

Rethinking Race for Strict Scrutiny Purposes: *Yniguez* and the Racialization of English Only

PROLOGUE

Maria-Kelly Yniguez spoke Spanish on the job. As an insurance claims manager for the State of Arizona, she managed medical malpractice claims asserted against the state.¹ A Latina fluent in English and Spanish, Maria often spoke Spanish to Latino claimants to help them understand intricate legal concepts related to their claims.² She inquired about the nature of their injuries, explained state policies and drafted documents in both Spanish and English to ensure that limited-English speakers knew the significance of the papers they were signing.³ For Maria, Spanish was also “part of her cultural heritage.”⁴ Her bilingualism thus provided Spanish-speakers not only vital information needed to process their claims but a sense of community.

In November 1988, Arizona voters passed Article 28,⁵ Arizona’s English Only amendment. It proclaimed that the State “shall act in English and no other language.”⁶ Upon its enactment, Maria stopped speaking Spanish to all clients for fear of employee sanctions,⁷ thereby foreclosing communication with a substantial portion of her department’s Latino clientele. With the passage of Article 28, bilingual clerks, teachers and state senators, among others, feared they would be unable to advise people who could speak only Spanish or Chinese or Navajo.⁸ Limited-English speaking residents could not

¹ *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 924 (9th Cir. 1995) (en banc), *vacated*, *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055 (1997).

² Brief For Respondent Maria-Kelly F. Yniguez, 1996 WL 426410, at *1, *Yniguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995) (No. 95-974). Maria-Kelly Yniguez spoke English to English-speaking clients, Spanish to Spanish-speaking clients, and a combination of the two languages to clients who could understand both. *Id.*

³ Stipulation as to Foundation and Non-Hearsay Nature of Certain Public Records and Reports at 3-5, *Yniguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995) (No. 95-974). Important meanings, feelings and concepts, she thought, were often most clearly and vividly expressed in Spanish. *Id.* at 5.

⁴ *Id.* at 3 (citing Plaintiff’s Statement of Facts, at para. 7). For Maria, Spanish conveyed a “sense of community and experiences shared by Hispanics.” Brief for Petitioners, 1996 WL 272394, at *3-4, *Yniguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995) (No. 95-974) (citing Joint Appendix, at 45, 51). She also spoke Spanish on the job “to demonstrate [her] belief that Arizona enjoys a pluralistic society.” *Id.* at *4 (quoting Joint Appendix at 45).

⁵ ARIZ. CONST. art. XXVIII.

⁶ *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 924 (9th Cir. 1995) (en banc) (citing ARIZ. CONST. art. XXVIII §§ 1(3)(a)(iv) and 3(1)(a)).

⁷ *Id.*

⁸ *Id.* at 952 (Reinhardt, J., concurring). See also *Ruiz v. Symington*, No. 1 CA-CV 94-0235, 1996 WL 309512 (Ariz. App. Div. 1, June 11, 1996) (related Arizona state court case).

communicate effectively with employees of a state housing office, clerks at the small claims court or legislators inquiring about concerns of their community.⁹ Yniguez filed suit against the State of Arizona on the grounds that the provision violated the First Amendment's protection of free speech and the Fourteenth Amendment's guarantee of equal protection against invidious racial classifications.¹⁰ Among her reasons for filing suit was her concern for the Latinos denied governmental services in a language they could understand.¹¹

In *Yniguez v. Arizonans for Official English*,¹² the Ninth Circuit struck down Arizona's English Only amendment on First Amendment grounds.¹³ Noticeably absent from the court's opinion was a discussion of whether Article 28 is a racial classification for strict scrutiny purposes. In *Arizonans for Official English v. Arizona*,¹⁴ the United States Supreme Court likewise bypassed racial classification analysis, ignoring racial issues entirely. The Court instead vacated the Ninth Circuit's judgment and directed dismissal by the Arizona District Court based on issues of mootness and jurisdiction.¹⁵ In all likelihood, the United States Supreme Court will soon determine the constitutionality of Article 28 on appeal from the Arizona state courts.¹⁶ At that time, the Court may address the appropriate standard of review, including whether Article 28 is a racial classification.

I. INTRODUCTION

Maria-Kelly Yniguez's challenge to Article 28 provides fertile ground for examining the law's approach to defining race. Courts, lawyers and legislatures often mistakenly view race as immutable and biologically-

The plaintiffs in *Ruiz* include four Arizona state elected officials, five state employees and one private citizen, all of whom are bilingual in Spanish and English. *Id.* at *3. See *infra* note 113 and accompanying text.

⁹ *Yniguez*, 69 F.3d at 941.

¹⁰ *Id.* at 925.

¹¹ Plaintiff's Statement of Facts, at 5, *Yniguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995) (No. 95-974).

¹² 69 F.3d 920 (9th Cir. 1995) (en banc).

¹³ *Id.* See *infra* Part II.A.

¹⁴ 117 S. Ct. 1055 (1997).

¹⁵ *Id.* at 1060. See *infra* Part II.B.

¹⁶ See *Arizonans for Official English v. Arizona*, 117 S. Ct. at 1075 (referring to *Ruiz v. Symington*, No. 1 CA-CV 94-0235, 1996 WL 309512 (Ariz. App. Div. 1, June 11, 1996)). See also Judy Wiessler, *High Court Sidesteps English-Only Ruling/Another Arizona Case Likely to Resurface*, HOUST. CHRON., Mar. 4, 1997, at 7. See *infra* notes 22-23, 112-13 and accompanying text.

determined¹⁷ rather than socially constructed.¹⁸ Based on this flawed assumption, and often without analysis, courts determine whether a governmental classification is “racial” for purposes of constitutional scrutiny.¹⁹ Yniguez’s story and its surrounding racialized²⁰ rhetoric raise the question of when a facially neutral classification is “racial” in order to invoke strict scrutiny review. Using Yniguez’s story, and through analysis of its surrounding discourse, this Comment explores how the law misdefines race. This Comment also offers the beginnings of an alternative theoretical framework for determining whether a particular governmental classification is racial for constitutional scrutiny purposes.

Because the Supreme Court declined to rule on the constitutionality of Article 28 and vacated all lower court *Yniguez* rulings, the question of whether Article 28 is a racial classification remains unanswered. The Supreme Court, however, may determine the legality of Article 28 in the near future.²¹ The issue of Article 28’s “proper construction” is before the Arizona Supreme Court in *Ruiz v. Symington*,²² and commentators suggest that the United States Supreme Court will likely review the Arizona high court’s ruling.²³ On

¹⁷ See *infra* Part III discussing “Biological Race.”

¹⁸ The “social construction” of race, as I use the term, refers to the ongoing process of creation, shaping and transformation of race by social and political forces. This forming and reforming of race thereby imbues groups, social practices and events with racial meaning. My definition is based upon the theory of “racial formation” developed by critical sociologists, Michael Omi and Howard Winant. MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES FROM THE 1960S TO THE 1990S* (2d. ed. 1994). See *infra* notes 176-78 and accompanying text. See also Ian Haney-Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. REV. 1, 11 (1994) (describing race as socially fabricated by humans rather than created by natural differentiation). See *infra* Part IV describing race as a social construction.

¹⁹ According to the infamous *Carolene Products* footnote four, when determining the existence of racial classifications, courts look to political powerlessness and existence of stereotypes, among other things, to determine whether a group is “discrete and insular.” U.S. v. *Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938). Footnote four, which is attentive to history and social conditions, is frequently cited as justification for heightened scrutiny of racial classifications. However, it has not, in following cases, been employed to determine whether a group was a racial minority. Courts instead have assumed a biological “immutable” conception of race. See *infra* Part III.

²⁰ See Michael Omi, *Out of the Melting Pot and Into the Fire: Race Relations Policy, in THE STATE OF ASIAN AMERICA: POLICY ISSUES TO THE YEAR 2020* 203 (1993) (describing notion of “racialization.”). See *infra* Part IV for a discussion of “racialization.”

²¹ See *infra* Part II.B. See also Wiessler, *supra* note 16, at 7.

²² No. 1 CA-CV 94-0235, 1996 WL 309512 (Ariz. App. Div. 1, June 11, 1996).

²³ See Howard Fischer, *English-Only Law Bypassed by High Court*, ARIZ. DAILY STAR, Mar. 4, 1997, at 1A; Linda Greenhouse, *‘Official’ English Lawsuit Rejected But Issue Stays Alive in Arizona*, NEW ORLEANS TIMES-PICAYUNE, Mar. 4, 1997 at A1. See *infra* Part II.B.

review, unless the Court finds grounds for heightened constitutional scrutiny,²⁴ the facially neutral Article 28 will be subject to rational basis review.²⁵ The Court applies the rigorous strict scrutiny standard to "suspect" classifications such as race or national origin.²⁶ In contrast, the rational basis standard applies when there is no suspect or semi-suspect class.²⁷ Using rational basis review, the Court customarily defers to legislative action; whereas under strict scrutiny the Court almost always invalidates the governmental classification.²⁸

It is for this reason that the standard of review is crucial: it will likely determine whether Arizona's English Only amendment and others like it are legitimized. The dissent in *Yniguez* and the trial court in *Ruiz* both found the First Amendment challenge unavailing.²⁹ Thus, a likely threshold question for the Supreme Court will be whether Article 28 should be treated as a racial classification, invoking strict scrutiny review.³⁰ The framework selected for addressing this question will likely decide the legality of not only English

²⁴ Classifications which are "suspect" or that abridge fundamental rights are subject to strict scrutiny review. *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995).

²⁵ *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949).

²⁶ *Loving v. Virginia*, 388 U.S. 1 (1967) (race); *Hernandez v. Texas*, 347 U.S. 475 (1954) (national origin). Under this rigorous standard, the state action in question must serve a compelling state interest and be narrowly tailored to achieve that interest. *Adarand*, 115 S. Ct. 2097; *City of Richmond v. Croson*, 488 U.S. 469 (1989).

²⁷ *Railway Express*, 336 U.S. 106. The classification will be upheld if it is merely rationally related to a legitimate governmental purpose. *Id.*

²⁸ See Gerald Gunther, *The Supreme Court, 1971 Term — Forward: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1971) (strict scrutiny standard is "strict in theory, but fatal in fact"). But see *Adarand*, 115 S. Ct. 2097 (attempting to dispel the notion of strict scrutiny as fatal in fact).

²⁹ See *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 960 (9th Cir. 1995) (en banc) (Kozinski, J., dissenting); *Ruiz v. Symington*, No. 1 CA-CV 94-0235, 1996 WL 309512, at *3 (Ariz. App. Div. 1, June 11, 1996). See *infra* text accompanying notes 80-82.

³⁰ Although several articles have addressed the racial character of the English Only movement, only a few have addressed in depth the notion of language restrictions as racial classifications. See Antonio J. Califa, *Declaring English the Official Language: Prejudice Spoken Here*, 24 HARV. C.R.-C.L. L. REV. 293 (1989) (refuting English Only policy arguments and asserting federal English Only bill's violation of equal protection); Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism and Official English*, 77 MINN. L. REV. 269 (1992) (using historical analysis to expose nativist underpinnings and reject constitutionality of Official English laws); Note, "Official English": *Federal Limits on Efforts to Curtail Bilingual Services in the States*, 100 HARV. L. REV. 1345 (1987) (arguing that language minorities are quasi-suspect classes for equal protection purposes); Andrew Averbach, *Language Classifications and the Equal Protection Clause: When is Language a Pretext for Race or Ethnicity?*, 74 B.U. L. REV. 481 (1994) (suggesting a subjective intent standard for finding connections between race and language for equal protection purposes); Michele Arington, *English-Only Laws and Direct Legislation: The Battle in the States Over Language Minority Rights*, 7 J.L. & POL. 325 (1991). These articles, however, do not articulate a theoretical framework for making that determination.

Only statutes across the country but also facially neutral legislation concerning welfare, immigration and other issues with racial impacts.³¹

This Comment asserts that the appropriate framework for examining racial classifications is not based on biological determinants. Rigid biologically-determined racial categories have little scientific basis³² and were historically part of a pseudo-scientific effort to justify white superiority.³³ Instead, the appropriate framework is based on "racial formation"³⁴ theory and the socio-legal concept of the social construction of race.³⁵ Racial formation is a sociohistorical process by which social and political forces continually create, shape and transform race, thereby imparting racial meaning to groups, social practices and events.³⁶ Race is thus changeable rather than fixed, political rather than biological and value-laden rather than neutral.³⁷

Accordingly, this Comment proposes the following principle: A governmental classification is racial for strict scrutiny purposes if, considering all the circumstances, the classification is substantially racialized. As discussed below, this means focusing not only on legislators' elusive "intent,"³⁸ but on all of the circumstances giving rise to the framing, adoption and implementation of the classification as well as the classification's racial

³¹ Upholding the statute thus sends a message to other states contemplating enactment of similar restrictive English Only laws that such laws are appropriate. Commentators have also suggested that the revival of Arizona's English Only amendment could further stimulate the backlash against immigrants and non-English speaking minorities. See David Savage, *English-Only Appeal Goes to Supreme Court*, L.A. TIMES, Mar. 26, 1996, at 1 (reporting on *Yniguez* case).

³² See Lopez, *supra* note 18, at 11-16. See also *infra* Part III.

³³ See Neil Gotanda, *A Critique of "Our Constitution is Colorblind"*, 44 STAN. L. REV. 1, 28 (1991) (observing that the treatment of race as a fixed essence stems from both natural science, originally used to prove Negro inferiority, and physiognomy, suggesting the existence of unalterable biological characteristics). See *infra* Part III.

³⁴ OMI & WINANT, *supra* note 18, at 55-56. See *infra* Part IV discussing "Racial Formation."

³⁵ See *infra* Part IV.

³⁶ OMI & WINANT, *supra* note 18, at 55-56.

³⁷ See *infra* Part IV.

³⁸ The doctrine of discriminatory purpose requires a showing that legislators intended to single out a particular racial group for unequal treatment. *Washington v. Davis*, 426 U.S. 229 (1976). In addition, intent must be "because of," not "in spite of" the unequal treatment. *Personal Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979). Professor Charles R. Lawrence, III has suggested a "cultural meaning" test as an alternative to the traditional "intent" test. Charles R. Lawrence, III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 324 (1987) [hereinafter Lawrence, *Unconscious Racism*]. Lawrence's test uncovers unconscious racism deeply ingrained in the culture and triggers judicial recognition of race-based behavior when there is a finding that the culture attaches racial significance to a governmental action. *Id.* See also *infra* note 228.

effects.³⁹ This also means challenging as inadequate the narrow biological definition of race currently employed by the Court, recognizing the social and political construction of race, and inquiring into whether the classification is imbued with racial meaning and impact. Application of this framework reveals the weakness in English Only proponents' arguments that Article 28 is not about race. It illuminates their efforts to cloak in ostensibly "neutral" culture-based assertions⁴⁰ their implicit arguments for allocating resources and opportunity along racial lines.⁴¹ This framework, attentive to context and history, is developed in preliminary fashion and is meant to serve as a starting point with which to examine the connection between law and racial dynamics. Because the Supreme Court set aside *Yniguez*, the framework has larger relevance for analyzing possible future suits based on Article 28 or other cases involving arguably racialized governmental classifications.

This Comment is divided into five Parts. Part II describes *Yniguez* and Arizona's English Only amendment in the context of increasing U.S. backlash against immigration. Part III identifies the current legal notion of race as immutable and biological rather than as malleable and culturally and politically constructed, and describes its limitations and inaccuracies. Part IV introduces racial formation both as a relevant theoretical framework and a critique of the notion of race as biological and immutable. Finally, Part V sets forth an alternative legal principle for determining whether a racial classification exists for strict scrutiny purposes and illustrates its application through an analysis of the facially neutral Arizona English Only amendment, the *Yniguez* case and surrounding debates.

³⁹ See *infra* Part V setting forth the proposed framework.

⁴⁰ See *infra* Part V.B.2. See also Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CALIF. L. REV. 863, 874 (1993) (examining and rejecting both race-based and culture-based immigration restriction arguments).

⁴¹ See Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821 (1997) [hereinafter Yamamoto, *Critical Race Praxis*] (observing that many in power positions use cultural difference to justify exclusion of racialized groups from the polity).

II. THE YNIGUEZ CASE IN SOCIAL CONTEXT

The *Yniguez* case arises at a time of nationwide anti-immigrant backlash.⁴² Rapidly increasing Asian and Latino immigrant populations,⁴³ perceived as threats to white racial and cultural homogeneity,⁴⁴ are increasingly subject to restrictive laws.⁴⁵ Anti-immigrant supporters rally to deny welfare to illegal and legal immigrants,⁴⁶ abolish affirmative action⁴⁷ and deny health care and education to illegal immigrants.⁴⁸ Border security has become a national rallying cry.⁴⁹ As Professor Bill Ong Hing argues, underlying these anti-immigrant debates is a fear that "immigrants will leave their nonwhite mark on the American landscape."⁵⁰

Within this anti-immigrant movement, a burgeoning English Only movement has resurfaced.⁵¹ The United States House of Representatives in August 1996 passed a national English Only bill.⁵² Presidential candidate Bob

⁴² See generally Kevin R. Johnson, *Fear of an "Alien Nation": Race, Immigration, and Immigrants*, 7 STAN. L. & POL'Y REV. 111 (1996) (describing hostility and nativist sentiment of recent immigration debates); Frank Wu, *Limits of Borders: A Moderate Proposal for Immigration Reform*, 7 STAN. L. & POL'Y REV. 35 (1996) (examining current immigration law debates); Hing, *supra* note 40.

⁴³ Between 1970 and 1990 the Latino population increased by 141 percent, and the Asian population grew by 384.9 percent. Hing, *supra* note 40, at 865 (utilizing these statistics to illustrate reasons for increasing anti-immigrant backlash). By the year 2000, Latinos will be the largest minority group in the United States. Tim Chavez, *For Hispanic People, Big GOP Tent is Big Lie*, GANNETT NEWS SERVICE, Aug. 8, 1996, available in WESTLAW, GANNETTNS File. By the middle of the 21st century only half of the United States population is expected to be non-Hispanic whites. Steven Holmes, *Census Sees a Profound Ethnic Shift in U.S.*, N.Y. TIMES, Mar. 14, 1996, at A8 (reporting on census study). Hispanics are expected to make up 24.5 percent of the population, an increase from today's 10.2 percent, and Asians will comprise 8.2 percent, up from the current 3.3 percent. *Id.*

⁴⁴ See Daina Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CALIF. L. REV. 1053, 1078 (1994).

⁴⁵ See generally Johnson, *supra* note 42, at 111-13.

⁴⁶ See *Clinton Will Sign Welfare Overhaul*, S.F. EXAMINER, Aug. 1, 1996, at A1.

⁴⁷ See Dave Leshner, *Battle Over Prop. 209 Moves to the Courts*, L.A. TIMES, Nov. 7, 1996, at A-1.

⁴⁸ See Paul Feldman, *Major Portions of Prop. 187 Thrown Out By Federal Judge*, L.A. TIMES, Nov. 21, 1995, at 1.

⁴⁹ See Johnson, *supra* note 42, at 111-13.

⁵⁰ Hing, *supra* note 40, at 875.

⁵¹ Califa, *supra* note 30, at 295.

⁵² See *House Passes Bill Making English Federal Government's Official Language*, U.S. NEWSWIRE, Aug. 1, 1996, available in WESTLAW, ALLNEWSPLUS file (reporting that English Only bills have been introduced in every Congress since 1983). The recently-passed House English Only bill declared English the "official language of the Government of the United States" in order to preserve national unity and to "prevent division along linguistic lines." H.R. 123, 104th Cong., 2d sess. (1995). Under the bill, the Federal Government must

Dole called for English Only to protect threats to "national unity."⁵³ Twenty-two states have passed laws establishing English as their official language, nineteen of which were passed in the 1980s and 1990s.⁵⁴ U.S. English, an English Only advocacy group, boasts a membership of close to one million.⁵⁵ Like anti-immigrant proponents, English Only supporters cloak underlying racial debates about who belongs to the polity in "neutral" terms of "American" culture.⁵⁶ English Only laws, enacted in part to counteract the perceived threat to mainstream culture, operate in practice to exclude undesirable nonwhite groups from the polity.⁵⁷ It is within this context that Arizona's electorate passed Article 28. And it is against this backdrop that the Ninth Circuit in *Yniguez* struck down Arizona's English Only amendment as

conduct all of its official business in English. Catalina Carnia, *House Passes Controversial English Bill*, DALLAS MORNING NEWS, Aug. 2, 1996, at A1. The bill purports to promote assimilation, efficiency and fairness. H.R. 123, 104th Cong., 2d sess. (1995). See also Marc Lacey, *Translating the English Only Bill*, L.A. TIMES, Aug. 9, 1996, at A3 (exploring possible effects of a federal English Only bill).

⁵³ Jan Crawford Greenburg, *High Court will Hear 'Official English' Case*, CHIC. TRIB., Mar. 26, 1996, at 6.

⁵⁴ Joseph Torres, *Language is Poised to Become a Defining Election Issue*, IDAHO STATESMAN, May 7, 1996, at 1. Hawai'i recognizes both English and Hawaiian as official languages. HAW. CONST. art. XV § 4. See also Steven Bender, *Consumer Protection for Latinos: Overcoming Language Fraud and English-Only in the Marketplace*, 45 AM. U. L. REV. 1027 (1996) (noting the difference between "English Only" laws which prohibit the government from speaking languages other than English and "Official English" laws which make English the "official" language of the state).

⁵⁵ David Savage, *English-Only Law Stands, Court Says*, L.A. TIMES, Mar. 4, 1997, at A3. U.S. English was founded by John Tanton and S.I. Hayakawa in 1983 and is the oldest organization dedicated to making English the nation's official language. Stephen Green, *House Votes to Make English the Official Federal Language*, SAN DIEGO UNION-TRIB., Aug. 2, 1996, at A1. FAIR, the Federation for American Immigration Reform, an anti-immigrant lobbying group was also founded by Tanton. Patrick McDonnell, *Activists See Dire Immigration Threat*, L.A. TIMES, Aug. 11, 1996, at A3.

⁵⁶ See *infra* Part V.B. Commentators have recognized that English Only arguments are often directly connected to those made by anti-immigrant groups. See, e.g., Brief of Puerto Rican Legal Defense and Educational Fund; National Asian Pacific American Legal Consortium; Legal Aid Society of San Francisco, et al., *Yniguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995) (No. 95-974) (noting connection between anti-immigrant and English Only groups).

⁵⁷ See Perea, *supra* note 30, at 281. See also Mari J. Matsuda, *Voices of America: Accent Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1360-67, 1397-98 (1991) (asserting that accent discrimination is a mechanism for distribution of power, and observing bias against "low-status" accents that depart from the norm "American" accent).

a “prohibited means of promoting the English language”⁵⁸ and facially overbroad.⁵⁹

Article 28 passed by ballot initiative by a one percent margin in 1988,⁶⁰ the result of a petition drive by Arizonans for Official English to amend Arizona’s constitution.⁶¹ The Article mandates that “[t]he English language is the official language of the State of Arizona”⁶² and that the State and “all political subdivisions . . . [including] all government officials and employees during the performance of government business . . . shall act in English and no other language.”⁶³ The Article’s sweeping prohibition of non-English languages compels the use of English for all governmental agencies, organizations, municipalities, ordinances, rules, and programs including “every entity, person, action or item.”⁶⁴ Under the amendment, English is “the language of the ballot, the public schools and all government functions and actions.”⁶⁵ Its enforcement provision allows any person residing in or doing business in the state to bring suit to enforce the Article.⁶⁶ Immediately after Article 28’s enactment, many limited-English speakers could not communicate effectively with the Arizona government in a language other than English, thereby giving rise to Yniguez’s suit.⁶⁷

A. *The Ninth Circuit Opinion*

In *Yniguez v. Arizonans for Official English*, Maria-Kelly Yniguez sought an injunction against state enforcement of Article 28 and a declaration that it

⁵⁸ *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 947 (9th Cir. 1995) (en banc), vacated, *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055 (1997).

⁵⁹ *Id.* at 949.

⁶⁰ *Id.* at 924. Article 28 passed by a slim margin of 50.5%, 569,993 to 580,830. *Id.* See also Recent Development, *Ninth Circuit Invalidates Arizona Constitution’s Official English Requirement*, 109 HARV. L. REV. 1827 (1996) (reporting on and analyzing the *Yniguez* case).

⁶¹ *Yniguez*, 69 F.3d at 924. Arizonans for Official English is a citizens’ group which was the primary proponent of Article 28. *Id.* The Article 28 petition drive was funded by U.S. English. James Crawford, *U.S. English — Agendas Hidden Between the Lines*, HOUST. CHRON., Oct. 30, 1988, at 4.

⁶² ARIZ. CONST. art. XXVIII § 1(1).

⁶³ *Yniguez*, 69 F.3d at 924 (citing ARIZ. CONST. art. XXVIII §§ 1(3)(a)(iv) and 3(1)(a)).

⁶⁴ ARIZ. CONST. art. XXVIII § 1(3)(b).

⁶⁵ *Id.* at § 1(2).

⁶⁶ *Id.* at § 4. After passage of the Article, Arizona Attorney General Robert Corbin stated “If I were to try to speak my limited Spanish on duty and someone filed suit, I would imagine the court would issue a restraining order.” Stipulation as to Foundation and Non-Hearsay Nature of Certain Public Records and Reports at 9-10, *Yniguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995) (No. 95-974).

⁶⁷ See Plaintiff’s Statement of Facts, at 5, *Yniguez*, 69 F.3d 920 (9th Cir. 1995) (No. 95-974).

violated the First and Fourteenth Amendments.⁶⁸ The district court held that Arizona's amendment was facially overbroad and infringed upon First Amendment protected speech.⁶⁹ After Arizona's governor refused to appeal, Arizonans for Official English intervened.⁷⁰ The group argued that Article 28 encouraged unity, political stability, a common language and public confidence.⁷¹ On appeal, the Ninth Circuit unanimously affirmed the district court's holding that Arizona's amendment was facially overbroad and violated the First Amendment.⁷² The Ninth Circuit subsequently granted a rehearing en banc.⁷³ Writing for the majority, Judge Reinhardt rejected Arizonans for Official English's arguments,⁷⁴ declaring that there is a "critical difference between encouraging the use of English and repressing the use of other languages."⁷⁵ The en banc majority ultimately struck down Article 28 as an invalid regulation of public employee speech and unconstitutionally overbroad.⁷⁶ Article 28, the court held, violated the First Amendment rights of Yniguez, public employees and their listeners, and government employees in the executive, legislative and judicial branches.⁷⁷ The court also noted that "the adverse impact of Article 28's over-breadth is especially egregious because it is not uniformly spread over the population, but falls almost entirely upon Hispanics and other national origin minorities."⁷⁸ As such, the court reasoned, it is an unconstitutional compulsion of the use of the English language.⁷⁹

Judge Kozinski, in dissent, argued vigorously against First Amendment protection of Yniguez's speech.⁸⁰ He declared that state employees cannot "arrest the gears of government by refusing to say or do what the state chooses to have said or done."⁸¹ Yniguez's speech, he contended, was in effect the government's speech and could therefore be constitutionally regulated by the state.⁸²

⁶⁸ *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 925 (9th Cir. 1995) (en banc).

⁶⁹ *Yniguez v. Mofford*, 730 F. Supp. 309, 317 (D. Ariz. 1990).

⁷⁰ *Yniguez v. Arizona*, 939 F.2d 727 (9th Cir. 1991).

⁷¹ *Yniguez*, 69 F.3d at 944.

⁷² *Id.* at 924.

⁷³ *Yniguez v. Arizonans for Official English*, 53 F.3d 1084 (9th Cir. May 12, 1995).

⁷⁴ *Yniguez*, 69 F.3d at 944-46.

⁷⁵ *Id.* at 923, 946-47 (English "cannot be coerced by methods which conflict with the Constitution.").

⁷⁶ *Id.* at 947.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 948.

⁸⁰ *See id.* at 960-63 (Kozinski, J., dissenting).

⁸¹ *Id.* at 960 (Kozinski, J., dissenting).

⁸² *Id.* at 962 (Kozinski, J., dissenting).

Judge Reinhardt responded to Kozinski's dissent in a rare and impassioned special concurrence to his own majority opinion.⁸³ Reinhardt explicitly denounced the racialized, nativist fears expressed by Kozinski.⁸⁴ He condemned Judge Kozinski's "absolutist, authoritarian" world in which government clerks would be unable to help Chinese, Spanish or Navajo persons apply for food stamps, driver's licenses, aid for their children or disability benefits.⁸⁵ In Kozinski's world, Judge Reinhardt continued, "[g]overnment employees could be compelled to parrot racist and sexist slogans [and] to hurl hateful invective at non-English speaking people asking for assistance."⁸⁶ His would be "an Orwellian world in which Big Brother could compel its minions to say War is Peace and Peace is War"⁸⁷ According to Judge Reinhardt, Article 28 was a nativist measure that deprived Spanish, Chinese and Navajo from all government assistance and severely penalized non-English speakers.⁸⁸

Noticeably absent from the Ninth Circuit en banc majority opinion was discussion of whether Article 28 is a racial classification for strict scrutiny purposes. Judge Reinhardt's majority opinion pointed to underlying racial motivations and potential effects on particular racial groups, but confined discussion to First Amendment issues.⁸⁹ On the one hand, the majority may have deemed it unnecessary to engage in racial classification analysis in light of its First Amendment conclusion.⁹⁰ On the other hand, the majority's absence of racial discussion might be attributable to unstated legal constraints: the court's unacknowledged reliance on an earlier Ninth Circuit case,⁹¹ and the court's embrace of the jurisprudential formulation of race as an immutable, biological trait.

The *Yniguez* court may have relied on the Ninth Circuit's decision in *Olagues v. Russoniello*⁹² and decided implicitly that Article 28 was not a racial classification. In *Olagues*, the Ninth Circuit established an objective test for determining whether language classifications discriminate on the basis of race or national origin.⁹³ An en banc majority held that a U.S. Attorney's secret investigation into possible voter fraud targeting Spanish-speaking and

⁸³ *Id.* at 952 (Reinhardt, J., concurring).

⁸⁴ *Id.* at 952-54 (Reinhardt, J., concurring).

⁸⁵ *Id.* at 952-53 (Reinhardt, J., concurring).

⁸⁶ *Id.* at 954 (Reinhardt, J., concurring).

⁸⁷ *Id.* at 953 (Reinhardt, J., concurring).

⁸⁸ *Id.*

⁸⁹ *Id.* at 948-49.

⁹⁰ *See id.* at 924.

⁹¹ *See infra* notes 92-98 and accompanying text.

⁹² 797 F.2d 1511 (9th Cir. 1986) (en banc), *vacated as moot*, 484 U.S. 806 (1987).

⁹³ *Id.* at 1521. *See also* Averbach, *supra* note 30, at 484 (suggesting a subjective intent standard for establishing a nexus between race and language for equal protection purposes).

Chinese-speaking immigrants involved a suspect classification based on race and national origin.⁹⁴ The court distinguished “general” classifications that apply to both English and non-English speakers from “specific” classifications that apply to specific language groups.⁹⁵ Under the test, a classification specifically targeting certain language groups would be subject to strict scrutiny. On the other hand, a broad, “general” classification merely imposing a disproportionate impact on a particular racial group would be deemed racially harmless because it applies to all groups, and as such would not invoke strict scrutiny.⁹⁶ As the dissent in *Olagues* pointed out, however, there is no logical distinction between a general and specific classification; a general classification may have as racially significant an impact as a specific one.⁹⁷ More importantly, the *Olagues* majority’s “objective” test assumes a fixed, biological understanding of what race is and thus assumes easy determination of whether a classification specifically targets a racial group.⁹⁸

As mentioned earlier, the Ninth Circuit in *Yniguez* bypassed racial classification analysis entirely. It may have done so because it found sufficient grounds in the First Amendment. It may also have relied on *Olagues* and its shaky “objective” test — Article 28 targets the Arizona population in general rather than specific language groups. Or, the Ninth Circuit may have recognized, as the dissent in *Olagues* and commentators did, that the foundation of the objective test is outdated; it is grounded in an idea increasingly subject to challenge — the traditional notion of race as immutable and biological rather than socially constructed.

B. The Supreme Court Opinion

The United States Supreme Court heard oral argument in *Arizonans for Official English v. Arizona* on December 4, 1996.⁹⁹ The Court limited its hour-long questioning to issues of standing, mootness and jurisdiction.¹⁰⁰ Specifically, the Justices focused their interrogation on whether the case had become moot when Yniguez left her government job,¹⁰¹ whether Arizonans for Official English had standing as a private organization to defend the English

⁹⁴ *Olagues*, 797 F.2d at 1521.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 1527 (Wallace, J., dissenting).

⁹⁸ *Id.*

⁹⁹ See United States Supreme Court Official Transcript, *Arizonans for Official English v. Arizona* (U.S. Dec. 4, 1996) (No. 95-974).

¹⁰⁰ See *id.*

¹⁰¹ *Id.* at 30-33.

Only provision¹⁰² and whether there was a case or controversy in the first place.¹⁰³ Chief Justice Rehnquist made it clear early on that the Justices' questions would be limited to standing issues rather than the constitutional merits of Arizona's English Only Amendment.¹⁰⁴

In *Arizonans for Official English v. Arizona*,¹⁰⁵ the United States Supreme Court "expresse[d] no view on the correct interpretation of Article XXVIII or on the measure's constitutionality."¹⁰⁶ Instead, it decided the case on procedural grounds.¹⁰⁷ Holding that the case was moot and should not have been decided on the merits,¹⁰⁸ the Court vacated the Ninth Circuit's judgment and remanded the case with directions that it be dismissed by the Arizona District Court.¹⁰⁹ In the opinion authored by Justice Ginsburg, the Court announced that the case had become moot when Yniguez resigned from her job with the state.¹¹⁰ In addition, the Court indicated that the Ninth Circuit should have obtained a controlling construction of Article 28 from the Arizona Supreme Court before hearing the case.¹¹¹ Referring to a related case currently before the Arizona Supreme Court,¹¹² the Court stated that "[o]nce [the Arizona Supreme Court] has spoken, adjudication of any remaining federal constitutional question may indeed become greatly simplified."¹¹³

¹⁰² *Id.* at 8-12.

¹⁰³ *Id.* at 50-51. See also David Savage, *High Court's 'English Only' Case Boils Down to Legalese*, L.A. TIMES, Dec. 5, 1996, at A30 [hereinafter Savage, *Boils Down to Legalese*] (reporting on the oral argument and possible implications).

¹⁰⁴ Steve Lash, *First Amendment English Only Case Becomes High Court Debate on Standing*, WEST'S LEGAL NEWS, Dec. 5, 1996, available in WESTLAW, WLN file.

¹⁰⁵ 117 S. Ct. 1055 (1997).

¹⁰⁶ *Id.* at 1060.

¹⁰⁷ See *id.* at 1072.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 1075.

¹¹⁰ *Id.* at 1072.

¹¹¹ *Id.* at 1075.

¹¹² *Ruiz v. Symington*, No. 1 CA-CV 94-0235, 1996 WL 309512 (Ariz. App. Div. 1, June 11, 1996).

¹¹³ *Arizonans for Official English v. Arizona*, 117 S. Ct. at 1075. In *Ruiz v. Symington*, Arizona legislators and employees challenged the constitutionality of Article 28 on First, Fourteenth and Ninth Amendment grounds in Arizona State Superior Court. See *Ruiz*, 1996 WL 309512, at *3. The trial court held that Article 28 is content-neutral and as such does not violate the First Amendment of the United States Constitution. *Id.* In addition, according to the trial court, Article 28 does not violate the Equal Protection Clause of the Fourteenth Amendment or the Ninth Amendment. *Id.* The Arizona Court of Appeals reversed. *Id.* at *4. The appellate court adopted the analysis of the Ninth Circuit in *Yniguez*, and declared Article 28 unconstitutional on First Amendment grounds. See *id.* The Arizona Supreme Court is currently reviewing *Ruiz* to determine the "proper" interpretation of Article 28's language. See *Arizonans for Official English v. Arizona*, 117 S. Ct. at 1075.

Markedly absent from the Court's opinion and from oral argument was discussion of whether Article 28 is a racial classification for strict scrutiny purposes. Because the Supreme Court "expresse[d] no view . . . on the measure's constitutionality," the issue remains unresolved whether Article 28 violates the Fourteenth Amendment's guarantee of equal protection against invidious racial classifications.¹¹⁴ It also leaves undecided whether English Only provisions of other states are racial classifications. As mentioned, the United States Supreme Court may soon review the future Arizona Supreme Court ruling.¹¹⁵ Moreover, Article 28 or English Only provisions of other states may be subject to further constitutional challenges. It is for these reasons that a workable legal principle for determining whether a classification is "racial" is needed.

III. THE DOMINANT PARADIGM: BIOLOGICAL RACE

In determining whether a governmental classification is racial, courts look to so-called "immutable characteristics" such as race or gender.¹¹⁶ This dominant paradigm narrowly conceives of race as a fixed biological category.¹¹⁷ Rooted in Eighteenth Century pseudo-science,¹¹⁸ race is defined genetically and is reflected physically in skin color,¹¹⁹ facial features¹²⁰ and

¹¹⁴ See *Savage, Boils Down to Legalese*, *supra* note 103, at A30. See *supra* notes 21-23 and accompanying text.

¹¹⁵ See *Wiessler*, *supra* note 16, at 7.

¹¹⁶ See *infra* notes 126-31. This notion of race as an immutable trait underlies the Supreme Court's current "colorblind" jurisprudence. See, e.g., *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995); *City of Richmond v. Croson*, 488 U.S. 469 (1989); *Shaw v. Reno*, 509 U.S. 630 (1993); *Shaw v. Hunt*, 116 S. Ct. 1894 (1996); *Bush v. Vera*, 116 S. Ct. 1941 (1996).

¹¹⁷ *Gotanda*, *supra* note 33, at 28 (observing that the treatment of race as a fixed essence stems from both natural science, originally used to prove Negro inferiority, and physiognomy, suggesting the existence of unalterable biological characteristics); *Lopez*, *supra* note 18, at 11. See also *OMI & WINANT*, *supra* note 18, at 54; *DAVID THEO GOLDBERG, RACIST CULTURE: PHILOSOPHY AND THE POLITICS OF MEANING* 11 (1993).

¹¹⁸ See *Lopez*, *supra* note 18, at 14.

¹¹⁹ Courts determined who was "white," and therefore entitled to citizenship. See, e.g., *Gong Lum v. Rice*, 275 U.S. 78 (1927) (Chinese); *Ozawa v. United States*, 260 U.S. 178 (1922) (Japanese); *United States v. Bhagat Singh Thind*, 261 U.S. 204 (1923) (Asian Indians); *In re Halladjian*, 174 F. 834 (C.C.D. Mass. 1909) (Armenians).

¹²⁰ See, e.g., *Hudgins v. Wright*, 11 Va. (1 Hen. & M.) 134 (Sup. Ct. App. 1806) (using racial test of skin color, "flat nose and wooly head of hair" to determine whether a person is black or Indian). See also *Lopez*, *supra* note 18, at 2 (utilizing the case to illustrate fallacies of the common legal notion of race).

hair texture,¹²¹ and is unconnected to culture, history or social context.¹²² Historically, racial categories based on “biology” were assumed to reflect the innate inferiority of nonwhites and used as justification for differential treatment of various racialized groups.¹²³ Eighteenth and Nineteenth century categorization of races into “Mongoloid,” “Negroid” and “Caucasoid” was in fact part of an effort to justify white domination.¹²⁴

The United States Supreme Court has historically embraced, and in recent cases continues to embrace, the notion of race as a fixed, biological essence.¹²⁵ For example, in *Regents of the University of California v. Bakke*,¹²⁶ Justice Brennan pronounced that “race, like gender and illegitimacy is an immutable characteristic which its possessors are powerless to escape or set aside.”¹²⁷ The majority in *Frontiero v. Richardson*¹²⁸ maintained that “sex, like race and national origin is an immutable characteristic determined solely by the accident of birth”¹²⁹ Finally, Justice Stewart, dissenting in *Fullilove v. Klutznick*,¹³⁰ declared that “[t]he color of a person’s skin and the country of his origin are immutable facts that bear no relation to ability, disadvantage, [or] moral culpability”¹³¹ This seemingly “objective” connection of race to biology, skin color and “accident of birth” and disconnection to history and contemporary social context gives the appearance that race is immutable.¹³²

Professor Neil Gotanda terms this disconnected notion of race, “formal race,”¹³³ and suggests that the Supreme Court embraces formal race when

¹²¹ See *Hudgins*, 11 Va. (1 Hen. & M.) 134. See also Lopez, *supra* note 18, at 14. In addition, many Nineteenth Century “scientists” attempted to determine race using cranial capacity, brain mass, jaw size and body lice. *Id.*

¹²² Gotanda, *supra* note 33, at 38.

¹²³ *Id.* at 28. Slavery, for example, was justified by the assumption that Blacks were inherently inferior. *Id.* According to the rule of hypodescent, anyone with one drop of “negro” blood was racially inferior and legitimately subject to discriminatory laws. *Id.* at 27.

¹²⁴ Lopez, *supra* note 18, at 13-14. See also Cheryl Harris, *Whiteness As Property*, 106 HARV. L. REV. 1709, 1739 (1993); Gotanda, *supra* note 33, at 28-29 (arguing that these categories are “embedded in popular notions of race.”).

¹²⁵ See Gotanda, *supra* note 33, at 29-32.

¹²⁶ 438 U.S. 265 (1978).

¹²⁷ *Id.* at 360 (Brennan, J., concurring/dissenting).

¹²⁸ 411 U.S. 677 (1973).

¹²⁹ *Id.* at 686.

¹³⁰ 448 U.S. 448 (1980).

¹³¹ *Id.* at 524 (Stewart, J., dissenting). See also Gotanda, *supra* note 33, at 31-32 (describing examples of the Court’s reliance on immutable, biological race).

¹³² Gotanda, *supra* note 33, at 30-31.

¹³³ *Id.* at 4. Gotanda defines four types of race to analyze how legal ideology, particularly colorblind constitutionalism, sanctions racial inequality: “Formal race,” “status race,” “historical race,” and “culture race.” *Id.* at 4-5.

analyzing racial classifications.¹³⁴ Formal race reflects only skin color or country of national origin and is unconnected to social context, history, culture, ability, disadvantage, wealth or language.¹³⁵ The category "Black," for example, is seen as detached from subordinate social status and historical experience¹³⁶ of slavery, Jim Crow laws and government-supported discrimination.¹³⁷

Many race scholars assert that the dominant paradigm of unalterable, biological race is inaccurate and limited in several respects.¹³⁸ First, it is based on false biological assumptions that have no scientific basis.¹³⁹ Second, and related, it views race as neutral and without social content,¹⁴⁰ failing to take into account the ways that race and racial categories are socially constructed.¹⁴¹ In doing so, the paradigm does not recognize the dominant society's ability to racialize groups — to treat people as members of a racial group regardless of personal choice — and thereby perpetuate racial inequalities.¹⁴² By viewing race formally — neutrally and without content — the dominant paradigm allows society to blame racial groups for their own oppression by pointing to their inferior culture while ignoring institutional forces.¹⁴³ Third, due to the way race is conceptualized in legal discourse, lawyers, law scholars and students working within this paradigm are compelled to respond with a similar narrow doctrinal frame of analysis that ignores the socio-historical construction of race. Finally, and specific to this

¹³⁴ *Id.* at 40. Gotanda suggests that recent Supreme Court jurisprudence uses formal race in its "color-blind" application of strict scrutiny to any and all racial classifications without regard to historical or social context. *Id.* According to the formal race approach, consideration is not given to past segregation or America's history of oppression. *Id.* at 42. Formal-race, according to Gotanda, perpetuates advantages for whites. *Id.* at 50.

¹³⁵ *Id.* at 4.

¹³⁶ *Id.* at 38.

¹³⁷ See DERRICK BELL, RACE, RACISM AND AMERICAN LAW 6-44 (1992) (chronicle and commentary on America's legal treatment of race).

¹³⁸ See generally CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw, Neil Gotanda, Gary Peller, Kendall Thomas, eds., 1995); CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado, ed., 1995).

¹³⁹ See *infra* text accompanying notes 146-47.

¹⁴⁰ Gotanda, *supra* note 33, at 32. See also Yamamoto, *Critical Race Praxis*, *supra* note 41, at 847.

¹⁴¹ See *infra* Part IV discussing the social construction of race.

¹⁴² Lopez, *supra* note 18, at 28.

¹⁴³ See OMI & WINANT, *supra* note 18, at 20. See also Charles R. Lawrence, III, *Forward: Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819 (1995) [hereinafter Lawrence, *Jurisprudence of Transformation*] (citing John Powell, *Who Thought of Dropping Racial Categories, and Why?*, POVERTY & RACE, Jan./Feb. 1995, at 12-13) (asserting that the use of purported genetic differences among races is used to justify subordination and exclusion).

discussion, the use of the traditional race-as-immutable framework makes it difficult to find a racial element in debates that are racially coded in purportedly "neutral" economic and cultural terms.¹⁴⁴

Contrary to long-standing views, race can no longer be viewed as a concrete, biological characteristic.¹⁴⁵ Studies show that racial categories do not reflect fundamental genetic differences, and many scientists wholly reject race as biologically-determined.¹⁴⁶ In fact, studies reveal that there are greater genetic differences within a "racial" group than between two "racial" groups.¹⁴⁷

In addition to inaccuracy, a primary problem with treating race as biological is that it falsely assumes the neutrality and objectivity of racial classifications.¹⁴⁸ As a result of the law's reliance on physiognomy and ancestry to define race as evidenced by skin color, facial features, hair texture, and blood,¹⁴⁹ racial classification has "lost its connection to social reality."¹⁵⁰ Professor Gotanda argues that linking racial categories to science erroneously

¹⁴⁴ See *infra* text accompanying notes 253-56. See also Lawrence, *Unconscious Racism*, *supra* note 38, at 322; Johnson, *supra* note 42, at 113 (observing the difficulty in uncovering racist goals achieved through facially neutral means). See also Matsuda, *supra* note 57, at 1394 (recognizing the false neutrality of accent discrimination). Professor Angela Harris also observes that race is "deeply embedded" in language, perceptions and culture, and is "inscribed in the most innocent and neutral-seeming concepts." Angela P. Harris, *Forward: The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741, 743 (1994) [hereinafter, Harris, *Jurisprudence of Reconstruction*]. She explains that critical race theorists question law's objectivity and neutrality by "arguing that what looks like race-neutrality on the surface has a deeper structure that reflects white privilege." *Id.* at 754.

¹⁴⁵ OMI & WINANT, *supra* note 18, at 55; See also Lopez, *supra* note 18, at 6 ("Biological races like Negroid and Caucasoid simply do not exist."); Gotanda, *supra* note 33, at 6; GOLDBERG, *supra* note 117, at 69.

¹⁴⁶ See, e.g., Alice Littlefield, Leonard Lieberman & Larry T. Reynolds, *Redefining Race: The Potential Demise of a Concept in Physical Anthropology*, 23 CURRENT ANTHROPOLOGY 641 (1982) (citing study that 70% of cultural anthropologists and 50% of physical anthropologists reject race as biologically-determined).

¹⁴⁷ See Lopez, *supra* note 18, at 11-14 (citing Richard Lewontin, *The Apportionment of Human Diversity*, 6 EVOLUTIONARY BIOLOGY 381, 397 (1972); Masayoshi Nei & Arun Roychoudhury, *Genetic Relationship and Evolution of Human Races*, 14 EVOLUTIONARY BIOLOGY 1, 38 (1982)).

¹⁴⁸ See Gotanda, *supra* note 33, at 32.

¹⁴⁹ People with one drop of African blood were racially inferior and therefore legitimately subject to Jim Crow laws. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537 (1896). Hawaiians' eligibility to receive Homelands parcels were also determined by blood quantum. (fifty percent or more were "native Hawaiians" and less than fifty percent were "Hawaiians."). Hawaiian Homes Commission Act, 1920, ch. 42 Stat. 108, reprinted in 1 HAW. REV. STAT. 167-205. (Supp. 1989).

¹⁵⁰ Gotanda, *supra* note 33, at 40 (objective "links between racial categorization and skin color, physiognomy, and ancestry reinforce the belief that race is immutable."). *Id.* at 30-31.

suggests that race is a neutral, apolitical term, divorced from social content.¹⁵¹ This unconnectedness limits the concept of racism to simple personal prejudice, discounts historical and continuing systemic racial subordination¹⁵² and presupposes a level present-day racial playing field.¹⁵³

The Supreme Court's recent jurisprudence reveals this dissociation. In *Metro Broadcasting v. FCC*,¹⁵⁴ the Court upheld a federal race-based preference program for minority media ownership. Justice Scalia, during oral argument attacked Congress' preference policy as a matter of "blood, not background and environment."¹⁵⁵ Scalia's reference to blood suggests that race is linked to biology and divorced from "background and environment." For Justice Scalia, blood, and therefore race, is neutral and devoid of social meaning.¹⁵⁶

In *Saint Francis College v. Al-Khazraji*,¹⁵⁷ the Supreme Court held that an Arab American college professor could be protected from discrimination under 42 U.S.C. §1981.¹⁵⁸ Justice White's majority opinion seemingly acknowledged the notion of socially-constructed race when it stated that "racial classifications are for the most part sociopolitical, rather than biological, in nature."¹⁵⁹ The Court, however, ultimately based its decision on biological race — the "fact" that an individual is "genetically part of an ethnically and physiognomically distinctive subgrouping of homo sapiens."¹⁶⁰ The Court's reference to physiognomy indicates its reluctance to abandon the notion of immutable, biological race.

Finally, in *Fullilove v. Klutznick*,¹⁶¹ the Court upheld a federal statute requiring minority business set-asides. In dissent, Justice Stewart invoked the "fact" of biological race when he declared that "[u]nder our Constitution, the government may never act to the detriment of a person solely because of that person's race. The color of a person's skin and the country of his origin are immutable facts that bear no relation to ability, disadvantage, [or] moral

¹⁵¹ *Id.* at 32.

¹⁵² *Id.* at 43.

¹⁵³ Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1344-45 (1988) (rejecting neoconservative colorblindness arguments for their failure to recognize continuing societal racial oppression).

¹⁵⁴ 497 U.S. 547 (1990).

¹⁵⁵ Gotanda, *supra* note 33, at 32 (quoting Scalia).

¹⁵⁶ *See id.*

¹⁵⁷ 481 U.S. 604 (1987).

¹⁵⁸ *Id.* at 613.

¹⁵⁹ *Id.* at 610 n.5 (noting that traits that have been used to characterize races have been found to have little biological significance).

¹⁶⁰ *Id.* at 613. *See also* Gotanda, *supra* note 33, at 31-32.

¹⁶¹ 448 U.S. 448 (1980).

culpability”¹⁶² Stewart’s reference to an “objective” fact such as skin color is “transferred to the racial category to assert [its] immutability”¹⁶³ resulting in a racial category that looks like a fact.¹⁶⁴ As these examples suggest, and as Gotanda asserts, “objective” links between racial categorization and skin color, physiognomy, and ancestry are social and legal assertions, not scientific facts.¹⁶⁵

The *Yniguez* English Only debate illustrates how lawyers operating within this dominant paradigm are sharply restricted in their legal analysis of racial classifications.¹⁶⁶ Arguments made by amicus groups in *Yniguez* narrowly defined race by assuming its immutability while failing to recognize the dynamic, changeable characteristics of race as a social construction.¹⁶⁷ Within this restricted legal paradigm, many briefs struggled in their attempts to identify the racial character of Arizona’s English Only statute and the English Only movement.¹⁶⁸ Relying on the same cases, attorneys assumed that race is fixed and biological and yet, with unacknowledged dissonance, argued the apparent cultural connection between language, race and national origin for equal protection purposes.¹⁶⁹ For example, some amicus groups relied on

¹⁶² *Id.* at 524 (Stewart, J., dissenting).

¹⁶³ Gotanda, *supra* note 33, at 31.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 32. Thus when Justice Powell in *Fullilove* declared, “the time cannot come too soon when no governmental decision will be based upon immutable characteristics of pigmentation or origin,” he likewise connected skin color to race and falsely invoked the notion of race as biological fact. *Fullilove*, 448 U.S. at 516.

¹⁶⁶ My experience with the *Yniguez* case comes from my participation in the writing of the amicus brief of the Hawai’i Civil Rights Commission, Na Loio No Na Kanaka, Native Hawaiian Legal Corporation and Native Hawaiian Advisory Council in *Yniguez v. Arizonans for Official English* in the summer of 1996.

¹⁶⁷ My comments here are not meant to disparage the significant arguments made by amicus groups and are meant only as a critique of the limited legal paradigm itself.

¹⁶⁸ *See, e.g.*, Brief of Puerto Rican Legal Defense and Educational Fund, et al., *Yniguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995) (No. 95-974); Brief of the State of New Mexico as Amicus Curiae in Support of Respondents Maria-Kelly F. Yniguez and Arizonans Against Constitutional Tampering, *Yniguez*, 69 F.3d 920 (9th Cir. 1995) (No. 95-974); Brief of the Navajo Nation as Amicus Curiae in Support of Respondents Yniguez and Arizonans Against Constitutional Tampering, *Yniguez*, 69 F.3d 920 (9th Cir. 1995) (No. 95-974).

¹⁶⁹ The Supreme Court has previously recognized the connection between language use and national origin for equal protection purposes. *See Meyer v. Nebraska*, 262 U.S. 390 (1923) (declaring that a Nebraska law outlawing the teaching of non-English languages affects only citizens of foreign ancestry); *Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1926) (holding that a law requiring business books to be kept in English or Spanish discriminated against Chinese); *Lau v. Nichols*, 414 U.S. 563 (1974) (concluding that the San Francisco school system’s failure to provide English language instruction to children of Chinese ancestry is racial or national origin discrimination); *Hernandez v. New York*, 500 U.S. 352 (1991); *Hernandez v. Texas*, 347 U.S.

cases embracing the biological notion of race to assert that Latinos and other racial minorities are "discrete and insular minorities" affected by Article 28 and are therefore a suspect class for equal protection purposes.¹⁷⁰ They argued that Article 28, although facially neutral, invidiously discriminates against Latinos and other groups on the basis of immutable traits.¹⁷¹ Others argued that language-based distinctions are a proxy for national origin classifications.¹⁷² None challenged the assumption, embedded in Supreme Court cases, that race is solely biological.

As revealed by these arguments, the biological-race paradigm often leaves hidden the racial element of English Only by overlooking the social construction of race. By expanding inquiry into a realm largely ignored by the courts, the following discussion endeavors to illustrate how race is instead an historically contingent social construction, inextricably connected to culture and history.

IV. SHIFTING THE PARADIGM: RACIALIZATION AND THE SOCIAL CONSTRUCTION OF RACE

Rather than an unalterable, biological characteristic, race is a social construction¹⁷³ which plays an essential part in structuring and representing

475 (1954). *See also* *Garcia v. Spun Steak*, 998 F.2d 1480, 1486 (9th Cir. 1993) (declaring that workplace English Only rules may disproportionately affect Hispanics); *NAACP v. City of Richmond*, 743 F.2d 1346 (9th Cir. 1984); *Fragante v. City and County of Honolulu*, 888 F.2d 591, 595 (9th Cir. 1989) (stating that national origin discrimination includes discrimination "because an individual has the . . . linguistic characteristics of a national origin group."); *Asian American Business Group v. City of Pomona*, 716 F. Supp. 1328, 1330 (C.D. Cal. 1989); *Gutierrez v. Municipal Court*, 838 F.2d 1031, 1039 (9th Cir. 1988), *vacated as moot*, 490 U.S. 1016 (1989).

¹⁷⁰ *See, e.g.*, Brief of Puerto Rican Legal Defense and Educational Fund, et al., *Yniguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995) (No. 95-974). *See also* Note, *A Trait-Based Approach to National Origin Claims Under Title VII*, 94 YALE L.J. 1164 (1985).

¹⁷¹ *See* Brief of Puerto Rican Legal Defense and Educational Fund, et al., *Yniguez*, 69 F.3d 920 (9th Cir. 1995) (No. 95-974).

¹⁷² *See* Brief of the Navajo Nation as Amicus Curiae in Support of Respondents Yniguez and Arizonans Against Constitutional Tampering, *Yniguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995) (No. 95-974).

¹⁷³ Lopez, *supra* note 18, at 7 (describing race as "plastic and inconstant," fabricated by humans rather than created by natural differentiation). Whereas Lopez focuses more on constructed racial identity, this Comment addresses how both racial identity and current issues, events or debates, such as the English Only debate can also be implicitly racialized. *See also* MARY WATERS, *ETHNIC OPTIONS: CHOOSING IDENTITIES IN AMERICA* (1990). By recognizing that race is a social construction is not to say that it does not exist. On the contrary, according to Omi and Winant, race should be thought of as an "element of social structure rather than an irregularity within it . . . [and] a dimension of human representation rather than an illusion." OMI & WINANT, *supra* note 18, at 55. *See also* Kimberlé Crenshaw, *Mapping the Margins:*

the social world.¹⁷⁴ According to critical sociologists Michael Omi and Howard Winant, race is understood as an “unstable and ‘decentered’ complex of social meanings constantly being transformed by political struggle.”¹⁷⁵ This notion of race provides the basis for Omi and Winant’s theory of “racial formation.”¹⁷⁶ Racial formation is a sociohistorical process by which race is created, shaped and transformed by social and political forces which in turn creates racial and cultural meaning.¹⁷⁷ As races are continually formed and

Intersectionality, Identity Politics, and Violence Against Women of Color, 43 STAN. L. REV. 1241 (1991) (observing that socially constructed categories have political significance and are tied to the distribution of power); Lawrence, *Jurisprudence of Transformation*, *supra* note 143, at 847 n.71 (asserting that the recognition of race as a social construction does not make it any less real); Harris, *Jurisprudence of Reconstruction*, *supra* note 144, at 772 (suggesting that race as a social construction does not make it “unreal [or] eradicable . . .”).

¹⁷⁴ OMI & WINANT, *supra* note 18, at 55.

¹⁷⁵ *Id.* See also John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2160 (1992) [hereinafter Calmore, *Multicultural World*] (defining race in similar fashion).

¹⁷⁶ OMI & WINANT, *supra* note 18, at 55. The authors posit that racial formation “emphasizes the social nature of race, the absence of any essential racial characteristics, the historical flexibility of racial meanings and categories, the conflictual character of race at both the ‘micro-’ and ‘macro-social’ levels, and the irreducible political aspect of racial dynamics.” *Id.* at 4. This pathbreaking theory has been increasingly recognized in legal spheres to explain various dimensions of race in American society. See Eric K. Yamamoto, *Rethinking Alliances: Agency, Responsibility and Interracial Justice*, 3 UCLA AS. PAC. AM. L.J. 33 (1996) [hereinafter Yamamoto, *Rethinking Alliances*] (addressing conflict among nonwhite racial groups and developing the notion of differential racialization and constrained racial group agency as part of a framework for interracial justice); John O. Calmore, *Racialized Space and the Culture of Segregation: “Hewing A Stone of Hope from a Mountain of Despair”*, 143 U. PA. L. REV. 1233 (1995) [hereinafter Calmore, *Racialized Space*] (recognizing the racialization of housing segregation and offering a conception of social justice); Margaret Chon, *On the Need for Asian American Narratives in Law: Ethnic Specimens, Native Informants, Storytelling and Silences*, 3 ASIAN PAC. AM. L.J. 4 (1995) (exploring Asian American racial formation in the United States); Cynthia Kwei Yung Lee, *Beyond Black and White: Racializing Asian Americans in a Society Obsessed with O.J.*, 6 HASTINGS WOMEN’S L.J. 165 (1995); Jennifer Russell, *The Race/Class Conundrum and the Pursuit of Individualism in the Making of Social Policy*, 46 HASTINGS L.J. 1353 (1995); Luis Angel Toro, *“A People Distinct From Others”*: *Race and Identity in Federal Indian Law and the Hispanic Classification in OMB Directive No. 15*, 26 TEX. TECH L. REV. 1219 (1995); John Powell, *An Agenda for the Post-Civil Rights Era*, 29 U.S.F. L. REV. 889 (1995); Jayne Chong-Soon Lee, *Navigating the Topology of Race*, 46 STAN. L. REV. 747 (1994). See also GOLDBERG, *supra* note 117, at 80.

¹⁷⁷ OMI & WINANT, *supra* note 18, at 55-56. The authors define racial formation as “the sociohistorical process by which racial categories are created, inhabited, transformed, and destroyed.” *Id.* at 55. They describe racial formation as “a process of historically situated projects in which human bodies and social structures are represented and organized.” *Id.* at 55-56. Additionally, racial formation is connected to the “evolution of hegemony, the way in which society is organized and ruled.” *Id.* at 56. Based on racial formation theory, Professor Ian Haney-Lopez offers a theory of “racial fabrication” to emphasize the human element of

reformed they are imbued with social meaning — the process of racialization. Racialization thus “signifies the extension of racial meaning to a previously racially unclassified relationship, social practice, or group.”¹⁷⁸

An example of both racial formation and racialization involves the creation of “Asian American” as a racial category.¹⁷⁹ The category formed as a political label for the first time in the 1960s.¹⁸⁰ Until then, each ethnic group such as Chinese Americans, Japanese Americans and Korean Americans were recognized separately — each with small numbers and little political clout.¹⁸¹ In the 1960s these groups coalesced politically into a singular “Asian American” racial category that became recognized legally by the federal census, courts and legislatures.¹⁸² For the first time these groups shared a common legally-recognized racial identity and, in some respects, despite continuing internal dissonance, gained political clout as Asian Americans.¹⁸³

racialization. Lopez, *supra* note 18, at 28. Professor Charles Lawrence, III's theory of unconscious racial motivation suggests that racialization can occur on an unconscious level. See Lawrence, *Unconscious Racism*, *supra* note 38. His “cultural meaning” test “posits the connection between unconscious racism and the existence of cultural symbols that have racial meaning.” *Id.* at 324. See *infra* note 228. See also Linda Krieger, *The Content of our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995).

¹⁷⁸ Omi, *supra* note 20, at 203. See also Calmore, *Racialized Space*, *supra* note 176, at 1235 (describing racialization as a “dialectical process of signification”). Professor Eric Yamamoto extends racialization theory to include “differential racialization.” Yamamoto, *Rethinking Alliances*, *supra* note 176, at 61-64. Differential racialization “acknowledges that historical and contemporary influences racialize different racial groups differently.” *Id.* at 61. Class divisions, length of residence in the United States, urban/rural differences, and gender, for example, contribute to the differential racialization of racial groups. *Id.* at 61-63. Differential racialization between and within racial groups creates differing racial meanings for members of those racial groups, and those meanings in turn impact “individual identity, collective consciousness and political organization.” Omi, *supra* note 20, at 207. Differential racialization thus contributes to differing status and power among racial groups. Yamamoto, *Rethinking Alliances*, *supra* at 36.

¹⁷⁹ OMI & WINANT, *supra* note 18, at 89. See also YEN ESPIRITU, *ASIAN AMERICAN PAN-ETHNICITY* (1992).

¹⁸⁰ OMI & WINANT, *supra* note 18, at 89.

¹⁸¹ WILLIAM WEI, *THE ASIAN AMERICAN MOVEMENT* 26 (1993).

¹⁸² *Id.*

¹⁸³ See OMI & WINANT, *supra* note 18, at 89. Native Hawaiians were racialized when the distinction between “Hawaiian” and “Native Hawaiian” was constructed. Pressured by sugar plantations to limit the amount of benefits Hawaiians would receive, Congress defined “Native Hawaiian” as “those people with 50 percent or more native blood.” Hawaiian Homes Commission Act, 1920, Ch. 42 Stat. 108, *reprinted in* 1 HAW. REV. STAT. 167-205 (Supp. 1989). This definition of Native Hawaiian designated two classes of people of Hawaiian ancestry by distinguishing between people of Hawaiian ancestry who have less than 50 percent native blood and those who have more. Those who have less than 50 percent native blood are “Hawaiian” and are defined as “any descendent of the aboriginal peoples inhabiting the

As the formation of "Asian American" illustrates, race is socially constructed.¹⁸⁴ According to Omi and Winant, race as a social construction has two components: cultural representation and social structure.¹⁸⁵ "Racial projects" are the social mechanisms through which representational and structural changes lead to changes in racial identity and meaning.¹⁸⁶ A racial project is "simultaneously an interpretation, representation, or explanation of racial dynamic[s], and an effort to reorganize and redistribute resources along particular racial lines."¹⁸⁷ The political struggles to gain recognition of "Asian American" as a racial category are examples of racial projects. Webs of racial projects combine to create cultural and racial meaning.¹⁸⁸

Professor Eric Yamamoto observes that courts are "sites and generators of cultural performances."¹⁸⁹ From this view, courts transform legal disputes

Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778." Hawaiian Homes Commission Act, 1920, Ch. 42 Stat. 108, *reprinted in* 1 HAW. REV. STAT. 167-205 (Supp. 1989). Another example of racialization involves the definition of Native Hawaiian as a "political" rather than "racial" category. While recognizing that in some instances, Native Hawaiian is a racial group, the Hawai'i Supreme Court has likened Hawaiians to Native Americans and deemed Hawaiians a political group. *See Rice v. Cayetano*, 941 F. Supp. 1529 (1996). *See also* *Morton v. Mancari*, 417 U.S. 535 (1974) (holding that because Native Americans have a special relationship to the U.S. government they are a political category rather than a racial one).

¹⁸⁴ Another example of the racialization of groups is revealed by the ever-changing U.S. Census racial classification system. The 1890 Census included White, Black, Mulatto, Quadroon, Octoroon, Chinese, Japanese and Indian. Lopez, *supra* note 18, at 36. Over time, racial categories have been created, eliminated and altered. The 1990 Census included Black, White, Indian, Eskimo, Aleut, several choices under "Asian or Pacific Islander," "Hispanic," and "Other race." Toro, *supra* note 176, at 1232. Multiracial groups, in addition, have launched a drive for a "multiracial" category on the 2000 Census. *See* Alethea Yip, *One or the Other*, ASIANWEEK, Jan. 3, 1997, at 14.

¹⁸⁵ OMI & WINANT, *supra* note 18, at 56.

¹⁸⁶ *Id.* For Omi and Winant, racial projects connect representation and structure, linking "what race means in a particular discursive practice and the ways in which both social structures and everyday experiences are racially organized, based upon that meaning." *Id.*

¹⁸⁷ *Id.* The authors emphasize that racial projects exist in an historical context, "descending from previous conflicts." *Id.* at 58.

¹⁸⁸ *Id.* at 60.

¹⁸⁹ Eric K. Yamamoto, Moses Haia and Donna Kalama, *Courts and the Cultural Performance: Native Hawaiians' Uncertain Federal and State Law Rights to Sue*, 16 U. HAW. L. REV. 1, 6 (1994) [hereinafter Yamamoto, *Cultural Performance*]. From this view, courts serve as forums for processing complex, conflicting social-cultural narratives with historical foundations. *Id.* at 8. Law is "an integral part of political-cultural processes that generate 'structures of meaning that radiate throughout social life and serve as part of the material people use to negotiate their understanding of everyday events and relationships.'" Yamamoto, *Critical Race Praxis*, *supra* note 41, at 842 (quoting David M. Trubek, *The Handmaiden's Revenge: On Reading and Using the Newer Sociology of Civil Procedure*, 51 LAW AND CONTEMP. PROBS. 111, 124 (1988)).

into public messages or socio-legal narratives about groups, institutions, and relationships.¹⁹⁰ Law functions as a "cultural system that structures relationships throughout society, not just those that come before courts."¹⁹¹ Cultural representations, or stories about a racialized group's subordinate status thus become inscribed in legal text¹⁹² and imprinted into social structure, thereby sanctioning a racial hierarchy.¹⁹³ In this manner, law and cultural representations unite to create and perpetuate racial meaning¹⁹⁴ — law becomes a racialization mechanism and functions to perpetuate a racialized social structure.¹⁹⁵

Arizona's English Only legislation and its exclusion of racialized groups is an example of racialization. As discussed in Part V, cultural representations by proponents of the English Only movement attempt to define who is "American" by demarcating who belongs and who does not belong to the U.S. polity largely along racial lines.¹⁹⁶ In this fashion, English Only legislation creates and shapes racial meaning and functions to perpetuate a racialized social structure.¹⁹⁷

¹⁹⁰ A prevailing cultural narrative can be sustained or contested through the sculpting and retelling of stories through court process. Yamamoto, *Cultural Performance*, *supra* note 189, at 21. Courts serve as locations to illuminate institutional power arrangements, tell dominant stories and counter-stories to refute dominant narratives. *Id.* at 27. See also Gerald Torres and Kathryn Milun, *Translating Yonnonidio by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625 (1990); Richard Delgado, *Legal Storytelling: Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1988).

¹⁹¹ Yamamoto, *Critical Race Praxis*, *supra* note 41, at 844 (quoting Guyora Binder, *Beyond Criticism*, 55 U. CHI. L. REV. 888, 889 (1988)).

¹⁹² See ARNOLD KRUPAT, *ETHNO-CRITICISM: ETHNOGRAPHY, HISTORY & LITERATURE* 133 (1992).

¹⁹³ See Yamamoto, *Critical Race Praxis*, *supra* note 41, at 843-44 (arguing that dominant socio-legal narratives legitimize systemic oppression of racialized minorities); Amicus Curiae Brief of Hawai'i Civil Rights Commission, Native Hawaiian Legal Corporation, Na Loio No Na Kanaka and Native Hawaiian Advisory Council in Support of Affirming the Judgment at 3, *Yniguez v Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995) (No. 95-974) (asserting that Arizona's English Only amendment "is designed to achieve a false sense of unity through an apparently homogenous polity by rendering invisible those who do not look and talk like 'Americans.'"). See also OMI & WINANT, *supra* note 18, at 84.

¹⁹⁴ See Yamamoto, *Critical Race Praxis*, *supra* note 41, at 842.

¹⁹⁵ *Id.* at 844.

¹⁹⁶ See Amicus Curiae Brief of Hawai'i Civil Rights Commission, et al., in Support of Affirming the Judgment at 3, *Yniguez*, 69 F.3d 920 (9th Cir. 1995) (No. 95-974) (arguing that Article 28 defines along racial lines who can participate in the polity). See *infra* Part V.B.2.

¹⁹⁷ See Amicus Curiae Brief of Hawai'i Civil Rights Commission, et al., in Support of Affirming the Judgment at 22, *Yniguez*, 69 F.3d 920 (9th Cir. 1995) (No. 95-974) See also OMI & WINANT, *supra* note 18, at 55. While representational and structural factors are intertwined and occur simultaneously, this Comment separates the two in order to carefully dissect the English Only debates, defended in cultural terms, but racially coded. See *infra* Part V.B.

A. Cultural Representation

Cultural representations of groups are central to the process of racialization. Culture is a "system of inherited conceptions expressed in symbolic forms by means of which [people] communicate, perpetuate, and develop their knowledge about attitudes toward life."¹⁹⁸ These conceptions in turn "serve as part of the material people use to negotiate their understanding of everyday events and relationships."¹⁹⁹ Cultural representation involves the attachment of cultural images to generally recognized racial groups, thereby interpreting events and intergroup dynamics and imbuing those events and groups with racial meaning.²⁰⁰ At one level, cultural representations can be blatantly racialized. These include representations of the black crack dealer,²⁰¹ the sinister Chinese,²⁰² the lazy Mexican²⁰³ or the white man who can't jump.²⁰⁴ These widely held racial stereotypes provide people with "common sense" explanations of our everyday experiences and perceptions.²⁰⁵ Organizations and institutions at the same time draw upon "common" racial meanings to support these stereotypes — hiring Asian Americans as midlevel managers, for example, because they follow orders and don't make waves.²⁰⁶

On a deeper level, cultural representations can involve seemingly neutral cultural depictions that impart non-neutral racial meanings. In this sense, externally neutral debates couched in cultural terms can be racially coded.²⁰⁷ Culture-based arguments that avoid race and ethnicity have implications that

¹⁹⁸ Calmore, *Multicultural World*, *supra* note 175, at 2182 (quoting CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 89 (1973)).

¹⁹⁹ Yamamoto, *Critical Race Praxis*, *supra* note 41, at 884-85 (quoting David M. Trubek, *The Handmaiden's Revenge: On Reading and Using the Newer Sociology of Civil Procedure*, 51 *LAW AND CONTEMP. PROBS.* 111, 124 (1988)). Dominant culture, according to Yamamoto, "informs how dominant groups think about and act upon race." ERIC K. YAMAMOTO, *RACE, CULTURE AND RESPONSIBILITY: INTERRACIAL JUSTICE IN POST-CIVIL RIGHTS AMERICA* [hereinafter YAMAMOTO, *INTERRACIAL JUSTICE*] (forthcoming 1997) (manuscript on file with author).

²⁰⁰ OMI & WINANT, *supra* note 18, at 60.

²⁰¹ See PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 85-88 (1991).

²⁰² WEI, *supra* note 181, at 48 (exploring evolution of Asian American stereotypes in America).

²⁰³ RONALD TAKAKI, *A DIFFERENT MIRROR* (1993).

²⁰⁴ OMI & WINANT, *supra* note 18, at 59.

²⁰⁵ *Id.* at 54. See also Calmore, *Racialized Space*, *supra* note 176, at 1242. Linda Krieger asserts that racial stereotypes, as unconscious forms of bias, affect intergroup judgment and decisionmaking. Krieger, *supra* note 177, at 1194.

²⁰⁶ See generally Yamamoto, *Critical Race Praxis*, *supra* note 41.

²⁰⁷ See GOLDBERG, *supra* note 117, at 73; Hing, *supra* note 40, at 874.

are distinctly race-based.²⁰⁸ In the context of the English Only debate, for example, racially-coded cultural representations include the notions of “linguistic ghettos,”²⁰⁹ “cultural apartheid”²¹⁰ “ethnic separatism”²¹¹ or the American “melting pot.”²¹² As discussed below, these statements, although outwardly “cultural” are ideologically racial — they implicitly call for allocation of resources along racial lines.²¹³ In this manner, “culture [is] a surrogate for race.”²¹⁴ Racial formation theory thus reveals that race and culture are dependent and connected. Racial formation also illustrates how racialized groups are harmed through negative cultural images, even while proponents of those images proclaim, “I’m not racist, I’m talking about culture.”²¹⁵

Cultural representation occurs on both levels within the English Only debate. At the “cultural” level, supporters of the Arizona English Only statute professedly talk about “American” culture, not race. They argue that in order to be “American” one must speak only English.²¹⁶ On another level, blatant, disparaging cultural representations of Latinos reveal the ill-will of some English Only supporters.²¹⁷ As Professor Hing observes, both arguments share the same philosophical race-based core.²¹⁸

²⁰⁸ Hing, *supra* note 40, at 874.

²⁰⁹ See Teri Bailey, *High Court Begins Debate on ‘English Only’ Issue*, HOUST. CHRON., Dec. 5, 1996, at 1.

²¹⁰ Brief of FLA-187 Committee, et al., as Amici Curiae in Support of Petitioners at 3, *Yniguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995) (No. 95-974).

²¹¹ See Brief Amicus Curiae of Arizona Civil Liberties Union, Los Abogados Hispanic Bar Assn., League of United Latin American Citizens, et al., in Support of Appellants’ Appeal at 30, *Ruiz v. Arizonans for Official English*, (No. 1 CA-CV 94-235) (Maricopa County Superior Court No. CV 92-19603) (quoting Arizona Publicity Pamphlet at 26).

²¹² Brief of FLA-187 Committee, et al., as Amici Curiae in Support of Petitioners at 12, *Yniguez*, 69 F.3d 920 (9th Cir. 1995) (No. 95-974).

²¹³ Yamamoto, *Critical Race Praxis*, *supra* note 41, at 848.

²¹⁴ YAMAMOTO, *INTERRACIAL JUSTICE*, *supra* note 199, at 67. Professor Angela Harris also observes that “the exploration of race as culture examines how racial ‘others’ are created in society and how the meanings of ‘race’ change over time.” Harris, *Jurisprudence of Reconstruction*, *supra* note 144, at 770.

²¹⁵ See Yamamoto, *Critical Race Praxis*, *supra* note 41, at 847-88 (asserting that antidiscrimination law prohibits discrimination based on skin color, but allows culture discrimination).

²¹⁶ See Brief of FLA-187 Committee, et al., as Amici Curiae in Support of Petitioners, *Yniguez*, 69 F.3d 920 (9th Cir. 1995) (No. 95-974) (calling for linguistic unity to counteract non-assimilation and balkanization); Brief of the Washington Legal Foundation, et al., *Yniguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995) (No. 95-974) (invoking images of traditional America and threats to national unity in order to advocate a common culture and language).

²¹⁷ See *infra* Part V.B.1.

²¹⁸ Hing, *supra* note 40, at 875.

B. Social Structure

The racialization process also affects social structure. Social structure involves the standardization and routinization of race, and the reorganization and redistribution of resources along racial lines.²¹⁹ In a racial formation context, institutional structures of society serve to clarify racial representations and create racial hierarchies within an historical context.²²⁰ Social situations give rise to structures of inequality that sustain certain notions of race.²²¹ Outlawing non-English languages from everyday governmental and political activities determines along racial lines who is allowed or not allowed to participate in the American polity²²² — for example, excluding many of Yniguez's Latino clientele from challenging medical malpractice. As Omi and Winant suggest, "[t]hrough policies which are explicitly or implicitly racial, state institutions organize and enforce the racial politics of everyday life."²²³ In this sense, "[t]he racial order is equilibrated by the state — encoded in law, organized through policy-making, and enforced by a repressive apparatus."²²⁴ English Only legislation, for example, effectively bars racial, ethnic and language minorities from access to governmental assistance and political participation.²²⁵ Article 28, likewise, would prevent many government employees from speaking Spanish to clients, thereby denying many Latinos governmental services in a language they could understand.

Social structures and everyday experiences are racially organized, based upon cultural representations. This, in turn, creates racial meaning. Drawing upon this notion, the following Section offers a workable legal principle for determining whether a classification is racial for strict scrutiny purposes.

²¹⁹ OMI & WINANT, *supra* note 18, at 56.

²²⁰ *Id.*

²²¹ Calmore, *Racialized Space*, *supra* note 176, at 1242.

²²² See Matsuda, *supra* note 57, at 1367 (observing the existence of a "status hierarchy of accents.").

²²³ OMI & WINANT, *supra* note 18, at 83-84.

²²⁴ *Id.* at 84.

²²⁵ See, e.g., Jeff Shain, *With 'Official English' Law, Some May Be Officially Out of Luck*, S.F. CHRON, Dec. 1996, at A1 (reporting that many Latinos in Arizona would be deprived of services in Spanish at medical clinics, state-assistance offices and schools).

V. SUBSTANTIAL RACIALIZATION: A PROPOSAL

A. A Definition

Based on the foregoing discussion of *Yniguez* and the social construction of race, and in light of the inadequacy of the current biological notion of race relied on by courts and lawyers, this Comment proposes an alternative principle for determining whether a particular governmental classification is racial for strict scrutiny purposes: A governmental classification is "racial" for strict scrutiny purposes if, considering all the circumstances, the classification is substantially racialized. This principle entails acknowledgment of the social construction of race and racial formation analysis.²²⁶ It requires focusing not only on legislators' elusive "intent," but on all of the circumstances giving rise to the framing, adoption and implementation of the classification, including the text of the classification, its official history, the surrounding political rhetoric, the tenor of judicial pronouncements, and the classification's overall cultural and social structural effects.²²⁷ In short, this means inquiring into whether the classification is imbued with racial meaning and impact.²²⁸ The substantial racialization

²²⁶ See OMI & WINANT, *supra* note 18 (racial formation).

²²⁷ In some ways, the Seattle-Hunter test, recently applied by U.S. District Court Chief Judge Thelton Henderson in *Coalition for Economic Equity v. Pete Wilson*, is similar to the "substantial racialization" test. See *Coalition for Economic Equity v. Pete Wilson*, 1996 WL 734682 (N.D. Cal. 1996) (No. C 96-4024 TEH) (preliminarily enjoining enforcement of California's Proposition 209). The Seattle-Hunter doctrine states that "if an initiative removes the authority to address a racial problem — and only a racial problem — from the existing decisionmaking body, in such a way as to burden minority interests, it must be examined for equal protection purposes as if it were a racial classification." *Id.* at 17. This requires the court to apply a two-pronged test: first, whether there is a "racial focus," in that the initiative singles out for special treatment issues that are associated with racial minority interests; and second, whether that initiative with a "racial focus" restructures the political process to the detriment of minorities. *Id.* at 17-22. According to the first prong of the test as Henderson applied it, the court must find a "racial focus" by examining the characterization of the measure (by analyzing, for example, the ballot pamphlets), the election results, the response by government officials after passage of the measure, the effect of the measure and its impact on the political process. *Id.* This test is limited to instances in which an initiative restructures the political process. *Id.* Even while the "racial focus" test implicitly draws upon racialization theory, it does not set forth a theoretical framework for determining whether a classification is imbued with racial meaning. In contrast to the racial focus test, the "substantial racialization" test suggested by this Comment is broader and makes explicit that racialization is the underlying theory. It identifies the existence of racial meaning in neutral classifications, thereby triggering strict scrutiny.

²²⁸ This proposed principle draws upon Professor Charles Lawrence, III's "cultural meaning" test which addresses unconscious wrongdoing to "trigger[] judicial recognition of race-based behavior." See Lawrence, *Unconscious Racism*, *supra* note 38, at 324. According to Lawrence, a large part of the behavior that produces racial discrimination is influenced by

principle thus requires assessment of explicit racial representations, implicit racial representations coded in the ostensibly neutral terms of “culture,” and social structural effects along racial group lines.

Central to the principle is the concept of racialization — the “extension of racial meaning to a previously racially unclassified relationship, social practice, or group.”²²⁹ As described earlier, the racialization process is essential to racial formation theory. According to racial formation theory, race is created, shaped and transformed by social and political forces which in turn creates racial and cultural meaning.²³⁰ As races are continually formed and reformed they are imbued with social meaning. The substantial racialization framework draws upon this process in its scrutiny of the circumstances surrounding a governmental classification. Interrogation of all of the circumstances giving rise to the framing, adoption and implementation of a classification is thus for the purpose of ascertaining the classification’s “substantial” racial meaning and effects.

The substantial racialization principle is a preliminary approach meant to provide a starting point rather than conclusive solutions. When applied, it illuminates the underlying racialized character of Article 28, *Yniguez*, and the surrounding English Only rhetoric by revealing the ways in which English Only laws determine along racial lines which groups can participate in the United States polity.

B. Application

This Section elaborates on the substantial racialization principle by applying it to the *Yniguez* case and its surrounding English Only rhetoric.

“unconscious racial motivation.” *Id.* at 322. He posits that

beliefs [transmitted by the culture] . . . are so much a part of the culture that . . . they seem part of the individual’s rational ordering of her perceptions of the world. The individual is unaware, for example, that the ubiquitous presence of a cultural stereotype has influenced her perception that blacks are lazy or unintelligent. Because racism is so deeply ingrained in our culture, it is likely to be transmitted by tacit understandings . . .

Id. at 323. The cultural meaning test requires evaluation of a governmental classification “to determine whether it conveys a symbolic message to which the culture attaches racial significance.” *Id.* at 324. As such, it requires the consideration of the historical and social context in which the decision was made and carried out. *Id.* at 356. A finding that the culture thinks of a governmental action in racial terms would be a determination that the governmental actors acted because they were influenced by racial considerations, even though they were not aware of their racial beliefs. *Id.* The Court would then apply strict scrutiny. *Id.* Lawrence asserts that the cultural meaning test “focus[es] our attention on the correct question: Have societal attitudes about race influenced the governmental actor’s decision?” *Id.* at 328. See also Yamamoto, *Rethinking Alliances*, *supra* note 176, at 61-64 (differential racialization).

²²⁹ Omi, *supra* note 20, at 203.

²³⁰ OMI & WINANT, *supra* note 18, at 55-56.

This Comment concludes that Article 28 is substantially racialized and should therefore be subject to strict scrutiny review. To illustrate the application of the framework in determining whether a classification is racial for strict scrutiny purposes, three aspects of the *Yniguez* case and surrounding English Only debates will be analyzed. These aspects are: clear instances of racial representations, racialized meanings embedded in "cultural" discourse, and social structural effects. Analysis of these aspects collectively reveals the "substantial racialization" of the Article 28 classification.

1. Clear Cases of Racialized Discourse

An essential part of determining whether a classification is substantially racialized involves an examination of clear instances of racialized discourse. This means examining the overtly racial political rhetoric surrounding the English Only movement and Article 28. Because of the restrictive "discriminatory intent" test²³¹ and increasing sophistication among supporters of English Only, supporters refrain from speaking in explicitly racial terms even when what they say has racial meaning.²³² It is thus difficult to find explicitly racial statements in support of English Only.²³³ Nevertheless, some presidential hopefuls, anti-immigrant proponents and writers frame the debate in blatantly racial terms.²³⁴ Some express a fear of a nation overrun by brown-skinned non-English speaking Asian and Latino immigrants.²³⁵ Others link non-English languages to unwanted immigrant groups and argue for elimination of those languages.²³⁶ Still others assert that Latinos deliberately

²³¹ See *Washington v. Davis*, 426 U.S. 229 (1976); *Personal Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979).

²³² See Matsuda, *supra* note 57, at 1397 (asserting that "[t]he angry insistence the 'they' should speak English serves as a proxy for a whole range of fears displaced by the social opprobrium directed at explicit racism."). See also Lawrence, *Unconscious Racism*, *supra* note 38, at 324; Krieger, *supra* note 177.

²³³ Authors have identified explicit racial representations of both English Only and anti-immigrant debates. See, e.g., Johnson, *supra* note 42, 114; Wu, *supra* note 42, at 38; Hing, *supra* note 40, at 863-64; Califa, *supra* note 30, at 326-27.

²³⁴ See, e.g., PETER BRIMELOW, *ALIEN NATION* (1995).

²³⁵ *Id.*

²³⁶ See Califa, *supra* note 30, at 328 (arguing that language is a proxy for unwanted racial groups). See also Matsuda, *supra* note 57, at 1354-56. A passage quoted in the Amicus Brief of the Arizona Civil Liberties Union also illustrates a similar argument.

[D]ark skin color and Spanish when spoken by Mexicans went together in the minds of Anglos and so the very language itself became a badge of inferiority. Inversely, whiteness, English and superior attributes went hand in hand. Thus, when Mexicans were rejected on racial grounds, so was the language.

See Brief Amicus Curiae of Arizona Civil Liberties Union, et al., in Support of Appellants' Appeal at 30, *Ruiz v. Arizonans for Official English*, (No. 1 CA-CV 94-235) (Maricopa County

refuse to learn English as part of a political plan of de-assimilation.²³⁷ Latinos are often represented as “illiterate, impoverished, dirty, backward, criminally inclined, . . . dark-complexioned, and now pushing cocaine and marijuana north for all they are worth.”²³⁸ These widely held racial stereotypes provide “common sense” explanations to explain everyday experiences and perceptions.²³⁹ And proponents of English Only draw upon these “common” racial meanings to support these stereotypes — fashioning English Only laws in part to combat the perceived racial threat to the English language and “American” culture.

John Tanton, founder of U.S. English,²⁴⁰ the advocacy group responsible for financing the Article 28 campaign, warned in 1986 of a “Latin onslaught.”²⁴¹ In a highly controversial memo, he announced the white majority’s refusal to peaceably give up its political power to a brown-skinned group “that is simply more fertile.”²⁴² This rampant fertility of Latinos, he feared, would cause “those with their pants up [to] get caught by those with their pants down.”²⁴³ Echoing the sentiments of several English Only proponents, Tanton’s blatantly racist statements revealed both his belief that the only legitimate culture is white, and his fear that Latinos pose a threat to white dominance.²⁴⁴ He connected language to immigrant groups, maintaining that “the question of bilingualism grows out of U.S. immigration policy” because the drastically increasing Latino population has overwhelmed “the assimilative capacity of the country.”²⁴⁵ Tanton drew parallels between South Africa and Southern California’s increasing minority population, suggesting that powerful, wealthy whites and Asians speaking a common language would have to coexist with the multitudes of poor, non-English speaking, uneducated Latinos and Blacks.²⁴⁶ These images of apartheid suggest a racialized social structure in

Superior Court No. CV 92-19603) (quoting F. ARTURO ROSALES, “HABLAR EN CRISTIANO”: THE SPANISH LANGUAGE AND MEXICANS IN THE UNITED STATES, 1848-1950 30 (1990)).

²³⁷ See *The Balkans, U.S.A.*, NATIONAL REVIEW, Mar. 5, 1990, at 19.

²³⁸ Califa, *supra* note 30, at 328 n.227 (quoting McArthur, *Worried About Something Else*, 60 INT’L J. SOC. LANG., 87, 91 (1986)). McArthur notes that even though these fears are not rational, “it can help to make fears tidy and manageable if one talks in an apparently rational manner about the Constitution and safeguarding the nation’s language—English.” *Id.* (quoting McArthur at 91).

²³⁹ OMI & WINANT, *supra* note 18, at 59. See also Calmore, *Racialized Space*, *supra* note 176, at 1242.

²⁴⁰ Crawford, *supra* note 61, at 4.

²⁴¹ *Id.* (quoting John Tanton, memo to WITAN IV at 2).

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ Califa, *supra* note 30, at 326.

²⁴⁵ Crawford, *supra* note 61, at 4 (quoting Tanton).

²⁴⁶ See Califa, *supra* note 30, at 27 n.222 (quoting Tanton).

which a Latino and African American underclass, while vastly outnumbering whites, will remain economically, politically and socially subordinate. Finally, he asked, "As Whites see their power and control over their lives declining, will they simply go quietly into the night?"²⁴⁷ Easily characterized as "racialized," statements such as these place race as the centerpiece of the English Only discourse.

Other English Only proponents blatantly frame the debate in racial terms. Terry Robbins, head of Dade Americans United to Protect the English Language and former spokesperson for U.S. English, implied that Latinos were encroaching upon America's homogeneous core white culture.

If Hispanics get their way, perhaps someday Spanish could replace English here entirely. . . . [I]t's precisely because of the large numbers of Hispanics who have come here, that we ought to remind them, and better still educate them to the fact that the United States is not a mongrel nation. We have a common language, it's English and we're damn proud of it.²⁴⁸

"Mongrel" clearly conjures images of the menacing savage Indian, the sinister ponytailed Chinese or the barbarous brown-skinned Hawaiian, and echoes early fears of diminishing white racial purity.²⁴⁹

By reintroducing this vision of American as racially white, anti-immigrant²⁵⁰ and anti-racial minority, and by demonizing immigrants and cultivating perceptions of an American culture overrun by hordes of non-white immigrants unable or unwilling to learn English, English Only proponents use Article 28 as a vehicle to determine along racial lines who belongs in American society and who does not. As these examples suggest, blatant racial representations and interpretations of racial dynamics extend racial meaning to Article 28. More difficult to detect are those racialized agendas cloaked in seemingly benign cultural assertions. In those situations, supporters ideologically mean race, but speak in the rhetoric of "culture."

²⁴⁷ Crawford, *supra* note 61, at 4 (quoting Tanton).

²⁴⁸ Califa, *supra* note 30, at 321 n.183 (quoting presentation by Terry Robbins, Florida Int'l Univ. (Oct. 8, 1987)).

²⁴⁹ See RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE 16 (1989). [hereinafter TAKAKI, STRANGERS].

²⁵⁰ Patrick Buchanan, conservative republican candidate in the 1992 presidential election, proclaimed

I think God made all people good, but if we had to take a million immigrants in, say Zulus, next year, or Englishmen, and put them in Virginia, what group would be easier to assimilate and would cause less problems for the people of Virginia?

Hing, *supra* note 40, at 863-64 (quoting *In Buchanan's Words*, WASH. POST., Feb. 29, 1992, at A2).

2. *Culture as Surrogate for Race*²⁵¹

In contrast to the easily identifiable racialized discourse in the previous Section, racialized meanings embedded in “cultural” representations are more difficult to detect. This subtle cultural racialization of the English Only debate allows moderates to argue in favor of English Only legislation without invoking overtly racial images. While explicit racial remarks of the far right can simply be dismissed by some as extreme, conservative, and racist,²⁵² cultural representations with racial undertones are more difficult to unpack and therefore more difficult to address. At this deeper level, “mainstream” English Only supporters couch the debate about who belongs and who can participate in economic and cultural terms, claiming to speak of “American” culture, not race. They argue that in order to be “American” one must speak English and only English.²⁵³

Warning of “rampant bilingualism,” “linguistic ghettos” and “language rivals,” English Only advocates thus argue explicitly for reservation of American culture²⁵⁴ while racializing the issue by rhetorical sleight of hand: “ghetto” refers to inner city African Americans; “rivals” implicates Black, Latino and Asian gangs; and “rampant” conjures images of hordes of Mexicans crossing the Southwest border. In these situations, culture is a surrogate for race, and more particularly for racial exclusion.²⁵⁵ As Professor Hing aptly observes, “[g]iven the huge numbers of immigrants who enter this country from Asian and Latin American countries whose citizens are not white and who in most cases do not speak English, criticism of the inability

²⁵¹ YAMAMOTO, INTERRACIAL JUSTICE, *supra* note 199, at 25.

²⁵² See *supra* text accompanying notes 233-50. John Crawford observes that the English Only campaign is not an extreme fringe movement, but one with a broad following. Crawford, *supra* note 61, at 4.

²⁵³ See Brief of FLA-187 Committee, et al., as Amici Curiae in Support of Petitioners, *Yniguez*, 69 F.3d 920 (9th Cir. 1995) (No. 95-974); Brief of the Washington Legal Foundation, et al., *Yniguez*, 69 F.3d 920 (9th Cir. 1995) (No. 95-974).

²⁵⁴ According to Professor Juan Perea, the “American” culture they seek to protect is largely white, English-speaking and Anglo-Saxon. See Perea, *supra* note 30, at 276 (arguing that the English language is a key component of America’s core white culture); TAKAKI, STRANGERS, *supra* note 249, at 7 (noting that “American” is often equated with “white.”). To many English Only supporters, a threat to mainstream American culture by racialized outsiders means, at bottom, a threat to the white race. Perea, *supra* note 30, at 276.

²⁵⁵ See GOLDBERG, *supra* note 117, at 73 (describing notion of cultural race). Speaking in terms of culture legitimates the negation and exclusion of racialized non-English speaking groups. For similar arguments see Amicus Curiae Brief of Hawai’i Civil Rights Commission, et al., in Support of Affirming the Judgment at 3, *Yniguez*, 69 F.3d 920 (9th Cir. 1995) (No. 95-974) (recognizing Article 28’s negation of nonwhite racial and cultural groups).

to speak English coincides neatly with race."²⁵⁶ Interrogation of the English Only movement's culture-cloaked racialized discourse is thus an essential part of substantial racialization analysis.

The official Arizona Publicity Pamphlet, prepared and distributed by the Arizona Secretary of State, urged the Arizona electorate to vote for Proposition 106, the proposed English Only amendment.²⁵⁷ The pamphlet was the only official means to familiarize Arizona voters with the ballot proposition.²⁵⁸ The pamphlet's racialized political rhetoric urged voters in cultural terms to "stop [the] erosion of our common bond . . . threatened by language conflicts and ethnic separatism."²⁵⁹ "Our common bond" refers to a mainstream, homogenous American culture, and "language conflicts" implies hostility toward those who do not speak or act like "Americans." "Ethnic separatism" suggests that Latinos and other non-English speaking groups deliberately choose to "colonize" themselves, demanding "Official Spanish" and "official bilingualism" rather than learn English.²⁶⁰ By arguing for protection of common "American" customs and values in externally neutral language, Proposition 106 supporters implicitly called for allocation of resources along racial lines.

The Arizona Legislative Council's argument in favor of Proposition 106 likewise pushed for the preservation of a homogenous polity by excluding those who do not speak or act like "Americans."

²⁵⁶ Hing, *supra* note 40, at 874. Amicus briefs likewise recognized the "thinly disguised" racial character of Article 28. See, e.g., Brief Amicus Curiae of Arizona Civil Liberties Union, Los Abogados Hispanic Bar Assn., League of United Latin American Citizens, et al., in Support of Appellants' Appeal, Ruiz v. Arizonans for Official English, (No. 1 CA-CV 94-235) (Maricopa County Superior Court No. CV 92-19603); Brief of Puerto Rican Legal Defense and Educational Fund, et al., Yniguez v. Arizonans for Official English, 69 F.3d 920 (9th Cir. 1995) (No. 95-974).

²⁵⁷ See Brief of Amici Curiae Mexican American Legal Defense and Education Fund; American Civil Liberties Union of Northern California, Inc. and Legal Aid Society of San Francisco, Employment Law Center, Ruiz v. Arizonans for Official English, (No. 1 CA-CV 94-235) (Maricopa County Superior Court No. CV 92-19603). The pamphlet included the official title, text and legislative analysis of Proposition 106 and arguments for and against Proposition 106 by the Legislative Council and private persons and groups. *Id.*

²⁵⁸ *Id.*

²⁵⁹ See Brief Amicus Curiae of Arizona Civil Liberties Union, et al., in Support of Appellants' Appeal at 30, Ruiz v. Arizonans for Official English, (No. 1 CA-CV 94-235) (Maricopa County Superior Court No. CV 92-19603) (quoting Arizona Publicity Pamphlet at 26). In Yniguez, similar arguments were advanced by Arizonans for Official English to promote Article 28. See Yniguez v. Arizonans for Official English, 69 F.3d 920, 944 (9th Cir. 1995) (en banc).

²⁶⁰ See *The Balkans, U.S.A.*, NATIONAL REVIEW, Mar. 5, 1990 at 19. See also *Groups Want to Stop Ads in Spanish*, SAN JOSE MERC. NEWS, Dec. 23, 1985, at 14D (quoting Terry Robbins, spokesperson for U.S. English as saying, "Why does poor Juan and Maria have a problem ordering a Whopper? . . . It isn't that they aren't able to, they don't want to.").

The State of Arizona is at a crossroads. It can move towards the fears and tensions of language rivalries and ethnic distrust, or it can reverse this trend and strengthen our common bond, the English language.²⁶¹

By warning of the “fears and tensions of language rivalries and ethnic distrust,” the Legislative Council’s cultural arguments impart non-neutral racial meanings which contribute to the substantial racialization of Article 28. “Fears,” “tensions,” “rivalries” and “ethnic distrust” are in fact value-laden words about culture that denigrate racial groups: “rivalries” suggests Latino inner city gangs and “ethnic distrust” invokes images of the sinister Asian or illegal Latino. The Council’s use of “common bond,” like the Arizona Publicity Pamphlet, implies a homogenous polity that excludes those who do not speak or act like “Americans.” Linking language and exclusion, supporters of Arizona’s English Only legislation characterized non-English speaking minorities as social threats to the American landscape²⁶² and creators of societal conflict. In this fashion, English Only supporters attached cultural images to generally recognized racial groups, thereby imbuing Article 28 with racial meaning.²⁶³

Ninth Circuit Judge Fernandez, in his *Yniguez* dissent also justified his support for English Only in terms of culture. In seemingly neutral terms with racialized underpinnings, Fernandez in effect advocated sustaining a “unified” white America. To illustrate his view that “diversity limits unity,”²⁶⁴ he quoted a passage from *Guadalupe Organization, Inc. v. Tempe Elementary School District*,²⁶⁵ a case in which the Ninth Circuit held that a school district had no constitutional duty under the Equal Protection Clause to provide bilingual-bicultural education to non-English speaking Mexican-American and Yaqui Indian students.²⁶⁶

Linguistic and cultural diversity within the nation-state, whatever may be its advantages from time to time, can restrict the scope of the fundamental compact. Diversity limits unity.²⁶⁷

²⁶¹ See Brief of Puerto Rican Legal Defense and Education Fund, et al., as Amici Curiae in Support of Respondents at 10-11, *Yniguez*, 69 F.3d 920 (9th Cir. 1995) (No. 95-974) (quoting Arizona Publicity Pamphlet at 26).

²⁶² See *id.* at 11 (exposing racist arguments such as these).

²⁶³ OMI & WINANT, *supra* note 18, at 60.

²⁶⁴ *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 959 (9th Cir. 1995) (en banc) (Fernandez, J., dissenting).

²⁶⁵ 587 F.2d 1022 (1978).

²⁶⁶ *Id.* at 1027.

²⁶⁷ *Yniguez*, 69 F.3d at 959 (Fernandez, J., dissenting) (quoting *Guadalupe Organization, Inc. v. Tempe Elementary School District*, 587 F.2d at 1027).

The passage suggests that in order to create unity, diversity must be eliminated. It implies what Tanton and others have explicitly declared: the only legitimate culture is white. And in order to preserve a "common constellation" of customs and values, we must eliminate the culturally different. Judge Fernandez's quoted reference to 18th century America supports this conclusion.

In the language of eighteenth century philosophy, the century in which our Constitution was written, the social compact depends on the force of benevolence which springs naturally from the hearts of all men but which attenuates as it crosses linguistic lines. Multiple linguistic and cultural centers impede both the egress of each center's own and the ingress of all others. Benevolence, moreover, spends much of its force within each center and, to reinforce affection toward insiders, hostility toward outsiders develops.²⁶⁸

Benevolence, as the passage implies, attenuates as it crosses linguistic lines from the core culture to racialized non-English speaking groups, and legitimate hostility toward outsider groups increases. The *Guadalupe* passage thus implies that culture is a surrogate for race — American culture is "unified" only if it excludes and eliminates culturally different racialized minorities.²⁶⁹ Interrogation of Article 28's "cultural" discourse illustrates clearly that representations about culture are not neutral; rather they are value-laden, deeply political, and they extend racial meaning to Article 28.²⁷⁰

Subtle yet potent racialization of Article 28 is also found in the amicus briefs for Arizonans for Official English. Like many other English Only proponents, amicus groups cloaked ideologically race-based agendas in "neutral" culture-based assertions and argued implicitly for allocation of resources along racial lines.²⁷¹ The FLA-187 Committee²⁷² in its brief asserted that there is a growing tension between "cultural pluralism" and efforts to maintain assimilation.²⁷³ The failure of non-English speaking groups to assimilate into the "American" cultural mainstream, it argued, foreshadows "linguistic and cultural isolation" which in turn causes separatism and balkanization, giving non-white groups political leverage.²⁷⁴ Warning of the

²⁶⁸ *Id.*

²⁶⁹ *See id.*

²⁷⁰ *See OMI & WINANT, supra* note 18, at 60.

²⁷¹ *See Yamamoto, Critical Race Praxis, supra* note 41, at 848 (observing that many in power positions use cultural difference to justify exclusion of racialized groups from the polity).

²⁷² Brief of FLA-187 Committee, et al., as Amicus Curiae in Support of Petitioners, *Yniguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1996) (No. 95-974). The FLA-187 Committee is a group committed to protecting states' Official English laws. *Id.* at 1.

²⁷³ *Id.* at 3.

²⁷⁴ *Id.* at 14. Immigration restrictionists, Gary Rubin and Frank Sherry in a recent memorandum likewise argued that those advocating bilingualism "want to do away with the

dangers of “cultural apartheid” and “cultural and linguistic welfare,”²⁷⁵ the Committee implicitly invoked images of race. “Apartheid” implies a racialized hierarchical structure, and “welfare” conjures images of the urban black “welfare queen” whose poverty flows from her own cultural deficiencies rather than from structural inequality.²⁷⁶ The FLA-187 Committee maintained that the widely varying views of the “traditional American melting pot” are causing concern over the United States’ ability to remain a cohesive political unit. For the Committee, the hallowed place the melting pot idea has held has been undermined²⁷⁷ — weakened by increasing nonwhite populations in seeming conflict with the dominant core culture.

The conservative Washington Legal Foundation’s²⁷⁸ brief also used externally neutral cultural representations to impart non-neutral racial meanings. The Foundation maintained that the principles upon which this country was founded are accessible “to all men in all times,” provided individuals speak only English.²⁷⁹ It asserted as evidence the cornerstones of the “American” experience: the Mayflower Compact, The Declaration of Independence, The Federalist Papers, the Constitution, the Gettysburg Address and two hundred years of jurisprudence²⁸⁰ — documents that historically sanctioned a white “American” culture and mandated exclusion of racialized others.²⁸¹ The Foundation in effect argued for exclusion of racialized minority groups: “[u]nity comes from a common language and core public culture of certain shared values, beliefs and customs which make us

English language and everything European.” Hing, *supra* note 40, at 875 (quoting Memorandum from Gary Rubin and Frank Sherry, National Immigration Refugee and Citizenship Forum, Apr. 1, 1992).

America has a language, a history and a culture. It does not want or need to import others. For two hundred years immigrants have come to our shores looking for something better than what they were leaving behind . . . They neither expect nor want America to turn itself into a banana republic so they can feel more at home.

Hing, *supra* note 40, at 875 (quoting Memorandum from Gary Rubin and Frank Sherry, National Immigration Refugee and Citizenship forum, Apr. 1, 1992).

²⁷⁵ Brief of FLA-187 Committee, et al., as Amicus Curiae in Support of Petitioners at 3, *Yniguez*, 69 F.3d 920 (9th Cir. 1995) (No. 95-974).

²⁷⁶ See Calmore, *Racialized Space*, *supra* note 176, at 1247-48.

²⁷⁷ Brief of FLA-187 Committee, et al. as Amicus Curiae in Support of Petitioners at 12, *Yniguez*, 69 F.3d 920 (9th Cir. 1995) (No. 95-974).

²⁷⁸ Amicus Brief of the Washington Legal Foundation, The Claremont Institute for the Study of Statesmanship and Political Philosophy, 34 Members of Congress, and the State of Nebraska as Amici Curiae in Support of Petitioners, *Yniguez v. Arizonans for Official English* 69 F.3d 920 (9th Cir. 1995) (No. 95-974). The Washington Legal Foundation is a group committed to opposing intrusions by the federal government upon the states. *Id.* at 1.

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 24.

²⁸¹ See BELL, *supra* note 137, at 6-44; TAKAKI, STRANGERS, *supra* note 249, at 14.

distinctly 'Americans.'"²⁸² It warned of a new "cult of ethnicity . . . [that] denounce[s] the idea of a melting pot, . . . challenge[s] the concept of 'one people,' and . . . perpetuate[s] separate ethnic and racial communities."²⁸³ This "cult," it claimed, is reversing the "historic idea of a unifying American identity."²⁸⁴ The brief's own startling language belies the group's racialized understanding of who is "American": concepts embedded in the "American" civic mind "make us, the children of immigrants, the 'blood of the blood, and flesh of the flesh' of the Founders who came before us."²⁸⁵

In sum, Article 28 proponents recast unacceptable racial images as acceptable harmless cultural images. Even while proponents attempt studiously to avoid race using externally neutral arguments, their representations are distinctly race-based.²⁸⁶ And their culture-cloaked racialization is a way to justify excluding certain undesirable racial groups from the polity.

The substantial racialization principle entails interrogation of cultural representations, both blatant and hidden. These representations, along with social structural impacts and effects create, shape and perpetuate substantial racial meaning. Through the *Yniguez* legal and political struggle, race is formed and reformed. Analysis of English Only cultural rhetoric, along with social structural effects, thus points toward the substantial racialization of Article 28.

3. Social Structural Effects

An examination of social structural effects also plays an essential part in ascertaining whether a classification is substantially racialized for strict scrutiny purposes. Social structure involves the reorganization and redistribution of resources along racial lines based on cultural representations, and the creation of racial hierarchies within an historical context.²⁸⁷ Explicitly or implicitly racial policies enforce everyday racial politics.²⁸⁸ At the same time, "a racialized social structure shapes racial experience and conditions

²⁸² Amicus Brief of the Washington Legal Foundation, et al., as Amici Curiae in Support of Petitioners at 27-28, *Yniguez*, 69 F.3d 920 (9th Cir. 1995) (No. 95-974) (citing S. Rep. No. 132, 99th Cong., 1st Sess. 7 (1985)).

²⁸³ *Id.* at 26 (quoting Arthur Schlessinger).

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 25 (quoting Abraham Lincoln).

²⁸⁶ See Hing, *supra* note 40, at 874.

²⁸⁷ OMI & WINANT, *supra* note 18, at 56.

²⁸⁸ *Id.* at 83-84.

meaning."²⁸⁹ Analysis of social structural effects thus means inquiring into whether the classification has racial impact and effects.

Article 28 has both racial meaning and impact: it determines along racial lines who is allowed or not allowed to participate in the American polity by excluding those deemed less than "American."²⁹⁰ In effect, English Only laws enacted to counteract the perceived threat to mainstream culture operate to exclude nonwhites from it.²⁹¹

In *Yniguez*, Judge Reinhardt recognized Article 28's disenfranchisement and political marginalization of Latinos and other non-English speaking minorities in Arizona.²⁹² Writing for the en banc majority, he observed how the amendment sanctions a hierarchical organization by viewing particular groups' language, and therefore their race, as secondary or subordinate.

[M]onolingual Spanish-speaking residents of Arizona cannot . . . communicate effectively with employees of a state or local housing office about a landlord's wrongful retention of a rental deposit, nor can they learn from clerks of the state court about how and where to file small claims court complaints²⁹³

The passage identifies the racialized social structure created and perpetuated by Article 28. Unable to communicate with a housing office, a clerk of a small claims court or a state senator, racialized groups would be abruptly eliminated from America's social and political activity.²⁹⁴

The court further recognized that "[t]hose with a limited command of English will face commensurate difficulties in obtaining or providing

²⁸⁹ *Id.* at 59.

²⁹⁰ See Amicus Curiae Brief of Hawai'i Civil Rights Commission, et al., in Support of Affirming the Judgment at 4, *Yniguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995) (No. 95-974).

²⁹¹ See Brief of Human Rights Watch, Amicus Curiae, in Support of Respondents at 5, *Yniguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995) (No. 95-974) (arguing that repression of minority languages is usually "motivated by the desire to repress, marginalize or forcibly assimilate the speakers of those languages, who are often perceived as threats to the political unity. . .").

²⁹² *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 952 (9th Cir. 1995) (en banc) (Reinhardt, J., concurring).

²⁹³ *Id.* at 941. The adverse effects, however, are not limited to Latinos. Indeed, the court recognized that Article 28 would adversely affect Native Americans by "preclud[ing] a legislative committee from . . . questioning a tribal leader in his native language concerning the problems of his community." *Id.* In addition, a Navajo state senator would be unable to "inquir[e] directly of his Navajo-speaking constituents regarding problems they sought to bring to his attention." *Id.*

²⁹⁴ See *id.* (stating that non-English speaking minorities would be prevented from receiving essential information and ideas).

[essential] information."²⁹⁵ If all state and local government officials and employees were prohibited from speaking non-English languages, the court reasoned, non-English speaking groups could not obtain information "concerning their daily needs and lives."²⁹⁶ According to the court, Article 28 had a virtually limitless reach to include civil servants, teachers, town-hall discussions between constituents and representatives and translations of judicial proceedings.²⁹⁷

Judge Reinhardt's special concurrence also identified the racial element in Article 28's sweep and revealed most completely its sanction of racialized minorities' subordinate position in the social structure.

[B]ilingual government clerks would not be able to advise persons who can speak only Spanish — or Chinese or Navajo — how to apply for food stamps, or aid for their children, or unemployment or disability benefits. Public employees would be prohibited from helping non-English speaking residents file complaints against those who mistreat them or who violate their rights or even from helping them secure driver's licenses or permits to open small businesses. Bilingual traffic officers would not be able to give directions to nearby medical clinics or schools.²⁹⁸

Chinese, Navajos and Latinos would be disenfranchised,²⁹⁹ and in effect negated,³⁰⁰ if the amendment were allowed to remain in effect. He also

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 936. The legislation leaves in place other languages in emergency situations, the requirement of bilingual schooling for children, and disallows English Only rules that conflict with federal laws. ARIZ. CONST. art. XXVIII § 3(2).

²⁹⁷ *Yniguez*, 69 F.3d at 932. The federal English Only bill recently passed by the House of Representatives also legally sanctions a racialized social order. If implemented, the bill could eliminate tax forms, Social Security forms, tourism brochures, and immigration materials in languages other than English. See Marc Lacey, *Translating the English Only Bill*, L.A. TIMES, Aug. 9, 1996, at A3 (reporting on the effects of a federal English Only bill). It could also eliminate, for example, Selective Service information in Spanish, and a U.S. postal pamphlet showing Spanish-speakers how to buy stamps. *Id.* English Only laws such as these could also omit laws requiring translation of consumer contracts and hinder the development of legislative, administrative and judicial reforms to help language minorities. Bender, *supra* note 54, at 1052 (arguing that English Only laws adversely affect consumer protection of Latinos). Most importantly, the Federal bill would eliminate bilingual ballots, a provision added in 1975 to the Voting Rights Act of 1965, thereby reducing voter participation among limited-English speaking racialized groups and excluding them from full participation in the electoral process. See Bert Eljera, *Bilingual Voting Under Attack*, ASIANWEEK, May 31, 1996, at 8 (reporting on effects on over 1 million limited English-proficient voters if bilingual ballots are eliminated).

²⁹⁸ *Yniguez*, 69 F.3d at 952-53 (Reinhardt, J., concurring).

²⁹⁹ See Statement of Juan Perea before the United States Senate, March 7, 1996, 1996 WL 7135995 at *14 (arguing against a proposed Senate federal English Only bill).

³⁰⁰ See Amicus Curiae Brief of Hawai'i Civil Rights Commission, et al., in Support of Affirming the Judgment at 3, *Yniguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir.

observed that under Article 28, non-English speaking migrant farm workers would find themselves deprived of almost all government assistance, and “[r]ecent immigrants . . . including many who fled persecution, would find their lives . . . unduly harsh . . .”³⁰¹ The impact on racialized groups is clear: “migrant farm workers” clearly suggests Latinos, and “recent immigrants who fled persecution” implicates Vietnamese, Cambodian and Laotian immigrants.

Judge Reinhardt recognized that the sweeping prohibition of non-English languages would exclude undesirable immigrant groups from all realms: political (communication with representatives, reading and understanding ballots), state governmental (applications for benefits, directions for filing complaints and obtaining permits) and social (directions to clinics or schools, tourism brochures). Article 28 would be a vehicle for excluding groups who do not look and sound like “Americans.”³⁰² In this manner, Article 28 reorganizes and redistributes resources along racial lines, preserving control over the political and social processes for whites and rendering invisible racialized minorities.

The preceding examples reveal the racialized impacts of Article 28 and the English Only movement. They also illustrate how racialization is a product of political and social forces. Finally, they show that despite resort to the rhetoric of “culture,” Article 28 determines whether racial groups will be denigrated and “legitimately” cut off from the U.S. polity. Examination of social structural effects, along with other circumstances giving rise to the framing and adoption of the classification, shows how race is created, shaped and transformed by social and political forces and in turn creates racial and cultural meaning.³⁰³ Analysis of the English Only debates using the substantial racialization framework also reveals how law and cultural

1995) (No. 95-974).

³⁰¹ *Id.* at 952-53 (Reinhardt, J., concurring).

³⁰² ACLU attorney Edward Chen similarly argues that “official English” legislation implies that “those who do not speak English are somehow less than ‘official’ and thus relegates them to second class status in the eyes of the law.” Statement of Edward Chen, Staff Counsel American Civil Liberties Union of Northern California on Civil Liberties Implications of “Official English” Legislation before U.S. Senate, Dec. 6, 1995. Racialization is also identified by the political rhetoric opposing other English Only legislation nationally. During debates on the House floor about the federal English Only bill, Luis Guterrez, a Democrat Representative, declared that “English Only is the Jim Crow of the 1990s.” See Mike Dorning, *House Clears English Only Measure After Emotional Debate*, CHIC. TRIB., Aug. 2, 1996, at 3 (describing charged House debates of federal English Only bill). By referring to laws which in the past disenfranchised African Americans, he recognized the racialization of the English Only discourse — Latinos are similarly disenfranchised through English Only’s mandate of a racialized social order.

³⁰³ OMI & WINANT, *supra* note 18, at 55-56.

representations unite to create and perpetuate racial meaning³⁰⁴ and function to perpetuate a racialized social structure.³⁰⁵ Applying the substantial racialization principle to the *Yniguez* judicial pronouncements, the surrounding political rhetoric and likely social structural effects suggests that Article 28 is substantially racialized and should therefore be subject to strict scrutiny review.

CONCLUSION

This Comment has shown, through Maria-Kelly Yniguez's story, how the law misdefines race for purposes of determining whether strict scrutiny review applies. Maria's story helps to illustrate the limitations of the current biologically-determined legal paradigm of race. It also helps us to rethink the notion of race as socially constructed — changeable, non-neutral, and deeply rooted in political struggle. Maria's story also highlights the need for an alternative framework with which to view facially neutral racial classifications. This Comment has advanced the beginnings of a principle, based on theories of racial formation and the social construction of race, to determine when facially neutral governmental classifications are "substantially racialized" in order to invoke strict scrutiny review. This framework suggests going beyond focusing merely on legislators' elusive "intent" to interrogate all of the circumstances giving rise to the framing, adoption and implementation of the classification. It entails acknowledging the social construction of race and inquiring into whether the classification is imbued with racial meaning. In doing so, the approach seeks to expose the ways in which English Only proponents' racially-coded, culture-based arguments demarcate who belongs and who does not belong to the U.S. polity largely along racial lines.

Not all will embrace this proposed principle of substantial racialization. Paradigm shifts occur over time. The preceding analysis urges others to rethink the concept of racial classifications and work within and beyond traditional legal paradigms to acknowledge race's socially contingent and value-charged nature. This rethinking, of course, extends beyond English Only. It is relevant to other "neutral" racial classifications and to future analysis of other contemporary race issues.

Maria-Kelly Yniguez spoke Spanish on the job. Racially-coded English Only laws silenced her voice. By acknowledging that racial classifications have tacit racial meanings and effects we can unmask "neutral" classifications

³⁰⁴ See Yamamoto, *Critical Race Praxis*, *supra* note 41, at 842.

³⁰⁵ *Id.* at 844.

and reveal the racialization of governmental actions shaping the content and character of American society.

Susan Kiyomi Serrano³⁰⁶

³⁰⁶ Class of 1998, William S. Richardson School of Law. The author extends her deepest thanks to Professor Eric K. Yamamoto for his insightful comments, invaluable guidance, and most of all, inspiration. Many thanks to Professor Judy Weightman and Kristin Shigemura for reading and commenting on earlier drafts of this article. Thanks also to the editors of the University of Hawai'i Law Review.