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Official English Movement and the Demise of Diversity: The Elimination of Federal Judicial and Statutory Minority Language Rights, The

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Comments

THE "OFFICIAL ENGLISH" MOVEMENT AND THE DEMISE OF DIVERSITY: The Elimination of Federal Judicial and Statutory Minority Language Rights

"[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."[1]

Although "official English" has been a topic of concern since the founding of our country, for the first time in our nation's history there is a real possibility that there will be little protection for minority language rights.[2] Unlike the early 1900s, when minority language rights were primarily local and state issues,[3] the new "official English" movement has taken on a national character with national implications.

Traditionally, federal statutes and the United States Constitution have provided protection for minority language rights. Federal statutory protections include the Voting Rights Act,[4] Titles VI[5] and VII[6] of the Civil Rights Act, the Bilingual Education Act,[7] and the Equal Educational

1. Meyer v. Nebraska, 262 U.S. 390, 401 (1923).

2. For purposes of this comment, "minority language rights" means the right of an individual to not be isolated from education, employment, or governmental participation because his/her primary or native language is not English.

3. Jamie B. Draper & Martha Jimenez, *Language Debates in the United States, in* THE REFERENCE SHELF: ENGLISH : OUR OFFICIAL LANGUAGE? 10, 10 (Bee Gallegos ed., 1994).

4. 42 U.S.C. § 1973 (1994) (§ 1973aa-1a requires bilingual voting assistance in certain situations).

5. 42 U.S.C. § 2000d (1994) (prohibits exclusion in federally assisted programs on the basis of national origin).

6. 42 U.S.C. § 2000e (1994) (prohibits discrimination in the workplace on the basis of national origin).

7. 20 U.S.C. §§ 3281 et seq. (1994) (provides for bilingual education programs).

Opportunities Act.[8] Constitutional safeguards include the First[9] and Fourteenth[10] Amendments. An alarming trend indicates that the federal statutory protections are being eroded by state and federal legislation. Pending federal legislation[11] would repeal many, if not all, statutory protections. In addition, the Supreme Court recently decided a Ninth Circuit case challenging the constitutionality of the Arizona "official English" constitutional amendment.[12]

This comment examines the history of language rights by identifying the relationship between statutory enactments and the subsequent judicial interpretations. Additionally, this comment illustrates the face of the current "official English" movement by reviewing state "official English" statutes, pending federal legislation, and *Arizonans for Official English v. Arizona*.[13] This comment concludes by presenting a constitutional framework for analyzing "official English" statutes.

I. "OFFICIAL ENGLISH" MOVEMENTS: PAST AND PRESENT

A. Historical Background

Language diversity has been an issue since before the American Revolution.[14] In 1753, Benjamin Franklin expressed fears about the need for interpreters in Pennsylvania because of the large numbers of German settlers.[15] Franklin also complained about German schools, German newspapers, and German street signs.[16] However, the United States never declared an official language. The Continental Congress made a conscious decision to protect multiligualism by not declaring English the official language, but rather issued many significant docu-

8. 20 U.S.C. §§ 1701 et seq. (1994) (§ 1703 prohibits the denial of equal educational opportunity on the basis of national origin; an educational agency is required to overcome language barriers).

9. U.S. CONST. amend. I.

10. U.S. CONST. amend. XIV, § 1.

11. *See infra* text accompanying notes 62-66.

12. Arizonans for Official English v. Arizona, 65 U.S.L.W. 4169 (1997), *sub nom.* Yniguez v. Arizonans for Official English, 69 F.3d 920 (9th Cir. 1995) (*en banc*), *sub nom.* Yniguez v. Mofford, 730 F. Supp. 309 (D. Ariz. 1990).

13. *Id.*

14. James C. Stalker, *Official English or English Only, in* THE REFERENCE SHELF 44, 44-52 (Bee Gallegos ed., 1994).

15. *Id.* at 46-47.

16. JAMES CRAWFORD, HOLD YOUR TONGUE 37 (1992) ("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* . . . ?" (quoting Benjamin Franklin, 1775) (emphasis in original)).

ments, including the Articles of Confederation, in German and French.[17] Nevertheless, the tradition of multilingualism in America has never been sure nor consistent.

After the Civil War, with the enactment of the Fourteenth Amendment, the federal government was viewed as the protector of individual rights.[18] However, language rights were not necessarily considered an individual right worthy of federal protection. For example, in the 1880's, the Indian Peace Commission concluded that language differences were the main problem between Native Americans and the federal government's policy of Manifest Destiny.[19] Additionally, an English-proficiency requirement was enacted in 1897 to bar Italians and Slavs from Pennsylvania's coal fields, and a congressional measure was approved in 1906 which denied citizenship to immigrants unable to speak English.[20] According to one study, after World War I, twenty-three states enacted statutes restricting foreign language instruction, particularly German, in response to post-war anti-German sentiment.[21] Unlike the current "official English" movement, these examples seem to have targeted specific groups for particular purposes.[22]

Despite these acts against language minorities, since 1964, the federal government has *affirmatively* protected minority language rights.[23] The following sections outline the federal government's activity in protecting minority language groups' access to government, employment and education.

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17. Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 285-86 (1992).

18. *Id.* at 309. The Civil War was fought, in part, over state governments' violations of individual rights. As part of the Reconstruction, the Fourteenth Amendment was adopted which, for the first time, applied the Bill of Rights (including due process and equal protection of the laws) to state governments. States would no longer be entrusted as the protector of individual rights, a marked changed from the Revolution where the federal government could not be trusted. *Id.*

19. CRAWFORD, *supra* note 16, at 43-44 ("Through sameness of language is produced sameness of sentiment, and thought; customs and habits, . . . their barbarous dialects should be blotted out and the English language substituted." (quoting the Indian Peace Commission of 1868)).

20. *See id.* at 28-53.

21. Leila Sadat Wexler, *Official English, Nationalism and Linguistic Terror: A French Lesson*, 71 WASH. L. REV. 285, 340 (1996).

22. CRAWFORD, *supra* note 16, at 3. Explanations for the xenophobic nature of the current official English movement include racism toward the demographic changes of the immigrants and mass communications increasing the perceived threat of these immigrants. The source countries have changed since Congress abolished the national origin quota system in 1965. The new immigrants from Southeast Asia and Latin America are less familiar racially, culturally and linguistically. Minority tongues are suddenly more visible and dissonant. Wexler, *supra* note 21, at 353.

23. The Civil Rights Act of 1964 illustrates the inclusion of minority language rights in the civil rights movement of the 1960's and 1970's. The Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

1. Access to Government

Access to government[24] is partially protected by the Voting Rights Act of 1965.[25] In 1975, amendments to the Voting Rights Act added bilingual election requirements.[26] The bilingual election provisions require assistance in languages other than English if: (1) a single minority group comprises over five percent of voting age citizens; and (2) the jurisdiction or state illiteracy rate exceeds the national rate.[27] These amendments were intended to protect against state or local unilingual ballots[28] because strong evidence indicated that English-only elections excluded minority citizens from participation in elections.[29] Studies indicate that the bilingual ballot provisions have been successful; bilingual ballots have affected voter participation to such an extent that election results have been directly impacted.[30]

2. Employment

Congress enacted Title VII of the Civil Rights Act of 1964[31] to prohibit employment discrimination based on race, color, religion, sex or national origin. "Employment" includes hiring, firing, payment of wages and other terms and conditions of employment. Employers bound by Title VII include state and local governments, agencies, and any employers or labor organizations comprised of fifteen or more employees or members of industries affecting commerce.[32] To enforce the guarantees contained in Title VII, Congress created the Equal Employment Opportunity Commission (EEOC).[33]

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24. For purposes of this comment, "access to government" is defined as the ability to participate in any level of the political process.

25. 42 U.S.C. § 1973 (1994).

26. 42 U.S.C. §§ 1973aa-1a (Pub. L. No. 94-73, 89 Stat. 400 to 406 (1975)). This section was extended through 1992 (Pub. L. No. 97-205, 96 Stat. 131 to 135 (1982)) and through August 6, 2007 (Pub. L. No. 102-344, 106 Stat. 291 (1992)).

27. 42 U.S.C. §§ 1973aa-1a (1994).

28. Frank M. Lowery, IV, Comment, *Through the Looking Glass: Linguistic Separatism and National Unity*, 41 EMORY L.J. 223, 297 (1992).

29. 42 U.S.C. § 1973aa-1a(a) (1994) ("Congress finds that, through the use of various practices and procedures, citizens of language minorities have been effectively excluded from participation in the electoral process. Among other factors, the denial of the right to vote of such minority group citizens is ordinarily directly related to the unequal educational opportunities afforded them, resulting in high illiteracy and low voting participation.").

30. Antonio J. Califa, *Declaring English the Official Language: Prejudice Spoken Here*, 24 HARV. C.R.-C.L. L. REV. 293, 306-07 (1989).

31. Pub. L. No. 88-352, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. § 2000e (1994)).

32. 42 U.S.C. § 2000e (1994).

33. David T. Wiley, *Whose Proof?: Deference to EEOC Guidelines on Disparate Impact Discrimination Analysis of "English-Only" Rules*, 29 GA. L. REV. 539, 544-45 (1995).

The EEOC's failure to immediately issue guidelines for evaluating rules regulating language choice proved problematic for courts wanting some guidance. In *Garcia v. Gloor*, the Fifth Circuit implicitly requested EEOC guidance.[34] In response, the EEOC promulgated the "Guidelines on Discrimination Because of National Origin," which directly address English-only rules in the workplace.[35]

The EEOC guidelines presume workplace English-only rules discriminate on the basis of national origin because:

> A rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment. 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 would result in a discriminatory working environment.[36]

An employer may rebut the presumption of discrimination by demonstrating a business necessity for an English-only rule.[37]

3. Bilingual Education

In 1968, Congress passed the Bilingual Education Act,[38] which targeted the special educational needs of non-English speaking students.[39] The Act provided grants to school districts which implemented programs aimed at increasing English proficiency. The Bilingual Education Act encouraged language assistance but allowed school

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34. 618 F.2d 264, 268 & n.1 (5th Cir. 1980) ("While the EEOC has considered in specific instances whether a policy prohibiting the speaking of Spanish in normal interoffice contacts discriminates on the basis of national origin, it has adopted neither a regulation stating a standard for testing such language rules nor any general policy, presumed to be derived from the statute prohibiting them. We therefore approach the problem on the basis of the statute itself and the case law.").

35. 29 C.F.R. § 1606.7.

36. 29 C.F.R. § 1606.7(a).

37. 29 C.F.R. § 1606.7(b).

38. Pub. L. No. 90-247, 81 Stat. 783, 816 (codified as amended at 20 U.S.C. §§ 3221-61 (1988)). For a discussion of the subsequent amendments to and reauthorizations of the Bilingual Education Act, *see* Rachel F. Moran, *The Politics of Discretion: Federal Intervention of Bilingual Education*, 76 CAL. L. REV. 1249, 1272-1314 (1988).

39. Michelle Arington, Note, *English-Only Laws and Direct Legislation: The Battle in the States Over Language Minority Rights*, 7 J.L. & POL. 325, 333 (1991).

districts to retain discretion in developing bilingual programs and in applying for funds.[40]

Since the Act did not *require* districts to provide bilingual education or to submit grant applications, bilingual education remained a local curriculum decision.[41] The Act did not impose direct mandates on local school districts. In fact, congressional appropriations between 1969 and 1973 always fell below authorized expenditure levels.[42] However, evidence indicates that the Act nonetheless indirectly improved state and local bilingual education policy.[43] Prior to 1968 no state had enacted bilingual educational provisions.[44] By 1973 at least six states had created such provisions while a number of other states repealed statutes making English the exclusive language of instruction.[45]

In 1970, the Department of Health, Education and Welfare (HEW) determined that Title VI of the Civil Rights Act of 1964 required schools to provide special educational assistance to students not proficient in English.[46] HEW's interpretation of Title VI established that ignoring the needs of non-English speaking students was a form of national origin discrimination.[47] HEW issued an official memorandum mandating that school districts receiving federal funds rectify the language deficiencies of non-English speaking students.[48]

In *Lau v. Nichols*,[49] the United States Supreme Court unanimously upheld HEW's interpretation of Title VI. The Court held that the San Francisco school system's failure to provide English language instruction denied a "meaningful opportunity" to participate in public education in violation of Title VI.[50] The Court reasoned that exclusion based upon a characteristic unique to a national origin minority group had the same effect as an intentional scheme to exclude such a group from a realistic chance to obtain an education.[51] The Court declared:"[T]here is no equali-

40. *Id.*

41. *Id.*

42. In 1968 Congress did not appropriate any funds under the Act, although $15 million had been authorized. Between 1969 and 1973 annual funding never exceeded $35 million even though up to $135 million had been authorized. Moran, *supra* note 38, at 1264-65.

43. *Id.* at 1265.

44. *Id.*

45. These states included Illinois, Massachusetts, Oregon, and Pennsylvania. *Id.*

46. 35 Fed. Reg. 11,595 (1970) (codified at 45 C.F.R. pt. 80 (1970)); *see also*, DENNIS BARON, THE ENGLISH-ONLY QUESTION 172 (1990).

47. 35 Fed. Reg. 11,595, *supra* note 46.

48. *Id.*

49. 414 U.S. 563 (1973).

50. *Id.* at 569.

51. *Id.* at 566.

ty of treatment merely by providing students with the same facilities, textbooks, teacher, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education."[52] However, the Supreme Court did not prescribe the steps a school district must take to remedy language deficiencies.

Congress codified *Lau* with the Equal Educational Opportunities Act (EEOA) of 1974.[53] Section 204 of the EEOA provides that:

> No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex or national origin, by . . . (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in the instructional programs.[54]

While state and local school districts maintain a great deal of discretion in the area of bilingual education, federal statutes and case law impose an affirmative obligation on schools to provide some special language instruction to those students who do not speak English.

B. The New "Official English" Movement

The newest "official English" movement began in the 1980's in state legislatures, culminating in pending federal legislation. The following sections present the face of this movement in terms of legislation and the issues the new debate focuses on.

1. The "Official English" Movement In The States

Since the early 1980's, states have been passing "official English" legislation, with the movement gaining momentum in the latter part of the decade. In 1980, only two states had enacted legislation declaring English the official language. Currently, twenty-two states have enacted such legislation.[55]

State statutes and constitutional amendments declaring English the official language fall along a continuum. At one end are rather benign legislation and amendments that simply declare English the official lan-

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52. *Id.*

53. Pub. L. No. 93-380, 88 Stat. 515 (codified at 20 U.S.C. §§1701-1758 (1982)).

54. *Id.* § 1701(f).

55. Wyoming passed an "official English" statute during the 1996 legislative session. 1996 Wyo. Sess. Laws Ch. 34 (codified at WYO. STAT. ANN. § 8-6-101 (Michie 1997)).

guage.[56] At the other end of the continuum are legislation and amendments, including the Wyoming statute, composed of more restrictive provisions.[57] The Wyoming statute declares that except as otherwise provided by law, no state agency or political subdivision of the state shall be required to provide any documents, information, literature or other written materials in any language other than English. The statute also provides that a state agency may act in a language other than English under eight exceptions.[58]

The most restrictive legislation enacted to date is the Arizona constitutional amendment,[59] discussed at length later in this comment. Other

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56. *See*, KY. REV. STAT. ANN. § 2.013 (Banks-Baldwin 1984); ILL. ANN. STAT. ch. 5, para. 460/20 (Smith-Hurd 1991); IND. CODE ANN. 1-2-10-1 (West 1984); MISS. CODE ANN. 3-3-31 (1987); N.D. CENT. CODE. § 54-02-13 (1987): Arkansas declares English the official language and specifically guarantees this statute does not prevent providing educational opportunities to all children. ARK. CODE ANN. 1-4-117 (Michie 1987). English and Hawaiian are the official languages of Hawaii. HAW. REV. STAT. CONST. ART. XV 4 (1978). The Montana Code provides that English is the official and primary language of the state and local governments but specifically states that "this section is not intended to violate the federal or state constitutional right to freedom of speech of government officers and employees acting in the course and scope of their employment. This section does not prohibit a government officer or employee acting in the course and scope of employment from using a language other than English . . . " MT. CODE ANN. § 1-1-510 (1995).

57. WYO. STAT. ANN. § 8-6-101 (Michie 1997). See app. B. Two provisions direct the respective legislature to take all steps necessary to implement the new sections: Colorado and Florida. COLO. REV. STAT. ANN. CONST. ART. II 30a (West 1992); FLA. STAT. ANN. CONST. ART. II § 9 (West 1988).

Georgia provides an almost schizophrenic approach to official language. One part provides that English "shall be the language used for each public record . . . and each public meeting . . . and for official Acts of the State of Georgia, including those governmental documents, records, meetings, actions, or policies. . . . " GA. CODE ANN. § 50-3-100 (1981). However, a later provision provides that "state agencies, counties, municipal corporations, and political subdivisions of this state are authorized to use or to print official documents and forms in languages other than [English], at the discretion of their governing authorities . . . (as long as an English translation is provided)." *Id.*

Virginia's legislation provides that no state agency or government is either required or prevented from providing documents, literature, and information in a language other than English. However, it also provides that "school boards shall have no obligation to teach the standard curriculum, except those courses in foreign languages, in a language other than English." VA. CODE ANN. § 7.1-42 (1996); VA. CODE ANN. § 22.1-212.1 (1996). New Hampshire provides that English must be the language for "all official public documents and records, and of all proceedings and nonpublic sessions." N.H. REV. STAT. ANN. § 3-C:1 (1995).

Tennessee's statute mandates that ballots and all other governmental publications and communications be conducted in English, including public instruction. TENN. CODE. ANN. § 4-1-404 (1984). South Dakota provides the same restrictions but includes an exception for public health, safety or emergency services. However, in order to trigger the exceptions, approval at an open public meeting is required. S.D. CODIFIED LAWS § 1-27-20 through § 1-27-22 (1995).

The South Carolina code provides that "neither the State nor any political subdivision thereof shall require . . . the use of any language other than English. S.C. CODE ANN. § 1-1-696 (1987); S.C. CODE ANN. § 1-1-697 (1987). The "exceptions" section only states that the official language provision does not apply to education. *Id.*

58. WYO. STAT. ANN. § 8-6-101 (Michie 1997).

59. ARIZ. CONST. ART. XXVIII (1988). *See* app. C.

examples of legislation at the restrictive end of the continuum are Alabama and California which provide that English is the official language and direct the legislature to take all steps to *enhance and preserve* the role of English as the official language.[60] It is unclear from this type of legislation how far legislatures will go to "preserve" the English language.

Another example of the most restrictive legislation is Nebraska's Constitution, which provides not only that English is the state's official language but also that "all official proceedings, records and publications shall be in such language, and the common school branches shall be taught in said language in public, private, denominational and parochial schools."[61]

2. The Federal "Official English" Movement

On August 1, 1996, the United States House passed House Bill 123, the English Language Empowerment Act of 1996 (the ELEA).[62] The Act declared that English was the official language of the federal government, mandated that the federal government conduct its business in English, eliminated the federal bilingual ballot requirement, and required that naturalization ceremonies be conducted in English.[63] The Senate Judiciary Committee did not act on the bill before the 104th Congress adjourned. However, discussion of the bill is still helpful for purposes of this comment because the bills and resolutions presented in the 105th Congress are very similar.[64]

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60. ALA. CODE CONST. AMEND. NO. 509 (1990); CAL. CODE. CONST. ART. III 6 (West 1986).

61. NEB. REV. STAT. CONST. ART. I § 27 (1920).

62. 142 CONG. REC. H9725-04. See app. A.

63. *Id.* at H9726.

64. The Bill Emerson English Language Empowerment Act of 1997 (the EELEA), H.R. 123, 105th Cong. (1997), is identical to the ELEA except this version does not specifically repeal the bilingual ballot mandate contained in the Voting Rights Act. 143 CONG. REC. E36-01 (daily ed. January 7, 1997)(statement of Rep. Cunningham). Rep. Doolittle proposed an amendment to the United States Constitution that declares English the official language and requires that "the English language shall be used for all public acts including every order, resolution, vote or election, and for all records and judicial proceedings of the Government of the United states and the governments of the several States". The resolution also gives Congress and state governments the power to enforce the article by appropriate legislation. H.R.J. Res. 37, 105th Cong. (1997). The Declaration of Official Language Act of 1997 (the DOLA) seems to parallel the ELEA most directly. Besides declaring English the official language of the federal government, it *requires* that "communications by officers and employees of the Government of the United States with United States citizens" be in English. The DOLA also requires that naturalization ceremonies be conducted *entirely* in English and repeals the bilingual election requirements. Further, the DOLA "preempts any State or Federal law which is inconsistent." H.R. 622, 105th Cong. (1997). The Language of Government Act of 1997 (the LGA) is the only "official English" legislation currently pending in the Senate. The LGA seems to be the least imposing of the current federal proposals. While it requires official business be conducted in English, the

If enacted, the effect of the ELEA and similar legislation is twofold. First, the ELEA and similar legislation would supersede any existing federal law contrary to its provisions. This could effectively repeal the minority language protections contained in Titles VI and VII of the Civil Rights Act of 1964, the Voting Rights Act of 1975, the Equal Educational Opportunities Act, the Bilingual Education Act, and any other language provision included in federal legislation.[65] Second, the ELEA and similar legislation would remove the supremacy of federal legislation in providing minority language right protections to citizens of the states. Without the mandates contained in existing federal legislation, state and local governments, as well as the private sector, would be free to restrict minority language rights. The ELEA and similar legislation would not only erode civil rights which were recognized during the sixties and seventies, it would create an unprecedented view of a unilingual nation that has never been a part of the American tradition.[66]

LGA does allow use of other languages in nonofficial capacities. The LGA places an *affirmative obligation* on the federal government to preserve and enhance the role of English. S. 323, 105th Cong. (1997). The text of the most recent proposal is unavailable at publication. H.R. 1005, 105th Cong. (1997).

65. Other laws potentially affected include: Court Interpreters Act, 28 U.S.C. § 1277(d) (1982); federally-funded community and migrant health care centers, 42 U.S.C. § 254b(f)(3)(j)-254c (1982); and federally-funded alcohol treatment and abuse programs, 42 U.S.C. § 4577(b) (1982). *See supra* text accompanying note 64 (the Doolittle Amendment and DOLA specifically repeal the bilingual election requirements contained in the Voting Rights Act); § 166 of the ELEA ("[t]hat except as otherwise provided in this chapter, the provisions of this chapter shall supersede any existing Federal law that contravenes such provisions").

66. BARON, *supra* note 46, at 65-67; Amicus Brief in Support of Respondents at 24-25, *Yniguez* (No. 95-974)("Although members of the Continental Congress recognized some of the same concerns raised by Petitioners today about the use of non-English languages, no attempt was made to prohibit non-English speech in the new nation. For example, during the Continental Congress, Benjamin Franklin expressed concern that the large German population would increasingly undermine Anglican dominance in Pennsylvania and he publicly complained of the increasing German influence in American society. Despite his concerns, Franklin did not attempt to limit the use of German in the new United States-by government or by the people-but instead published himself the first German newspaper in the United States. . . . In fact, Franklin opposed a proposal that would limit the printing and sale of German materials."); *see also,* Perea, *supra* note 17, at 274.

Representative Serrano submitted a resolution to the House of Representatives in opposition to the federal "official English" proposals. Serrano's resolution is entitled the "English Plus Resolution" and states that "'English-only' measures, . . . would violate traditions of cultural pluralism, divide communities along ethnic lines, jeopardize the provision of law enforcement, public health, education, and other vital services to those whose English is limited, impair government efficiency, and undercut the national interest by hindering the development of language skills needed to enhance international competitiveness and conduct diplomacy." The resolution goes on to state that "official English" measures "would represent an unwarranted Federal regulation of self-expression, abrogate constitutional rights to freedom of expression and equal protection of laws, violate international human rights treaties to which the United States is a signatory, and contradict the spirit of the 1923 Supreme Court case *Meyer v. Nebraska*." The resolution concludes by encouraging the federal government to pursue policies of inclusion, multilingualism and diversity, and continue to provide services in languages other than English. H.R. Con. Res. 4, 105th Congress (1997).

3. The Policy Debate

In order to survive constitutional challenges language restrictions must serve, at a minimum, legitimate government interests. Proponents of the "official English" movement offer several policy justifications for language restrictions. These justifications include national unity, economic benefits, and greater political and social participation.

A. National Unity and National Identity

Proponents of "official English" argue that English is the "glue" that holds the nation together.[67] National unity is the main justification supporters use for enacting "official English" legislation:

> [G]overnment has substantial interests in protecting itself and society from the divisive effects of official multilingualism. A common language promotes the maintenance of our pluralistic democracy: if language and cultural separatism rise above a certain level, the unity and political stability of the nation will — in time — be seriously diminished . . . . This unity comes from a common language and a core public culture of certain shared values, beliefs, and customs which make us distinctly 'Americans.'[68]

Proponents argue that the very diversity that America celebrates requires a common language in order to maintain commonality. They argue that declaring an official language is an "insurance policy" against future social disorder and conflict based on linguistic differences.[69]

The national unity argument fails for several reasons. First, there is no historical basis for tying national unity to a common language. None of the thirteen colonies found it necessary to declare English the official language, even though there was no public school system to teach English and little mobility to bring together isolated groups of immigrants.[70] Furthermore, linguistic differences have had nothing to do with some of the bloodiest human conflicts, for example, the

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67. 142 CONG. REC. H9725-04, H9730 (daily ed. Aug. 1, 1996) (statement of Rep. Roth).

68. Brief for Petitioners at 36-37, *Yniguez* (No. 95-974) (1996 WL 272394).

69. CRAWFORD, *supra* note 16, at 234. "Official English" proponents often cite Canada's language strife as an example for why the U.S. needs an official language policy. However, it does not follow that because Canadians are fighting over language, language must be responsible. *Id.*

70. Brief of Amici Curiae Linguistic Society of America and National Council For Languages and International Studies at 10, *Yniguez* (No. 95-974)(1996 WL 413764).

American Civil War, World War II, and most recently, civil unrest in Yugoslavia and Rwanda.[71]

Additionally, even though the United States has always been a multilingual and multicultural nation,[72] there is no evidence that English is any less prevalent now than ever before.[73]

> There is no serious movement to make any non-English language the official language. . . . In fact, quite the opposite is true. Non-English speaking immigrants are shifting to English at an historically rapid pace.[74]

English has always been the defacto official language of the United States. Even without restrictive legislation, minority languages have always been peripheral in American society.[75] Studies indicate that a greater percentage of Americans speak English than ever before, and non-English or bilingual speakers continued to learn English as quickly as earlier immigrants.[76] And finally, there is no dispute that English is the international language of commerce, science and affairs between nations.[77]

B. Economic Benefits

The second justification for "official English" enactments is economic benefits.[78] Proponents argue that providing governmental services in languages other than English costs state and local governments billions of dollars.[79] However, proponents are hard pressed to provide data showing the actual costs involved in providing bilingual services. In its report to the House Committee on Rules considering the English Language Empowerment Act of 1996, the General Accounting Office (GAO) reported:

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71. *Id.* at 14-15.

72. *See* Dennis Baron, *English in Multicultural America, in* THE REFERENCE SHELF 79, 78-87 (Bee Gallegos ed., 1994.)

73. Perea, *supra* note 16, at 347 (94 to 96 percent of the American population speak English; 85 percent claim English as their native tongue) (citing Joshua A. Fishman, *"English Only": Ghosts, Myths, and Dangers*, 74 INT'L J. SOC. LANGUAGE 125, 129 (1988)).

74. Brief for Respondent Maria-Kelly F. Yniguez at 41 (No. 95-974)(1996 WL 426410).

75. Baron, *supra* note 71, at 87.

76. *Id.* at 79.

77. Perea, *supra* note 17, at 347.

78. The author of Wyoming's legislation, Nimi McConigley, states that the legislation was enacted primarily as a measure to protect state resources. Telephone Interview with Nimi McConigley Republican Representative to State House (Sept. 5, 1996). McConigley argues that the legislation is simply intended to save costs associated with providing information in languages other than English and to preempt possible lawsuits based on the availability of that information. According to McConigley, the people of Wyoming speak close to 60 different languages. *Id.*

79. Reply Brief for Petitioners at 5, *Yniguez* (No. 95-974) (1996 WL 491444).

"We found that no single, comprehensive data source existed within the federal government that could identify and quantify the total number of foreign language publications and documents issued both internally and externally by federal government agencies and organizations."[80] The GAO did find two data sources which indicated that less than one percent of federal documents were published in foreign languages.[81] Additionally, correspondence to the committee from the Congressional Budget Office (CBO) indicated that the impact of the English Language Empowerment Act of 1996 on the federal budget would be minimal.[82] While the CBO expected that the bill would have little effect on the federal government, it would impose direct compliance cost on the private sector.[83]

Proponents argue that "official English" does not divide citizens along linguistic lines but rather opens opportunities to those who do not speak English.[84] They argue that English is the key to attaining the American dream because when persons are less than proficient in English, they are relegated to lower-paying jobs.[85] While the economic realities of this argument are correct, there is no evidence to suggest that "official English" legislation creates more incentives to learn English than those already created by the marketplace.[86] There is a direct correlation between the ability to speak English and higher income levels.[87] Generally, immigrants are well aware of the advantages of acquiring English.[88] In other words, it is the economic realities of the marketplace which creates the incentive to learn English, not government compulsion.

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80. H. R. Rep. 734, 104th Cong., 2d Sess. 1996 (WL 440272 (Leg. Hist.)).

81. *Id.* Moreover, the United States Supreme Court has held that administrative convenience will almost never be a sufficient justification for discrimination. *Cf.* Wengler v. Druggist's Mutual Ins. Co., 446 U.S. 142 (1980) (sex-based classification for presumed dependency for payment of worker's compensation death benefits unconstitutional); Rostker v. Goldberg, 453 U.S. 58 (1981) (Court upheld male-only draft registration as military necessity, but dissent pointed out that administrative inconvenience was not enough to justify sex discrimination).

82. H.R. Rep. 734, *supra* note 80. For example, less printing could reduce some costs, while oral translation could increase other costs. The net change in costs would depend on how agencies interpret the bill's exemptions.

83. *Id.*

84. In support of the Wyoming legislation McConigley indicates that the legislation is intended to provide an incentive to immigrants to learn English so that they are provided a "level playing field" in job opportunities and in participation in the American culture and democratic process. Telephone Interview with Nimi McConigley, *supra* note 76. McConigley, who is an immigrant from India, argues that attacks on the legislation as anti-immigrant or racist are unfounded. She argues that language is simply a means to communicate and should not create an emotional threat.

85. 142 CONG. REC. H9725-04-H9730 (daily ed. Aug. 1, 1996) (statement of Rep. Solomon).

86. Brief for Respondent Maria-Kelly F. Yniguez at 40 (No. 95-974) (1996 WL 426410); Brief of Amici Curiae Linguistic Society of America and National Council for Languages and International Studies, *Yniguez* at 21-25 (No. 95-974) (1996 WL 413764); Lowery, *supra* note 28, at 318-19.

87. Brief for Respondent Maria-Kelly F. Yniguez, *supra* note 83, at 18.

88. *Id.* at 19.

C. *Greater Political and Social Participation*

Proponents of "official English" argue that a uniform governmental policy on language will provide incentives to learn English and thus prevent immigrants from isolating themselves along linguistic lines. Proponents correctly point out that populations divided by language tend to segregate socioeconomically along the same lines, with elite groups speaking one language and disadvantages classes speaking another.[89] They argue that "official English" provisions encourage non-English speakers to learn English because in order to deal with government they *must* speak English.[90] Additionally, proponents argue that such provisions are inclusive rather than exclusive because "official English" provisions "indirectly ease the integration of non-English speakers into schools, the job market, the economy, and society."[91] Finally, proponents claim that a healthy political life becomes impossible when an individual is unable to deliberate issues with a common understanding and a common language.[92]

However, declaring English as the official language will not create faster assimilation or greater participation in society.[93] "Social mobility is the crucial factor,"[94] because the desire to move up the social ladder fosters contact with English speakers and thus increases incentives to speak the dominant language.[95] Immigrants often trade their native language for English as a more helpful means of gaining social acceptance, economic mobility, political clout and other advantages.

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89. Brief of Washington Legal Foundation, The Claremont Institute for the Study of Statesmanship and Political Philosophy, 34 Members of Congress as Amici Curiae in support of Petitioners, *Yniguez* at 23-30 (No. 95-974) (1996 WL 284694).

90. *Id.* at 28.

91. *Id.* It is in this area that proponents erroneously attack bilingual education as "retarding" rather than expediting the integration of Hispanic children into the English-speaking world.

92. *Id.* at 23.

93. Brief of Amici Curiae Linguistic Society of American and National council for Languages and International Studies for Respondent, *Yniguez* at 7-8 (No. 95-974) (1996 WL 413764) ("By limiting communication between the government and its citizens, Article XXVIII can only serve to reduce participation in voting and other forms of self-governance."); Brief for Respondent Maria-Kelly F. Yniguez at 46 (No. 95-974) (1996 WL 426410). *See also* Perea, *supra* note 17, at 348 ("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. According to a 1982 study by the Mexican-American Legal Defense and Education Fund, seventy-two percent of monolingual Spanish-speaking *citizens* would be less likely to vote without the language assistance the Voting Rights Act requires.") (citing Califa, *supra* note 30, at 306.).

94. CRAWFORD, *supra* note 16, at 23.

95. *Id.*

The replacement of native languages with English is best achieved through bilingual education, not governmental compulsion.[96] Studies show that children learn very little English in sink-or-swim classrooms.[97] Research suggests that there are no shortcuts to English proficiency; teaching English as quickly as possible fails to prepare students to compete on equal terms.[98] Bilingual education is clearly the best means for assimilation. In addition, there is no evidence that current language minorities are failing to assimilate. A demographic report in 1988 showed that Hispanic immigrants are approaching a two-generation shift to English dominance as compared to a three-generation shift for previous immigrants.[99] Additionally, the current educational system cannot keep up with the demand for adult English classes.[100]

However, English proficiency alone does not guarantee political or social success.[101] "[T]he best way to bring non-English-speakers into the 'mainstream' is to involve them in the democratic process while they learn English, not shut them out of it until they are fluent."[102] Certain minorities should not be shut out of the democratic process because of their histories and current circumstances. Laws like the Voting Rights Act are designed to overthrow tyrannies of the majority whereas "official English" provisions are designed to do the opposite.

II. JUDICIAL LIMITATION OF MINORITY LANGUAGE RIGHTS PROTECTIONS

The following sections discuss how courts are currently limiting the language protections enacted in the 1960's and 1970's. Of particular note is how the courts' limitations began with the onset of the new "official

96. *Id.* at 210.

97. *Id.* at 211. Interestingly, the new Ebonics movement adds additional support to this point. A 1989 study found that Black English-speaking students who were taught for three months by teachers trained in the structure of Ebonics showed a nearly 60 percent reduction in the use of Ebonic features in their standard English writing assignments. A control group taught with conventional English used Ebonic elements *more* in writing assignments. In another study, students were divided into three groups. One group was taught reading materials using Ebonics, one with standard English, and one used transitional language with elements of both. At the end of four months, students using Ebonics had gained 6.2 months in their reading skills, compared with only 1.6 months for those using standard English-only materials. Kenneth Cole and James Tobin, *Linguists come to California School District's Defense*, DET. NEWS, Jan. 19, 1997, at A1.

98. CRAWFORD, *supra* note 16, at 231.

99. James Crawford, *Official English Isn't As Good As It Sounds*, in THE REFERENCE SHELF: ENGLISH: OUR OFFICIAL LANGUAGE? 52, 56 (Bee Gallegos ed., 1994).

100. BARON, *supra* note 46, at 192.

101. *Id.* at 193.

102. Brief for Amici Curiae United States Congress at 19 (No. 95-974) (1996 WL 418711).

English" movement. It is disconcerting to see the judiciary, as an "insulated branch" of the American government, react at the same time as legislatures to the political climate.

A. Access to Government

Courts have consistently upheld the bilingual ballot provisions of the Voting Rights Act.[103] However, courts have been unwilling to broadly interpret the Act beyond the bilingual ballot provisions. Initiative petitions[104] are not included in the protections provided by the Voting Rights Act.[105] Similarly, intentions to recall[106] are considered too far removed from the voting booth to fall within the scope of the Voting Rights Act.[107]

B. Employment

The Ninth Circuit was the first circuit to hear a workplace English-only case after the EEOC promulgated guidelines. In *Gutirrez v. County of Los Angeles*,[108] the employer required all employees to speak English during working hours unless translating to non-English-speaking persons. The rule did not apply when employees were on their breaks or lunch hours.[109] One employee brought suit under Title VII, alleging race and national origin discrimination with respect to a term or condition of employment.[110]

The court cited the EEOC Guidelines and noted that English-only rules directly affect an essential national origin characteristic, regardless

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103. The right to vote as contained in the Voting Rights Acts has been interpreted broadly; it is not merely the right to gain physical access to a voting booth but includes the right to an effective vote. Arroyo v. Tucker, 372 F. Supp. 764, 767 (1974); *see also* U.S. v. Metro. Dade County, 815 F. Supp. 1475, 1478 (1993)("The purpose of the Voting Rights Act of 1965 was and is to 'promote practical implementation of the Fifteenth Amendment, and to ensure that no citizen's right to vote is denied or abridged on account of race.'").

104. Voters who wish to amend a constitution, statute, or the like may initiate a petition and circulate the petition to gather enough signatures to place the initiative on the ballot.

105. Delgado v. Smith, 861 F.2d 1489, 1493 (11th Cir. 1988)("the petition process was far too removed from the voting booth"); Montero v. Meyer, 861 F.2d 603, 607 (10th Cir. 1988)("the 'electoral process' to which the minority language provisions of the Act apply does not commence under Colorado law until the Secretary of State certifies the measure is qualified for placement upon the ballot, and that signing of an initiated petition is not 'voting'").

106. Intentions to recall include the notice of an intention to recall a public official being published in a newspaper and the petitions subsequently circulated to place the intention on ballot. Zaldivar v. City of Los Angeles, 590 F. Supp 852, 853 (C.D.Cal. 1984).

107. *Id.* at 855 ("The Court cannot reasonably conclude that such conduct violates the Act when it is merely the first step in a process which might ultimately lead to the holding of an election to recall an elected official.").

108. 838 F.2d 1031 (9th Cir. 1988).

109. *Id.* at 1037.

110. *Id.* at 1036.

of the ability to comply. Moreover, the court articulated a standard for weighing the proffered business justification for the English-only rule:

> [T]he justification must be sufficiently compelling to override the discriminatory impact created by the challenged rule. In addition, the practice or rule must effectively carry out the business purpose it is alleged to serve, and there must be available no acceptable less discriminatory alternative which would accomplish the purpose as well.[111]

The court discarded all the proffered business justifications as insufficient to overcome the presumption against the English-only rule.[112]

The *Gutirrez* decision illustrates the idea that from the inception of the civil rights legislation until the mid-eighties, the federal government, agencies, and courts equated language restrictions with national origin discrimination. However, in 1992, the Ninth Circuit abandoned the national origin protections they had earlier recognized in Title VII. In *Garcia v. Spun Steak Co.*,[113] the Ninth Circuit expressly rejected the EEOC Guidelines and adopted a balancing test utilized in a pre-Guidelines decision by the Fifth Circuit in *Gloor*.[114]

The Ninth Circuit's express rejection of the EEOC Guidelines was a surprising decision for several reasons. First, the court had utilized the Guidelines just five years earlier in *Gutirrez*.[115] Second, the court stated that nothing in Title VII indicated that English-only rules should be presumed discriminatory.[116] Third, and most importantly, the general rule is that administrative interpretations by the enforcing agency are entitled to great deference-a court must find compelling reasons to reject the administrative guidelines.[117] The Ninth Circuit's reasons for rejecting the EEOC

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111. *Id.* at 1041-42 (citations omitted).

112. The rejected business justifications were: (1) the United States is an English-speaking country, and California is an English-speaking state; (2) the prevention of turning the workplace into a "Tower of Babel"; (3) the promotion of racial harmony; (4) the supervisors may not understand or speak Spanish, thus hindering their supervisory control; and (5) the California Constitution declares English the official language of California. *Id.* at 1042-44.

113. 998 F.2d 1480 (9th Cir. 1992), *vacated as moot*, 510 U.S. 1190 (1994)).

114. *Id.* at 1489-90.

115. *Gutirrez*, 838 F.2d at 1039. It should also be noted that this was the first time the Ninth Circuit did not cite EEOC guidelines with approval. *Garcia*, 13 F.3d at 299 (Reinhardt, J. dissenting) (citing Fragrante v. City and County of Honolulu, 888 F.2d 591, 595 (9th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990) and Jurado v. Eleven-Fifty Corp., 813 F.2d 1406, 1411 (9th Cir. 1987)).

116. *Garcia*, 998 F.2d at 1490. The court rejected the adverse effects presented by the plaintiff. Of particular interest is that the same adverse effects are noted in the EEOC Guidelines as the reasons for the rebuttable presumption of discrimination. *See* 29 CFR § 1606.7.

117. *Garcia*, 13 F.3d at 299 (Reinhardt, J. dissenting) (citing EEOC v. Commercial Office

Guidelines were hardly compelling. In *Gloor*, the Fifth Circuit adopted a balancing test because the EEOC had not issued any guidelines for workplace English-only rules.[118] The Ninth Circuit offered no explanation for going back to a rule implemented only because the EEOC had yet to offer guidance.[119]

The *Garcia* court held that the plaintiffs did not present a prima facie case of national origin discrimination. Most notably, the court rejected the three proffered adverse effects: (1) denial of the ability to express cultural heritage on the job, (2) denial of a privilege of employment enjoyed only by English-only speakers, and (3) creating an atmosphere of inferiority, isolation and intimidation.[120] The court rejected the first two effects by holding that Title VII does not protect privileges and that there cannot be a disparate impact if the employee can "readily comply" with the rule.[121] The Court rejected the last effect by holding that there was insufficient evidence presented in this specific case that the rule created a hostile environment.[122]

Products Co., 486 U.S. 107, 115 (1988)). *See also* Wiley, *supra* note 32, at 566-69 (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975)).

118. *Gloor*, 618 F.2d at 268. The requirements for establishing a prima facie case are: "(1) the existence of adverse effects of the policy; (2) that the impact of the policy is on terms, conditions, or privileges or employment of the protected class; (3) that the adverse effects are significant; and (4) the employee population in general is not affected by the policy to the same degree." Dan Cooperider & Stephen Wiss, *The Limits of Deference: The Ninth Circuit Rejects EEOC Guidelines on English-Only Rules in the Workplace-Garcia v. Spun Steak*, 25 GOLDEN GATE U.L. REV. 119, 137 (1995) (citing *Garcia*, 998 F.2d at 1486).

119. *Garcia*, 998 F.2d at 1489 ("We have been impressed by Judge Rubin's pre-Guidelines analysis for the Fifth Circuit in [*Gloor*]."). Commentators are concerned with the rejection of the EEOC Guidelines for the balancing test largely because this disparate impact analysis is unworkable in workplace English-only cases because: (1) the policy is not facially neutral, as disparate impact analysis requires, because the policy exclusively impacts national origin groups other than those whose primary language is English, and (2) the statistical data required to demonstrate the disparate impact is nearly impossible to produce. Stephanie L. Kralik, *Civil Rights-The Scope of Title VII Protection for Employees Challenging English-Only Rules-Garcia v. Spun Steak Co.*, 67 TEMP. L. REV. 393, 395 and 413 (1994). *See also* Cooperider & Wiss, *supra* note 118, at 147 (citing Perea, *supra* note 17, at 289).

120. *Garcia*, 998 F.2d at 1486-87.

121. *Id.* at 1487. The dissenting justice stated the concern with an analysis that weighs the "ability to comply":

> [The majority] concluded that bilingual employees do not suffer significant adverse effects from an English-only rule because they have the 'choice' of which language to employ, and can thus 'readily comply' with the rule. This analysis demonstrates a remarkable insensitivity to the facts and history of discrimination. Whether or not the employees can readily comply with a discriminatory rule is by no means the measure of whether they suffer significant adverse consequences. Some of the most objectionable discriminatory rules are the least obtrusive in terms of one's ability to comply: being required to sit in the back of the bus, for example; or being relegated during one's law school career to a portion of the classroom dedicated to one's exclusive use.

Garcia, 13 F.3d at 298 (Reinhardt, J. dissenting).

122. *Garcia*, 998 F.2d at 1488.

The dissenting justice in *Garcia* stated:

> Language is intimately tied to national origin and cultural identity: its discriminatory suppression cannot be dismissed as an 'inconvenience to the affected employees. . . . English-only rules not only symbolize a rejection of the excluded language and the culture it embodies, but also a denial of that side of an individual's personality.[123]

This statement parallels the reasoning of the EEOC for creating the rebuttable presumption of discrimination in its guidelines. This may be an isolated case; however, the Ninth Circuit opened the door for national origin discrimination in the workplace-a door previously closed by Congress and the EEOC.

C. Education

Bilingual education remains a matter of local discretion. Current bilingual education policy lacks judicial interpretation which defines what a bilingual education must entail. In order to show that a particular bilingual educational policy is discriminatory, a challenger must show that the policy has a discriminatory intent.

Although the EEOA and United States Supreme Court's decision in *Lau*[124] seem to establish protection for bilingual education, education has never been held by the United States Supreme Court to be a fundamental right.[125] In *Lau*, the Supreme Court did not reach the constitutional question of whether the educational program violated the equal protection clause.[126] The Court's decision to refrain from holding that education is a fundamental right and the lack of suggested remedies for providing an equal education indicated that the Court would not create specific minority language rights in education.[127]

A task force appointed by the United States Office of Civil Rights issued a report in 1975 indicating that the way to enforce the Supreme Court's decision in *Lau* was to mandate bilingual programs.[128] The Office

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123. *Garcia*, 13 F.3d at 298 (Reinhardt, J. dissenting).

124. *See supra* text accompanying notes 38-54.

125. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, (noting that although education is an important interest, it is not guaranteed by the Constitution); Guadalupe Organization, Inc. v. Tempe Elementary School, 587 F.2d 1022, 1026 (9th Cir. 1978) ("[E]ducation, although not an important interest, is not guaranteed by the Constitution. Therefore, it is not a fundamental right.").

126. *Lau*, 414 U.S. at 566.

127. BARON, *supra* note 46, at 172.

128. CQ Researcher, *Bilingual Education, in* THE REFERENCE SHELF; ENGLISH: OUR OFFICIAL

of Civil Rights reacted to the report by explaining that the so-called *Lau* remedies were *only* guidelines, but added that the burden of proving the acceptability of alternatives to bilingual programs rested on the school districts involved.[129]

Although the EEOA requires school districts to "take appropriate action to overcome language barriers," it does not define appropriate action.[130] In addition, the EEOA does not provide criteria for a court to evaluate whether or not a school district has taken such action.[131] In *Castaneda v. Pickard,*[132] the Fifth Circuit articulated a three-part analysis that some courts have been willing to follow.[133] The *Castaneda* guidelines require that bilingual instruction programs must: (1) be based on educationally recognized theory, (2) provide the resources and trained personnel necessary to transfer theory into effective instructional practices, and (3) must show measurable positive results within a reasonable amount of time.[134] While the *Castaneda* court provided the guidelines that other courts might use in evaluating bilingual education programs, it also stated

> [c]ourts should not substitute their educational values and theories for the educational and political decisions properly reserved to local school districts and the expert knowledge of educators, since they are ill equipped to do so.[135]

Clearly, bilingual education remains a highly discretionary arena for local school districts.

In addition to finding no specific remedies in the bilingual mandates, some courts now require an element of intent to show that differential impact is discriminatory. In *Gomez v. Illinois State Bd. of Educ.*, the Seventh Circuit held that the EEOA permits the state to set up its own bilingual education program and delegate to local school districts the primary burden of implementing it.[136] In addition, the *Gomez* court held that Title VI, like the equal protection clause, is violated only by conduct

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LANGUAGE? 98, 102-103 (Bee Gallegos eds., 1994).

129. *Id.*

130. 20 U.S.C. 1703(f) (1994).

131. Teresa P. v. Berkeley Unified Sch. Dist., 724 F. Supp. 698, 712 (N.D.Cal. 1989).

132. 648 F.2d 989 (5th Cir. 1981).

133. *See, Teresa P.*, 724 F. Supp. at 712 ("the clearest statement of the EEOA's appropriate action requirement is set forth in *Castaneda v. Pickard*"); Gomez v. Illinois State Bd. of Educ., 811 F.2d 1030, 1041 (7th Cir. 1987) (the *Castaneda* guidelines need fine tuning, but nonetheless provide a helpful analytic structure).

134. *Castaneda*, 648 F.2d at 1009-10.

135. *Teresa P.*, 724 F. Supp. at 713 (quoting *Castaneda*, 648 F.2d at 1009).

136. 811 F.2d at 1040.

"animated by intent" to discriminate and not by conduct which, although "benignly motivated," has differential impact on persons of different races.[137] Although there are guarantees of a bilingual education, courts continue to leave most discretion to local school districts which does not guarantee an *effective* bilingual education.

III. THE ROLE OF THE JUDICIARY IN THE "NEW OFFICIAL ENGLISH" MOVEMENT.

The language rights debate has proceeded in several stages. Until the twentieth century, neither federal nor state governments viewed language rights as a legal issue, whether to restrict or protect. The twentieth century has seen several waves of minority language rights movements. The post-World War periods saw attempts to limit non-English languages taught in schools but the courts tempered this movement.[138] The 1960's brought in a era protective of minority language rights. The federal government and the courts began affirmatively protecting minority language rights through civil rights legislation. The 1980's and 1990's, however, have seen a reverse trend — a

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137. *Id.*

138. In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the United States Supreme Court reviewed the constitutionality of a Nebraska law that prohibited the teaching of any language other than English until students reached the eighth grade. The Nebraska Supreme Court had affirmed the conviction of a teacher who taught Biblical stories in German. The United States Supreme Court struck down the law as violating the Fourteenth Amendment. Despite the anti-German sentiment after World War I, the Court stated that "[m]ere knowledge of the German language cannot reasonably be regarded as harmful. Heretofore it has been commonly looked upon as helpful and desirable." *Id.* at 400. Further, the Court stated:

> [T]he 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 a ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution.

Id. at 401.

> The Court basically held that there as no reason for this restrictive law:
> The desire of the Legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate. Unfortunate experiences during the late war and aversion toward every character of truculent adversaries were certainly enough to quicken that aspiration. But the means adopted, we think, exceed the limitations upon the power of the state and conflict with rights assured to plaintiff in error. . . No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed. We are constrained to conclude that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the state.

Id. at 402-403. For a further discussion of post-World War I anti-German sentiment, *see* Perea, *supra*, note 17 at 329-332.

trend toward the restriction of minority languages and the increased protection of the English language. It is clear from the federal "official English" movement that many in Congress have no intention of tempering this movement but instead have joined it.[139] The courts are the last step in a path leading to the total erosion of minority language rights. The First and Fourteenth Amendments are the tools courts may utilize in this final step. The following sections discuss how the courts can use these provisions to prevent the "official English" movement from eliminating minority language rights.

A. The First Amendment

The First Amendment guarantees that "Congress shall make no law . . . abridging the freedom of speech . . . ."[140] To determine whether a law violates the First Amendment, a court must address two issues. The first is whether the government can regulate what is being said. Second, the court must determine if the *manner* of regulation violates the First Amendment.

Whether the government can regulate speech turns on two broad categories of analysis for abridgment of speech. The first category is restricting speech because of its content, i.e., the ideas or information contained in it, or its general subject matter. The second category is restricting speech to avoid an "evil" unconnected with the speech's content, but rather with the physical qualities of the communication. This is usually referred to as expressive conduct or symbolic speech.[141] The "official English" question falls within both categories. It may be viewed as a regulation on what the speaker is saying[142] or a regulation on how the speaker chooses to voice his/her message.[143]

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139. President Clinton stated that he would have vetoed the ELEA if it had passed the Senate. Mike Dorning, *House Clears English-Only Measure After Emotional Debate,* CHI. TRIB., Aug. 2, 1996, at 3 (1996 WL 2695623). "The Clinton Administration has opposed the bill as objectionable, unnecessary, inefficient, and divisive. The Administration observed that English is universally acknowledged as the common language of the United States, but stated that nationhood is not based on language alone. Americans are also united by constitutional rights such as freedom of speech, representative democracy, respect for due process, and equal protection under the law, the Administration states. The proposed legislation is contrary to each of these principles, the Administration contends." The Week in Congress, Cong. Index (CCH) 72 (Bill Would Make English Official Language, Aug. 2, 1996). His veto, although clearly a step in the right direction, is only a partial solution. There is the possibility that Congress will override his veto on any of the "official English" proposals. Furthermore, his veto would guarantee that Titles VI and VII, the Voting Rights Act, the Equal Educational Opportunity Act and the Bilingual Education Act stay on the books, but this does not prevent judicial erosion of the effectiveness of these statutes.

140. U.S. CONST. amend. I.

141. LAWRENCE TRIBE, AMERICAN CONSTITUTION 792 (2nd Ed. 1988).

142. "Official English" proponents argue that speaking a language other than English may allow the speaker to undermine a supervisor's authority, or other divisive conduct, without the listener or supervisor knowing what is being said.

143. Proponents of the official English movement argue that choice of language "is a mode of

Assuming that the government may regulate a specific type of speech, the First Amendment also limits how the government can regulate that speech. There are several limits on how speech can be restricted but the overbreadth doctrine is the key issue for minority language restrictions. Under the overbreadth doctrine;

> an individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face 'because it also threatens others not before the court—those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid.'[144]

The overbreadth must be real and substantial.[145] The reason for the overbreadth doctrine is often called the chilling effect: "the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court."[146] Parties not before the court will self-censor, even though their speech is constitutionally-protected.[147]

Overbreadth relates strongly to the new "official English" movement because many of the statutes contain broad language with narrow exceptions. For example, several statutes take away the option of speaking in another language, even for such core First Amendment speech as communication between a constituent and his/her legislator, wedding ceremonies, government employees commenting on matters of public concern, and providing governmental entitlements and services.

B. The Fourteenth Amendment

The Fourteenth Amendment prevents a government from denying persons equal protection of the laws.[148] Courts use a three-tier system of review when analyzing equal protection challenges. The highest level of review, strict scrutiny, is reserved for suspect classifications,[149] usually

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conduct-a nonverbal expressive activity," *Yniguez*, 69 F.3d at 934.

144. Board of Airport Comm'rs. of the City of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569, 575 (1987).

145. *Id. See also*, Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

146. *Id.*

147. For a discussion, *see*, Martina Stewart, *English-Only Laws, Informational Interests, and the Meaning of the First Amendment in a Pluralistic Society*, 31 HARV. C.R.-C.L. L. REV. 539, 543-544 (1996) ("[T]he overbreadth doctrine protects the rights of speakers who may fear challenging the disputed regulation on their own.").

148. U.S. CONST. amend. XIV, § 1.

149. Suspect classifications are defined as classifications of discrete and insular minorities. United States v. Carolene Products Co., 304 U.S. 144, 153 (1938). A minority is discrete and insular when: (1) there has been a history of purposeful discrimination against the minority (City of Cleburne

race, ethnicity and national origin.[150] Governmental action at this level of review must be narrowly tailored to meet a compelling governmental interest.[151] Mid-level review, heightened scrutiny, is reserved for semi-suspect classifications, usually gender and legitimacy.[152] This level requires that governmental action be substantially related to an important governmental interest.[153] The lowest level of review, rational basis, is reserved for governmental action against a class of persons who are not a suspect class.[154] Rational basis review simply requires that the classification bear a rational relation to a legitimate governmental interest.[155] Strict scrutiny usually results in the governmental action being struck down, while most governmental action survives rational basis review.[156]

Classifications based on speaking a language other than English[157] have usually received rational basis review.[158] However, the Supreme Court has never reviewed an "official English" rule for equal protection violations.[159] There are two ways a court could invoke strict scrutiny to review language classifications. First, language classifications could be viewed by the courts as national origin discrimination or, second, language classifications could become a suspect class on their own.

Minority language classifications are national origin discrimination because

> [u]nlike facially neutral devices such as a minimum height requirement or a standardized test which may have a disparate impact upon a protected class, Speak-English-Only rules impact

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v. Cleburne Living Ctr., 473 U.S. 439, 439-447 (1985)), (2) there is prejudice based on inaccurate stereotypes of the minority (Craig v. Boren, 429 U.S. 190 (1976)), (3) the class is defined by an immutable trait (*Cleburne*, 473 U.S. at 447), and (4) the group is politically powerless (Plyler v. Doe, 457 U.S. 202, 210 (1982)).

150. Hernandez v. Texas, 347 U.S. 475, 477 (1954) (Mexican-Americans are a suspect class); Korematsu v. United States, 323 U.S. 214 (1944) (Japanese-Americans are a suspect class).

151. Palmore v. Sidoti, 466 U.S. 429, 432-33 (1984).

152. Clark v. Jeter, 486 U.S. 456, 461 (1988).

153. *Id.*

154. Romer v. Evans, 116 S.Ct. 1620, 1629 (1996).

155. San Antonio Sch. Dist. Indep. v. Rodriguez, 411 U.S. 1, 40 (1973).

156. *See generally* Gerald Gunther, *The Supreme Court, 1971 Term-Forward: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1971); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.3 at 583 (4th ed. 1990).

157. Hereinafter, the term "language classifications" will be used.

158. Soberal-Perez v. Heckler, 717 F.2d 36 (2nd Cir. 1983), *cert. denied*, 466 U.S. 929 (1984); Frontera v. Sindell, 522 F.2d 1215 (6th Cir. 1975); Carmona v. Sheffield, 475 F.2d 738 (9th Cir. 1973); *Guadalupe Organization Inc.*, 587 F.2d at 1022.

159. The Court has not done so under equal protection; however, the Court did review a language restriction under substantive due process analysis. *See, Meyer*, 262 U.S. 390. In *Hernandez v. New York*, 500 U.S. 352, 369-72 (1991), the Court did state (in a plurality decision) that language can be treated as a surrogate for *race* for purposes of equal protection.

> national origin minorities almost exclusively. Just as skin color and surname often identify one's racial identity, one's primary language and accent commonly identify national origin.[160]

Several courts have already stated that language classifications are intimately tied to national origin discrimination.[161] The EEOC Guidelines on Discrimination Because of National Origin and HEW's interpretation of Title VI equate linguistic characteristics with national origin. In addition, statistics demonstrate the correlation between national origin and language. For example, ninety-seven percent of individuals who speak Spanish are Hispanic.[162]

Language classifications can also become a suspect class, independent of the tie to national origin, because persons who speak minority languages are discrete and insular minorities. A minority is discrete and insular when: (1) there has been a history of purposeful discrimination against the minority, (2) there is prejudice based on inaccurate stereotypes of the minority, (3) the class is defined by an immutable trait, and (4) the group is politically powerless.[163] As discussed throughout this comment, there has been a history of purposeful discrimination against language minorities.[164] Second, the prejudice against language minorities is based on inaccurate stereotypes.[165] Third, the class is defined by an immutable trait which is their national origin.[166] Finally, language minorities are

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160. Edward M. Chen, *Garcia v. Spunsteak Co.: Speak-English-Only Rules and the Demise of Workplace Pluralism*, 1 ASIAN L.J. 155 (1994) (citing Perea, *supra* note 12, at 289-92).

161. *See Gutierrez*, 838 F.2d at 1038, 1041; *Garcia*, 618 F.2d at 267; *Yniguez*, 69 F.3d at 948; Olagues v. Russoniello, 770 F.2d 791 (9th Cir. 1995); Odima v. West Tucson Hotel Co., 991 F.2d 595, 601 (9th Cir. 1993) ("accent and national origin are obviously inextricably intertwined"); *Hernandez*, 500 U.S. at 370-72 (language can be treated as a surrogate for race).

162. Leonardo F. Estrada, *The Extent of Spanish/English Bilingualism in the United States*, 15 AZTLAN INT'L J. CHICANO STUD. RES. 379, 381 (1984); *see also* STATISTICAL RECORD OF ASIAN AMERICANS (Susan B. Gall & Timothy L. Gall eds., 1983).

163. See *supra* note 148.

164. *See supra* text accompanying notes 14-22. The new "official English" movement seems to be targeted specifically at Hispanics and Southeast Asians. Perea, *supra* note 17, at 343-44 ("The cause of the official English movement is the immigration of people unpopular in the eyes of the majority. . . . Many commentators agree that the cause of the official English is the large, and largely unwelcome, immigration of many Hispanics and Southeast Asians during recent decades.")(citing Califa, *supra* note 30, at 297-99 (noting that the influx of Cubans, Mexicans and Southeast Asians after 1959 caused 'concern among immigration restrictionists')); Joshua A. Fishman, *"English Only": Its Ghosts, Myths, and Dangers*, 74 INT'L J. SOC. LANGUAGE 125, 133-34 (1988); 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)). The "official English" movement is targeting specific national origin groups through their language-by their very acts they are equating a minority language with national origin.

165. *See supra* text accompanying notes 73, 76, 93-99 (discussing, among other things, the prevalence of English and willingness and ability to learn English).

166. *See supra* text accompanying note 160 (statistical relationship between language and national origin).

generally politically powerless, especially when governments do not mandate access through provisions like the Voting Rights Act.[167]

While the Supreme Court may not equate language classifications with national origin classifications or create a new suspect classification, the Court has indicated that equal protection may still find strength in rational basis review. In *Romer v. Evans*, the Supreme Court reviewed the constitutionality of Colorado's Amendment 2, which "precluded all legislative, executive or judicial action at any level of government designed to protect the status of persons based on 'homosexual, lesbian, or bisexual orientation.'"[168] The Court struck down the Amendment on rational basis review: "We must conclude that Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else."[169] The Court noted that even in an "ordinary equal protection case," the Court insists on a rational link between a classification and a state objective.[170]

Amendment 2 provides a powerful parallel to certain language restrictions. Amendment 2 was a negative right enactment (mandating that sexual orientation cannot be protected) like some of the "official English" enactments (minority language rights may not be protected; or rather, only English will be protected). "Official English" legislation carves minority language speakers out of equal protection of the laws. Stated another way,

> Although language minorities, unlike homosexuals, do not currently face legal discrimination, amendments to state constitutions that declare English to be a state's official language place language minorities in the same legal position as homosexuals under Amendment 2. . . . None of the amendments expressly legalizes discrimination on the basis of language, but the amendments implicitly or explicitly recognize the legislature's right to implement English as the state's official language. The effect of these amendments is to render language minorities powerless to attack governmental actions that may harm their interests, as the government may justify its actions by asserting that it is using its constitutional mandate to make English the state's official language.[171]

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167. *See supra* accompanying note 28-30.

168. 116 S.Ct. at 1623.

169. *Id.* at 1629.

170. *Id.* at 1627.

171. Daniel J. Garfield, *Don't Box Me In: The Unconstitutionality of Amendment 2 and English-Only Amendments*, 89 NW. U. L. REV. 690, 691-92 (1995).

As the Supreme Court stated in *Romer*, "[i]t is a status-based enactment divorced from any *factual* context from which [a court] could discern a relationship to legitimate state interests; it is a classification of persons[172] undertaken for its own sake, something the Equal Protection Clause does not permit."[173]

To pass constitutional muster under the *Romer* analysis, the state or federal government must show legitimate reasons to place languages in a hierarchy. Particularly relevant to language rights, the Court stated:

> Central to both the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. 'Equal protection of the law is not achieved through indiscriminate imposition of inequalities.' . . . A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the law in the most literal sense. . . . [L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. '[I]f the constitutional perception of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.[174]

There is every indication that the new "official English" legislation stems from "an animosity towards the class of persons affected."[175] The next section examines this premise in terms of recent legislation.

C. *The United States Constitution Applied to the New Movement*

1. The Arizona Amendment

In 1988, Arizona voters passed Article XXVIII of the Arizona Constitution in a ballot initiative.[176] Yniguez, a bilingual Hispanic woman

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172. "Official English" legislation is the classification of persons whose primary or native language is not English, as compared to those whose primary language is English.

173. *Romer*, 116 S. Ct. at 1629. Emphasis added. Garfield's comment predates the Supreme Court's decision in *Romer* but accurately predicted that the Supreme Court would not utilize strict scrutiny but rather rational basis to strike down Amendment 2.

174. *Id.* at 1628.

175. *See supra* note 22 and accompanying text.

176. *See* app. C. Article XXVIII prohibits any state official or employee from speaking or providing documents in any language other than English, with limited exceptions for education, for

employed by the Department of Administration, handled medical malpractice claims against the state of Arizona.[177] Before Article XXVIII passed, Yniguez communicated in Spanish to unilingual Spanish-speaking claimants, while also conversing in Spanish and English to bilingual claimants.[178] Article XXVIII Section 3 prohibits the "state from using or requiring the use of languages other than English."[179] State employees who fail to obey the Arizona Constitution are sanctioned; therefore, Yniguez ceased speaking Spanish after passage of Article XXVIII.[180]

Yniguez filed suit against the State of Arizona, among other defendants, claiming Article XXVIII violated the First and Fourteenth Amendments of the United States Constitution, as well as federal civil rights laws.[181] The United States District Court for the District of Arizona held Article XXVIII unconstitutional as a violation of the First Amendment for being facially overbroad.[182] Since Arizona Governor Mofford, who criticized the Article from its inception, decided not to appeal the district court decision, Arizonans for Official English and the Arizona Attorney General intervened post-judgment for the purpose of pursuing an appeal.[183] The district court denied the motions for intervention. The Ninth Circuit reversed, but limited the Attorney General's motion to arguing the constitutionality of Article XXVIII.[184]

Arizona's Article XXVIII is the most restrictive "official English" provision enacted to date.[185] The Ninth Circuit struck the amendment down on first amendment grounds, most notably overbreadth.[186]

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protecting rights of criminal defendants or victims of crime, and to "protect public health or safety".

177. *Yniguez*, 69 F.3d at 924.

178. *Id.*

179. See app. C.

180. *Yniguez*, 69 F.3d at 924.

181. *Id.* at 925.

182. *Id.*

183. *Id.* at 926.

184. *Id.*

185. "The article's plain language broadly prohibits all government officials and employees from speaking languages other than English in performing their official duties, save to the extent that the use of non-English languages is permitted pursuant to the provision's narrow exceptions section." *Id.* at 931.

186. *Yniguez*, 69 F.3d at 931-38. In its analysis, the Ninth Circuit divided the First Amendment issues into four categories: (1) overbreadth, (2) speech v. expressive conduct, (3) affirmative v. negative rights, and (4) public employee speech. "Under the overbreadth doctrine, an individual whose own speech may constitutionally be prohibited under a given provision is permitted to challenge its facial validity because of the threat that the speech of third parties not before the court will be chilled." *Id.* (citing Board of Airport Comm'rs v. Jews for Jesus, 482 U.S. 569 (1987)). In addition, the overbreadth must be real and substantial. *Id.* at 931. The Ninth Circuit noted that Article XXVIII could not be more inclusive of persons in government service. *Id.* at 932.

The district court decision was even more helpful in discussing the overbreadth of Article

In its decision, the court noted that the government generally has more latitude in regulating "expressive conduct" or "symbolic speech" when "the regulation is not directed at the communicative nature of that conduct."[187] The main arguments of the appellants, Arizonans for Official English, were (1) that the amendment regulates expressive conduct, not speech, and (2) the case law demonstrates that courts do not recognize the language right of anyone whose primary language is not English, most notably the right to state services in their native language.[188] The Ninth Circuit quickly discarded the argument that choice of language is expressive conduct:

> [T]he fact that such 'conduct' is shaped by a language-that is, a sophisticated and complex system of understood meanings-is what makes it speech. Language is by definition speech, and the regulation of any language is the regulation of speech . . . . A bilingual person does, of course, make an expressive choice by choosing to speak one language rather than another . . . . Nonetheless, this expressive effect does not reduce choice of language to the level of 'conduct'.[189]

The court concluded that

> [t]o call a prohibition that precludes the conveying of information to thousands of Arizonans in a language they can comprehend a mere regulation of 'mode of expression' is to miss entirely the basic point of First Amendment protections.[190]

XXVIII. Yniguez v. Mofford, 730 F. Supp. 309 (D. Ariz. 1990). In particular, the district court noted that the amendment forbids any state employee from speaking any language other than English except in a few limiting circumstances, with examples of which employees were so limited: (1) state legislators speaking to his/her constituents, (2) state employees commenting on matters of public concern, and (3) judges performing wedding ceremonies. *Id.* at 314.

The Ninth Circuit addressed the two arguments presented by the appellants: (1) Article XXVIII interferes with expressive conduct, not pure speech, and (2) the state cannot be compelled to provide information to all members of the public in a language that they can comprehend. *Yniguez*, 69 F.3d at 934.

187. *Id.*

188. *See supra* text accompanying note 161.

189. *Yniguez*, 69 F.3d at 934-35 (citations omitted). The Ninth Circuit held that this was similar to the United States Supreme Court's decision in Cohen v. California, 403 U.S. 15 (1971), when it upheld the right to "say 'fuck the draft' rather than 'I strongly oppose the draft.' Like the proponents of Article XXVIII, the state in *Cohen* had described Cohen's choice of language as conduct equivalent to burning a draft card. The Court unequivocally rejected that comparison, stating that Cohen's conviction rested 'solely upon speech.'" *Yniguez*, 69 F.3d at 935.

190. *Id.* at 936.

The Ninth Circuit also dismissed the relationship to the recent trend of cases that do not recognize a right to state services in one's native language. The court acknowledged that although, traditionally, "non-English speakers have no affirmative right to compel state government to provide information in a language that they can comprehend,"[191] the appellants were confusing negative with affirmative rights. The court held that this case was not about requiring a state to provide information in a language other than English, but rather a case where

> the state cannot, consistent with the First Amendment, gag the employees currently providing members of the public with information and thereby effectively preclude large numbers of persons from receiving information that they have previously received.[192]

The Ninth Circuit also had to grapple with the distinction between private speech and public employee speech. It seems clear that it would be unconstitutional to prohibit the speaking of languages other than English for an entire state or country.[193] However, the Court also noted that the Supreme Court "has made clear that it is the government's interest in performing its functions efficiently and effectively that underlies its right to exercise greater control over the speech of public employees."[194] The greater control, however, is a limited doctrine.

The Supreme Court cases

> also establish . . . that public employee speech deserves far greater protection when the employee is speaking not simply upon employment matters of personal or internal interest but instead 'as a citizen upon matters of public concern.'. . . In such cases, the

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191. *Id.*

192. *Id.* at 936-37. Note the similarity between this analysis and that presented by the *Romer* decision. Although *Romer* was in the context of equal protection, the premise is the same. A state may not be affirmatively obligated to provide information or services in a language other than English, but a state cannot prevent employees, agencies, or others from doing so if they choose. The affirmative rights v. negative rights doctrine find strength in both First Amendment and equal protection analysis.

193. *See id.* at 937 (citing *Meyer*, 262 U.S. at 401). In an interesting twist on the subject, one author stated that "although Article XXVIII restricts the government official or employee instead of the citizen, the effect is identical. The inability to understand English would preclude citizens from speaking to the elected representatives and to government bureaucrats, preventing the citizens from obtaining government services to which they otherwise were entitled. Article XXVIII thus accomplishes indirectly that which Arizona cannot do directly, rendering it unconstitutional." Scott H. Angstreich, *Speaking in Tongues: Whose Rights at Stake? Yniguez v. Arizonans for Official English*, 19 HARV. J.L. & PUB. POL'Y 634, 642 (Winter 1996).

194. *Yniguez*, 69 F.3d at 939.

> content of the speech requires that the government's concern with efficiency and effectiveness be balanced against the public employee's first amendment interest in speaking.[195]

The Court held that the balance tips in favor of the public employee's interest in speaking in this case:

> The employee speech banned by Article XXVIII is unquestionably of public import. It pertains to the provision of governmental services and information. Unless that speech is delivered in a form that the intended recipients can comprehend, they are likely to be deprived of much needed data as well as of substantial public and private benefits.[196]

The Court emphasized the fact that efficiency and effectiveness are actually decreased with the amendment.[197]

The other state justifications for the law are: "protecting democracy by encouraging 'unity and political stability'; encouraging a common language; and protecting public confidence."[198] The court quickly dismissed these claims, as the state never presented "more than 'assertion and conjecture to support its claim.'"[199] The court found support from the United States Supreme Court decisions in *Meyer v. Nebraska*,[200] and *Farrington v. Tokushige*,[201]

> As in *Meyer*, the *Tokushige* Court recognized the validity of the interests asserted in defense of the statute. Nonetheless, citing *Meyer's* invalidation of the Nebraska law, it found that the statute's promotion of these interests was insufficient to justify infringing on the constitutionally protected right to educate one's children to become proficient in one's mother tongue. . . . Although there is probably no more effective way of encouraging

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195. *Id.* (citations omitted).

196. *Id.* at 940. The Court listed circumstances where needed speech would be prohibited: residents cannot obtain information regarding state and local social services, state legislators cannot communicate with some of their constituents, residents cannot communicate with state or local housing offices or clerks of court. *Id.* at 941-42. The reader should also note the relationship of this argument to equal protection analysis in that the court must weigh the need for efficiency with the need for the individual to have equal protection of the laws.

197. *Id.* at 942.

198. *Id.* at 944.

199. *Id.* at 945.

200. 262 U.S. 390 (1923).

201. 273 U.S. 284 (1927).

> the uniform use of English than to ensure that children grow up speaking it, both statutes were struck down on the ground that these interests were insufficient to warrant such restrictions on the use of foreign languages.'[202]

Although the decision may indicate strong limits on employers' ability to control their employees' speech, employees do not have an absolute right to say anything they wish while at their jobs.[203] The focus is on the audience and their interest in the content of the communication.[204]

Despite the fact that the Ninth Circuit's decision addressed many areas of the First Amendment which limit a government's ability to restrict its employees to speak English, providing a useful framework for future cases, the decision did not stand. The United States Supreme Court reversed the Ninth Circuit decision and ordered that the district court decision be dismissed.[205] The Court reversed the Ninth Circuit decision for mootness, holding that there was no case or controversy because Yniguez had left her state job.[206] As a result of this action, the Court passed on an opportunity to definitively present a constitutional framework for "official English" statutes.[207]

2. "Benign" Legislation

Legislation that simply declares English the official language could not be challenged for constitutionality because no one would have standing to bring an action. The legislation itself does not do anything. Assuming there was standing, even this least restrictive legislation could be struck down on equal protection grounds. If a court applied strict scrutiny

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202. *Yniguez*, 69 F.3d at 945-46 (citations omitted).

203. *See* Angstreich, *supra* note 193, at 640.

204. *Id.* (citing Waters v. Churchill, 114 S.Ct. 1878, 1886 (1994)).

205. *Arizonans for Official English*, 65 U.S.L.W. 4169.

206. *Id.* Yniguez attempted to preserve the case on appeal by requesting nominal damages; however, the Court held this was insufficient to save the case because it resembled a "friendly or feigned proceeding" and the Ninth Circuit should have noticed that "a claim for nominal damages, extracted late in the day from Yniguez's general prayer for relief and asserted solely to avoid otherwise certain mootness, bore close inspection." *Id.* The Court refrained from deciding whether Arizonans for Official English and Robert D. Park had standing to intervene but did state that they "have grave doubts" concerning their standing.

207. Although it is the duty of courts to avoid constitutional questions if possible, certain doctrines like overbreadth may allow courts to ignore procedural requirements, such as standing. *See, e.g.*, Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 261-264 (1994); Lisa A. Kloppenberg, *Avoiding Serious Constitutional Doubts: The Supreme Court's Construction of Statutes Raising Free Speech Concerns*, 30 U.C. DAVIS L. REV. 1, 93 (1996).

(by first determining that language classifications are suspect classifications), the state would have to: (1) present a compelling governmental interest, and (2) demonstrate the law was narrowly tailored to meet the interest. The compelling governmental interest in this legislation is most likely national unity.[208] This most would likely be struck down as not being a compelling governmental interest for several reasons. As indicated above, there is no historical basis for declaring English the primary language. In addition, the concern over social strife because of a lack of an official language is likewise unproven.[209] Finally, there is no real threat to the English language. In fact, it is now the true international language.[210] It seems apparent that governments would not be able to demonstrate that declaring English the official language is for a compelling state interest.[211]

If the court utilized a rational basis test like that utilized in *Romer*, the law might pass constitutional muster. The state would have a lesser burden, as they only need to show: (1) a legitimate governmental interest, and (2) the law is rationally related to the governmental interest. The Court stated in *Romer* that a law cannot be a "status-based enactment divorced from any factual context."[212] Again, the debate would focus on whether the court believed that there was a real threat to the English language and that the best way to achieve national unity was with such a law.

This example demonstrates the need for courts to utilize an equal protection analysis, in addition to a First Amendment inquiry, because the equal protection analysis focuses more on the motivations behind the law and can restrict the constitutionality of such laws even when they would pass First Amendment analysis.

3. Wyoming

The Wyoming "official English" statute would most likely pass First Amendment analysis. The law allows for an education exception as well as an exception for information or services provided *orally* in a language other than English. A court is not likely to find that every citizen is enti-

208. Economics, social, and political participation do not seem to be related to this legislation because it provides no restrictions, no mandates, no specific purpose other than to state English is the official language.

209. The examples from Canada are simply not dispositive. As discussed earlier, the conflict is usually about something other than language.

210. Perea, *supra* note 17, at 347.

211. A court would most likely find the statute narrowly tailored but would still strike the law down because there is no compelling state interest.

212. 116 S. Ct. at 1629.

tled to written *and* oral communication in any form with its government in his/her native tongue. The law does not seem to be overbroad because there is likely no chilling effect if the act is given liberal interpretation and provides for no real restrictions. On the face of the statute, there does not seem to be a violation.

The law, however, most likely would be struck down on equal protection grounds. Again, as indicated above, Wyoming would have a very difficult time arguing that there is a compelling interest in limiting all government communications, with the exception of oral communications, to English. Proponents of the law argue that it is justified by the interests in national unity, economics, and greater political and social participation. As indicated above, national unity would probably never be considered a compelling governmental interest. The economic argument fails as well because there is no evidence on costs (whether saved or lost). Additionally, if the government allows for oral communication in another language, it is difficult to fathom how providing an interpreter is less costly than keeping documents on file in another language.

Greater political and social participation are probably considered compelling government interests; however, the manner in which the law attempts to achieve this fails. The law is not narrowly tailored because it mandates policies that just do not work. If an immigrant cannot receive basic or necessary information in order to become a productive member of society, the law is exclusionary rather than inclusionary. As discussed earlier, the best way to help immigrants learn English is to teach them and assist them in their native tongue — not exclude them as a manner of coercing them to learn English.

Under a *Romer* style equal protection analysis, there is likely a legitimate governmental interest in increasing political and social participation, as well as efficiency and national unity. However, the law may not be rationally related to these interests for many of the same reasons indicated above. There is little, if any, evidence to support the idea that laws that force individuals to learn English before participating in society actually work. In fact, the evidence is to the contrary. Wyoming's law is not very restrictive, however, in that it allows governmental transactions in another language if the official so desires. In all likelihood, Wyoming's law would pass *Romer* equal protection analysis but fail strict scrutiny.

4. Federal "Official English" Proposals

The federal government will face the same uphill battles presented above in demonstrating a compelling governmental interest. In addition,

the ELEA and similar proposals are much more restrictive than Wyoming's provisions because they *prohibit* communication in other languages, with few exceptions. Because of these prohibitions, the ELEA and similar proposals are likely to fail a *Romer* analysis because they do exactly what Colorado's Amendment 2 did: they single out classifications from protection of the laws[213] rather than limiting what the government is obligated to do.

Furthermore, the First Amendment would present an obstacle. The ELEA and similar proposals allow only *oral* communication between legislatures and constituents-severely chilling protected speech.[214] The proposals are clearly overbroad, in much the same manner as the Arizona Amendment, because they apply to all branches of government in their official business (including governmental actions, documents, policies, informational material, any other publications, as well as judicial proceedings).[215]

These examples of First and Fourteenth Amendment analysis of English-only laws demonstrate how important it is for the courts to create a consistent constitutional framework. First, courts must utilize the Fourteenth Amendment in addition to the First Amendment when analyzing "official English" statutes because each Amendment tests different issues. Additionally, it is the duty of the courts to temper a political movement so that it does not violate individual rights. The judiciary's role in the "official English" movement is truly that of a counter majoritarian force-restricting the movement before it eliminates all minority language rights.

CONCLUSION

The "official English" movement classifies language minorities "not to further a proper legislative end but to make them unequal to everyone else."[216] The recent actions to erode federal statutory protection of minori-

213. The bill states that services or information may not be provided in another language, as opposed the Wyoming statute which just prevents an affirmative obligation to do so.

214. Fiscal efficiency, which has never been a sufficient justification for limiting protected speech, is the justification for allowing for oral communications.

215. At this point it is also helpful to note the far-reaching impacts of this legislation in terms of repealing the Voting Rights Act, and Titles VI and Titles VII. "Discrimination in voting will re-emerge," because it denies the right to vote to those without English as their primary language. Perea, *supra*, note 17, at 366-67. It would exclude "politically vulnerable groups identified by language and national origin," as well as encouraging employers to prohibit use of other languages. *Id.* In effect, non-English-speaking persons would be eliminated form the government, voting and the workplace. A court simply could not find that such a law is narrowly tailored nor meets a compelling or legitimate state interest.

216. *Romer*, 116 S. Ct. at 1629.

ty language rights could have been tempered by the United States Supreme Court in *Arizonans for Official English v. Arizona*. By dismissing the opportunity to decide *Arizonans for Official English* on substantive grounds, the Supreme Court left the door open for the "official English" movement-a movement justified by nothing less than nativism and prejudice-to eliminate the ground won by the civil rights legislation in the 1960's and 1970's.

LORI A. MCMULLEN
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APPENDIX A: The English Language Empowerment Act of 1996

§ 161. Declaration of official language of Federal Government

The official Language of the Federal Government is English

§ 162. Preserving and enhancing the role of the official language

Representatives of the Federal Government shall have an affirmative obligation to preserve and enhance the role of English as the official language of the Federal Government. Such obligation shall include encouraging greater opportunities for individuals to learn the English language.

§ 163. Official Federal Government activities in English

(a) Conduct of Business. Representatives of the Federal Government shall conduct official business in English.

(b) Denial of Services. No person shall be denied services, assistance, or facilities, directly or indirectly provided by the Federal Government solely because the person communicates in English.

(c) Entitlement. Every person in the United States is entitled: (1) to communicate with representatives of the Federal Government in English. (2) to receive information from or contribute information to the Federal Government in English; and (3) be informed or be subject to official orders in English.

§ 164. Standing

A person injured by a violation of this chapter may in a civil action obtain appropriate relief.

§165. Reform of naturalization requirements

(a) Fluency. It has been the longstanding national belief that full citizenship in the United States requires fluency in English. English is the language of opportunity for all immigrants to take their rightful place in society in the United States.

(b) Ceremonies. All authorized official shall conduct all naturalization ceremonies entirely in English.

§ 166. Application

Except as otherwise provided in this chapter, the provisions of this

chapter shall supersede any existing Federal law that contravenes such provision (such as requiring the use of a language other than English for official business of the Federal Government).

§167. Rule of Construction

Nothing in this chapter shall be construed: (1) to prohibit a Member of Congress or an employee or official of the Federal Government, while performing official business, from communicating orally with another person in a language other than English; (2) to discriminate against or restrict the rights of any individual in the country; and (3) to discourage or prevent the use of languages other than English in an nonofficial capacity.

§168. Affirmation of constitutional protections

Nothing in this chapter shall be construed to be inconsistent with he Constitution of the United States.

§ 169. Definitions

For purposes of this chapter: (1) Federal Government. The term Federal Government means all branches of the national Government and all employees and officials of the national Government while performing official business. (2) Official business. The term official business means governmental actions, documents, or policies which are enforceable with the full weight and authority to the Federal Government, and includes publications, income tax forms, and informational material, but does not include:

(A) teaching of languages;

(B) actions, documents, or policies necessary for
(i) national security issues; or
(ii) international relations, trade, or commerce;

(C)actions or documents that protect the public health or safety;

(D) actions or documents that facilitate the activities of the Census;

(E) actions, documents, or policies that are not enforceable in the United States;

(F) actions that protect the rights of victims of crimes or criminal defendants;

(G) actions in which the United States has initiated a civil lawsuit; or

(H) documents that utilize terms of art or phrases from languages other than English.

APPENDIX B: Wyoming Official-English Statute

§ 8-6-101. **English as official language of Wyoming.**

(a) English shall be designated as the official language of Wyoming. Except as otherwise provided by law, no state agency or political subdivision of the state shall be required to provide any documents, information, literature or other written materials in any language other than English.

(b) A state agency or political subdivision or its officers or employees may act in a language other than the English language for any of the following purposes:

(i) to provide information orally to individuals in the course of delivering services to the general public;

(ii) to comply with federal law;

(iii) to protect the public health or safety;

(iv) to protect the rights of parties and witnesses in a civil or criminal action in a court or in an administrative proceeding:

(v) to provide instruction in foreign and Native American language courses;

(vi) to provide instruction designed to aid students with limited English proficiency so they can make a timely transition to use of the English language in the public schools;

(vii) to promote international commerce, trade or tourism;

(viii) to use terms of art or phrases from languages other than the English language in documents.

APPENDIX C: Arizona Constitution Article XXVIII

§1 English as the official language; applicability

(1) The English language is the official language of the State of Arizona.

(2) As the official language of this State, the English language is the language of the ballot, the public schools and all government functions and actions.

(3) (a) This Article applies to:

(i) the legislative, executive and judicial branches of government,

(ii) all political subdivisions, departments, agencies, organizations, and instrumentalities of this State, including local governments and municipalities,

(iii) all statutes, ordinances, rules, orders, programs and policies,

(iv) all governmental officials and employees during the performance of government business.

(b) As used in this Article, the phrase "This State and all political subdivisions of this State" shall include every entity, person, action or item described in this Section, as appropriate to the circumstances.

§ 2. Requiring this state to preserve, protect and enhance English

§ 2(2). This State and all political subdivisions of this State shall take all reasonable steps to preserve, protect and enhance the role of the English language as the official language of the State of Arizona.

§ 3. Prohibiting this state from using or requiring the use of languages other than English; exceptions

§ 3.(1) Except as provided in Subsection (2):

(a) This State and all political subdivisions of this State shall not act in English and in not other language.

(b) No entity to which this Article applies shall make or enforce a law, order, decree or policy which requires the use of a language other than English.

(c) No governmental document shall be valid, effective or enforceable unless it is in the English language.

§3.(2) This State and all political subdivisions of this State may act in a language other than English under any of the following circumstances:

(a) to assist students who are not proficient in the English language, to the extent necessary to comply with federal law, by giving educational instruction in a language other than English to provide as rapid as possible a transition toEnglish,

(b) to comply with other federal laws,

(c) to teach a student a foreign language as a part of a required or voluntary educational curriculum,

(d) to protect public health or safety,

(e) to protect the rights of criminal defendants or victims of crime.

§4. Enforcement: standing.

A person who resided in or does business in this State shall have standing to bring suit to enforce this Article in a court of record of the State. The Legislature may enact reasonable limitations on the time and manner of bringing suit under this subsection.