decree, program, or policy, the use in the United States of any language other than English.
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> SECTION 3. This article shall not prohibit any law, ordinance, regulation, order, decree, program, or policy—
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> (1) to provide educational instruction in a language other than English for the purpose of making students who use a language other than English proficient in English;
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> (2) to teach a foreign language to students who are already proficient in English;
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> (3) to protect public health and safety; or
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> (4) to allow translators for litigants, defendants, or witnesses in court cases.
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> SECTION 4. The Congress and the States may enforce this article by appropriate legislation.

This Article treats the Shumway Bill as a proposed federal statute, rather than a constitutional amendment, because a statute may be the real goal of USE and because a constitutional amendment is not a realistic possibility.[82] The policy arguments against English-Only laws are applicable whether these laws are in the form of a statute or a constitutional amendment.

The Shumway Bill is more draconian than other proposed English-Only legislation. For example, a bill introduced by Senator Steve Symms of Idaho consisted merely of a declaration that English was the official language and that the Congress was empowered to pass appropriate legislation to enforce the law.[83] The Shumway Bill actually prohibits the federal government or any state government from using a language other than English.[84] The Shumway Bill would thus "solve" the implementation problems USE has faced in California.[85] The Shumway Bill not only requires English, it *prohibits* the state from using or condoning the usage of any other language in connection with a number of activities.

Section 3 of the Shumway Bill provides for exceptions to the English-Only rule.[86] A non-English language may be used (1) to provide educational instruction for the English-proficiency of a non-English-speaking student; (2) to teach a foreign language to English-proficient students; (3) to protect health and safety; or (4) to allow translators in court cases. Although earlier versions of the federal English-Only bill only contained the first exception,[87] Representative Shumway added the other three exceptions in response to criticism by other members of Congress.[88] The bill provides no exception for the use of foreign

[82] An amendment would have to be approved by two-thirds of the House and two-thirds of the Senate and then ratified by three-fourths of the state legislatures, 38 states. U.S. Const. art. V. Amending the Constitution is no easy task, and has been successfully accomplished only 16 times since the adoption of the Bill of Rights. *See* U.S. Const. amends. XI–XXVI. USE is apparently mindful of these difficulties. Gerda Bikales, then-executive director of USE, conceded that a constitutional amendment has virtually no chance of adoption. N.Y. Times, Oct. 4, 1986, at 4, col. 1.

[83] S.J. Res. 13, 100th Cong., 1st Sess. (1987).

[84] Shumway Bill, *supra* note 81, § 2.

[85] *See supra* notes 75–77 and accompanying text.

[86] *See* Shumway Bill, *supra* note 81.

[87] S.J. Res. 13, 100th Cong., 1st Sess. (1987).

[88] Letter from Rep. Norman D. Shumway to fellow members of Congress (Sept. 15, 1988) (seeking support for the revised amendment).

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[95] Pub. L. No. 94-73,
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[96] Pub. L. No. 94-73, 19
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languages as aids to voters, by means of translators or multilingual ballots. This was no accident. USE has been heavily involved in efforts to curtail these aids to California voters.[89]

The federal government presently requires the use of a foreign language in various ways not covered by the exceptions. Interpreters are used in the physical and mental examination of alien immigrants who wish to enter the United States.[90] Service of process on a foreign national must be accompanied by a translation into the foreign language commonly used in the nation of origin.[91] Where there is a substantial number of non-English speakers, federally funded migrant and community health centers[92] as well as alcohol abuse and treatment programs[93] must employ people who can communicate with the non-English speaking clients. Additionally, twenty-one agencies of the federal government provide information in languages other than English.[94] These are a few examples of the many ways in which the federal government requires the usage of languages other than English. All of them would be prohibited under the Shumway Bill. The bill's effect is clearest in three vitally important areas: voting, education and employment discrimination.

1. Voting

In 1975 Congress added bilingual provisions to the Voting Rights Act.[95] Congress found that voters suffered discrimination on the basis of language, and that such discrimination was "pervasive and national in scope."[96] Moreover, Hispanics were

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[89] *See supra* notes 66–68 and accompanying text.

[90] 8 U.S.C. § 1224 (Supp. III 1985).

[91] 28 U.S.C. § 1827 (1982).

[92] 2 U.S.C. §§ 254b and 254c (1982).

[93] 2 U.S.C. § 4577(b) (1983).

[94] *Senate Hearings*, *supra* note 10, at 20 (statement of Sen. Huddleston). "These publications cover a broad spectrum, and range from White House press releases to fact sheets on power mowers." *Id.*

[95] Pub. L. No. 94-73, 1975 U.S. Code Cong. & Admin. News (89 Stat.) 400–02 (codified as amended at 42 U.S.C. §§ 1973b(f) and 1973aa-1a (1982)).

[96] Pub. L. No. 94-73, 1975 U.S. Code Cong. & Admin. News (89 Stat.) 401 (codified as amended at 42 U.S.C. § 1973b(f)(1) (1982)).

found to have suffered more discrimination than other language minorities.[97]

The bilingual provisions require a jurisdiction to provide assistance in a language other than English if the jurisdiction meets two conditions. First, over five percent of voting-age citizens must belong to a single minority group.[98] Second, either the jurisdiction-wide or state-wide illiteracy rate must exceed the national rate.[99] In 1982, the bilingual provisions of the Voting Rights Act were extended to 1992.[100] Congress found that there was a continuing need for bilingual elections and that they could be implemented in a cost-effective manner. The Senate Report on the extension noted that elderly citizens, who are least likely to learn English as a second language,[101] are the ones most likely to need bilingual assistance.[102] A 1982 study for the Mexican American Legal Defense and Educational Fund found that seventy percent of monolingual Spanish-speaking citizens would be less likely to register to vote if bilingual assistance were eliminated.[103] If bilingual ballots were unavailable, seventy-two percent of the monolingual Spanish-speakers would be less likely to cast a vote.[104] Therefore, the Shumway Bill would effectively disenfranchise a large number of elderly voters who, by voting, are affirming their desire to be part of the American political community.[105]

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[97] The Senate report on the proposed provisions stated that:

> Weighing the overwhelming evidence before it on the voting problems encountered by language minority citizens, the Subcommittee acted to expand the protections of the Voting Rights Act to insure their free access to the franchise. The definition of those groups included in "language minorities" was determined on the basis of the evidence of voting discrimination. *Persons of Spanish heritage was the group most severely affected by discriminatory practices*, while the documentation concerning Asian Americans, American Indians and Alaskan Natives was substantial.

S. Rep. No. 295, 94th Cong., 1st Sess. 30–31, *reprinted in* 1975 U.S. Code Cong. & Admin. News 774, 797 (emphasis added).

[98] 2 U.S.C. § 1973aa-1a(b) (1983).

[99] *Id.*

[100] Pub. L. No. 97-205, § 4, 1982 U.S. Code Cong. & Admin. News (96 Stat.) 134.

[101] *See infra* note 149 (study showing correlation between age and English acquisition).

[102] S. Rep. No. 417, 97th Cong., 2d Sess. 65–66, *reprinted in* 1982 U.S. Code Cong. & Admin. News 177, 244–45.

[103] R. Brischetto, *supra* note 40, at 100, table 28.

[104] *Id.*

[105] Voting is an assertion of belonging to a political community. Karst, *Paths to*

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[107] *Id.* at 14.
[108] *Id.* at 27.
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[110] GAO Voting R
[111] *Id.* at 27.
[112] *Id.* at 32.
[113] *See* Shumway

According to a report issued by the General Accounting Office ("GAO") in September 1986, 375 jurisdictions in twenty-one states were covered under the language-minority provisions of the Voting Rights Act.[106] In the jurisdictions surveyed by the GAO Voting Report, Hispanics were the most commonly served minority group (ninety-six percent of responding jurisdictions offering written assistance did so for Hispanics, and eighty-nine percent of those offering oral assistance served Hispanics).[107] The GAO Voting Report found that those Hispanic voters who were least able to read or speak English made up the largest portion of voters using the Spanish version of the ballot.[108]

While the Shumway Bill's overall impact on the electorate would be quite significant, the bill would have its most staggering effects in Texas and California because of their large Hispanic populations.[109] Two-thirds of the jurisdictions covered by the Voting Rights Act are located in Texas; every county in the state is covered.[110] In Texas alone, 69,000 Hispanics, or twenty-five percent of Hispanics that voted in the 1984 election, were estimated to have used written assistance.[111] Almost a third of all Hispanic voters in Texas—85,000—received oral assistance in Spanish.[112] These are significant numbers. Independent of concerns over an individual's right to vote, the situation in Texas illustrates that election *results* could be affected if Spanish assistance is not available at the voting booth.

2. *Education*

The first exception to the Shumway Bill would allow native language instruction only for the purpose of teaching English.[113]

Belonging: The Constitution and Cultural Identity, 64 N.C.L. Rev. 303, 347 (Jan. 1986). To deprive bilingual voters of ballots they need to vote impedes their assimilation. *Id.*

[106] United States General Accounting Office, Bilingual Voting Assistance Costs of and Use During the November 1984 General Election (1986) [Hereinafter GAO Voting Report].

[107] *Id.* at 14.

[108] *Id.* at 27.

[109] U.S. Dep't of Commerce, The Hispanic Population in the United States Mar. 1988 (Advance Report). Fifty-five percent of all Hispanics in the United States resided in California and Texas. *Id.* at 1. There are approximately 6,589,000 Hispanics in California and 4,134,000 in Texas. *Id.* at 2.

[110] GAO Voting Report, *supra* note 106, at 7.

[111] *Id.* at 27.

[112] *Id.* at 32.

[113] *See* Shumway Bill, *supra* note 81.

While the exception appears to allow bilingual instruction, it actually poses significant restrictions and would eliminate many bilingual programs currently in use.

The federal government has acted to ensure that children from limited English-speaking backgrounds have equal educational opportunity. In 1967, Congress passed the Bilingual Education Act,[114] which declared a willingness to assist local school districts financially in implementing new and imaginative programs designed for these special educational needs.[115] The Act explicitly provided for bilingual education, which has been defined as follows:

> [B]ilingual education involves the use of two languages, one of which is English, as mediums of instruction to assist children of limited English-speaking ability. Both languages are used for the same student population—not as an isolated effort, but as a key component of a program embracing the total curriculum.[116]

In response to the Act, states now have laws that allow the use of a non-English language for educational purposes broader than those found in the Shumway Bill.[117] For example, schools use the child's native language to teach subjects such as math, while simultaneously striving for proficiency in English.[118] These school districts have instituted bilingual education programs where native-language use is not solely for the purpose of making a student proficient in English.

The optimum *mix* of native-language and English-language instruction has been a source of lively academic and political debate.[119] The latest Congressional pronouncement addresses the question as follows:

> [T]he Committee [on Labor and Human Resources] underscores its support of bilingual education . . . .

[114] Pub. L. No. 90-247, 81 Stat. 816, 1967 U.S. Code Cong. & Admin. News 917 (codified as amended at 20 U.S.C. §§ 3221–3261 (Supp. IV 1986)).

[115] *Id.*

[116] S. Rep. No. 763, 93rd Cong., 2nd Sess. 42 (1974).

[117] *See, e.g.*, Ill. Ann. Stat. ch. 122, para. 14C-3 (Smith-Hurd Supp. 1988).

[118] J. Crawford, *supra* note 3, at 126–41.

[119] K. Hakuta, *supra* note 23, at 206.

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> The best way to provide English language instruction to limited-English-proficient children is a subject that has been much debated by educators, policymakers, students, and parents . . . . Positions range from strong support of transitional bilingual education, an approach that employs instruction in the student's native language at the beginning and increases the use of English as time goes by, to strong support of methods which rely solely on English to teach the student.
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> This bill does not make a statement as to which instructional approach is better, nor do the Committee Members wish to debate the merits of each type of language instruction. Instead, *the Committee believes that there is a need for greater flexibility at the school district level.*[120]

The Shumway Bill would end this debate and this flexibility and would disallow any native-language instruction in substantive subjects such as math and science. It would dictate that there is only one language of instruction, and it would allow use of the native language only to make the child English-proficient.[121] Transitional bilingual education would be eliminated.[122] The Shumway Bill would take students back to "sink or swim" instruction; students would not understand instruction in subjects like science or math until they became proficient in English.

In effect, adoption of the Shumway Bill would repeal the Bilingual Education Act. Shumway would also repeal those stat-

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[120] S. Rep. No. 92, 100th Cong., 1st Sess. 4 (1987) (emphasis added).

[121] *See* Shumway Bill, *supra* note 81, § 3(1).

[122] Association for Supervision and Curriculum Development, Building an Indivisible Nation: Bilingual Education in Context (1987) defines the most common forms for teaching children with limited English proficiency. The definition of transitional bilingual education is as follows:

> *Transitional bilingual education.* Instruction in the content areas is offered in the students' native language for a limited time (usually two or three years) while the students are learning English. As soon as they're judged ready to be taught in English alone, they are placed in mainstream classrooms with native English-speaking students.

Id. at 19.

utes, administrative practices and judicial remedies that require native language instruction when other methods of instruction are not effective.[123] For example, courts that have required bilingual education as a remedy in desegregation cases would be prohibited from doing so.[124]

3. *Employment*

In 1987, the Equal Employment Opportunity Commission ("EEOC") adopted a guideline stating that a rule requiring employees to speak only English in the workplace was a burdensome condition of employment.[125] The guideline established a

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[123] Other important statutes concerning education of students with limited English proficiency include the Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1703(f) (1982) (declaring unlawful the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by the students in its instructional programs), and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (Supp. 1986) (prohibiting discrimination on the basis of national origin by recipients of federal financial assistance).

Administratively, the Department of Health Education and Welfare implemented its Title VI national origin discrimination program by declaring on July 10, 1970, that "[w]here inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students." 35 Fed. Reg. 11595 (1970). This declaration was relied on by the Supreme Court in Lau v. Nichols, 414 U.S. 563, 568 (1974), and is still in effect.

Both Title VI and the Equal Educational Opportunities Act stress flexibility. If a particular instructional method is not effective, a school district should try others. Passage of the Shumway Bill would mean that the range of educational options would be narrowed drastically. If an English immersion program were unsuccessful, the school district would be prohibited by federal law from trying any bilingual approach, including the "late exit" approach that has been so successful at the Eastman Avenue school and which some researchers think is the best pedagogical approach. *See* Crawford, *Language Acquisition Theory Revolutionizing Instruction*, Education Week, Apr. 1, 1987, at 30, 32.

[124] *See, e.g.*, Serna v. Portales Mun. Schools, 351 F. Supp. 1279 (D.N.M. 1972), *aff'd.*, 499 F.2d 1147 (10th Cir. 1974); United States v. Texas, 342 F. Supp 24 (E.D. Tex. 1971), *aff'd.*, 466 F.2d 518 (5th Cir. 1972).

[125] The EEOC guideline states as follows:

> The primary language of an individual is often an essential national origin characteristic. Prohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably, disadvantages an individual's employment opportunities on the basis of national origin. It may also create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment . . . .

29 C.F.R. § 1606.7 (1987).

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presumption that such a rule violated Title VII of the Civil Rights Act of 1964,[126] thereby triggering close scrutiny.[127]

Enacting the Shumway Bill could repeal this regulation. The Shumway Bill prohibits the United States from requiring that any language but English be used.[128] The EEOC regulation not only *allows* a language other than English to be used, but it could also be construed as *requiring* uses of other languages in order to create a non-burdensome work environment. At present an English-Only rule is acceptable only if justified by business necessity.[129]

The importance of the EEOC regulation can be seen by comparing cases decided before and after it was promulgated. In *Garcia v. Gloor*,[130] decided before promulgation, the Fifth Circuit upheld the dismissal of an employee for speaking Spanish.[131] In *Gutierrez v. Municipal Court*,[132] decided after promulgation, the Ninth Circuit invalidated a similar dismissal.[133] If the Shumway Bill were passed, and the EEOC regulation were therefore repealed, employers would be free to fire workers merely for speaking their native languages.

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[126] 42 U.S.C. §§ 2000e to 2000e-17 (1982).

[127] *See* 29 C.F.R. § 1606.7 (1987). The EEOC's close scrutiny of these rules should not be confused with courts' review standards in equal protection analyses. *See infra* notes 237–332 and accompanying text.

[128] Shumway Bill, *supra* note 81, § 2.

[129] "An employer may have a rule requiring that employees speak only in English at certain times where the employer can show that the rule is justified by business necessity." 29 C.F.R. § 1606.7(b) (1987).

[130] 618 F.2d 264 (5th Cir. 1980) *cert. denied*, 449 U.S. 1113 (1981).

[131] *Id.* The Fifth Circuit relied heavily on the fact that the employee was bilingual and could readily have complied with the speak-English-Only rule. *Id.* at 270. *See also infra* note 262.

[132] 838 F.2d 1031 (9th Cir. 1988) *vacated as moot*, 57 U.S.L.W. 3687 (U.S. Apr. 17, 1989).

[133] *Id.* In *Gutierrez*, part of the employee's official duties required use of Spanish. *Id.* at 1036. The employee challenged a rule that mandated that employees speak English only during work, except when translating. *Id.* The Ninth Circuit agreed with the EEOC that English-Only rules generally have an adverse impact on protected groups and that they should be closely scrutinized. *Id.* at 1040. The court further agreed with the EEOC that English-Only rules can create an atmosphere of "inferiority, isolation and intimidation." *Id.* (quoting 29 C.F.R. § 1606.7 (1987)).

The *Gutierrez* court would uphold the English-Only rule solely for reasons of business necessity. *Id.* The court found the rule not to be a business necessity. *Id.* at 1042–44.

II. A Policy Analysis of English-Only Laws

In order to identify the negative policy implications of the English-Only movement, it is necessary to identify the movement's underlying rationales. This section will analyze these rationales and offer a critique of the movement's fundamental assumptions and conclusions.

A. Refuting the Policy Arguments Advanced by English-Only Proponents

The general argument in favor of English-Only laws makes the following assumptions:[134] (1) For a variety of reasons, recent Hispanic immigrants are not learning English as other immigrants did. Declaration of English as the official language will encourage Hispanics to learn English. (2) Bilingual ballots, bilingual education and other services are disincentives to learning English. An English-Only law would remove these "crutches" and force Hispanics to learn English. (3) English is being threatened by a "competing" language—Spanish—and must be declared the official language before Spanish is declared official. (4) The nation is endangered by the same sort of linguistic discord and separatism which has plagued other bilingual countries. Declaration of English as the official language would solve this problem.

1. Acquisition of English Proficiency by Hispanic Immigrants

According to English-Only advocates, recent immigrants are not learning English.[135] They argue that, for the first time, a

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[134] These arguments are found generally in S. Diamond, *supra* note 4; S. Hayakawa, *supra* note 52; G. Bikales & G. Imhoff, A Kind of Discordant Harmony (U.S. English 1985); U.S. English, In Defense of Our Common Language (undated pamphlet).

[135] "Please join me in the effort to encourage linguistic minorities to gain a new knowledge of English . . . ." Letter from Rep. Norman D. Shumway to fellow members of Congress (Nov. 18, 1985) (asking for support for an Official English law). "English is not recognized or treated by the U.S. government as the country's official language. *As a result*, the newest immigrants to the United States, unlike their predecessors, are not learning English." *Senate Hearing*, *supra* note 10, at 8–9 (1984) (statement of Sen. Jeremiah Denton) (emphasis added). The logical flaw is obvious: the United States has never had an official language law, and immigrants have always learned English.

majority of immigrants speaks only one language—Spanish.[136] Furthermore, they assert, the number of Spanish-speaking persons immigrating to the United States has reached an unprecedented level.[137] English-Only advocates argue that these people are poor, unskilled and uneducated,[138] and pose a threat to the nation.[139] An unwillingness or inability to learn English, they

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[136] Bikales and Imhoff described the rise of Spanish as follows:

> [F]or the first time, a majority of migrants [sic] speak just one language—Spanish. This majority concentration of Spanish speakers among new migrants has already lasted for more than a decade and promises to continue for the foreseeable future . . . .
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> [A] vocal Hispanic leadership . . . gives lip service to the need of Hispanics to learn English while excoriating any practical English-language instruction that does not also reinforce the native language . . . .
>
> [T]he definition of the inability to speak English as *prima facie* evidence of membership in a disadvantaged and discriminated-against group entitled to affirmative action benefits, has *rewarded limited English-language ability* . . . .

Bikales & Imhoff, *supra* note 134, at 8–10 (1985) (emphasis added).

[137] *Id.* at 8.

[138] English First, *Immigration Bill: Burdens the Nation; Fuels Bilingual Crisis*, Members' Report, Dec. 1986, at 1–2.

[139] English First included this analysis of the Immigration Reform and Control Act of 1986, Pub. Law No. 99-603, 1986 U.S. Cong. Code & Admin. News (100 Stat.) 3359, in its report to its members:

> This immigration bill grants blanket amnesty to all illegal aliens who arrived in this country prior to 1982 . . . .
>
> [T]his bill will swell the welfare roles, burden the border states with increased unemployment and rising cost of benefits . . . .
>
> But those of us concerned with the language crisis in our country, see still another, far-reaching, adverse effect that this legislation will have for all Americans.
>
> Once illegal aliens are granted amnesty, their children will enter our public schools, and an already existing problem will grow to mammoth proportions.
>
> These children will remain part of that population which never learns English, and threatens to make America a bilingual country, costing the American taxpayer billions of dollars.
>
> Token citizenship will not help poor, unskilled Hispanics when they find themselves in a permanent underclass, isolated by a language barrier. The hopes that brought them here in the first place will turn to despair as they become dependent upon government handouts . . . .
>
> Congress has presented the indigenous population of Mexico with an open invitation to walk across our Southern Border. It has irresponsibly encouraged the mass entrance of poor, unskilled people into our country, jeopardizing the health of our economy.
>
> . . . *We favor responsible immigration that places a high value on American citizenship.*

argue, distinguishes Hispanics from prior waves of immigrants who learned English quickly.[140] English-Only proponents assume that Hispanics cannot understand that economic advancement in the United States is closely tied to proficiency in the English language.[141]

Despite these claims, two major studies recently demonstrated that Hispanics cannot be distinguished from other groups by inability or unwillingness to learn English. A 1986 study by Kevin F. McCarthy and R. Burciaga Valdez and a 1988 study by Calvin Veltman show that the rate of English language acquisition by both native-born and immigrant Hispanophones (first language heard is Spanish) is impressive.[142]

The McCarthy and Valdez Study showed that the classic three-generation model of language acquisition is present for Hispanics.[143] According to this model, the first generation is mainly monolingual in Spanish. The second generation is bilingual with working knowledge in both the native language and English, the language of the adopted country. By the third generation, English is the preferred language.[144] This is the pattern

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> Citizenship is a privilege that must be earned. And part of the process of obtaining citizenship status must be learning the English language.

Id. (emphasis added).

[140] "I don't know about your forefathers but when mine came to America, the first thing they did was learn English . . . . [L]earning English wasn't just a practical necessity. It was a moral obligation." Letter from Rep. Jim Horn, Tex. State Legislature (undated) (fundraising letter on behalf of English First).

[141] K. Hakuta described the economic incentive to learn English:

> There are, of course, reasons aplenty for learning English, many of them economic. Very few people can thrive in this country without a good working knowledge of English. For example, the 1980 census asked people who were not native speakers of English to rate their own ability to speak it. They were asked to say whether they could speak English "very well," "well," "not well," or "not at all." For native speakers of Spanish, the median reported 1979 income among men who claimed to speak English "very well" was $10,938; for "well" $9592; for "not well" $7873; for "not at all" $6083.

K. Hakuta, *supra* note 23, at 167.

[142] K. McCarthy & R. Burciaga Valdez, Current and Future Effects of Mexican Immigration in California (1986) [hereinafter McCarthy & Valdez Study]; C. Veltman, The Future of the Spanish Language in the United States (1988) [hereinafter Veltman Study].

[143] McCarthy & Valdez Study, *supra* note 142, at 65.

[144] *Id.* at 61, fig. 6.5. Of immigrants born in Mexico who had been in the United States for only a short time, about 25% spoke English well. The rate for immigrants who return frequently to their native country was approximately 35%. For those who

previous immigrants followed and seems to be applicable to Mexican-Americans in California as well.

The Veltman Study explored the language practices of all Hispanics.[145] Veltman found that the acquisition of English by Hispanic immigrants is primarily determined by two factors: (1) how long the immigrant has lived in the United States[146] and (2) how old the immigrant was when she arrived in the United States.[147] Older teenagers and adults do not transfer to English as quickly as do younger immigrants.[148] Nevertheless, the language shift of immigrants begins immediately upon arrival in the United States, progresses rapidly, and ends within approximately fifteen years.[149] The Veltman Study concluded that Hispanic immigrants rapidly shift to the English language.[150] The language shift from Spanish to English currently spans between

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were permanent residents of the United States the rate of English usage was very high—about half. The dramatic shift occurs in the first generation of Mexican-Americans born in the United States. More than 90% are proficient in English. The second generation of native-born Mexican-Americans is about 95% English proficient. More than half of the second generation are *monolingual English speakers*. They either will not or cannot speak Spanish. For the second generation native-born, Spanish monolingualism is very low—approximately 2%.

[145] Veltman Study, *supra* note 142, at 2.

[146] *Id.* at 40.

[147] *Id.* at 44. Veltman uses an example of a hypothetical group of children aged five through nine when they arrived in the United States. After an average stay of only nine months, 70% will speak English on a regular basis. After an average stay of four years, nearly all will speak English regularly, and 30% will have adopted English as their usual preferred language. After approximately nine years of residence 60% will use English as their preferred language, and after 14 years, the percentage who use English is 70%. Ten percent will have abandoned the use of Spanish as a daily language. *Id.*

[148] *Id.* at 44. Veltman noted that most did not come to the United States to obtain a formal education, and will probably be employed in jobs that have limited contacts with English speakers. *Id.*

[149] *Id.* at 44. Veltman found that approximately 80% of those aged 15 through 24 at time of arrival will come to speak English on a regular basis. This figure declines in inverse correlation with the age of the immigrant at the time of arrival. Thus, of those aged 25–34 at time of arrival, 70% will become regular English speakers. Fifty percent of those aged 35–44 and 30% of those aged 45 and over will come to speak English on a regular basis. *Id.*

[150] *Id.* at 44–45. Veltman asserted:

> The data presented in this chapter certainly do not indicate that hispanophone immigrants resist the learning of English; in fact, the data indicate very rapid movement to English on the part of Spanish language immigrants. Given the age structure of the immigrant population, more than three-fourths of any group of immigrants will come to speak English on a regular basis after approximately 15 years residence in the United States.

Id.

two and three generations, with a two-generation model more likely in the future.[151] Eventually, 52% of Hispanophones will adopt English as their principal language.[152] Of the remainder, 39.7% will be Spanish bilingual.[153] Spanish monolinguals comprise 8.3% of the native-born Hispanophone population.[154]

Veltman pointed out that Spanish monolingualism persists because of continued immigration, and not because Hispanics are not learning English.[155] Thus, he asserted that an interruption in the immigrant stream would stabilize the size of the Spanish-speaking population for about fifteen years and would be followed by a progressively rapid decline.[156] Ultimately, without continued immigration, Spanish would not survive in the United States.[157] Veltman's study shows that the proponents of the English-Only movement are incorrect when they assert that Hispanics do not learn English. The study also emphasizes the correspondence between the degree of Spanish monolingualism and current immigration patterns. Put another way, statistics showing the number of Hispanics who do not speak English will always include recently arrived Hispanics and, thus, will never capture those Hispanics who *have* learned English.

The argument that Hispanics need an English-Only law to encourage them to learn English is specious. Ninety-eight percent of Hispanic parents think that knowing English very well is essential.[158] Classes for adults who want to learn English are in tremendous demand. There are long waiting lists for these classes in many areas of the country, including 40,000 persons in Los Angeles County.[159] All indications show that Hispanics are learning English without any legal coercion. It is not only condescending and prejudicial to assume that Hispanics need

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[151] *Id.* at 3.
[152] *Id.* at 46.
[153] *Id.*
[154] *Id.* at 45. One-third of all Spanish speaking immigrants comes to the United States at age fourteen or younger. Approximately 60% of the children that will eventually be born to these Spanish-language immigrants will speak English as a *first* language. *Id.*
[155] *Id.* at 109.
[156] *Id.* at iv.
[157] *Id.* at 3.
[158] J. Crawford, *supra* note 3, at 60.
[159] Woo, *Immigrants—A Rush to the Classrooms*, L.A. Times, Sept. 24, 1986, at 1.

an English-Only law before they will discover that learning English is essential to advancement in this country; it is also wrong.

2. Bilingual Ballots, Bilingual Education and Other Bilingual Services and the Acquisition of English Proficiency

a. Voting

English-Only proponents assert that bilingual ballots send an erroneous message to new immigrants that they can participate fully in the political system without learning the English language.[160] However, the proponents offer no empirical foundation for this assertion. In fact, Hispanics are learning English despite the prevalence of bilingual ballots.[161] English-Only ballots would only serve to disenfranchise Hispanics—which may be the intended effect.

b. Education

English-Only proponents argue that bilingual education obstructs students from learning English and confuses parents and students about the role of English in the United States.[162] For

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[160] Address by J. Tanton, Los Angeles Rotary International Meeting (Apr. 15, 1988). J. William Orozco, the southern California spokesman for the English-Only proposition passed in 1986, said that schools should stop sending home notices to parents in languages other than English. "That should be stopped—if you continue to put *crutches* under people, they're never going to learn English." Trombley, *Assemblyman Vows to Carry the Ball for English-Only Action*, L.A. Times, Nov. 6, 1986, at 3 (emphasis added). Even essential services available in Spanish, such as a 911 emergency telephone line, have been criticized as disincentives to learning English. Crawford, *supra* note 49.

[161] *See supra* notes 142–159 and accompanying text.

[162] Bikales, Testimony on *F.Y. 1984 Appropriations for Bilingual Education* (May 24, 1983).

> Bilingual education retards the acquisition of English language skills, and the integration of the students into the American mainstream. Inevitably it confuses both students and parents. Newcomers to the United States cannot be expected to understand the ways of this country and they look to the public schools to tell them unequivocally what is expected of them in America. When the children continue to be taught in the language of origin, we give them and their parents very ambiguous signals, which may well lead them to conclude that English is perhaps not essential after all.

Id.

decades there has been a heated debate on how to teach a child whose native language is not English.[163] Recent evidence shows that native-language instruction is a successful method of helping students make the transition to instruction in English.[164] Some studies have concluded that the more extensive the instruction in the native language, the better students perform in a variety of subjects, such as math and science.[165] Because knowledge transfers readily from one language to another, students do not have to relearn in English what they have already learned in their native language.[166] Further, a strong foundation in a native language makes learning a second language easier.[167] This applies not only to science and math, but also to reading and writing.[168] In general, Hispanic students perform better in bilingual programs than in English-only classrooms.[169]

For English-Only advocates, however, the success of bilingual education is irrelevant. Their concern is not that bilingual education adversely affects English acquisition; what actually concerns them is the length of the transition period.[170] The advocates of English-Only laws are willing to sacrifice educational concerns in order to calm their irrational fear that bilingual education threatens "national unity."[171]

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[163] K. Hakuta, *supra* note 23, at 193.

[164] J. Crawford, *supra* note 3, at 79 (citing General Accounting Office, Bilingual Education: A New Look at the Research Evidence (1987)).

[165] "Preliminary reports indicate that the more extensive the instruction in the native language, the better students may do on English-language tests in reading, language arts, and math . . . ." Association for Supervision and Curriculum Development, Building an Indivisible Nation: Bilingual Education in Context 21 (1987).

[166] *Id.* at 22.

[167] *Id.*

[168] *Id.*

[169] "Hispanic children in English-Only programs have the highest drop-out rate in [Boston]: 54% and rising. By comparison, the bilingual drop-out rate is below the 40% city average." *Newscenter Five Checkpoint: Bilingual Education* (WCVB television broadcast, Feb. 26, 1989) [hereinafter *Checkpoint*].

[170] Debate between Bikales and the author, USE Nat'l Membership Meeting, Philadelphia, May 2, 1987. When presented with evidence of the success of the bilingual program at Eastman Avenue School in Los Angeles, where some children stayed in the program for five years but score higher than the district-wide averages in all subjects, Bikales found the program unacceptable because of the length of the program.

[171] *Encounter*, (Voice of America Radio Interview, Oct. 10, 1986).

> If the transition is going to take a five-year minimum, we consider that even if a child comes out of there speaking very good English and speaking his or her native language, that it's nevertheless unacceptable. We do not accept that

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[172] S. Rep. No. 92.

[173] K. Hakuta, *supra*

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By law, bilingual education's primary purpose is to teach English to students who are not English-proficient.[172] The federal bilingual education law serves a transitional objective, and schools are supposed to end native-language instruction as quickly as possible.[173] Within one to three years, the majority of students are in "regular" classes conducted entirely in English.[174] The number of schools which continue to instruct in the native language is negligible.[175] Even in those schools that do, the shift from Spanish to English is inexorable; bilingual programs do not impede the acquisition of English.[176]

c. Bilingualism in General

English-Only activists contend that other uses of non-English languages discourage the learning of English. These other uses include emergency 911 services,[177] school notices to parents,[178] radio broadcasts,[179] and adver-

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kind of self-segregation for years on end . . . . I think what's at stake here is national unity, and nothing could be more important than that.

The Eastman school is located in heavily Hispanic East Los Angeles. As the former principal of that school has said, "[I]t didn't make any difference in East L.A. We were 99.9 percent Hispanic. There was no one else to integrate with." J. Crawford, *supra* note 3, at 133. Furthermore, in cities such as Boston, Hispanic parents who keep their children in bilingual programs "feel very reluctant [to have them begin English-Only classes], *not* because they don't want their children to go to the regular program, but because they are afraid they're going to be isolated and treated poorly." *Checkpoint*, *supra* note 169 (interview with Miguel Roma, bilingual instructor). A legal pronouncement effectively eliminating Spanish from many services does nothing to dispel Hispanics' fears that Anglo society will treat them poorly; it will only make the situation worse.

[172] S. Rep. No. 92, 100th Cong., 1st Sess. 5 (1987).

[173] K. Hakuta, *supra* note 23, at 204.

[174] In the Boston public school system, for example, 70% of students in bilingual programs move on to English-Only classrooms within two years. *Checkpoint*, *supra* note 169.

[175] K. Hakuta, *supra* note 23, at 205.

[176] This is true even where native-language instruction is extensive and the society is more conducive to native-language maintenance. For example, Veltman found that Greek-Canadian children change to English as their preferred language even though the emphasis on maintaining the native language is much greater in Canada than in the United States. Veltman, *Comment*, 60 Int'l J. Soc. Lang. 177, 180 (1986).

[177] *See* Crawford, *supra* note 49.

[178] *See* Trombley, *supra* note 160.

[179] Letter from Gerda Bikales, executive director, USE, to Secretary, Federal Communications Commission ("FCC") (Sept. 26, 1985). Bikales asked the FCC to adopt a rule that would limit the growth of the number of Spanish-language radio stations in south Texas. The chief reason given for the request was that, because English speakers

tising.[180] Empirically there is no evidence showing that these types of services inhibit English acquisition.[181] Instead, terminating these services could only create health hazards (in the case of emergency services) and culturally isolate Hispanic immigrants (in the case of school notices and advertisements).

3. Spanish as a Threat to English as the Official Language

English-Only advocates argue that the inroads of "rival" languages and the erosion of English are signals that the time

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had problems finding radio stations that broadcast in English, there had been an erosion of English on the radio dial.

> Clearly, it is not in the best interests, of the nation, nor of the State of Texas, nor of its various ethnic populations, to encourage the further systematic displacement of English-language radio stations in the Texas border counties. When evaluating the public interest function of radio stations, language is not a neutral variable; language can serve as the carrier of our common civic culture, or it can serve to isolate those who are newcomers to this culture.
>
> . . . .
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> Freedom of speech is not unlimited. As Justice Brandeis has pointed out, no one is free to shout "fire" in a crowded theater. Speech and information are often curtailed in matters relating to national security, for example. Cutting off American citizens from sources of information in the language of their country, fostering language segregation via the airwaves, these are major problems that warrant the steps we propose.

The FCC refused USE's request, citing, among other authorities, the first amendment. Letter from James C. McKinney, chief, Mass Media Bureau, FCC, to Gerda Bikales (Nov. 27, 1985).

[180] A 1985 Associated Press story details efforts of English-Only groups to stop businesses from advertising in Spanish:

> "We object to Philip Morris or any other companies who are advertising in languages other than English," said Stanley Diamond, head of the California chapter of U.S. English, an advocacy group. "What they are doing tends to separate out citizens and our people by language." . . . This fall Diamond's . . . chapter launched a coupon mail-in protest against a Spanish-language Yellow Pages . . . . "We certainly would feel that the corporations, the telephone company with the Spanish Yellow Pages should change . . . . We will do everything we can to put this advertising in English only . . . and in no other language," said Diamond. In Florida, U.S. English spokeswoman Terry Robbins plans to target corporations after completing a campaign to declare English that state's official language. "I've targeted government first. Then I will go on to the private sector in the next few months," she said. She already has written as a private citizen to McDonald's and Burger King protesting Spanish in fast-food menus. "Why does poor Juan or Maria have a problem ordering a Whopper?" she asked. "It isn't that they aren't able to, they don't want to."

Group Wants Stop to Ads in Spanish, San Jose Mercury News, Dec. 23, 1985, at F1.

[181] *See supra* notes 142–159 for a discussion of the rate of English acquisition among Hispanics.

has come to grant English more formal recognition.[182] They feel that English must be legally protected from the threat of the Spanish language.[183] There is, however, no broad-based movement to make Spanish the official language of the United States, nor is there serious discussion of such a movement.[184] Not one Hispanic organization supports a declaration of Spanish as the official language.[185] Such a movement would be impossible, given the overwhelming shift to English that the Veltman and the McCarthy and Valdez studies have shown.[186] Like other immigrant groups, Hispanics recognize that the economic, social and political benefits of this country are not available to those who cannot speak English.[187] In fact, it was the Congressional

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[182] Bikales, *Foreword* to A. Blaustein & D. Epstein, *supra* note 11.

[183] Terry Robbins, the former head of USE operations in Florida, identified Hispanics as responsible for disturbing the homogeneous environment of the United States:

> There are misguided persons, specifically Hispanic immigrants, who have chosen to come here to enjoy our freedoms, who would legislate another language, Spanish, as co-equal and co-legal with English. I feel safe to say it is the Hispanic immigrant because no other immigrant group that came to our country has tried to put the language of their birth country on an equal status with English. If Hispanics get their way, perhaps someday Spanish could replace English here entirely . . . . I say it's precisely because of the large numbers of Hispanics who have come here, that we ought to remind them, and better still educate them to the fact that the United States is not a mongrel nation. We have a common language, it's English and we're damn proud of it.

Presentation by Terry Robbins, Florida Int'l Univ. (Oct. 8, 1987). Robbins was commended for her outstanding work in two issues of USE's bimonthly newsletter. *See Terry Robbins, "Charter Member of U.S. English,"* Update, Feb.–Mar. 1984, at 2; *The Advertising Dilemma: Is It Discrimination?*, Update, Sept.–Oct. 1985, at 2. At the time of the presentation quoted above, Robbins was chairperson of Dade Americans United to Protect the English Language, Inc.

[184] In a study done by Susannah MacKaye for the Stanford University Linguistics Department, all newspaper editorials, op-ed columns and letters to the editor on Proposition 63 were analyzed. Out of the hundreds of letters on Proposition 63, only *one* letter favored the creation of a bilingual/bicultural California. S. MacKaye, California Proposition 63 and Public Perceptions of Language (1987).

[185] When asked to name one Hispanic leader who favored the official recognition of Spanish, Sen. Hayakawa could not respond. Crawford, The Language Policy Debate: Implications for Educational Equity 8 (transcript of keynote speech before the Interstate Collaboration for Nat'l Origin Compliance Regional Planning Conference, American University Mid-Atlantic Equity Center, Feb. 18, 1988) [hereinafter Crawford, Language Policy Debate].

[186] Veltman Study, *supra* note 142. McCarthy and Valdez Study, *supra* note 142.

[187] James Crawford has explained why Hispanics are learning English in impressive numbers:

> The reason for this dramatic shift [from Spanish to English] is simple: English is the high-status language in the United States. It is the language of mass communication, popular culture, and most importantly, of economic opportu-

Hispanic Caucus (which opposes English-Only legislation) that introduced into Congress the English Proficiency Act to increase funding for English literacy programs.[188] Significantly, USE did not support this legislation.[189]

The English language is not being eroded. On the contrary, English is enjoying a period of growth, both domestically and internationally. Of the five most widely spoken languages in the world, English is the only *universal* language; it is used by a large portion of the world's population for easy communication between peoples of diverse cultural and language backgrounds.[190] Ironically, in a recent issue of the USE publication *Update*, the "erosion of English" is asserted side-by-side with an article showing the preeminence of English in technology, business, sports, glamour, aviation, navigation and Christianity.[191] The scare tactics employed by the English-Only proponents create misguided perceptions of Spanish-language eminence.

4. *Bilingualism as Separatism*

Citing the problems of Canada,[192] Sri Lanka, Belgium[193] and other multilingual countries,[194] advocates of the English-Only movement contend that if English is not declared the official

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> nity. Linguistic minorities do not need an English Language Amendment to explain this elementary fact of life. The idea that they do reflects arrogance and condescension, if not outright racism.

Presentation by James Crawford, National Educ. Ass'n Joint Conference on the Concerns of Minorities and Women, at 16 (June 30, 1988).

[188] J. Crawford, *supra* note 3, at 59.

[189] *Id.* at 59. This position on the part of USE "raised questions about its real intentions: to break down language barriers or to target non-English speakers for abuse." *Id.*

[190] Kachru, *American English and Other Englishes*, in Language in the USA, *supra* note 12, at 21.

[191] *Compare The Story of English*, Update, Nov.–Dec. 1986, at 4 *with Immigration Reform Bill Enacted: A Loss and Some Gains*, Update, Nov.–Dec. 1986, at 4.

[192] *Senate Hearings*, *supra* note 10, at 21 (statement of Sen. Huddleston).

[193] Bikales, *We Must Make English Our Official Language*, Washington Jewish Week, Mar. 19, 1987, at 25.

[194] "Switzerland, which is often cited as a paradise of multilingual cooperation, is going through some of the same linguistic tension experienced by other multilingual nations such as Belgium, Canada, or Sri Lanka." Tanton, *The Swiss Myth*, Update, Sept.–Oct. 1988, at 4.

language the United States will become a nation divided over language. However, there are situational differences between these countries and the United States, and a fair comparison cannot be drawn.[195] Canada's problems with English and French speakers, for example, are based on a linguistic and historical situation that does not exist in the United States. In Canada, both English and French were declared official national languages in 1969.[196] The French-speaking majority declared French the exclusive language of Quebec in 1974 in order to stifle what it considered a threat from the English-speaking minority.[197] This declaration led to more draconian language laws two years later and caused the divisiveness.[198]

The Canadian experience with language problems suggests that divisiveness and discord are *more* likely when one language is declared official to the disadvantage of speakers of another language. Such was the situation in Sri Lanka and Belgium, as well. In Sri Lanka, the 1956 decision by the Sinhalese-speaking majority to make their language official precipitated a bloody resistance by the Tamil minority.[199] In Belgium the divisiveness was not the result of bilingualism; it was the result of intolerance by French speakers of their Dutch-speaking compatriots.[200]

A similar situation has the potential to develop in the United States, especially if English-Only legislation is passed. English-Only proposals enjoy great popular support, ranging from seventy-five to ninety percent of the electorate.[201] While the En-

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[195] *See* Beardsmore & Willemyns, *Comment*, 60 Int'l J. Soc. Lang. 117, 119 (1986) (Canada and Belgium); Kandiah, *Comment*, 60 Int'l J. Soc. Lang. 183, 185–86 (1986) (Sri Lanka).

[196] Maldoof, *Comment: A Canadian Perspective*, 60 Int'l J. Soc. Lang. 105, 110 (1986).

[197] *Id.* at 111. The Quebec law "was adopted in response to growing nationalist sentiment and a feeling that the French-speaking majority was threatened by the English-speaking minority and the strength of the English language and culture of North America." *Id.*

[198] *Id.* at 112–13.

[199] Kandiah, *supra* note 195, at 185–86.

[200] The language issue is in fact a symptom of the problem, not the problem itself:

> [T]he defacto [sic] supremacy of French for over a century led to the statistical majority of Dutch-speakers in the country being downgraded to second-rate status within the national entity . . . . In other words, it is not bilingualism per se that has been at the origin of such tensions, but lack of equality.

Beardsmore & Willemyns, *supra* note 195, at 121.

[201] Crawford, Language Policy Debate, *supra* note 185, at 6.

glish-speaking community may see English-Only proposals as benign, minority-language communities view such legislation as stigmatizing and as an expression of xenophobia.[202] One prominent Hispanic leader likened English-Only laws to the Jim Crow laws faced by blacks.[203] The emotional reaction to these laws is so intense that it unites Hispanic communities which otherwise differ in many important respects, including race and national origin.[204] Research shows that the English-Only issue has united Hispanic Republicans and Hispanic Democrats to an unusual extent.[205]

Although Hispanics recognize that being able to speak and understand English is an important obligation of citizenship,[206] they are overwhelmingly opposed to English-Only legislation. This is no paradox. Hispanics are concerned that the English-Only movement is an attempt to brand Hispanics as inferior and un-American.[207] A review of the available record justifies these concerns.

The fears and prejudices of English-Only proponents in the United States can create the very divisiveness they purport to avoid.[208] "The likelihood that linguistic division will lead to po-

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[202] *Id.*

[203] *Senate Hearing*, *supra* note 10, at 9 (testimony of Arnoldo S. Torres).

[204] Karst, *supra* note 105, at 354.

[205] R. Brischetto, The Political Empowerment of Texas Mexicans 1974–1988, at 16 (1988). In 1988, only 23% of all Hispanic voters in Texas interviewed at exit polls favored English-Only legislation. *Id.* In its 1986 exit polls, 35% of the same group had favored English-Only legislation. *Id.* at 4. In polling California Hispanics, the Institute found that approximately 70% opposed the English-Only law in 1986. *California Latinos Nix English-Only Proposal*, Southwest Voter Research Notes, Dec. 1986, at 1. According to a New York Times/CBS News poll conducted May 11–14, 1987, 71% of Hispanics opposed a constitutional amendment mandating that governments use only English in the conduct of business. These data show that the Hispanic community is alarmed by English-only legislation, and that its repugnance is growing.

[206] In a survey conducted by the National Opinion Research Center, between February and April of 1984, 98% of Hispanics surveyed thought that ability to speak and understand English was an important obligation that a citizen owes the country. Eighty-one percent thought English proficiency a very important obligation. Only 2% thought that English proficiency was not an obligation that a citizen owes to the country. Public Opinion, Oct.–Nov. 1985, at 32–33.

[207] Current Topics in Law and Policy, *supra* note 25, at 549.

[208] *See* Beardsmore & Willemyns, *supra* note 195. Beardsmore and Willemyns note that:

> the Belgian and the Canadian cases clearly underline [that] denying language rights [in the United States] could lead to political tension and that if there has been conflict in these countries, it has been precisely because of the promotion

litical conflicts is particularly great when the language cleavages are linked with the presence of a dominant group which blocks the social mobility of members of a subordinate group, at least partly on the basis of language factors."[209] If any event is capable of giving rise to a *real* movement to have Spanish declared an official language, it would be a declaration that English is the one and only official language of the United States.[210]

B. Revealing the Actual Motivations of English-Only Proponents

English-Only proponents explain their motives in terms of English-language acquisition and national unity.[211] As this section has shown, those stated goals are not achieved—and in fact are thwarted—by English-Only legislation.[212] Prejudice and fear are the underlying motivations of the English-Only movement. "Language is a common medium for the expression of political difficulties; it is the *how* of many political struggles and manipulations in political systems, but it is not the *why*."[213]

> of one language to some supreme status to the detriment of the rights of the (often majority) speakers of another language.

Id. at 121.

[209] Inglehart & Woodward, *Language Conflicts and the Political Community*, in Language and Social Context 358–60 (1972).

[210] Declaration of an official language by a majority group often encourages minority groups to have their language declared a second official language. E. Annamalai, a linguist at the Central Institute of Indian Languages, makes this point well:

> It must be noted that in most cases the claims of minority languages for official status started after the legal acceptance of the majority language as the official language. The majority languages had been enjoying a *de facto* dominant position . . . but when they were made *de jure* official languages, objections and counterclaims were made by the minority languages. For example, it was after the declaration of Assamese as the official language of Assam that the tribal language groups in that state fought for and achieved separate states.

Annamalai, *Comment: Legal vs. Social*, 60 Int'l J. Soc. Lang. 145, 149 (1986). *See also supra* notes 196–200 (discussion of Canadian, Belgian and Sri Lankan cases).

[211] *See generally supra* note 134 and accompanying text.

[212] *See supra* notes 208–210 and accompanying text.

[213] O'Barr, *The Study of Language and Politics*, in Language and Politics 1, 19 (1976) (emphasis in original).

1. *What English-Only Proponents Really Want*

Dr. Tanton, the founder of USE, wrote a paper in 1986 that was distributed to a select few WITAN IV conference participants.[214] The paper was used as a focal point for a conference attended by leaders of the English-Only movement and was not intended for public distribution. Shorn of the treacly rhetoric that USE public documents contain, this private paper provides an unusually clear view of what really concerns USE's founder.[215] Dr. Tanton is not primarily interested in the Spanish or English language. He is concerned about Hispanics and the threat they pose to Anglo dominance. In one of his more blatantly offensive statements, Dr. Tanton revealed the type of thinking that prompted him to found USE: "[P]erhaps this is the first instance in which those with their pants up are going to get caught by those with their pants down!"[216]

In the WITAN IV paper, Dr. Tanton expressed his fear that Hispanic fertility[217] will lead to Hispanic domination and vio-

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[214] WITAN is derived from an Old English word meaning "members of a council of wise men." Members include leaders of USE. J. Crawford, *supra* note 3, at 66 n.5.

[215] James Crawford publicized the formerly secret WITAN IV paper in a newspaper article. Crawford, *supra* note 49. Dr. Tanton wrote a reply that was published on the same day in the same newspaper. Tanton, *U.S. English—It's Being Victimized by the "Big Lie"*, Houston Chron., Oct. 30, 1988, Outlook section at 5. Dr. Tanton admitted to authorship of the WITAN IV paper but resigned as chairman of USE so "I could defend my reputation from an unwarranted attempt at character assassination while sparing a worthy group and cause." *Id.* As a result of the publication of the contents of the paper, Linda Chavez, the president of USE, also resigned her position, calling the WITAN IV paper "anti-Hispanic and anti-Catholic." Arocha, *Chavez Quits U.S. English Organization*, Wash. Post, Oct. 20, 1988, at A18. Walter Cronkite resigned from the USE Board of Advisors. Johnson, *supra* note 53.

[216] Memorandum from John Tanton to WITAN IV Attendees, at 4 (Oct. 10, 1986).

[217] The WITAN IV Paper, at 1.

> *Gobernar es poblar* translates "to govern is to populate." In this society where the majority rules, does this hold? Will the present majority peaceably hand over its political power to a group that is simply more fertile?
>
> Can *homo contraceptivus* [sic] compete with *homo progenitiva* [sic] if borders aren't controlled? Or is advice to limit one's family simple advice to move over and let someone else with greater reproductive powers occupy the space?

Id. at 4.

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Id. at 2.

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[221] *Id.*

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Id.

[223] Tanton apparently
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lence.[218] He worried that Hispanics, who are largely Catholic, will alter some of America's fundamental societal norms, such as the separation of church and state.[219] Dr. Tanton asserts that Hispanics will not better themselves economically and educationally,[220] but will nevertheless demand scarce slots in institutions of higher education to which they would not be entitled by merit.[221] According to Dr. Tanton, Hispanic fertility will result in whites' becoming a minority. At the same time, Hispanics will remain economically subordinate to Anglos, resulting in an "American apartheid."[222] Tanton's temporary solution to the Hispanic problem is a twenty-year ban on immigration.[223]

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[218] Tanton asked:

> How will we make the transition from a dominant non-Hispanic society with a Spanish influence to a dominant Spanish society with non-Hispanic influence? . . . As Whites see their power and control over their lives declining, will they simply go quietly into the night? Or will there be an explosion?
>
> Will Latin American migrants bring with them the tradition of the mordida (bribe), the lack of involvement in public affairs, etc.?

Id. at 2.

[219] "What are the implications of [higher immigration of Catholics] for the separation of church and state? The Catholic Church has never been reticent on this point. If they get a majority of the voters, will they pitch out this concept?" *Id.*

[220] "What are the differences in educability [sic] between Hispanics (with their 50% dropout rate) and Asiatics [sic] (with their excellent school records and long tradition of scholarship)?" *Id.* at 5.

[221] *Id.*

[222] Tanton fears a growing Hispanic—and black—population that will overthrow white society:

> Is apartheid in Southern California's future? The demographic picture in South Africa now is startlingly similar to what we'll see in California in 2030. In Southern Africa, a White minority owns the property, has the best jobs and education, has the political power, and speaks one language. A non-White majority has poor education, jobs and income, owns little property, is on its way to political power and speaks a different language . . . . In the California of 2030, the non Hispanic Whites and Asians, will own the property, have the good jobs and education speak one language and be mostly Protestant and "other." The Blacks and Hispanics will have the poor jobs, will lack education, own little property, speak another language and will be mainly Catholic. Will there be strength in this diversity? or will this prove a social and political San Andreas Fault?

Id.

[223] Tanton apparently believes that reduced immigration during World War II ended racial and ethnic tensions that had prevailed in the early 1900's:

> The theory of a moratorium: the pause in immigration between 1930–1950, combined with the assimilating experience of fighting side-by-side . . . in World

2. *What Lies Behind the Fears*

English-Only proponents are worried about a perceived Hispanic threat, not the threat of Spanish.[224] Language is merely a proxy or signaling system, a convenient and more subtle way of identifying those who are unwanted.[225] English-Only proponents are worried about people whom they perceive to be morally and intellectually inferior,[226] but who, because of their numbers, pose a political threat.[227] Tom McArthur, an editor of English Today, has written that uneasiness about language is almost always symptomatic of a larger uneasiness.[228]

What is the English-Only movement really worried about? First, Hispanics can easily immigrate to the United States. The United States has a large land border with Latin America which

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> War II gave us a needed pause so that we could assimilate the mass of people who came in the early years of the century. Do we again need such a pause?

Id. at 3.

[224] *See, e.g.*, *supra* note 139 and accompanying text.

[225] "Language is an automatic signaling system, second only to race in identifying targets for possible privilege or discrimination." Duetsch, *The Political Significance of Linguistic Conflicts*, in Les Etats Multilingues 7 (1975) (footnote omitted).

[226] *See supra* notes 214–223 and accompanying text (discussion of the WITAN IV paper).

[227] As one commentator has observed:

> [Supporters of the English-Only movement] have never felt the need to make English the official language of the United States in response to the agitation of the French in Maine, angry Injuns at Wounded Knee, aggrieved Hawaiians, or to any other tiny minority. They only defend . . . English . . . when it is threatened by the one other linguistic tool that signifies in the Americas . . . .
>
> The border is porous to the south . . . . [T]he millions of Hispanics *down there* are not manageable. The concern that Anglo-America could be swamped by Hispano-America is comparable to the fear that French America (Quebec) could be swamped by English America (the rest of Canada plus the States) . . . .
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> . . .
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> . . . Spanish is the language of masses perceived variously as illiterate, impoverished, dirty, backward, criminally inclined, residually Roman Catholic, prone to Communist infiltration, dark-complexioned, and now pushing cocaine and marijuana north for all they are worth.
>
> There does not have to be much rationality in the response to such fears, but it can help to make fears tidy and manageable if one talks in an apparently rational manner about the Constitution and safeguarding the nation's language—English . . . .

McArthur, *Comment: Worried About Something Else*, 60 Int'l. J. Soc. Lang. 87, 91 (1986).

[228] *Id.*

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it is unable to control.[229] Second, because Hispanics are more visible and empowered than previous immigrant groups, they are all the more threatening. Unlike previous immigrants, Hispanics have the advantage of bilingual ballots and bilingual education,[230] which seems to reinforce their "foreignness." Third, the English-speaking majority is unsure about how to deal with this "threat."[231] The English-Only movement represents "middle class anglo fears and anxieties" manifested by the creation of "mythical and simplistic and stereotyped scapegoats. If those with these fears are successful in passing 'English Official' amendments, this would represent another 'liberation of Grenada' syndrome rather than any mature grappling with the really monumental economic, social and political causes of conflict."[232] English-Only legislation is motivated by fear and prejudice and is a simplistic way of dealing with complex problems, such as Mexico's population explosion.[233] In addition to being simplistic, the English-Only solution would have dangerous consequences for Hispanics and society as a whole.

C. *Summary of Policy Analysis*

English-Only laws in general, and the Shumway Bill in particular, are not benign and will not accomplish the positive objectives they purport to accomplish. They are not meant to

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[229] *Id.*

[230] Current Topics in Law and Policy, *supra* note 25, at 524–25.

[231] Rodriguez, *Prop. 63 Would Betray State's Future*, L.A. Times, Oct. 26, 1986, at IV-2. "I see Proposition 63 as a betrayal of California's tradition of optimism. Proposition 63 is a balding, pot-bellied, frightened, third- or fourth-generation proposition. It is the Mexican immigrant running under cover of night that middle-aged California now fears."

[232] Fishman, *"English Only": Its Ghosts, Myths and Dangers*, 74 Int'l J. Soc. Lang. 125, 132 (1988). According to Fishman, the causes of Anglo insecurity are the loss of American leverage on the world scene over the last 20 years, the relatively disappointing performance of the American economy, and the loss of social mobility for the next generation.

[233] Karst has described the xenophobic tendencies of American culture as follows:

> In America hostility among cultural groups . . . is properly seen as a threat to [national] unity . . . . Those who react to cultural differences with fear or anger generally espouse nativist policies designed to repress the differences by excluding the "others" from the country, by forcing them to conform to the norms of the dominant culture, or by relegating them to a subordinate status in society.

Karst, *supra* note 105, at 311.

help immigrants learn English, or even to preserve a national unity that would include Hispanics. They are simply "packaged" that way. What these laws really reflect is the cultural insecurity and prejudice of their supporters.[234] The effects of the legislation are negative—deprivation of voting and education rights, increased hostility among groups, and a weaker nation.[235] The Shumway Bill is anti-Hispanic and is motivated by cultural insecurity. Hispanics' understandable resentment of the English-Only position is "directly traceable to the Nation's history of discrimination against people of Hispanic background."[236]

III. An Equal Protection Analysis of the Shumway Bill

The Shumway Bill and other English-Only laws fail to meet the objectives that they purport to achieve; they do not encourage immigrants to learn English and they do not foster national unity.[237] These laws deprive Hispanics and other groups of important educational[238] and voting rights, in violation of the equal protection clause of the fourteenth amendment.[239]

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[234] Fishman asserts that the proponents of English-Only laws are actually trying to say, "'who's in control here anyway: we who deserve to be or those riff-raff and upstarts?'" Fishman, *supra* note 232, at 132.

[235] As Sen. Pete Domenici (R-N.M.) said in response to Sen. Steve Symms (R-Idaho), a proponent of English-Only:

> [T]his amendment won't remedy any of the problems which the Senator from Idaho has pointed out. It won't help anyone learn the English language. It won't improve our society. It won't lead to a more cohesive nation. In fact, it will create a more divided nation. This amendment is an insult to all Americans for whom English is not the first language now at this stage of their life and to all those Americans who would like to learn English but who can't for one reason or another.
>
> . . .
>
> I oppose this amendment because it does nothing that it is supposed to do. It won't help a poor Italian grocer to learn how to write English . . . . It won't create a better, stronger, more cohesive American society.

131 Cong. Rec. S11456 (daily ed. Sept. 13, 1985) (statement of Sen. Domenici).

[236] Karst, *supra* note 105, at 354–55.

[237] *See supra* notes 142–159, 208–210 and accompanying text.

[238] For further discussion of the equal protection clause as it applies to bilingual education, see Note, *The Constitutional Right of Bilingual Children to an Equal Educational Opportunity*, 47 S. Cal. L. Rev. 943 (1974).

[239] Section one of the fourteenth amendment to the United States Constitution provides, in pertinent part, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Equal protection requirements apply to the federal government, as well as to state government. Buckley v. Valeo, 424 U.S. 1 (1976); Bolling v. Sharpe, 347 U.S. 497, 500 (1954). The Shumway Bill is discussed herein as

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The Supreme Court has developed a system of varying levels of scrutiny depending on the basis of classification. These are the strict scrutiny test, the heightened scrutiny test, the traditional rational basis test and the modern rational basis test. The following sections of this Article briefly discuss the doctrines of each test. The Shumway Bill is then analyzed under the tests and shown to be unconstitutional under all but the most permissive level of review.

A. The Strict Scrutiny Test

The strict scrutiny test is the most rigorous equal protection test used by the courts. It applies only when a law creates a suspect classification (discrimination on the basis of race,[240]

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though it were a proposed federal statute, not a proposed constitutional amendment. *See supra* note 82 and accompanying text. If the Shumway proposal were ratified as an amendment to the United States Constitution, the equal protection analysis would not apply. Since the Shumway proposal would be more recent, it would overrule prior federal and state statutes, cases and administrative rulings. An English language amendment would override inconsistent state laws. If there were a conflict between the English language Amendment and prior case law interpreting another constitutional provision, it is likely that the English Language Amendment would be controlling, since it is specific in its prohibition of the use of other languages.

Meyer v. Nebraska, 262 U.S. 390 (1923), which refused to uphold a language ban, has been called a precursor of modern equal protection doctrine. L. Tribe, American Constitutional Law 1320 n.13 (2d ed. 1988). The state of Nebraska had passed a law that prohibited the teaching of any language but English to a child before he or she reached the eighth grade. In *Meyer*, the state convicted a parochial school teacher of violating the "English-Only" law because he had taught a Bible story in German. Nebraska courts upheld the conviction. The Supreme Court struck down the Nebraska law and similar statutes in Iowa and Ohio. The Court noted that the foreign-born population was large, that its members used foreign words, "moved in a foreign atmosphere," 262 U.S. at 401, and followed foreign leaders. The Court went so far as to say that such practices resulted in the children being hindered from becoming citizens of the most useful type, and the public safety was imperiled. Nevertheless the court declared that these reasons were insufficient to justify the legislation:

> That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution—a desirable end cannot be promoted by prohibited means.

Id.

[240] *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (invalidating a law prohibiting whites, and only whites, from marrying outside their race; Court held law was a measure designed to maintain white supremacy).

national origin[241] or alienage)[242] or when a fundamental right (the right to vote or a right conferred by the Constitution)[243] is curtailed.[244] In addition, the test applies only if the discrimination at issue is intentional.[245] Under the strict scrutiny test, the challenged classification must be suitably tailored to achieve a compelling governmental interest,[246] and there must be no less restrictive classification that would achieve that purpose.[247] Therefore courts will not give such classifications the presumptive validity that is accorded most legislation.[248] If applicable, the strict scrutiny test is extremely difficult to pass.[249]

1. The Shumway Bill Creates a Suspect Class

Because language-based classifications are often the equivalent of national origin classifications, they have been treated as suspect.[250] In *Olagues v. Russionello*,[251] the Ninth Circuit held that under a strict scrutiny test an investigation targeting

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[241] *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944) (allowing the exclusion of Japanese-Americans from certain areas on the West Coast during World War II).

[242] *See, e.g.*, Bernal v. Fainter, 467 U.S. 216 (1984).

[243] *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 31–35 (1973) (determining that education was not a fundamental right and therefore that strict scrutiny did not apply).

[244] *See* City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985) (dicta describing application of strict scrutiny). Even if Spanish-speakers are not recognized as an independent suspect class—indeed, even if Hispanics were not a suspect class on the basis of race or national origin—the Shumway Bill would be subject to the strict scrutiny test because it infringes on a fundamental right—the right to vote. *See supra* notes 95–112 and accompanying text.

[245] Washington v. Davis, 426 U.S. 229 (1976). To be intentionally discriminatory, a law must discriminate on its face, be administered unequally, Yick Wo v. Hopkins, 118 U.S. 356 (1886), or spring from discriminating motives. Washington v. Davis, 426 U.S. 229. *But see* Castaneda v. Partida, 430 U.S. 482, 493 (1977) (showing of 30% disparity between proportion of Mexican-Americans in general population and proportion on grand juries was sufficient to show discrimination).

[246] City of Cleburne v. Cleburne Living Center, 473 U.S. at 440.

[247] McLaughlin v. Florida, 379 U.S. 184, 194 (1964).

[248] *Cleburne*, 473 U.S. at 440.

[249] L. Tribe, *supra* note 239, at 1451–52.

[250] *E.g.*, Olagues v. Russionello, 797 F.2d 1511 (9th Cir. 1986), *vacated as moot*, 108 S. Ct. 52 (1987). The Ninth Circuit has relied on the reasoning of *Olagues*, despite the Supreme Court's order vacating the opinion. *See* Gutierrez v. Municipal Court, 838 F.2d 1031, 1039 n.6 (9th Cir. 1988) *vacated as moot*, 57 U.S.L.W. 3687 (U.S. Apr. 17, 1989).

[251] 797 F.2d 1511.

Spanish and Chinese speakers was equivalent to one targeting Spanish and Chinese immigrants:[252]

> [A]n individual's primary language skill generally flows from his or her national origin . . . . The target groups in this case are distinct and easily identifiable. Just as persons of different ethnic groups are distinguished by surnames . . . persons of different nationalities are often distinguished by a foreign language. Here it is clear that the investigation targeted Chinese and Hispanic immigrants. The courts have long recognized the history of discriminatory treatment inflicted on Chinese and Hispanic people.[253]

In *Yu Cong Eng v. Trinidad*,[254] the Court held that prohibiting the use of the Chinese language for bookkeeping violated the equal protection rights of Chinese merchants. In *Hernandez v. Texas*,[255] the Court linked discrimination on the basis of Spanish surnames to discrimination on the basis of national origin.[256] Furthermore, the Court has held that Americans of Mexican origin can be synonymous with "persons of Spanish language."[257] Because language and accents are identifying characteristics, laws that have a negative effect on bilingual or non-English speakers "may be mere pretexts for intentional national

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[252] *Id.* at 1520. "Stated simply, the challenged investigation targeted recently registered, foreign-born voters who requested bilingual ballots. Bilingual ballots are only available in Spanish and Chinese. Therefore, as a practical matter, the investigation targeted Spanish-speaking and Chinese-speaking immigrants." *Id.*

[253] *Id.* at 1520–21.

[254] 271 U.S. 500 (1926). In *Yu Cong Eng*, the Court overturned a statute that mandated that business records and accounts be kept in English, Spanish or one of the local dialects in use in the Philippines. Use of the Chinese language for bookkeeping was prohibited. Although this early case does not use the term "strict scrutiny," the Court held that excluding use of the Chinese language harmed merchants of Chinese national origin, *id.* at 523–25, and violated the equal protection clause: "[W]e think the present law which deprives [the Chinese merchants] of something indispensable to the carrying on of their business, and is obviously intended chiefly to affect them as distinguished from the rest of the community, is a denial to them of the equal protection of the laws." *Id.* at 528.

[255] 347 U.S. 475 (1954).

[256] The Court rejected the State's claim that its practice of relying on surnames in choosing jurors was not discrimination on the basis of "descent." "[J]ust as persons of a different race are distinguished by color, these Spanish names provide ready identification of the members of this class." *Id.* at 480 n.12.

[257] Castaneda v. Partida, 430 U.S. 482, 486 n.5 (1977).

origin discrimination."[258] Several courts have explicitly linked national origin to language or accent.[259]

Language, then, has been used and recognized as a proxy for national origin. A law that targets Spanish monolinguals implicitly targets Hispanics.[260] The fact that the Shumway Bill would not adversely affect *all* Hispanics (since English-speaking Hispanics arguably would not be harmed by it)[261] does not mitigate the invidious motives behind the bill and cannot justify the implications that the Bill has for non-English speakers.[262]

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[258] Gutierrez v. Municipal Court, 838 F.2d 1031, 1039 (9th Cir. 1988) *vacated as moot*, 57 U.S.L.W. 3687 (U.S. Apr. 17, 1989). In *Gutierrez*, part of the employee's official duties required use of Spanish. The employee challenged a rule that mandated that employees speak only English while at work, except when translating. In a carefully reasoned opinion, the Ninth Circuit noted that a close relationship exists between language and national origin, *id.* at 1039, and that "[f]rom the standpoint of the Anglo-American, another person's use of a foreign language may serve to identify that individual as being of foreign extraction or as having a specific national origin." *Id.* (citations omitted).

[259] *See, e.g.*, Carino v. University of Okla. Bd. of Regents, 750 F.2d 815, 819 (10th Cir. 1984) (demotion resulting from national origin and "related" accent was impermissible); Berke v. Ohio Dep't of Pub. Welfare, 628 F.2d 980, 981 (6th Cir. 1980) (plaintiff denied employment because of her accent, which "flowed from her national origin," which constituted illegal discrimination).

[260] This is not to say that all Hispanics are Spanish monolinguals. The rate of Hispanic acquisition of English is impressive. *See supra* notes 142–159 and accompanying text. *See also infra* note 261 (arguing that even English-speaking Hispanics are stigmatized by English-Only laws).

The fact that Hispanics immigrate from several different countries in the Americas does not weaken their group status as a suspect class. On the contrary, Hispanics fall into three recognized suspect classes: national origin, race and, for those who are not United States citizens, alienage. An argument can be made that this trinity justifies the use of a test even more rigorous than strict scrutiny. *See* Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 Harv. C.R.-C.L. L. Rev. 9, 34–35 (1989) (arguing for a more rigorous test for women of color). Applying such an argument, English-Only laws are even more vulnerable.

[261] In fact, all Hispanics, English-speaking or not, would be harmed by the Shumway Bill because of the Bill's Hispanophobic motivations. Furthermore, claiming that English-Only laws do not hurt all Hispanics, or are not aimed at all Hispanics, is reminiscent of southern laws during Reconstruction requiring literacy tests of anyone whose grandfather was not eligible to vote. The real purpose of these "grandfather clauses" was to disenfranchise blacks, almost all of whom had grandfathers that were slaves. *See generally* Schmidt, *Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 3: Black Disenfranchisement from the KKK to the Grandfather Clause*, 82 Colum. L. Rev. 835 (1982). One southern lawmaker affirmed that these clauses constituted "discrimination within the letter of the law." *Id.* at 846. Grandfather clauses were eventually struck down by the Supreme Court. *See, e.g.*, *id.* at 869.

[262] Courts that refuse to recognize that language is a proxy for national origin may still find that langauge is an independent suspect class. The Supreme Court has ac-

knowledged that new suspect classes may be needed if identifiable groups require that protection.

> Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact.

Hernandez v. Texas, 347 U.S. 475, 478 (1954) (holding national origin a suspect class). The traditional indicia of a suspect classification are whether the class is "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." San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973). Under this definition, Hispanics have long been recognized as such a class by the Courts. For example, *see, e.g.*, White v. Regester, 412 U.S. 755 (1973), in which the Court cited with approval the district court's finding to this effect:

> The [district] court observed, based upon prior cases and the record before it, that the Bexar community, along with other Mexican-Americans in Texas, had long "suffered from, and continues to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, health, politics and others."

Id. at 768 (quoting Graves v. Barnes, 343 F. Supp. 704, 728 (W.D. Tex. 1972)). Congressional passage of bilingual provisions to the Voting Rights Act, *see supra* notes 95–97 and accompanying text, and federal involvement in education, *see supra* notes 115–116, 119–120 and accompanying text, show governmental recognition of discrimination against Hispanics. Administrative actions by the EEOC also take account of historical disadvantages faced by Hispanics. *See supra* notes 125–126 and accompanying text.

English-Only advocates may argue that "immutability"—the inability to change a characteristic—is a major factor in the recognition of suspect classes and that inability to speak English is not immutable—that a person can "learn" her way out of the suspect class. Immutability is not always a necessary element of a suspect class, however. For example, although alienage is not an immutable characteristic—an alien can become a citizen—aliens have been treated as a suspect class. Bernal v. Fainter, 467 U.S. 216 (1984). Further, as the Veltman Study suggested, for immigrants of a certain age, language may in fact be an immutable characteristic. *See supra* note 149. In Garcia v. Gloor, 618 F.2d 264, 270 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981), the court recognized that "[t]o a person who speaks only one tongue or to a person who has difficulty using another language than the one spoken in his home, language might well be an immutable characteristic like skin color, sex or place of birth."

A factual inquiry into the experiences of Spanish-speakers in the United States will reveal the history of purposeful unequal treatment against them, as well as the social disabilities and political powerlessness that they endure. As a practical matter, then, these afflictions are largely the same as those suffered by all Hispanics. Thus, the distinction between this analysis and the "proxy" analysis seems to break down. Nevertheless, the independent inquiry into the status of Spanish-speakers may, to courts, be a more appealing way to frame the analysis if they are hesitant to open the doors of equal protection to groups that are contained in, or share common characteristics with, recognized suspect classes.

2. *Intentional Discrimination and the Shumway Bill*

If a law is facially neutral,[263] it may nonetheless disproportionately burden a particular group.[264] In addition to a disproportionate impact, often known as discriminatory effect or result, courts require a further showing of discriminatory intent.[265] In *Personnel Adm'r of Mass. v. Feeney*,[266] the Court held that to show intent a plaintiff must show that the decision-maker acted "because of," and not just "in spite of," the adverse consequences suffered by the group.[267] The plaintiff need not show that the challenged action rested solely on discriminatory purposes,[268] but that a discriminatory purpose was a motivating factor in the decision.[269] The presence of a permissible legislative motive will not validate a statute that would not have been passed "but-for" a discriminatory purpose.[270] Both circumstantial and direct evidence of intent are examined.[271] The legislative or administrative history is highly relevant.[272]

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[263] A facially discriminatory law will be invalidated without further inquiry if the strict scrutiny test is applied. *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184 (1964) (statute prohibiting unmarried interracial couple from "habitually liv[ing] in and occupy[ing] in the nighttime the same room" found unconstitutional, though Court did not examine legislature's intent).

[264] *See, e.g.*, Hunter v. Underwood, 471 U.S. 222 (1985) (disparate impact was shown where blacks were 1.7 times more likely to lose their right to vote under an Alabama statute rescinding the franchise for crimes involving "moral turpitude").

[265] In Washington v. Davis, 426 U.S. 229 (1976), the Court held that disproportionate impact standing alone was insufficient. "[T]he invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." *Id.* at 240.

[266] 42 U.S. 256 (1979). *Feeney* involved the application of intermediate scrutiny. *Id.* at 273–74. Nevertheless, the *Feeney* Court's analysis of discriminatory intent is applicable to the strict scrutiny test.

[267] *Id.* at 279.

[268] Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265 (1977). "Rarely can it be said that a legislature or administrative body . . . made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one."

[269] *Id.* at 266. Despite the difficulty involved in proving discriminatory intent,

> [t]wo conclusions should emerge, and they are the two that probably need to emerge if the skeptical are to be convinced: first, that there are real-world cases where an unconstitutional motivation, even on the part of a legislature, can quite confidently be inferred, and second, that there will be cases your intuition tells you involve unconstitutional action that cannot be responsibly rationalized on anything *but* a motivation theory.

J.H. Ely, Democracy and Distrust 139 (1980).

[270] Hunter v. Underwood, 471 U.S. 222, 231 (1985).

[271] *Arlington Heights*, 429 U.S. at 269.

[272] *Id.* at 268.

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Since the Shumway Bill is still a proposal, and there is little legislative history, examination of this factor is necessarily limited. Nevertheless, statements made by proponents[273] show that this law is not being proposed "in spite" of its negative effects upon Hispanics; it is being proposed "because of" prejudice against Hispanics and a fear of the purported Hispanic "threat."[274] Perhaps standing alone, section one of the Shumway Bill (declaring English the official language) could be construed as having a non-invidious purpose. However, section two (prohibiting governments from using any other language) nullifies important rights,[275] and does so without a legitimate, non-invidious purpose. It is invidious, for example, to deprive people of bilingual ballots, even if the stated reason is to encourage them to learn English.[276]

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[273] *See, e.g.*, *supra* notes 214–223 and accompanying text (discussion of WITAN IV paper).

[274] The Court has stated, however, that discriminatory intent cannot be attributed to the whole legislature based on the statements of certain proponents of the bill. Hunter v. Underwood, 471 U.S. 222, 228 (1985). It may therefore prove difficult to show discriminatory intent in the passage of the Shumway Bill, because statements tending to reveal discriminatory motives are rarely made on the record. Even Dr. Tanton's WITAN IV paper, which is the most inflammatory evidence of the English-Only movement's discriminatory intent, was not intended for public release. Even so, the discriminatory intent need not be the only factor behind a bill's passage for the law to be unconstitutional:

> The considerations that make motivation relevant argue not for the discovery of the "sole" motivation (is there ever just one?) or even the "dominant" motivation (whatever that might mean), but rather for asking whether an unconstitutional motivation appears materially to have influenced the choice: if one did, the procedure was illegitimate . . . and its product should be invalidated.

J.H. Ely, *supra* note 269, at 138.

[275] *See generally supra* notes 95–133 and accompanying text.

[276] *See, e.g.*, Katzenbach v. Morgan, 384 U.S. 641 (1966). In *Katzenbach*, the Court upheld Congress' finding that literacy tests were discriminatory and struck down a New York statute requiring literacy tests, even though the statute's alleged purpose was to encourage Spanish-speakers to learn English:

> We are told that New York's English literacy requirement originated in the desire to provide an incentive for non-English speaking immigrants to learn the English language . . . . Yet Congress might well have questioned, in light of the many exemptions provided, and some evidence suggesting that prejudice played a prominent role in the enactment of the requirement, whether these were actually the interests being served.

Id. at 654 (footnotes omitted). The Court cited statements made during consideration of the English literacy requirement as evidence of prejudice:

In *Feeney*, the Court found that a statute that gave hiring preference to veterans did not intentionally discriminate against women, who were nevertheless adversely affected by the law.[277] The Court used the term "unavoidable consequence" when it described the negative effect the statute had on women.[278] However, the Court did assert that if negative effects on a particular group are foreseeable before a law is passed, a strong inference can be drawn that the adverse effects were desired.[279] The Shumway Bill falls into this category. Discrimination against Hispanics is not an "unavoidable consequence" of the Shumway Bill; on the contrary, a stated purpose of the bill is to create burdens on non-English-speaking Hispanics which will prompt them to learn English.[280] Furthermore, the adverse consequences of the Shumway Bill are currently foreseeable.[281] If the bill is ever passed, a court may infer that these consequences were desired by the legislature. Application of the strict scrutiny test would be warranted.

3. *Strict Scrutiny Applied to the Shumway Bill*

Under the strict scrutiny test, a law must be necessary to promote a compelling governmental interest,[282] and there must be no less discriminatory alternative to achieve that interest.[283]

> "More precious . . . are the mental qualities of our race. While those stand unimpaired, all is safe. They are exposed to a single danger, and that is [the] constant[] change[] [in] our voting citizenship through the wholesale, but valuable and necessary infusion of Southern and Eastern European races . . . . The danger has begun . . . . We should check it."

Id. at 654 n.14 (quoting III N.Y. State Constitutional Convention 3012).

[277] Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 n.25 (1979).

[278] *Id.*

[279] *Id.* Professor C. Edwin Baker argues that *Feeney* requires a contextual rather than a subjective motive. The Court will look at the purposes of a law and will only strike the law down if one of those purposes is constitutionally objectionable. Baker, *Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection* 131 U. Pa. L. Rev. 933, 978–79 (1983). *Feeney*, under this analysis, rests on the distinction that the preference statute was not "about" women, but "about" veterans. The fact that women were hurt was unavoidable.

[280] *See supra* notes 160, 177–180 and accompanying text.

[281] *See generally supra* notes 105, 121–122, 128–133, 169, 181, 202–210 and accompanying text.

[282] Loving v. Virginia, 388 U.S. 1, 11 (1967).

[283] McLaughlin v. Florida, 379 U.S. 184, 194 (1964).

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Rarely do laws meet the burdens of this test.[284] Certainly the Shumway Bill would not. Even if courts fell prey to the English-Only movement's rhetoric and agreed that English-Only laws would achieve their stated goals of English acquisition and national unity,[285] the laws would still fail the strict scrutiny test. There are less restrictive ways to achieve these goals.[286] The Shumway Bill would therefore be found unconstitutional under the strict scrutiny standard.

B. The Heightened Scrutiny Test

Even if strict scrutiny did not apply to the Shumway Bill, the bill would not pass constitutional muster under heightened scrutiny, a standard of review that is more lenient than strict scrutiny. The heightened or intermediate scrutiny standard involves the examination of a challenged classification that does not rise to the level of being "suspect," but which nonetheless merits stringent judicial review.[287] This section will examine the factors which trigger heightened scrutiny. The heightened scrutiny standard of review will then be analyzed and applied to the Shumway Bill.

1. Triggering Heightened Scrutiny

a. Quasi-Suspect Classes and Important Rights

While strict scrutiny is triggered by a suspect classification, heightened scrutiny applies where a classification is quasi-sus-

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[284] *See, e.g.*, L. Tribe, *supra* note 239, at 1451–52. Accordingly, Gerald Gunther has described this level of review as "strict in theory" but "fatal in fact." Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972).

[285] *See supra* note 134 and accompanying text.

[286] Increased funding for English classes is one obvious way to achieve the goal without denying anyone's equal protection rights.

[287] "The Court has never provided a coherent explanation of the characteristics which . . . trigger intermediate review." L. Tribe, *supra* note 239, at 1614 (footnote omitted). Professor Tribe has also intimated that the modern rational basis test, *see infra* notes 317–332 and accompanying text, is actually a "*covert* use" of a heightened scrutiny test. *See* L. Tribe, *supra* note 239, at 1443–46 (emphasis in original). It is therefore important to note that the theoretical "levels" of scrutiny, and how and when they apply, may have limited value in practice. "The lack of openly acknowledged criteria for heightened scrutiny permits arbitrary use" of this test. *Id.* at 1445.

pect. When determining that a classification is quasi-suspect, the Court looks at whether there is a history of discrimination against the group[288] and whether the classification stigmatizes the group as inferior or blocks participation in society.[289] The Court also looks at the importance of the allegedly compromised right and the degree to which it is infringed.[290] The right must be important, but need not be fundamental.[291] Important rights are those that tend to disempower the disadvantaged group.[292]

In *Plyler v. Doe*,[293] for example, the Supreme Court invalidated a Texas law that denied a public school education to alien children. Although alienage was not found to constitute a suspect classification, the sensitive issues involved[294] required a form of heightened scrutiny.[295] The Court reasoned that although education was not a fundamental right,[296] it was nonetheless extremely important.[297] Because of the significance Americans historically have placed on being well-educated, and the lasting impact of a child's lack of educational opportunity, the Court

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[288] *See* Matthews v. Lucas, 427 U.S. 495, 506 (1976) (denying illegitimate children suspect status in part because they had not suffered from a history of discrimination).

[289] Plyler v. Doe, 457 U.S. 202, 218–19 (1982).

[290] L. Tribe, *supra* note 239, at 1612–13.

[291] *Id.* at 1610.

[292] *See, e.g.*, City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) (right of mentally retarded persons to housing); Plyler v. Doe, 457 U.S. 202 (1982) (right of alien children to education).

[293] 57 U.S. 202 (1982).

[294] The Court stated that this case presented issues of "special constitutional sensitivity." *Id.* at 226. The Court noted that a child does not have the power to control where he or she lives. Therefore, the presence of the child in the United States was to some degree immutable from the perspective of the child. *Id.* at 220. The Court also concluded that the Texas law "imposes a life-time hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions." *Id.* at 223.

[295] *Id.* at 224. The Court stated that "certain forms of legislative classification, while not facially invidious, nonetheless gave rise to recurring constitutional difficulties." *Id.* at 217. In those circumstances, the Court will insist that the classification reflect a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a substantial state interest. Professor Tribe has called this heightened scrutiny, though the Court did not use the term. L. Tribe, *supra* note 239, at 1444–45.

[296] *Id.* at 221. In San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973), the Court held that education was not a fundamental right. It limited the category of fundamental rights to the right to vote and to rights found, explicitly or implicitly, in the Constitution. *Id.* at 35.

[297] *Plyler*, 457 U.S. at 221.

concluded that education is not merely another governmental benefit.[298]

b. The Shumway Bill Creates a Quasi-Suspect Class and Impinges on Important Rights

The Shumway Bill would trigger intermediate scrutiny because sensitive issues are involved in the classification of non-English-speaking Hispanics, and important interests are denied under the bill.[299] Even if Spanish monolinguals did not constitute an independent *suspect* class,[300] they would certainly constitute a *quasi*-suspect class.

2. Heightened Scrutiny Applied to the Shumway Bill

Heightened scrutiny requires that a quasi-suspect classification substantially further an important state interest.[301] Even assuming that the government's interests in fostering English acquisition and national unity are important,[302] English-Only laws like the Shumway Bill cannot survive intermediate scrutiny because the stated objectives[303] are not substantially furthered

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[298] "American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance." *Id.* (quoting Meyer v. Nebraska, 262 U.S. 390, 400 (1923)).

[299] *See generally supra* notes 95–133 and accompanying text.

[300] *See supra* notes 250–262 and accompanying text (discussion of Spanish monolinguals as suspect class).

[301] Craig v. Boren, 429 U.S. 190, 197–98 (1976). The heightened scrutiny test requires that the connection between the classification and the objective be real, not speculative. *Id.* Also, the classification must substantially further the objective, not merely be rationally related to it. *Id.* at 197. Finally, the objective must be an important one, not just a legitimate one. *Id.* This standard is notably similar to the modern rational basis test. *See infra* notes 317–332 and accompanying text.

[302] The objective in *Craig*, 429 U.S. 190, was sufficiently important to allow the Court to move to the next step in intermediate analysis—whether the classification substantially furthered the important state interest. In other cases, however, the government's interest has been rejected altogether. Thus, the Court struck down an Idaho statute that automatically gave men preference over women as executors of decedents' estates. Reed v. Reed, 404 U.S. 71 (1971) (the objectives of reducing the workload of probate courts and avoiding inter-family conflict were not important enough to sustain the gender-based classification). *See also* Frontiero v. Richardson, 411 U.S. 677 (1973) (invalidating federal statute requiring women in the military, but not men, to prove their spouses were dependent on them in order to receive dependency allowance).

[303] *See supra* note 134 and accompanying text.

by the legislation.[304] Although the Shumway Bill seeks to promote English literacy and national unity, studies indicate that Hispanics are learning English at an impressive rate without English-Only laws.[305] In addition, evidence suggests that English-Only laws would foster political divisiveness, rather than national unity.[306]

English-Only proponents argue that bilingual ballots and bilingual education confuse the immigrant into thinking he does not need to learn English, and that declaring English the official language would solve this problem.[307] Even if immigrants were not learning English, the elimination of bilingual ballots and bilingual education are not substantially related to the goal of increasing English proficiency. Eliminating bilingual education may actually *prevent* Hispanics from successfully learning English. Denying immigrants the franchise and effective bilingual education produces only minimal incentive to learn English. Thus, English-Only laws would fail the "substantial furtherance" prong of the intermediate scrutiny test.[308] A more direct way of

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[304] If the objectives were in dispute, a court would not be limited to analyzing the stated legislative goals. "This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation." Weinberger v. Weisenfeld, 420 U.S. 636, 648 n.16 (1974).

[305] *See supra* notes 142–159 and accompanying text.

[306] *See supra* notes 208–210 and accompanying text.

[307] *See, e.g., supra* note 160 and accompanying text.

[308] *See supra* notes 293–298 and accompanying text (discussion of Plyler v. Doe, 471 U.S. 202 (1982)). The *Plyler* Court conceded that the state had a right to protect itself from an influx of illegal immigrants that produced harsh economic effects. But after conceding that the end was legitimate, the Court found the law did not substantially further that end.

> [The Texas law] hardly offers an effective method of dealing with an urgent demographic or economic problem. There is no evidence in the record suggesting that illegal entrants impose any significant burden on the State's economy. To the contrary, the available evidence suggests that illegal aliens underutilize public services, while contributing their labor to the local economy and tax money to the state . . . . *The dominant incentive for illegal entry into the State of Texas is the availability of employment; few if any illegal immigrants come to this country or presumably to the State of Texas, in order to avail themselves of a free education.*

Id. at 228 (citations omitted) (emphasis added). Given the overwhelming economic and social benefits of English proficiency, denial of bilingual voting assistance, bilingual education and other bilingual services will not further the goal of English acquisition.

In Craig v. Boren, 429 U.S. 190 (1976), the Court demonstrated that the fit between the means adopted and the ends sought must be very close. The Court struck down a

achieving the objective of English proficiency, for example, would be to fund adequate numbers of adult English classes.[309] Thus, the Shumway Bill would be invalidated under the heightened scrutiny test.[310]

C. The Rational Basis Test

1. The Traditional Rational Basis Test

The traditional rational basis test is the most permissive from the government's perspective, and the most rigid from the perspective of an injured plaintiff. Even if the challenged law disadvantages an identifiable group, the law will be upheld if it could possibly achieve a legitimate governmental purpose. Thus, in *Kotch v. River Port Pilot Comm'rs*,[311] the Supreme

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statute that set the drinking age for males at 21 and for females at 18. The Court rejected the state's argument that gender was an accurate classification to improve traffic safety, despite considerable statistical evidence that males under 21 were more likely than females to drive while intoxicated.

[309] English-Only proponents have not supported such efforts in the past. *See supra* notes 188–189 and accompanying text.

[310] The Shumway Bill would also be invalidated on grounds of over-breadth. *See* Craig v. Boren, 429 U.S. at 198. Although proponents of the bill argue that bilingual ballots will encourage Hispanics to learn English, all bilingual voters would be affected by the bill, including those who are too old to learn and those who are enrolled in classes and trying to learn.

The Supreme Court has also ruled that a law does not further a state interest if its stated policy conflicts with the actual result. In Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982), for example, the Supreme Court held that a policy of admitting only women into the university to protect women from the presence of men in the same classes was fatally undermined, since the state permitted men to attend classes as auditors. *Id.* at 730. Similarly, the Shumway Bill would allow English-proficient students to study foreign languages. Shumway Bill, *supra* note 81, at § 3(2). English-Only laws also permit American Indians and Hawaiians to maintain their native languages. *See, e.g.*, U.S. English, Frequently Used Arguments Against the Legal Protection of English 4 (Fall 1987) ("We recognize that Native American languages are part of the heritage of the North American Continent. We are opposed to the official institutionalization of rival immigrant languages in competition with English, but we support opportunities for Native Americans to maintain their own languages."). These exceptions undermine the stated purposes of English-Only laws, because they defeat the linguistic uniformity which the laws are supposedly designed to achieve. Thus, English-Only laws would not pass the heightened scrutiny test.

[311] 330 U.S. 552 (1947). Plaintiff challenged a state statute that required an apprenticeship before a river pilot's license would issue. The Pilot's Association, which was sanctioned by the state, would not let him become a member. *Id.* at 555. In fact, only friends and relatives of experienced pilots were allowed to join the Association. *Id.* Plaintiff's challenge on equal protection grounds was rejected under the rational basis test. *Id.*

Court was willing to speculate as to the reason for a classification based on nepotism.[312] The Court did not examine whether there was any rationality in fact, nor did it look at the legislative history to see if the legislature's motivation could be discerned. The rational basis test was satisfied if there was a conceivable reason for the classification being challenged.

In the absence of a showing of irrational prejudice[313] or intentional discrimination,[314] a language classification may be subject to the traditional rational basis test.[315] If a court refused to apply strict or heightened scrutiny, it could conceivably uphold the law. The court could ignore the discriminatory motives of the Shumway Bill[316] and could defer to the state's legislative determination. However, because the Shumway Bill creates a suspect or quasi-suspect classification and is motivated by intentional anti-Hispanic discrimination, the rational basis test should not apply.

2. *The Modern Rational Basis Test*

Even if the rational basis test did apply to the Shumway Bill, a court would not be obligated to follow the traditional form of that test. Recently, the Court has shown less deference to the government's motives in applying the rational basis test. In *City of Cleburne v. Cleburne Living Center*,[317] the Court invalidated Cleburne's denial of a permit to a group home for the mentally retarded. Using the rational basis standard, the Court said that a state may not rely on a classification if its relationship to an asserted goal is so attenuated as to render the

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[312] *Id.* at 555, 563.

[313] *See infra* notes 326–327 and accompanying text (discussion of City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985)).

[314] *See supra* notes 265–272 and accompanying text (discussion of intent requirement).

[315] *See, e.g.*, Soberal-Perez v. Heckler, 717 F.2d 36 (2d Cir. 1983) (court applied rational basis test, finding that the Secretary of Health and Human Services was not motivated by prejudice and had no intent to discriminate in failing to furnish Social Security forms in Spanish); Frontera v. Sindell, 522 F.2d 1215 (6th Cir. 1975) (rational basis test applied where no intent to discriminate was shown in failing to administer civil service examinations in Spanish).

[316] *See, e.g.*, *supra* notes 214–223 and accompanying text (discussion of WITAN IV paper).

[317] 73 U.S. 432 (1985).

distinction arbitrary or irrational.[318] The Court carefully examined the city's stated purposes for denying the permit, and found them to lack a factual basis.[319] It then determined that the city's action codified private biases in the community, and therefore violated the rational basis test.[320]

The differences between the traditional rational basis test (*Kotch*) and the modern test (*Cleburne*) are significant. In the earlier case, the Court supplied the rational basis for the challenged legislation. In *Cleburne* the Court very carefully limited its inquiry to the record and refused to speculate as to whether there "might" be a basis on which the city's decision could be upheld under the rational basis test.[321]

3. The Modern Rational Basis Test Applied to the Shumway Bill

The Shumway Bill would fail the modern rational basis test for several reasons. First, English-Only proponents claim that the Shumway Bill would encourage Hispanics to learn English and would remove disincentives that currently impede English acquisition.[322] These arguments are premised on the erroneous assumption that Hispanics are not learning English already.[323] While encouraging the acquisition of English may very well be a legitimate governmental interest, it is a goal which is already being achieved. The Shumway Bill could not possibly be rationally related to this interest.

Without the Shumway Bill, English-Only supporters worry that national unity will suffer. They base this fear on the experiences of other multilingual nations.[324] However, the divisive-

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[318] *Id.* at 446 (citing Zobel v. Williams, 457 U.S. 55, 61–63 (1982)).

[319] *Id.* at 450. "At least this record does not clarify how . . . the characteristics of the intended occupants of the . . . home rationally justify denying to those occupants what would be permitted to groups occupying the same site for different purposes." *Id.*

[320] *Id.* at 448. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Id.* (quoting Palmore v. Sidoti, 466 U.S. 429, 433 (1984)).

[321] The modern rational basis test seems strikingly similar to the heightened scrutiny test. *See* L. Tribe, *supra* note 239, at 1443–46; *supra* notes 287, 301.

[322] *See, e.g.*, *supra* note 160.

[323] *See supra* notes 142–159 and accompanying text, discussing Hispanics' impressive acquisition of English.

[324] *See supra* notes 192–194 and accompanying text.

ness which plagues these countries resulted from attempts to subvert one language group to the other.[325] This is exactly what the Shumway Bill attempts to do. The Shumway Bill is unrelated to the goal of national unity; it would actually *create* divisiveness in the United States.

In *Cleburne*,[326] the Court concluded that there was no non-invidious reason for the different treatment of the mentally retarded plaintiffs. "[R]equiring the permit in this case appears to us to rest on an *irrational prejudice* against the mentally retarded."[327] Irrational prejudice is different from discriminatory intent; the *Cleburne* Court was not applying the *Feeney*[328] analysis when it determined that the city's action was impermissible. It was the city's backward views of mentally retarded people, as opposed to a desire to harm them, that rendered the action unacceptable to the Court. Thus, if Congress decided to publish the Congressional Record only in English because it was too costly to print it in other languages and because the vast majority of people are English speakers, the Court should uphold that decision since there is no desire to harm non-English speakers and no negative stereotype of them.[329]

The Shumway Bill, however, would fail because even if the bill is not intentionally discriminatory, it is based on a belief that Hispanics do not learn English on their own. Such a misinformed belief is, at best, an irrational prejudice. Furthermore, the WITAN IV paper[330] and other statements and actions reveal that the bill's proponents hold backward views about Hispanics that are based on irrational prejudices. Dr. Tanton has revealed his own stereotypes of Hispanics which include, inter alia, that Hispanics are too sexually active.[331] Certainly the *Cleburne* Court would not allow the codification of these private prejudices in a piece of national legislation.[332] The Shumway Bill would therefore fail the modern rational basis test.

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[325] *See supra* notes 197–198 and accompanying text.

[326] 473 U.S. 432.

[327] *Id.* at 450 (emphasis added).

[328] Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979).

[329] The negative effect of the decision on non-English speakers would be an "unavoidable consequence" of a measure adopted for the legitimate purpose of saving money. *See id.* at 279 n.25.

[330] *See supra* notes 214–223 and accompanying text.

[331] *See supra* note 216 and accompanying text.

[332] City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 448 (1985).

Conclusion

National unity and English proficiency are splendid goals. The English-Only movement's rhetoric focuses on these goals and has met with great financial and political success. Careful examination of the record, however, reveals that these laudable ends are accompanied by unacceptable means and driven by invidious motives.

The English-Only movement is fueled by cultural insecurity and prejudice against Hispanics. The leaders of this movement are clearly worried about something else. They are frightened by Hispanic immigration and the possibility that Anglos will lose political dominance. The anti-Hispanic feelings, however, are not motivated entirely by self-interest. Pure prejudice also plays a part. English-Only proponents feel that Hispanics have objectionable cultural traits which are harmful to the country. Cultural insecurity may also underlie the fear that the economy cannot accommodate the large number of Hispanic immigrants who are attracted to the United States. While this may be a valid concern, English-Only laws do nothing to address this demographic problem.

This Article has asserted the intellectual paucity of the English-Only movement. There is simply no non-invidious reason to disenfranchise Hispanic voters or to mandate the singular educational program that the Shumway Bill would call for. English-Only laws would not foster national unity, but would instead promote divisiveness. Official language laws have been shown to have this effect in other countries. Thus, the Shumway Bill and English-Only laws do not accomplish the goals they purport to accomplish. Their only accomplishments are invidious.

The Shumway Bill would not survive equal protection challenges. The bill infringes on important rights such as education and nondiscriminatory work environments, as well as the right to vote, which the Court recognizes as fundamental. Since the Shumway Bill is directed at Hispanics and not at the Spanish language per se, the intent requirement of the equal protection attack would be met. The strict scrutiny test would be appropriately applied to the Shumway Bill because the class deprived of rights is defined by language—a proxy for national origin. If

a class defined by language is not suspect, it is certainly quasi-suspect. Under either test, the Shumway Bill would be found unconstitutional. Even under the modern rational basis test, the Shumway Bill would be invalidated because the relationship between the stated goals (national unity) and the means employed (depriving voters of bilingual voting assistance) is too attenuated.

The Shumway Bill must therefore be rejected on equal protection grounds. Language discrimination is an area where the majoritarian political process may not adequately reflect or protect concerns of the minority. Prejudice disguised as national unity wins popular support. If the proposal is enacted, the Constitution will be the only refuge for America's linguistic minorities.

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*269 DEMOGRAPHY AND DISTRUST: AN ESSAY ON AMERICAN LANGUAGES, CULTURAL PLURALISM, AND OFFICIAL ENGLISH [FNa]

Juan F. Perea [FNaa]

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*271 [P]rovidence has been pleased to give this one connected country to one united people-a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs ....

John Jay, Writing in The Federalist in 1788. [FN1]

Artikel des Bundes und der Immerwahrendenden Eintracht zwischen der Staaten von New-Hampshire, Massachusetts-Bay, Rhode-Eyland und Providence Plantaxen, Connecticut, Neu-Yorck, Neu Jersey, Pennsylvanien, Delaware, Maryland, Virginien, Nord-Carolina, Sud-Carolina und Georgien. Aus dem Englischen ubersetzt. Lancaster Gedruckt und zu haben bey Francis Bailey.

Entry reflecting official German edition of the Articles of Confederation by the Continental Congress, Nov. 1777. [FN2]

Toda ley, decreto, reglamento y disposicion que por su naturaleza deban publicarse, se publicaran en ingles y en Castellano.

Art. XI, Section 21, California State Constitution of 1849, in its Spanish-language version. [FN3]

INTRODUCTION

The persistence of certain historical views of language in America obscures both past and present complexity. [FN4] A historical *272 view exists-a myth of linguistic homogeneity, reflected in The Federalist above-that allows many people to regard English as the only truly American language. This historical view also encourages the perception that all other American languages are "foreign," despite their equal or greater residency within these shores. This same historical perspective supports the claim of the official English movement that our national unity depends on linguistic homogeneity and legal reinforcement of the already dominant role of the English language in our society. Alongside this myth lies the equally persistent myth that true "American" identity is coterminous with the contours of America's dominant culture. Our history of cultural pluralism, and our legal history reflecting that pluralism, tell a very different and far richer story of American culture and identity. [FN5]

Several paradoxes extant at the beginning of American culture persist into the present. [FN6] An important paradox lies in the conflict between American cultural pluralism and the American demand for conformity. As historian Michael Kammen has written,

[A] "dialectic of plurality and conformism lies at the core of American life, making for the originality of the social structure, and raising the most contradictory evaluations." Americans have repeatedly reaffirmed the social philosophy of individualism, even making it the basis of their political thought. Yet they have been a nation of joiners .... Nor has American respect for the abstract "individual" always guaranteed respect for particular persons. [FN7]

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*273 America has always been a land of many different languages and cultures. Prior to the colonization of this continent, Native American peoples spoke approximately 1000 distinct languages. [FN8] The conquest and colonization of America by Spain and England resulted in the displacement and decimation of the Native American peoples and their languages and cultures. [FN9] Despite this legacy of conquest, many Native American languages are still spoken today. [FN10]

*274 The European colonial powers, and immigrants arriving in the wake of colonization, introduced European languages, principally Spanish and English, into what is now the United States. [FN11] Subsequent immigrations of many different peoples introduced their different languages and cultures. Eventually the United States came to be known as a land of immigrants. This nation's welcoming symbol, the Statue of Liberty, embodies a promise of liberty and equality for immigrants from diverse cultures. [FN12]

In the presence of many American languages, native languages and the European languages of the various peoples who populated the colonies, the Framers gave no special designation to any American language. [FN13] This neutrality was neither accident nor oversight, for the Framers were acutely aware of the various white ethnic groups populating the colonies. During the Revolutionary War, for example, the Continental Congress issued official publications in German, French, and English. [FN14]

One episode is particularly revealing with respect to the Framers' recognition of American cultural pluralism. On July 4, 1776, John Hancock named a committee consisting of Thomas Jefferson, John Adams, and Benjamin Franklin to design *275 a Great Seal for the new nation. Du Simitiere, an artist the committee consulted, also participated. On August 20, 1776, the Committee returned its proposal for the Great Seal, based principally on Du Simitiere's proposal. [FN15] Horace Kallen described the proposal as follows:

> They proposed that the seal should be engraved on the obverse with a shield divided into six quarterings, symbolizing the six major lands of origin of the American people-England, Scotland, Ireland, France, Germany, Holland; there should also be one escutcheon each for each of the thirteen colonies; the right hand support should be the Goddess of Liberty; the left hand, the Goddess of justice; a crest at the top should contain the eye of Providence in radiant triangle. The motto was to be: E Pluribus Unum. [FN16]

The proposed Seal, though ultimately not adopted, has great significance. [FN17] The Framers recognized the cultural diversity of the white immigrant populations in the colonies and proposed, initially, to make that very diversity the symbol of the new nation. Furthermore, in its context, the phrase E Pluribus Unum meant, in equal measures, a union composed of ethnically different peoples. [FN18] Both diversity and union were recognized in the proposed seal as consistent with each other. The American union did not mean eliminating pluribus, cultural pluralism, present at the inception of the union and present now.

One aspect of the American reaction to its cultural pluralism, therefore, has been a tolerant, expansive view of liberty that includes recognition and respect for the cultural differences of Americans. With respect to language, this tradition begins in England, where movements to standardize the English *276 language failed because they were thought contrary to the spirit of English liberty. In America, the Jeffersonian view of individual liberty exemplifies this tradition. [FN19] It is exemplified also by the substantial legal recognition given to languages other than English by various states during the nineteenth century.

American cultural pluralism, however, has also engendered an equal and opposite reaction: a

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demand for uniformity and assimilation to some vision of American identity, assumed to be homogeneous. [FN20] This was the vision John Jay presented. Jay's America belonged just to one people, descended from the same ancestors, speaking the same language, practicing the same religion, and sharing similar manners and customs. [FN21] The reality, as described above, was much more complex even at the time Jay wrote in The Federalist. Yet Jay's statement contains both truth and myth.

The truth lies in the cultural dominance, then and now, of Anglo-Saxon culture. Jay was describing the dominant culture of America, "dominant by virtue of original settlement, the preemption of power, or overwhelming predominance in numbers." [FN22] This dominant culture was, and remains, the culture of white, Protestant, English-speaking, Anglo-Saxon Americans. [FN23] This, in the terminology of sociology, is America's core culture. [FN24] English is, without question, the dominant language of America and a key characteristic of America's core culture.

The myth in Jay's statement lies in its exclusion of other cultural groups from the American identity. Although America's dominant, core culture remains substantially what it was at the time of the nation's beginning, other peoples of different language and culture have always been present in America. The Framers recognized some of this diversity in their proposal for a Great Seal.

It is both this context of American pluralism, an America composed of one dominant culture and many other cultures, ***277** and the theory that "we, the people" are the source of governmental legitimacy, that appear to have yielded an American preoccupation with identity. [FN25] American legal history is filled with instances of the majority, members of the core culture, defining through the law who belongs, and who may belong, within the American people, and who may not. A recurring theme in American law is the attempt, particularly at times of great national stress, to define the American identity through the law using the components of ethnicity.

Ethnicity, "from the Greek word 'ethnos,' meaning 'people' or 'nation'," may be defined as a "sense of peoplehood." [FN26] Various constituent aspects of ethnicity include the nation itself, race, religion, and national origin. [FN27] Language, too, is one of the primary aspects of ethnicity. [FN28]

Legal definitions of American identity have often involved ***278** the components of ethnicity. The Framers of the Constitution considered "the people" to be certain male members of the core culture, and excluded others based on their race. [FN29] Our immigration laws have sought to define American identity by race, and later by national origin as a proxy for race. More recently, the official English movement has sought to define American identity through the law by defining our official language as English.

At times of national stress, American nativism has often come to the fore, labelling American cultures, American traits different from those of the core Anglo-Saxon culture as "foreign" or "un-American." Nativism has been defined by one leading scholar as

> intense opposition to an internal minority on the grounds of its foreign (i.e., "un-American") connections. Specific nativistic antagonisms may, and do, vary widely in response to the changing character of minority irritants and the shifting conditions of the day; but through each separate hostility runs the connecting, energizing force of modern nationalism. While drawing on much broader cultural antipathies and ethnocentric judgments, nativism translates them into a zeal to destroy the enemies of a distinctively American way of life. [FN30]

American nativism has often taken the form of reinforcing the core culture through the law-using the law to restrict the expression of ethnic traits, including languages, different from those of the

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majority. This labelling and use of ethnicity has yielded some of the most regrettable incidents in American legal history, such as the controversy over the Alien and Sedition Acts and the Communist witch hunts of the McCarthy era.

Consistent with prior nativist movements, the official English movement reasserts the American demand for conformity, this time through the vessel of language. The movement has sought, unsuccessfully, a constitutional amendment to make English the official language of the United States. [FN31] With greater success, the movement has persuaded state legislatures and voters to enact statutes and constitutional amendments making English the official language of seventeen states. [FN32]

The movement is, however, based on a series of myths and motivations that render its legislative results constitutionally suspect. The first myth is that our national unity somehow depends solely on the English language, therefore we must protect ***279** the language through constitutional amendment or legislation. [FN33] A corollary of this myth is that the only language of true American identity is the English language. Another myth is that multilingual election ballots, the elimination of which constitutes a cherished goal of the movement, somehow threaten our society. [FN34] A final myth is the movement's proposition that bilingual education is a new threat to our society, introduced by self-interested Hispanic leaders seeking to secure employment for bilingual teachers. [FN35]

This article reviews the largely unknown legal history documenting the interaction between the dominant culture and other American cultures with respect to language. This historical context has been almost entirely absent from debates about the official English movement yet it yields significant insights into the inconsistency between the aims of the movement and principles of liberty at the core of our culture. Legal history explodes both the myth of linguistic homogeneity posited by John Jay, a view still widely held, and the myths supporting the official English movement.

Part I of the article reviews early efforts to make English the national language of England, efforts which failed because they were inconsistent with the English spirit of liberty. Part II demonstrates that the Continental Congress, during and after the Revolutionary War, issued many official publications in languages other than English. Part III of the article explores the views of some of the Framers on the linguistic and cultural diversity within the United States. Part IV describes the views ***280** of the Framers and early American intellectual leaders on the issues of a national language academy and language standardization. Part V of the article presents the various appeals to early Congresses for official publications in German. These Congresses, responding to requests by German-speaking constituents, debated with sophistication whether or not to issue official publications in the German language. This legal history demonstrates that debates about our cultural pluralism and our linguistic diversity actually date back to the founding of the republic.

Part VI demonstrates that languages other than English, including German, Spanish, and French, were accepted as American languages, "official" languages of several states, at an earlier time in our history. It is only an ahistorical view that can deem them foreign on this soil. The very significant extent to which languages other than English attained legal recognition, particularly in the states, is another largely unrecognized aspect of our legal history.

Part VII examines the operation of American nativism through the law. In particular, I focus on the use of the law to enforce conformity through language restriction. Legal restrictions on the German language and the German-language press were an important part of the movement against German-Americans during World War I. The development of our immigration laws demonstrates the use of language as a proxy device to exclude persons because of their national origin. To a large

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degree, nativism has resulted in language restrictions in our immigration laws. This trend culminates in the English-literacy requirement for citizenship which, quite remarkably, Congress enacted virtually without debate at the height of the McCarthy era as part of the Subversive Activities Control Act of 1950. These incidents illustrate clearly the symbolic politics of language and ethnicity.

The official English movement belongs firmly within this matrix. Language, one of the primary ingredients of ethnicity, has been one of the vehicles through which the majority has sought to define what is American. The official English movement is only the latest in a long history of nativist attempts to exclude certain unpopular Americans from the definition of what is American.

Finally, Part VIII analyzes and evaluates the official English movement. This part first explores insights from political science, sociolinguistics, philosophy, and law into the political ***281** uses and symbolism of language. Principles are drawn from these disciplines to evaluate the meaning, symbolism and constitutionality of official English laws. Language is a fundamental ethnic trait. Official English laws, therefore, take an ethnic trait of the dominant culture, the English language, and give that trait legal, governmental sanction, creating second-class citizenship for Americans who possess different (hence unofficial), but equally American traits. Official English laws violate principles of equal citizenship at the core of the equal protection clause. [FN36] Furthermore, as before in our history, language is being manipulated as a proxy for national-origin discrimination. This form of discrimination has not yet been adequately recognized nor addressed as a form of unconstitutional discrimination.

I. THE ANTECEDENTS: EFFORTS TO STANDARDIZE THE ENGLISH LANGUAGE IN BRITAIN

The attitude of the English towards their language and its standardization later became the inheritance of the American colonists and the Framers of our government. Failed attempts to standardize the language of England were later repeated in America. [FN37]

English became the language of England very gradually. [FN38] The struggle for the status of English took place in society at large, in the government, and in the legal profession. After the Norman conquest in 1066, English began as a relatively low-status language of the common people. At this time, Norman French was the standard language of Parliament, the courts, and the upper classes. [FN39] Latin was the language of legal writing and scholarship. [FN40] English grew in prominence as poets, preachers and some officials began writing in English. [FN41] By the end of the twelfth century, the French-speaking upper class in ***282** England also had acquired English. [FN42] By the end of the fourteenth century, English had become the mother tongue of Englishmen. [FN43] Lawyers, however, resisted adopting English as the language of legal practice. It was not until the end of the eighteenth century, 400 years after English had become the mother tongue of Englishmen, that English became the language of the law. [FN44]

After English seemed established as the language of England, a strong movement to create a standard English developed. [FN45] Between 1712 and 1800, English scholars continuously proposed an academy to regulate speech and standardize the language. [FN46] Scholars addressed appeals for such an academy, to be modeled after similar academies in Italy, France and Spain, to the King of England during this period. These appeals often requested the King's sponsorship for the proposed academy. [FN47] One commentator, responding to the argument that fixing the pronunciation of the English language would require a dictator, suggested using the King's pronunciation as a standard:

> We have a Monarch on the throne whose superior enunciation, and elegant pronunciation of his native tongue, have long been the pride of British ears. [If one were to] collect his manner of

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> sounding these dubious words, and communicate them to the publick [FN48] ... [e]very true-born Briton would pride himself thereon. [FN49]

In this commentator's view, the ultimate source of sponsorship and authenticity of language was the King himself.

The proposed academy met much resistance. Joseph Priestley, the great English chemist, lodged a serious objection: "[A] public Academy, invested with authority to ascertain the use of words ... [is] unsuitable to the genius of a free nation ...." [FN50] One proponent of the academy expressed his view that ***283** matters of language choice could not be dictated to Englishmen:

> Lest you should think that I would indeavor to force Men by Law to write with Propriety and Correctness of Style, I must declare, that I mean only to force them to spell with Uniformity ...; and I can not but esteem the English Language to be of such Consequence to Englishmen in general that a proper Act, for the improvement and Preservation of it, would do Honor to an English Parliament. [FN51]

Despite the writer's suggestion for an Act of Parliament standardizing the English language, no such law was ever enacted. Without support from Parliament or a national language academy, the only standardization of English during this period resulted from the publication of Dr. Samuel Johnson's dictionary in 1755. [FN52] Johnson opposed the establishment of a language academy: "If an academy should be established for the cultivation of our stile, I ... hope the spirit of English liberty will hinder or destroy [it]." [FN53] Proponents of the Academy, bitterly disappointed at England's failure to regulate the language, wrote that Englishmen should "take shame to ourselves, when we reflect that we are the only civilized nation in Europe, perhaps in the known world, who have never taken any pains about our language, but have left it to take its course wholly under the guidance of chance." [FN54]

None of these attempts to make English the standard or official language of England succeeded, and only two minor statutes survive today. [FN55] Political and social factors in England during this period made the establishment of an academy impossible. [FN56] Professor Heath has identified two critical factors responsible for this outcome:

> The first is the view that Englishmen must not be forced by law in their language choices; the second is the conviction that discerning citizens will, of their own volition, make proper decisions about language ***284** in order to do honor to their identity.... Rejection of a national academy underscored the view that achievement of status for the English language was not a matter for Parliamentary statutes, but rather one of individual choice for socially-minded individuals. [FN57]

Proponents of the academy, having failed in their own country, looked to the fledgling, predominantly English-speaking United States as a promising place to establish an academy. Sir Herbert Croft, British etymologist and the author of an English dictionary, discussed a proposal for an American academy of the English language with John Adams, the American minister in London in 1788. [FN58] Croft later wrote:

> Perhaps we are, just now, not very far distant from the precise moment, for making some grand attempt, with regard to fixing the standard of our language (no language can be fixed) in America. Such an attempt would, I think, succeed, in America, for the same reasons that would make it fail in England; whither, however, it would communicate its good effects. Deservedly immortal would be that patriot, on either side of the Atlantick, who should succeed in such an attempt. [FN59]

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Croft's forecast regarding the standardization of language in America was to prove wrong.

II. THE CONTINENTAL CONGRESS AND OFFICIAL MULTILINGUALISM DURING THE REVOLUTION

Despite the popular perception that English always has been the only language of the United States, Americans have spoken many languages throughout the nation's history. Native Americans, for example, spoke approximately 1000 different languages. [FN60] Substantial populations spoke European languages other than English: Spanish in Florida and what is now the southwestern United States; German in Pennsylvania, Maryland, Virginia, New York and Ohio; French in Louisiana; Dutch and Swedish in New York and Delaware. [FN61] The principal European languages other than English in what is now the continental United States were German, French and Spanish. [FN62] ***285** In the colonies prior to the Revolutionary War, German was the most widely spoken language besides English. [FN63]

The leaders of the American Revolution were keenly aware that American populations spoke languages other than English. Indeed, before, during, and after the Revolutionary War, the leaders of the Revolution sought to promote the allegiance of these non-English speaking populations, and their understanding of the revolutionary cause, by issuing key documents in German and French. In 1774, the Continental Congress issued

> Extracts from the Votes and Proceedings of the American Continental Congress, Held at Philadelphia on the fifth day of September, Containing, The Bill of Rights, a List of Grievances, Occasional Resolves, The Association, An Address to the People of Great Britain, and a Memorial to the Inhabitants of the British American Colonies. [FN64]

The Continental Congress ordered these extracts published in both English and German. [FN65] During that same year, the Continental Congress issued a proclamation in French, addressed to the inhabitants of Quebec, informing them of the rights the American colonists claimed against the English King, and inviting them to "accede to our confederation." [FN66] The Congress resolved that the delegates from Pennsylvania would "superintend the translating, printing, publishing & dispersing" of the address, with the assistance of delegates from New Hampshire, Massachusetts, and New York. [FN67]

The Continental Congress also resolved that the "Rules and Articles, for the Better Government of the Troops Raised" by the Colonies, and the articles of war, be translated into French. [FN68] Another resolution of Congress "[o]rdered that the delegates of the Colony of Pennsylvania procure letters from the German clergy," letters presumably written in German, "to ***286** their friends and countrymen" in New York and North Carolina. [FN69] An address to the people of Ireland was translated into German. [FN70] The Congress also issued an address "To the People in General, and particularly to the Inhabitants of Pennsylvania," in both English and German. [FN71]

In addition to these attempts to win the allegiance of German and French speaking peoples, the Continental Congress recruited German colonists and their sons for military service during the Revolutionary War. On May 25, 1776, Congress resolved "That one batallion of Germans be raised for the service of the United Colonies." [FN72] The battalion was to be composed of "four companies of Germans ... in Pennsylvania, and four companies in Maryland." [FN73] The language of command of the German battalion was probably German. [FN74] On December 1, 1776, the Congress ordered the "German Batallion to march immediately to join General Washington." [FN75]

During the Revolutionary War, other documents were translated into German. In 1777, an address of the convention of New York to the people of New York was translated, [FN76] and 1000 copies

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were published in German. [FN77]

After the War, the Continental Congress published the Articles of Confederation, the first, and ultimately unsuccessful, charter for the new American government, in official English, German and French editions. [FN78] By publishing this fundamental document in several languages, the Continental Congress explicitly recognized the linguistic and cultural pluralism within the new American realm and the need to communicate with ***287** linguistically different populations in the languages they understood. The Continental Congress also realized clearly the importance of language as a political instrument. The Congress, hoping to communicate with and win the allegiance of American peoples whose language was different from English, published many significant documents in German and French.

III. THE VIEWS OF THE FRAMERS

A. THE VIEWS OF FRANKLIN, JEFFERSON AND RUSH

Given the presence of substantial populations in America that spoke languages other than English and the efforts of the Continental Congress to communicate with these populations in their own languages, it is not surprising that the Framers held and expressed views about non-English languages and cultures in America. The English resistance to language standardization, however, formed part of the Framers' inheritance in the Colonies. The legacy of failed attempts to standardize the English language in Britain provided no framework for language standardization in the fledgling United States. [FN79] In the Colonies, the absence of a formal language policy left the issues of language and ethnicity to the political process.

Early friction between the core English culture and a different culture, and debate about this issue, began in Pennsylvania, with its large proportion of German-speaking citizens. Benjamin Franklin expressed a strongly negative attitude towards German-speaking colonists. Writing in 1753 to Peter Collinson, Franklin linked the German colonists with the dangers of faction and social disorder: "I am perfectly of your mind, that measures of great Temper are necessary with the Germans: and am not without Apprehensions, that thro' their indiscretion or Ours, or both, great disorders and inconveniences may one day arise among us." [FN80] Franklin viewed German-speakers as ignorant, immoral, and not worthy of trust, characteristics he attributed to their German national origin and language. Franklin wrote:

> Those who come hither are generally of the most ignorant Stupid sort of their own nation, and as Ignorance is often attended with Credulity when Knavery would mislead it, and with Suspicion when Honesty would set it right; and as few of the English understand the German ***288** Language, and so cannot address them either from the Press or Pulpit, 'tis almost impossible to remove any prejudices they once entertain.... Not being used to Liberty, they know not how to make a modest use of it. [FN81]

Franklin thus ascribed ignorance and other negative characteristics to those who differed not in knowledge, but in language. Indeed, in the same letter, Franklin recognized that the Pennsylvania Germans "import[ed] many Books" and operated two printing houses entirely in German, two bilingual German-English printing houses, and two German-language newspapers. [FN82] These facts belie Franklin's assumption that the Germans were "ignorant."

Franklin's observations demonstrate the substantial extent to which the German language and culture influenced American colonial culture in Pennsylvania:

> They have one German newspaper and one half-German. Advertisements intended to be

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> general are now printed in Dutch [German] and English; the Signs in our Streets [Philadelphia] have inscriptions in both languages, and in some places only German: They begin of late to make all their Bonds and other legal writings in their own language, which (though I think it ought not to be) are allowed good in our Courts, where the German Business so encreases that there is continual need of Interpreters; and I suppose in a few years they will be also necessary in the Assembly, to tell one half of our legislators what the other half say; In short unless the stream of their importation could be turned from this to other Colonies, as you very judiciously propose, they will soon so outnumber us, that all the advantages we have will not (in My Opinion) be able to preserve our language, and even our Government will become precarious. [FN83]

Franklin feared the Germans because he feared that their numbers could dictate outcomes in the political process and that they would undermine colonial government. This is an early expression of a fear often repeated throughout our legal history: the fear that those who are culturally different, those who speak a different language, represent a threat to our government. Franklin was writing about political control: he feared that if Germans wielded political power they would use it to undermine the established government.

Franklin also worried about the German influence upon the predominant English culture of the time. In his Observations Concerning the Increase of Mankind, Franklin lamented the presence of Germans and others who would render impure the English in America:

> ***289** And since Detachments of English from Britain sent to America, will have their Places at Home so soon supply'd and increase so largely here; why should the Palatine Boors be suffered to swarm into our Settlements, and by herding together establish their Language and Manners to the Exclusion of ours? Why should Pennsylvania, founded by the English, become a Colony of Aliens, who will shortly be so numerous as to Germanize us instead of our Anglifying them, and will never adopt our Language or Customs, any more than they can acquire our Complexion. [FN84]

Franklin's negative attitude toward the Germans is particularly obvious in this excerpt, in which he refers to them as a "swarm" and as "boors," racially different from the English.

In contrast to the contempt Franklin held for the Germans and their language and culture, other Framers encouraged multilingualism as a means of access to the written knowledge developed in other nations at a time when the United States had not developed a substantial scientific and artistic literature. Thomas Jefferson, himself fluent in French and a student of the Anglo-Saxon language, stated that the study of French was "absolutely essential under our present circumstances." [FN85] Jefferson recognized the political utility of facility in languages other than English. [FN86] Jefferson recommended the study of politics, law, and history in France, in order to facilitate the acquisition of the French language. [FN87] He stated that:

> With respect to modern languages, French, as I have before observed, is indispensible. Next to this the Spanish is most important to an American. Our connection with Spain is already important and will ***290** become daily more so. Besides this the antient part of American history is written chiefly in Spanish. [FN88]

Jefferson also urged, with varying degrees of success, his family to read Don Quixote in Spanish and other works in French to maintain their facility in those languages. [FN89]

Jefferson was not alone among the Framers in his recognition of the importance of multilingualism as a means of access to knowledge. Benjamin Rush, signer of the Declaration of Independence and a leading proponent of education in post-Revolutionary America, also advocated learning several

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languages. In the Plan of a Federal University, he makes several observations on the importance of language study, including the study of English, Spanish, French, and German, at a proposed federal university:

> The cultivation and perfection of our language becomes a matter of consequence, when viewed in another light. It will probably be spoken by more people, in the course of two or three centuries, than ever spoke any one language, at one time, since the creation of the world.... [C]onsider the influence, which the prevalence of only two languages, viz, the English and the Spanish, in the extensive regions of North and South America, will have upon manners, commerce, knowledge, and civilization.
>
> ... The German and French languages should be taught in this university. The many excellent books which are written in both these languages, upon all subjects, more especially upon those which relate to the advancement of national improvements of all kinds, will render a knowledge of them an essential part of the education of a legislator of the united states. [FN90]

Rush, like Jefferson, observed the current, and predicted the future, prevalence of Spanish. He urged his readers to acquire other languages to broaden their sources of knowledge.

***291** Rush was a founder of the German college established in Lancaster, Pennsylvania. [FN91] On August 31, 1785, Rush proposed the German college in a letter addressed "To the Citizens of Pennsylvania of German Birth and Extraction." [FN92] Responding to the objections of "[s]ome narrow-minded people" who feared that the German college would become "the means [for the Germans] of keeping up their language in our country," Rush wrote that the Germans, "by teaching and learning in their own language, they will sooner acquire a perfect knowledge of the English language." [FN93] The German college would not only preserve the German language, it would also "open the eyes of the Germans to a sense of the importance and utility of the English language and become perhaps the only possible means, consistent with their liberty, of spreading a knowledge of the English language among them." [FN94]

Within two years, the German college was created. Rush described the bilingual ceremony consecrating the German college. [FN95] In his address to those assembled, Rush listed some of the advantages of the bilingual college:

> By means of this seminary in the 1st place, the partition wall which has long separated the English and German inhabitants of the state will be broken down.... By means of this College the English language will be introduced among our German fellow citizens. In a state where all legal proceedings as well as commerce are carried on in English, a knowledge of it must be of the utmost consequence for the preservation of property. If our Germans expected at a future day to establish their language in Pennsylvania, they never can expect to see it established in our federal councils, where they must prepare to be called to assist in the government of the United States. The English language will be absolutely necessary to qualify them for usefulness in our great national legislature.... By means of this College the German language will be preserved from extinction and corruption by being taught in a grammatical manner. [FN96]

Rush believed that in a nation in which the English language was dominant, the Pennsylvania Germans would have to ***292** master English to assist in the government and to participate fully in national affairs. His solution was to establish a German college in which the two languages would co-exist, with German-language instruction facilitating the acquisition of English.

Significantly, Rush thought that the German college, its teaching in German, would "become, perhaps the only possible means, consistent with their liberty, of spreading a knowledge of the

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English language" among the Pennsylvania Germans. [FN97] Rush recognized that linguistic minorities would acquire English voluntarily, because of its social utility, and that legal coercion of linguistic minorities would intrude upon their personal liberty. [FN98] Rush also recognized value in preserving the German language and culture. Rush did not see acquisition of English and preservation of German as mutually exclusive. On the contrary, they were complementary: acquisition of English was not inconsistent, then or now, with preservation of an American culture different from the core culture.

B. THE CONTROVERSY OVER THE ALIEN AND SEDITION ACTS: EARLY POLITICAL USES OF ETHNICITY

In 1798 Congress passed the Alien and Sedition Acts. [FN99] The controversy over these acts reveals much about the nation's insecurity about its identity. Although the controversy was not about American languages, it was, in part, about American ethnicity and culture, and about defining who belongs, who does not, and why. The controversy demonstrates the tendency in American culture, manifested early in our history, to identify difference from the core English culture with "foreignness" and, further, to identify this supposed "foreignness" with the subversion of American government and American identity. [FN100]

***293** The identification of the Republican party with the French and their foreignness, ethnicity, culture, and language, became a key Federalist strategy in an attempt to label the Republicans as traitors and to command loyalty to Federalist domestic political purposes. [FN101] The Federalist fear of "foreign influence," and the attribution of internal dissent and Republican opposition to this foreign influence, provided the climate necessary for the Alien and Sedition legislation. [FN102] From a very early stage in American politics, many associated "foreign influence," foreign national origin, and foreign traits with disloyalty to America and its government. Difference from the core culture was equated with disloyalty.

Jefferson described the Alien and Sedition legislation as "a most detestable thing." [FN103] His revulsion for the nativist and oppressive legislation grew from his conception of the proper spheres of governmental control and individual freedom. [FN104] In ***294** 1801, after Jefferson had become President, he wrote to Joseph Priestley and commented on the legislation. [FN105] "What an effort," he wrote, "of bigotry in politics and religion have we gone through!" [FN106] Likening the legislation to the witch hunts, he lamented the attempt to "bring back the times of Vandalism, when ignorance put everything into the hands of power and priestcraft." [FN107] Jefferson expressed his "disdain [for] the legitimacy of that libel on legislation," the alien law. [FN108]

Jefferson also expressed his optimism about the nation's rebound from the ordeal:

> As the storm is now subsiding, and the horizon becoming serene, it is pleasant to consider the phenomenon with attention.... The mighty wave of public opinion which has rolled over it is new. But the most pleasing novelty is, its so quietly subsiding over such an extent of surface to its true level again. The order and good sense displayed in this recovery from delusion, and in the momentous crisis which lately arose, really bespeak a strength of character in our nation which augurs well for the duration of our Republic; and I am much better satisfied ***295** now of its stability than I was before it was tried. [FN109]

So, for Jefferson, the stability of the nation was confirmed and strengthened by its rejection of xenophobia and by the triumph of tolerance of divergent opinions.

IV. EARLY EFFORTS TO ESTABLISH A NATIONAL LANGUAGE ACADEMY

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A. JOHN ADAMS PROPOSES A NATIONAL LANGUAGE ACADEMY

On September 5, 1780, John Adams, then on a diplomatic mission to Europe, wrote a letter to the President of Congress, suggesting the establishment of a national language academy. [FN110] He proposed an "American Academy for refining, improving, and ascertaining the English Language." [FN111] In Adams's view, language was a political instrument: "It is not to be disputed that the form of government has an influence upon language, and language in its turn influences not only the form of government, but the temper, the sentiments, and manners of the people." [FN112] Like Rush, Adams felt that English was destined to become a language of the world because of the growing American population, America's growing international influence, and the still prominent stature of England. Adams also desired to establish the superiority of the new American form of government, which could distinguish itself by establishing a national language academy, a feat which had eluded England. [FN113]

***296** Only Congress, according to Adams, could give this Academy "reputation, influence, and authority through all the States and with other nations." [FN114] Adams proposed that the American government follow the example set by certain European nations and standardize the English language:

> Most of the nations of Europe have thought it necessary to establish by public authority institutions for fixing and improving their proper languages. I need not mention the academies in France, Spain, and Italy, their learned labors, nor their great success. But it is very remarkable, that although many learned and ingenious men in England have from age to age projected similar institutions for correcting and improving the English tongue, yet the government have never found time to interpose in any manner; so that to this day there is no grammar nor dictionary extant of the English language which has the least public authority ....
>
> The honor of forming the first public institution for refining, correcting, improving, and ascertaining the English language, I hope is reserved for congress; they have every motive that can possibly influence a public assembly to undertake it. It will have a happy effect upon the union of the States to have a public standard for all persons in every part of the continent to appeal to, both for the signification and pronunciation of the language. [FN115]

Adams wrote that, "[u]pon a recommendation from congress, there is no doubt but the legislature of every State in the confederation would readily pass a law making such a society a body politic." [FN116] In Adams's view, both federal and state governments would use language to shape the sentiments of the people. [FN117]

Adams's proposal was sent to committee, where it died. [FN118] Congress apparently never acted on, nor debated, Adams's proposed Academy. [FN119] Just as the proposed Academy in England was thought to be "unsuitable to the genius of a free nation," [FN120] ***297** so Congress was not persuaded of the necessity for such an academy. [FN121] According to Professor Heath, federally sponsored cultural institutions "faced severe obstacles during the early years of the Republic." [FN122] They were associated with monarchies, and Adams, a leading Federalist, was often viewed as a monarchist. His proposal for a centralized language academy was likely viewed as evidence of his monarchist preferences. [FN123] Adams's proposal was doomed to failure. It was inconsistent with principles of individual liberty, and it had the taint of monarchist association.

B. PRIVATE EFFORTS TO ESTABLISH A LANGUAGE ACADEMY

Although Congress failed to act upon Adams's suggestion that the federal government establish and support a national language academy, some years after the controversy over the Alien and

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Sedition Acts several leading American intellectuals persevered in efforts to establish language standardization through private means. [FN124] Noah Webster was chief among them. [FN125] In his Dissertations on the English Language, Webster made a plea for recognition and standardization of a national language:

> We have therefore the fairest opportunity of establishing a national language, and of giving it uniformity and perspicuity, in North America, that ever presented itself to mankind.... [FN126]
>
> ***298** [A] national language is a band of national union. Every engine should be employed to render the people of this country national; to call their attachments home to their own country; and to inspire them with the pride of national character.... [FN127]
>
> Let us then seize the present moment, and establish a national language, as well as a national government. Let us remember that there is a certain respect due to the opinions of other nations. As an independent people, our reputation abroad demands that, in all things, we should be federal; be national; for if we do not respect ourselves, we may be assured that other nations will not respect us. [FN128]

Webster's efforts at language standardization between 1783 and 1828 resulted in several publications, including his American Dictionary of the English Language, published in 1828. [FN129] Webster recognized, in the preface to his 1828 dictionary, that language was an instrument of the people and that there could be no final federal authority on matters of language. [FN130] Webster nonetheless sought endorsement for his new dictionary from the Supreme Court of the United States. Webster's request for endorsement was, however, rejected by Chief Justice John Marshall. [FN131]

The desire of certain leading intellectuals of the day for language standardization resulted in the establishment, in 1820, of the American Academy of Language & Belles Lettres, a private academy which lasted only a few years. [FN132] Its founders established the Academy despite their awareness of the objections to a national language academy. [FN133] Its goals, as stated in its first circular, were to guard the English language against "local or foreign corruptions," to settle issues of spelling and word usage, and "generally, to form and maintain, as far as [practicable], an English standard of writing and pronunciation, correct, fixed, and uniform, throughout our extensive territory." [FN134] Such linguistic uniformity would, in the Academy's ***299** view, promote the development of an American literature. [FN135] That development would help make the new nation great just as the European language academies had promoted their respective nations. [FN136] The founders of the private Academy, like John Adams before them, [FN137] recognized the important political role of language: "The commanding influence of literature upon national wealth and power, as well as morals, character, and happiness, especially in free communities, will not be doubted by those whose minds have been most directed to this interesting branch of civil policy." [FN138]

By the time of the publication of its second circular, dated July 12, 1821, the Academy's president was John Quincy Adams, then Secretary of State. [FN139] Its contributors, members, and honorary members included: Chief Justice John Marshall and Justices Joseph Story, John Jay, and Brockholst Livingston of the Supreme Court; former Presidents John Adams (by then deceased), Thomas Jefferson, and James Madison; President James Monroe; and numerous other prominent Americans, including Noah Webster. [FN140] In the second circular the Academy remained faithful to its original purpose of standardizing the English language. [FN141] The Academy recognized the power of education, like language, as an instrument of political control: "Improvement in mind and morals will lessen the power of ***300** faction." [FN142]

In January, 1822, the Academy issued its final publication, Circular III, which included several

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letters from its members and patrons. [FN143] This circular acknowledges some of the difficulties inherent in fulfilling the Academy's goals in a constitutional democracy: "Those institutions, among other nations, which, in their organization, have had the aid of kings and national treasuries, were free from many difficulties which attend our Association; because they were formed for countries of less extent, much better known, and whose talents and resources were altogether more concentrated." [FN144] In America there was no support for the Academy from the government [FN145] and there could be none from any King.

One of the letters printed in this circular was from the late President John Adams. Remaining true to the spirit of his unsuccessful proposal, forty years earlier, for a national language academy, Adams was "exceedingly delighted" with the plans for the Academy. [FN146] Furthermore, he wrote, "[t]he plan is worthy [of] the adoption of the national government, and it will be ***301** an immortal honor to our Congress to incorporate, to establish and endow it, with sufficient funds, to defray all its necessary expenses." [FN147] Adams also repeated his criticism of Great Britain's failure to adopt a language academy: "Men of letters throughout all Europe have long expressed their wonder, that the British Parliament have been so inattentive to the cultivation of their own language.... [T]he government have instituted nothing for the improvement of their language." [FN148]

Thomas Jefferson warned that the Academy should not focus on fixing standards for the English language, but rather on elaborating vocabulary to facilitate scientific progress. [FN149] Jefferson rejected fixing the language based either on the language of England or on the model of the European academies:

> There are so many differences between us and England, of soil, climate, culture, productions, laws, religion, and government, that we must be left far behind the march of circumstances, were we to hold ourselves rigorously to their standard. If, like the French Academicians, it were proposed to fix our language, it would be fortunate, that the step was not taken in the days of our Saxon ancestors whose vocabulary would illy express the science of this day. [FN150]

Of course, the French and other European language academies were exactly the models the founders of the Academy of "Belles Lettres" had in mind. [FN151] Jefferson thus gently ridiculed the Academy by pointing out the absurdity of its goals. Fixing the Saxon language in the time of the Saxons would have severely inhibited cultural development and scientific progress. [FN152]

Chief Justice Marshall also responded to the Academy. Marshall believed that the intermingling of social classes in America, and not governmental or private intervention, would result in language standardization of its own momentum:

> At present, the intermingling of classes; the intercommunication of well educated persons with those whose improvement is very limited; the removals from one neighborhood and state, to another distant neighborhood, and another state; the intimate intercourse thus kept up between all ranks, and the different parts of our extensive empire, all contribute to preserve an identity of language through the United ***302** States, which can find no example in other parts of the world. [FN153]

In Marshall's view, unique characteristics of American liberty, the exceptional geographical and social mobility of American people and their necessary intermingling, were sufficient to maintain identity of language. The social and commercial contact among the American people would alone be sufficient to preserve a national language. Furthermore, Marshall clearly anticipated that, as conflicts over language arose, they would be settled by individuals responding to local conditions. The intimate intercourse of the American people with each other was both a necessary and sufficient

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condition for the resolution of language differences, rendering further standardization unnecessary. [FN154] Marshall also warned against the overzealous patriotism of extreme advocates of language standardization and urged a more tempered posture: "The present state of society, give to the European portion of the commonwealth of letters, some right to take the lead; but Americans may co-operate in the joint work, and may exercise their own judgment on the performance of their fellow laborers, as well as on their own." [FN155]

Marshall's view of language standardization is also suggested in his response to Noah Webster's request for the Supreme Court's official endorsement of his dictionary and other written works. [FN156] Marshall refused to endorse Webster's dictionary on behalf of the Supreme Court. Marshall wrote that the Court, as a governmental body, could not endorse the dictionary. [FN157] He explained that the justices could provide such an endorsement only in their individual capacities, if they chose to, and not in their official capacities. [FN158] Marshall's response suggests that he viewed language choice and standardization as matters for individual, not governmental, decision. [FN159]

Interestingly, Marshall's insights regarding the intermingling of peoples and the operation of local communities in resolving language matters were confirmed in states that had ***303** substantial linguistic minorities. [FN160] Marshall's insight also helps explain why English has remained the dominant language of the United States since the nation's inception, despite the presence of groups speaking other languages. The intermingling of peoples in our nation, coupled with the early and continuous dominance of English, has resulted in virtually universal knowledge of English among American residents, without the imposition of a standard or official language by the government. [FN161]

Ultimately, as Marshall envisioned, the resolution of language issues at the local level made the private Academy unnecessary. [FN162] Its national aims never were fulfilled. The Academy published no further circulars. [FN163] Despite John Adams's call for national sponsorship of the Academy and its goals, no pleas to Congress were made and Congress never acted on its behalf. [FN164] The unique characteristics of American society and liberty allowed communities to adopt local solutions to any language problems that arose, rendering any academy, public or private, unnecessary.

V. APPEALS TO CONGRESS FOR OFFICIAL PUBLICATIONS IN GERMAN

A. EFFORTS TO OBTAIN FEDERAL PUBLICATIONS IN GERMAN, 1794-1798

Between the late eighteenth century and the mid-nineteenth century, America's German-speaking minority lobbied Congress to print federal laws and documents in German as well as in English. In early 1794, German citizens living in Augusta County, Virginia, petitioned Congress to print official versions of federal laws in German. [FN165] On April 1, 1794, Representative Preston read the motion of a committee of the House of Representatives, which provided that the "Secretary of State [is] authorized to have such proportion of the laws of the United States printed in the German language as he may think proper and necessary to accommodate the German citizens ***304** of the United States." [FN166] Apparently no vote was taken on this motion. [FN167] Reintroducing the proposal, Representative Moore read the recommendation of a House committee, which stated that

> the provision heretofore made has been entirely inadequate to the purpose of a due promulgation of the laws; that it is become expedient to extend the provision on this subject to the commencement of the Government under the present constitution. That for the accomodation of such Germans, citizens of the United States, as do not understand the English language, it will be necessary that the laws be translated, and printed in the German language. [FN168]

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Accordingly, the committee recommended printing "complete sets of the laws of the Congress" in German. [FN169] These German editions of the federal laws were to be distributed in such proportion as representatives from districts containing German citizens certified were necessary to the Secretary of State. [FN170] The committee recommendation was defeated by a vote of 41 votes for, and 42 votes against. [FN171] The Speaker of the House at the time, F. A. Muhlenberg, apparently vacated his post at the time and did not cast a vote, therefore possibly contributing to the defeat of the measure by just one vote. [FN172]

Reintroduced the next year, the proposal underwent "a very long discussion." [FN173] Supporting the publication of the laws in German, Representative Hartley suggested that

> it was perhaps desirable that the Germans should learn English; but if it is our object to give present information, we should do it in the language understood. The Germans who are advanced in years cannot learn our language in a day. It would be generous in the Government to inform those persons. Many honest men ... were led away by misrepresentation; ignorance of the laws laid them open to deception .... ***305** It had been the practice in Pennsylvania to publish the laws in English and German. Good consequences had resulted from it. [FN174]

Hartley identified an important issue here. If the goal of government is to communicate information, it can do so best in the languages understood by its citizens. The goal of teaching Americans the language of the core culture is a different goal.

Some representatives opposed the proposal. Representative Murray said that "it had never been the custom in England to translate the laws into Welsh or Gaelic, and yet the great bulk of the Welsh, and some hundred thousands of people in Scotland, did not understand a word of English." [FN175] The resolution that resulted from this discussion contained no language regarding publication of the laws in German. [FN176] Apparently the resolution never came to a vote. [FN177]

Later, in 1798, there were new attempts to have government documents published in German. A message by President Adams, delivered on April 7, 1798, was published in German. [FN178] Two requests by Congressmen Brook and Williams for the printing of more German copies of the President's message were rejected after lengthy debate on the House floor. [FN179]

B. THE CONGRESS DEBATES FEDERAL PUBLICATIONS IN GERMAN, 1835-1862

Like the efforts of the 1790s, there were subsequent efforts to persuade Congress to publish certain documents in the German language. From the 1830s until about 1860, German immigration to America increased considerably. [FN180] In 1835, German liberals petitioned Congress, apparently without success, to publish its proceedings and legislation in German. [FN181] In 1843, Representative Ramsay introduced a resolution "to procure, in the German language, 3000 copies of the President's message, for the use of the members of this House." [FN182] Representative Slidell of Louisiana suggested printing documents in French. [FN183] ***306** After a long debate and three votes, these proposals were tabled without further legislative action. [FN184]

On April 24, 1862, Representative Walton of Vermont presented a resolution calling for the printing of 200,000 extra copies of the Patent Office Report on Agriculture for 1861. [FN185] Representative Aldrich, from Minnesota, moved to amend the resolution to provide that "fifty thousand copies of said report be printed in the German language." [FN186] A fascinating debate on the political implications of official publications in languages other than English ensued, [FN187] a debate that foreshadowed current debates about official English.

Representative Morrill vehemently opposed Aldrich's motion. Morrill stated, incorrectly, [FN188]

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that "[i]t would be, for the first time in the whole history of our Government, a departure, as I conceive, from the sound and correct principle which has heretofore been acted on, of printing our documents in the English language." [FN189] Morrill argued that if documents were printed in German, then they also would have to be printed in other languages spoken by American populations, such as the French-speaking and Norwegian-speaking populations. He also complained about the cost of publication in German, which would cost as much as publication in English, "and probably much more." [FN190] Morrill then commented on the issue of assimilation:

> I am in favor of having the foreign population which comes here assimilated with and become Americans. There is no reason why this [amendment] should be adopted in behalf of the German Population, for ... they are educated, and understand, perhaps, more in relation to languages than any other class of foreign population that comes to this country.... I consider the proposition as unsound in principle, and as utterly subversive of the true doctrine of the country, and I hope we shall continue to hold to the sound and safe practice of printing ***307** in the English language. [FN191]

Publication of the report exclusively in English, Morrill believed, would speed the assimilation of the "foreign" German-speakers to the English language and American culture and avoid the problems of different language-minority citizens competing for publications in their own languages. He was apparently unaware that many of the German speakers were Americans and, therefore, not "foreign" except in the sense that their culture differed from the core English-speaking culture. Like the Federalists during the Alien and Sedition Act controversy, Morrill equated German, an American language different from English, with subversion of "the true doctrine of the country." Once again, "foreign influence" is construed as a vehicle for subversion.

Representative Washburne of Illinois responded to Morrill's arguments. He urged adoption of the resolution as a "measure of justice to our German population." [FN192] Washburne noted that the German population numbered in the hundreds of thousands and that they were mostly agriculturists, many of whom did not understand English. Since this population did not understand English, publishing the agricultural report in English deprived them of the benefit of the report. Washburne felt that the German-speaking population was entitled to information in a language they could understand:

> I ask the House if they are willing to see these honest, patriotic, and liberty-loving citizens of our country, who have rallied, sixty thousand strong, under our flag to fight the battles of the country, deprived of that information to which they are entitled ...? The practice has been already inaugurated in many of the States of publishing documents in the German language, and who has ever complained of the evil result of that? No one. I am proud to say that in my own State [Illinois], where we have so many of those estimable and patriotic citizens, we are not unwilling to print documents in German, in order that all Germans may read and understand what the Government is doing-a Government which they contribute, in so great a degree, to sustain and uphold, not only by their labor, but by their blood .... [FN193]

Washburne then addressed Representative Morrill's cost argument. Washburne described the cost of printing 25,000 German copies of the report as "paltry" and a "drop in the bucket." [FN194] He urged the House to adopt Representative Aldrich's resolution: "Let us pay this compliment, so well deserved ***308** by our German citizens. They are a grateful people, and it will add still further to their generous love of their adopted country." [FN195] Responding to the argument that French-speaking or Norwegian-speaking citizens also would want documents printed in their respective languages, Washburne stated that when the numbers of French speakers was similar to the number of German speakers, then it would be appropriate to "mete out to them the same measure of justice I would now mete out to the Germans." [FN196]

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Shortly after Representative Washburne's comments, a resolution to print 25,000 copies of the agricultural report in German passed by a narrow margin. [FN197] Remarkably, the next day Representative Walton of Vermont introduced a resolution rescinding the printing of the agricultural report in German. Walton's resolution introduced a fresh round of debate on the issue. [FN198]

Walton commented that the prior day's resolution would require employing a corps of German translators and acquiring type for printing in German or hiring German printers to perform the work. [FN199] Furthermore, questioned Walton, if the German-speaking citizens were entitled to this report in German, were they not also entitled to other government documents in German, including the "laws and debates of Congress in German?" [FN200]

Walton then posed the crucial question: "I submit the question whether we are to have a national language or not?" [FN201] Representative Maynard asked a similar question: "I should like, if it be in order, to ask the question whether, in point of fact, we have any legal language or not?" [FN202] For procedural reasons, these questions were not answered or debated, and Walton's resolution rescinding the printing of the agricultural report in German was adopted. [FN203]

The crucial question, whether we have a national language, ***309** was asked but never answered. In fact, no national or "legal" language existed. Rather, the nation had a dominant, prevalent language, English, and many other American languages. The Congress had authorized the printing of an agricultural report in German, for the benefit of German-American citizens, for a single day. The swift rescission of this act, and the extensive debate surrounding the resolution, are ample evidence of the controversy and ambivalence surrounding congressional acknowledgement of German as an American language in the 1860s. During the nineteenth century, however, several states were much less ambivalent about accommodating their citizens who spoke German, Spanish, and French.

VI. OFFICIAL MULTILINGUALISM IN THE STATES

In The Kentucky Resolutions, Thomas Jefferson argued that the Alien and Sedition Acts unconstitutionally infringed the powers reserved to the states and to the people under the Tenth Amendment. [FN204] Jefferson saw the states as the protectors of individual liberties against federal tyranny. [FN205] As Jefferson had foreseen, the states protected the different languages of minorities to a much greater extent than the federal government did. As long as persons who spoke different languages constituted a sufficiently powerful political force in their states, they were able to obtain state recognition of their different languages in state law. The very significant extent of state legal recognition of languages other than English is a largely unknown aspect of our legal history.

This section describes the official recognition of various American languages in the states and focusses on a few states with rich legal histories of multilingualism: first Pennsylvania, with its long official recognition of German; next California and New Mexico, with their rich histories of official bilingualism in Spanish and English; and finally Louisiana, with its history of bilingualism in French and English. Several other states granted, in one form or another, official recognition to the languages of their citizens, usually English plus one additional language. [FN206]

***310** This section has several purposes. It documents our history of cultural and linguistic pluralism, as it has been recognized in the laws of various states. Describing this history reveals the largely unsuspected extent of official state recognition of the different languages of America. The history reveals the great extent to which the myth of American linguistic homogeneity in English has obscured a reality far more complex and diverse. Many American languages coexisted, often with legal parity, in the states for a long time. The history shows that our roots have always lain in cultural pluralism.

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A. PENNSYLVANIA

A significant population of German-speaking immigrants, over one-third of the state's population, inhabited Pennsylvania before the Revolutionary War. According to the 1790 census, 160,000 of the state's 434,373 inhabitants were German. [FN207] German was the standard language in the area where the German population was concentrated. [FN208] The German citizens of America wielded wealth and political power, which they used to influence federal and state legislatures. They proved their patriotism by sending a German-speaking battalion to fight in the Revolutionary War [FN209] and by participating in the Philadelphia conventions of 1774 and 1775. [FN210]

After the Revolutionary War, the German-speaking population of Pennsylvania had significant political influence. The Pennsylvania Germans, United States citizens, persuaded the state legislature to authorize the official publication of the Pennsylvania laws in German, as well as in English, in 1805. [FN211] On April 4, 1805, Governor Thomas McKean approved legislation authorizing him to procure "one thousand copies of the ***311** laws ... together with the constitution of the United States and of this State, to be translated, digested and published in the German language." [FN212] The actual publication of the laws in German occurred two years later. [FN213] The editors of this publication expressed their hope to be able to continue the publication, in German, of the state laws every two years. [FN214] On April 7, 1807, the legislature authorized the Secretary of the Commonwealth to "distribute the journals [of the General Assembly] printed in the German language." [FN215]

Although publication of the Pennsylvania state laws in German did not occur every two years, subsequent editions of the laws in German were published. During the 1836-37 legislative session, the legislature passed an act requiring the Secretary of the Commonwealth "to contract, (annually,) for the printing and delivery in the German language, of a number of copies of the laws of the present and future sessions of the legislature, sufficient to supply such persons as now are ... entitled to receive the copies of the laws in the English language." [FN216] In 1840, the legislature authorized the printing of 1200 copies of the laws in German. [FN217]

During 1837 and 1838, Pennsylvania held a constitutional convention to consider amendments to the state constitution. [FN218] One of the proposed amendments provided for public education, at state expense, for Pennsylvania schoolchildren. [FN219] A further series of amendments, much debated, concerned the proper languages of instruction for public education. At the time, German speakers constituted approximately one-third of the population and owned about one-third of the wealth of the state. [FN220] Although not enacted, an amendment was offered providing that public education would be conducted "in the English ***312** or German languages." [FN221] Ultimately, however, Pennsylvania went further than any other state in giving official sanction to public education in more than one language. [FN222] The debate on the constitutional amendments focussed on the propriety of giving legal sanction to education in more than one language. This debate is important because it demonstrates the lawmakers' sophisticated awareness, at an early time in this nation's history, of the implications of creating constitutional or statutory status for one or another language.

Delegates who opposed creating official sanction for two languages expressed concern that such sanction would be divisive:

> Suppose the authorities of England, France or Spain, should attempt to keep up two languages in their governments. Why, we would look upon them as being deranged, to think of such a thing. What earthly object could there be in keeping up two languages in a country, when it is known that it would only be attended with difficulty, create distrust, and perhaps be the cause of public excitement. [FN223]

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Once again, some legislators considered a language or culture other than the English to be destabilizing, productive of faction, even "deranged." Opponents of the amendment felt that official sanction for two languages in the law would create nefarious class distinctions and would encourage voting on the basis of ethnic loyalty, rather than on some other basis. [FN224] Presumably legislators sharing the ethnicity of the core English culture were scared of losing votes. They labelled a vote based on "ethnic loyalty" as disloyal or somehow suspect, when it might be a vote for the most adequate representation. The concern about voting according to ethnic loyalty, however, was expressed only regarding the Germans, and not regarding members of the core English-speaking culture voting for each other.

Opponents emphasized that "intelligent Germans" wanted no such distinction based on language. [FN225] One delegate expressed the view that Germans did not desire public education in German because it was "of very little practical use to them. All the public records have been kept in English, and here all our business is transacted and carried on through the medium ***313** of the English language." [FN226] According to some legislators, their German constituents wanted the state to cease its publications in German because they wanted to teach their children the English language, since "a knowledge of the English or the prevailing tongue, is necessary to the convenience and prosperity of their children." [FN227] German-speaking citizens of the time knew the social and economic incentives for learning the English language.

Delegates who supported giving the German language legal recognition were concerned that, absent such recognition, the German language would slowly become extinct. Delegate Barnitz of York County, for example, made the following remarks:

> Our laws ... are carried into effect in the English language. That language has the preponderance; and my fear is, that although all languages are, in a general sense, placed upon the same footing as to giving instructions, yet that here is a leading language-in which all your laws are carried into effect, and which may tend to the suppression of all others. This is a consideration which has impressed itself deeply on my mind-and it may be construed into a reason why every thing-and all other languages-must give way to the English language. That language, thus carries with it something of authority, by means of its operation in the laws and the regulation of the laws; and unless some special provision is made for the education of the descendants of the German people in the German language, all those who may be in any respect concerned in the administration of the laws, will be apt to believe that they have discharged the whole duty required of them by the constitution, so soon as they have seen the school law carried into operation in the English language. To my mind, this is a serious difficulty. [FN228]

Delegate Barnitz's comments reflect his awareness of the relationship between law and the preservation of languages: the operation of laws written in English furthered the dominance and authority of the English language. In the same way, legal authorization for education in German could help preserve that language and culture.

Some delegates felt that the best course would be to provide for public education while making no reference to language. Delegate Heister, for example, suggested that there should be no constitutional provision respecting the language or languages of public instruction. He thought that the legislature should encourage education in the English language to the fullest extent. Moreover, he believed that the presence of different ***314** languages, German and English in Pennsylvania, French and English in Louisiana, was divisive and that languages other than English should disappear, to increase the feeling of unity and happiness among citizens. At the same time, however, he

> would do nothing by force; I would leave it to the Germans to come in gradually, as they choose

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copies of the Governor's message in German. [FN240]

*316 B. CALIFORNIA

The Spanish language was introduced into Mexico in 1519, when explorers and conquerors from Spain arrived and claimed Mexico for the Spanish crown. [FN241] Over the next three centuries, Spanish-speaking people migrated northward into the area which later became Arizona, California, New Mexico, and Texas. [FN242] By 1790, approximately 23,000 Spanish-speaking persons populated these areas. [FN243]

The American annexation and conquest of California began in 1846. By January, 1847, the United States had destroyed the native government of California and had severed California from Mexican control. [FN244] California and other Spanish-speaking areas became territories of the United States in 1848 under the Treaty of Guadalupe Hidalgo. [FN245] The treaty provided that Mexican citizens who remained within the newly ceded territories for a year after ratification would become United States citizens. [FN246] The treaty also stated that Mexicans residing in these areas would receive some constitutional and legal protections enjoyed by American citizens. [FN247]

After brief rule under two American military governors, a constitutional convention was held in 1849 in Monterrey, which ultimately led to statehood. Within a short time democracy unleashed the hostility of the new English-speaking immigrants against the native Spanish-speaking Californios. [FN248] The first California State Constitution, however, was drafted in a "context *317 of linguistic equality." [FN249] Eight of the forty-eight delegates to the California Constitutional Convention were Spanish-speaking Californios. [FN250] An official translator was present.

The Californios arrived at the convention anxious to protect their civil rights and land titles, which were at risk under the Treaty of Guadalupe Hidalgo and because of the influx of English-speaking Anglo gold-rushers. [FN251] The Californios shaped several features of the 1849 constitution, including provisions on voting qualifications, taxation, boundaries, and publication of the laws. [FN252] All resolutions and articles the convention considered were translated prior to any vote. [FN253] The constitution was published in both Spanish and English. [FN254]

One provision of California's first constitution, adopted unanimously by the convention, [FN255] provided for official recognition of Spanish and English through the promulgation of the laws in both languages: "All laws, decrees, regulations, and provisions, which from their nature require publication, shall be published in English and Spanish." [FN256] The United States Congress approved this constitution, containing this provision, when it admitted California as a state on September 9, 1850. [FN257] Implementing the constitutional provision, the California legislature provided for a state translator. [FN258]

In 1850, the legislature enacted a statute that authorized the dissemination of statutes, legislative journals, supreme court decisions, and other government documents in Spanish and English. [FN259] During that session, the legislature ordered the printing of 1050 English copies and 350 Spanish copies of all laws passed that year. [FN260] During the 1851 and 1852 legislative *318 sessions, the legislature authorized the printing of the California laws and other documents in English and Spanish. [FN261] The 1852 legislature authorized 700 English copies and 300 Spanish copies of laws passed that session. [FN262] Some of the Spanish editions of the California laws were abridged versions of the English editions. [FN263] A series of legislative enactments during the period from 1852 to 1863 established procedures for the translation of the laws into Spanish, including the selection of laws to be translated, the selection of a qualified translator, the administration of an oath promising faithful and correct translation, and a bidding procedure for choosing the least expensive translator. [FN264]

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At the same time, there was much ambivalence toward the Californios and their Spanish language. The 1855 legislature, gripped by "Hispanophobia," among other factors, defied the California constitution and refused to provide for a Spanish translation of the laws. [FN265] By the 1870s, the political climate had changed with the demographics of the state, which had experienced a huge influx of English speakers during the years of the gold rush, 1849 and beyond.

In 1848, approximately half of California's 15,000 residents were of Mexican descent and presumably Spanish-speaking. [FN266] In the wake of the gold rush, in 1849 alone the population grew by about 100,000, including 80,000 new Anglo English speakers. [FN267] Initially, the Californios participated in the gold rush. They were, however, met with tremendous hostility from the new Yankee immigrants who, ironically, labelled the Californios "foreigners" in their own land. [FN268] With a new political majority of English speakers, and a diminishing minority of Spanish speakers, the perceived necessity for and the perceived utility of laws published in Spanish deteriorated gradually. [FN269]

***319** The Californios eventually lost the political clout that they had had during the constitutional convention of 1849 because of several factors: the hostility and violence of the Anglo immigrants to California; the administration of property laws that non-English speakers did not understand; and the sudden transformation of the Californios into a political minority. [FN270] The last official edition of the California laws in Spanish appeared in 1878. [FN271]

The next year, the California Constitution of 1879 prohibited the publication of the laws in any language other than English: the laws and proceedings of government were to be published in "no other than the English language." [FN272] Despite this change in the constitution, certain regions, such as southern California, remained Spanish-speaking during and after the 1870s. [FN273] In 1894, an amendment to the California Constitution provided that the laws were to be published in "no other than the English language" and imposed an English literacy requirement for eligibility to vote. [FN274] Subsequently, in 1897, the legislature repealed laws authorizing publication of the California laws in Spanish. [FN275] In 1986, nearly 100 years later, California voters, by referendum, amended the state constitution to make English the official language of the state. [FN276]

C. NEW MEXICO

The immigration of English-speakers to New Mexico had "an entirely different character, in quality and quantity, from the immigration that so quickly engulfed the Spanish-speaking in ... California." [FN277] This difference accounts, perhaps, for the greater longevity of official bilingualism in New Mexico and for the greater acceptance and recognition of New Mexico's Spanish ***320** and English linguistic traditions that continues today. [FN278] Prior to 1846, there were only about 100 English speaking settlers in New Mexico. [FN279] It took many more years for English speakers to become a politically dominant group.

The organic laws of the territory of New Mexico were published in a bilingual, Spanish-and-English edition on October 7, 1846. [FN280] The first page announces its title, "Leyes del Territorio de Nuevo Mejico," "Laws of the Territory of New Mexico," in both languages. [FN281] Each subsequent page of this edition contains the laws printed in Spanish on the left side of the page and in English on the right, [FN282] a reflection of linguistic and cultural parity. In December, 1847, the first laws enacted by the territorial general assembly were published in both Spanish and English, with the Spanish version on one page and the English version on the opposite page of the same volumes. [FN283] This manner of publishing the laws continued until 1867, after which separate Spanish and English editions of the New Mexico laws were usually published. [FN284] The laws of the New Mexico territory enacted during the session held in June, 1851, were published in Spanish

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and English as a United States Senate document, the only session laws to be published as a federal document. [FN285]

The laws enacted during the 1868-69 session were translated into English from the original enactment in Spanish. [FN286] This was typical at the time. Until 1870, the laws were usually enacted in Spanish and then translated into English. After 1870, the opposite order became prevalent, with enactment in ***321** English followed by translation into Spanish. [FN287]

Between 1870 and 1907, the legislature routinely authorized the publication of "bills, rules, reports" and other documents in Spanish. [FN288] In 1874, the legislature passed an act requiring that "in the construction of the statutes of this Territory ... the language in which the said law was originally passed, shall govern, whether it be in Spanish or English." [FN289] The legislature apparently concluded that statutory meaning was rendered more faithfully in the original language of enactment, rather than the language of translation. [FN290]

New Mexico's bilingual identity was also recognized in its educational system. In 1909, the state legislature created the "New Mexico Spanish-American Normal School." [FN291] The school was deemed necessary because "[o]ver 400 country public schools in New Mexico are composed principally of scholars whose native language is Spanish, and who consequently can only be taught English and other studies effectively by teachers acquainted with the Spanish language." [FN292] The state created the school to train Spanish-speaking teachers in the art of instructing Spanish-speaking students to speak English. [FN293]

Despite repeated attempts at statehood beginning in 1850, New Mexico did not became a state until 1912, when a majority of its population was English-speaking for the first time. [FN294] The reason for this delay was Congress's unwillingness to grant ***322** statehood to a predominantly Spanish-speaking territory. [FN295] Congress also expressed its bias in favor of English in the New Mexico Enabling Act, which made New Mexico a state. The Enabling Act required that the public "schools shall always be conducted in English" and that "ability to read, write, speak and understand the English language without an interpreter shall be a necessary qualification for all state officers and members of the state legislature." [FN296] Congress, bowing to pressure ***323** from Hispanic citizens of the state, withdrew the English literacy requirement for state elective offices in the next year. [FN297]

New Mexico adopted a constitution in 1911. Perhaps in response to the segregation of black children in public schools, the constitution prohibited such treatment for Hispanic children:

> Children of Spanish descent in the State of New Mexico shall never be denied the right and privilege of admission and attendance in the public schools or other public educational institutions of the State, and they shall never be classed in separate schools, but shall forever enjoy perfect equality with other children in all public schools and educational institutions of the State, and the legislature shall provide penalties for the violation of this section. [FN298]

The constitution required official bilingualism, stating that for twenty years after its adoption, all laws "shall be published in both the English and Spanish languages." [FN299] Two legislative acts extended this period by twenty years, until early in 1953. [FN300]

Beginning with the organic laws of 1846 and continuing for over 100 years, the laws of New Mexico were published in official Spanish and English editions. State-sponsored official bilingualism, therefore, enjoyed unusual longevity in New Mexico. More recently, in 1989 New Mexico officially endorsed the preservation of its bilingual linguistic heritage:

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> [The New Mexico legislature] reaffirms its advocacy of the teaching of other languages in the United States and its belief that the position of English is not threatened. Proficiency on the part of our citizens in more than one language is to the economic and cultural benefit of our state and the nation.... Proficiency in English plus other languages should be encouraged throughout the state. [FN301]

D. LOUISIANA

After approximately 100 years of French rule and forty years of Spanish rule, the territory containing Louisiana became a United States territory under a treaty dated October 21, 1803. [FN302] This treaty guaranteed to all residents of the territory enjoyment of "all the rights, advantages, and immunities, of citizens ***324** of the United States." [FN303] The first laws governing the territories of Louisiana and Orleans, in the Legislative Act of 1804, were published in both French and English on opposite pages of the same volume. [FN304]

Since the eighteenth century, Louisiana has had a sizeable French-speaking population. [FN305] The first constitution of the state of Louisiana, ratified in 1812, required that "[a]ll laws that may be passed by the Legislature, and the public records of this State, and the judicial and legislative written proceedings of the same, ... be promulgated, preserved and conducted in the language in which the constitution of the United States is written." [FN306] The Louisiana Constitutions of 1845, 1852, and 1864 contain similar provisions. [FN307] Although these provisions required publication of the Louisiana laws in English, publication in English was not intended to be exclusive. Other provisions of the constitutions of 1845 and 1852 required promulgation of the laws in French and English: "The constitution and laws of this State shall be promulgated in the English and French languages." [FN308] Accordingly, between 1804 and 1867, and later in 1881, the laws were published in both English and French. [FN309]

During the first half of the nineteenth century, the political and cultural influence of the French-speaking population reached its height. French literature and the French-language press flourished. [FN310] The influence of the French-speaking population waned in 1864, however, with the defeat of the South and the ascendancy of the Republican party, which included few of the French. [FN311] An anti-French feeling characterized the period between 1864 and 1879. This animosity manifested itself in lessened constitutional protection for the French language. [FN312] In this instance, language was used as a vehicle for expressing hostility against people of French ethnicity.

***325** The Louisiana Constitution of 1864, reflecting this anti-French feeling, omitted the provisions requiring publication of the laws in French. [FN313] This version of the constitution provided, for the first time, [FN314] that instruction "in the common schools shall be conducted in the English language." [FN315] The constitution still recognized, however, that citizens speaking English, French, and German would be voting to ratify the Louisiana Constitution. The 1864 constitution provided that, for the period from adjournment of the constitutional convention until ratification, "[t]his constitution shall be published in three papers ... whereof two shall publish the same in English and French, and one in German." [FN316] Again reflecting the diminished influence of the French, the state constitution of 1868 became more pro-English, requiring publication of the laws in English: "The laws, public records, and the judicial and legislative proceedings of the State shall be promulgated and preserved in the English language; and no laws shall require judicial process to be issued in any other than the English language." [FN317]

Ultimately, the French regained some influence with the ascendancy of the Democratic party. [FN318] By 1879, the state constitution authorized, again, publication of the laws in French:

> The laws, public records and the judicial and legislative written proceedings of the State shall

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> be promulgated, preserved, and conducted in the English language; but the General Assembly may provide for the publication of the laws in the French language, and prescribe that judicial advertisements in certain designated cities and parishes shall also be made in that language. [FN319]

The 1879 constitution also reintroduced the possibility of primary school instruction in French, as well as English:

> The general exercises in the public schools shall be conducted in the English language and the elementary branches taught therein; provided, that these elementary branches may be also taught in the French language in those parishes in the State or localities in said parishes where the French language predominates, if no additional ***326** expense is incurred thereby. [FN320]

Despite this renewed recognition of the French language, by this time it was clear that English was the dominant language of the state. The French-speaking population would never regain its pre-Civil War dominance. [FN321] Hence, despite the constitutional authorization for the publication of laws in both French and English, after 1881 there was, apparently, no French edition of the laws. [FN322] The constitution of 1921 omitted all references to the French language [FN323] and required public instruction to be in English. [FN324] This constitution remained in effect until 1974.

The Louisiana Constitution of 1975, while not mentioning the French language, asserts the right of residents "to preserve, foster and promote their respective historic, linguistic and cultural origins." [FN325] This provision was intended to preserve the French Acadian culture and the French language of Louisiana. [FN326]

The legal histories of these states reveal that they gave official recognition to languages other than English to a far greater extent than did the federal government. [FN327] America's cultural pluralism was thus more openly acknowledged in the law of these states during the nineteenth century than today, ***327** when increasing numbers of states are adopting official English laws. At times when Americans who spoke other languages were politically powerful and numerous, state legislatures openly gave official status to their languages. Although some state legislators and constitution-makers expressed the common fears that different languages would lead to division and disloyalty, these fears did not predominate in several states during this period of our history. Indeed, legislatures in Pennsylvania and Louisiana provided for single-language public education in German and French, respectively. The legislative recognition of more than one official language by several states belies the notion that national unity somehow depends on linguistic homogeneity.

Legal history also sheds light on the use of languages other than English for public education. Some proponents of official English assert that demands by Hispanics for bilingual services, and particularly for bilingual education, are unprecedented. In the 1984 Senate hearings on the subject of an official English constitutional amendment, Senator Huddleston quoted Theodore H. White in his testimony:

> Some Hispanics have, however, made a demand never voiced by immigrants before: that the United States in effect officially recognize itself as a bicultural, bilingual nation. They demand that the United States become a bilingual country, with all children entitled to be taught in the language of their heritage, at public expense. [FN328]

Legal history demonstrates that Senator Huddleston and Theodore White are wrong. First, the demand for bilingual education dates back to the inception of our nation. In 1787, the German college at Lancaster was established to provide bilingual education in German and in English. In 1837, the Pennsylvania legislature authorized the founding of German-language schools on an equal

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basis with English-language schools, both at public expense. Louisiana, prior to 1864 and after 1879, provided for public education in English and French. Many schools of this time, and earlier, were monolingual in languages other than English. Whatever the merits of the extensive current debates about bilingual education, it has existed as a legitimate, state-supported form of education since our nation's beginning. [FN329]

***328** Therefore the statement that this is a demand "never voiced by immigrants before" is simply false for two reasons: false, because bilingual education, at least in German and French, has been a feature of our educational landscape literally for centuries; and false, because Hispanic populations have lived within the current borders of the United States since before this nation existed. The Hispanic population is both a colonial population with ancient ties to this country, in the same sense as the English colonists, and an immigrant population, with reference to current immigrants. To refer to the entire Hispanic population, and particularly the Mexican-American population of the Southwest and California, as "immigrants" denies the longevity of the Hispanic populations of this country.

VII. NATIVISM AND THE LEGAL ENFORCEMENT OF CONFORMITY THROUGH LANGUAGE

American nativism and racism have targeted many groups throughout our history. Native Americans, African-Americans, Mexican-Americans, and Asian-Americans, among other groups, have been subjected to unequal treatment and oppression because of their differences from the majority culture. [FN330] ***329** The following section illustrates how nativism manifested itself through legal restrictions on the language and culture of one group, the German and German-American population resident here during the time of World War I. This section also discusses the restrictive use of literacy and language requirements in our immigration laws. Finally, this section describes the official English movement and its use of language to exclude certain Americans from political participation.

A. WORLD WAR I AND THE MOVEMENT AGAINST THE GERMAN CULTURE IN AMERICA

America during 1910-1914 experienced growing nativism, as the nation groped for a sense of national unity. [FN331] World War I focussed this nativism: "The struggle with Germany ... called forth the most strenuous nationalism and the most pervasive nativism that the United States had ever known." [FN332] Nativism takes aim at the ethnicity of "enemy people." Germans were deemed disloyal merely for being, acting, speaking, and reading like Germans. At the time, Germans were the largest national-origin group of immigrants in America, numbering more than 2.3 million persons. [FN333] Germans had also been the largest non-English-speaking group of American colonists.

Once again, loyalty was equated with conformity to the core English-speaking culture. [FN334] As during the controversy over the Alien and Sedition Acts, difference from the core culture and difference of opinion were equated with foreign influence and subversion of American identity. The wartime hysteria yielded unprecedented demands for conformity, embodied in the movement for "100 per cent Americanism." [FN335] One hundred percent Americans, mostly members of the core culture, "felt sure that the nation would never be safe until ***330** every vestige of German culture had been stamped out." [FN336] One writer on Americanization, echoing the words of John Jay in The Federalist, wrote that "[t]he war has taught us the need of a more united people, speaking one language, thinking one tradition, and holding allegiance to one patriotism-America." [FN337] The wartime nativism led to the imprisonment, public flogging and lynching of Germans. [FN338]

"To Kill or Use Our German Press?" asked the Literary Digest of May 11, 1918. Killing the

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German press would eliminate "enemy publications" assumed to be under German influence. Others argued that "[t]he best use to which German-language papers can be put in these days is communicating American sentiments to people who can not read English." [FN339] Eliminating the German press went beyond rhetoric and into the law. A 1920 Oregon law prohibited publication of any foreign language newspaper unless it carried a full, conspicuous, and literal translation of all its contents. [FN340] Such translation being prohibitively expensive, the law was intended to put the foreign-language press out of business. Advocates of such measures had forgotten "the service done by the foreign language press to the government during the war by aiding the loans and explaining the draft." [FN341] They would silence not only the press, but also the German voice. The governor of Iowa banned the use of any language other than English "in all schools, church services, conversations in public places or over the telephone." [FN342]

Killing the German culture in American society also meant killing it in the schools. Many states attempted to ban the teaching of German and other foreign languages in their schools. By 1919, fifteen states had banned the teaching of foreign languages, and required English to be the sole language of instruction in primary schools, both public and private. [FN343] Illinois made English its exclusive language of instruction

> [b]ecause the English language is the common as well as official language of our country, and because it is essential to good citizenship that each citizen shall have or speedily acquire, as his natural tongue, *331 the language in which the laws of the land, the decrees of the courts, and the announcements and pronouncements of its officials are made. [FN344]

Although English was the dominant language of the country, apparently only Illinois, rather peremptorily, declared it the official language of the land.

A Nebraska statute prohibited teaching any language other than English to students who had not passed the eighth grade. [FN345] In 1922 the Supreme Court of Nebraska affirmed the conviction of Robert Meyer, who had violated the statute by teaching biblical stories in German to a ten-year-old. [FN346] In its opinion, the Nebraska court expressed fears of languages other than English, their inherent danger, and their perceived lack of relation to American identity:

> The legislature had seen the baneful effects of permitting foreigners, who had taken residence in this country, to rear and educate their children in the language of their native land. The result of that condition was found to be inimical to our own safety. To allow the children of foreigners, who had emigrated here, to be taught from early childhood the language of the country of their parents was to rear them with that language as their mother tongue. It was to educate them so that they must always think in that language, and, as a consequence, naturally inculcate in them the ideas and sentiments foreign to the best interest of this country. The statute, therefore, was intended not only to require that the education of all children be conducted in the English language, but that, until they had grown into that language and until it had become part of them, they should not be taught any other language. [FN347]

For the Nebraska court, as for many Americans past and present, a foreign mother tongue was "foreign to the best interests of this country." The pattern repeats itself often. The United States Supreme Court, more detached from the nativism of the time, reversed Meyer's conviction and found that the statute violated substantive due process rights under the Fourteenth Amendment. [FN348] The Court wrote that "[t]he protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue." [FN349]

The war against Germany produced an unprecedented fear of German-American ethnicity, resulting in intensified demands *332 for conformity with the core culture and the concomitant

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dismemberment of the German culture and language in America. A wartime crisis spawned intense social and legal suppression of ethnic traits associated with the enemy. America attempted to define her true identity as that of her core culture. The perception of foreignness, i.e., difference from that core culture, was once again equated with disloyalty and subversion. At roughly this same time, nativists sought to reinforce the core American culture through the immigration and naturalization laws.

B. OFFICIAL LANGUAGE POLICY ENACTED THROUGH THE IMMIGRATION AND NATURALIZATION LAWS

Despite the absence of federal laws declaring English to be the official language of our country, some federal laws do, in effect, produce this result. Our current federal immigration and naturalization laws contain a requirement of literacy in English for naturalized citizenship, [FN350] and a literacy requirement for admission to the United States. [FN351] In addition, the Immigration Reform and Control Act of 1986 required aliens newly legalized under its amnesty provision to demonstrate "minimal understanding of ordinary English" in order to become permanent resident aliens. [FN352]

The English-literacy requirement for citizenship is of tremendous symbolic importance. It is an important expression of federal policy in favor of English. It is through our naturalization laws that, in clearest form, the nation spells out the criteria that must be met by those who would join the American nation.

English literacy has not, however, always been a requirement for citizenship. Nor has literacy always been a requirement for initial admission to the nation. The evolution of the English-language literacy requirement further demonstrates that nativism finds expression through language restrictions.

1. Literacy Tests for Admission to the United States

A strong popular movement favoring coerced assimilation occurred for the first time near the beginning of the twentieth ***333** century. [FN353] Before this time, until around 1880, immigration to the United States had been open and unrestricted. Most people assumed that American society would assimilate new immigrants. Indeed, because most of the immigrants until this time were from northwestern Europe, and especially from Great Britain, Germany, and Scandinavia, traditional sources of the American population, their racial and cultural characteristics matched those of the existing population relatively well and they were able to assimilate with relatively little cultural friction. [FN354]

By 1890, immigrants from these countries began to be outnumbered by immigrants from the countries of southern and eastern Europe: Italy, Poland, and the Austro-Hungarian empire. [FN355] These new immigrants brought with them their distinctive cultural traits. [FN356] In response to these new, culturally different immigrants, a strong popular movement, fueled by American nativism, developed in favor of restrictions on immigration to the United States. [FN357]

The first goal of proponents of restricted immigration was a literacy test for immigrants that, in theory, would exclude a large proportion of those seeking admission to the United States. The literacy test, "though ostensibly selective in theory, would prove restrictive in operation." [FN358] The purpose of the literacy test was clear: to exclude people whose ethnicity differed from that of the majority. Advocates of the test hoped that the literacy test would reduce immigration by twenty-five percent. [FN359]

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Opponents of the new European immigration tried three times, without success, to enact restrictive legislation that included a literacy requirement in some language for admission to the United States. Such legislation passed the Congress on three occasions. It was consistently vetoed by successive presidents because it was such a departure from prior, liberal immigration policy. [FN360]

*334 President Taft's veto of the immigration legislation including the literacy test on February 14, 1913 is particularly instructive. Taft refused to sign the legislation because of the literacy test and its potentially restrictive effects on immigration. Taft relied on the objections of his Secretary of Commerce, Charles Nagel, in vetoing the legislation. [FN361]

Nagel objected to the legislation for several reasons. First, proponents of the literacy test, who had originally justified the test as a measure for selecting only literate immigrants, had changed positions and now attempted to defend it as "a practical measure to exclude a large proportion of immigrants from certain countries." [FN362] Nagel objected to the change in justifications because "[t]he measure proposes to reach its result by indirection, and is defended purely upon the ground of practical policy, the final purpose being to reduce the quantity of cheap labor in this country." [FN363] Nagel concluded that the test was "based upon a fallacy in undertaking to apply a test which is not calculated to reach the truth and to find relief from a danger which really does not exist." [FN364] Taft's veto of the literacy test, therefore, rejected the use of a literacy test as a proxy for the goal of excluding certain "undesirable" immigrants from southern Italy, Poland, Mexico, and Greece because of their national origin. Thus language, in the form of a literacy test, was proposed and rejected as a proxy for exclusion on the basis of national origin.

President Wilson also vetoed immigration legislation containing a literacy test. [FN365] For Wilson, the restrictive legislation embodied "a radical departure from the traditional and long established policy of this country," a policy based on relatively uninhibited access to the freedoms available in this country. [FN366] Like Taft, Wilson objected to the exclusionary effects of the literacy test, which were contrary to our established immigration policy: "In this bill it is proposed to turn away from tests of character and of quality and impose tests which exclude and *335 restrict." [FN367]

Congress, however, enacted the provision requiring a literacy test over President Wilson's veto in 1917, on the eve of America's entry into World War I. [FN368] The literacy test excluded "[a]ll aliens over sixteen years of age, physically capable of reading, who can not read the English language, or some other language or dialect, including Hebrew or Yiddish." [FN369] Increasing literacy rates in southern Europe and the postwar migration of educated Europeans, however, made a simple literacy test ineffective as an exclusionary device. [FN370]

When this failure became apparent, more effective restrictive legislation passed establishing numerical quotas for immigrants. [FN371] The prevailing idea among advocates of quota restrictions was that national unity depended on racial "homogeneity," which appeared to mean preservation of the existing racial character of the country. [FN372] Thus, one congressman argued that "[t]he trouble grows out of a country composed of intermingled and mongrelized people. The stability of a country depends upon the homogeneity of population." [FN373] Another congressman coined the slogan, "one race, one country, one destiny." [FN374] As the advocates of restriction saw it, the survival of constitutional democracy depended on maintenance of the Nordic race: "If, therefore, the principle of individual liberty, guarded by a constitutional government created on this continent nearly a century and a half ago, is to endure, the basic strain of our population must be maintained." [FN375]

These comments illustrate the theme, repeated throughout our history, that our national identity, unity, and loyalty to our government depend on uniformity-sometimes racial, sometimes *336

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linguistic. "Foreign influences," persons whose ethnicity differs from that of the majority, are perceived as a threat to the nation. America's supposedly uniform ethnicity had to be created and preserved through the law. In the case of the immigration laws, the idea was that national unity depended on racial purity and uniformity, with existing American races superior to any others seeking entry. As is discussed infra, an identical theme underlies the official English movement's claim that national unity depends on linguistic uniformity or purity. [FN376]

The controversy over the inclusion of a literacy test for admission to the United States illustrates two of the principal themes of this article. First, the repeated exchanges between several presidents and several Congresses illustrate the tension between the perception of America that would accomodate pluralism and a view of America based on a need to restrict difference and encourage conformity. These exchanges illustrate the dialectic between plurality and conformism. The repeated presidential vetoes of legislation including the literacy test stemmed from the inconsistency between a literacy test that would exclude immigrants and America's tradition of providing haven for freedom-seeking peoples. The presidential vetoes drew from the tradition of liberty that includes freedom for ethnically different peoples within our shores. By reaffirming the view of America as a land of opportunity for different peoples, these presidents reaffirmed the view of America as a pluralistic society. Congress, in contrast, responded to a strong popular movement supporting coerced assimilation, or increased conformity to some image of the desirable American. [FN377] During this time period, pressures for conformity within American society ran strong. [FN378]

The controversy over the literacy tests also illustrates the use of language as a proxy for the exclusion of immigrants on the basis of national origin. The heart of Secretary Nagel's and President Taft's objections to the literacy test was its use as an indirect, disguised device for exclusion because of national origin. When the literacy test ultimately prevailed despite several vetoes, Congress had established a precedent for the use of language ability as a proxy for national origin.

***337** 2. The Development of Language Requirements for Citizenship

The first statutory requirement of English ability for naturalized citizenship appeared in 1906. The rationale for the statute was that a requirement of ability to speak English would improve the "quality" of naturalized citizens. The Commission on Naturalization of 1905 expressed the prevailing view: "[T]he proposition is incontrovertible that no man is a desirable citizen of the United States who does not know the English language." [FN379]

The initial requirement was that an applicant be able to speak English. [FN380] Some courts, however, added a gloss requiring literacy to the statutory provision. For example, in Petition of Katz, [FN381] the federal district court found that a successful Polish immigrant, unable to read English, could not fulfill the statutory requirement of attachment "to the principles of the Constitution of the United States." [FN382] The Nationality Act of 1940 also contained the requirement that an applicant for citizenship speak English. Section 304 of the Act stated: "No person ... shall hereafter be naturalized as a citizen of the United States upon his own petition who cannot speak the English language." [FN383]

In 1950, at the height of the national hysteria over the threat of communism, Congress stiffened the language requirements for naturalization. The Subversive Activities Control Act of 1950 [FN384] amended section 304 to demand full literacy in English:

> No person ... shall hereafter be naturalized as a citizen of the United States upon his own petition who cannot demonstrate

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(1) an understanding of the English language, including an ability to read, write and speak words in ordinary usage in the English language ..., [and]

(2) a knowledge and understanding of the fundamentals of the history, *338 and of the principles and form of government, of the United States. [FN385]

These provisions of the naturalization statute remain essentially the same today. [FN386]

The symbolic importance of an English literacy requirement for naturalization should not be underestimated. It is in the naturalization laws that the criteria for belonging to America, for participating in its government, are most clearly stated. As one leading commentator aptly stated it, "[a]n English literacy requirement ... establishes the fact that the United States is an English culture and that its citizens will have to learn English in order to participate fully in it. The very existence of a literacy test establishes the 'official' character of the language." [FN387] To date, this represents the maximum degree to which English is officially and legally recognized as the language of the United States.

It is revealing that increased requirements for citizenship were enacted as part of the Subversive Activities Control legislation. Once again, "foreign" characteristics, this time lack of English literacy, were associated with disloyalty and "subversive activities." Commenting on the literacy requirement, Senator McCarran, Chairman of the Senate Judiciary Committee at the time, wrote:

As a practical matter, it is difficult to understand how a person who has no knowledge of English could intelligently exercise the franchise, or keep advised and informed on the political and social problems of the community in which he lives. There are today over one thousand foreign-language newspapers in this country; and while many of them are undoubtedly loyal to our basic concepts, the fact is, as revealed by Congressional investigation, that a number of these publications are not only following the line of the Communist party, but are actually controlled by the Communist party or its fronts. [FN388]

Earlier in his article, Senator McCarran wrote that "[t]he segment of the Act dealing with immigration and naturalization is designed to screen out subversives who seek to cloak their nefarious practices with the garb of United States citizenship." [FN389]

According to the testimony of then Attorney General Tom Clark, 91.4% of the more militant members of the Communist *339 party "were of foreign stock or were married to persons of foreign stock." [FN390] Furthermore, Clark testified that

[a]mong national minority groups and racial groups, the activities [for youths] are planned to accentuate nationality and racial differences, to emphasize any discrimination, to retard Americanization, and to prevent their successful assimilation into our way of living. In their activities among labor groups, Communists continually aim to create a feeling of class consciousness. Thus the pattern, while different to meet the needs of each group, is always ga[u]ged toward the same aim of pitting class against class, group against group, in an endless effort to foment strife, discontent, confusion, and disorganization. [FN391]

Hence, according to Clark, accentuation of inherent ethnic differences, differences of nationality and race, formed part of the Communist conspiracy to destabilize America. Once again, Congress found foreign "stock," i.e., foreign national origin, foreign ethnicity and foreign language journals to be the locus of the Communist threat to America and its government. [FN392]

It is startling that the Act established more stringent standards for education and literacy

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standards for American citizenship with relatively little debate or opposition. [FN393] President Truman, in his message vetoing the Internal Security Act of 1950, noted that "these provisions [including the English literacy requirement], for the most part, have received little or no attention in the legislative process." [FN394] Some congressmen apparently agreed that some sections of the act had not received complete consideration. [FN395] Debate on the English-literacy provision appears to have been minimal. Senator McCarran phrased his argument in favor of the more stringent language requirement just as it appears above in his article. [FN396] McCarran asked how Congress could "invest with citizenship an alien ***340** whose only concepts of government are formulated by what he may read in this type of press [the foreign language press, which McCarran believed to be controlled by Communists] and who has not availed himself of the opportunity to read simple English?" [FN397] The intent of the English-literacy requirement, therefore, was to exclude aliens, thought to be under Communist control, from citizenship and voting. Representative Sabath opposed the amendments to the naturalization laws:

> Under the provisions of this bill it will be increasingly difficult and make it nearly impossible for many honest and sincere persons to be naturalized.
>
> ... I do not look with favor on the requirement that a petitioner for naturalization be able to read and write and speak simple English. This provision will not apply to the very elements the bill attempts to reach, except to require the well-trained spy or subversive to spend a bit more time in the school where he is trained to be a subverter or agent of a foreign land. [FN398]

Indeed, what alien, resourceful and well-connected enough to subvert American democracy, could fail to meet the requirements for naturalization?

The legislation, just like the Alien and Sedition Acts, and with just as broad a legislative brush, aimed to exclude aliens from citizenship to keep the "foreign influence" out of America. Supreme fear and distrust of "foreign" traits and the "foreign language" press led to legal restrictions designed to reinforce the identity of the core American culture. Nativism demands that only English-speaking Americans and the English-language press can be trusted. The English literacy requirement for citizenship remains the same today. [FN399]

C. THE OFFICIAL ENGLISH MOVEMENT: THE POLITICS OF CONFORMITY OR EXCLUSION

From the panorama of the legal treatment of ethnicity and language several distinctive features of nativist movements stand out. Nativism tends to grow and flourish at times of national stress, often in response to unwelcome immigration or wartime. Nativism triggers restrictive laws aimed at persons whose ethnicity differs from that of the core culture, ostensibly to serve the goals of national unity or national security. Nativist movements, at times of national stress, seek to reinforce their narrow view of American cultural identity through the ***341** law by restricting cultural traits deemed "foreign." Another feature common to these nativist movements is the desire to disenfranchise certain Americans, or to impede the naturalization of aspiring Americans, because of their difference from the core culture.

The official English movement of the 1980s is part of this ignoble tradition. [FN400] Former Senator S.I. Hayakawa, acting through U.S. English, an organization he founded with Dr. John Tanton, sought an amendment to the Constitution making English the official language of the United States. [FN401] Subcommittees of the Senate Judiciary Committee, in 1984, [FN402] and the House Judiciary Committee, in 1988, [FN403] conducted hearings on proposed official English amendments. Despite persistent efforts and publicity, proponents of official English have not yet succeeded in achieving a federal constitutional amendment. [FN404]

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The official English movement now appears to have a two-fold strategy: first, to obtain official English laws or constitutional amendments in the states, and, second, to have enacted a federal statute making English the official language of the federal government. Since the movement's ultimate goal is still a federal constitutional amendment, [FN405] it appears that official English proponents will attempt to strengthen their position by arguing that the presence of many state laws and a possible federal ***342** statute increases or proves the necessity for a federal constitutional amendment. [FN406]

The official English movement has been quite successful in promoting state official English laws. Seventeen states now have laws declaring English to be the official language of the state. [FN407] The movement has recently sought official English amendments to the state constitutions of Maryland, West Virginia, and Missouri. [FN408] According to its promotional literature, U.S. English has "kicked off a nationwide campaign to encourage more states to designate English as the official language of government." [FN409] The state official English laws have usually been enacted by direct popular votes on referenda by overwhelming margins. [FN410] Moreover, a federal statute to codify English as the official language of the federal government was introduced in 1990 and 1991. [FN411] These legislative efforts of U.S. English continue unabated.

Through a federal constitutional amendment or statute, ***343** the movement seeks the elimination of bilingual ballots in state and federal elections. [FN412] To accomplish this result, they must, in effect, persuade Congress to repeal certain provisions of the Voting Rights Act that require bilingual ballots under some circumstances. [FN413] Regarding these provisions of the Voting Rights Act, former Senator Hayakawa testified in 1984 that he "would like to have [them] thrown out altogether." [FN414]

According to its current literature, U.S. English has these additional goals: to "reform bilingual education through funding flexibility and accountability for effective programs"; "to promote opportunities for adults to learn English"; and "to uphold language and civic requirements for naturalization." [FN415] These current goals represent some fairly radical reformulations of objectives sought by the organization for years. Among their initial goals, as described in 1983, were the following: "restrict government funding for bilingual education to short-term transitional programs only"; and "control immigration so that it does not reinforce trends toward language segregation." [FN416]

The official English movement belongs squarely within the matrix of American nativism, in modern form. The cause of the official English movement is the immigration of people unpopular in the eyes of the majority. Its manifestations are those of earlier nativist movements: a desire, now abandoned, to restrict immigration; an appeal to national unity or, conversely, raising the familiar spectre of national disunity and the disintegration of American culture caused by new immigration; and, most important, the desire to disenfranchise certain Americans.

1. The Cause: Unwelcome Immigration

Many commentators agree that the cause of the official ***344** English movement is the large, and largely unwelcome, immigration of many Hispanics and Southeast Asians during recent decades. [FN417] Since the repeal of national origin quotas in 1965, [FN418] increasing numbers of immigrants have come from non-European countries, thus changing the racial and cultural balance carefully preserved by the prior quota system. In addition to legal immigration, there was a large influx of aliens from Latin America who subsequently were legalized during the amnesty offered in 1987 and 1988. [FN419] According to one estimate, 300,000 Hispanic immigrants a year flow into the southern and western regions of the United States. [FN420]

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Like all other immigrant groups, these immigrants have brought with them their native languages. The influx of Spanish-speaking Hispanic immigrants has antagonized many Americans. [FN421] Immigrants from Southeast Asia have also encountered hostility, violence, and language restriction. [FN422] ***345** The racial and cultural differences of recent immigrants from the core culture have not gone unnoticed.

2. Official English and Immigration

Part of U.S. English's original program was to "control immigration so that it does not reinforce trends toward language segregation." [FN423] The organization intended to lobby for legislation to restrict immigration that would reinforce the maintenance of certain languages, particularly Spanish, which, after English, is the second most-used language in this country. This means limiting the immigration of Hispanics, who are depicted as advocates of "language segregation." Its original emphasis on restricting immigration is not surprising. This has been a long-time goal of Dr. John Tanton, founder and former chairman of U.S. English.

Dr. Tanton has long advocated immigration restrictions, particularly on immigration from Hispanic countries. [FN424] In a now infamous memo, Dr. Tanton expressed his grave concerns about Hispanic fertility and reproduction, Catholicism, and the threat that Hispanics pose to white Anglo dominance of American society:

> How will we make the transition from a dominant non-Hispanic society with a Spanish influence to a dominant Spanish society with non-Hispanic influence? ... As Whites see their power and control over their lives declining, will they simply go quietly into the night? Or will there be an explosion? ...
>
> .... Gobernar es poblar translates "to govern is to populate." In this society where the majority rules, does this hold? Will the present majority peaceably hand over its political power to a group that is simply more fertile? ...
>
> Will Latin American migrants bring with them the tradition of the mordida (bribe), the lack of involvement in public affairs, etc.? ...
>
> In the California of 2030, the non Hispanic Whites and Asians, will own the property, have the good jobs and education, speak one language and be mostly Protestant and "other." The Blacks and Hispanics will have the poor jobs, will lack education, own little property, speak another language and will be mainly Catholic. [FN425]

***346** Tanton's concern is the perceived threat that immigration presents to the dominant core culture. Tanton, echoing Benjamin Franklin's prejudiced views of the Germans in Pennsylvania 200 years ago, would exclude Hispanics by banning their immigration for twenty years. [FN426] As the founder of U.S. English, Tanton must have seen this organization as a means consistent with his aims. Tanton's "smoking gun" statements only confirm what has been obvious to most Hispanics and many commentators: that official English is a movement fueled by prejudice and fear and directed at Hispanics. [FN427]

3. The Appeal to National Unity

The official English movement renews the claim that national unity depends on ethnic purity-really conformity with the Anglo core culture-this time in the form of language. According to Hayakawa, multilingual election ballots present an "open threat ... to our cherished idea of 'one nation, indivisible.'" [FN428] Senator Huddleston, sponsor of the proposed constitutional

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amendment in 1984, made explicit his view of the ***347** connection between the English language and our national identity: "This amendment addresses something so fundamental to our sense of identity as Americans." [FN429] According to Senator Denton, official English laws will "help to preserve the basic internal unity" of our country. [FN430]

This perceived threat to the English language, however, is not supported by fact. English is ubiquitous. Between ninety-four and ninety-six percent of the American population is English-speaking. Fully eighty-five percent of the population claims English as its mother tongue. [FN431] Furthermore, English enjoys virtual hegemony as an international language of business, commerce, and interaction between nations. The unparalleled international status of English as "the world's most prestigious, most effective, and most sought-after vehicle of communication" only reinforces its importance. [FN432] Given the national and international status of English, concerns about its deterioration (and ours), echoed throughout our history, are greatly overstated. Since fact does not support claims of deterioration of the English language, nor of national disunity, something else must be going on.

4. The Demand for Disenfranchisement

Since its inception, one of the official English movement's principal goals has been to eliminate bilingual, or more correctly, multilingual voting ballots. This can be accomplished only through the Congress's repeal, or refusal to extend, provisions in the 1975 amendments to the Voting Rights Act. Proponents of official English offer the following arguments in favor of English-only ballots. English-only ballots are very popular (especially among persons who speak only English). [FN433] Bilingual ballots make many people very distressed and angry. [FN434] According to Hayakawa, this distress and anger does not result from "ethnic prejudice or hostility," but rather from "the open ***348** threat" to our national unity posed by multilingual ballots. [FN435]

Proponents of official English argue that English-only ballots create incentives for citizens to learn English and to realize that they cannot enjoy full participation in American life without learning English. Furthermore, the argument runs, multilingual ballots impair the political process because they make some voters dependent on "interpreters or go-betweens," because they preserve "minority voting blocks," and because voters whose primary language is not English will not be "as fully informed as possible" when they go to the polls. [FN436] Proponents of official English thus claim that multilingual ballots reduce political participation, a claim glaringly at odds with the obvious access to political participation that multilingual ballots provide to non-English speakers. [FN437]

These arguments deserve brief response. First, English-only ballots create no meaningful incentive to learn English, particularly given the overwhelming social and economic incentives to learn English. English-only ballots disenfranchise citizens who, for various reasons, have retained a language other than English. [FN438] According to a 1982 study by the Mexican-American Legal Defense and Educational Fund, seventy-two percent of monolingual Spanish-speaking citizens would be less likely to vote without the language assistance the Voting Rights Act requires. [FN439] Similarly, monolingual citizens speaking other non-English languages also would be disenfranchised.

Second, voters who rely on American newspapers printed in languages other than English, such as Miami's main newspaper, the Miami Herald, which is published daily in both Spanish and English editions, can be fully informed about the issues ***349** in an election. [FN440] The Supreme Court recognized as much when, in 1966, it upheld the Voting Rights Act in Katzenbach v. Morgan. [FN441] The Court stated that ability to read or understand Spanish-language newspapers, radio, and television is as effective a means of obtaining political information as ability to read English. [FN442]

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The movement's concern about "minority voting blocs" defined by language both expresses fear of the political power of Hispanics and the offensive assumption that minority group members think alike and vote alike. If proponents of official English are truly concerned about ethnic voting blocs, they should also be equally concerned about English-speaking ethnic voting blocs. Their concern, however, is only about ethnicity, Hispanic or Asian, different from that of the core culture.

Furthermore, the movement vastly overstates the competence and political participation of members of the majority core culture. Only about half of all eligible voters usually vote. [FN443] Are all voters "as fully informed as possible?" Why deny access to multilingual ballots to citizens who do care enough to vote? And why hold only minority voters to a standard of "being as fully informed as possible" for voting? The movement's arguments amount to saying that people who do not know English are too ignorant to make informed voting decisions, an offensive presumption common throughout our history.

Congress enacted the 1975 amendments to the Voting Rights Act, which provide for bilingual ballots in certain geographic areas, to eliminate pervasive discrimination against citizens in voting. Congress found that "voting discrimination against citizens of language minorities is pervasive and national in scope." [FN444] Furthermore, Congress found that "[p]ersons of Spanish heritage [are] the group most severely affected by discriminatory practices, while the documentation of discriminatory practices concerning Asian Americans ... [is] ***350** substantial." [FN445] This discrimination was accomplished by state and local officials who conducted elections only in English. Repeal of this legislation will likely return this country resolutely to the pervasive discrimination that existed prior to its enactment.

A principal aim of official English advocates is to repeal parts of the Voting Rights Act. If this aim was publicized in these terms, it would be clear that they seek to impair and effectively deny the right to vote to American citizens whose language may not be English. Stated in this manner, the goals of the movement would be significantly less attractive politically. Since the direct goal is politically unattractive, they have couched the argument by indirection, by proxy, using principally the Spanish language as a catalyst for nativism. A very similar use of language as a proxy device for national origin was the basis for President Taft's veto of initial attempts to pass literacy requirements for admission to the country. The advocacy of language restrictions is, therefore, an old technique for discrimination on the basis of national origin.

VIII. AN EVALUATION OF OFFICIAL ENGLISH

A. LANGUAGE AS SYMBOL

The historical record demonstrates both the significant legal recognition and protection given to different languages and the nativist restrictions imposed through the law on language. While many aspects of this history are virtually unknown within the legal academy, scholars of language and politics and sociolinguistics have long been aware of the political significance of language. The work of scholars in these disciplines provides a framework within which to assess the current meaning and symbolism of the official English movement.

Language is both our principal means of communication and a social symbol, malleable and capable of manipulation for the achievement of social or political goals. [FN446] As one scholar states,

> ***351** [t]here is of course no such thing as an 'apolitical' language as there is no such thing as an 'apolitical' person.... Politics is human relations, and language is an organic component of such relations. It is simply impossible to disassociate languages from the contexts in which they are

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learned and used. [FN447]

For this reason a study of context, for our purposes the history of the legal treatment of ethnicity and different American languages, is fundamental for an understanding of the symbolic meaning of language.

The context contains many components, social and legal. In America we have (and always have had) a situation where many languages coexist, with the English language dominant. Spanish, for example, is the second most-used American language. [FN448] Sociolinguists sometimes refer to this situation as diglossia, defined as "[a] situation where two languages coexist in the same speech community but differ in domains of use, attitudes toward each, and patterns of acquisition and proficiency." [FN449] As we can infer from this definition, coexistence does not imply equal dominance, prestige, or spheres of influence.

Discussions of different languages and other aspects of ethnicity are discussions of human differences. [FN450] And "it is almost an axiom of human society that ... [h]ierarchy is found everywhere superimposed upon difference." [FN451] So it is with languages. Different languages have very different prestige values in our society. [FN452] These differences in prestige manifest ***352** themselves through bias, conscious or unconscious, for or against certain languages. [FN453]

The perceived intelligibility, for example, of languages is influenced by these prestige rankings. For instance, if the people who speak a particular language have prestige and power, people perceive their language as easy to understand. [FN454] Conversely, the languages of groups perceived as lacking in prestige and power, or groups who are the objects of prejudice, are often perceived as difficult to understand. [FN455]

Discourse itself, the expression of ideas, and the ordering of discourse, who gets to express ideas, who gets to express them first, and which ideas get expressed, also reflect hierarchy and relationships of power in society. As Michel Foucault wrote, "as history constantly teaches us, discourse is not simply that which translates struggles or systems of domination, but is the thing for which and by which there is struggle .... [D]iscourse is the power which is to be seized." [FN456] For example, ***353** access to public forums or the press is an ample power indeed. The presence or absence of certain languages, their encouragement within or elimination from certain public forums, like the ballot in public elections, reflect the results of this struggle and the presence or absence of domination. Furthermore, discourse and the order of discourse are governed by ritual, and are thus endowed with social significance. [FN457] Accordingly, we pay more attention to those discourses made significant through rituals with social sanction than to others.

There are rules, formal and informal, conscious and unconscious, governing our discourse: "[I]n every society the production of discourse is at once controlled, selected, organized and redistributed by a certain number of procedures whose role is to ward off its powers and dangers." [FN458] These principles, expressed in the context of discourse within a single language, apply with equal force to discourse in different languages, for a multilingual society must allocate its discourses and maintain rules to govern discourses in different languages. Legal rules or sanctions regarding discourse or the proper languages of discourse thus control that discourse and create hierarchy in the power of discourse.

To some extent, language usage is self-regulating and reflects existing hierarchy. Speech communities may be defined as "[t]hose with whom we share a consensus about language structure, language use, and norms for interaction ... [and communities] within which we expect speaker intent and listener comprehension to mesh." [FN459] Speech communities generally ***354** know and define appropriate rules for the use of different languages at different times. [FN460] These rules can be

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both formal, as in a statutory rule, and informal, such as the unwritten rules governing the overwhelming number of economic and social situations in which English would be considered the appropriate language to use. The importance of informal English-language requirements should not be underestimated: knowledge of English is essential to success in the economy, in education, and in society. [FN461] These are powerful incentives that have always led immigrant peoples to acquire English. [FN462]

Furthermore, government can manipulate differences in language competence for political purposes, [FN463] such as by controlling access to power by requiring certain degrees of language competence so particular groups are favored and others disfavored. [FN464] "Requiring a functional knowledge of the language for participation in political arenas in effect defines a boundary which impedes the political access of some citizens." [FN465] The official English movement aims to regulate access to the political process through language in this manner.

The symbolic value of a particular language can be made important as an aspect of nationalism. [FN466] Furthermore, political problems are often sublimated into language problems. Language is often the bearer of strains and problems not related to communication. [FN467] Despite its use as a symbol of nationalism, *355 language is a poor proxy for political unity. As one writer has noted, "[c]ommunity of language and culture ... does not necessarily give rise to political unity, any more than linguistic and cultural dissimilarity prevents political unity." [FN468] Political structures, therefore, are "not necessarily coterminous with language communities." [FN469]

Given the symbolic and psychological values attached to language, important psychological consequences result when the government intervenes and establishes language policies. As one scholar has explained,

> one should not minimize the psychological effects which language policies handed down from above have upon individuals. One's language is intimately associated with the individual; new languages are difficult to learn; and language is a particularly easy tool to use in political control. Therefore, when language policies establish boundaries between people and government the effects are likely to be quite significant: alienation, distancing, and political impotence.... Thus, language can be used not only to establish real boundaries but communicate attitudes and feelings of government toward people as well. [FN470]

In a democracy, the attitudes and feelings of "government" are those of the majority or its representatives. Thus the majority can manipulate language and language laws to express its approval or disapproval of favored or disfavored groups within the society.

Often in our society favored and disfavored groups are defined by their ethnicity: race, national origin, religion, ancestry, and language. Language often has been the basis for discrimination against groups whose language is not English. [FN471] Language *356 is a fundamental symbol of ethnicity. As Joshua Fishman has written,

> [b]y its very nature language is the quintessential symbol, the symbol par excellence....
>
> ... [It] is more likely than most symbols of ethnicity to become the symbol of ethnicity. Language is the recorder of paternity, the expresser of patrimony and the carrier of phenomenology. Any vehicle carrying such precious freight must come to be viewed as equally precious in and of itself. The link between language and ethnicity is thus one of sanctity-by-association.... Anything can become symbolic of ethnicity ... but since language is the prime symbol system to begin with and since it is commonly relied upon so heavily (even if not exclusively) to enact, celebrate and "call forth" all ethnic activity, the likelihood that it will be

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> recognized and singled out as symbolic of ethnicity is great indeed.... [I]ndeed, it becomes a prime ethnic value in and of itself. [FN472]

Language is thus a crucial symbol of ethnicity. This is just as true of English as of Spanish or any other language. English is a crucial symbol of the ethnicity of America's dominant core culture. Language can be a symbol of group status, a symbol of dominance, and a symbol of participation in or exclusion from the political process. Campaigns to make a language standard or official can thus be seen as attempts to create or reinforce the dominance of the culture of which the language forms an integral part. [FN473]

B. OFFICIAL ENGLISH LAWS VIOLATE THE EQUAL PROTECTION CLAUSE

Modern constitutional law must recognize that certain classifications based on language or language ability, and in particular official English laws, violate the Equal Protection Clause. [FN474] Official English laws violate the Equal Protection Clause by creating invidious classifications in a number of ways. First, official English laws use language as a proxy for unpopular national origin. Accordingly, courts should review such laws as ***357** invidious classifications based on national origin and subject them to heightened scrutiny. Furthermore, official English laws are motivated in large part by nativism, which courts should recognize to be an unconstitutional motivation. Lastly, courts and legislatures should recognize the full measure of inequality created by official English laws. This inequality, though perhaps not obvious at first glance, is the creation of second-class citizenship for all Americans whose primary language is not English. For all of these reasons, official English laws violate the Equal Protection Clause of the Fourteenth Amendment.

1. Language as a Proxy for Unpopular National Origin

The courts, in several contexts, have recognized that language discrimination can be a proxy for national origin discrimination. [FN475] In Hernandez v. New York, [FN476] a Court plurality recognized that language can function as a proxy for race. [FN477] Justice Kennedy, writing for the plurality, stated that

> [w]e would face a quite different case if the prosecutor had justified his peremptory challenges with the explanation that he did not want Spanish-speaking jurors. It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis. [FN478]

The plurality also recognized the links between language, ethnicity, and personal identity. [FN479]

Although the Court has not decided many cases focussing directly on language restrictions, it has invalidated such restrictions under the Fourteenth Amendment. [FN480] In Meyer v. Nebraska, [FN481] for example, the Court found that state laws prohibiting instruction in German violated the Due Process ***358** Clause of the Fourteenth Amendment. [FN482] The Meyer court wrote that "[t]he protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue." [FN483] In Yu Cong Eng v. Trinidad, [FN484] the Court considered the constitutionality of a Philippine law that prohibited Chinese merchants from keeping their business account books in Chinese, the only language these merchants knew. [FN485] Finding that enforcement of the law "would seriously embarrass all of [the Chinese merchants] and would drive out of business a great number," [FN486] the Court held that the law denied the merchants due process and equal protection under the Fourteenth Amendment. [FN487]

Although Meyer and Yu Cong Eng, decided in 1923 and 1926, respectively, are decisions based on

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the substantive due process doctrine of that period, they have continuing vitality. The Hernandez plurality cites them to support the proposition that language may be treated as a proxy for race for purposes of an equal protection analysis. [FN488] Accordingly, language may properly be considered a proxy for race and, by extension, national origin. [FN489]

Furthermore, in analogous areas of civil rights law, discrimination because of language has also been treated as a proxy for national origin discrimination. Courts interpreting Title VII of the Civil Rights Act of 1964, [FN490] for example, have concluded that discrimination on the basis of language and accent can be prohibited as forms of national origin discrimination. [FN491] The Equal Employment Opportunity Commission ***359** (EEOC), the federal agency charged with enforcing Title VII, has construed the prohibition against national origin discrimination broadly to include discrimination because of characteristics associated with different national origin. The EEOC also recognizes that "[t]he primary language of an individual is often an essential national origin characteristic." [FN492] EEOC regulations prohibit discrimination against someone because she possesses the "physical, cultural, or linguistic characteristics of a national origin group." [FN493] Legal commentators also have recognized the essential and inextricable link between language and national origin. [FN494]

There has, therefore, been a broad recognition on the part of courts, the EEOC, and commentators that language appropriately can be considered a proxy for national origin. Statistics also reflect the strength of the connection between language and national origin. A 1984 study indicates that ninety-seven percent of persons who usually speak Spanish are of Hispanic origin. [FN495] According to the same study, approximately seventy-seven percent of American Hispanics speak Spanish. [FN496] These statistics demonstrate how close a proxy language is for national ***360** origin and, accordingly, how close a fit language discrimination can be for discrimination because of national origin.

More recent statistics from the 1990 United States Census show the numbers of persons potentially affected by language restrictions and language discrimination. According to the 1990 census, the United States had 230.4 million persons five years old and over. [FN497] The number of such persons reporting that they spoke Spanish at home was 17.3 million persons. [FN498] The number of persons who speak languages other than English, including Spanish plus any other non-English languages, at home was 31.8 million persons, well over ten percent of the population. [FN499] Assuming that the language spoken at home is a strong indicator of one's primary language, language restrictions may affect well over ten percent of the American population. Since these numbers do not include children under five years old, the statistics actually under-count the number of persons whose primary language is not English.

The Spanish language, therefore, functions as a very close proxy for Hispanic national origin. The anti-Hispanic origins of the official English movement provide ample evidence that, under present circumstances, proposals for official English legislation in fact represent discrimination against Hispanics, in principal part, framed by proxy and indirection through the closely correlated medium of language. [FN500] Courts should subject discriminatory state action based on language, because of its inextricable relationship to ethnicity and national origin, to heightened scrutiny and should find it unconstitutional. [FN501]

***361** 2. Official English Laws are Motivated by Nativism, an Unconstitutional Motivation

The anti-Hispanic origins of the official English movement demonstrate that traditional nativism is a major factor underlying the movement. [FN502] It is well established that state action based directly on race or national origin is subject to strict judicial scrutiny and violates the Equal Protection Clause. [FN503] Because of this relatively recent constitutional development, modern

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nativism cannot operate in its traditional ways. [FN504] Laws targetting minority groups directly because of their national origin, such as the internment of Japanese-Americans at issue in Korematusu, or overt discrimination against Hispanic-Americans, would be unconstitutional today. Increasingly, our society has rejected overt racism as immoral and unsophisticated. [FN505] For these reasons, modern nativism and racism can operate only through the law on a symbolic level, using seemingly unobjectionable symbols or proxies associated with differing national origin as objects for its oppressive legislation.

The presence of languages other than English in public forums angers many Americans. Their anger depends on the false assumption that American identity is exclusively a homogeneous, monolingual, English-speaking identity, an assumption history refutes. This anger can be understood as a rejection of the concept that Americans speak languages other than English and the concept that political power must be shared with American citizens who speak different languages and who do not conform to the dominant culture. This resentment reflects the oft-repeated fear and distrust of language difference. Their anger, and its displacement into the arena of language law and policy, is nativism, modern style.

Proponents of official English make much of the fact that ***362** their initiatives are popular and, when enacted, are enacted by overwhelming margins. Increasingly, official English laws have been enacted by a direct vote on an initiative or a referendum, rather than representative legislative processes. [FN506] Popularity, however, is not the same as constitutionality. Although proof of legislative motivation is difficult, evidence exists showing that multilingual ballots make many people "distressed or angry." [FN507] The overwhelming popularity of these laws proves what most Hispanics have already learned: that many people either dislike or ignore Hispanic culture and the Spanish language. The popularity of official English laws only proves, as Congress recognized in its 1975 amendments to the Voting Rights Act, [FN508] that Hispanics are an unpopular minority that has suffered a long history of discrimination implemented in part through language discrimination.

Americans share a common cultural heritage in which differences from the core culture, including differences of race, national origin, and language, have been viewed as "foreign" and subversive of American democracy. [FN509] Difference in America has truly become a focal point for distrust. [FN510] It is this feature of our culture that should alert courts to scrutinize closely legislation that restricts the expressions of ethnic difference in our culturally pluralistic society. Courts should thus recognize that nativism is an unconstitutional motivation for state action. The nativist motivations of the official English movement should subject their legislative achievements, upon proper challenge, to heightened judicial scrutiny.

***363** 3. The Official English Classification: The Creation of Unequal Insiders and Outsiders Through the Law

Historical context provides a guide to interpreting the cultural meaning that language difference has in our culture and to understanding the kind of inequality official English laws create. In addition, the Supreme Court's decisions under the Establishment Clause demonstrate the Court's sensitivity, in the First Amendment context, to both the coercion present in government-sponsored religious observances and symbols and the insider and outsider statuses such government sponsorship creates. These decisions, by analogy, also help in interpreting the meaning and symbolism of language and language laws.

The Court has recognized the unconstitutional coercion and outsider status created by government-sanctioned symbols in its Establishment Clause jurisprudence. The Court has consistently rejected prayers or prayer-equivalents in public schools as violations of the First Amendment. [FN511] In Lee v. Weisman, [FN512] the Court held that a "nonsectarian" invocation and benediction, prepared

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pursuant to a set of "Guidelines for Civic Occasions" and delivered at a high school graduation, violated the Establishment Clause. [FN513] The Court recognized the "particular risk of indirect coercion" of students who, as a result of state action, faced the choice of whether to miss their graduation ceremonies or be subjected to a coerced and unwanted invocation and benediction. [FN514] The Court reasoned that "[t]o recognize that the choice imposed by the State constitutes an unacceptable constraint only acknowledges that the government may no more use social pressure to enforce orthodoxy than it may use more direct means." [FN515]

***364** As it wrote in Engel v. Vitale, [FN516] "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." [FN517] More generally, the Court has recognized a broad individual freedom of thought and conscience, forcefully expressed in West Virginia Board of Education v. Barnette: [FN518] "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." [FN519]

Recognizing the danger of state-sponsored orthodoxy, the Weisman Court was also sensitive to the injury inflicted upon nonconforming persons by state-sanctioned religious symbols. The injury is that a nonbeliever or dissenter is forced by the state to either accept, or at least acquiesce in, a religious expression offensive to the nonbeliever. [FN520] Through its overt promotion of religious observance, the state in effect creates a class of insiders, those believers not offended by the religious observance, and a class of outsiders, those nonbelievers or outsiders who dissent from the majority's beliefs. [FN521] In her concurring opinion in Wallace v. Jaffree, [FN522] Justice O'Connor aptly described this state-created outsider status:

> ***365** [T]he Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community. Direct government action endorsing religion or a particular religious practice is invalid under this approach because it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." [FN523]

Symbols created by the state convey political ideas and status in the same way that religious symbols convey theological ideas and status. [FN524] It is exactly this state-created coercion to conform and the resulting insider/outsider stratification that is created by official English laws. Official English laws use language to create state-sponsored orthodoxy in language. One result is the psychological and linguistic coercion of persons who reject the orthodoxy. [FN525] These laws also create classes of insiders and outsiders defined by language and ethnicity. Official English laws create and perpetuate relationships of domination and subordination between American languages, and the citizens speaking them. [FN526] These laws, by sanctioning and reinforcing only the language and ethnic traits of the dominant culture to the exclusion of different, equally American, languages, in fact create great inequality. [FN527]

The dominance of the English language, coupled with its ***366** acceptance as the "normal" language of public discourse, obscures the extent to which, consciously or unconsciously, language operates to define in and out groups. [FN528] The use of the English language and enhancement of its legal status through official language laws for the purpose of defining our national identity is entirely self-affirming for members of the dominant culture. There is no dissonance, no perception of inequality, for members of a dominant culture when they act to declare one of their ethnic traits, the English language, to be the language of official discourse.

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Some of the forms of inequality that official English enactments create are obvious. If, through repeal of the 1975 amendments to the Voting Rights Act, multilingual ballots are entirely eliminated, discrimination in voting will re-emerge, denying voting rights to citizens whose primary languages are not English. [FN529] State action allocating the right to vote based on English-language ability creates a major defect in our representative processes-the exclusion of politically vulnerable groups identified by language and national origin. Furthermore, in the employment context, official English enactments encourage employers to prohibit the use of languages other than English in their workplaces. [FN530] Official English laws thus operate to eliminate non-English languages from among our most important ***367** public forums-government, the voting booth, and the workplace.

Official English laws produce less obvious, but no less invidious, forms of inequality even when they are not implemented. Indeed, some commentators have missed entirely the symbolism of official English laws. These commentators, while expressing concerns about the legality of implementing state official English laws in a manner that conflicts with federal law, seem content as long as these laws are only "symbolic." [FN531] Hence, they argue, as long as these laws are not implemented, as long as they are merely symbolic and do not "do" anything, then they are unobjectionable as symbols of "national unity" or "linguistic unity." [FN532]

As the Establishment Clause cases illustrate, state-sponsored symbols are not necessarily constitutional merely because they are symbols. [FN533] One must examine the cultural meaning of the symbol. [FN534] Suppose we had no Fourteenth Amendment and none of the ensuing jurisprudence under the Equal Protection Clause. Suppose, as a society, we ratify a constitutional amendment designating white as the official race of America and male as the official gender. [FN535] Many, hopefully most, ***368** Americans would find these official designations offensive. To a certain extent, however, these official designations would merely represent realities about the distribution of power and wealth in our society. Arguably, they merely confirm the dominance of certain types of people in society and are thus merely "symbolic" or representative of an existing social order.

What is it about these purely "symbolic" official designations that is offensive? First, they are not accurate symbols. The official race designation excludes many people of different races and colors who are as American as the "official." Yet the official designation makes no mention of them; it treats them as though they did not exist. Similarly with the official designation of the male gender; it would be as though the female gender did not exist. In the context of American history, a history rife with racism and sexism, such official designations would create stigmas of inferiority borne by people of color and women. [FN536]

Second, these official designations take fundamental aspects of individual identity and give some of them governmental sanction, while excluding others. Some traits will have more governmental sanction, and therefore greater prestige and power, than others. Those people with official traits will become "more equal" than others because of this official sanction. Thus even a merely "symbolic" enactment creates inequality with respect to the traits given or not given official sanction. State action that designates certain ethnic traits as "official," consigns all persons lacking official traits to second-class citizenship.

It is, therefore, wrong to interpret the language symbol as "neutral" or unobjectionable if official English laws are deemed only "symbolic." Modern nativism can only operate on a symbolic level. [FN537] Language is a trait easily manipulated for the assertion ***369** of political status and control. The English language is a crucial symbol of the ethnicity of America's dominant core culture. Official English laws thus use the language symbol to assert and enforce the dominance of the core culture and to marginalize all other American cultures. Hence, on a symbolic level, the debate about

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an "official" language (and the concomitant creation of "unofficial," un-American languages) is, at its core, a debate about cultural and political dominance and power. [FN538]

Current official English laws symbolize the rejection of this nation's Hispanic heritage and culture, a heritage legal history amply bears out. [FN539] This heritage predates the English in some areas of the United States and remains vitally alive. [FN540] Official English laws symbolize the rejection of the other noncore cultures of recent immigrants and Native Americans. Proof of the nativist meaning of the official English symbol lies in the history of the movement and in the distress, anger, and threat its proponents express in response to the mere presence ***370** of several languages on voting ballots. The animating premise of the official English movement is that Hispanic people, and their language, do not belong within the concept of what is American. The movement's demand for disenfranchisement, its rejection of Spanish and other American languages for voting purposes, sends a powerful message of rejection and exclusion to certain segments of the American citizenry, defined by national origin. It is a familiar message of rejection experienced by unpopular groups in this society. [FN541] This message, targeted principally at Hispanics, and the resulting discouragement of non-English-speaking citizens from voting, constitutes a serious defect in the political process of the kind that merits heightened judicial scrutiny. [FN542]

Part of the offensive symbolism of the official English movement is that the differing prestige values of Spanish and English would be given further legal sanction upon the enactment of a constitutional amendment or statute declaring English the official language. Official English laws create an explicit cultural dividing line between official-language discourse, with its correspondingly greater status, and unofficial-language discourse, with correspondingly lesser status. Although these status relationships exist now, albeit in implicit form, official English would enlarge the crucial governmental arena for English-language discourse and consequently reduce this arena for other languages.

Official English laws violate the principle of equal citizenship thought to be at the core of the Equal Protection Clause. As Professor Kenneth Karst writes, "[u]nder that principle, every individual is presumptively entitled to be treated by the organized society as a respected, responsible, and participating member. Stated negatively, the principle forbids the organized society to treat people as members of an inferior or dependent caste, or as nonparticipants." [FN543] Just as state endorsement of religion creates classes of insiders and outsiders, so do official language laws. Courts should recognize this inequality and subject ***371** official English laws to heightened scrutiny. [FN544]

Official English laws, therefore, in any form create inequality. To the extent that they classify citizens by language, a close proxy for national origin, they merit heightened scrutiny. To the extent they are motivated by anti-Hispanic and anti-Asian nativist sentiment, their motivation is unconstitutional. To the extent these laws are "symbolic," they are symbolic of the wrong things. They are symbolic of nativist hatred directed toward peoples whose language, and often color, differ from those of the dominant culture. They reinforce the dominant culture, at the expense of marginalizing America's other cultures. [FN545]

CONCLUSION

Legal history demonstrates that many American languages have co-existed within these borders. In certain states, languages like Spanish, French, and German had legal parity with English. With the hindsight that history provides, it is apparent that different languages have never threatened the unity of the nation. Indeed, even if one accepts the assumption that other languages somehow threaten the dominance of English, then the threat to English is currently at its minimum point, given the unprecedented domestic and international prestige and influence the English language

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Language standardization offends principles of individual liberty at the core of our culture. During early English history, movements to standardize language were thought to be inconsistent with "the genius of a free nation." [FN546] A similarly broad conception of individual liberty shaped the views of some of the Framers, particularly Jefferson and Rush. To a large extent, the uniqueness of American society and the interdependence and intermingling of our peoples, as foreseen by Chief Justice ***372** Marshall, have rendered national language standardization unnecessary. A strong case can be made, then, that language standardization, as considered by the Framers or in current form, as proposed by the official English movement, offends principles of individual liberty recognized by the Framers.

It is perhaps for these reasons that proposals for language standardization on the federal level have never been accepted. John Adams's initial proposal for a national language academy never emerged from Congress. The later attempt to create a private academy failed after only a few years. Such proposals were contrary to our spirit of liberty. Similarly, current proposals for national language standardization such as official English would seem to stand little chance of success. [FN547] We should recognize, as some Framers did, that language choice is properly, in substantial part, beyond the control of national government.

The historical record shows that the national government has generally avoided the standardization of English, or its imposition as an official language. The principal exception appears to be the English language requirements in our immigration laws. [FN548] Avoiding the adoption of an official language beyond what already exists appears to be the best stance for the federal government with respect to language. [FN549] This position is most consistent with principles of liberty recognized by the Framers [FN550] and in substantive due process decisions of the Supreme Court. [FN551] To the extent that the federal government has recognized linguistic diversity, chiefly in the Bilingual Education Act and the 1975 amendments to the Voting Rights Act, it has provided opportunities for, or required, localities with substantial linguistic minorities to accomodate those minorities.

The history set forth in this article demonstrates that debates about America's different languages and cultures have always been a prominent feature of our political landscape. ***373** These debates often have been about the tension between tolerance of cultural pluralism and the demand for conformity. The history demonstrates that America, during times of national stress, has been frightened of its own who differ from the core culture. During these times, America seeks to reinforce the identity of its core culture through the law, creating a climate in which the traits of certain Americans are deemed "foreign." History also demonstrates the manipulation of language as a national symbol, and the expression of American nativism through laws restricting the languages and cultures of Americans whose culture differs from the core culture.

The official English movement appears to be, then, another round in the "dialectic of plurality and conformism," the paradox generated by the fact of American cultural pluralism confronted with the demand for conformity to the ethnic traits of America's core culture. The demand of official English is the demand for national identity through linguistic homogeneity, a homogeneity that has never existed in America's people. It is a demand for unity based on conformity, a demand clearly at odds with the fact of American pluralism and core principles of American liberty.

Our country, and its government, must include all who belong. This article has demonstrated that many cultures and languages belong to America, even if the nation as a whole has failed to recognize that fact. Cultural pluralism, therefore, need not lead to distrust. To disenfranchise Americans, or to exclude Americans "symbolically" because of the language they speak, is an old wrong of

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exclusion. Rather than repeat this wrong, we must expand the concept of "American" such that it includes the full measure, linguistic, racial, and cultural, of Americans.

To the extent that the history set forth in this article has been unknown, it is because the stories many historians have told about our history and American identity have been incomplete. To the extent that this history surprises, it is because our concept of American identity has been too narrow. To the extent that this history helps expand our sense of who belongs within the American polity, and to the extent that we can accept and act upon this expanded sense, there will be less room for the inequality bred of nativism.

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FNaa. Assistant Professor, University of Florida College of Law. I would like to thank Alex Aleinikoff, Nancy Dowd, Joe Feagin, Kermit Hall, Rachel Moran, Michael Olivas, Don Peters, Sharon Rush, and Chris Slobogin for their helpful and insightful comments and criticisms of this article. I would also like to thank Michael Dupee and Kristi Kangas for their excellent research assistance. Finally, my sincere thanks to the staff of the Legal Information Center at the University of Florida, who greeted my requests for obscure historical materials with grace and who always found what I needed, one way or another.

FN1. THE FEDERALIST NO. 2, at 94 (John Jay) (Benjamin Fletcher Wright ed., 1961).

FN2. 9 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 1088 (Worthington Chauncey Ford ed., 1907) (1777); see also 1 HEINZ KLOSS, DAS VOLKSGRUPPENRECHT IN DEN VEREINIGTEN STAATEN VON AMERIKA 78 (1940) (reprinting the Continental Congress's entries reflecting official English, German, and French editions of the Articles of Confederation).

FN3. CAL. CONST. of 1849, art. XI, § 21, reprinted in THE ORIGINAL CONSTITUTION OF THE STATE OF CALIFORNIA 1849, at 12, 43 (Telefact Foundation 1965) (reproducing handwritten section of Spanish version of California's first constitution). The author's translation of the original Spanish text is as follows: "Every law, decree, regulation and provision that, because of its nature, should be published, shall be published in English and in Spanish."

FN4. See MICHEL FOUCAULT, THE ARCHAEOLOGY OF KNOWLEDGE 5, 7 (A.M. Sheridan Smith trans., 1972) ("[T]hus historical descriptions are necessarily ordered by the present state of knowledge, they increase with every transformation and never cease, in turn, to break with themselves.... [H]istory is one way in which a society recognizes and develops a mass of documentation with which it is inextricably linked."); MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION AND EXCLUSION IN AMERICAN LAW 239-40 (1990) ("Claiming to narrate history is always problematic. No one has direct access to the past. Even if we did, we could not avoid bringing to it our own concerns, assumptions, and perspectives."); cf. id. at 198 (explaining that "[i]n efforts to recover the untold stories of women's experiences, feminists, like scholars of black history, have discovered leaders, inventors and other contributors to public life whom traditional historians simply neglected because of their own assumptions about gender and race"). This article seeks to recover our largely untold story of American cultural pluralism and its reflection in the law, an aspect of our legal history largely neglected by many historians due to their assumptions of cultural homogeneity.

FN5. I use the term "America" with the following meaning. In references to the "America" after colonization but prior to 1776 and the establishment of the United States, I use "America" to mean principally the geographical region now occupied by the continental United States, which then consisted of the colonies and vast territories. After 1776, I use "America" to refer principally to the United States of America.

FN6. The manifest contradiction between the promise of individual equality contained in the Declaration of Independence and the jarring reality of slavery is one of these paradoxes. See generally MICHAEL KAMMEN, PEOPLE OF PARADOX 92-126 (1972) (discussing pluralism and dualism in American history).

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FN7. Id. at 292 (footnote omitted) (quoting Raymond Aron, From France, in AS OTHERS SEE US: THE UNITED STATES THROUGH FOREIGN EYES 59-60 (Franz M. Joseph ed., 1959)).

Two recent issues of Time magazine well illustrate American ambivalence about recognizing its cultural pluralism or demanding conformity to "American identity." In its Special Issue of July 11, 1988, Time's cover story was titled Magnifico! Hispanic Culture Breaks out of the Barrio. The issue contains several articles describing the contributions of Hispanic artists, actors, musicians, and dancers to American culture. Almost three years later, in the July 8, 1991 issue, Time's cover asks the question "Who Are We?". This issue contains a remarkable essay by Arthur Schlesinger, Jr., titled The Cult of Ethnicity, Good and Bad. Schlesinger asked:

> [W]hat happens when people of different origins, speaking different languages and professing different religions, inhabit the same locality and live under the same political sovereignty? Ethnic and racial conflict-far more than ideological conflict-is the explosive problem of our times. On every side today ethnicity is breaking up nations.

Arthur Schlesinger, Jr., The Cult of Ethnicity, Good and Bad, TIME, July 8, 1991, at 21, 21. He then offered his solution to American problems of ethnic divisiveness: the forging of a new national identity. Id. I interpret this "new national identity" as an identity based on the dominant core culture.

Schlesinger's views are both illuminating and myopic. The legal history presented in this article demonstrates that cultural pluralism and varied ethnicity, including the official recognition of languages other than English, have been a feature of our society since the birth of our nation. See discussion infra part VI. Schlesinger writes about ethnicity as though it pertains only to others, different from himself. Ethnicity means a "sense of peoplehood," and the racial, linguistic, religious, and other cultural traits that contribute to that sense. See infra notes 26-28 and accompanying text. Everyone has one. If ethnicity is a problem that threatens to break up our nation, then Schlesinger's ethnicity, too, is a part of the problem.

As long as people associate the definition of "American" with the Anglo-Saxon core culture, then members of the dominant culture can always easily label Americans with different traits as "ethnic," "foreign," "un-American," or "second-class." Another solution exists, apart from labelling non-conforming Americans members of a "cult of ethnicity." It lies in expanding the concept of "American" so that it contains the full measure of our peoples' traits.

FN8. NANCY F. CONKLIN & MARGARET A. LOURIE, A HOST OF TONGUES: LANGUAGE COMMUNITIES IN THE UNITED STATES 6 (1983).

FN9. Id. at 6-8; see also ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 287-317 (1990) (an excellent exposition of the role of the law in legitimizing the conquest of Native American peoples); Robert A. Williams, Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law, 31 ARIZ. L. REV. 237 (1989) [hereinafter Williams, Documents of Barbarism] (discussing the confrontation between white and Native American societies).

FN10. See William L. Leap, American Indian Languages, in LANGUAGE IN THE USA 116, 116-44 (Charles A. Ferguson & Shirley B. Heath eds., 1981) (describing the richness and variety of Native American languages). Today, over 200 Native American languages are still spoken and studied. The Navajo tribe is the largest Native American speech community, with about 89,000 members who still speak the Navajo language. Id. at 126. The Delaware and Cherokee languages also survive. Cherokee is a written language, based on a syllabary developed by Sequoyah, a member of the tribe. CONKLIN & LOURIE, supra note 8, at 199. After Sequoyah developed the syllabary, most adult Cherokee became fully literate in their language. Id. In 1828, the Cherokee established a printing press and published The Cherokee Phoenix, a weekly newspaper, in their own language. Id. They also translated English-language laws into their language, which enabled them to challenge the 1830 Indian Removal Act. See id. at 197-202. Moreover, the Cherokee asserted their tribal sovereignty by drafting a constitution and challenging the right of the dominant white race to take their lands. See Williams, Documents of Barbarism, supra note 9, at 242. In addition to

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the Cherokee, numerous other Native American peoples were literate and had written languages. See Willard Walker, Native American Writing Systems, in LANGUAGE IN THE USA, supra, at 145, 145-74.

FN11. Charles A. Ferguson & Shirley B. Heath, Introduction to Leap, supra note 10, at 111, 114-15.

FN12. See KAMMEN, supra note 6, at 108.

FN13. During the colonial period, other European languages predominated in territories not then part of the United States. The Spanish crown controlled the southwestern, and part of the southeastern, United States. Spanish was the dominant European language of the Southwest, and remained so for years after California and New Mexico acquired statehood. At the same time, the French controlled vast areas, including Louisiana and parts of the midwestern United States and Canada. French was thus the predominant language in Louisiana for many years, a fact which the legal history of the state reflects. See discussion infra part VI.B-D.

FN14. See infra notes 60-78 and accompanying text.

FN15. See Report on a Seal for the United States (Aug. 20, 1776), in 1 THE PAPERS OF THOMAS JEFFERSON 494, 494-97 (Julian A. Boyd et al. eds., 1950) [hereinafter JEFFERSON PAPERS].

FN16. HORACE M. KALLEN, CULTURAL PLURALISM AND THE AMERICAN IDEA 69 (1956); see also RICHARD S. PATTERSON & RICHARDSON DOUGALL, THE EAGLE AND THE SHIELD: A HISTORY OF THE GREAT SEAL OF THE UNITED STATES 6-31 (1976) (explaining the committee's work, Du Simitiere's proposals, and the motto E Pluribus Unum).

FN17. This committee's proposal was never accepted. The proposal was referred to a new committee on March 25, 1780 and the final version of the Great Seal was not adopted until June 20, 1782. This version, the familiar American eagle clutching an olive branch and arrows in its talons, was based on proposals by Secretary Charles Thomson and William Barton. Report on a Seal for the United States, supra note 15, at 497 (explanatory note); see 22 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 338-40 (Gaillard Hunt ed., 1914) (1782).

FN18. See PATTERSON & DOUGALL, supra note 16, at 19, 24-25. One scholar noted that the phrase E Pluribus Unum, often cited in the name of national and linguistic unity, is itself in Latin, not English. See DENIS BARON, THE ENGLISH-ONLY QUESTION 56 (1990).

FN19. See infra note 104.

FN20. See KAMMEN, supra note 6, at 98 (citing ERIK ERIKSON, CHILDHOOD AND SOCIETY 285 (1963)).

FN21. See supra text accompanying note 1.

FN22. MILTON M. GORDON, ASSIMILATION IN AMERICAN LIFE 72 (1964). The view that Anglo-Saxon colonists were the "original settlers" of what is now the United States ignores the true original inhabitants, the Native American peoples.

FN23. Id.

FN24. Id. at 72, 74.

FN25. The persistence throughout our history of insecurity and questions about "American" identity seems to be a direct result of the Framers' need to justify their revolution against the British monarchy. At the time of the Revolution, the nation's Framers, struggling to achieve legitimacy for their government and their revolution, developed a new theory of governmental legitimacy. They believed that legitimacy lay not in any monarch, nor in heredity or

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nobility, but in the people. KAMMEN, supra note 6, at 52-54.

Although the proposition "that all men are created equal" was self-evident, the Framers did not include all the people among those whose consent would make government legitimate. Although the Constitution acknowledged the existence of African-Americans and Native Americans, it denied members of both groups equal citizenship. See DERRICK A. BELL, JR., RACE, RACISM AND AMERICAN LAW 15-30 (2d.ed. 1980); see also Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 454 (1857) (holding that a descendant of a slave was not a state citizen under the Constitution). Indeed, the Framers knew from the beginning that slavery and the American idea of equality, as reflected in the Declaration of Independence, could not be reconciled. See BELL, supra, at 21-24; KALLEN, supra note 16, at 76. After the enactment of the Fourteenth Amendment in 1868, much of the litigation under the Equal Protection Clause has sought to narrow the distance between America's promise of equality and the reality of inequality. See, e.g., Loving v. Virginia, 388 U.S. 1 (1967); Brown v. Board of Educ., 347 U.S. 483 (1954); Korematsu v. United States, 323 U.S. 214 (1944).

A paradox thus results from the elevation of "the people" as the source of governmental legitimacy and the simultaneous subjugation of certain groups to less-than-equal status within the polity. Which people does society include among "the people" who make government legitimate? See generally EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA 237-87 (1988) (discussing the invention of the "American people" as the basis for national sovereignty).

FN26. GORDON, supra note 22, at 24.

FN27. Id. at 26.

FN28. See Joshua A. Fishman, Language and Ethnicity, in LANGUAGE, ETHNICITY AND INTERGROUP RELATIONS 15, 18-20, 25-26 (Howard Giles ed., 1977).

FN29. See supra note 25.

FN30. JOHN HIGHAM, STRANGERS IN THE LAND 4 (2d ed. 1988).

FN31. See infra text accompanying notes 401-04.

FN32. See infra note 407.

FN33. See The English Language Amendment: Hearing on S.J. Res. 167 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 98th Cong., 2d Sess., at 11 (statement of Sen. Denton), 15 (statement of Sen. Huddleston), 53 (statement of S.I. Hayakawa, Co-Founder, U.S. English) (1984) [hereinafter Senate Hearing]; see also William G. Milan, Comment: Undressing the English Language Amendment, 60 INT'L J. SOC. LANGUAGE 93, 95 (1986) ("[T]he greatest myth of all is that there is a necessary connection between speaking English and being an American. Equating American nationalism with the 'melting pot' is nothing more than a confusion of the concepts of unity and uniformity."); Comment, The Proposed English Language Amendment: Shield or Sword?, 3 YALE L. & POL'Y REV. 519, 530 (1985) (observing that those who support making English the official language of America "mak[e] precisely the mistake of equating the obviousness of language usage with its importance to national unity").

FN34. See Senate Hearing, supra note 33, at 53 (statement of Hayakawa); Guy Wright, U.S. English, S.F. CHRON., Mar. 20, 1983, at B9, cited in Senate Hearing, supra note 33, at 64.

FN35. See Senate Hearing, supra note 33, at 54, 60-61 (statement of Hayakawa).

FN36. Cf. Kenneth L. Karst, Citizenship, Race, and Marginality, 30 WM. & MARY L. REV. 1, 1 (1988) (explaining the principle of equal citizenship behind the Fourteenth Amendment and asserting that it forbids society to treat certain

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members as an inferior caste).

FN37. See Shirley Brice Heath & Frederick Mandebach, Language Status Decisions and the Law in the United States, in PROGRESS IN LANGUAGE PLANNING 87, 92 (Juan Cobarrubias & Joshua A. Fishman eds., 1983); Shirley Brice Heath, A National Language Academy? Debate in the New Nation, 11 INT'L J. SOC. LANGUAGE 9, 10 (1976).

FN38. Heath & Mandebach, supra note 37, at 88-92.

FN39. Id. at 88-89.

FN40. Id. at 89.

FN41. Id.

FN42. Id.

FN43. Id.

FN44. Id. at 90.

FN45. Id. at 91; see also Allen W. Read, Suggestions for an Academy in England in the Latter Half of the Eighteenth Century, 36 MOD. PHILOLOGY 145 (1938) (surveying the historical debate surrounding proposals to establish an academy to regulate speech in England).

FN46. See Heath & Mandebach, supra note 37, at 91; Read, supra note 45, at 145.

FN47. See Read, supra note 45, at 146-56.

FN48. I have reproduced all quotations without interposing "[sic]" where contemporary standards call for it in order to retain the original character of earlier verisons of English.

FN49. Letter signed "Alphonso", 69 GENTLEMAN'S MAG. 1125, 1125-26 (Supp. 1799), quoted in Read, supra note 45, at 156.

FN50. JOSEPH PRIESTLEY, THE RUDIMENTS OF ENGLISH GRAMMAR at vii (photo. reprint 1971) (London, R. Griffiths 1761), quoted in Read, supra note 45, at 149. Priestley later moved to America and became part of Thomas Jefferson's circle of friends and thinkers. See DANIEL J. BOORSTIN, THE LOST WORLD OF THOMAS JEFFERSON 17 (1948).

FN51. GEORGE HARRIS, OBSERVATIONS UPON THE ENGLISH LANGUAGE IN A LETTER TO A FRIEND, 1722-1796, at 13-14 (London 1752), quoted in Read, supra note 45, at 145.

FN52. Heath & Mandebach, supra note 37, at 91.

FN53. Samuel Johnson, Preface to E.L. MCADAM, JR. & GEORGE MILNE, JOHNSON'S DICTIONARY: A MODERN SELECTION 3, 27 (1963).

FN54. An examen of Mr. Sheridan's plan for the improvement of education in this country (By a set of gentlemen associated for that purpose) (London 1784), quoted in Read, supra note 45, at 151.

FN55. Heath & Mandebach, supra note 37, at 93. The two surviving statutes require that crown writs and incidental

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papers be in English and that sailors on British ships know English. Id.

FN56. Read, supra note 45, at 156.

FN57. Heath & Mandebach, supra note 37, at 91-92.

FN58. Heath, supra note 37, at 41 n.3.

FN59. Letter from Herbert Croft to the Princess Royal of England (1797), quoted in Read, supra note 45, at 155-56.

FN60. See supra note 8 and accompanying text.

FN61. See CONKLIN & LOURIE, supra note 8, at 3-5; HEINZ KLOSS, THE AMERICAN BILINGUAL TRADITION 11-12 (1977).

FN62. There were approximately 220,000 German settlers by 1790. There were also about 43,000 French speakers and 41,000 Spanish speakers in the United States when the nation annexed French and Spanish territories. KLOSS, supra note 61, at 11-12.

FN63. See id.

FN64. 1 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, supra note 2, at 135 (1905) (1774).

FN65. Id.

FN66. Id. at 105-13. The Continental Congress was apparently very interested in persuading Canadians to join the revolutionary effort. In its instructions to R.R. Livingston, Robert Treat Paine, and John Langdon, Esq., the Congress exhorted them to "repair, with as much despatch" as possible to Ticonderoga and to "exert [their] utmost endeavours to induce the Canadians to accede to a union with these colonies." 3 id. at 340 (1905) (1775).

FN67. 1 id. at 113 (1904) (1774). The Continental Congress authorized payment of eight dollars to Du Simitiere for translating the address of the united colonies to the inhabitants of Quebec. 3 id. at 286 (1905) (1775). One thousand copies of the address were printed for distribution in Canada. Id. at 507.

FN68. 3 id. at 512 (1905) (1775).

FN69. Resolution of Congress, June 28, 1775, quoted in KLOSS, supra note 2, at 75.

FN70. See 3 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, supra note 2, at 513-14 (1905) (1775).

FN71. 6 id. at 1126 (1906) (1776).

FN72. 4 id. at 392, 395 n.3 (1905) (1776).

FN73. KLOSS, supra note 61, at 27.

FN74. Id.

FN75. 6 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, supra note 2, at 997 (1906) (1776).

FN76. The Continental Congress passed the following resolution:

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> [C]ongress have received the address of the said convention to the people of that State, containing sentiments highly and generally interesting to the inhabitants of these States, to whose serious perusal and attention it is earnestly recommended; and that the same be translated into the German language, and printed at the expence of the continent.
>
> 7 id. at 42 (1907) (1777).

FN77. 9 id. at 1081 (1907) (1777).

FN78. Id. at 1088.

FN79. See Heath, supra note 37, at 10-11.

FN80. Letter from Benjamin Franklin to Peter Collinson (May 9, 1753), in 4 THE PAPERS OF BENJAMIN FRANKLIN 483, 483 (Leonard W. Labaree et al. eds., 1961).

FN81. Id. at 483-84.

FN82. Id. at 484.

FN83. Id. at 484-85.

FN84. BENJAMIN FRANKLIN, OBSERVATIONS CONCERNING THE INCREASE OF MANKIND (1751), reprinted in 4 THE PAPERS OF BENJAMIN FRANKLIN, supra note 80, at 227, 234. Franklin also lamented the "darken[ing]" of the people of America resulting from the importation of African slaves. He commented that America had a "fair ... opportunity, by excluding all Blacks and Tawneys, of increasing the lovely White and Red." Id. These remarks, and some relating to Germans, were deleted from several of the editions of this essay that appeared during his lifetime. See Introduction to FRANKLIN, supra, at 225, 226 n.5.

FN85. Letter from Thomas Jefferson to Thomas Mann Randolph, Jr. (July 6, 1787), in 11 JEFFERSON PAPERS, supra note 15, at 556, 556-57 (1955). Jefferson, however, was not free of ambivalence about multilingualism in the political arena. He proposed sending 30,000 Anglophones to the Louisiana territory to prevent the population from preserving its French language and legal culture. See BARON, supra note 18, at 2. Jefferson later encouraged the protection of French in Louisiana. Id. at 10.

FN86. See, e.g., Letter from Thomas Jefferson to Sir Herbert Croft (Oct. 30, 1798), in THE COMPLETE JEFFERSON 855 n.1, 856 n.1 (Saul K. Padover ed., 1943) (explaining the usefulness of the study of Anglo-Saxon "for explanation of a multitude of law-terms").

FN87. Letter from Thomas Jefferson to Thomas Mann Randolph, Jr., supra note 85, at 557.

FN88. Id. at 558; see also Letter from Thomas Jefferson to Peter Carr (Aug. 10, 1788), in THE COMPLETE JEFFERSON, supra note 86, at 1057, 1057 (declaring that "[o]ur future connections with Spain and Spanish America will render that language a valuable acquisition").

FN89. See, e.g., Letter from Thomas Jefferson to Mary Jefferson (May 23, 1790), in 16 JEFFERSON PAPERS, supra note 15, at 435, 435 (1961); Letter from Thomas Jefferson to Mary Jefferson (Apr. 11, 1790), in 16 JEFFERSON PAPERS, supra note 15, at 331, 331 (1961); Letter from Thomas Jefferson to Elizabeth Wayles Eppes (Mar. 7, 1790), in 16 JEFFERSON PAPERS, supra note 15, at 208, 208 (1961); Letter from Thomas Jefferson to Martha Jefferson (Feb. 18, 1784), in 6 JEFFERSON PAPERS, supra note 15, at 543, 543-44 (1952); see also Letter from Mary Jefferson to Thomas Jefferson (May 23, 1790), 16 JEFFERSON PAPERS, supra note 15, at 435, 435-36 (1961) (reporting on her progress in reading Don Quixote).

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FN90. Citizen of Pennsylvania, Plan of a Federal University, reprinted in 4 THE AMERICAN MUSEUM 443 (AMERICAN PERIODICAL SERIES, Reel 4) (1788) (attributing document to Rush).

FN91. The college at Lancaster was later named Franklin & Marshall College.

FN92. Letter from A Friend to Equal Liberty and Learning in Pennsylvania to the Citizens of Pennsylvania of German Birth and Extraction: Proposal of a German College (Aug. 31, 1785) [hereinafter Letter from A Friend to Equal Liberty], in 1 LETTERS OF BENJAMIN RUSH 364, 364 & n.1 (L.H. Butterfield ed., 1951) [hereinafter RUSH LETTERS] (attributing letter to Rush).

FN93. Id. at 365.

FN94. Id. at 366.

FN95. Letter from Benjamin Rush to Annis Boudinot Stockton (June 19, 1787), in 1 RUSH LETTERS, supra note 92, at 420, 421.

FN96. Id. at 421-22.

FN97. Letter from A Friend to Equal Liberty, supra note 92, at 366.

FN98. Id. at 364-65; see also Heath, supra note 37, at 14-15 (asserting that repression of others' native languages can also provoke resistance).

FN99. See Law of July 14, 1798, 5th Cong., 2d Sess., ch. 74, §§ 1-4, reprinted in 1 Stat. 596, 596-97 (expired) (sedition); Law of July 6, 1798, 5th Cong., 2d sess., ch. 66, §§ 1-3, reprinted in 1 Stat. 577, 577-78 (expired) (alien enemies); Law of June 25, 1798, 5th Cong., 2d Sess., ch. 58, §§ 1-6, reprinted in 1 Stat. 570, 570-72 (expired) (alien deportation); Law of June 18, 1798, ch. 54, §§ 1-7, reprinted in 1 Stat. 566, 566-69 (expired) (naturalization). For excellent discussions on the Alien and Sedition Acts and the political currents surrounding them, see JOHN C. MILLER, CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS (1951); JAMES M. SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES (1956).

FN100. Benjamin Franklin had earlier expressed similar views about the German people of Pennsylvania. See supra text accompanying notes 80-84.

FN101. The Federalists associated dissent from their policies with disloyalty toward the government. Indeed, despite the essentially domestic nature of the political dispute between the Federalists and the Republicans, the debate was cast in terms of aversion to or allegiance with the disruptive foreign influence of the French. A French observer, for example, wrote that each party used "'foreign influence as it need[ed], to dominate."' SMITH, supra note 99, at 12 (quoting 1 SAMUEL E. MORISON & HENRY S. COMMAGER, THE GROWTH OF THE AMERICAN REPUBLIC 352 (3d ed. 1942)). An Englishman observed this same dynamic at work:

> Federalist & Anti-Federalist ... does not mean those for & against a Federal form of Government, but in fact ins & Outs, tho' it is not confessed.... The Federalists ... accuse the other party of being Democrats, the Antis accuse their Opponents of being Aristocrats. The Feds. say the Antis wish to introduce Anarchy & plunder & the French, the other party say that the Federalists are contending for Monarchy Aristocracy & British influence which they alledge to be too great already.

Letter from David M. Erskine to Thomas M. Erskine (Jan. 1, 1799), in Patricia Holbert Menk, D.M. Erskine: Letters from America, 1798-1799, 6 WM. & MARY Q. 251, 277-78 (1949). The Federalists thus used the labels "French ethnicity" and "foreign influence" for political purposes to define in-groups and out-groups. See SMITH, supra note 99, at 20-21.

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FN102. See supra note 99.

FN103. Letter from Thomas Jefferson to James Madison (May 31, 1798), in 4 THE WRITINGS OF THOMAS JEFFERSON 243, 244 (H.A. Washington ed., Philadelphia, Lippincott 1871) [hereinafter JEFFERSON WRITINGS].

FN104. Jefferson strongly supported the individual's freedom to choose his beliefs free from governmental interference. See THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA (Query XVII: The Different Religions Received into that State) (1782), reprinted in THE COMPLETE JEFFERSON, supra note 86, at 673, 673-76. In 1782, he discussed religious oppression in America:

> The error seems not sufficiently eradicated, that the operations of the mind, as well as the acts of the body, are subject to the coercion of the laws. But our rulers can have no authority over such natural rights, only as we have submitted to them. The rights of conscience we never submitted, we could not submit. We are answerable for them to our God. The legitimate powers of government extend to such acts only as are injurious to others.

Id. at 675 (emphasis added).

In Jefferson's view, government could intrude upon individual freedom only in limited instances-when one's behavior threatened to injure another. His views were very similar in that respect to those of John Stuart Mill. Mill asserted that society simply had no right to interfere with one's conduct where that conduct did not affect others. See JOHN S. MILL, THREE ESSAYS: ON LIBERTY, REPRESENTATIVE GOVERNMENT, THE SUBJECTION OF WOMEN 92-93 (London, Oxford University Press 1975) (1859, 1861, 1869).

Jefferson was a strong advocate of tolerance for religious differences. He commented favorably on Pennsylvania and New York, states which had avoided any establishment of religion. Jefferson observed how many religions flourished without social strife in these states:

> On the contrary, their harmony is unparalleled, and can be ascribed to nothing but their unbounded tolerance, because there is no other circumstance in which they differ from every nation on earth. They have made the happy discovery, that the way to silence religious disputes, is to take no notice of them.

JEFFERSON, supra, at 676. By defining so broadly his conception of individual freedom of conscience, Jefferson expressed essential principles of tolerance for cultural pluralism and diversity. But see generally LEONARD W. LEVY, JEFFERSON & CIVIL LIBERTIES: THE DARKER SIDE (1963) (describing Jefferson's departures from his libertarian writings when demanded by personal or political expediency).

FN105. Letter from Thomas Jefferson to Joseph Priestley (Mar. 21, 1801), in 4 JEFFERSON WRITINGS, supra note 103, at 373, 373.

FN106. Id.

FN107. Id.

FN108. Id. at 374.

FN109. Id.

FN110. Letter from John Adams to Samuel Huntington (Sept. 5, 1780), in 7 THE WORKS OF JOHN ADAMS 249, 249-50 (Charles F. Adams ed., Boston, Little, Brown & Co. 1852) [hereinafter ADAMS WORKS]. In 1778, John Adams was sent on a diplomatic mission to help negotiate peace with Great Britain and obtain financial assistance for the new nation. Heath, supra note 37, at 19. He conceived of the idea of a national language academy during his stay in Amsterdam. Id. While Adams dined with a group of Dutch men, a lawyer commented to him "that English would

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be the general Language in the next Century, and that America would make it so." John Adams, Diary Entry (Aug. 28, 1780), in 2 DIARY & AUTOBIOGRAPHY OF JOHN ADAMS 446, 446 (L.H. Butterfield ed., 1961). In a diary entry he made after the dinner, Adams concluded that "[i]t w [ould] be the Honour of Congress to form an Accademy for improving and ascertaining the English Language." Id. A week later he wrote to Samuel Huntington, the President of Congress, with his proposal. See Letter from John Adams to Samuel Huntington, supra, at 249-50.

FN111. Letter from John Adams to Samuel Huntington, supra note 110, at 250.

FN112. Id. Scholars advanced proposals for such an academy sporadically during the eighteenth century. See Allen W. Read, American Projects for an Academy to Regulate Speech, 51 PUBLICATIONS MOD. LANGUAGE ASS'N 1141, 1141-44 (1936).

FN113. See Letter from John Adams to Edmund Jenings (Sept. 23, 1780), in 9 ADAMS WORKS, supra note 110, at 510, 510. Two weeks after his letter to Samuel Huntington, Adams wrote to Edmund Jenings:

> I have written to Congress a serious request, that they would appoint an academy for refining, correcting, improving, and ascertaining the English language. After Congress shall have done it, perhaps the British king and parlaiment may have the honor of copying the example. This I should admire. England will never have any more honor, excepting now and then of imitating the Americans.
>
> Id.

FN114. Letter from John Adams to Samuel Huntington, supra note 110, at 250.

FN115. Id. at 249-50.

FN116. Id. at 251.

FN117. See Heath, supra note 37, at 20.

FN118. Id. at 22.

FN119. Id.

FN120. PRIESTLEY, supra note 50, at vii, quoted in Read, supra note 45, at 149.

FN121. Heath, supra note 37, at 22.

FN122. Id.

FN123. Id.

FN124. Language standardization-creating uniformity within a single language-is not the same as attempting to establish an official language by seeking governmental support and imprimatur for one language among many. Nevertheless, the views of the Framers with respect to language standardization are important to the study of official language policy in several ways. First, some Framers, such as John Adams, believed that language standardization was consistent with, and even integral to, federal recognition of English. Noah Webster shared this view. See infra text accompanying notes 126-28. Others, however, including Chief Justice Marshall, appear to have regarded language standardization as an unnecessary infringement upon individual liberty, a view similar to the views which prevailed in England. See infra text accompanying notes 153-59. Their opinions on standardization may thus suggest their views on official English laws, which, in my view, represent an even greater infringement on individual liberty. Finally, the Framers' commentary on language standardization illustrates their views on the relation of language to

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American society.

FN125. See generally DANIEL J. BOORSTIN, THE AMERICANS: THE COLONIAL EXPERIENCE 266, 277-83 (1958) (describing the efforts of Noah Webster and others to standardize English).

FN126. NOAH WEBSTER, DISSERTATIONS ON THE ENGLISH LANGUAGE (1789), reprinted in 54 ENGLISH LINGUISTICS 1500-1800, at 36 (R.C. Alston ed., 1967).

FN127. Id. at 397.

FN128. Id. at 406.

FN129. Heath, supra note 37, at 24. His early efforts enjoyed only limited success: he sold 2500 copies of this dictionary. Id. Webster was later forced to mortgage his home to produce a second edition, and he was frequently in debt because of the limited success of his books on language. Id.

FN130. Id. at 25.

FN131. Letter from John Marshall to Noah Webster (Jan. 14, 1831) (unpublished manuscript, on file with Noah Webster Manuscripts, New York Public Library) (discussing the justices' resolution "not to subscribe to any paper of the character of that proposed by you at this place or in a body").

FN132. See Heath, supra note 37, at 27, 28-35. There were earlier attempts to establish a similar society. Id. at 26-27.

FN133. See id. at 29-34.

FN134. AMERICAN ACADEMY OF LANGUAGE & BELLES LETTRES, CIRCULAR (1820) [hereinafter CIRCULAR I], quoted in Heath, supra note 37, at 29. Since part of the Academy's mission was to "guard against local or foreign corruptions," its founders thought that "[i]t is also important that attention should be paid to the numerous names of places, French, Spanish and Aboriginal, which are daily becoming incorporated with our literature, and concerning which so much diversity at present exists." Id. at 31.

FN135. Heath, supra note 37, at 29.

FN136. Id.

FN137. See supra notes 111-13 and accompanying text.

FN138. CIRCULAR I, supra note 134, quoted in Heath, supra note 37, at 30.

FN139. See AMERICAN ACADEMY OF LANGUAGE & BELLES LETTRES, CIRCULAR, at 3 (New York 1821) [hereinafter CIRCULAR II].

FN140. Id. at 3-4.

FN141. Id. at 13. The Academy formed a committee to compile "a list of words and phrases, whether acknowledged corruptions or words of doubtful authority, which are charged upon us as bad English, with a view to take the best practical course for promoting the purity and uniformity of our language." Id.

The second circular demonstrates that the Academy, while still concerned with promoting the United States through its language, broadened its aims to include improving the education of the poor and of children. See Heath, supra

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note 37, at 31. These broadened goals may have been a response to criticism of its aristocratic image and its self-styled similarity to the aristocratic academies of Europe. See id.

FN142. CIRCULAR II, supra note 139, at 16.

FN143. See AMERICAN ACADEMY OF LANGUAGE & BELLES LETTRES, CIRCULAR III 5-40 (New York, Charles Baldwin 1822) [hereinafter CIRCULAR III]. Circular III contained correspondence from its members which reflected their differing views. The Honorable John Trumble of Connecticut expressed concern about the difficulties the Academy faced, but acknowledged some of its advantages:

> To attempt the formation of a national language, different from the English in its dialect, would indeed be absurd and impracticable. To fix the standard of a living language, and think to arrest the progess of innovations which many will adopt as improvements, though condemned by others as corruptions, is a task of equal difficulty. Yet ... the unified efforts of distinguished scholars ... will assist us to banish cant phrases; to correct vulgar solecisms and improprieties; to check the affected pomp of pedantry, and prevent the introduction and increase of foreign phraseology, inconsistent with the idioms of the English language.
>
> Letter from John Trumbull to William S. Cardell (May 5, 1820), in CIRCULAR III, supra, at 6, 6.

Governor Oliver Wolcott of Connecticut asserted that "[i]t is scarcely two hundred years, since the English language was first adopted as the language of science and philosophy in England itself." Letter from Oliver Wolcott to William S. Cardell (Dec. 22, 1820), in CIRCULAR III, supra, at 7, 7. He also observed that the rapid spread of English through North America, Asia and Africa resulted from "improvements in science and the arts" and the language's growing use in international commerce. Id.

FN144. CIRCULAR III, supra note 143, at 3.

FN145. See Heath, supra note 37, at 34.

FN146. Letter from John Adams to William S. Cardell (Mar. 3, 1820), in CIRCULAR III, supra note 143, at 5, 5.

FN147. Id.

FN148. Id.

FN149. Letter from Thomas Jefferson to William S. Cardell (Jan. 27, 1821), in CIRCULAR III, supra note 143, at 10, 10, cited in Heath, supra note 37, at 33.

FN150. Id.

FN151. See Heath, supra note 37, at 29.

FN152. Letter from Thomas Jefferson to William S. Cardell, supra note 149, at 10, cited in Heath, supra note 37, at 33.

FN153. Letter from John Marshall to William S. Cardell (June 25, 1821), in CIRCULAR III, supra note 143, at 10, 10-11, quoted in Heath, supra note 37, at 33-34.

FN154. See Heath, supra note 37, at 33.

FN155. Letter from John Marshall to William S. Cardell, supra note 153, at 10, quoted in Heath, supra note 37, at 33.

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FN156. For another discussion of this letter, see supra note 131 and accompanying text.

FN157. Letter from John Marshall to Noah Webster, supra note 131.

FN158. Id.

FN159. See Heath, supra note 37, at 33.

FN160. See discussion infra part VI.

FN161. Approximately 94-96% of Americans speak English. Joshua A. Fishman, ' English only': its ghosts, myths, and dangers, 74 INT'L J. SOC. LANGUAGE 125, 129 (1988) (citing JOSHUA A. FISHMAN ET AL., THE RISE AND FALL OF THE ETHNIC REVIVAL (1985)).

FN162. Heath, supra note 37, at 34.

FN163. Id.

FN164. Id. at 34, 35.

FN165. KLOSS, supra note 61, at 28.

FN166. H.R. DOC. NO. 50, 23d Cong., 1st Sess. 81 (1834) (proposal regarding "Laws published in the German Language").

FN167. KLOSS, supra note 61, at 28.

FN168. H.R. Res. 59, 3d Cong., 2d Sess. (1794); see also KLOSS, supra note 61, at 28 (discussing Congress's consideration of the proposal to print federal laws in German).

FN169. H.R. Res. 59, supra note 168.

FN170. ANNALS OF CONG., 3d Cong., 2d Sess. 1082 (1795); KLOSS, supra note 61, at 28.

FN171. KLOSS, supra note 61, at 28.

FN172. Id. This later became known as the "Muhlenberg legend," according to which German nearly became the official language of the United States. According to the legend, Congress, newly independent from Great Britain, wanted to abolish English as the official language and replace it with German. Muhlenberg's actions, however, thwarted the proposal. Id.; see also Heath, supra note 37, at 41 n.3 (stating that the legend was "widespread among lesser historians of the nineteenth century").

FN173. ANNALS OF CONG., 3d Cong., 2d Sess. 1228 (1795).

FN174. Id. at 1228-29 (paraphrasing Rep. Hartley).

FN175. Id. at 1229.

FN176. Id.

FN177. KLOSS, supra note 61, at 28.

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FN178. Id.

FN179. Id. at 29.

FN180. Id.

FN181. Id.

FN182. CONG. GLOBE, 28th Cong., 1st Sess. 23 (1843).

FN183. KLOSS, supra note 61, at 29.

FN184. CONG. GLOBE, 28th Cong., 1st Sess. 23 (1843).

FN185. CONG. GLOBE, 37th Cong., 2d Sess. 1820 (1862).

FN186. Id. Aldrich later lowered the proposed number of German copies to 25,000. The debate first centered on the appropriate number of copies to be printed in German. In response to Aldrich's suggestion, Representative Holman proposed increasing the number to 40,000, one-fifth of the total, a recognition "that the great body of the German population is engaged in agricultural pursuits" and that this number would constitute a "fair proportion to be published in German." Id.

FN187. See id. at 1820-43.

FN188. The Continental Congress had issued a number of its publications, including the Articles of Confederation, in German and French as well as English. See supra notes 64-71 and accompanying text.

FN189. CONG. GLOBE, 37th Cong., 2d Sess. 1821 (1862).

FN190. Id.

FN191. Id. (emphasis added).

FN192. Id.

FN193. Id.

FN194. Id.

FN195. Id.

FN196. Id. At this point in the debate, the congressmen engaged in banter about the partisan and politically self-serving nature of the debate, which provoked laughter on the House floor. Id.

FN197. Id. The resolution passed on April 24, 1862 by a vote of 57 for, 51 against. Id.

FN198. See id. at 1842-43.

FN199. Id. at 1842.

FN200. Id.

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FN201. Id.

FN202. Id.

FN203. Id. at 1842-43. A motion from Representative Washburne to table Walton's motion was pending at the time Maynard asked his question. Washburne's motion was defeated, and Walton's resolution passed. Id.

FN204. See THOMAS JEFFERSON, THE KENTUCKY RESOLUTIONS (1798), reprinted in THE COMPLETE JEFFERSON, supra note 86, at 128, 128-34.

FN205. See id. at 129.

FN206. Other writers have covered various aspects of this state-sponsored multilingualism. See, e.g., BARON, supra note 18, at 112-32 (discussing language and law in Illinois); Jurig Fedynskyj, State Session Laws in Non-English Languages: A Chapter of American Legal History, 46 IND. L.J. 463 (1971). See generally KLOSS, supra note 61 (examining our history of bilingualism).

FN207. 2 ALBERT B. FAUST, THE GERMAN ELEMENT IN THE UNITED STATES 14 (1909).

FN208. See KLOSS, supra note 61, at 140. A number of Pennsylvania Germans migrated to North Carolina during the colonial period, bringing German to North Carolina, where it flourished until the nineteenth century. See William H. Gehrke, The Transition from the German to the English Language in North Carolina, 12 N.C. HIST. REV. 1, 1 (1935).

FN209. See supra notes 72-75 and accompanying text.

FN210. See Arnold H. Leibowitz, The Imposition of English as the Language of Instruction in American Schools, 10 REVISTA DE DERECHO PUERTORRIQUENO 175, 178 (1970) (citing 2 FAUST, supra note 207, at 291).

FN211. Fedynskyj, supra note 206, at 464.

FN212. Act of Apr. 4, 1805, ch. 89, § 1, 1805 Pa. Laws 264, 264-65.

FN213. Fedynskyj, supra note 206, at 468 & n.23.

FN214. Id.

FN215. Act of Apr. 7, 1807, ch. 6, 1807 Pa. Laws 302; see also 17 JOURNAL OF THE SENATE OF THE COMMONWEALTH OF PENNSYLVANIA: SESSION 1806-07, at 85, 274, 345, 351, 370, 428, 480-81 (1807) (discussing printing the laws of the General Assembly in German).

FN216. Act of Jan. 21, 1837, No. 9, 1837 Pa. Laws 8 (amended by No. 107, 1837 Pa. Laws 354).

FN217. Act of Mar. 31, 1840, No. 95, 1840 Pa. Laws 209, 209-10.

FN218. For another discussion of the Pennsylvania Constitutional Convention of 1837-38, see BARON, supra note 18, at 74-83.

FN219. 5 PROCEEDINGS AND DEBATES OF THE CONVENTION OF THE COMMONWEALTH OF PENNSYLVANIA 224 (1838) [hereinafter PENNSYLVANIA PROCEEDINGS].

FN220. Id. at 281.

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FN221. Id. at 226.

FN222. Leibowitz, supra note 210, at 179. In 1837, the legislature passed a statute permitting the establishment of German-language schools on an equal footing with English-language schools. Id.

FN223. 5 PENNSYLVANIA PROCEEDINGS, supra note 219, at 227.

FN224. Id. at 228-29.

FN225. Id. at 229.

FN226. Id.

FN227. Id. at 224.

FN228. Id. at 277-78.

FN229. Id. at 281.

FN230. Id.

FN231. See Leibowitz, supra note 210, at 179.

FN232. Act of Mar. 24, 1843, No. 56, § 1, 1843 Pa. Laws 110.

FN233. Id.

FN234. Id. § 3.

FN235. Act of Jan. 23, 1843, No. 2, § 2, 1843 Pa. Laws 2.

FN236. Act of Apr. 29, 1844, No. 33, 1844 Pa. Laws 610.

FN237. Act of Jan. 25, 1847, No. 15, 1847 Pa. Laws 55 (repealed 1850).

FN238. Act of Jan. 21, 1850, No. 6, 1850 Pa. Laws 6 (repealed 1876).

FN239. Act of Apr. 9, 1856, No. 280, 1856 Pa. Laws 262, 262-65.

FN240. Act of Jan. 10th, 1889, Concurrent Res. No. 3, 1889 Pa. Laws 443.

FN241. CHARLES GIBSON, SPAIN IN AMERICA 25 (1966); A. CURTIS WILGUS, THE DEVELOPMENT OF HISPANIC AMERICA 89 (1941). Spanish was the first European language introduced into America. The first English-speaking colony was not settled until 1607. See JACK P. GREENE, SETTLEMENTS TO SOCIETY: 1584-1763, at 1-2 (1975) (sketching a brief history of English colonization).

FN242. Leibowitz, supra note 210, at 199.

FN243. Id. at 99 (citing HERSCHEL MANUEL, SPANISH-SPEAKING CHILDREN OF THE SOUTHWEST 4 (1965)).

FN244. LEONARD PITT, DECLINE OF THE CALIFORNIOS 26-35 (1966).

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FN245. Treaty of Peace with the Republic of Mexico, Feb. 2, 1848, U.S.-Mex., 9 Stat. 922 [hereinafter Treaty of Guadalupe Hidalgo]. For discussions on the Treaty of Guadalupe Hidalgo and its aftermath, see RICHARD GRISWOLD DEL CASTILLO, THE TREATY OF GUADALUPE HIDALGO: A LEGACY OF CONFLICT (1990); ARMANDO B. RENDON, CHICANO MANIFESTO 71-85 (1971).

FN246. See Treaty of Guadalupe Hidalgo, supra note 245, art. VIII, 9 Stat. at 929 (granting Mexican citizens a choice of citizenship, but providing a default choice of United States citizenship in the event they did not make their election in one year).

FN247. See id. art. IX, 9 Stat. at 930.

FN248. PITT, supra note 244, at 42.

FN249. Leibowitz, supra note 210, at 200.

FN250. PITT, supra note 244, at 43.

FN251. Id. at 44-48.

FN252. Id. at 44 (citing J. ROSS BROWNE, REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA ... SEPTEMBER AND OCTOBER, 1849 (Washington 1850)); Donald E. Hargis, Native Californians in the Constitutional Convention of 1849, HIST. SOC'Y OF S. CAL. Q., Mar. 1954, at 3, 3-13.

FN253. Leibowitz, supra note 210, at 200 (citing Edwin F. Klotz, The Confluence of Cultures, in THE ORIGINAL CONSTITUTION OF THE STATE OF CALIFORNIA 1849, supra note 3, at 5, 6).

FN254. Klotz, supra note 253, at 6.

FN255. PITT, supra note 244, at 46.

FN256. CAL. CONST. of 1849, art. XI, § 21.

FN257. Act for the Admission of California, 9 Stat. 452, 452-53 (1850) (approved Sept. 9, 1850).

FN258. Act of Jan. 31, 1850, ch. 8, 1850 Cal. Stat. 51 (repealed 1897).

FN259. Act of Apr. 22, 1850, ch. 124, 1850 Cal. Stat. 340, 341.

FN260. Id.

FN261. Act of Apr. 29, 1852, ch. 50, § 4, 1852 Cal. Stat. 113, 114; Act of Mar. 15, 1851, ch. 93, § 2, 1851 Cal. Stat. 404, 405.

FN262. See § 4, 1852 Cal. Stat. at 114.

FN263. Fedynskyj, supra note 206, at 473.

FN264. See id. at 472 (discussing the chronology of the translation procedures in various amendments) (citing Act of Apr. 27, 1863, ch. 430, 1863 Cal. Stat. 703 (repealed 1897); Act of Apr. 2, 1859, ch. 153, 1859 Cal. Stat. 154 (repealed 1897); Act of Mar. 19, 1853, ch. 36, 1853 Cal. Stat. 52 (repealed 1854); Act of Apr. 24, 1852, ch. 51, 1852 Cal. Stat. 116 (repealed 1897)).

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FN265. PITT, supra note 244, at 198.

FN266. Leibowitz, supra note 210, at 200.

FN267. PITT, supra note 244, at 52.

FN268. Id. at 50-51.

FN269. See generally Leibowitz, supra note 210, at 200 (explaining the decline of Spanish education in the Southwest).

FN270. See PITT, supra note 244, at 89-91, 278-84 (discussing "Yankee" and Hispanic perceptions of the decline of the Californios); Leibowitz, supra note 210, at 201.

FN271. Fedynskyj, supra note 206, at 473.

FN272. CAL. CONST. art. IV, § 24 (repealed 1966).

FN273. Leibowitz, supra note 210, at 201.

FN274. CAL. CONST. art. II, § 1 (1894) (repealed 1972).

FN275. Act of Mar. 9, 1897, ch. 96, 1897 Cal. Stat. 99 (repealing Cal. Pol. Code § 415 (1873)).

FN276. CAL. CONST. art. III, § 6.

FN277. CAREY MCWILLIAMS, NORTH FROM MEXICO 116 (1968), quoted in Leibowitz, supra note 210, at 202. For other discussions of the history of New Mexico, see GEORGE ISIDORE SANCHEZ, FORGOTTEN PEOPLE: A STUDY OF NEW MEXICANS (1940); NANCIE L. SOLIEN GONZALEZ, THE SPANISH-AMERICAN OF NEW MEXICO: A HERITAGE OF PRIDE (1969).

FN278. For another discussion of the history and legal treatment of Spanish in New Mexico, see BARON, supra note 18, at 94-104.

FN279. Leibowitz, supra note 210, at 202.

FN280. 1846 N.M. Laws 1. The author examined copies of these volumes available on microfiche.

FN281. Id.

FN282. See, e.g., id. at 2.

FN283. Fedynskyj, supra note 206, at 471.

FN284. Id.; see also 1869 N.M. Laws 17 (apparently ending practice of printing Spanish and English versions of the laws on alternate pages of the same volume). The laws of 1870, however, were printed using alternating pages in Spanish and English. See 1870 N.M. Laws 18-19.

FN285. See Fedynskyj, supra note 206, at 471 (citing S. MISC. DOC. NO. 14, 32d Cong., 1st Sess. 1, 1-5 (1852) (federal printing, in Spanish, of New Mexico law creating official Spanish-English translator); H.R. MISC. DOC. NO. 4, 32d Cong., 1st Sess. (1852)).

FN286. See, e.g., Act of Dec. 30, 1868, ch. 1, 1869 N.M. Laws 17, 18 (stating that the text was "[t]ranslated from

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the original Spanish").

FN287. Fedynskyj, supra note 206, at 471.

FN288. The 1869-70 session was published in a bilingual edition. Other sessions made explicit provision for both English and Spanish editions. See H.R.J. Res. 1, 37th Leg., 1907 N.M. Laws 297; H.R.J. Res. 2, 36th Leg., 1905 N.M. Laws 370; H.R.J. Res. 12, 35th Leg., 1903 N.M. Laws 245; H.R.J. Res. 7, 35th Leg., 1903 N.M. Laws 242; Act of Mar. 19, 1903, ch. 102, 1903 N.M. Laws 179; H.R.J. Res. VIII, 34th Leg., 1901 N.M. Laws 213; H.R.J. Res. I, 34th Leg., 1901 N.M. Laws 207; Act of Jan. 24, 1899, ch. 2, 1899 N.M. Laws 20; Act of Feb. 4, 1897, ch. 5, 1897 N.M. Laws 17; Act of Feb. 6, 1895, ch. 31, 1895 N.M. Laws 71; H.R.J. Res. I, 30th Leg., 1893 N.M. Laws 150; Act of Jan. 19, 1893, ch. 3, 1893 N.M. Laws 19; Act of Jan. 31, 1891, ch. 8, 1891 N.M. Laws 22; Act of Jan. 16, 1889, ch. 4, 1889 N.M. Laws 6; Act to Provide for the Payment of Printing in Spanish, ch. 65, §§ 1-3, 1887 N.M. Laws 217; Act of Apr. 3, 1884, ch. 71, 1884 N.M. Laws 185.

FN289. Act of Jan. 8, 1874, ch. 1, § 1, 1874 N.M. Laws 17.

FN290. Cf. Douglass v. Lewis, 9 P. 377, 379 (N.M. 1886) (noting the difficulties of construing a statute passed in Spanish and interpreted in English), cited in Fedynskyj, supra note 206, at 475.

FN291. An Act to Establish the New Mexico Spanish-American Normal School, ch. 97, 1909 N.M. Laws 254.

FN292. Id.

FN293. Id.

FN294. Leibowitz, supra note 210, at 203.

FN295. KLOSS, supra note 61, at 128. As of 1902, New Mexico had petitioned for statehood for approximately 50 years. Citizens of New Mexico complained about the federal government's persistent denial of statehood in a petition adopted by a convention held in Albuquerque on October 15, 1901. They declared they were entitled to statehood "'by virtue of the principles enunciated in the Declaration of Independence,"' much of the language of which they adopted in their petition. 35 CONG. REC. 5143-44 (1902) (quoting the petition).

The principal objection to their admission appears to have been prejudice against their Spanish language and Spanish and Mexican heritage. Representative Knox, an advocate for statehood, described the arguments of opponents: "There has been a great deal of talk about those people-about their being Spaniards and Mexicans and 'greasers'-people who do not come up to the American standard, who have lain without progress for a great many years." Id. at 5139; see also 45 CONG. REC. 707 (1910) (discussing concerns about the Spanish language and language diversity in the United States). Knox refuted these arguments, noting that residents of New Mexico had excellent schools:

> I have heard it said by members of the House that they have schools in which Spanish is the language taught, and that that is decidedly objectionable. Generally speaking, that statement is not correct. They have a very excellent school system. It is the district school system of New England and the rest of the United States.
>
> 35 CONG. REC. 5139 (1902).

Three years later, Senator Teller would respond to similar concerns about the Spanish language of the territory's residents:

> I confess to some irritation and some vexation when I am told that among the reasons why you should deny citizenship to these people is the fact that they still speak the Spanish tongue and have to have an interpreter in

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court. I do not wonder that the Spaniards of New Mexico speak the Spanish tongue, and I should have less respect for them if they did not.

They come of a great race. They can go back not long since when they were the dominating power of the world; and if you want to go back into the history of individuals, you can find among the people of that race men who were as thoroughly imbued with the ideas that were crystallized in our Declaration of Independence as you can find anywhere in the world. You can go back hundreds of years and find those men proclaiming great political truths that sometimes we think are of modern origin and with respect to which we are entitled to claim credit as the promoters and discoverers. The history of her statesmen and her warriors gives to the people of that country a right to be proud of their race and of the people from whom they come.

39 CONG. REC. 1687 (1905).

FN296. New Mexico Enabling Act of 1910, ch. 310, § 2(4)-(5), 36 Stat. 557, 559 (1910) (amended 1911).

FN297. S.J. Res. 57, 62d Cong., 1st Sess., 37 Stat. 39, 41 (1911).

FN298. N.M. CONST. art. XII, § 10.

FN299. Id. art. XX, § 12. An edition of annotated statutes appeared in Spanish only in 1915. Fedynskyj, supra note 206, at 471.

FN300. Act of Apr. 9, 1943, ch. 31, 1943 N.M. Laws 34; Act of Mar. 17, 1931, ch. 113, 1931 N.M. Laws 201.

FN301. "Supporting Language Rights in the United States," Resolution of the New Mexico Legislature (Mar. 1989), reprinted in BILL PIATT, ONLY ENGLISH?: LAW AND LANGUAGE POLICY IN THE UNITED STATES 25, 25 (1990).

FN302. Treaty Ceding Louisiana, Apr. 30, 1803, U.S.-Fr., 8 Stat. 200.

FN303. Id. art. III, 8 Stat. at 202.

FN304. Fedynskyj, supra note 206, at 473.

FN305. See KLOSS, supra note 61, at 107-08 (discussing early Louisiana history). For another discussion of bilingualism in Louisiana, see BARON, supra note 18, at 83-87.

FN306. LA. CONST. of 1812, art. VI, § 15.

FN307. See LA. CONST. of 1864, tit. VII, art. 103; LA. CONST. of 1852, tit. VI, art. 100.; LA CONST. of 1845, tit. VI, art. 103.

FN308. See LA. CONST. of 1852, tit. VI, art. 129; LA. CONST. of 1845, tit. VI, art. 132.

FN309. Fedynskyj, supra note 206, at 473.

FN310. KLOSS, supra note 61, at 108.

FN311. Id. at 109, 113. Indeed, the French-speaking population had supported Louisiana's secession from the Union in 1861. Id. at 109.

FN312. Id. at 114.

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FN313. Id. at 113.

FN314. Id.

FN315. LA. CONST. of 1864, tit. XI, art. 142.

FN316. Id. tit. XIV, art. 155. Twenty of the 90 members of the 1864 constitutional convention had German surnames and the convention nearly decided to publish its records in German as well as French. KLOSS, supra note 61, at 113.

FN317. LA. CONST. of 1868, tit. VI, art. 109.

FN318. KLOSS, supra note 61, at 113.

FN319. LA. CONST. of 1879, art. 154. The Louisiana Constitution of 1913 contained a similar provision. See LA. CONST. of 1913, art. 165.

FN320. LA. CONST. of 1879, art. 226.

FN321. See KLOSS, supra note 61, at 114.

FN322. Fedynskyj, supra note 206, at 473-74.

FN323. KLOSS, supra note 61, at 113.

FN324. LA. CONST. of 1921, art. 12, § 12.

FN325. LA. CONST. art. XII, § 4 (1975), quoted in KLOSS, supra note 61, at 114.

FN326. See Lee Hargrave, "Statutory" and "Hortatory" Provisions of the Louisiana Constitution of 1974, 43 LA. L. REV. 647, 682 (1983) (asserting that "[p]roponents of the section were primarily Francophones concerned with the protection of the French Acadian culture").

FN327. The earlier acceptance of official bilingualism in several states, contrasted with the currently increasing acceptance in the states of official English laws, raises an interesting issue about the proper locus of regulation of language rights. History demonstrates that language has been principally regulated by states under state constitutional and statutory law, with few exceptions, for example, language rights regulated under the relatively recent Federal Voting Rights Act. Restrictions on language, however, have been struck down by the Supreme Court as violations of substantive due process in Yu Cong Eng v. Trinidad, 271 U.S. 500 (1926) and Meyer v. Nebraska, 262 U.S. 390 (1923).

There is a distinction between official bilingualism or multilingualism, which arguably promotes liberty by enhancing the status of more than one language, and official English, which creates inequality by promoting only the language of the dominant culture. The state-sponsored inequality created by official English laws should be subject to federal judicial review under the Equal Protection Clause. See discussion infra part VIII.B.

FN328. Senate Hearing, supra note 33, at 16 (statement of Sen. Huddleston) (quoting THEODORE H. WHITE, AMERICA IN SEARCH OF ITSELF: THE MAKING OF THE PRESIDENT, 1956-1980 (1982)).

FN329. For discussions on the current status of bilingual education and the Federal Bilingual Education Act, see JAMES CRAWFORD, BILINGUAL EDUCATION: HISTORY, POLITICS, THEORY AND PRACTICE (1989); PIATT, supra note 301, at 37-57; Rachel F. Moran, The Politics of Discretion: Federal Intervention in Bilingual Education, 76 CAL. L. REV. 1249 (1988); Rachel F. Moran, Bilingual Education as a Status Conflict, 75 CAL. L.

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REV. 321 (1987) [hereinafter Status Conflict]; see also Leibowitz, supra note 210, at 175 (citing policy reasons for English-only instruction).

FN330. For a comprehensive history of American nativism, see HIGHAM, supra note 30. For a discussion of the nativism and racism underlying early immigration laws directed at the Chinese, see SHIN SHIN TSAI, THE CHINESE EXPERIENCE IN AMERICA 56-81 (1986); see also WILLIAM L. TUNG, THE CHINESE IN AMERICA 1820-1973 (1974) (discussing the changing status of the Chinese in America). Regarding American treatment of the Japanese, see ROGER DANIELS, THE POLITICS OF PREJUDICE: THE ANTI-JAPANESE MOVEMENT IN CALIFORNIA AND THE STRUGGLE FOR JAPANESE EXCLUSION 92-105 (1962); JAPANESE EXCLUSION, H.R. DOC. NO. 600, 68th Cong., 2d Sess. (1925). See generally THOMAS ALEXANDER ALEINIKOFF & DAVID A. MARTIN, IMMIGRATION PROCESS AND POLICY 1-61 (2d ed. 1991) (discussing history of Chinese exclusion laws and American immigration); RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS (1989) (discussing the immigration and settlement of Asians in the United States).

For discussions of American treatment of Mexicans and Mexican-Americans, see MICHAEL A. BARRERA, RACE AND CLASS IN THE SOUTHWEST: A THEORY OF RACIAL INEQUALITY 62-99 (1979) (describing the labor history of Chicanos and Mexican immigrants); ERNESTO GALARZA, MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY 46-57 (1964) (explaining the Bracero program's importation and exploitation of Mexican farm laborers). See generally Richard Delgado, Derrick Bell and the Ideology of Racial Reform: Will We Ever Be Saved?, 97 YALE L.J. 923, 938-41 (1988) (explaining the Constitution's failure to protect African-Americans, Native Americans, Mexican-Americans and Asian-Americans); Michael A. Olivas, The Chronicles, My Grandfather's Stories, and Immigration Law: The Slave Traders Chronicle as Racial History, 34 ST. LOUIS U. L.J. 425, 430-39 (1990) (discussing America's decimation of the Cherokee nation, the history of the exclusion of the Chinese, and discrimination against Mexicans and Mexican-Americans through the Bracero program and "Operation Wetback").

FN331. HIGHAM, supra note 30, at 195.

FN332. Id.

FN333. Id. at 196, 388 n.2.

FN334. See id. at 205.

FN335. Id. at 204.

FN336. Id. at 208.

FN337. Harry Rider, Americanization, 14 AM. POL. SCI. REV. 110, 110 (1920).

FN338. See HIGHAM, supra note 30, at 209-10.

FN339. To Kill or Use Our German Press?, LITERARY DIG., May 11, 1918, at 12, 12.

FN340. HIGHAM, supra note 30, at 260.

FN341. American by Decree, THE NEW REPUBLIC, Apr. 28, 1920, at 262, 262-63.

FN342. HIGHAM, supra note 30, at 248.

FN343. Id. at 260.

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FN344. Act of June 28, 1919, § 1, 1919 Ill. Laws 917, 917-18, quoted in Rider, supra note 337, at 111.

FN345. See Meyer v. Nebraska, 262 U.S. 390, 397 (1923).

FN346. Meyer v. State, 187 N.W. 100, 101 (Neb. 1922), rev'd, 262 U.S. 390 (1923).

FN347. Id. at 102.

FN348. 262 U.S. at 401.

FN349. Id.

FN350. See 8 U.S.C. § 1423 (1988).

FN351. See 8 U.S.C. § 1182(25) (1988).

FN352. See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, 3394 (codified at 8 U.S.C. § 1255a(b)(1)(D)(i) (1987 & Supp. 1992)).

FN353. HIGHAM, supra note 30, at 234.

FN354. ROBERT DIVINE, AMERICAN IMMIGRATION POLICY, 1924-1952, at 2-3 (1957). I do not include Africans within the term "immigrants" because they were brought here against their will in bondage, rather than voluntarily.

FN355. Id. at 3.

FN356. Id.

FN357. Id.

FN358. Id. at 4.

FN359. Id. at 5; BARON, supra note 18, at 57.

FN360. See HIGHAM, supra note 30, at 186-93 (describing non-restrictive attitude toward immigration until World War I).

FN361. See Taft's Veto of Literacy Test for Immigrants (Feb. 14, 1913), reprinted in 2 HENRY S. COMMAGER, DOCUMENTS OF AMERICAN HISTORY 77, 77-78 (7th ed. 1963).

FN362. Letter from Charles Nagel to William Howard Taft (1913), in 2 COMMAGER, supra note 361, at 77, 77.

FN363. Id. (emphasis added).

FN364. Id.

FN365. Wilson's Veto of Literacy Test for Immigrants (Jan. 28, 1915), reprinted in 2 COMMAGER, supra note 361, at 101.

FN366. Id.

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FN367. Id. at 102.

FN368. See EDWARD P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798-1965, at 467 (1981).

FN369. Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874, 877 (repealed 1952).

FN370. HIGHAM, supra note 30, at 308. Our current immigration laws retain the requirement of literacy in some language as a condition of admission to the United States. See 8 U.S.C. § 1182(25) (1988).

FN371. Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153 (repealed 1952); Immigration Act of 1921, ch. 8, 42 Stat. 5 (repealed 1952); see HIGHAM, supra note 30, at 308-11; HUTCHINSON, supra note 368, at 468-70.

FN372. See DIVINE, supra note 354, at 11-18.

FN373. 65 CONG. REC. 5673 (1924) (statement of Rep. Wilson), quoted in DIVINE, supra note 354, at 14.

FN374. Id. at 5868 (statement of Rep. Hershey), quoted in DIVINE, supra note 354, at 15.

FN375. H.R. REP. NO. 350, 68th Cong., 1st Sess. 13 (1924), quoted in DIVINE, supra note 354, at 15.

FN376. See discussion infra part VII.C.3.

FN377. HIGHAM, supra note 30, at 235.

FN378. This was the time of the "crusade for Americanization" and the movement for 100% Americanization. See id. at 234-63.

FN379. COMMISSION ON NATURALIZATION, REPORT TO THE PRESIDENT (Nov. 8, 1905), reprinted in H.R. DOC. NO. 46, 59th Cong., 1st. Sess. 11 (1905).

FN380. Section 8 of the Naturalization Act of 1906 provided that "no alien shall hereafter be naturalized or admitted as a citizen of the United States who can not speak the English language." Naturalization Act of 1906, ch. 3592, § 8, 34 Stat. 596, 599.

FN381. 21 F.2d 867 (E.D. Mich. 1927).

FN382. Id. at 868. But cf. In re Rodriguez, 81 F. 337, 353 (W.D. Tex. 1897) (holding that illiteracy in English and Spanish was not a barrier to citizenship for a law abiding person of Mexican descent).

FN383. Nationality Act of 1940, ch. 876, § 304, 54 Stat. 1140 (repealed 1952).

FN384. Ch. 1024, 64 Stat. 1018 (repealed 1952).

FN385. Id. § 30.

FN386. See 8 U.S.C. § 1423 (1988).

FN387. Arnold H. Leibowitz, English Literacy: Legal Sanction for Discrimination, 45 NOTRE DAME L. 7, 14 (1969).

FN388. Patrick McCarran, The Internal Security Act of 1950, 12 U. PITT. L. REV. 481, 511 (1951) (footnote

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omitted).

FN389. Id. at 506.

FN390. Communist Activities Among Aliens and National Groups: Hearings on S. 1832 Before the Subcomm. on Immigration and Naturalization of the Comm. on the Judiciary, 81st Cong., 1st Sess. 319, 320 (1950) [hereinafter Communist Activities Hearings] (statement of Attorney General Clark).

FN391. Id. at 321.

FN392. Interestingly, the supporting data McCarran cites for the assertion that foreign-language newspapers were under Communist control was the testimony of a single witness who testified that two newspapers serving American Serbians and Croatians were organs for the Communist party. See McCarran, supra note 388, at 511 (citing Communist Activities Hearings, supra note 390, at 603 et seq.). It is startling that with a sample of only two out of over 1000 foreign-language newspapers, McCarran was able to discredit essentially the entire foreign-language press.

FN393. Note, Internal Security Act of 1950, 50 COLUM. L. REV. 606, 643 (1951).

FN394. 96 CONG. REC. 15,629 (1950).

FN395. Id. at 15,297.

FN396. Id. at 14,183.

FN397. Id.

FN398. Id. at 14,850.

FN399. See 8 U.S.C. § 1423 (1988).

FN400. For discussions on law, language policy and the official English movement, see BARON, supra note 18 (1990); LANGUAGE LOYALTIES: A SOURCE BOOK ON THE OFFICIAL ENGLISH CONTROVERSY (James Crawford ed., 1992) (collecting articles discussing various views of, and the history behind, the official English movement); PIATT, supra note 301 (discussing development of language rights movement in the context of existing political and social institutions); 60 INT'L J. SOC. LANGUAGE (1986) (collecting articles discussing the proposed official English amendment).

FN401. Former Senator Hayakawa founded U.S. English with Dr. John Tanton, an opthamologist and social activist who founded the Federation for American Immigration Reform in 1979. Antonio J. Califa, Declaring English the Official Language: Prejudice Spoken Here, 24 HARV. C.R.-C.L. L. REV. 293, 300 & nn. 49-50 (1989).

FN402. See Senate Hearing, supra note 33.

FN403. See Hearings on H.J.R. 13, H.J.R. 33, H.J.R. 60 & H.J.R. 83 before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary, 100th Cong., 2d Sess. (1988) [hereinafter House Hearings]. See generally CRAWFORD, supra note 329, at 52-69 (discussing the history of the official English movement).

FN404. The organization has, however, been quite successful in attracting adherents and money. As of 1988, it had approximately 350,000 members and an annual budget of $7 million. Califa, supra note 401, at 299.

FN405. See Federal English Statute Introduced, U.S. ENGLISH UPDATE (U.S. English, Washington, D.C.), May/June 1990, at 1, 5.

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FN406. See id. ("We stand a better chance of passing federal legislation with every state that approves an Official English measure.").

FN407. These states include: Alabama, ALA. CONST. amend. 509; Arizona, ARIZ. CONST. art. 28; Arkansas, ARK. CODE. ANN. § 1-4-117 (Michie 1987); California, CAL. CONST. art. III, § 6; Colorado, COLO. CONST. art. II, § 309; Florida, FLA. CONST. art. II, § 9; Georgia, 1986 Ga. Laws 529; Illinois, ILL. REV. STAT. ch. 1, ¶ 3005 (1991); Indiana, IND. CODE. 1-2-10-1 (1991); Kentucky, KY. REV. STAT. ANN. § 2.013 (Baldwin 1991); Mississippi, MISS. CODE ANN. § 3-3-31 (1991); Nebraska, NEB. CONST. art. 1, § 27; North Carolina, N.C. GEN. STAT. § 145-12 (1991); North Dakota, N.D. CENT. CODE § 54-02-13 (1991); South Carolina, S.C. CODE ANN. § 1-1-696 (Law Co-op. 1990); Tennessee, TENN. CODE ANN. § 4-1-404 (1992); and Virginia, VA. CODE ANN. § 22.1-212.1 (Michie 1992).

Of these seventeen, all but Nebraska and Illinois enacted English-only laws since the movement began in the early 1980s. Additionally, a Hawaiian constitutional provision makes Hawaiian and English both official state languages. See HAW. CONST. art. 15, § 4. Hawaii is therefore an example of official multilingualism, the opposite of what the official English movement hopes to achieve.

A federal district court held the Arizona constitutional amendment unconstitutional in Yniguez v. Mofford, 730 F. Supp. 309, 314 (D. Ariz. 1990), aff'd in part and rev'd in part, 939 F.2d 727 (9th Cir. 1991). The Court of Appeals for the Ninth Circuit noted on appeal, however, that the district court opinion might not affect the enforceability of the amendment by Arizona state courts. Yniguez v. Arizona, 939 F.2d 727, 736-37 (9th Cir. 1991).

FN408. See MD. H.B. 29, 398th Sess. (1992); MO. H.B. 1158, 86th Ass'y, 2d Sess. (1992); W. VA. H.B. 4086, 70th Legis., 2d Sess. (1992).

FN409. U.S. ENGLISH UPDATE (U.S. English, Washington, D.C.), May/June 1990, at 5.

FN410. See Michele Arington, Note, English-only Laws and Direct Legislation: The Battle in the States over Language Minority Rights, 7 J.L. & POL. 325, 342-43 & n.120 (1991).

FN411. See Federal English Statute Introduced, supra note 405, at 1, 5.

FN412. See Califa, supra note 401, at 300-05.

FN413. See 42 U.S.C. § 1973b(f) (1988). This section of the Voting Rights Act mandates that "[n]o voting qualification or prerequisite to voting ... shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen to vote because he is a member of a language minority group." Id. § 1973b(f)(2). Moreover, § 1973b(f)(4) requires a state or political subdivision subject to the prohibitions of § 1973b(a) to provide registration and voting materials in the language of the applicable minority group. See id. § 1973b(f)(4).

FN414. Senate Hearing, supra note 33, at 68.

FN415. U.S. ENGLISH FACTS (U.S. English, Washington, D.C.), July 1990 (handout describing goals of U.S. English).

FN416. Wright, supra note 34, at B3, quoted in Senate Hearing, supra note 33, at 64.

FN417. Cf. Califa, supra note 401, at 297-99 (noting that the influx of Cubans, Mexicans and Southeast Asians after 1959 caused "concern among immigration restrictionists like the Federation for American Immigration Reform"); Fishman, supra note 161, at 133-34 (asserting that English-only movement stems from "anglo-oriented middle class Americans" worried about their loss of social and political power); David F. Marshall, The Question of an Official Language: Language Rights and the English Language Amendment, 60 INT'L J. SOC. LANGUAGE 7, 12-13 (1986)

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(describing post-Civil War xenophobia and fear of immigration).

FN418. Immigration and Nationality Act Amendments of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.).

FN419. Under § 245A of the Immigration and Nationality Act, 8 U.S.C. § 1255a (1988 & Supp. III 1992), the United States government awarded legal status to more than 1.6 million formerly illegal aliens, enabling them to remain in the country. THOMAS A. ALEINIKOFF & DAVID A. MARTIN, IMMIGRATION: PROCESS AND POLICY 679 (2d ed. 1991).

FN420. Jeffrey Schmalz, Hispanic Influx Spurs 3 Ballots on Language, N.Y. TIMES, Oct. 26, 1988, at A1.

FN421. Id. ("What especially galls longtime Floridians is not so much what they perceive as Hispanic Americans' slowness to learn English as the fact that native Americans are increasingly finding that they have to speak Spanish."); see also Retha Hill, English-Language Bill Attacked; Hispanics Fear State Measure Would Erect Barrier to Services, WASH. POST, Feb. 21, 1991, Maryland Weekly Section, at M1 (describing perceived need for official English legislation in Maryland because of belief that influx of Hispanic and Asian immigrants "[w]ould be a hindrance of the smooth operation of government").

FN422. See, e.g., Frederic M. Biddle, English Language Called Racist; Critic Slams It As 'Unwelcoming' to Immigrants of Color, BOSTON GLOBE, Apr. 2, 1991, at 18 (discussing a Lowell, Massachusetts official English ordinance directed at recent Laotian immigrants, which a local professor described as "legitimiz [ing] resentment against non-native English speakers"); see also Felicity Barringer, Ideas & Trends: A Land of Immigrants Gets Uneasy About Immigration, N.Y. TIMES, Oct. 14, 1990, at 4 (describing hostility towards Asian immigrants because of their perceived threat to "linguistic cohesion").

FN423. Wright, supra note 34, at B3, quoted in Senate Hearing, supra note 33, at 64.

FN424. See Califa, supra note 401, at 326. Califa notes that the crux of Dr. Tanton's concern is not the Spanish language per se but the Hispanic race itself. Id.

FN425. John Tanton, WITAN IV Paper 2, 4 (1986), quoted in Califa, supra note 401, at 326-27 & nn. 217-18, 222. Evidence also suggests former Senator Hayakawa's bias against Hispanics. For example, in his prepared statement submitted during the 1984 Senate Judiciary Committee hearings, he attributed all demands for bilingual services to "Hispanic political leaders" and, after describing the positive achievements of Asian immigrants, recited only the dismal statistics regarding the educational failures of Hispanics. See Senate Hearing, supra note 33, at 61. It is, however, hardly surprising that Hispanics, whose language is the second most spoken language in the United States, actively promote and protect their language and culture. A more balanced description than Hayakawa's would have noted the many Hispanic-Americans who have achieved distinction in private and public life.

FN426. Califa, supra note 401, at 327.

FN427. See id. at 324 ("Hispanics are concerned that the English-Only movement is an attempt to brand Hispanics as inferior and un-American."). Statistics demonstrate that a large majority of Hispanics oppose official English legislation. In Texas, only 35% of Hispanics polled in 1986 favored such legislation, and only 23% did so in 1988. In California, approximately 70% of Hispanics opposed the official English law enacted there. According to a New York Times/CBS poll conducted in 1987, 71% opposed a constitutional amendment designating English as the official language of government. See id. at 324 & n.205.

Joshua Fishman discussed the impact of the official English movement on Hispanics:

The Hispanic middle class is obviously faced with a 'no-win' situation. Either they must reject the charge of anti-

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Americanism or they must confirm it, and the only way they can reject the charge in today's climate of opinion is to vote for 'English-only' far more frequently than do other Hispanics (29%). Hispanics pay their own price, a doubly heavy price, for their membership, or membership aspirations, in the American establishment.

Fishman, supra note 161, at 134.

FN428. Senate Hearing, supra note 33, at 53.

FN429. Id. at 15.

FN430. Id. at 11. Senator Denton asserted that the "language barrier that plagues millions of Americans each year" is a major source of "discrimination [against] and exploitation" of those who do not speak English. Id.

FN431. Fishman, supra note 161, at 129.

FN432. Id.

FN433. Cf. Senate Hearing, supra note 33, at 57-58 (statement of Hayakawa) (stating that one English-only association, Californians for Ballots in English, delivered 626,321 signatures to registrars on an initiative requiring the governor to petition the president and Congress to relieve California from having to provide non-English voter and ballot information).

FN434. Id. at 59 (statement of Hayakawa).

FN435. Id.

FN436. Id. at 20 (testimony of Sen. Huddleston).

FN437. Califa, supra note 401, at 306-07 (emphasizing the need for bilingual assistance in voting); see also supra note 413 (describing the multilingual provisions of the Voting Rights Act).

FN438. Indeed, the burden English-only ballots impose on non-English speakers is even worse in light of evidence that learning a second language is very difficult. See Juan F. Perea, English-Only Rules and the Right to Speak One's Primary Language in the Workplace, 23 U. MICH. J.L. REF. 265, 279-82 & nn.90-110 (1990) (citing studies demonstrating the difficulties of acquiring a second language under certain conditions). Congress acknowledged these difficulties by creating an exception to the English literacy requirement for naturalization. See 8 U.S.C. § 1423(1) (1988 & Supp. III 1992) (dispensing with literacy requirement for individuals over 50 who have lived in the United States for at least 20 years).

FN439. Califa, supra note 401, at 306 n.104 (citing R. BRECHETTO, BILINGUAL ELECTIONS AT WORK IN THE SOUTHWEST 100, table 28 (1982)).

FN440. Schmalz, supra note 420, at A1. Moreover, the radio station boasting the largest advertising revenues in the Miami area in 1987 was a Spanish-only station. Id.

FN441. 384 U.S. 641 (1966).

FN442. Id. at 655.

FN443. See Jay Bookman, Voices of Anger: Atlantans Discuss How the Country Lost its Way, ATL. CONST., July 12, 1992, at C3 (explaining that voter turnout in the 1988 presidential election was only 50.1%); see also Mark D. Uebling, All-American Apathy, AM. DEMOGRAPHICS, Nov. 1991, at 30 (explaining that only 36% of all adults

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voted in 1990 congressional elections).

FN444. 42 U.S.C. § 1973b(f)(1) (1988).

FN445. S. REP. NO. 295, 94th Cong., 1st. Sess. 31 (1975), reprinted in 1975 U.S.C.C.A.N. 774, 797.

FN446. See Henry L. Bretton, Political Science, Language, and Politics, in LANGUAGE AND POLITICS 431, 434 (William O'Barr & Jean O'Barr eds., 1976). Bretton argues that language opens the door to power and wealth, pointing to the historical hegemony of Latin and French and suggesting that they were elite languages "beyond the reach of the masses." Id.

FN447. Id. at 437.

FN448. See Charles A. Ferguson & Shirley Brice Heath, Introduction to LANGUAGE IN THE USA, supra note 10, at xxv, xxv. The United States is either the fourth or fifth largest Spanish-speaking country in the world. THOMAS WEYR, HISPANIC U.S.A. 3 (1988).

FN449. Joan Rubin, Language and Politics from a Sociolinguistic Point of View, in LANGUAGE AND POLITICS, supra note 446, at 389, 389; see also FRANCOIS GROSJEAN, LIFE WITH TWO LANGUAGES 130-32 (1982); JOSIANE F. HAMERS & MICHEL H.A. BLANC, BILINGUALITY & BILINGUALISM 173-76, 267 (1990).

FN450. Cf. MINOW, supra note 4, at 232-36 (describing the uses of language in shaping, categorizing and evaluating human difference from a feminist perspective).

FN451. William O'Barr, Boundaries, Strategies, and Power Relations, in LANGUAGE AND POLITICS, supra note 446, at 405, 415. Further, as Professor Matsuda has written, speech "serves an important function in addition to communication of ideas. Speech also positions people socially. In many societies, certain dialects and accents are associated with wealth and power." Mari J. Matsuda, Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction, 100 YALE L.J. 1329, 1351-52 (1991).

FN452. Rubin, supra note 449, at 394; see also John J. Gumperz & Jenny Cook-Gumperz, Introduction: Language and the Communication of Social Identity, in LANGUAGE AND SOCIAL IDENTITY 1, 7 (John J. Gumperz ed., 1982) ("[I]n the United States, American English is the primary language of the indigenous population but this common language hides an underlying diversity in values and discourse conventions. These differences were for a long time dismissed as nonstandard language practices that detracted from the potential effectiveness of the group as communicators, even though the first language of the group was English."); C. Bouchard Ryan & M.A. Carranza, Ingroup and Outgroup Reactions to Mexican American Language Varieties, in LANGUAGE, ETHNICITY AND INTERGROUP RELATIONS, supra note 28, at 59, 61 (explaining how assimilationist forces in America cause society to value "being American" and "speaking American" so that there is "linguistic pressure to speak English at the expense of other language[s]. This pressure is based on the implicit assumption that English is superior and all other [languages] inferior.").

FN453. See Matsuda, supra note 451, at 1351-52 & nn.81-82 (noting that speech contributes to social position); cf. Charles R. Lawrence, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 STAN. L. REV. 317, 322-23 & nn.20-26 (1987) (explaining that much bias is unconscious and results from "deeply imbedded" cultural experiences).

FN454. Rubin, supra note 449, at 394.

FN455. Id. Spanish is sometimes deemed a low-status language in this country. Roseann Gonzalez describes the low status assigned to Spanish and reports that "the enduring sentiment variously held by a number [of] Americans [is] that Spanish speakers are 'illiterate, impoverished, [and] backward.'" Roseann D. Gonzalez et al., Language Rights and

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Mexican Americans: Much Ado About Nothing (May 6-9, 1988) (presented at Minority Language Rights and Minority Education: European and North American Perspectives, Cornell University), reprinted in House Hearings, supra note 403, at 181, 183-85.

> It is the low status assigned to the Spanish language by the dominant culture that accounts for persistent, derogatory, references to Spanish-speakers as generating a "tower of babel" within the United States. The inability of many persons to understand Spanish does not make the language itself inherently unintelligible, or any less intelligible than English.

FN456. Michel Foucault, The Order of Discourse, in LANGUAGE AND POLITICS 108, 110 (Michael J. Shapiro ed., 1984); see also Kenneth L. Karst, Boundaries and Reasons: Freedom of Expression and the Subordination of Groups, 1990 U. ILL. L. REV. 95, 95 (asserting that "expression is power").

FN457. Cf. FOUCAULT, supra note 4, at 225 (explaining that ritual "defines the qualifications required of the speaker, ... lays down gestures to be made, behaviour, circumstances, and the whole range of signs that must accompany discourse; finally, it lays down the supposed or imposed significance of the words used"); Foucault, supra note 456, at 114 (arguing that a hierarchy of discourse exists). For example, we pay more attention to the president giving his state-of-the-union address before Congress than to a homeless heckler outside because ritual socially sanctions the president's speech.

FN458. Foucault, supra note 456, at 109; see also FOUCAULT, supra note 4, at 220 ("|T|here are, of course, many other systems for the control and delimitation of discourse .... I believe we can isolate another group: internal rules, where discourse exercises its own control; rules concerned with the principles of classification, ordering and distribution."); Gumperz & Cook-Gumperz, supra note 452, at 7 (discussing the relation between accepted modes of discourse and the bureaucratic system).

FN459. CONKLIN & LOURIE, supra note 8, at 110. This "speech community" shares a consensus on the proper use of language. Id.

FN460. Id.

FN461. Arnold H. Leibowitz, Language and the Law: The Exercise of Political Power through Official Designation of Language, in LANGUAGE AND POLITICS, supra note 446, at 449, 461-62. Leibowitz cites professional examinations and the selective service examination as practical examples of customary English use in the United States. Id. at 462.

FN462. For a detailed analysis of Hispanic learning patterns, see Califa, supra note 401, at 314-16 & nn.141-57.

FN463. See O'Barr, supra note 451, at 413, 418; see also Howard Giles et al., Towards a Theory of Language in Ethnic Group Relations, in LANGUAGE, ETHNICITY AND INTERGROUP RELATIONS, supra note 28, at 307, 307-08 (describing the use of language as a means of subordinating linguistically different groups).

FN464. Cf. O'Barr, supra note 451, at 413 (using Tanzania as an example of a nation that requires functional knowledge of Swahili as a condition precedent to political participation).

FN465. Id.

FN466. See Rubin, supra note 449, at 396. The official English movement makes the more extreme argument that our national unity depends on the societal imposition of English. See supra text accompanying notes 428-30.

FN467. Cf. Rubin, supra note 449, at 396-98 (describing the use of language as a political, economic and nationalist device). See generally O'Barr, supra note 451 (discussing the role of language in creating political and social

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boundaries).

FN468. AFRICAN POLITICAL SYSTEMS 23 (Meyer Fortes & E.E. Evans-Pritchard eds., 1940), quoted in O'Barr, supra note 451, at 410-11.

FN469. O'Barr, supra note 451, at 411. For example, despite the official English movement's claim that other languages threaten national unity, America's greatest political conflicts have been between people of similar ethnicity who spoke the same language. Both the Revolutionary and the Civil Wars, for example, were fought principally between peoples of similar ethnicity who all spoke English. Therefore, in the face of deep political divisions, the fact of shared language was inconsequential. Having a shared language does not necessarily create internal unity.

FN470. Id. at 414; see also Ryan & Carranza, supra note 452, at 63 (asserting that "hostility and resentment are often engendered in Spanish speakers who are pressed into viewing their language as 'inferior'").

FN471. See Kenneth L. Karst, Paths to Belonging: The Constitution and Cultural Identity, 64 N.C. L. REV. 303, 351-52 (1986) (explaining that "[a] distinctive language sets a cultural group off from others, with one consistent unhappy consequence throughout American history: discrimination against members of the cultural minority").

FN472. Fishman, supra note 28, at 25-26 (emphasis added).

FN473. See Giles et al., supra note 463, at 307-08 (arguing that dominant groups can "manipulate language ... by ... enforcing their linguistic values on subordinate groups by large-scale legislation" when their dominant status is threatened).

FN474. Earlier Supreme Court decisions held that prohibitions on the use or teaching of certain languages constituted deprivations of liberty under the substantive due process doctrine. See Yu Cong Eng v. Trinidad, 271 U.S. 500, 528 (1926); Meyer v. Nebraska, 262 U.S. 390, 403 (1923). Although the substantive due process rationale of these cases is no longer completely accepted, it is important to note that the Court recognized that language restrictions deny liberty.

FN475. Our history demonstrates a tradition of the use of language as a proxy for national origin discrimination. See discussion supra part VII.

FN476. 111 S. Ct. 1859 (1991).

FN477. Id. at 1872-73; see also id. at 1877 (Stevens, J., dissenting) (asserting that "an explanation [for striking prospective jurors] that is 'race-neutral' on its face is nonetheless unacceptable if it is merely a proxy for a discriminatory practice"). Hernandez examined peremptory challenges directed at Latino jurors because of their bilingualism and demeanor. The Court decided that such challenges did not violate the Equal Protection Clause. Id. at 1873.

FN478. Id. at 1872-73 (emphasis added).

FN479. See id. at 1872.

FN480. In Hernandez, the Court avoided deciding the question of language discrimination by finding that the prosecutor had acted because of both the prospective Latino jurors' bilingualism and their demeanor. Id. at 1872.

FN481. 262 U.S. 390 (1923).

FN482. Id. at 400.

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FN483. Id. at 401.

FN484. 271 U.S. 500 (1926)

FN485. Id. at 508-09.

FN486. Id. at 514.

FN487. Id. at 524-25.

FN488. Hernandez v. New York, 111 S. Ct. 1859, 1873 (1991) (plurality opinion).

FN489. Cf. Hernandez v. Texas, 347 U.S. 475, 477 (1954) (finding that Mexican-Americans are a suspect class for purposes of equal protection analysis); Korematsu v. United States, 323 U.S. 214, 216 (1944) (same, as to Japanese national origin).

FN490. 42 U.S.C. § 2000e (1988).

FN491. See, e.g., Gutierrez v. Municipal Court, 838 F.2d 1031, 1045 (9th Cir. 1988) (holding that district court appropriately issued preliminary injunction under Title VII against enforcement of employer's rule prohibiting use of languages other than English), vacated as moot, 490 U.S. 1016; Carino v. University of Oklahoma Bd. of Regents, 750 F.2d 815, 819 (10th Cir. 1984) (finding that employers may not make "adverse employment decisions" based on an employee having an accent where the accent does not interfere with the employee's ability to perform job duties); see also Court Strikes Down English-Only Rule as Unlawful Discrimination under Title VII, 169 DAILY LAB. REP., Oct. 9, 1991, at A-8 (describing Garcia v. Spun Steak Co., No. C-91-1949 RHS, 1991 WL 268021 (N.D. Cal. Oct. 23, 1991)). But see Garcia v. Gloor, 618 F.2d 264, 272 (5th Cir. 1980) (concluding that, for bilinguals, there is not necessarily a nexus between national origin and language), cert. denied, 449 U.S. 1113 (1981).

FN492. 29 C.F.R. § 1606.7(a) (1989).

FN493. Id. § 1606.1.

FN494. See, e.g., Karst, supra note 471, at 351-57; Matsuda, supra note 451, at 1329; Myres S. McDougal et al., Freedom from Discrimination in Choice of Language and International Human Rights, 1 S. ILL. U. L.J. 151, 152 (1976) (asserting that "language is commonly taken as a prime indicator of an individual's group identifications"); Perea, supra note 438, at 274-79; Bill Piatt, Toward Domestic Recognition of a Human Right to Language, 23 HOUS. L. REV. 885, 894-901 (1986); Note, "Official English": Federal Limits on Efforts to Curtail Bilingual Services in the States, 100 HARV. L. REV. 1345, 1355 (1987) [hereinafter Note, Federal Limits] (arguing that "courts might determine that [language-based] classifications in fact discriminate on the basis of national origin" because litigants "have argued that no factor is more intimately tied to a person's ethnic or national identity than is language") (citation omitted); see also Note, A Trait-Based Approach to National Origin Claims Under Title VII, 94 YALE L.J. 1164, 1165 (1984) [hereinafter Note, Trait-Based Approach] (asserting that "[d]ifferences in dress, language, accent, and custom associated with a non-American origin are more likely to elicit prejudicial attitudes than the fact of the origin itself").

FN495. Leobardo F. Estrada, The Extent of Spanish/English Bilingualism in the United States, 15 AZTLAN INT'L J. CHICANO STUD. RES. 379, 381 (1984).

FN496. Id. at 383.

FN497. Telephone Interview with Stephanie Profit, United States Census Bureau Regional Office, Atlanta, Ga. (June 1992). I have rounded the data to the nearest tenth of a million.

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FN498. Id. The number of Spanish speakers who reported that they did not speak English very well was 8.3 million, slightly less than half the total. Id.

FN499. Id.

FN500. See discussion supra part VII.C. The use of referenda to enact official English laws by direct majority vote, because they bypass usual representative legislative processes, are constitutionally suspect. See Arington, supra note 410, at 342-49. Accordingly, courts should scrutinize official English laws enacted in this manner closely.

FN501. The Supreme Court recognized the link between language and national origin: "Language permits an individual to express both a personal identity and membership in a community, and those who share a common language may interact in ways more intimate than those without this bond." Hernandez v. New York, 111 S. Ct. 1859, 1872 (1991) (plurality opinion). Unfortunately, this sentiment did not influence the Court's decision, which permits the use of peremptory challenges to exclude bilingual jurors. Indeed, one interpretation of Hernandez is that the Court's own fear of language difference affected the outcome.

FN502. People may support official English laws for many reasons, only one of which is the nativist rejection of Hispanics, Asians and other people deemed to be foreign. Some, for example, may support these laws believing that an official language may be a valuable tool in unifying American culture or ensuring uninhibited participation in the economy. While these beliefs may be sincere, the overwhelming majority of Americans already speak English, suggesting that no such law is necessary. See Califa, supra note 401, at 294 & n.7. Furthermore, the official English movement has only recently abandoned its overtly nativist rhetoric and leadership. See supra notes 415-16 and accompanying text.

FN503. Hernandez v. Texas, 347 U.S. 475, 478 (1954); Korematsu v. United States, 323 U.S. 214, 216 (1944).

FN504. See HIGHAM, supra note 30, at 4.

FN505. Lawrence, supra note 453, at 335.

FN506. See Arington, supra note 410, at 342-49.

FN507. Senate Hearing, supra note 33, at 53 (statement of Hayakawa); see also Gerda Bikales, Comment: the other side, 60 INT'L J. SOC. LANGUAGE 77, 81 (1986) (asserting that "[t]here is deep resentment against the displacement of English in our country, and against the acceptance of alternative languages in public usage"). Bikales is the executive director of U.S. English. Id. at 85.

FN508. See 42 U.S.C. § 1973b(f) (1988).

FN509. Cf. Lawrence, supra note 453, at 339-44 (describing our cultural heritage of racism).

FN510. Cf. City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989). In Croson, the plurality expressed distrust of decisions of the Richmond city council, which was predominantly black, citing the possibility of "simple racial politics." Id. at 493 (plurality opinion). Justice Marshall, in dissent, objected to the use of strict scrutiny in evaluating remedial measures enacted by municipalities with black leadership, asserting that such "insulting judgments have no place in constitutional jurisprudence." Id. at 555 (Marshall, J., dissenting).

FN511. See, e.g., Lee v. Weisman, 112 S. Ct. 2649, 2655 (1992) (finding that "the controlling precedents as they relate to prayer and religious exercise in primary and secondary public schools compel the holding here that the policy of the city of Providence [which allowed prayer in graduation ceremonies] is an unconstitutional one"); Wallace v. Jaffree, 472 U.S. 38, 61 (1985); Engel v. Vitale, 370 U.S. 421, 436 (1962). School prayer cases often run afoul of the Establishment Clause because public school prayers lack a secular purpose and constitute government endorsement

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of religion. See LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 14.9, 14.15 (2d ed. 1988).

FN512. 112 S. Ct. 2649 (1992).

FN513. Id. at 2655.

FN514. Distinguishing between young students and adults, the Court explained that it did "not address whether that choice is acceptable if the affected citizens are mature adults." Id. at 2658. Although the degree of coercion may differ, I believe that it would nonetheless be present for adults.

FN515. Id. at 2659.

FN516. 370 U.S. 421 (1962).

FN517. Id. at 431; see also 112 S. Ct. at 2675 (Blackmun, J., concurring) (explaining that some of the Framers understood the First Amendment to prevent government endorsement of any particular religion).

FN518. 319 U.S. 624 (1943).

FN519. Id. at 642. See generally TRIBE, supra note 511, § 15-5 (summarizing the Court's treatment of government practices which compel certain beliefs).

FN520. The Court explained that

> for the dissenter of high school age, who has a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow, the injury is no less real .... It is of little comfort to a dissenter, then, to be told that for her the act of standing or remaining in silence signifies mere respect, rather than participation. What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it.
>
> 112 S. Ct. at 2658.

The Court has not been consistently sensitive about this issue, however. See Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (upholding the display of a creche among secular symbols of Christmas in a city-sponsored display); see also TRIBE, supra note 511, § 14-15 (discussing how the Court's analysis failed to explain why the creche was not a government endorsement of religion).

FN521. See 112 S. Ct. at 2659.

FN522. 472 U.S. 38 (1985).

FN523. Id. at 69 (O'Connor, J., concurring) (quoting Lynch, 465 U.S. at 668); see also Lynch, 465 U.S. at 701 (Brennan, J., dissenting) ("The 'primary effect' of including a nativity scene in the city's display is ... to place the government's imprimatur of approval on the particular religious beliefs exemplified by the creche .... The effect on minority religious groups, as well as on those who may reject all religion, is to convey the message that their views are not similarly worthy of public recognition nor entitled to public support.").

In his concurring opinion in Weisman, Justice Blackmun also recognized the state-created outsider status faced by dissenting persons: "When the government puts its imprimatur on a particular religion, it conveys a message of exclusion to all those who do not adhere to the favored beliefs. A government cannot be premised on the belief that all persons are created equal when it asserts that God prefers some." 112 S. Ct. at 2665 (Blackmun, J., concurring) (footnote omitted); see also TRIBE, supra note 511, § 14-14 (explaining that, while separation between church and

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state does not bar religious involvement in politics, it does bar the government's symbolic endorsement of religion).

FN524. See West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 632-33 (1943); see also discussion supra part VIII.A (explaining the power of language as a symbol).

FN525. See discussion supra part VIII.A.

FN526. See discussion supra part VIII.A.

FN527. Cf. T. Alexander Aleinikoff, A Case for Race-Consciousness, 91 COLUM. L. REV. 1060, 1069 (1991) (asserting that there is actually "great inequality" in discourse between the races "because it is the white version that becomes the 'official story' in the dominant culture").

FN528. Early proposals to establish a national language academy sought to use English to define the "in group" of Americans. The association, in many legislative debates, of languages other than English with un-American identity suggests that an important part of the dominant culture's self-definition rests on English-speaking ability. Congress's adoption of an English literacy requirement for United States citizenship during the McCarthy era also evidenced this characteristic of the dominant culture.

FN529. Multilingual ballots, because they always include English, exclude no English-speaking person and include Americans who speak other languages. They are thus symbols of America's vibrant cultural pluralism, a reflection of a national commitment to include traditionally excluded groups and of core principles of representative government. These ballots tell a story of successful American pluralism.

FN530. See, e.g., Gutierrez v. Municipal Court, 838 F.2d 1031, 1044 (9th Cir. 1988), vacated as moot, 490 U.S. 1016 (1989); see also Court Strikes Down English-Only Rule as Unlawful Discrimination Under Title VII, supra note 491, at A-8 (describing Garcia v. Spun Steak, No. C-91-1949 RHS, 1991 WL 268021 (N.D. Cal. Oct. 23, 1991), in which the court found that an employer's English-only rule violated Title VII). The Regional Trial Attorney for the Equal Employment Opportunity Commission, Douglas J. Farmer, suggested that California's official English amendment may have heightened "employer consciousness to the [English-only] rules and emboldened them, improperly, to take those risks." Id.

FN531. See Arington, supra note 410, at 328; Note, Federal Limits, supra note 494, at 1353 (explaining that "[a]s a symbolic gesture, a state's declaration of English as its official language violates no constitutional norms; a common language is a goal that all can share").

A striking feature of the debate about official English is the passivity of many commentators in accepting official English as merely a symbol. One commentator writes that "[s]ome of the laws declaring English a state's official language appear on their face to have little more significance than a state's choice of an official motto or the official state bird." Arington, supra note 410, at 339. The article proceeds to point out that Mississippi's official English statute is in the same statutory section designating "the official state flag, tree, bird, flower, land mammal, water mammal, fish, shell, waterfowl, insect and beverage." Id. at 339 n.96. Unfortunately, once these commentators accept official English laws as merely symbolic, the inquiry into their legality ends. The official designation of language, however, is of far greater moment than the official state fish, fowl or beverage.

FN532. Arington, supra note 410, at 339.

FN533. See, e.g., County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 601-02 (1989) (finding the display of a nativity scene in the county courthouse unconstitutional); Lynch v. Donnelly, 465 U.S. 668, 725-26 (1984) (Brennan, J., dissenting) (concluding that the presence of a creche in display was an unconstitutional endorsement of religion). But see id. at 668 (upholding the legality of a Christmas display which included a creche among various other traditional symbols of Christmas).

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FN534. See Lawrence, supra note 453, at 355-58.

FN535. Although adoption of such an amendment seems far-fetched, our history is rife with similar examples of state-sanctioned oppression of marginalized groups. See, e.g., Plessy v. Ferguson, 163 U.S. 537 (1896); Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857).

FN536. See Charles R. Lawrence, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 DUKE L.J. 431, 439-40.

FN537. Because of changes in constitutional and statutory law in recent decades, modern nativism can proceed only along certain limited avenues. For instance, the Supreme Court declared that any law that classifies by race or national origin will be subject to strict judicial scrutiny. See Korematsu v. United States, 323 U.S. 214, 216 (1944). Moreover, Congress rejected the national origins quota system in 1965 as discriminatory. See supra note 418 and accompanying text. Thus, because direct restrictions on Hispanic immigration and voting violate the law, advocates of official English have resorted to seeking legislation that ties restrictions to a trait that is a close proxy for national origin: language. See Matsuda, supra note 451, at 1397-98; cf. Gerald Torres, Local Knowledge, Local Color: Critical Legal Studies, 25 SAN DIEGO L. REV. 1043, 1065 (1988) (describing the more subtle forms that racism now takes) (citing Thomas F. Pettigrew, New Patterns of Racism: The Different Worlds of 1984 and 1964, 37 RUTGERS L. REV. 673 (1985)).

FN538. See Moran, Status Conflict, supra note 329, at 321, 341, 345-50. Indeed, "the official designation of language has been used by those in control of the decision-making machinery as a means of political manipulation and control.... [L]anguage is primarily a means of control." Leibowitz, supra note 461, at 449; see also Torres, supra note 537, at 1051 ("Law does not stand outside the process of legitimization, for it is both producer and product of the dominant social culture. Legal culture and institutions are, indeed, the clearest articulations of the reigning social vision and, thus, are important elements in the function of both popular beliefs about commonplace relationships and popular acquiescence to the existing distribution of social goods and power.").

FN539. Many commentators assert that the official English movement is anti-Hispanic and anti-Asian in character. See, e.g., Califa, supra note 401, at 293, 294-95, 320; James Crawford, What's Behind Official English?, in LANGUAGE LOYALTIES: A SOURCE BOOK ON THE OFFICIAL ENGLISH CONTROVERSY, supra note 400, at 171, 171-77; Fishman, supra note 161, at 125, 132-34; Tom McArthur, Comment: Worried about something else, 60 INT'L J. SOC. LANGUAGE 87, 90-91 (1986); Camilo Perez-Bustillo, What Happens When English Only Comes to Town? A Case Study of Lowell, Massachusetts, in LANGUAGE LOYALTIES: A SOURCE BOOK ON THE OFFICIAL ENGLISH CONTROVERSY, supra note 400, at 194, 194-201; Comment, supra note 33, at 522-23. See generally 11 CHICANO-LATINO L. REV. (1991) (collecting articles identifying the pervasiveness of discrimination that English-only legislation and policies produce).

FN540. The oldest city in the United States is St. Augustine, Florida, established in 1565, prior to Jamestown, which was not established until 1607. See Amy Bushnell, The Noble and Loyal City 1565-1668, in THE OLDEST CITY: ST. AUGUSTINE, SAGA OF SURVIVAL 28, 28-29 (Jean P. Waterbury ed., 1983).

FN541. See Leibowitz, supra note 461, at 463 (explaining how language restrictions and other discriminatory legislation against "alien" groups result from hostility and adversely affect such groups).

FN542. See JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 153 (1980) (asserting that courts should treat as suspect those classifications that "disadvantage groups we know to be the object of widespread vilification, groups we know others (specifically those who control the legislative process) might wish to injure"); Lawrence, supra note 536, at 469-70.

FN543. Karst, supra note 36, at 1.

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FN544. For a discussion of how courts should apply heightened scrutiny and thus invalidate official English laws, see Califa, supra note 401, at 330-43.. Official English laws may also violate the First Amendment. Laws which seek to limit public discourse to English have a silencing and chilling effect upon the speech of bilingual, or monolingual, Spanish-speaking public employees. In Yniguez v. Mofford, 730 F. Supp. 309 (D. Ariz. 1990), the federal district court applied this rationale to hold Arizona's official English law unconstitutionally overbroad.

FN545. My arguments about the unconstitutionality of official English laws are directed only at these laws. I do not take the position that all government regulation of language is unconstitutional or undesirable.

FN546. See supra note 50 and accompanying text.

FN547. See BARON, supra note 18, at 179 ("As it has been in the past, such state and local nativism tends to be blocked at the federal level."). But see id. at 191 (asserting that the federal English-only amendment has some chance of success because linguistic discrimination remains publicly acceptable in the United States).

FN548. See supra text accompanying notes 350-52.

FN549. The imposition of linguistic conformity through official language laws, rather than fostering unity, might engender hostility and social unrest. See BARON, supra note 18, at 180.

FN550. See discussion supra part III.

FN551. See supra note 474.

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