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Constitutional Limitations on Official English Declarations

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CONSTITUTIONAL LIMITATIONS ON OFFICIAL ENGLISH DECLARATIONS

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I. INTRODUCTION

> A former President demands the deportation of any immigrant who fails to learn English after five years. Twenty states impose "Americanization" programs to promote . . . "the language of America." And the Governor of Iowa forbids the use of any language but English in gatherings of three or more people or even over the telephone. This was America in 1918. The former President, Theodore Roosevelt, was expressing the nativism of the time, a fear that the waves of European immigrants were diluting American culture and threatening national unity.[1]

In recent years, fears of America losing its unity and identity have resurged, and attempts to protect the official status of the English language in American life have reappeared at the state and federal levels. In 1981, Senator S. I. Hayakawa proposed a constitutional amendment designating English as the official language of the United States.[2] The English Language Amendment (ELA) was subsequently reintroduced in 1983 and 1985.[3] At the state level, the English-only movement has given rise to statutes and constitutional amendments declaring English as the official language.[4] At the local

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1. Reinhold, *Resentment Against New Immigrants*, N.Y. Times, Oct. 26, 1986, § 4, at 6, col. 4.

2. S.J. Res. 72, 97th Cong., 1st Sess., 127 CONG. REC. 7400 (1981).

3. H.R.J. Res. 96, 99th Cong., 1st Sess., 131 CONG. REC. H167 (daily ed. Jan. 24, 1985); S.J. Res. 20, 99th Cong., 1st Sess., 131 CONG. REC. S468 (daily ed. Jan. 22, 1985); 129 CONG. REC. E757-58 (daily ed. Mar. 2, 1983) (statement of Rep. Shumway); S.J. Res. 167, 98th Cong., 1st Sess., 129 CONG. REC. S12,640-44 (daily ed. Sept. 21, 1983) (statements of Senators Huddleston and Simms).

4. Nebraska, in 1920, *see* NEB. CONST. art. I, § 27, and Illinois, in 1923, *see* ILL. ANN. STAT. ch I, para. 3005 (Smith-Hurd 1980), were the only two states which had declared English their official language prior to 1981. Since then, eleven states have followed suit. These states are Virginia, in 1981, *see* VA. CODE ANN. § 22.1-212.1 (1985); Indiana, in 1984, *see* IND. CODE ANN. tit. 1, art. 2, ch. 10 § 1 (1988); Kentucky, in 1984, *see* KY. REV. STAT. ANN. § 2.013 (Michie/Bobbs-Merrill 1985); Tennessee, in 1984, *see* TENN. CODE ANN. § 4-1-404 (1985); Georgia, in 1986, *see* 1986 GA. LAWS 70; California, in 1986, *see* CAL. CONST. art. III § 6; Arkansas, in 1987, *see* 1987 ARK. ACTS 40; Mississippi, in 1987, *see* MISS. CODE ANN. § 3-3-31 (Cum. Supp. 1989); North Carolina, in 1987, *see* N.C. GEN. STAT. § 145-12 (Supp. 1987); North Dakota, in 1987, *see* N.D. CENT. CODE § 54-02-13 (1987); South Carolina, in 1987, *see* S.C. CODE ANN. §§ 1-1-696 to 1-1-698 (Law. Co-op. 1986); Arizona, in 1988, *see* ARIZ. CONST. art. XXXVIII, § 1; Florida, in 1988, *see* FLA. CONST. art. II, § 9; and Colorado, in 1988, *see* COLO. CONST. art. II, § 30.

and municipal level, English-only efforts are even more widespread.[5]

Supporters of the English-only movement base their proposals on what they perceive to be a growing cultural separatism which is threatening to the unity and political stability of the nation.[6] Proponents warn that, without the strong bond of a common language, bilingualism and biculturalism will give rise to the internal dissent and political instability prevalent in such countries as Canada, Belgium, and Sri Lanka.[7] Opponents of the English-only movement, on the other hand, maintain that the movement is a veiled expression of racism and xenophobia which seeks to restrict the use of minority languages and curtail bilingual services for limited English speakers.[8]

The mere declaration of English as the "official" language, without reference to a subsequent enforcement provision, would have little practical effect.[9] Nonetheless, the sweeping language of such declarations would provide the means by which parties hostile to the provision of bilingual programs could challenge every form of language assistance currently available. California's constitutional amendment has made this possibility explicit by according to any individual or business the requisite standing to challenge any "law which diminishes or ignores the role of English as the common language of the State of California."[10] The Tennessee legislature has gone even further mandating that "[a]ll communications and publications, including ballots, produced by governmental entities in Tennessee shall be in English, and instruction in the public schools and colleges of Tennessee shall be conducted in English unless the nature of the course would require otherwise."[11]

The question therefore arises as to what is the legal force of a state declaration of an official language as applied to programs designed to meet the needs of language minorities. This article argues that the breadth of legal interpretation of such declarations as applied to bilingual services is substantially limited by the equal protection clause of the fourteenth amendment and by federal statutory provisions.

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5. In 1980 voters in Miami and surrounding Dade County, which have a large Cuban community, approved a law severely restricting the official use of Spanish. As a result, signs at the local zoo could not identify animals in any language except English. Lindsey, *Debates Growing on Use of English*, N.Y. Times, July 21, 1986, at 1, col. 1.

6. S. Res. No. 62, 98th Cong., 1st Sess. 7 (1983).

7. S.J. Res. 167, 98th Cong., 1st Sess., 129 CONG. REC. S12,640, S12,642-43 (daily ed. Sept. 21, 1983) (statement of Sen. Huddleston).

8. *The English Language Amendment: Hearings on S.J. Res. 167 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 152 (1984) (statement of Arnold O. Torres, Executive Director of the League of United Latin American Citizens).

9. Dale, *Legal Analysis of S.J. Res. 167, Proposing an Amendment to the U.S. Constitution to Make English the Official Language of the United States*, CONGRESSIONAL RESEARCH SERVICE 32 (1983).

10. CAL. CONST. art. III, § 6.

11. TENN. CODE ANN. § 4-1-404 (1985) (emphasis added).

Part II traces the history of the English-only movement in the United States. Part III examines the equal protection ramifications of official-English declarations as proxies for national origin discrimination. Part IV examines the ramifications of official-English declarations on language minority voting and education rights through a fundamental rights analysis. Part V discusses federal legislation which recognizes the rights of language minorities and limits state flexibility in the areas of voting and education. Finally, the article concludes that English-only declarations must be narrowly interpreted inasmuch as a broad construction would abrogate constitutional and statutory rights afforded to language minorities.

II. THE HISTORY OF THE ENGLISH-ONLY MOVEMENT

A. Why the United States Does Not Have an Official Language

The Constitution contains no reference to English as the "official" or "national" language of the United States because the framers of the Constitution chose not to have an official language.[12] Although they recognized the symbolic ramifications of a common language, the Founders wanted to attract new immigrants to the nascent nation.[13] The Founders believed that a policy of individual choice would be in accord with the democratic spirit of the country.[14] Thus, the framers resolved that there would be "an identity of language through[out] the United States," but the identity would not be mandated by public law.[15]

The legacy of the revolutionary period is one of tolerance of diverse languages. In Pennsylvania, statutes were published in both English and German, and both local government business and lower courts were conducted in German.[16] Similarly, Louisiana published its statutes in French and English, and both languages were used in the legislature and the courts. Other states published documents in several languages. For instance, the constitution proposed for Minnesota in 1857 was published in German, Swedish, Norwegian, and French.[17]

Linguistic diversity could also be found in the public schools. In 1836, Pennsylvania permitted the establishment of German-language schools. In 1840, Ohio expressly sanctioned the German-English

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12. Heath, *English in our Language Heritage*, in LANGUAGE IN THE U.S.A. 6, 7 (1981).

13. Marshall, *The Question of an Official Language: Language Rights and the English Language Amendment*, 60 INT'L J. SOC. LANG. 7, 11 (1986).

14. *Id.*

15. Heath, *Language and Politics in the United States*, in LINGUISTIC AND ANTHROPOLOGY: GEORGETOWN UNIVERSITY ROUNDTABLE ON LANGUAGE AND LINGUISTICS 273 (1977) (quoting Chief Justice John Marshall).

16. Marshall, *supra* note 13.

17. Wagner, *The Historical Background of Bilingualism and Biculturalism in the United States*, in THE NEW BILINGUALISM 29, 36 (M. Ridge ed. 1981).

school system in Cincinnati.[18] Similarly, other ethnic communities were able to establish a public school system with a course of instruction in their mother tongue.[19]

B. The Americanization Movement

It was not until the early twentieth century that social, political, and economic forces opposed the maintenance of linguistic diversity and sought the imposition of standard English. This period was characterized by an increase of immigration, particularly of immigrants who were not Anglo-Saxon but were, increasingly, Roman Catholic or Orthodox.[20] These differences gave rise to "a xenophobia reflecting a newly defined ethnocentricity."[21] The fear engendered by the wave of new immigrants is captured by the poem "Unguarded Gates" by Thomas Bailey Aldrich:

> In street and alley what strange tongues are these,
> Accents of menace alien to our air,
> Voices that once the Tower of Babel knew!
> O Liberty, white Goddess is it well
> To leave the gates unguarded?[22]

With the fear of "strange tongues" came a fear that the immigrants would embrace ideas foreign to the nation.[23]

The Germans and the Irish were the first to be reviled in the late 19th century. The Haymarket labor riots in 1886 in Chicago fostered a belief that Germans were anarchist, "cutthroats of Beelzebub from the Rhine."[24] One commentator referred to German-Americans as the "very scum and offal of Europe."[25] The coming of World War I fueled this hostility toward German immigrants.[26] As the source of immigration shifted to Southern and Eastern Europe, it was the turn of Italians and Jews. The New York Tribune in 1882 complained of the "filthy" Jewish immigrants who crowded the streets of Battery Park.[27]

The high concentration of immigrants in the cities created additional difficulties because of the shift from an agricultural to an industrial base.[28] With the change in the economy and the fluctuations

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18. *Id.*
19. Heath, *supra* note 12, at 13.
20. Wagner, *supra* note 17, at 37.
21. Marshall, *supra* note 13, at 12.
22. Wagner, *supra* note 17, at 40.
23. Note, *The Proposed English Language Amendment: Shield or Sword?*, 3 YALE L. & POL'Y REV. 519, 534 (1985).
24. Reinhold, *Resentment Against New Immigrants*, N.Y. Times, Oct. 26, 1986, § 4, at 6, col. 4.
25. *Id.*
26. Note, *supra* note 23, at 536.
27. Reinhold, *supra* note 24.
28. Marshall, *supra* note 13, at 13.

of the new labor market, came a new vulnerability to economic depressions. When jobs were scarce, the old immigrants resented competing with the new immigrants for employment.[29]

There was also the perception that the new immigrants were not assimilating as quickly as their predecessors. The Federal Immigration Commission published a report in 1911 contrasting the "new" immigrants to the "old," maintaining that the latter had quickly assimilated while "new" immigrants were less intelligent, less willing to learn English, and had no intentions of permanently settling in the United States.[30]

This antagonism reached a peak in 1920 with a movement to transform these immigrants into "Americans." The movement sought to assimilate the new immigrants in order to maintain national unity. The English language was viewed as the "glue" that bonded ethnically diverse groups. Consequently, language became the focus of the Americanization movement and English language education emerged as the chief goal.[31] By 1919 fifteen states had enacted legislation restricting the use of languages other than English in public and private schools.[32] By 1923 the number of states with English-only requirements had risen to thirty-four.[33]

The state of Nebraska prohibited the teaching of any language other than English in either public or private schools to children who had not successfully completed the eighth grade.[34] The Supreme Court in *Meyer v. Nebraska* reaffirmed the right of the states to require that instruction be given in English in the public schools, but denied they had the right to do so in private schools. In so doing, Justice McReynolds wrote:

> [T]he 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 those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this

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29. *Id.*

30. *Open Letter to the Legislators Re: Laws Declaring English the Official Language*, CONFERENCE ON LANGUAGE RIGHTS AND PUBLIC POLICY, Stanford University (April 16, 17, 1988).

31. Note, *supra* note 23, at 533.

32. *Id.* at 536.

33. McFadden, *Bilingual Education and the Law*, 12 J. L. & EDUC. 1, 7 (1983).

34. The Nebraska statute, 1919 Neb. Laws 249, stated:

> Section 1. . . . No person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject to any person in any language then [sic] the English language.
>
> Sec. 2. . . . Languages, other than the English language, may be taught as languages only after a pupil shall have attained and successfully passed the eighth grade as evidenced by a certificate of graduation issued by the county superintendent of the county in which the child resides.

> cannot be coerced by methods which conflict with the Constitution—a desirable end cannot be promoted by prohibited means.[35]

States were more successful in the use of language restrictions to exclude immigrants from political and economic life. The New York State Constitution was amended to include an English language requirement whose purpose was to disenfranchise over one million Yiddish-speaking citizens. New York also enacted a statute requiring non-English speakers to enroll in educational programs as a condition of continued employment.[36]

At the federal level, a senate bill was introduced to make English the "language of instruction in all schools, public and private,"[37] but it never passed. Exclusive federal control over immigration and naturalization, however, allowed the imposition of language qualifications as a means of restricting immigration. A literacy test for admission to the United States was enacted in 1917.[38] The English language requirement for naturalization had a much earlier birth. The Naturalization Act of 1906 required that an applicant for citizenship be able to speak English to the satisfaction of a naturalization examiner.

In 1920 a direct immigration restriction was imposed and with this, the fears which fueled the Americanization movement subsided.[39] Immigrants melted into the pot and times changed amid boom, the depression and a second world war. The decades that followed were characterized by a sense of internationalism and increased formal educational exposure to foreign languages and cultures. The National Defense Education Act, prompted by Sputnik as well as other Soviet advances in science and technology, provided financing for foreign language instruction which was found to be "critical" to the national interest.[40] These forces fostered an appreciation of a multilinguistic society. In the 1960's, language rights came as an integral part of the civil rights movement with the passage of the first Bilingual Education Act[41] and the 1975 amendment to the Voting Rights Act which required the publication of bilingual voting materials.[42]

The history of language policy in the United States reveals a cyclical pattern of tolerance for linguistic diversity, interspersed with periods of language restrictionism. A strong sense emerges that accommodation of other languages and cultures is in accord with

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35. Meyer v. Nebraska, 262 U.S. 390, 401 (1923); *see also* Bartels v. Iowa, 262 U.S. 404 (1923).
36. Note, *supra* note 23, at 536.
37. S. 1017, 66th Cong., 1st Sess., No. 10 (1919).
38. Note, *supra* note 23, at 537.
39. *Id.*
40. Rohter, *Why Foreign Languages Are Relevant Again*, N.Y. Times, Jan. 4, 1987, § 12, at 33, col. 2.
41. 20 U.S.C. § 880b-6, Supp. III (1968).
42. *See* 42 U.S.C. § 1973aa-la(b) (1982).

the notion of individual freedom upon which this country was founded. Historical accounts of the place of English in the language heritage of the United States should reassure those who fear language and ethnic maintenance leads to cultural or political divisiveness.

C. The Current English-Only Movement

Since 1965 the United States has experienced another wave of immigration. Once again linguistic differences have become the focus of an English-only movement. This time the target language is Spanish, a language brought by Mexican and other Latin American immigrants.[43] Legislation for an English Language Amendment (ELA) was introduced in both houses in 1981, 1983, and again in 1985.[44] There were two versions of the ELA introduced in 1985. The Senate version provided: "Section 1. The English language shall be the official language of the United States. Section 2. The Congress shall have the power to enforce this article by appropriate legislation."[45] The House version provided:

> Section 1. The English language shall be the official language of the United States.
> Section 2. Neither the United States nor any State shall require by law, ordinance, regulation, order, decree, program, or policy, the use in the United States of any language other than English.
> Section 3. This article shall not prohibit any law, ordinance, regulation, order, decree, program, or policy requiring educational instruction in a language other than English for the purposes of making students who use a language other than English proficient in English.
> Section 4. The Congress and the States may enforce this article by appropriate legislation.[46]

Proponents of the ELA base their proposals on the nation's need for a common bond.[47] There is a concern that our nation is threatened with cultural separatism. Bilingual education and multilingual ballots are viewed as encouraging separatism and hostility and discouraging assimilation. In 1983 former California Senator S. I. Hayakawa, who introduced the first ELA in the Senate,[48] founded and now

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43. *See Immigration Statistics: Hearing Before the Subcomm. on Census and Population of the House Comm. on Post Office and Civil Service*, 99th Cong., 1st Sess., 23-24 (1985) (statement of John Nahan, Director, Office of Plans and Analysis, Immigration and Naturalization Service).

44. Former Senator S. I. Hayakawa, the author of the official language provision in the Immigration Reform and Control Act, first proposed such an amendment in 1981. *See supra* note 2. In 1983 and again in 1985, similar amendments were introduced in the House and the Senate. *See supra* note 3.

45. S.J. Res. 20, 99th Cong., 1st Sess., 131 CONG. REC. S468 (daily ed. Jan. 22, 1985).

46. H.R.J. Res. 96, 99th Cong., 1st Sess., 131 CONG. REC. H167 (daily ed. Jan. 24, 1985).

47. Note, *supra* note 23, at 520.

48. S.J. Res. 72, 97th Cong., 1st Sess., 127 CONG. REC. 7400 (1981).

serves as honorary chair of U.S. English,[49] a nonprofit organization dedicated to making English our official language. The organization has over 200,000 members and a board of advisors with such notables as Saul Bellow, Jacques Barzun, Alistair Cooke, and George Gilder. The organization's agenda includes adoption of the ELA, the repeal of laws mandating bilingual voting materials, and restriction of government funding for bilingual education to transitional programs.[50]

Recognizing the adverse climate at the federal level, however, official English proponents are directing most of their efforts towards the states. Sixteen state governments have amended their constitutions or passed legislation declaring English the official state language,[51] and thirty states are considering similar proposals.[52] A survey of legislative patterns has shown that official English initiatives have been most successful where there has been little discussion on the potential ramifications of such declarations. By contrast, such legislation has been defeated in most instances where ethnic communities have raised the possible threat to bilingual services posed by these initiatives.[53]

Some organizations, such as the Federation of American Cultural and Language Communities, Inc. (FACLC), seek to oppose English-only efforts by introducing a Cultural Rights Amendment (CRA). The FACLC amendment provides:

> Section 1. The right of the people to preserve, foster, and promote their respective historical, linguistic and cultural origins is recognized. No person shall be denied the equal protection of the laws because of culture or language.
> Section 2. The Congress shall have the power to enforce this Article by appropriate legislation.[54]

More recent are the efforts of the English Plus Information Clearinghouse (EPIC). EPIC was established by thirty diverse organizations for the promotion of the concept of English Plus, which "holds that the national interest can best be served when all members

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49. While U.S. English is the largest organization seeking the establishment of English as the national language, other organizations are also calling for such legislation. English First is an organization of state legislators which operates a political action committee to press for the adoption of state and federal amendments. It maintains that because recent immigrants refuse to learn English, they remain in "linguistic and economic ghettos, many living off welfare and costing working Americans millions of tax dollars every year." Another organization, the Council on Inter-American Security, published a report warning of terrorists crossing the U.S.-Mexican border and the alleged intent of Hispanic leaders to establish a separate nation within the United States called Aztlan. 1 EPIC Events 4, March/April 1988.

50. U.S. English Pamphlet, IN DEFENSE OF OUR COMMON LANGUAGE.

51. *See supra* note 4.

52. N.Y. Times, Aug. 2, 1987, § 1, at 32, col. 1.

53. Crawford, *37 States Consider "English Only" Bills, With Mixed Results*, EDUCATION WEEK, June 17, 1987.

54. Marshall, *supra* note 13, at 39.

of our society have full access to effective opportunities to acquire strong English language proficiency plus mastery of a second or multiple languages."[55]

The foregoing discussion suggests that throughout the history of the United States, whenever non-English speakers have been viewed as politically, socially, or economically threatening, arguments have focused on restricting their language and the imposition of standard English. This was the lesson from the Americanization movement of the early twentieth century. Therefore, "attempts to use language for 'patriotic ends' must be subjected to the strictest sort of scrutiny, and . . . elements of jingoism, racism and xenophobia hiding behind expressed concern for linguistic unity must be identified and rooted out of the debate before proposals to impose English on our official and unofficial life are given any serious consideration."[56]

III. LANGUAGE MINORITIES AND THE EQUAL PROTECTION CLAUSE

The equal protection clause of the fourteenth amendment guarantees equal treatment by government entities. It provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[57] There are three standards of judicial review for equal protection analysis: minimum rationality, intermediate scrutiny, and strict scrutiny. The basic minimum rationality test requires that a statute be rationally related to a legitimate state objective.[58] Courts have traditionally shown almost complete deference to legislative definitions of a legitimate state purpose.[59] Intermediate scrutiny heightens the level of review by requiring that the statute be necessary for the achievement of an important state interest.[60]

In order to preserve substantial values of equality and autonomy, strict scrutiny subjects to close inspection any governmental classification that is prejudicial to racial or other minorities,[61] or burdens fundamental rights.[62] As a standard of judicial review, strict scrutiny requires that the government show that the legislation in question is necessary to promote a compelling state interest.[63] Because few

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55. *English Plus Information Clearinghouse Statement of Purpose*, 1 EPIC EVENTS 2, March/April 1988.

56. Note, *supra* note 23, at 538.

57. U.S. CONST. amend. XIV, § 1.

58. *See* Skinner v. Oklahoma, 316 U.S. 535 (1942).

59. L. Tribe, AMERICAN CONSTITUTIONAL LAW 1440 (1988).

60. *See* Craig v. Boren, 429 U.S. 190 (1976); *see also* L. Tribe, *supra* note 59, at 1563.

61. *See, e.g.*, Bolling v. Sharpe, 347 U.S. 497, 499 (1954) ("Classifications based solely upon race . . . are contrary to our traditions and hence constitutionally suspect.").

62. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel); Skinner v. Oklahoma, 316 U.S. 535 (1942) (right to procreation); Reynolds v. Sims, 377 U.S. 533 (1964) (right to vote).

63. Plyler v. Doe, 457 U.S. 202, 217 (1982).

governmental classifications are upheld after being strictly srutinized, this standard of judicial review has been described as "strict in theory but fatal in fact."[64]

A. National Origin Discrimination

The core idea of equal protection strict scrutiny is to invalidate government action tainted by "prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities"[65] in our society. As new groups have become the targets of prejudice, courts have examined more carefully legislative classifications involving such groups. In 1954 discrimination on the basis of "ancestry or national origin" was found to be prohibited by the fourteenth amendment.[66]

A strong argument can be made that language discrimination is a proxy for national origin discrimination. Because an individual's primary language generally flows from his or her national origin, language becomes an automatic signaling system, second only to race, in identifying targets for discrimination. Although no case has expressly held that language-based classifications discriminate on the basis of national origin discrimination, the equation of language with national origin has been consistently recognized.

1. Linguistic Exclusion

The Supreme Court has recognized on several occasions that legally sanctioned language discrimination has the effect, and frequently the purpose, of discriminating on the basis of race and national origin. In *Meyer v. Nebraska*, the Court recognized that the only children essentially affected by a statute mandating English as the exclusive language of instruction in the schools were those of foreign origin.[67] Four years later, in *Yu Cong Eng v. Trinidad*, the Court was asked to review an act of the Philippine Legislature which prohibited anyone from keeping business account books in any language other than English, Spanish, or a local dialect.[68] Based on the large number of Chinese in the islands who spoke only Chinese and given the the name of the act—the Chinese Bookkeeping Act—

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64. Gunther, *The Supreme Court, 1971 Term-Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

65. United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938) (dictum).

66. Hernandez v. Texas, 347 U.S. 475, 479 (1954). In 1973 the Supreme Court interpreted the phrase "national origin" of Title VII of the Civil Rights Act of 1964 and held that the term refers to "the country where a person was born, or more broadly, the country from which his or her ancestors came." Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973).

67. 262 U.S. 390, 398-99 (1922).

68. 271 U.S. 500, 524-25 (1926).

the Court struck down the act concluding that it was intended to prevent Chinese merchants from conducting business in the Philippines.

English literacy tests also have been used to exclude ethnic minorities from the franchise. In *Katzenbach v. Morgan*, the Court invalidated New York's English literacy requirement, holding that although states have power to set voting qualifications, they cannot do so contrary to the fourteenth amendment.[69] The Court questioned New York's stated interest in providing an incentive for non-English speaking immigrants to learn the English language in light of the grandfather clause provision and evidence indicating that the enactment of the test was motivated by racial animosity towards the Puerto Rican community.[70]

2. Title VII Employment Discrimination Law

Employment discrimination law expressly recognizes that ancestral or national origin becomes apparent through the medium of cultural characteristics. The Equal Employment Opportunity Commission (EEOC) Guidelines on Discrimination Because of National Origin define "national origin discrimination broadly as including . . . the denial of equal employment opportunity because of an individual's, or his or her ancestor's place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group."[71]

The EEOC has applied this standard to employer speak-English-only rules:

> 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.[72]

Legal challenges to English-only rules in employment have been successful. In one EEOC case, an employer prohibited Spanish-surnamed Americans from speaking in their native tongues while employed as barbers. The court held that in the absence of a showing of business necessity, the rule operated to deny the plaintiffs a privilege of employment enjoyed by Anglos and thus was discriminatory on the basis of national origin.[73]

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69. 384 U.S. 641 (1966). *See also* Castro v. State, 2 Cal. 3d 223, 466 P.2d 244, 248 n.11, 85 Cal. Rptr. 20 (1970).

70. *Katzenbach*, 384 U.S. at 654.

71. 29 C.F.R. § 1606.1 (1984) (emphasis added).

72. 29 C.F.R. § 1606.7 (1984).

73. EEOC Dec. No. 72-0281, EEOC Compl. Man. (CCH) ¶ 6293 (Aug. 9, 1971). *See also* EEOC Dec. No. 71-446, EEOC Compl. Man. (CCH) ¶ 6173 (Nov. 5, 1970) ("Enforcement

A more blatant example of discriminatory treatment was addressed in *Saucedo v. Brothers Well Service, Inc.*[74] A Mexican-American employee was discharged for speaking two words of Spanish on the job in violation of an English-only rule. The foreman involved in the same incident was neither fired nor reprimanded, even though he was guilty of a more serious breach of conduct, fighting. Recognizing that the foreman's conduct was much more serious than the employee's use of a Spanish phrase, the court held that the employer had breached his obligation to avoid discriminating against employees. The court further stated that a rule which prohibits speaking Spanish on the job has a disparate impact upon Mexican-Americans.[75]

The EEOC guidelines and the employment discrimination cases recognize that an employer whose animus is directed at ancestral origin is unlikely to question applicants about their ancestry directly, given the clear prohibition against discrimination on the basis of national origin. Instead, the employer would be likely to rely on the basis of proxies such as surname, accent, language, or any other number of national origin-linked characteristics.

3. Class Action Certification

Judicial acceptance of the notion of trait-based discrimination is indicated by the grouping of various origins into composite categories, such as "Spanish language" and "Spanish-surnamed." For instance, in *Craig v. County of Los Angeles*, the plaintiff class of Mexican-Americans was defined by the district court as "any person who is 'Spanish-Surnamed' or a 'Spanish-Language' person."[76]

Similarly, in *Hernandez v. Texas*, the plaintiff class of Mexican-Americans was identified by a Spanish surname. There the court stated that "just as persons of a different race are distinguished by color . . . Spanish names provide ready identification of the members of [the] class."[77] If the phrase "ancestral or national origin" had

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of a rule barring the use of the Spanish language during working and nonworking time that was directed solely against Spanish surnamed American employees had the unlawful effect of discriminating . . . on the basis of national origin by denying to such employees . . . [a] privilege of employment enjoyed by other employees."). EEOC Dec. No. 73-0479, EEOC Compl. Man. (CCH) ¶ 6381 (Feb. 14, 1973) (a union was guilty of discrimination on the basis of national origin when it actively curtailed the use of the Spanish language by its Spanish-speaking employees when they were speaking to Spanish-surnamed members of the union).

74. 464 F. Supp. 919 (S.D. Tex. 1979).

75. *Id.* at 922.

76. 626 F.2d 659, 661 n.1 (9th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981). *See also* EEOC v. Navajo Ref. Co., 593 F.2d 988 (10th Cir. 1979) (disparate impact claim brought by Spanish-surnamed Americans); EEOC v. Datapoint Corp., 570 F.2d 1264 (5th Cir. 1978) (disparate treatment class action brought on behalf of Spanish-surnamed people); Serna v. Portales Mun. Schools, 499 F.2d 1147 (10th Cir. 1974) (claim under the Civil Rights Act by Spanish-surnamed students).

77. *Hernandez*, 347 U.S. at 480 n.12.

been narrowly construed, courts would have insisted that these classes be defined as Mexican-Americans, Cuban-Americans, etc.

4. Education

Within the educational forum, there has been a similar equation of language differentiation and national origin discrimination. In *Lau v. Nichols*, the plaintiff class of approximately 1800 non-English speaking Chinese students in the San Francisco school system raised an equal protection claim and a claim under Title VI of the Civil Rights Act of 1964.[78] Title VI prohibits discrimination based "on the ground of race, color, or national origin" in "any program or activity receiving Federal financial assistance."[79]

The Supreme Court first noted the importance of the English language in the California educational scheme. Fluency in English was a prerequisite to high school graduation, and the use of English as the basic language of instruction in public schools was mandated by the state. In addition, school attendance was compulsory.[80] Given the state-imposed standards, the Court found that the failure to provide special language assistance for the Chinese students violated Title VI's prohibition on discrimination on the basis of national origin.

In reaching this conclusion the Court also relied on guidelines promulgated by the Department of Health, Education and Welfare, (HEW). The guidelines required that school districts ensure that students of a particular national origin are not denied the opportunity to obtain the education generally obtained by other students in the system. Specifically, HEW ordered school districts to take affirmative steps to address the language needs of minority children "[w]here inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district. . . ."[81] Failure to rectify language deficiencies constitutes discrimination on the basis of national origin.

Shortly after the Supreme Court's ruling in *Lau*, the Tenth Circuit decided *Serna v. Portales*.[82] Plaintiffs filed a class action alleging national origin discrimination in the school district's failure to provide bilingual instruction to meet the language needs of Mexican-American students. The court followed very closely the formula set forth by the Supreme Court in *Lau*, noting that the children were required to attend schools where classes were conducted in English. Having

78. 414 U.S. 563 (1974).
79. 42 U.S.C. § 2000d (1982).
80. *Lau*, 414 U.S. at 566.
81. *Id.* at 568 (citing Memorandum of J. Stanley Pottinger, Director, Office for Civil Rights, 35 Fed. Reg. 11,595 (1970)).
82. 499 F.2d 1147 (10th Cir. 1974).

failed to rectify language deficiencies, the Portales school curriculum was discriminatory and in violation of Title VI and the HEW regulations.[83]

Congress codified the Court's ruling in *Lau* in section 1703(f) of the Equal Education Opportunities Act of 1974. The statute 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 its instructional programs."[84]

5. The Current Status of Language and National Origin Discrimination

In *Garcia v. Gloor*, the plaintiff brought a suit challenging the employer's policy requiring employees to speak only English while at work.[85] The plaintiff maintained that because national origin determines language preference, the policy was discriminatory on the basis of national origin and thus prohibited by the Equal Employment Opportunities Act and the Civil Rights Act of 1964. The Spanish language, the plaintiff maintained, is as important an aspect of ethnic identification for Mexican-Americans as skin color is to other races.[86]

The Fifth Circuit Court of Appeals upheld the district court and ruled that the policy did not violate the Civil Rights Act prohibition against national origin discrimination as applied to a person who is capable of speaking English, but deliberately disregards the employer's rule.[87] The court stated that language discrimination and discrimination on the basis of other ethnic and sociocultural traits cannot be equated with national origin discrimination.[88] However, it is important to note that the court's ruling is confined to a bilingual individual who chooses not to observe the employer's rule.

More importantly, the court recognized that language can be a proxy for national origin:

> Language may be used as a covert basis for national origin discrimination . . . We do not denigrate the importance of a person's language of preference or other aspects of his national, ethnic or racial identification. Differences in language and other cultural attributes may not be used as a fulcrum for discrimination . . . In some circumstances, the ability to speak or the speaking of a language other than English might be equated

83. *Id.* at 1154.
84. 20 U.S.C. § 1703(f) (1982).
85. 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981).
86. *Id.* at 267.
87. *Id.* at 272.
88. *Id.* at 268-69.

> with national origin, but this case concerns only a requirement that persons capable of speaking English do so while on duty.[89]

In *Olagues v. Russoniello*, the Ninth Circuit Court of Appeals addressed the relationship between language and national origin discrimination.[90] In this case, plaintiffs filed suit claiming that the U.S. Attorney's investigation of voter fraud, directed at foreign-born, recently registered voters who requested bilingual ballots, was discriminatory on the basis of language, race, and national origin.

The court found that the voter registration fraud investigation involved suspect classifications based on race and national origin.[91] Since bilingual ballots were only available in Spanish and Chinese, the court noted that as a practical matter the investigation singled out Spanish-speaking and Chinese-speaking immigrants for special inquiry. Moreover, the court also recognized that language can be a proxy for national origin.[92]

On the other hand, several federal courts have determined that language minorities are not a suspect class.[93] The court in *Soberal-Perez v. Heckler*, faced the question of whether the failure of the social security office to provide written notices and oral instructions in Spanish violates the equal protection clause.[94] The plaintiffs had received notices of denial of their social security claims in English. Because the plaintiffs were Hispanics with limited English abilities, they were unable to understand the notices and the oral instructions given at the social security office. As a result, plaintiffs waived their right to a hearing or failed to file timely appeals.

The court recognized that a language-based classification was implicitly made between English-speakers and non-English speakers. However, the court ruled that this was not the equivalent of a classification based on national origin, because "[l]anguage, by itself, does not identify members of a suspect class."[95] Strict scrutiny of language classifications is warranted only when a defendant has shown an intent to discriminate on the basis of a suspect class. The court thus applied a rational basis test and found that the use of English was not irrational since "English is the national language of the United States."[96]

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89. *Id.* at 268-70.
90. 797 F.2d 1511 (9th Cir. 1986), *vacated as moot*, 832 F.2d 131 (9th Cir. 1987).
91. *Id.* at 1521.
92. *Id.*
93. *See, e.g.*, Carmona v. Sheffield, 475 F.2d 738 (9th Cir. 1973) (giving notice of a denial of unemployment benefits in English is not a violation of equal protection); Frontera v. Sindell, 522 F.2d 1215 (6th Cir. 1975) (state action in conducting civil service examination only in English was not subject to strict judicial scrutiny).
94. 717 F.2d 36 (2d Cir. 1983), *cert. denied*, 466 U.S. 929 (1984).
95. *Id.* at 41.
96. *Id.* at 42.

More recently, in *Gutierrez v. Municipal Court*, the court reaffirmed the importance of language to national origin.[97] In *Gutierrez*, a court employee brought suit challenging an English-only rule in court offices. In upholding a preliminary injunction, the court recognized that language restrictions can readily mask an intent to discriminate on the basis of national origin.[98]

Also important was the court's refusal to follow the holding in *Garcia v. Gloor*, which immunized English-only rules from scrutiny where the employee challenging the rule is bilingual and can easily comply with the rule. Instead the court concluded that English-only rules must be closely scrutinized because they "generally have an adverse impact on protected groups."[99] The court stated:

> The cultural identity of certain minority groups is tied to the use of their primary tongue . . . The mere fact that an employee is bilingual does not eliminate the relationship between his primary language and the culture that is derived from his national origin. . . . Although an individual may learn English and become assimilated into American society, his primary language remains an important link to his ethnic culture and identity . . . The primary language not only conveys concepts, but is itself an affirmation of that culture.[100]

This recent and forceful pronouncement on the inextricable link between language and national origin, and the recognition that language restrictions can have an adverse impact on minorities, provides a persuasive rationale for finding that official-English declarations are a proxy for national origin discrimination.

Given the recognition that language can readily be used as a covert basis for discriminating on the basis of national origin, as well as the recognition that the exclusionary impact of official-English declarations falls almost exclusively upon ethnic minorities, such legislation should be found to be an indirect although highly effective means of discriminating on the basis of national origin and therefore should be subject to strict judicial scrutiny.

B. The Requirement of Intent

Facially neutral conduct can constitute discrimination in violation of the equal protection clause. However, proof of racially discriminatory intent or purpose is required in order to establish such a claim.[101] To establish discriminatory purpose, a party must show

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97. 838 F.2d 1031 (9th Cir. 1988).
98. *Id.* at 1039.
99. *Id.* at 1040.
100. *Id.* at 1039.
101. Washington v. Davis, 426 U.S. 229, 240 (1976) ("[T]he basic equal protection principle is that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.").

that "the decisionmaker . . . selected or reaffirmed a particular course of action 'because of' not merely 'in spite of' its adverse effects upon an identifiable group."[102] A party need not demonstrate, however, that the challenged action rested solely on invidious purposes.[103]

An invidious discriminatory purpose may be inferred from the "totality of the relevant facts, including [the fact] that the law bears more heavily on one race than another."[104] The "historical background of the [governmental] decision is one evidentiary source" for determining whether invidious discriminatory purpose was a motivating factor.[105]

An English-only policy is facially neutral with respect to language minorities. No distinctions are overtly drawn between language groups and all are given equal services in English. Nonetheless, the motivating factor behind English-only declarations is the abolition of bilingual programs, such as bilingual ballots and bilingual education. Bilingual programs are specifically designed for language minorities. Therefore, as a practical matter, English-only policies target non-English speaking minorities. As the court noted in *Olagues*, because national origin is generally the characteristic that defines one's primary language, the classification is one based on national origin.[106] Nonetheless, before strict scrutiny can be applied, a showing must be made that English-only policies are pursued at least in part because of their effects on those who do not speak English.

A strong argument can be made that the designs of English-only proposals satisfy the intent requirement. Proponents of official-English declarations have openly set out to end bilingual programs, with the stated purpose of affecting non-English speakers. Supporters maintain that language minorities must learn English in order to become fully integrated into American society.[107] Bilingual programs are viewed as discouraging linguistic minorities from learning to speak English. By withdrawing bilingual programs, advocates of English-only seek to "provide a positive incentive."[108] Thus, English-only advocates are clearly attempting to disadvantage those who speak other languages. Indeed, it is the adverse effect which will provide the "positive incentive" to learn English.

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102. Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979).

103. *See* Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) ("Rarely can it be said that . . . a particular purpose was the 'dominant' or 'primary' one.").

104. *Washington*, 426 U.S. at 242.

105. *Village of Arlington Heights*, 429 U.S. at 267.

106. *Olagues*, 797 F.2d at 1521.

107. H.R.J. Res. 169, 98th Cong., 1st Sess., 129 CONG. REC. E757 (1983) (statement of Rep. Shumway).

108. S.J. Res. 167, 98th Cong., 1st Sess., 129 CONG. REC. S12,641 (1983) (statement of Sen. Huddleston).

Moreover, the historical background of the English-only movement shows that the current debate over the status of the English language in the United States is largely a debate over the seriousness of the problems posed for American political and cultural institutions by Spanish speakers. Gerda Bikales, former executive director of U.S. English, believes that the concentration of immigrants who speak the same language is unlike any ever before experienced by the United States. She is reported to have stated, "I don't think Yiddish or Italian represented a threat to the union. But we are now setting ourselves up for an entrenched language ghetto."[109]

A publication by U.S. English discussing issues of assimilation focuses solely on the Spanish-speaking community.[110] The following are listed as impediments to assimilation:

> —immigration (combined legal and illegal) is at the highest level in our history;
> —for the first time, a majority of migrants speak just one language—Spanish. This majority concentration of Spanish speakers among new migrants has already lasted for more than a decade and promises to continue for the forseeable future;
> —the nearness of the countries from which many Spanish-speaking migrants come, and the relative convenience and low cost of travel and telephone communications, ensure that many new migrants will maintain their ties with their home countries;
> —the pattern of concentrated settlement of Spanish-speaking migrants in this country creates Spanish-speaking enclaves in some cities, a few cities in which Spanish is the dominant language, and entire regions of this country in which Spanish is already a viable language;
> —the growth of Spanish-language communications within the United States enables migrants who prefer not to speak English to receive their information and entertainment solely in Spanish while they live in the United States. They are served by an ever expanding radio and television Spanish language network, and by major English language networks eager to use new technologies to provide Spanish translations of regular programs.[111]

The publication continues by citing studies, surveys, and reports which demonstrate the lack of identity Hispanics have with American lifestyle, language, and ideals. English-only advocates conclude that Spanish immigrants are reluctant to break with their country of origin and are instead calling for official recognition of a bilingual, bicultural America.[112]

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109. Reinhold, *Resentment Against New Immigrants*, N.Y. Times, Oct. 26, 1986, § 4, at 6, col. 1.

110. G. Bikales and G. Imhoff, *A Kind of Discordant Harmony: Issues in Assimilation*, a discussion series published by U.S. English (July 1985).

111. *Id.* at 8-9.

112. "'Some Hispanics have, however, made a demand never voiced by immigrants before:

Finally, the emotionally charged debate preceding California's adoption of its official-English amendment evidences that the broader issue was immigration into the state. Senator Pete Wilson, a supporter of California's Proposition 63, linked support for the movement to growing hostility toward immigrants.[113] The foregoing discussion reveals that Spanish speakers are overwhelmingly the target group of official-English declarations and, thus, such declarations reflect an intent to discriminate on the basis of national origin.

IV. FUNDAMENTAL RIGHTS AND THE EQUAL PROTECTION CLAUSE

Legislative and administrative classifications are strictly scrutinized if they burden fundamental rights. The Supreme Court employs two different approaches to determine whether an interest is fundamental. The first approach is essentially an application of natural law. Thus, the right to procreate has been deemed "one of the basic rights of man,"[114] and the right to travel "occupies a position fundamental to the concept of our Federal Union."[115] The second approach consists of assessing whether there is a fundamental right implicitly or explicitly guaranteed by the Constitution.[116]

This portion of the article examines the validity of English-only rules from the perspective of their effect on certain fundamental rights, concluding that English-only restrictions are unconstitutional when they operate to interfere with the right to vote or to obtain an education.

A. The Right to Vote

By an application of natural law, the Supreme Court has identified the right to vote as fundamental.[117] States, however, retain broad powers to determine conditions under which the right to vote may be exercised. Article I, section 2 of the Constitution,[118] read along with the seventeenth amendment,[119] provides that in elections of

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that the United States, in effect, officially recognize itself as a bicultural, bilingual nation . . . [They] demand that the United States become a bilingual country, with all children entitled to be taught in the language of their heritage, at public expense.'" S.J. Res. 167, 98th Cong., 1st Sess., 129 CONG. REC. S12,640 (1983) (quoting Theodore H. White in *America In Search of Itself*).

113. L.A. Times, Aug. 21, 1986, § I, at 23, col. 1.

114. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

115. United States v. Guest, 383 U.S. 745, 757 (1966).

116. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973).

117. Dunn v. Blumstein, 405 U.S. 330 (1972); Reynolds v. Sims, 377 U.S. 533 (1964); Yick Wo v. Hopkins, 118 U.S. 356 (1886). Some commentators have suggested that language should itself constitute a fundamental right. *See, e.g.*, Piatt, *Toward Domestic Recognition of a Human Right to Language*, 23 HOUS. L. REV. 885 (1986).

118. U.S. CONST. art. I, § 2, cl. 1.

119. U.S. CONST. amend. XVII.

United States Representatives and Senators, the electors of each state shall have the qualifications required for electors of the most numerous branch of the legislature of the state.

The right to control voter qualifications, however, does not rest exclusively with the states. State control over federal elections is subject to congressional power under article I, section 4 of the Constitution.[120] Federal supremacy over state voter qualification authority was expanded by the 1964 Supreme Court ruling of *Reynolds v. Sims*,[121] in which the Court recognized voting as a fundamental political right:

> [T]he right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.[122]

Thus, the Constitution allocates to the states the right to establish qualifications for state and national elections. But Congress reserves the power to alter them if they interfere with public participation through the franchise. An illustrative example is the use of literacy tests to restrict certain minorities from the polls.

The states of Mississippi and Louisiana required that prospective voters pass a literacy test as a prerequisite to voting. Specifically, the Mississippi Constitution required that voter applicants demonstrate the ability to read, understand, and interpret any provision of the state constitution.[123] In Louisiana, a statute required voter applicants to state a reasonable interpretation of any clause in the Louisiana or federal constitution to the satisfaction of an examiner.[124]

In *United States v. Mississippi*[125] and *Louisiana v. United States*,[126] the Supreme Court found that although the literacy tests were facially neutral, they invidiously discriminated against blacks. The Court enjoined future use of these tests which were a "trap, sufficient to stop even the most brilliant man on his way to the voting booth."[127] In 1965 Congress passed the Voting Rights Act which prohibited

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120. *See* U.S. CONST. art. I, § 4, cl. 1 which provides: "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each state by the Legislature thereof; but Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators."

121. 377 U.S. 533 (1964).

122. *Id.* at 561-62.

123. United States v. Mississippi, 380 U.S. 128, 132 (1965).

124. Louisiana v. United States, 380 U.S. 145, 148-50 (1965).

125. 380 U.S. 128 (1965).

126. 380 U.S. 145 (1965).

127. *Id.* at 153.

the use of literacy tests.[128] Finally, in 1970, Congress enacted a nationwide ban on the use of literacy tests.[129]

Although official-English declarations do not expressly prohibit language minorities from voting, such declarations create a barrier to voting by non-English proficient minorities. By prohibiting bilingual election materials, language minorities are left with an all-English ballot they cannot understand. In essence, English-only voting ballots impose an English literacy requirement on language minorities which would work as effectively to reduce voter participation in a discriminatory manner as the literacy tests struck down in *Mississippi* and *Louisiana*.

Congress has explicitly recognized that pervasive discrimination exists against linguistic minorities:

> The Congress finds that voting discrimination against citizens of language minorities is pervasive and national in scope . . . [T]hey have been denied equal educational opportunities by State and local governments, resulting in severe disabilities and continuing illiteracy in the English language. The Congress further finds that, where State and local officials conduct elections only in English, language minority citizens are excluded from participating in the electoral process. In many areas of the country, this exclusion is aggravated by acts of physical, economic and political intimidation.[130]

Furthermore, federal courts have interpreted the fundamental right to vote as not only physical access to the voting booth, but also the right to an effective vote. The court in *United States v. Louisiana*[131] required voting assistance to illiterate citizens, stating that they could not "impute to Congress the self-defeating notion that an illiterate has the right [to] pull the lever of a voting machine, but not the right to know for whom he pulls the lever."[132]

In *Garza v. Smith*, the court reiterated the fundamental nature of the effective exercise of the franchise.[133] There, the district court held that Texas had violated the equal protection clause by permitting physically handicapped voters to be assisted in voting, but denying such assistance to illiterate voters. In so holding the court stated that the right to vote "includes the right to be informed as to which mark on the ballot, or lever on a voting machine will effectuate a voter's political choice."[134] Without the right to be informed of the

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128. 42 U.S.C. §§ 1971-1974.
129. 42 U.S.C. § 1973b. The constitutionality of the ban was subsequently upheld in Oregon v. Mitchell, 400 U.S. 112 (1970).
130. 42 U.S.C. § 1973b(f)(1).
131. 265 F. Supp. 703 (E.D. La. 1966), *aff'd*, 386 U.S. 270 (1967).
132. *Id.* at 708.
133. 320 F. Supp. 131 (W.D. Tex. 1970), *vacated*, 401 U.S. 1006 (1971).
134. *Id.* at 136.

effect the physical act of voting will produce, the right to vote becomes an "empty ritual."[135]

The expanded voting right was applied to non-English speaking citizens in *Puerto Rican Organization For Political Action v. Kusper*.[136] In *Kusper*, the court ordered that language assistance be given to Spanish-speaking voters in order to effectively cast a vote. Comparing this case to the cases involving illiterate voters, the court stated that "[i]f a person who cannot read English is entitled to oral assistance . . . so a Spanish-speaking Puerto Rican is entitled to assistance in the language he can read or understand."[137] In 1974, a New York court in *Torres v. Sachs*[138] followed suit by holding that the city's practice of conducting elections in English only, deprived Spanish-speaking voters of the right to an effective vote.[139]

It follows that official-English declarations, by withdrawing bilingual assistance to non-English speaking voters, substantially impact on these voters' right to effectively exercise their fundamental right to vote. Because they do not understand ballots written solely in English, they will not know for whom or for what they are voting. In essence, they would be just as disabled as the physically handicapped or the illiterate voter. Thus, while non-English speaking minorities will not be prevented from entering the booth, their casting a ballot would be nothing more than an "empty ritual."

B. The Right to Education

The question of whether education is a fundamental right was at issue in *San Antonio Independent School District v. Rodriguez*, where the Court reviewed the Texas system of financing its public schools.[140] The public school financing scheme used local property taxation as a base, thereby yielding a smaller sum per student in some school districts than in others.

In examining these disparities in light of the equal protection clause, the Court declined to apply strict scrutiny based on education as a fundamental right, and found that although education is one of the most important services performed by the state, it is not among the rights explicitly or implicitly guaranteed by the Constitution.[141] The Court did, however, take note of the argument that there is a nexus between education and effective exercise of the fundamental interests in free speech and the franchise. Therefore, the Court did not foreclose the possibility "that some identifiable

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135. *Id.*
136. 490 F.2d 575 (7th Cir. 1973).
137. *Id.* at 580.
138. 381 F. Supp. 309 (S.D.N.Y. 1974).
139. *Id.* at 312.
140. 411 U.S. 1 (1973).
141. *Id.* at 33-34.

quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either [the right to speak or the right to vote]."[142] Given the absence of an absolute denial of educational opportunity, the Court sustained the financing scheme using rational basis analysis.

Thus, although it is well established that education is not a fundamental right, the Supreme Court has not definitively settled the question whether a minimally adequate education is a fundamental right.[143] Arguably, the right to a minimally adequate education is fundamental.

There are at least two basic arguments that can be advanced in support of the view that a minimally adequate education is fundamental. The first argument is based on the recognition in *Brown v. Board of Education* "of the importance of education to our democratic society."[144] The Court made it clear that education "is required in the performance of our most basic public responsibilities, even service in the armed forces . . . [and] is the very foundation of good citizenship."[145]

Moreover, the dissent by Justice Marshall in *Rodriguez* notes that Supreme Court precedent in the field of equal protection reveals that the Court has applied varying standards depending on the "constitutional and societal importance of the interest adversely affected."[146]

Second, the right to a minimally adequate education should be characterized as fundamental because it is "inextricably linked to the right to participate in the electoral process and to the rights of free speech and association guaranteed by the First Amendment."[147] The states' interest in the intelligent use of the ballot can only be satisfied when reading skills and thought processes have been developed. More importantly, to the extent that official-English declarations deny language assistance to non-English speaking children, the children are deprived of English language skills which are necessary for effective access to the ballot. The first amendment right to speak and receive information is similarly impaired if the speaker is incapable of articulating his thoughts or assimilating information. Therefore, although the Court has held that education is not a fundamental right, it did not preclude the argument that the interest in a minimally adequate education is fundamental because of its vital function in our society and its necessity for effectuating other fundamental rights.

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142. *Id.* at 36.
143. Papasan v. Allain, 478 U.S. 265, 285 (1986).
144. 347 U.S. 483, 493 (1954).
145. *Id.*
146. *Rodriguez*, 411 U.S. at 99.
147. *Id.* at 63.

Even if the right to a minimally adequate education is not found to be fundamental, legislation which discriminatorily infringes on that right should be accorded heightened scrutiny under the absolute deprivation rationale of *Plyler v. Doe*.[148] In *Plyler*, the Court invalidated a Texas law barring the children of illegal immigrants from attending public schools. The Court declared that education was not a fundamental right, but "neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction."[149] The Court specifically noted the importance of education for effective and intelligent participation in the political system, cataloguing education as the analogue of the right to vote.[150] This characterization of education as a quasi-fundamental right led to the application of a heightened standard of review: in order to be considered rational, the Texas education law would have to further a "substantial" state interest.[151]

Similarly, English-only declarations, by prohibiting bilingual education, deny all educational opportunity to non-English speaking students, since schooling is premised on a basic ability to understand the language of instruction. The Supreme Court recognized in *Lau v. Nichols* that non-English speaking children cannot derive educational benefits from incomprehensible instruction:

> [T]here is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education . . . Basic English skills are at the very core of what these public schools teach. Imposition of a requirement that, before a child can effectively participate in the educational program, he must already have acquired those basic skills is to make a mockery of public education. We know that those who do not understand English are certain to find their classroom experiences wholly incomprehensible and in no way meaningful.[152]

When a student cannot understand the language employed in the school, the student cannot be said to have an educational opportunity in any sense. Thus, the type of educational barrier imposed by an official-English declaration is similar in effect to the absolute denial

148. 457 U.S. 202 (1982).
149. *Id.* at 221.
150. *Id.* at 234.
151. *Id.* at 224. The holding of *Plyler*, however, was limited to its facts by the Court's recent decision in Kadrmas v. Dickinson Public Schools, 108 S. Ct. 2481 (1988). This does not preclude the supposition, though, that for the Court to find education to be a fundamental right an English-only case might present an appropriate factual basis.
152. 414 U.S. 563 (1974).

of an education to the children of illegal immigrants in *Plyler*. The impairment of this right raises questions of equal protection which should be subjected, at least, to heightened scrutiny.

C. Compelling State Interest

Official-English declarations which are based on a suspect classification and which impair the fundamental right to vote and the right to education, can be sustained only if such legislation is necessary to promote a compelling state interest.[153] In pursuing that interest, a state cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Rather, the state must choose the least drastic means available.[154] Thus, it is important that courts determine whether the publicly declared goals of official-English declarations are of such a compelling nature so as to justify the legislation.

English-only advocates generally advance two reasons for official-English declarations. First, they claim that English is the common bond of the American people and that bond is being threatened by the encroachment of foreign languages.[155] Second, they assert that all language minorities must learn English if they are to fully participate in American society and that bilingual programs discourage language minorities from learning English by making life too easy for non-English speakers.[156]

As to the first proposition, our early history shows that core notions of individual liberty militated against any inclination to grant English official status. The legacy of this early period is tolerance for linguistic diversity. Nonetheless, even recognizing that English is the common bond of our society, it does not follow that English is the only or the most important bonding force of the American people. The common heritage shared by old and new immigrants is a belief in democracy, freedom, and equality of opportunity. A mastery of the English language is not a prerequisite for loyalty or commitment to these ideals.

English-only advocates base their claim that the English language is being eroded, and thus national unity threatened, on the fact that English is not the primary language of a minority of Americans. Senator Huddleston, the Senate sponsor of the ELA introduced in 1983 and 1985, cited statistics showing that the number of people in the United States that use a language other than English in their

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153. Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

154. Dunn v. Blumstein, 405 U.S. 330 (1972).

155. 129 CONG. REC. E5877-78 (daily ed. Nov. 18, 1983) (statement of Rep. Shumway); 127 CONG. REC. 7444 (1981).

156. 129 CONG. REC. E757 (daily ed. Mar. 2, 1983) (statement of Rep. Shumway); 129 CONG. REC. S12,640-44 (daily ed. Sept. 21, 1983) (statements of Senators Huddleston and Simms).

homes rose from eight million in 1975 to twenty-two million in 1980, as evidence that the melting pot is not working.[157]

These statistics lend questionable support to the position of English-only supporters that the primacy of the English language is in danger. Proponents of English-only insist that official-English declarations would not discourage the use of other languages in private contexts, such as in homes, community groups, churches, or cultural schools.[158] More importantly, although twenty-two million Americans speak a language other than English in the home, it would be erroneous to assume that people who speak a language other than English in the home cannot also speak English.

In fact, the 1980 Census reveals that of eleven million Hispanics who reported that they speak Spanish at home, over eight million reported that they also speak English.[159] Only 2.7 million reported that they speak very little or no English at all. Of those who speak a language other than Spanish in the home, almost nine million reported that they speak English well or very well, and only 1.4 million reported that they speak little or no English.[160] Indeed, English is the usual language in ninety-four percent of households in the United States.[161] These statistics show that English is the language of the nation.

In addition, English-only supporters point to the separatist tendencies of such countries as Canada as the model of what the future of the United States will be if the primacy of the English language is not maintained. However, scholars have rejected linguistic comparisons between the French-speaking population in Canada and the Spanish-speaking population in the United States, noting that in Quebec only two percent of native speakers of French become primarily English speakers, while in the American Southwest, for example, sixty percent of the Spanish speakers adopt the English language.[162] Such comparisons are also said to ignore the importance of factors such as history, geography, religion, and politics. The language divisions exist and persist because of deeper societal splits.[163] Proponents of English-only have also overlooked the fact that there are many examples of nations, such as Switzerland, where official multilingualism has not caused political strife.

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157. *Id.* at S12,641 (citing the 1980 Census).

158. 127 CONG. REC. 23,980-82 (1981); U.S. English Fact Sheet, English Language Amendment (1987).

159. *1980 Census of Population and Housing*, doc. PHC80-S1-1, at 14.

160. *Id.*

161. Heath, *Language and Equity: An Historical Perspective*, CONFERENCE ON LANGUAGE RIGHTS AND PUBLIC POLICY, Stanford University, April 16-17, 1988.

162. Note, *supra* note 23, at 531.

163. *Id.*; Hakuta, *Dangers of Outlawing Our Differences*, N.Y. Times, April 26, 1987, § 23, at 36, col. 1.

Moreover, scholars note that separatist problems are attributed, at least in part, to a denial of language rights by a province or nation.[164] Thus, the tension and divisiveness generated by an English-only declaration can result in a self-fulfilling prophecy. Finally, the absence of language differences does not guarantee national unity. This much is recognized by English-only supporters.[165]

There is no demonstrated urgency to legislate English-only language restrictions. Rather, the real need lies in the nation's inattention to foreign languages. At a time when a nationwide campaign is seeking to declare English the national language, Congress and business leaders are concerned "that the inability of most Americans to master a second language has undermined this nation's commercial and strategic position in an increasingly competitive world."[166]

The second proposition, that immigrants must become proficient in English in order to become fully integrated into the society, is recognized by language minorities. The necessity of all Americans to communicate without translation is woven into the fabric of our society. Social, political, and economic advancement depends on it. Research has shown that ninety-eight percent of Hispanics surveyed felt that it is essential for their children to read and write English.[167] In New York, there is a waiting list of thousands for adult English classes,[168] and in Los Angeles over 40,000 adults seeking English language classes were turned away.[169] The response to adult English classes underscores the strong desire among newcomers to become proficient in English.

In addition, the perception that large numbers of immigrants are not learning English is inaccurate. Researchers have found that Spanish speakers are following the traditional pattern of English acquisition, if not assimilating the English language more rapidly.[170] Indeed, according to a 1985 Rand Corporation study, over ninety-five percent of first generation Mexican-Americans are proficient in English and more than half of the second generation is monolingual in English.[171] Thus, the provision of bilingual services has not discouraged non-English speaking minorities from learning English.

Instead, bilingual services allow language minority citizens to participate in society while becoming proficient in English. It is contradictory for English-only supporters to, on the one hand, express concern at the inability of language minorities to participate in society

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164. Marshall, *supra* note 13, at 32.
165. 129 CONG. REC. S12,643 (daily ed. Sept. 21, 1983) (statement of Sen. Huddleston).
166. Rohter, *supra* note 40.
167. U.S. English, *Obligations of Citizenship* (1984).
168. N.Y. Times, Oct. 12, 1986, § 1, at 51, col. 1.
169. L.A. Times, Sept. 24, 1986, at 29, col. 1.
170. Note, *supra* note 23, at 529; Veltman, *Comment*, 60 INT'L J. SOC. LANG. 178 (1986).
171. N.Y. Times, Oct. 2, 1986, § 1, at 23, col. 3.

because of a language barrier and, on the other hand, seek to deny them the very programs that integrate these citizens into the society. It is contradictory for them to maintain that a policy of bilingualism segregates minorities from politics, the economy, and society[172] when it is the abolition of bilingual services which would ensure that fewer language minorities become proficient in English. Restricting programs and services that allow individuals to participate in mainstream institutions while they are mastering the English language only serves to further marginalize the language minority population.

English-only advocates, however, also maintain that withdrawing bilingual services would provide a positive incentive for voting citizens to learn English. They argue that the nation would benefit because the voters would be "as fully informed as possible."[173] It is probable that non-English speaking citizens, faced with an all English ballot would just not vote, resulting in the disenfranchisement of a section of the citizenry. Such a denial of a right so precious and fundamental in our society cannot be deemed a necessary or appropriate means of encouraging persons to learn English. Their argument further ignores the effectiveness of the foreign language media. "[A]n ability to read or understand Spanish is as effective as an ability to read English for those to whom Spanish-language newspapers and Spanish-language radio and television programs are available to inform them of election issues and governmental affairs."[174]

Furthermore, while the provision of bilingual services imposes a financial and administrative burden, the Supreme Court has consistently held that states are prohibited by the equal protection clause from minimizing expenditures by means which invidiously discriminate against a suspect class[175] or impair a fundamental right.[176]

Finally, official-English declarations are not the least drastic means by which the objectives sought by English-only supporters can be accomplished. Greater language proficiency can be achieved by providing for greater funding for language training. The 1984 Bilingual Education Act provides for programs of Family English Literacy. The Family English Proficiency Program was designed to help limited English proficient adults learn English. Yet only six grant applications were funded in 1985 and the Administration recommended zero funding in 1986.[177] The demand for adult English classes in New York is so high that thousands of people are on waiting lists. Educational officials say that enrollment could be easily doubled, but the main obstacle is the lack of funding.[178]

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172. 129 CONG. REC. S12,643 (daily ed. Sept. 21, 1983) (statement of Sen. Huddleston).
173. *Id.* at S12,641.
174. Katzenbach v. Morgan, 384 U.S. 641, 655 (1966).
175. Shapiro v. Thompson, 394 U.S. 618, 633 (1969).
176. Dunn v. Blumstein, 405 U.S. 330, 351 (1972).
177. MALDEF statement on the ELA.
178. N.Y. Times, Oct. 12, 1986, § 1, at 51, col. 1.

Alternatively, with exclusive jurisdiction over naturalization, Congress can raise the level of English literacy required for naturalization. The minimal English currently required for citizenship tests hardly qualifies immigrants for the array of propositions currently on American ballots.

The foregoing application of the equal protection strict scrutiny test shows that official-English declarations cannot withstand constitutional scrutiny. The asserted state interests do not meet the requisite compelling status, and the existence of less drastic alternatives that promote the state interests reveals that the legislation is not necessary to achieve the asserted interests.

V. THE SUPREMACY CLAUSE

State action must give way to federal legislation where a valid "act of Congress fairly interpreted is in actual conflict with the law of the State."[179] The underlying rationale of this doctrine of pre-emption is that the supremacy clause of article VI invalidates state laws that frustrate the federal scheme. Article VI of the United States Constitution provides that "[t]he Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land."[180]

Congress may evince a purpose to pre-empt state law in three ways. First, Congress may expressly state that federal authority over a particular subject is to be exclusive. Second, federal pre-emption may be inferred from the language of the statute, legislative history, or the objects of the federal regulatory scheme. Finally, if it is impossible to comply with both federal and state law, federal law will prevail and state law must yield.[181] This portion of the article addresses the effect of official-English declarations on federal enactments. It is argued that such declarations are invalid under the supremacy clause to the extent that they interfere with those statutory guarantees.

A. Federal Recognition of Language Minorities' Rights

In the 1960's Black American citizens made increasing demands for legislation protecting their civil rights. As part of the civil rights movement, protective legislation was extended to language rights with the passage of the Voting Rights Act of 1965 and the first Bilingual Education Act.

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179. Savage v. Jones, 225 U.S. 501, 533 (1912) (dictum).

180. U.S. CONST. art. VI, cl. 2.

181. *See* Edgar v. Mite Corp., 457 U.S. 624 (1982); Chicago & N.W. Transp. v. Kalo Brick & Tile, 450 U.S. 311 (1981); Malone v. White Motor Corp., 435 U.S. 497 (1978); People of the State of Illinois v. Kerr-McGee Chemical Corp., 677 F.2d 571 (7th Cir. 1982), *cert. denied*, 459 U.S. 1049 (1982); New Jersey State Chamber of Commerce v. Hughey, 774 F.2d 587 (3d Cir. 1985).

1. The Voting Rights Act

The United States Commission on Civil Rights, in a 1975 report to Congress,[182] noted that English-only registration and voting limited the political participation of voters whose primary language was not English. With this background, Congress amended the 1965 Voting Rights Act and explicitly required that state and local governments publish bilingual election materials when more than five percent of the voting-age residents were members of a single language minority, and the illiteracy rate in English of such groups was higher than the national average.[183]

Originally, the amendment was given a ten year lifespan, with the goal of the experiment to determine whether providing bilingual election materials would facilitate voting by language minority citizens.[184] However, in 1982, Congress reaffirmed its determination that bilingual election materials are necessary and extended the program for another ten years.[185]

2. The Bilingual Education Act

The passage of the 1965 Voting Rights Act set a precedent for the recognition of language rights in education. In 1967 Congress passed the Bilingual Education Act, which offers financial assistance for local bilingual programs designed to meet the needs of children with limited facility in English.[186]

The Equal Educational Opportunities Act of 1974, moved a step beyond encouraging bilingual language assistance. The Act requires that a school district "take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."[187]

Another federal provision of significance is Title VI of the Civil Rights Act of 1964.[188] In broad terms, the Act proscribes discrimination in federally assisted programs. The Department of Health, Education and Welfare (HEW) issued regulations to implement this mandate. The regulations required that school districts take affirmative steps to address the special language needs of non-English speaking students. Federal courts have interpreted the Civil Rights Act of 1964 and the HEW regulations as mandating bilingual education. In *Lau v. Nichols*, the Supreme Court relied on Title VI of the Civil Rights Act in requiring that special language assistance

182. United States Commission on Civil Rights, *The Voting Rights Act: Ten Years After* 117-21 (1975).
183. 42 U.S.C. § 1973aa-1a(b) (1982).
184. *See* 1975 U.S. CODE CONG. & ADMIN. NEWS 795, 798.
185. 42 U.S.C. § 1973aa-1a(b) (1982).
186. 20 U.S.C. §§ 3221-3261 (1982).
187. 20 U.S.C. § 1703(f) (1982).
188. 42 U.S.C. § 2000 (1982).

be provided for non-English speaking Chinese students.[189] The federal court in *Portales v. Serna* stated that "[u]nder Title VI of the Civil Rights Act of 1964 [children of limited English-speaking ability] have a right to bilingual education."[190] A similar finding was made by a New York federal court in *Rios v. Read*.[191]

3. Other Federal Language Programs

There are other instances where federal law mandates the use of foreign languages. Federal courts provide interpreters for parties whose primary language is other than English in civil and criminal proceedings initiated by the United States.[192] Interpreters must also be provided in physical and mental examinations of aliens seeking entry into the United States.[193] The use of foreign language personnel are required in federally funded migrant and community health centers,[194] and in alcohol abuse and treatment programs.[195]

B. The Impact of Official-English Declarations on Federal Programs

Current English-only efforts are openly challenging government services for language minorities. Federal bilingual programs developed under the Voting Rights Act and the Bilingual Education Act are specifically targeted by the English Language Amendment. Senator Hayakawa stated that the ELA would "establish English as the official language," "abolish requirements for bilingual election materials," and "allow transitional instruction in English for non-English speaking students but do away with requirements for foreign language instruction in other academic subjects."[196]

At the state level, although most official-English declarations are broad statements, some expressly proscribe the provision of bilingual services. The Tennessee statute declaring English the official language of the state mandates that "[a]ll communications and publications, including ballots, produced by governmental entities . . . shall be in English, and instruction in the public schools and colleges . . . shall be conducted in English.[197]

The effect of a broad interpretation of English-only declarations on federal language programs is clear: bilingual services would cease. Bilingual voting under the Voting Rights Act would end. Yet a study

189. 414 U.S. 563 (1974).
190. 499 F.2d 1147 (10th Cir. 1974).
191. 480 F. Supp. 14 (E.D.N.Y. 1978).
192. 28 U.S.C. § 1827 (1982).
193. 8 U.S.C. § 1224 (1982).
194. 42 U.S.C. § 254 (1982).
195. 42 U.S.C. § 4577(b) (1982).
196. S.J. Res. 72, 97th Cong., 1st Sess., 127 CONG. REC. 23,980-82 (1981).
197. TENN. CODE ANN. § 4-1-404 (1985).

conducted by the Mexican American Legal Defense and Education Fund (MALDEF) found that twenty-four percent of Hispanic voters used bilingual ballots in the 1980 elections.[198] A MALDEF study of Mexican-American voters also found that one-third of the voters surveyed would not have registered if bilingual ballots had not been available.[199] Moreover, of the 310 jurisdictions required to provide multilingual ballots,[200] 281 involve Spanish speakers.[201]

One of the most affected groups by this is the Puerto Rican community. Puerto Ricans born on the island are United States citizens eligible to vote.[202] Unlike immigrants from foreign countries, Puerto Ricans are not required to satisfy any English literacy requirements before attaining citizenship status.[203] Since the dominant language in Puerto Rico is Spanish, it is obvious that many of these citizens may not understand an English ballot. Congress sought to secure the rights of Puerto Ricans to vote in Section 1973b(e) of the Voting Rights Act. This section provides:

> (1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language. (2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State or local election because of his inability to read, write, understand, or interpret any matter in the English language . . . .[204]

The Supreme Court upheld the constitutionality of this provision in *Katzenbach v. Morgan,* noting that Section 1973b(e) enables the Puerto Rican community to secure their civil rights and the equal protection of the laws.[205]

In education, language rights recognized since *Meyer v. Nebraska,* as well as interpretations of Title VI of the Civil Rights Act and the Equal Educational Opportunities Act of 1974 mandating language assistance to non-English speaking students, would be severely cur-

198. S. Rep. No. 417, 97th Cong., 2d Sess. 66 n.219, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 177, 245 n.219.
199. Alter, *English Spoken Here, Please,* 103 NEWSWEEK 24 (1984).
200. 42 U.S.C. §§ 1971-1973 (1981 & Supp. 1985).
201. Note, *supra* note 23, at 524.
202. 8 U.S.C. § 1402 (1982).
203. *Id.*
204. 42 U.S.C. § 1973b(e) (1982).
205. 384 U.S. 641 (1966).

tailed by official-English declarations. Other federal language programs, such as the Court Interpreters Act, would be nullified to the extent that they require rather than permit the use of a foreign language.

Inasmuch as official-English declarations prohibit the very acts which the federal government requires, either expressly or through a broad judicial interpretation of such declarations, they are in direct contravention of federal enactments mandating the provision of bilingual services. It is clear that compliance with both official-English declarations and federal legislation recognizing language rights would be impossible. The legislation would reverse the language rights gained over the last fifty years. Therefore, under the preemption doctrine federal law must prevail and the state law must yield.

1. Official-English Declarations in Practice: The Illinois Experiment

Illinois declared English the official language of the state in 1923.[206] This proclamation currently appears in its statutes immediately after a designation of the state's official insect, the monarch butterfly,[207] and before a designation of its official mineral, fluorite.[208] Thus, the declaration seems to have largely symbolic value. This was the finding made in *Puerto Rican Organization for Political Action v. Kusper*.[209] In *Kusper* the court granted a preliminary injunction compelling the Chicago Board of Election Commissioners to provide voting assistance in Spanish to Puerto Rican citizens who were unable to read or understand English. The defendants appealed, arguing that the injunction required them to violate the state's official-English declaration. The court found the statute to be purely symbolic, noting that it "appear[ed] with [other statutes] naming the state bird and the state song" and "ha[d] never been used to prevent publication of official materials in other languages."[210]

Kusper raises the question as to what effect Illinois' official-English proclamation had on language policies. In Illinois courts, evidence may be given through a translator in any language.[211] Interpreters are also provided in mental health facilities.[212] The bilingual education program encourages instruction in the native languages of children, but mandates instruction of the "history and culture of the country, territory or geographic area which is the native land of the parents

206. ILL. ANN. STAT. ch. 1, para. 3005 (Smith-Hurd 1980).
207. *Id.* at para. 3004.
208. *Id.* at para. 3006.
209. 490 F.2d 575 (7th Cir. 1973).
210. *Id.* at 577.
211. ILL. ANN. STAT. ch. 110, para. 8-1401 (Smith-Hurd 1984).
212. *Id.* at ch. 91 1/2, para. 3-204 (Smith-Hurd 1987).

of children of limited English-speaking ability."[213] Most surprising is that state "agencies having direct contact with substantial numbers of non-English speaking . . . citizens [must] establish occupational titles for persons having sufficient linguistic ability or cultural knowledge to be able to render effective service to such citizens."[214]

The official-English declaration in Illinois is clearly a symbolic gesture, not affecting bilingual education, not affecting bilingual ballots, and not even affecting the provision of services in other languages by the state.

2. Current English-Only Declarations

A recent ruling by the Ninth Circuit in *Gutierrez v. Municipal Court*,[215] confined California's official-English amendment to the realm of symbolism, following the precedent established by *Kusper*. In *Gutierrez*, a court interpreter brought suit challenging a policy set by the municipal court requiring employees to converse only in English while at work, except during the course of translation. The appellants maintained that the official-English amendment required the use of English in all official state business, thus requiring state employees to communicate in English. The court rejected the argument that the amendment mandated an English-only work rule stating:

> Section 6 declares only that "English is the official language of the State of California," . . . and mandates only that "[t]he Legislature shall enforce this section by appropriate legislation" . . . While section 6 may conceivably have some concrete application to official government communications, if and when the measure is appropriately implemented by the state legislature, it appears otherwise to be primarily a symbolic statement concerning the importance of preserving, protecting, and strengthening the English language.[216]

The court also rejected arguments based on the legislative history that the intent of the amendment was to require that government business be conducted in English. The appellants relied on an argument contained in the ballot initiative which stated that the "'[g]overnment must protect English . . . by functioning in English . . .'"[217] The court noted, however, that even if this were the case, the rule in question went beyond official communications and sought to regulate private speech between employees.

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213. *Id.* at ch. 122, para. 14C-2(f) (Smith-Hurd Supp. 1989).
214. *Id.* at ch. 127, para. 63b109(6) (Smith-Hurd 1981 & Supp. 1989).
215. 838 F.2d 1031 (9th Cir. 1988).
216. *Id.* at 1044 (quoting CAL. CONST. art. III, § 6).
217. *Id.* at 1044 n.18 (quoting Argument in Favor of Proposition 63, *California Ballot Pamphlet* Y6 (Nov. 4, 1986)).

In November 1986 California voters approved the referendum amending their state constitution to declare English the state's official language by 73 percent of the vote.[218] Since the passage of the amendment, proponents of English-only have threatened to mount a legal campaign against bilingual programs. Stanley Diamond, head of the California chapter of U.S. English, said his organization is preparing lawsuits against Los Angeles, San Francisco, Alameda County, and two other municipalities for the continued use of multilingual ballots.

Another likely prospect for suit is the state's bilingual education program. Legislation governing the bilingual program expired in June 1987. Since English is the official language and since the law mandating bilingual education has expired, it would seem that the state's bilingual education program would end. Today, the bilingual education program in California continues unabated.[219] English-only advocates have not brought the legal actions threatened. However, while the court's decision in *Gutierrez* does not insulate language assistance programs from legal challenge, it does provide a strong legal basis for defending such suits.

English-only advocates have also sought to challenge bilingual services in other ways. In Florida, the U.S. English coordinator has written to the state governor attacking bilingual McDonald's menus, Spanish services provided by public hospitals, including instructions for patients recovering from pre- and post-natal care, use of the United States mail for Spanish language advertisements from Florida shopkeepers and even Spanish language materials in libraries. Florida English has also called for the elimination of 911 services for non-English-speakers noting that "[e]verybody calling the emergency line should have to learn enough English so they can say 'fire' or 'emergency' and give the address."[220]

In Monterey Park, a Los Angeles suburb with a large Chinese population, residents campaigned against advertising signs in Chinese characters. Similar protests were made in Linda Vista, a San Diego suburb with a sizable Southeast Asian community.[221] English-only advocates have also organized protests against such corporations as Philip Morris, Pacific Bell, and McDonald's for providing foreign language directories, billboards, and menus.[222]

Proponents of English-only have also launched a legislative campaign. In 1980 Dade County voters approved a measure that prohibited the use of funds "for the purpose of utilizing any language

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218. N.Y. Times, March 2, 1988, at 12, col. 3 (city ed.).
219. *Id.*
220. Crawford, *Conservative Groups Take Aim at Bilingual-Education Programs*, EDUCATION WEEK, March 19, 1986.
221. N.Y. Times, July 21, 1986, at 8, col. 1 (city ed.).
222. Proposition 63, Facts and Myth.

other than English or promoting culture other than that of the United States."[223] As a result, the county ceased translating documents and signs into Spanish. Therefore, signs at the local zoo could not identify animals in any language except English. An attempt to prohibit the county from conducting marriage ceremonies in any language but English, however, sparked protests and was abandoned. In 1984 the ordinance was modified so public employees could deal with medical patients and conduct other kinds of official business in languages other than English. Tourist attractions were also exempted from the law.[224] Also targeted for legislative attack are welfare applications, driver's license examinations and college scholarship applications.

Official-English declarations are broadly worded. Consequently, although English-only advocates maintain that these declarations would not prohibit or discourage the use of foreign languages in private contexts, such as commerce, they cannot control the ultimate consequences of their passage.

VI. CONCLUSION

The question of the future of the English language as a national symbol and a means of unification in the United States has been a frequent topic of debate throughout the history of this country. As the Americanization movement showed, however, language itself is often not the central issue, but a focus of arguments made for political, social, or economic purposes.

The current English-only movement resonates with the turn-of-the-century Americanization movement and the cries by language alarmists. Like the Americanization movement, the force behind the current movement is the resurgence of an anti-immigrant sentiment. This new wave of anti-immigrant sentiment is prompted by recent high rates of immigration from Latin American and Asian countries.

Nonetheless, this country remains staunchly monolingual. Although the United States has welcomed many immigrants in its short history, the melting pot has made bilingualism very temporary. As demonstrated by the Spanish-speaking community, within a generation, bilingualism rapidly shifts to English monolingualism.

English-only proponents seek to state more than the obvious: that English is the language of the United States. They seek to end bilingual programs which have been essential for the effective participation of non-English speaking citizens in our society. Official-English declarations would disenfranchise non-English speaking citizens. The right of children to an adequate education would be

223. N.Y. Times, Oct. 26, 1986, § 4, at 6, col. 1.
224. N.Y. Times, July 21, 1986, at 8, col. 1 (city ed.).

jeopardized. In so doing, English-only advocates are distinguishing a suspect class, impairing fundamental rights, and frustrating the objectives of federal enactments which seek to safeguard language minority rights. Such interference with the rights of language minorities violates current constitutional law under the equal protection clause and the supremacy clause.

It has long been established that a court should interpret a statute so as not to conflict with the Constitution.[225] A broad interpretation of official-English declarations places such legislation at odds with constitutional provisions. English-only declarations effectively classify along ethnic lines and impair fundamental rights. Therefore, official-English declarations must be strictly scrutinized and narrowly construed to limit their effect to the domain of symbolism. Only this result is consistent with the longstanding pronouncement that the protection of the Constitution extends to all citizens, not just those who speak the English language.

225. Presser v. Illinois, 116 U.S. 252, 269 (1886).